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Presidential Documents

Title 3

The President

Proclamation 5731 of October 16, 1987

National Forest Products Week, 1987

By the President of the United States of America

A Proclamation

This year we Americans again set aside a week in October to remind ourselves that from earliest times our vast forests have provided us with food, water, fuel, and raw materials, and that forests remain a source of countless products necessary for our shelter, comfort, and utility. We can be truly grateful for the jobs and trade that forests generate, for the extensive part forest products play in our national life, and for our firmly established national policy of wise use and preservation of forest resources.

We can be grateful too for the occurrence this year of one of the most active tree-planting campaigns in our history. The new forest trees going into the ground this year will be our living legacy for the generations to come. Tomorrow's forests will be productive and continually renewing sources of wood for housing, furniture, and paper; of water for drinking and irrigation; of rich habitats for fish and wildlife; and of opportunities for outdoor recreation. Just as now, forests will be vital to our economic, social, and environmental well-being in the future—and just as now, we will need careful and creative stewardship to nurture them.

To promote greater awareness and appreciation of the many benefits of forests for our Nation, the Congress, by Public Law 86-753 (36 U.S.C. 163), has designated the week beginning on the third Sunday in October of each year as "National Forest Products Week" and authorized and requested the President to issue a proclamation in observance of this week.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the week beginning October 18, 1987, as National Forest Products Week, and I urge all Americans to express their appreciation for our Nation's forests through suitable activities.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of October, in the year of our Lord nineteen hundred and eighty-seven, and of the Independence of the United States of America the two hundred and twelfth.

Ronald Reagan

[FR Doc. 87-24417
Filed 10-16-87; 4:47 pm]
Billing code 3195-01-M

Presidential Documents

Proclamation 5732 of October 16, 1987

National Immigrants Day, 1987

By the President of the United States of America

A Proclamation

Our national celebration of Immigrants Day is a moving reminder to us that America is unique among the nations. We are the sons and daughters of every land across the face of the Earth, yet we are an indivisible Nation. We are one people, and we are one in that which drew our forebears here—the love of "freedom's holy Light."

This year we most appropriately observe Immigrants Day on October 28, the 101st anniversary of the unveiling of the Statue of Liberty, the beloved statue Emma Lazarus called "Mother of Exiles," from whose "beacon-hand/Glows world-wide welcome." That welcome is America's welcome, which has ever beckoned millions upon millions of courageous souls to this land of freedom, justice, and opportunity.

Immigrants have always brought great gifts to their new home on these shores—the gifts of hardiness and heart, of intellect and hope. Two hundred years ago, immigrants were among the framers of a Constitution for these United States. They knew what they were about, for they began that charter of liberty and limited government with the words, "We the People" and created what a future President named Lincoln would call "government of the people, by the people, for the people."

One immigrant, J. Hector St. John de Crevecoeur, had described that people very well in 1782 when he wrote, "Here individuals of all nations are melted into a new race of man whose labors and posterity will one day cause great changes in the world." This prophecy came true, and immigrants helped, and are still helping, to make it so—immigrants to a country and a people one in mutual loyalty and one in steady devotion to "freedom's holy Light."

The Congress, by Senate Joint Resolution 86, has designated October 28, 1987, as "National Immigrants Day" and authorized and requested the President to issue a proclamation in observance of this event.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim October 28, 1987, as National Immigrants Day, and I call upon the people of the United States to observe that day with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of October, in the year of our Lord nineteen hundred and eighty-seven, and of the Independence of the United States of America the two hundred and twelfth.

Ronald Reagan

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Rules and Regulations

Federal Register
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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.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1250

Egg Research and Promotion

ACTION: Final rule.

SUMMARY: The interim final rule with request for comments published August 20, 1987, (52 FR 31376) which decreases the rate of assessment for the activities of the American Egg Board is made final. The rate was reduced from 5 cents per 30-dozen case of eggs to 2½ cents effective September 1, 1987, in an effort to secure a broader base of producer support for programs of primary importance to the egg industry.

EFFECTIVE DATE: October 20, 1987.

FOR FURTHER INFORMATION CONTACT: Janice L. Lockard, (202) 382-8132.

SUPPLEMENTARY INFORMATION: This rule has been reviewed under USDA procedures established in accordance with Executive Order 12291 and Departmental Regulation 1512-1 and has been classified "nonmajor" as it does not meet the criteria contained therein for major regulatory actions.

The Administrator, Agricultural Marketing Service, has determined that this action will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because rather than creating a burden, the action decreasing the assessment will result in an advantage to small entities, while at the same time contributing to programs which are anticipated to have long-term benefits for the industry. The majority of handlers and producers may be characterized as small entities. In addition, inasmuch as producers may request refunds of their assessments under the Egg Research and Consumer Information Act (7 U.S.C. 2701 *et seq.*), the disadvantage to any producer under this program would be minuscule. There also would be no change in the reporting or recordkeeping requirements imposed on producers and handlers as a result of this action which decreases the rate of assessment.

The Egg Research and Promotion Order in § 1250.347 authorizes the American Egg Board to collect assessments at the rate of not more than 5 cents per 30-dozen case of eggs, or the equivalent thereof. The assessment is refundable upon demand. The 5-cent rate has been unchanged under the Order since the program was first implemented in August 1976. The Order also provides that the Board may set a lower assessment rate with the approval of the Secretary of Agriculture. On July 22, 1987, the 18-producer-member American Egg Board reviewed the 5-cent assessment rate in light of current participation by egg producers in the program, the cost of the various activities conducted by the Board, and the anticipated needs of the industry. It was determined that a broader base of producer support was needed to carry out programs on a national basis which are essential to the industry and which cannot feasibly be carried out by individual producer entities or State or other egg organizations. To achieve this objective, the Board recommended that beginning on September 1, 1987, the assessment be set at 2½ cents per 30-dozen case of eggs (case of commercial eggs) to fund, in addition to normal authorized operating costs, the following ongoing primary American Egg Board activities: (i) Egg nutrition and education—to communicate information concerning the diet/cholesterol issue to health professionals, the media, and consumers; (ii) foodservice—to encourage greater usage of eggs in commercial and institutional operations; (iii) consumer education—to continue development of materials of consumer interest and to assist State and regional egg promotion organizations in their promotion efforts; and (iv) new product development—to demonstrate the use of eggs in food processing to major food manufacturing companies.

Because it was necessary to implement the decrease in the assessment rate as soon as possible to permit the Board to develop in a timely manner programs and a budget for the 1988 fiscal period, an interim final rule published August 20, 1987, was made effective September 1, 1987. Comments were invited until September 21, 1987. Comments were received from two egg trade associations in support of the action to decrease the assessment rate from 5 cents per 30-dozen case of eggs to 2½ cents. In addition to supporting the continuation of the activities of the American Egg Board, the commenters pointed favorably to the lessened financial burden on egg producers because of the decrease in the assessment rate. There were no comments opposing the change. The interim final rule also revised the authority citation for 7 CFR Part 1250.

Since this document does not alter the regulation decreasing assessment rates which has been in effect since September 1, 1987, there is no reason to postpone its effective date for 30 days. Thus, pursuant to 5 U.S.C. 553 good cause is found to make this document effective upon publication.

List of Subjects in 7 CFR Part 1250

Research and promotion, Eggs.

PART 1250—[AMENDED]

Accordingly, for reasons and purposes stated above and in the interim final rule published August 20, 1987, (52 FR 31376), the amendment made to § 1250.514 of Part 1250, Title 7, Code of Federal Regulations, by the said interim rule is hereby adopted as a final rule without change.

(Pub. L. 93-428, 88 Stat. 1171, as amended; 7 U.S.C. 2701-2718)

Done at Washington, DC, on October 14, 1987.

J. Patrick Boyle,
Administrator.

[FR Doc. 87-24250 Filed 10-19-87; 8:45 am]
BILLING CODE 3410-02-M

Farmers Home Administration

7 CFR Parts 1942, 1951, and 1955

Revision of Procedure To Service Community Program Loans Sold to the Private Sector With Servicing To Be Performed in the Private Sector

AGENCY: Farmers Home Administration, USDA.

ACTION: Final rule.

SUMMARY: The Farmers Home Administration (FmHA) amends its regulation to exclude the servicing of loans sold without insurance by FmHA to the private sector with servicing to be performed in the private sector. This action is necessary to clearly establish servicing responsibilities for such loans.

EFFECTIVE DATE: October 20, 1987.

FOR FURTHER INFORMATION CONTACT: Bonnie S. Justice, Loan Officer, Community Facilities Division, Farmers Home Administration, U.S. Department of Agriculture, Room 6304, South Agriculture Building, Washington, DC 20250; telephone (202) 382-1490.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established in Departmental Regulation 1512-1, which implements Executive Order 12291, and has been determined to be "nonmajor" since the annual effect on the economy is less than $100 million and there will be no significant increase in cost or prices for consumers; individual industries; Federal, State, or Local Government agencies; or geographic regions. Furthermore, there will be no adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This document has been reviewed in accordance with 7 CFR Part 1940, Subpart G, "Environmental Program". FmHA has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment and in accordance with the National Environmental Policy Act of 1969 Pub. L. 91-190, an Environmental Impact Statement is not required.

On September 1, 1987, a proposed rule was published in the **Federal Register** (52 FR 32933) for a 15 day review and comment period. No comments were received.

This change affects the following FmHA programs as listed in the Catalog of Federal Domestic Assistance and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. (7 CFR Part 3015, Subpart V, 48 FR 29112, June 24, 1983; 49 FR 22675, May 31, 1984; 50 FR 14088, April 10, 1985):

Sec.
10.418 Water and Waste Disposal Systems for Rural Communities.
10.423 Community Facilities Loans.

Discussion

FmHA is authorized by the Omnibus Budget Reconciliation Act to sell loans to the private sector with servicing to be performed in the private sector. This action is to clearly establish servicing responsibilities for such loans and to clarify in FmHA's servicing regulations to show that those loans will be serviced in the private sector. This action will provide that future changes to FmHA regulations will not be applicable to such loans.

List of Subjects

7 CFR Part 1942

Community development, Community facilities, Loan programs—housing and community development, Loan security, Rural areas, Waste treatment and disposal—domestic, Water supply—domestic.

7 CFR Part 1951

Account servicing, Grant programs—housing and community development, Reporting requirements, Rural areas, Subsidies.

7 CFR Part 1955

Foreclosure, Government acquired property, Government property management.

Accordingly, FmHA amends Chapter XVIII, Title 7, Code of Federal Regulations as follows:

PART 1942—ASSOCIATIONS

1. The authority citation for Part 1942 continues to read as follows:

Authority: 7 U.S.C 1989; 16 U.S.C. 1005; 7 CFR 2.23; 7 CFR 2.70.

Subpart A—Community Facility Loans

2. Section 1942.1 is amended by redesignating paragraph (c) as paragraph (d) and by adding a new paragraph (c) to read as follows:

§ 1942.1 General.

* * * * *

(c) Loans sold without insurance by FmHA to the private sector will be serviced in the private sector and will not be serviced under this subpart. The provisions of this subpart are not applicable to such loans. Future changes to this subpart will not be made applicable to such loans.

* * * * *

PART 1951—SERVICING AND COLLECTIONS

3. The authority citation for Part 1951 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23; 7 CFR 2.70.

Subpart E—Servicing of Community Program Loans and Grants

4. Section 1951.201 is revised to read as follows:

§ 1951.201 Purpose.

This subpart prescribes the policies, authorizations, and procedures for servicing Community Water and Waste Disposal System loans and grants, Community Facility Loans, Industrial Development grants, loans for Grazing and other shift-in-land use projects, Association Recreation loans, Association Irrigation and Drainage loans, Watershed loans and advances, Resource Conservation and Development loans, Economic Opportunity Cooperative loans, loans to Indian Tribes and Tribal Corporations, loans to Timer Development Organizations, Rural Renewal loans and Energy Impacted Area Development Assistance Program grants. Loans sold without insurance by the Farmers Home Administration to the private sector will be serviced in the private sector and will not be serviced under this subpart. The provisions of this subpart are not applicable to such loans. Future changes to this subpart will not be made applicable to such loans.

Subpart O—Servicing Cases Where Unauthorized Loans(s) or Other Financial Assistance Was Received—Community and Insured Business Programs

5. Section 1951.701 is revised to read as follows:

§ 1951.701 Purpose.

This subpart prescribes the policies and procedures for servicing Community and Business Program loans and/or grants made by Farmers Home Administration (FmHA) when it is determined that the borrower or grantee was not eligible for all or part of the financial assistance received in the form of a loan, grant, or subsidy granted, or any other direct financial assistance. It does not apply to guaranteed loans. Loans sold without insurance by the FmHA to the private sector will be serviced in the private sector and will not be serviced under this subpart. The provisions of this subpart are not applicable to such loans. Future changes to this subpart will not be made applicable to such loans.

PART 1955—PROPERTY MANAGEMENT

6. The authority citation for Part 1955 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23; 7 CFR 2.70.

Subpart A—Liquidation of Loans Secured by Real Estate and Acquisition of Real and Chattel Property

7. Section 1955.1 is revised to read as follows:

§ 1955.1 Purpose.

This subpart delegates authority and prescribes procedures for the liquidation of Farmers Home Administration (FmHA) loans identified in § 1955.3 (d) and (e) of this subpart and acquisition of property by voluntary conveyance to the Government, by foreclosure of security instruments, by exercise of the Government's redemption rights, and certain other actions which result in acquisition of property by the Government. When FmHA elects to liquidate a guaranteed loan *other than Business and Industrial (B&I)* under the contract of guarantee, the liquidation will be completed according to this subpart. Liquidations of guaranteed B&I loans will be effected upon direction from the Assistant Administrator, Community and Business Programs. For Community Programs and insured B&I actions involving loans secured by other than real or chattel property, the case will be forwarded to the National Office for prior review and guidance. Community Program loans sold without insurance by the FmHA to the private sector will be serviced in the private sector and will not be serviced under this subpart. The provisions of this subpart are not applicable to such loans. Future changes to this subpart will not be made applicable to such loans.

Subpart B—Management of Property

8. Section 1955.51 is amended by adding a new paragraph (d) to read as follows:

§ 1955.51 Purpose.

* * * * *

(d) Community Program loans sold without insurance by the FmHA to the private sector will be serviced in the private sector and will not be serviced under this subpart. The provisions of this subpart will not be made applicable to such loans.

Dated: September 25, 1987.

Vance L. Clark,

Administrator, Farmers Home Administration.

[FR Doc. 87-24208 Filed 10-19-87; 8:45 am]

BILLING CODE 3410-07-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 87-AWA-9]

Alteration of VOR Federal Airways; Expanded East Coast Plan, Phase II

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the descriptions of three Federal airways located in the vicinity of New York. These airways are part of an overall plan designed to alleviate congestion and compression of traffic in the airspace bounded by Eastern, New England, Great Lakes and the Southern Regions. While nine airways were included in the notice only V-2, V-29 and V-34 will be implemented at this time due to technical and administrative problems. This amendment is a part of Phase II of the Expanded East Coast Plan (EECP); Phase I was implemented February 12, 1987. The EECP is designed to make optimum use of the airspace along the east coast corridor. This action reduces en route and terminal delays in the Boston, MA; New York, NY; Miami, FL; Chicago, IL; and Atlanta, GA, areas, saves fuel and reduces controller workload. The EECP is being implemented in coordinated segments until completed.

EFFECTIVE DATE: 0901 UTC, November 19, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone: (202) 267-9250.

SUPPLEMENTARY INFORMATION:

History

On July 15, 1987, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to alter the descriptions of VOR Federal airways V-1, V-14, V-16, V-2, V-29, V-3, V-31, V-33 and V-34 located in the vicinity of New York (52 FR 26485). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. Congressman Dean A. Gallo requested that implementation of Phase II of the EECP be suspended pending a full and complete study of the noise impact over the State of New Jersey.

People Against Newark Noise commented that certain residents of New Jersey object to changes in air routes which will bring jet noise upon previously peaceful communities. Environmental assessment of airspace actions by the FAA is conducted in accordance with FAA Order 1050.1D, Policies and Procedures for Handling Environmental Impacts. Appendix 3 of the order requires environmental assessment of a Part 71 airspace action only when it would result in rerouting traffic over a noise-sensitive area at altitudes less than 3,000 feet above the surface. No such low-altitude routings were involved in the airway modification adopted in this amendment, and we do not consider that an environmental assessment is required under the National Environmental Policy Act or the Agency's Environmental Guidelines. In view of the comments of the New Jersey parties, however, the FAA is in the process of conducting a review of the environmental implications of the overall impact of Phase II of the EECP.

In consideration of the importance of the airway actions for the safe and efficient handling of air traffic on the east coast, and of the fact that the agency has complied with Federal environmental review requirements, the FAA does not believe that this action should be delayed pending the outcome of the review. With respect to the studies being conducted by the General Accounting Office and the New Jersey state government, the FAA will fully consider the results of these studies when completed, but we do not agree that important airway changes should be delayed pending the outcome of those studies.

People Against Newark Noise also questioned the basis for the FAA's determination that a regulatory evaluation is not required. The action does not meet the threshold requirements for a major rule under Executive Order 12291, and a regulatory impact analysis under that order is not required. Department of Transportation Regulatory Policies and Procedures (44 FR 11031) require an economic evaluation of agency rulemaking actions except in emergencies or when the agency determines that the economic impact is so minimal that the action does not warrant a full evaluation. Such

a determination was made in this case, in consideration of the minimal economic impacts of the airway changes proposed. Similarly, a regulatory flexibility analysis is not required since this action will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

AOPA objected that this proposal will impose complicated routings and/or additional mileages. The FAA agrees there will be additional mileages on certain airways due to the realignment of the standard instrument departures and standard terminal arrival routes. Nevertheless, this change in traffic flow has resulted in more than a 40% reduction in departure/arrival delays in the New York Metroplex area, thereby saving time and fuel. This action should more than offset the slight additional distance. The FAA does not consider these actions to constitute a complication of routing. Should unforeseen problems arise as a result of this phase of the EECP, the FAA would initiate appropriate remedial action as required.

The Air Transport Association (ATA) endorsed the objective of the EECP to establish an improved air traffic system which reduces delays for aircraft departing and arriving terminals in the eastern United States. However, ATA requested an overview of the total plan. Also, ATA requested a longer response time to the NPRM's because of the large volume of very technical and complicated material. FAA appreciates the comments and will carefully review and consider their suggestion.

Comments from the Department of the Navy and the Department of the Air Force objected to the routing of an airway through R-5202 and R-4105 and through certain military operations areas. Of the five victor airways objected to by the Navy and Air Force, only V-34 is being implemented at this time. V-34 does not penetrate any special use airspace.

Due to technical and administrative problems only V-2, V-29 and V-34 will be implemented at this time. Implementation of the other six airways will be delayed until a later date. With respect to V-34 "Ithaca, NY," was deleted from the description between Rochester, NY, and Hancock, NY. Section 71.123 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6C dated January 2, 1987.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations alters the descriptions of three VOR Federal airways located in the vicinity of New York. These airways are part of an overall plan designed to alleviate congestion and compression of traffic in the airspace bounded by Eastern, New England, Great Lakes and the Southern Regions. While nine airways were included in the notice only V-2, V-29 and V-34 will be implemented at this time due to technical and administrative problems. This amendment is a part of Phase II of the EECP; Phase I was implemented February 12, 1987. The EECP is designed to make optimum use of the airspace along the east coast corridor. This action reduces en route and terminal delays in the Boston, MA; New York, NY; Miami, FL; Chicago, IL; and Atlanta, GA, areas, saves fuel and reduces controller workload. The EECP is being implemented in coordinated segments until completed.

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

List of Subjects in 14 CFR Part 71

Aviation safety, VOR Federal airways.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended, as follows:

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) [Revised Pub. L. 97-449, January 12, 1983]; 14 CFR 11.69.

§ 71.123 [Amended]

2. Section 71.123 is amended as follows:

V-2 [Amended]

By removing the words "Gardner; to Lawrence, MA." and substituting the words "to Gardner."

V-29 [Amended]

By removing the words "Syracuse, NY;" and substituting the words "INT Binghamton 005° and Syracuse, NY, 169° radials; Syracuse;"

V-34 [Amended]

By removing the words "Ithaca, NY;"

Issued in Washington, DC, on October 8, 1987.

Daniel J. Peterson,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 87-24186 Filed 10-19-87; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 87-AWA-10]

Alteration of VOR Federal Airways; Expanded East Coast Plan, Phase II

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the descriptions of two Federal airways located in the vicinity of New York. These airways are part of an overall plan designed to alleviate congestion and compression of traffic in the airspace bounded by Eastern, New England, Great Lakes and the Southern Regions. While five airways were included in the notice only V-36 and V-54 will be implemented at this time due to technical and administrative problems. This amendment is a part of Phase II of the Expanded East Coast Plan (EECP); Phase I was implemented February 12, 1987. The EECP is designed to make optimum use of the airspace along the east coast corridor. This action reduces en route and terminal delays in the Boston, MA; New York, NY; Miami, FL; Chicago, IL; and Atlanta, GA, areas, saves fuel and reduces controller workload. The EECP is being implemented in coordinated segments until completed.

EFFECTIVE DATE: 0901 UTC, November 19, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace Branch (ATO-240), Airspace—Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-9250.

SUPPLEMENTARY INFORMATION:

History

On July 14, 1987, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to alter the descriptions of VOR Federal Airways V-36, V-39, V-44, V-54 and V-58 located in the vicinity of New York (52 FR 26351). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. Congressman Dean A. Gallo requested that implementation of Phase II of the EECP be suspended pending a full and complete study of the noise impact over the State of New Jersey.

People Against Newark Noise commented that certain residents of New Jersey object to changes in air routes which will bring jet noise upon previously peaceful communities. Environmental assessment of airspace actions by the FAA is conducted in accordance with FAA Order 1050.1D, Policies and Procedures for Handling Environmental Impacts. Appendix 3 of the order requires environmental assessment of a Part 71 airspace action only when it would result in rerouting traffic over a noise-sensitive area at altitudes less than 3,000 feet above the surface. No such low-altitude routings were involved in the airway modification adopted in this amendment, and we do not consider that an environmental assessment is required under the National Environmental Policy Act or the Agency's Environmental Guidelines. In view of the comments of the New Jersey parties, however, the FAA is in the process of conducting a review of the environmental implications of the overall impact of Phase II of the EECP.

In consideration of the importance of the airway actions for the safe and efficient handling of air traffic on the east coast, and of the fact that the agency has complied with Federal environmental review requirements, the FAA does not believe that this action should be delayed pending the outcome of the review. With respect to the studies being conducted by the General Accounting Office and the New Jersey state government, the FAA will fully consider the results of these studies when completed, but we do not agree that important airway changes should be delayed pending the outcome of those studies.

People Against Newark Noise also questioned the basis for the FAA's determination that a regulatory evaluation is not required. The action does not meet the threshold requirements for a major rule under Executive Order 12291, and a regulatory impact analysis under that order is not required. Department of Transportation Regulatory Policies and Procedures (44 FR 11031) require an economic evaluation of agency rulemaking actions except in emergencies or when the agency determines that the economic impact is so minimal that the action does not warrant a full evaluation. Such a determination was made in this case, in consideration of the minimal economic impacts of the airway changes proposed. Similarly, a regulatory flexibility analysis is not required since this action will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

AOPA objected that this proposal will impose complicated routings and/or additional mileages. The FAA agrees there will be additional mileages on certain airways due to the realignment of the standard instrument departures and standard terminal arrival routes. Nevertheless, this change in traffic flow has resulted in more than a 40% reduction in departure/arrival delays in the New York Metroplex area, thereby saving time and fuel. This action should more than offset the slight additional distance. The FAA does not consider these actions to constitute a complication of routing. Should unforeseen problems arise as a result of this phase of the EECP, the FAA would initiate appropriate remedial action as required.

The Air Transport Association (ATA) endorsed the objective of the EECP to establish an improved air traffic system which reduces delays for aircraft departing and arriving terminals in the eastern United States. However, ATA requested an overview of the total plan. Also, ATA requested a longer response time to the NPRM's because of the large volume of very technical and complicated material. FAA appreciates the comments and will carefully review and consider their suggestion.

Comments from the Department of the Navy and the Department of the Air Force objected to the routing of an airway through R-5202 and R-4105 and through certain military operations areas. Of the five victor airways objected to by the Navy and Air Force, only V-34 (ASD 87-AWA-9) is being implemented and V-34 does not penetrate any special use airspace.

Due to technical and administrative problems that surfaced in this docket only V-36 and V-54 will be implemented at this time. Implementation of the other three airways will be delayed until a later date. Section 71.123 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6C dated January 2, 1987.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations alters the descriptions of two VOR Federal airways located in the vicinity of New York. These airways are part of an overall plan designed to alleviate congestion and compression of traffic in the airspace bounded by Eastern, New England, Great Lakes and the Southern Regions. While five airways were included in the notice only V-36 and V-54 will be implemented at this time due to technical and administrative problems. This amendment is a part of Phase II of the Expanded East Coast Plan (EECP); Phase I was implemented February 12, 1987. The EECP is designed to make optimum use of the airspace along the east coast corridor. This action reduces en route and terminal delays in the Boston, MA; New York, NY; Miami, FL; Chicago, IL; and Atlanta, GA, areas, saves fuel and reduces controller workload. The EECP is being implemented in coordinated segments until completed.

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

List of Subjects in 14 CFR Part 71

Aviation safety, VOR Federal airways.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended, as follows:

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.123 [Amended]

2. Section 71.123 is amended as follows:

V-36 [Amended]

By removing the words "Lake Henry, PA; Sparta, NJ; LaGuardia, NY; INT LaGuardia 133° and Deer Park, NY, 209° radials; Deer Park." and substituting the words "INT Elmira 110° and LaGuardia, NY, 310° radials; to INT LaGuardia 310° and Stillwater, NJ, 043° radials."

V-54 [Amended]

By removing the words "to Fayetteville." and substituting the words "Fayetteville; to Kinston, NC."

Issued in Washington, DC, on October 8, 1987.

Daniel J. Peterson,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 87-24185 Filed 10-19-87; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 87-AWA-11]

Alteration of VOR Federal Airways; Expanded East Coast Plan, Phase II

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the descriptions of two Federal airways located in the vicinity of New York. These airways are part of an overall plan designed to alleviate congestion and compression of traffic in the airspace bounded by Eastern, New England, Great Lakes and the Southern Regions. While five airways were included in the notice only V-106 and V-116 will be implemented at this time due to technical and administrative problems. This amendment is a part of Phase II of the Expanded East Coast Plan (EECP); Phase I was implemented February 12, 1987. The EECP is designed to make optimum use of the airspace along the east coast corridor. This action reduces en route and terminal delays in the Boston, MA; New York, NY; Miami, FL; Chicago, IL; and Atlanta, GA, areas, saves fuel and reduces controller workload. The EECP is being implemented in coordinated segments until completed.

EFFECTIVE DATE: 0901 UTC, November 19, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone: (202) 267-9250.

SUPPLEMENTARY INFORMATION:

History

On July 15, 1987, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to alter the descriptions of VOR Federal Airways V-91, V-93, V-99, V-106 and V-116 located in the vicinity of New York (52 FR 26486). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. Congressman Dean A. Gallo requested that implementation of Phase II of the EECP be suspended pending a full and complete study of the noise impact over the State of New Jersey.

People Against Newark Noise commented that certain residents of New Jersey object to changes in air routes which will bring jet noise upon previously peaceful communities. Environmental assessment of airspace actions by the FAA is conducted in accordance with FAA Order 1050.1D, Policies and Procedures for Handling Environmental Impacts. Appendix 3 of the order requires environmental assessment of a Part 71 airspace action only when it would result in rerouting traffic over a noise-sensitive area at altitudes less than 3,000 feet above the surface. No such low-altitude routings were involved in the airway modification adopted in this amendment, and we do not consider that an environmental assessment is required under the National Environmental Policy Act or the Agency's Environmental Guidelines. In view of the comments of the New Jersey parties, however, the FAA is in the process of conducting a review of the environmental implications of the overall impact of Phase II of the EECP.

In consideration of the importance of the airway actions for the safe and efficient handling of air traffic on the east coast, and of the fact that the agency has complied with Federal environmental review requirements, the FAA does not believe that this action should be delayed pending the outcome of the review. With respect to the studies being conducted by the General Accounting Office and the New Jersey state government, the FAA will fully consider the results of these studies when completed, but we do not agree that important airway changes should be delayed pending the outcome of those studies.

People Against Newark Noise also questioned the basis for the FAA's determination that a regulatory evaluation is not required. The action does not meet the threshold requirements for a major rule under Executive Order 12291, and a regulatory impact analysis under that order is not required. Department of Transportation Regulatory Policies and Procedures (44 FR 11031) require an economic evaluation of agency rulemaking actions except in emergencies or when the agency determines that the economic impact is so minimal that the action does not warrant a full evaluation. Such a determination was made in this case, in consideration of the minimal economic impacts of the airway changes proposed. Similarly, a regulatory flexibility analysis is not required since this action will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

AOPA objected that this proposal will impose complicated routings and/or additional mileages. The FAA agrees there will be additional mileages on certain airways due to the realignment of the standard instrument departures and standard terminal arrival routes. Nevertheless, this change in traffic flow has resulted in more than a 40% reduction in departure/arrival delays in the New York Metroplex area, thereby saving time and fuel. This action should more than offset the slight additional distance. The FAA does not consider these actions to constitute a complication of routing. Should unforeseen problems arise as a result of this phase of the EECP, the FAA would initiate appropriate remedial action as required.

The Air Transport Association (ATA) endorsed the objective of the EECP to establish an improved air traffic system which reduces delays for aircraft departing and arriving terminals in the eastern United States. However, ATA requested an overview of the total plan. Also, ATA requested a longer response time to the NPRM's because of the large volume of very technical and complicated material. FAA appreciates the comments and will carefully review and consider their suggestion.

Due to technical and administrative problems only V-106 and V-116 will be implemented at this time. Implementation of the other three airways will be delayed until a later date. With respect to V-106, the portion between Lake Henry, NY, and Gardner, MA, has been omitted from this docket. Section 71.123 of Part 71 of the Federal Aviation Regulations was republished in

Handbook 7400.6C dated January 2, 1987.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations alters the descriptions of two VOR Federal airways located in the vicinity of New York. These airways are part of an overall plan designed to alleviate congestion and compression of traffic in the airspace bounded by Eastern, New England, Great Lakes and the Southern Regions. While five airways were included in the notice only V-106 and V-116 will be implemented at this time due to technical and administrative problems. This amendment is a part of Phase II of the Expanded East Coast Plan (EECP); Phase I was implemented February 12, 1987.

The EECP is designed to make optimum use of the airspace along the east coast corridor. This action reduces en route and terminal delays in the Boston, MA; New York, NY; Miami, FL; Chicago, IL; and Atlanta, GA, areas, saves fuel and reduces controller workload. The EECP is being implemented in coordinated segments until completed.

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

List of Subjects in 14 CFR Part 71

Aviation safety, VOR Federal airways.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended, as follows:

PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.123 [Amended]

2. Section 71.123 is amended as follows:

V-106 [Amended]

By removing the words "INT Gardner 041° and Manchester, NH, 249° radials; Manchester;" and substituting the words "Manchester, NH;"

V-116 [Amended]

By removing the words "Lake Henry, PA; INT Lake Henry 110° and Deer Park, NY, 296° radials; Deer Park." and substituting the words "INT Stonyfork 098° and Wilkes-Barre, PA, 310° radials; Wilkes-Barre; INT Wilkes-Barre 084° and Sparta, NJ, 300° radials; to Sparta."

Issued in Washington, DC, on October 8, 1987.

Daniel J. Peterson,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 87-24184 Filed 10-19-87; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 75

[Airspace Docket No. 87-AWA-3]

Alteration of Jet Routes; Expanded East Coast Plan, Phase II

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the descriptions of six jet routes located in the vicinity of New York. These jet routes are part of an overall plan designed to alleviate congestion and compression of traffic in the airspace bounded by Eastern, New England, Great Lakes and the Southern Regions. While ten jet routes were included in the notice only J-48, J-51, J-52, J-55, J-60 and J-64 will be implemented at this time due to technical and administrative problems. This amendment is a part of Phase II of the Expanded East Coast Plan (EECP); Phase I was implemented February 12, 1987. The EECP is designed to make optimum use of the airspace along the east coast corridor. This action reduces en route and terminal delays in the Boston, MA; New York, NY; Miami, FL; Chicago, IL; and Atlanta, GA. areas, saves fuel and reduces controller workload. The EECP is being implemented in coordinated segments until completed.

EFFECTIVE DATE: 0901 UTC, November 19, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-9250.

SUPPLEMENTARY INFORMATION:

History

On July 6 and August 14, 1987, the FAA proposed to amend Part 75 of the Federal Aviation Regulations (14 CFR Part 75) to alter the descriptions of Jet Routes J-37, J-40, J-42, J-48, J-51, J-52, J-55, J-60, J-62 and J-64 located in the vicinity of New York (52 FR 25243 and 30382). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. Congressman Dean A. Gallo requested that implementation of Phase II of the EECP be suspended pending a full and complete study of the noise impact over the State of New Jersey.

People Against Newark Noise commented that certain residents of New Jersey object to changes in air routes which will bring jet noise upon previously peaceful communities. Environmental assessment of airspace actions by the FAA is conducted in accordance with FAA Order 1050.1D, Policies and Procedures for Handling Environmental Impacts. Appendix 3 of the order requires environmental assessment of a Part 75 airspace action only when it would result in rerouting traffic over a noise-sensitive area at altitudes less than 3,000 feet above the surface. No such low-altitude routings were involved in the airway modification adopted in this amendment, and an environmental assessment was not required. With respect to the studies being conducted by the General Accounting Office and the New Jersey state government, the FAA will fully consider the results of these studies when completed. However, in consideration of the importance of the airway actions for the safe and efficient handling of air traffic on the east coast, and of the fact that the agency has complied with Federal environmental review requirements, the FAA does not believe that the action should be delayed pending the outcome of the studies.

People Against Newark Noise also questioned the basis for the FAA's determination that a regulatory evaluation is not required. The action does not meet the threshold requirements for a major rule under Executive Order 12291, and a regulatory

impact analysis under that order is not required. Department of Transportation Regulatory Policies and Procedures (44 FR 11031) require an economic evaluation of agency rulemaking actions except in emergencies or when the agency determines that the economic impact is so minimal that the action does not warrant a full evaluation. Such a determination was made in this case, in consideration of the minimal economic impacts of the airway changes proposed. Similarly, a regulatory flexibility analysis is not required since this action will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

AOPA objected that this proposal will impose complicated routings and/or additional mileages. The FAA agrees there will be additional mileages on certain airways due to the realignment of the standard instrument departures and standard terminal arrival routes. Nevertheless, this change in traffic flow has resulted in more than a 40% reduction in departure/arrival delays in the New York Metroplex area, thereby saving time and fuel. This action should more than offset the slight additional distance. The FAA does not consider these actions to constitute a complication of routing. Should unforeseen problems arise as a result of this phase of the EECP, the FAA would initiate appropriate remedial action as required.

The Air Transport Association (ATA) endorsed the objective of the EECP to establish an improved air traffic system which reduces delays for aircraft departing and arriving terminals in the eastern United States. However, ATA requested an overview of the total plan. Also, ATA requested a longer response time to the NPRM's because of the large volume of very technical and complicated material. FAA appreciates the comments and will carefully review and consider their suggestion.

Due to technical and administrative problems only J-48, J-51, J-52, J-55, J-60 and J-64 will be implemented at this time. Implementation of the other four jet routes will be delayed until a later date. With respect to J-48 and J-55 the alignment of these routes were changed to improve the traffic flow in those areas. Section 75.100 of Part 75 of the Federal Aviation Regulations was republished in Handbook 7400.6C dated January 2, 1987.

The Rule

This amendment to Part 75 of the Federal Aviation Regulations alters the descriptions of six jet routes located in the vicinity of New York. These routes are part of an overall plan designed to alleviate congestion and compression of traffic in the airspace bounded by Eastern, New England, Great Lakes and the Southern Regions. While ten jet routes were included in the notice only J-48, J-51, J-52, J-55, J-60 and J-64 will be implemented at this time due to technical and administrative problems. This amendment is a part of Phase II of the Expanded East Coast Plan (EECP); Phase I was implemented February 12, 1987. The EECP is designed to make optimum use of the airspace along the east coast corridor. This action reduces en route and terminal delays in the Boston, MA; New York, NY; Miami, FL; Chicago, IL; and Atlanta, GA, areas, saves fuel and reduces controller workload. The EECP is being implemented in coordinated segments until completed.

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

List of Subjects in 14 CFR Part 75

Aviation safety, Jet routes.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 75 of the Federal Aviation Regulations (14 CFR Part 75) as amended (52 FR 21248), is further amended, as follows:

PART 75—ESTABLISHMENT OF JET ROUTES AND AREA HIGH ROUTES

1. The authority citation for Part 75 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 75.100 [Amended]

2. Section 75.100 is amended as follows:

J-48 [Revised]

From INT Solberg, NJ, 264° and Pottstown, PA, 050° radials; Pottstown; Westminster, MD; Casanova, VA; to Pulaski, VA.

J-51 [Amended]

By removing the words "INT Columbia 040° and Flat Rock, VA, 213° radials; to Flat Rock." and substituting the words "INT Columbia 042° and Flat Rock, VA, 212° radials; Flat Rock; Nottingham, MD; Dupont, DE; to Yardley, NJ."

J-52 [Amended]

By removing the words "INT Columbia 040° and Raleigh-Durham, NC, 228° radials; Raleigh-Durham;" and substituting the words "Raleigh-Durham, NC;"

J-55 [Amended]

By removing the words "INT Florence 003° and Raleigh-Durham, NC, 228° radials; Raleigh-Durham," and substituting the words "INT Florence 003° and Raleigh-Durham, NC, 224° radials; Raleigh-Durham;"

J-60 [Amended]

By removing the words "INT Philipsburg 100° and Robbinsville, NJ, 293° radials;" and substituting the words "East Texas, PA;"

J-64 [Amended]

By removing the words "to Robbinsville, NJ." and substituting the words "Ravine, PA; to Robbinsville, NJ."

Issued in Washington, DC, on October 8, 1987.

Daniel J. Peterson,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 87-24187 Filed 10-19-87; 8:45 am]

BILLING CODE 4910-13-M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 15, 19 and 150

Revision of Federal Speculative Position Limits

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: The Commodity Futures Trading Commission ("Commission") has long established and enforced under its rulemaking authority speculative position limits for futures contracts on various agricultural commodities. These limits were first established by the Commission's predecessor agency. The Commission believes that it is appropriate at this time to amend the structure of, and particular levels set for, Federal speculative position limits.

In this regard, the Commission reviewed existing position limits, proposed revised limits, and has considered carefully the comments

received on its proposed revisions. The Commission is now adopting final rules amending Federal speculative position limits. These rules, as adopted, maintain the current speculative position limit levels for the delivery month and, in most cases, maintain the current levels for individual, deferred months. The speculative position limits for all-months-combined have been raised in selected contracts. In addition, certain reporting requirements are being modified in connection with these revisions, and other technical changes have been adopted.

EFFECTIVE DATE: December 21, 1987.

FOR FURTHER INFORMATION CONTACT: Blake Imel, Deputy Director, or Paul M. Architzel, Chief Counsel, Division of Economic Analysis, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, DC 20581, (202) 254-3201 or 254-6990, respectively.

SUPPLEMENTARY INFORMATION:

I. Background

A. Regulatory Framework

Speculative position limits have been a Congressionally mandated tool for the regulation of futures markets for over a half-century. In particular, section 4a(1) of the Commodity Exchange Act, 7 U.S.C. 6a(1) (1982) ("Act"), states that:

> [e]xcessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets causing sudden or unreasonable fluctuations or unwarranted changes in the price of such commodity is an undue and unnecessary burden on interstate commerce in such commodity.

Accordingly, the Congress provided the Commission with the authority to:

> Fix such limits on the amount of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery on or subject to the rules of any contract market as the Commission finds are necessary to diminish, eliminate, or prevent such burden.

Section 4a(1) of the Act.

Federal speculative position limits have a long-standing history, dating from the Commission's predecessor, the Commodity Exchange Commission ("CEC"). The CEC promulgated speculative position limits for corn, wheat, other grains, cotton, soybeans and other agricultural commodities. *See,* 17 CFR Part 150 (1987).

The CEC set speculative position limits generically by commodity. That regulatory structure included a limit, by commodity, on speculative positions in any one future and in all-futures-combined and an exemption for *bona fide* hedge positions and also provided for the filing of futures and cash market reports with the Commission. *See,* 17 CFR Parts 15, 18 and 19 (1987). The structure of these speculative position limits largely has remained unchanged since the time of their promulgation, with the exception of amendments added in 1984 by the Commission. 49 FR 36825 (September 20, 1984). These amendments provided exemptions for spread or arbitrage positions between futures and option contracts where the latter had exchange-set speculative position limits pursuant to Commission Rule 1.61, 17 CFR 1.61 (1987).

Since its creation, the Commission periodically has reviewed its policies pertaining to speculative position limits. For example, the Commission initially redefined "hedging," 42 FR 2748 (August 24, 1977), raised speculative position limits in wheat, 41 FR 35060 (August 19, 1976), and published a policy statement on aggregation, 44 FR 33839 (June 13, 1979). Subsequently, the Commission undertook a systematic and thorough examination of its speculative position limit policy. This included the Commission's promulgation and enforcement of Rule. 1.61, which requires that all contract markets not subject to Federal speculative position limits adopt and enforce exchange-set speculative position limits. Recently, the Commission has issued a clarification of its hedging definition with regard to the "temporary substitute" and "incidental" tests, 52 FR 27195 (July 20, 1987), and has issued guidelines regarding the inclusion of exemptions from exchange-set speculative position limits for risk management positions. 52 FR 34633 (September 14, 1987). Currently, the Commission is studying issues related to its aggregation policy.

As part of this overall review of speculative position limits, the Commission, in September 1986, published an Advance Notice of Proposed Rulemaking regarding the possible revision of Federal speculative position limits. 51 FR 31648. In that request for public comment, the Commission posed eight questions, including requests for comment on general issues such as whether any revisions to speculative position limits were necessary. In addition, the Commission requested comment on specific questions regarding particular exemptions currently applicable to certain commodities. The comment period on the Advance Notice of Proposed Rulemaking closed on November 3, 1986, and fifty-six comments were received by the Commission as of February 1, 1987. Comments were received from agricultural producers and producer associations, commercial users and their associations, exchanges and professional futures trading interests such as futures commission merchants and commodity trading advisors (including attorneys with futures-related practices).

B. The Proposed Rulemaking

After considering the comments received in response to the Advance Notice of Proposed Rulemaking, on March 5, 1987, the Commission proposed to amend Federal speculative position limits. 52 FR 6812. The Commission proposed to restructure speculative position limits, establishing them by contract market, rather than on a generic commodity basis. As proposed, the restructured speculative position limits generally increased in level from the spot limit, to a higher individual month limit, to a yet-higher all-futures-combined limit. As proposed, the speculative position limits applicable to spot months remained unchanged.

The proposed rules also provided for the inclusion of soybean oil and soybean meal futures under Federal limits and provided that the speculative position limits for contracts having essentially identical terms and conditions be cumulated. In addition, the Commission proposed to amend its present definition of "hedging" (17 CFR 1.3(z) (1987)), specifically to enumerate as *bona fide* hedging those spread positions which are offset in the cash market by sales and purchases which are made basis different delivery months. With this clarification, the Commission proposed to delete an existing spread exemption in cotton.

The Commission also proposed several amendments to existing reporting requirements. For example, the Commission proposed to amend Commission Rules 15.03(b), 19.00 and 19.01 to add soybean meal and soybean oil to the list of commodities for which the filing of Form 204 reports is required. In addition, the Commission proposed to raise reporting levels for certain commodities at which Series '04 reports—reports on cash market positions—must be filed. The Commission also proposed to modify the reporting requirements for the filing of Form 304 reports by cotton hedgers and to add a special call provision for the filing of the '04 reports for cash market information. Certain further amendments to the reporting rules were proposed in order to correct erroneous references, delete redundant material and make other conforming, technical changes.

C. Comments Received

The comment period on the proposed rules closed on June 3, 1987, and seventy-nine comments were received. Commenters included other governmental and quasi-governmental units, exchanges, producers and producer organizations, professional traders and futures commission merchants, and fund managers and commodity pool operators. The greatest number of comments—twenty-four—were received from producers, other individuals and producer organizations. Twenty comments were received from fund managers or commodity pools, and nineteen were received from commercial users of futures contracts. Generally, the comments took issue with various specific provisions of the proposed rules. Almost all of the individual producers commenting opposed any increase to speculative position limits.

Of those commenters favoring increased speculative position limits, many questioned the proposed structure of the limits which would have provided for increasing levels from the spot month level to a higher single month level. These commenters objected to this "telescoping" structure, preferring to have uniform levels for spot and individual deferred months.

A second concern raised by many commenters was the differing levels proposed for the various wheat contracts. Many commenters also opposed the proposed combined limits for contracts having essentially identical terms and conditions. Finally, many commenters believed that the all-futures-combined limits should be raised higher than those proposed, or deleted entirely. These issues are discussed in greater detail below.

As part of its proposed rulemaking, the Commission considered petitions for rulemaking from the New York Cotton Exchange ("NYCE") and the Chicago Board of Trade ("CBT"). The NYCE petitioned the Commission to increase speculative position limits on cotton in individual futures months (outside the spot month) to 1,200 contracts, and in all-futures-combined to 3,000 contracts. The CBT petitioned the Commission to establish Federal speculative position limits for soybean oil and soybean meal futures contracts and to delete the all-futures-combined limit from Federal speculative position limits. In proposing its amendments to these rules, the Commission granted the petition relating to soybean oil and soybean meal and considered and denied the remaining petitions for rulemaking. *See* 52 FR 6814. Subsequently, in response to its proposed rulemaking, the Commission received petitions from the Kansas City Board of Trade ("KCBT") and the Minneapolis Grain Exchange ("MGE"). These petitions seek to have the Federal speculative position limits for all wheat contracts set at the same level. Finally, in response to the proposed rulemaking the CBT submitted an additional petition for rulemaking which would cause speculative position limits for oats, soybeans, corn and wheat futures contracts to be set and enforced by the exchanges rather than by the Commission.

II. The Final Rules

A. Overall Structure

In proposing amendments to existing Federal speculative position limits, the Commission proposed to retain the current limits during the spot months and to raise in a stepped manner both the individual-month limits outside of the spot months and the all-futures-combined limits. In so doing the Commission stated that:

> [w]ith respect to whether the all-futures-combined level should be set higher than the individual futures month limit, the Commission recognizes generally that a higher all-futures-combined level may increase liquidity in the deferred months. After fully and carefully considering the issue and studying the relevant data, the Commission is proposing to incorporate that philosophy into the structure of Federal speculative position limits.

52 FR 6815.

The "telescoping" feature of this structure—raising the single month level from the spot month level—concerned many commenters with respect to its application to futures for grains, soybeans and soybean products. In general, the commenting exchanges objected on the grounds that "telescoping" could be conducive to unnecessary and artificial price aberrations. One commenter opined that such a structure "will lead to potential price distortion in the market place by 'running out speculative interest at an early date from the delivery month.' " Another commenter suggested that telescoping limits would "aggravate the present situation of trading in the front months alone while providing no solution to the deferred trading problem."

In light of the comments received, which objected to both the higher individual month levels proposed and the level at which the all-futures-combined limits were proposed, the Commission reexamined its data. As the Commission has noted previously, particular data concerning the distribution of speculative traders in a market can result in a range of acceptable speculative position limits. 45 FR 79831, 79833 (December 2, 1980). Accordingly, although distribution data of speculative positions in these markets clearly support the Commission's proposed limit levels for individual months and all-futures-combined, these data generally also support retaining the current limits for individual months and increasing the all-futures-combined limits higher than proposed. Although analysis of the Commission's data suggested that the proposed configuration most clearly addressed current trading needs, most commenters preferred the second alternative. Because this alternative is within the range of limits supported by the data and is the configuration clearly preferred by commenters, the Commission has determined, for grains, soybeans and soybean products, not to adopt the levels as proposed, but rather to adopt a modified configuration. Accordingly, as adopted, the speculative position limits will provide for single month limits which are the same as the spot month limits, with an all-futures-combined limit generally higher than that proposed by the Commission.[1]

In contrast, those commenting on the proposed speculative position limits in cotton did not object to the higher single month limit level. Indeed, the chief concern of such commenters was whether the data on position distributions supported higher individual and all-futures-combined limits than proposed. In this regard it should be noted that the NYCE's petition itself provided for such stepped increases. Accordingly, the Commission has determined, with respect to speculative position limits for cotton, to adopt as final a "telescoping" configuration. In addition, as discussed below, the Commission has reconsidered the level of such limits.

[1] As the Commission noted in proposing these rule amendments, however, the data can in no way support the all-futures-combined limit implicit in the CBT's Petition for Rulemaking dated November 7, 1986. For some contracts, deletion of the all-futures-combined limits would increase the overall permissible size of speculative position limits by five to seven times the current limits. Moreover, the overall limit could increase were additional trading months added. The resulting increase in speculative position limits would be unrelated to the size of positions generally held by speculators in these markets. Some commenters opined that such limits, in terms of the percentage of the speculative position limit to overall open interest, are no larger than those currently in effect for certain other commodities, especially financial instruments. However, the Commission is of the opinion that limits of that magnitude are inappropriate for the commodities having Federal speculative position limits.

Many commenters also opined that the Commission's proposal did not increase sufficiently the all-futures-combined levels to encourage use of the contract in the deferred months. These commenters suggested that the approach of the CBT's November 7, 1986, Petition for Rulemaking which was denied by the Commission—to delete entirely the all-futures-combined limit—would be preferable.[2] However, after fully considering the petition and based upon its analysis of the relevant data, the Commission in its proposed rulemaking rejected that Petition on the grounds that the data could not support speculative position limits of the magnitude implicit in the Petition. 52 FR 6814–15. The Commission hereby affirms that determination for the same reasons outlined in that **Federal Register** notice.

In regard to the higher limits being adopted, it should be noted that the Commission proposed that, for all contracts, the speculative position limits immediately preceding and during the spot month remain unchanged. This proposal was based upon the Commission's analysis of current deliverable supplies and the history of various spot month expirations. The Commission, as proposed, has determined to retain in its final rules current spot month speculative position limits.[3]

B. Contract-Specific Limits

Many commenters objected to the proposed establishment of speculative position limits on a contract-market basis, arguing that the historical basis for setting speculative position limits, on a generic commodity basis, should be continued. The exchanges, in particular, objected, stating that differing speculative position limits would disadvantage competitively those exchanges with lower levels. Thus, both the KCBT and the MGE petitioned the Commission to retain identical speculative position limits for similar commodities. These exchanges reasoned that unless speculative position limits for contracts at all exchanges for similar commodities were equivalent, speculative interest, in particular that of managed funds, would gravitate toward the contract with the higher limits. In addition, the MGE opined that:

> [a]ny great disparity in Federal speculative position limits would potentially affect the ability of spread traders to conduct their affairs. This would impair the operation of all wheat markets, where spreaders play a strong arbitrage role.

MGE Petition for Rulemaking dated May 12, 1987.

The Commission has considered carefully its proposal in light of these comments. The Commission is fully aware of the role arbitrage and spreading plays in these markets. The Commission also has considered any anti-competitive effects possibly resulting from differing speculative position limits. However, as the Commission noted in its March 5, 1987, **Federal Register** notice:

> There are vast differences among the contracts for the same or similar commodities. Accordingly, it would appear inappropriate to set a single speculative position limit for all markets trading the same or similar commodities. A single, commodity-wide speculative position limit would result in either a speculative position limit which was too low for certain contracts or far higher than other contracts could conceivably warrant or likely absorb.

52 FR 6815.

And as the Commission further noted, basing speculative position limits upon the characteristics of a specific contract market is consistent with the practice under Commission Rule 1.61.[4]

In this regard, the Commission noted in its Notice of Proposed Rulemaking that raising speculative position limits for contract markets which are currently not constrained by present limits could not be expected, by itself, to increase liquidity on those exchanges. Moreover, the data reflect that current levels of intermarket arbitrage are conducted at levels well below current speculative position limits. Therefore, increasing the existing speculative position limits, albeit by differing amounts, is unlikely to have an adverse effect on such market activity. Accordingly, the Commission has determined to adopt as final the proposed contract-specific structure for speculative position limits. The levels for each contract market's speculative position limit, as discussed in greater detail below, have been set according to the individual characteristics of that contract market.

C. Cumulative Limits

The Commission proposed to cumulate speculative positions in contracts having essentially identical terms and conditions. This proposal was consistent with the Commission's practice under Rule 1.61, to require exchanges having more than one contract trading in the same commodity, such as mini- and maxi-sized contracts, generally to cumulate speculative position limits for those contracts. In light of the comments received on this issue in response to the Advance Notice of Proposed Rulemaking and the significant change the proposal would make in the application of Federal speculative position limits, the Commission sought particular comment on the advisability of this proposed rule. 52 FR 6816.

Commenters were uniformly opposed to cumulating positions in contracts having identical terms and conditions. The exchanges most directly affected objected on the basis that the proposal would adjust downward their combined current speculative position limits in the spot months. They reasoned that there was no evidence that such a downward adjustment was warranted and opined that such an adjustment might adversely impact the hedging function of the MidAmerica Commodity Exchange ("MCE") contracts. Others agreed with this assessment and noted that combining speculative position limits in such a manner was contrary to the understanding of the CBT and MCE, at the time of their affiliation, of how the existing Federal speculative position limits would be applied.

Although the Commission's proposal to combine the specu1ative position limits for certain contracts, in effect, did reduce overall spot-month positions, it also increased positions in the deferred months. Moreover, the Commission noted that because traders would have been able to hold all or part of their positions on either contract market, the proposal should not have resulted in loss of liquidity on either exchange. In light of the levels of speculative positions in existing markets, the Commission believed the proposal was reasonable. However, as discussed above, there is a range of acceptable speculative position limits. In light of the strong preference of commenters to keep Federal speculative position limits separate for each contract market and the fact that separate levels are within the range of appropriate speculative position limits for the contracts

[2] As noted by the Commission in its March 5, 1987, **Federal Register** notice, several commenters unreservedly supported the CBT's proposal. However, that support was not unanimous; others disagreed with the assumptions upon which the petition was based.

[3] As noted in the **Federal Register** release proposing these rule amendments, this aspect of the proposal is consistent with Congressional understanding of the Federal speculative position limits. As the House Committee on Agriculture noted, any restructuring of speculative position limits "need not result in any increase in position limits in spot months." H.R. Report No. 624, 99th Cong., 2nd Sess. 45 (1986).

[4] Commission Rule 1.61(a)(2) provides that exchange speculative position limits be based upon: Position sizes customarily held by speculative traders on such market for a period of time selected by the contract market, which shall not be extraordinarily large relative to total open positions in the contract for such period.

supported by the relevant data, the Commission has determined not to cumulate these limits. In this regard, it should be noted, however, that the data regarding the distribution of speculative positions does not support an increase in the levels of speculative position limits for MCE contracts.

D. Limit Levels

In proposing the particular levels for speculative position limits, the Commission noted that the primary criterion for determining the levels for such limits is the size of positions—

> customarily held by speculative traders on such markets for a period of time * * * which shall not be extraordinarily large relative to total open positions in the contract for such period. Other factors which may be considered include "the breadth and liquidity of the cash market underlying each delivery month and the opportunity for arbitrage between the futures market and cash market and the commodity underlying the futures contract."

52 FR 6816–17, citing Commission Rule 1.61(a)(2).

The Commission further noted (52 FR 6816–17) that it reviewed total open contracts and the distribution of speculative position limits for the past several years in each contract under consideration. This included analysis of the number of speculative traders holding various sized positions on month-end dates and the relation of the Federal limits—or for soybean meal and oil, exchange limits—to annual average levels of open interest for the past several years. The Commission concluded that there was substantial variation in the range of positions held depending on the contract market and that comparison of total open contracts to the speculative position limit also varied substantially from one contract to another. The Commission noted that those speculative position limits which appeared to be potentially more restrictive in terms of individual positions in a particular contract market were also the smallest as a percentage of total open contracts in such contract markets. Based upon these and other data, the Commission proposed revisions to speculative position limit levels.

Many commenters generally questioned the Commission's reliance on trader distributions in determining the appropriate levels of speculative position limits. These commenters argued that such data were deceptive since activity in the agricultural futures market has been greater during past periods than currently. Commenters also argued that trader distributions are an inappropriate means of determining the appropriate speculative position limits because speculative position limits are a self-fulfilling prophecy. These commenters contended that the historically low speculative position limits in agricultural futures contracts have discouraged their use by managed futures accounts and commodity pools and that such institutional speculators will continue to shun these markets unless speculative position limits are dramatically increased.

The Commission appreciates the plausibility of the argument that past low speculative position limits possibly may have discouraged the speculative use of such markets by certain professionally managed accounts. Nevertheless, the Commission remains convinced that its approach is sound. Despite the possibility that such arguments may have some validity for certain speculators, the distribution of trader data nonetheless provide guidance with respect to the current use of these markets by a preponderance of speculators. In addition, as noted, in establishing the amended levels, the Commission also has considered the size of the limits in relation to total open contracts.

In light of the Commission's determinations to refrain from "telescoping" speculative position limits as proposed and from cumulating limits for contracts having essentially identical terms and conditions, the Commission reexamined the data on market activity and considered carefully the arguments submitted by various commenters. With the change in the proposed structure of the limits, the Commission has determined to amend Federal speculative position limits by increasing the all-futures-combined limits by four times the present spot and individual month limits for CBT corn and soybeans, and for NYCE cotton #2 four times the present spot month limit coupled with an increased individual month limit; by three times the current spot and individual month level for CBT wheat, soybean oil, and soybean meal, and KCBT hard winter wheat; and by two times the current spot and individual month level for MGE spring wheat. The Commission is not changing the levels of the CBT oats and the MCE contracts.[5] The following chart compares the current, proposed and final speculative position limits for these commodities:

[5] It should be noted that in addition to the Federal speculative position limits in MCE soybean meal that are being adopted with this rulemaking, the MCE has established spot month position limits, which apply to both hedgers and speculators, for its soybean meal futures contract. These position limits decrease to lower levels as the delivery month progresses. These position limits are unaffected by the Federal speculative position limits being adopted and remain exchange rather than Federal limits.

CURRENT, PROPOSED AND FINAL FEDERAL SPECULATIVE POSITION LIMITS FOR SELECTED, NON-DORMANT FUTURES CONTRACTS IN CONTRACTS OR CONTRACT EQUIVALENTS [1]

	Current limits			Proposed limits			Final limits		
	All months net	Single month	Spot month	All months net	Single month	Spot month	All months net	Single month	Spot month
CBT corn	600	600	600	1,800	1,200	600	2,400	600	600
CBT soybeans	600	600	600	1,800	1,200	600	2,400	600	600
CBT wheat	600	600	600	1,200	900	600	1,800	600	600
CBT soybean oil	540	540	540	1,080	810	540	1,620	540	540
CBT soybean meal	720	720	720	1,440	1,080	720	2,160	720	720
CBT oats	400	400	400	400	400	400	400	400	400
KCBT hard winter wheat	600	600	600	600	600	600	1,800	600	600
MGE spring wheat	600	600	600	600	600	600	1,200	600	600
NYCE cotton #2	300	300	300	600	450	300	1,200	450	300
MCE corn	600	600	600	(3)	(3)	(3)	600	600	600

CURRENT, PROPOSED AND FINAL FEDERAL SPECULATIVE POSITION LIMITS FOR SELECTED, NON-DORMANT FUTURES CONTRACTS IN CONTRACTS OR CONTRACT EQUIVALENTS [1]—Continued

	Current limits			Proposed limits			Final limits		
	All months net	Single month	Spot month	All months net	Single month	Spot month	All months net	Single month	Spot month
MCE wheat	600	600	600	(3)	(3)	(3)	600	600	600
MCE soybeans	600	600	600	(3)	(3)	(3)	600	600	600
MCE soybean meal	400	400	[2]120	(3)	(3)	(3)	400	400	400
MCE oats	400	400	400	(3)	(3)	(3)	400	400	400

[1] Unlike proposed Commission Rule 150.2, which establish limit levels in terms of bushels, bales, tons, or pounds of the commodity, this table expresses all limits in terms of contracts or contract equivalents. In the case of commodities traded on the MCE, the number of contracts are expressed in terms equivalent to the larger size delivery units which are traded on the CBT. The current CBT soybean oil and CBT and MCE soybean meal limits previously were not Federal limits.

Certain dormant contracts are not set out in this table. The limits for such contracts are not being changed.

[2] The Exchange spot month position limit noted for MCE soybean meal applies to hedgers as well as speculators and decreases to lower levels as the delivery month progresses.

[3] MCE and CBT positions to be combined under limits listed above for CBT.

These increases are based upon the Commission's consideration of, among other things, the distribution of speculative position sizes in recent years and recent levels of open interest. The Commission believes that, based on these factors, the revised limits will provide the trading opportunities and potential liquidity attributed to higher limits by commenters while at the same time continuing to safeguard these markets against speculative abuses as intended in the Commission's proposal. In addition, as noted, in arriving at these limit levels; the Commission has taken into consideration the comments concerning the structure of individual futures limits with respect to the relation of the spot month and other individual months.

Many commenters objected to increases in various contracts which were not proportional to other, selected commodities. For example, the Commission is increasing the net all-futures-combined limit for corn to four times the current spot-month limit but CBT and KCBT wheat are being increased to three times the current limit. Several commenters objected to such disparate increases, however, stating that they preferred to keep wheat and corn limits equivalent because "the wheat/corn spread has proven to be a popular speculative trading strategy * * *." Similarly, commenters objected to the relationship between proposed increases in the levels for soybeans, soybean oil, and soybean meal because positions at the soybean speculative position limit would not correspond to the crush ratio for positions at the speculative position limit in soybean oil and soybean meal.

The Commission has carefully considered these objections. As the Commission has explained, it is increasing speculative position limits by contract market based upon the distribution of trading positions and total open interest in each market. Were the Commission to increase speculative position limits by equivalent ratios in order to maintain the relationships posited by commenters, the result would be either to set speculative position limits for some contracts below levels which are justified by current trading patterns or to set others at levels which are unjustifiably high.

The Commission has determined to follow neither of those alternatives but rather to recognize that in certain instances the maximum positions permitted for those types of trading strategies will be determined by the lower speculative position limit. Thus, for a trader with a wheat/corn spread the lower wheat speculative position limit will determine the extent of the activity permitted, even though the speculative position limit for corn would itself not limit such positions. Similarly, in connection with the soybean crush relationship, spreaders will recognize that permitted positions in soybeans are greater than the corresponding levels for soybean oil and soybean meal. The Commission is confident that increasing the speculative position limits for certain markets above the increases appropriate for others will not result in any price distortion nor will it have any other adverse market impact. Moreover, in any event, to the extent that the preponderance of spreading currently is conducted well below current speculative position limits, the additional increases should have a minimal, if any, impact on such pricing relationships.

E. Spread Exemptions

The Commission proposed to modify two spreading exemptions, one for cotton and one for soybean crush and reverse crush positions. With respect to the cotton spread exemption, as the Commission noted in its Notice of Proposed Rulemaking, this particular exemption for spread positions appears to have been added in response to the statutory definition of hedging which pre-existed the 1974 amendments to the Act. 51 FR 31648, 31650 (September 4, 1986). Because these particular positions—whereby commercial market users cover with futures positions their price-unfixed cash purchases which are coupled with price-unfixed cash sales—are permitted under the Commission's current definition of hedging, the Commission proposed to delete this spreading exemption. In order to remove any doubt that such positions are covered under the Commission's hedging definition, the Commission proposed to amend Rule 1.3(z)(2) to enumerate specifically as *bona fide* hedging these spread positions. And, in light of the Commission's determination to increase speculative position limits in cotton, the change apparently would have little impact on speculators.

The Commission received few comments concerning this proposed rule amendment. One commenter did note, however, that the proposed increase in speculative limits in cotton negated the need for such a spread exemption for speculators. The Commission carefully considered the potential benefits of inter-month spread positions versus the potential for disruption of the market if such positions become unusually large, especially where such positions are across different crop years, and the fact that the majority of existing spread

positions would be accommodated by the proposed increases in the speculative position limits. On the basis of these considerations, the Commission has determined to adopt these proposed amendments as final.

Currently, the speculative position limits set by the CBT for soybean oil and soybean meal provide spread exemptions for crush and reverse crush positions. These exemptions relate to spread positions between futures contracts in soybeans and in soybean meal and soybean oil in a ratio approximately equivalent to those quantities of soybean products which are derived from soybean processing. Clearly, crush positions—long soybeans and short soybean oil and meal—maintained by soybean processors constitute hedging transactions where such positions represent temporary substitutes for positions to be taken later in the cash market. Crush positions allow the processor to determine or fix his processing margin in advance and are included within the exemptions permitted for anticipatory hedging under Commission Rule 1.3(z)(2). As the Commission noted in its notice of proposed rulemaking:

> [s]pecifically, for a crush position established by a soybean processor, the short positions in soybean oil and soybean meal futures would be permitted to the extent of twelve months unsold anticipated production under 17 CFR 1.3(z)(2)(i)(B); the long positions in soybean futures, to the extent of twelve months unfilled anticipated requirements, would be permitted under 17 CFR 1.3(z)(2)(ii)(C).

52 FR 6818.

However, based upon the comments received by the Commission in response to its Advance Notice of Proposed Rulemaking and its own analysis, the Commission stated its belief that there are important differences between the crush and reverse crush positions from the standpoint of *bona fide* hedging by soybean processors. As the Commission noted in its Notice of Proposed Rulemaking, the results of a crush position, plus or minus basis variation, are known once the position is established. With a reverse crush position, however, "the intended results transpire only if, and when, the futures markets reflect the expected or anticipated more favorable crushing margin and the position can be lifted." 52 FR 6818. Accordingly, the Commission noted that it did not appear appropriate to recognize the reverse crush spread position as an enumerated category of *bona fide* hedging under Commission Rule 1.3(z)(2). Nevertheless, the Commission made clear that requests for exemption from speculative position limits for such reverse crush positions would be considered by the Commission pursuant to Commission Rules 1.3(z)(3) and 1.47, 17 CFR 1.3(z)(3), 1.47.

Several commenters objected to the Commission's failure to include reverse crush positions as an enumerated hedge position. A few commenters objected on the grounds that the Commission ignored their analysis and reasoning in support of enumerating reverse crush positions as a *bona fide* hedge under Commission Rule 1.3(z)(2). Others objected on the basis that the filing of a petition with the Commission for an individual determination on the *bona fide* hedging nature of reverse crush positions was too cumbersome a process.

The Commission has considered carefully comments received in response to both the proposed rulemaking and the Advance Notice of Proposed Rulemaking with respect to the appropriate treatment for reverse crush positions under the Commission's definition of *bona fide* hedging. The Commission also has studied the examples supplied by commenters of the use of reverse crush positions for *bona fide* hedging. As the Commission stated in its Notice of Proposed Rulemaking, however, there are important differences between reverse crush and crush positions in the context of Commission Rule 1.3(z). Accordingly, the Commission believes that the determination of whether a reverse crush position is *bona fide* hedging should be made on a case-by-case basis. With respect to commenters' suggestions that such a process is burdensome, the Commission notes that filings pursuant to Rules 1.3(z)(3) and 1.47 may be made in advance of the time the actual position is contemplated and may establish a maximum exemption which remains in effect for such period as the justification remains appropriate.

The Commission, despite seeking specific comment with respect to the effect on speculators of deleting the crush and reverse crush spread exemptions, received few, if any, comments on the proposal. Data on large speculative positions for month-end dates from January 1983 through November 1986 indicate that removal of the crush and reverse crush exemptions, in light of the higher position limits being adopted, would have little impact on speculators. Accordingly, the Commission is adopting the rule as proposed.

F. Petitions for Rulemaking

In connection with its proposed rule amendments, the Commission received petitions for rulemaking from three exchanges—the CBT, the KCBT and the MGE. By petition dated May 19, 1987, the CBT proposed that the Commission place responsibility for "establishing, monitoring and enforcing speculative position limits" for futures contracts in oats, soybeans, corn and wheat with the relevant contract markets. In effect, the CBT's petition would bring these domestic agricultural commodities under the provisions of Commission Rule 1.61. The exchange contended that—

> the resultant bifurcation of responsibility for administering speculative position limits creates differences in treatment of agricultural and non-agricultural firms which are unnecessary, confusing and potentially damaging to efficient market operation.

CBT Petition of May 19, 1987 at 1–2.

The exchange also argued that exchange responsibility for these limits is preferrable because the present regulatory system "creates an impression that the agricultural and non-agricultural contracts * * * are different * * *." The CBT further argued that the granting of hedge exemptions by both the Commission and the exchanges may result in different outcomes for applications having the same factual basis. Finally, the CBT maintained that it—

> has demonstrated that its systems of monitoring compliance with and enforcement of speculative position limits is [sic] an effective and efficient means of satisfying the requirements of the Commission and the Commodity Exchange Act. It is fully capable of accepting the additional responsibility of applying the same system to * * * [these] contracts.

Id. at 2–3.

The Commission does not find these arguments persuasive. First, the Commission does not agree that the different treatment of domestic agricultural commodities is necessarily confusing or potentially damaging to efficient market operation. The difference in the regulatory structures is, in part, an outgrowth of the historical development of speculative position limits and is not intended by the Commission to distinguish these commodities from those having exchange-set speculative position limits. Second, the problem posited by the CBT of conflicting decisions on hedge applications is not addressed by a change from Federal to exchange-set speculative position limits. Such conflicts also can be anticipated where the various exchanges make such determinations. Indeed, in commodities such as wheat, where there are several contract markets, determinations by the Commission may lead to greater

consistency in interpreting the hedging definition.

In this regard, the direct regulation and enforcement by the Commission of Federal speculative position limits may exert a unifying force on the entire industry, providing more specific guidance and authority for the various exchanges to follow in making such determinations. Moreover, the Commission's maintenance of Federal speculative position limits for these commodities is in no way intended to impugn the regulatory programs of any of the affected exchanges. Finally, the Commission has been informed that various agricultural interests are "comfortable" filing with the Commission confidential information pertaining to cash market positions. Accordingly, the Commission, at this time, believes that Federal speculative position limits should be maintained and hereby denies the Petition of the CBT.

In addition the KCBT, by letter dated March 13, 1987, petitioned the Commission "to change the limits for KCBT wheat to the exact same bushel amounts as those specified in the revised regulation for CBT wheat." In addition, the MGE, by letter dated May 12, 1987, petitioned the Commission to "bring all of the presently traded wheat contracts * * * into conformity with each other." As the Commission discussed above, it has considered thoroughly these petitions and the comments received on this issue and has carefully reexamined the relevant data. For the reasons explained above, the Commission is adopting speculative position limits for the CBT and KCBT which are equivalent. It is also raising the all-futures-combined limit for the MGE. The increase is not equivalent, however, to that of the CBT and the KCBT. In light of the markedly lower levels of open interest and correspondingly lower level of speculative position sizes on the MGE, the petition of the MGE cannot be sustained. Accordingly, the Commission is hereby denying that petition.

G. Reporting Regulations

The Commission proposed several modifications to its reporting requirements in light of its proposal to bring soybean meal and soybean oil under Federal speculative position limits, in particular conforming changes to Commission Rules 15.03(b), 19.00 and 19.01 by adding soybean meal and soybean oil to the list of commodities for which Form 204 reports are required. Form 204 is also being amended to include information for soybean oil and soybean meal comparable to that currently required for soybeans.

In addition, the Commission proposed to raise the reporting level for some commodities at which '04 reports, reports on cash market positions, must be filed. 17 CFR 15.03(b). The Commission proposed to raise the level for reporting in corn and soybeans and to establish the level for soybean meal and soybean oil at the proposed speculative limit level for individual delivery months (outside of the spot-month) for CBT contracts in those commodities. The Commission also proposed to modify the reporting requirements for Form 304 reports for cotton hedgers. The reporting level in Commission Rule 15.03(b) was proposed to be raised to the spot-month speculative limit level for hedgers other than merchants, processors and dealers (*e.g.*, producers).

In light of the Commission's adoption of individual month speculative position limits which are the same as the spot-month limits for all contracts, other than cotton, along with higher all-futures limits for certain contracts, the proposed reporting levels are no longer appropriate. To avoid requiring series '04 reports from traders whose net positions do not exceed speculative position limit levels, however, the Commission is specifying in the rules as adopted that reporting levels for series '04 reports are at the applicable speculative position limit for the spot, single-month or all-months level for the particular commodity. By raising the applicable reporting level for the filing of '04 reports consistent with the increases to, and the change in the structure of, speculative position limits, the Commission is reducing a paperwork burden.[6] In addition, the proposed provision requiring any trader with reportable futures market positions to file '04 reports for cash market information as instructed by Commission special call is being adopted, as proposed. The Commission anticipates that it will be necessary to use this authority infrequently.

The Commission also proposed to amend Rule 15.00(b)(1)(ii) to make the filing of series '04 reports contingent on net rather than gross positions.[7] As the Commission explained in the Proposed Notice of Rulemaking, under the gross reporting rule a trader unnecessarily may be required to file such reports if his or her position exceeds the reporting level even if there is an off-setting position. As amended, such reports will not be required to be filed unless a net futures position results in the trader's exceeding the reporting level. The overall impact of these changes will be to reduce the reporting burden on hedgers. The Commission received no adverse comments on this proposed rule and is adopting it without change.

The Commission also proposed technical amendments to several reporting rules modifying erroneous references, deleting redundant material, and reflecting the deletion of some dormant commodities and is adopting those changes as proposed. In addition, the Commission is adopting proposed modifications to Commission Rule 15.02 which specifies the forms which clearing members, futures commission merchants and other traders use for reporting information required under Parts 17, 18 and 19. By adopting these modifications as proposed, the Commission is consolidating 12 different forms which are presently required into a single form to be used for all exchanges for reporting special account information under Commission Rule 17.00.

III. Related Matters

A. The Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq.* requires that agencies, in proposing rules, consider the impact of these rules on small businesses. The Commission has previously determined that contract markets and "large traders" are not "small entities" for purposes of the RFA. 47 FR 18618 (April 30, 1982). These proposed rules are limits on the size of speculative positions which typically may be held by the largest traders in these markets. Accordingly, if promulgated, these rules would have no significant economic impact on a substantial number of small entities. Moreover, the Commission invited comments from any firms or other persons which believe that the promulgating of these amendments might have a significant impact upon their activities. No such comments were received. For the above reasons, and pursuant to section 3(a) of the RFA, 5 U.S.C. 605(b), the Acting Chairman, on behalf of the Commission, hereby certifies that these regulations will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1980, 44 U.S.C. Chapter 35, ("PRA"), imposes certain requirements on federal agencies, including the Commission, in

[6] Cotton merchants, processors and dealers will be required under the revised Commission Rule 19.00(a)(2) to continue filing Form 304 reports at the current futures reporting level of 5,000 bales.

[7] These amendments apply only to the reporting levels at which cash market, as opposed to futures market, information must be submitted.

connection with their conducting or sponsoring any collection of information as defined by the PRA. In compliance with the PRA, the Commission has submitted to the Director of the Office of Management and Budget ("OMB") these rules, as proposed, and an explanation and details of the information collections required under them. Because these rules amend existing rules, the following OMB control numbers have already been assigned: Commission Rules 15.00, 15.02, and 15.03—3038-0007 and 0009; Commission Rules 19.00, 19.01, 19.03, 19.04 and 19.10—3038-0009.

Copies of the OMB approved information collection package associated with these rules may be obtained from Bob Neal, Office of Management and Budget, Room 3220, NEOB, Washington, DC 20503, (202) 395-7340.

List of Subjects

17 CFR Part 1

Consumer protection, Definitions, Hedging, Reporting requirements, Records.

17 CFR Part 15

Reporting requirements.

17 CFR Part 19

Agricultural commodities, Bona fide hedge positions, Cash reports, Reporting requirements.

17 CFR Part 150

Agricultural commodities, Bona fide hedge positions, Position limits.

In consideration of the foregoing, pursuant to the authority contained in the Commodity Exchange Act, and, in particular sections 2(a)(1), 2(a)(2), 4a, 4c, 4g, 4i, 4n, 5, 5a, 6b, 6c, and 15, 7 U.S.C. 2, 4, 4a, 6a, 6c, 6g, 6i, 6n, 7 7a, 12a, 13a-1, and 19, the Commission hereby amends Chapter I of Title 17 of the Code of Federal Regulations by amending Parts 1, 15, 19 and 150 as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

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

2. Section 1.3 is amended by revising paragraph (z)(2)(iii) and adding paragraph (z)(2)(iv), to read as follows:

§ 1.3 Definitions.

* * * * *

(z) Bona fide hedging transactions and positions—

(1) * * *

(2) * * *

(i) * * *

(iii) Offsetting sales and purchases for future delivery on a contract market which do not exceed in quantity that amount of the same cash commodity which has been bought and sold by the same person at unfixed prices basis different delivery months of the contract market, provided that no such position is maintained in any future during the five last trading days of that future.

(iv) Sales and purchases for future delivery described in paragraphs (z)(2)(i), (z)(2)(ii), and (z)(2)(iii) of this section may also be offset other than by the same quantity of the same cash commodity, provided that the fluctuations in value of the position for future delivery are substantially related to the fluctuations in value of the actual or anticipated cash position, and provided that the positions in any one future shall not be maintained during the five last trading days of that future.

* * * * *

PART 15—REPORTS—GENERAL PROVISIONS

3. The authority citation for Part 15 continues to read as follows:

Authority: 7 U.S.C. 2, 4, 6a, 6c(a)-(d), 6f, 6g, 6i, 6k, 6m, 6n, 7, 8, 12a, 19 and 21; 5 U.S.C. 552 and 552(b).

4. Section 15.00 is amended by revising paragraphs (b)(1) (i) and (ii) to read as follows:

§ 15.00 Definitions.

* * * * *

(b) "Reportable position" means:

(1) * * *

(i) For reports specified in Parts 17, 18 and § 19.00(a)(2) and (a)(3) of this chapter, any one open contract position in any one future of any commodity on any one contract market, excluding futures contracts against which notices of delivery have been stopped by a trader or issued by the clearing organization of a contract market which, at the close of the market on any business day, equals or exceeds the quantity specified in § 15.03 of this part.

(ii) For the purposes of reports specified in § 19.00(a)(1) of this chapter, any open contract position in any one future or in all-futures-combined, either net long or net short, of any commodity on any one contract market, excluding positions against which notices of delivery have been stopped by a trader or issued by the clearing organization of a contract market, which at the close of the market on the last business day of the week exceeds the net quantity limit in spot, single or in all-months fixed in § 150.2 of this chapter for the particular commodity and contract market.

* * * * *

5. Section 15.02 is amended by revising it to read as follows:

§ 15.02 Reporting forms.

Forms on which to report may be obtained from any office of the Commission. Forms to be used for the filing of reports are listed below, and persons required to file these forms may be determined by referring to the rule listed in the column opposite the form number.

Form No.	Title	Rule
40	Statement of Reporting Trader	18.04
101	Positions of Special Accounts on or Subject to the Rules of Specified Markets	17.00
102	Identification of Special Accounts	17.01
103	Large Trader Report	18.00
204	Cash Positions of Grain Traders (including Oilseeds and Products)	19.00
304	Cash Positions of Cotton Traders	19.00

(Approved by the Office of Management and Budget under control numbers 3038-0007 and 3038-0009)

§ 15.03 [Amended]

6. Section 15.03 is amended by removing paragraph (b) and the paragraph (a) designation.

PART 19—REPORTS BY PERSONS HOLDING BONA FIDE HEDGE POSITIONS PURSUANT TO SECTION 1.3(z) OF THIS CHAPTER AND BY MERCHANTS, PROCESSORS, AND DEALERS IN COTTON

7. The authority citation for Part 19 is revised to read as follows:

Authority: 7 U.S.C. 6g(1), 6i and 12a(5).

8. Section 19.00 is amended by revising paragraph (a) and the introductory text of paragraph (b) to read as follows:

§ 19.00 General provisions.

(a) *Who must file series '04 reports.* The following persons are required to file series '04 reports:

(1) All persons holding or controlling positions for future delivery that are reportable pursuant to § 15.00(b)(1)(ii) of this chapter and any part of which constitute bona fide hedging positions as defined in § 1.3(z) of this chapter,

(2) Merchants, processors, and dealers of cotton holding or controlling positions for futures delivery in cotton that are reportable pursuant to § 15.00(b)(1)(i) of this chapter, or

(3) All persons holding or controlling positions for future delivery that are

reportable pursuant to § 15.00(b)(1)(i) of this chapter who have received a special call for series '04 reports from the Commission or its designee. Filings in response to a special call shall be made within one business day of receipt of the special call unless otherwise specified in the call. For the purposes of this paragraph, the Commission hereby delegates to the Director of the Division of Economic Analysis, or to such other person designated by the Director, authority to issue calls for series '04 reports.

(b) *Information required.* Persons required to file series '04 reports shall show the information specified in § 19.01 of this part if the reportable futures position is in wheat, corn, oats, soybeans, soybean meal or soybean oil; and § 19.02 of this part if the reportable futures position is in cotton. The manner of reporting the information required in §§ 19.01 and 19.02 of this part is subject to the following:

* * * * *

9. Section 19.01 is amended by revising the heading and introductory text to read as follows:

§ 19.01 Cash reports pertaining to futures positions in wheat, corn, oats, soybeans, soybean oil or soybean meal.

Persons required to file '04 reports under § 19.00(a)(1) or § 19.00(a)(3) of this chapter shall file CFTC Form 204 reports showing the composition of the fixed price cash position of each commodity hedged in the futures contract market including:

* * * * *

10. Section 19.02 is amended by revising the introductory text to read as follows:

§ 19.02 Cash reports pertaining to futures positions in cotton.

Persons required to file '04 reports under § 19.00(a) of this chapter shall file CFTC Form 304 reports containing the following information:

* * * * *

§§ 19.03 and 19.04 [Removed and Reserved]

11. Sections 19.03 and 19.04 are removed and reserved.

12. Section 19.10 is amended by revising paragraphs (a) and (b) as follows:

§ 19.10 Time and place of filing reports.

* * * * *

(a) CFTC Form 204 reports with respect to transactions in wheat, corn, oats, soybeans, soybean meal and soybean oil should be sent to the Commission's office in Chicago, Ill., unless otherwise specifically authorized by the Commission or its designee.

(b) CFTC Form 304 reports with respect to transactions in cotton should be sent to the Commission's office in New York, NY, unless otherwise specifically authorized by the Commission or its designee.

13. Part 150 is revised to read as follows:

PART 150—LIMITS ON POSITIONS

Sec.
150.1 Definitions.
150.2 Position limits.
150.3 Exemptions.
150.4 Application to aggregate positions.
150.5 Responsibility of contract markets.

Authority: 7 U.S.C. 6a and 12a(5) (1982).

§ 150.1 Definitions.

As used in this part—

(a) "Spot month" means the futures contract next to expire during that period of time beginning at the close of trading on the trading day preceding the first day on which delivery notices can be issued to the clearing organization of a contract market.

(b) "Single month" means each separate futures trading month, other than the spot month future.

(c) "All-months" means the sum of all futures trading months including the spot month future.

§ 150.2 Position limits.

No person may hold or control net long or net short positions for the purchase or sale of a commodity for future delivery in excess of the following:

Contract	Unit of limit	Spot month	Single month	All-months
Chicago Board of Trade:				
Corn	Million bushels	3	3	12
Oats	Million bushels	2	2	2
Soybeans	Million bushels	3	3	12
Wheat	Million bushels	3	3	9
Soybean oil	60,000 pounds	540	540	1,620
Soybean meal	100 tons	720	720	2,160
Chicago Rice & Cotton Exchange:				
Corn	Million bushels	3	3	3
Soybeans	Million bushels	3	3	3
Short staple cotton	Hundred bales	300	300	300
Kansas City Board of Trade:				
Hard winter wheat	Million bushels	3	3	9
Corn	Million bushels	3	3	3
Soybeans	Million bushels	3	3	3
Gulf wheat	Million bushels	3	3	3
Minneapolis Grain Exchange:				
Hard red spring wheat	Million bushels	3	3	6
White wheat	Million bushels	3	3	3
Corn	Million bushels	3	3	3
Oats	Million bushels	2	2	2
Soybeans	Million bushels	3	3	3
Durum wheat	Million bushels	3	3	3
New York Cotton Exchange:				
Cotton (contract No. 1)	Hundred bales	300	300	300
Cotton (contract No. 2)	Hundred bales	300	450	1,200
MidAmerica Commodity Exchange:				
Corn	Million bushels	3	3	3
Oats	Million bushels	2	2	2
Soybeans	Million bushels	3	3	3
Wheat	Million bushels	3	3	3
Crude soybean meal	20 tons	2,000	2,000	2,000

§ 150.3 Exemptions.

The position limits set forth in § 150.2 of this part may be exceeded to the extent such positions are:

(a) *Bona fide* hedging transactions as defined in § 1.3(z) of this chapter; or

(b) Spread or arbitrage positions between futures and option contracts traded on the same board of trade in any one commodity which are as a totality off-setting, and upon such conditions as specified by the board of trade in rules adopted pursuant to §§ 1.61 and 1.41 of this chapter.

§ 150.4 Application to aggregate positions.

The position limits set forth in § 150.2 of this part shall be construed to apply to all positions in accounts for which any person by power of attorney or otherwise directly or indirectly holds positions or controls trading or to positions held by two or more persons acting pursuant to an expressed or implied agreement or understanding the same as if the positions were held by, or the trading of the positions were done by, a single individual.

§ 150.6 Responsibility of contract markets.

Nothing in this part shall be construed to affect any provisions of the Act relating to manipulation or corners nor to relieve any contract market or its governing board from responsibility under section 5(d) of the Act to prevent manipulation and corners.

Issued in Washington, DC, this 14th day of October, 1987, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 87-24142 Filed 10-19-87; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs for Use in Animal Feeds; Decoquinate

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Rhone-Poulenc, Inc., providing for deletion of the requirement that cattle feeds containing decoquinate not be fed to breeding animals.

EFFECTIVE DATE: October 20, 1987.

FOR FURTHER INFORMATION CONTACT: Adriano R. Gabuten, Center for Veterinary Medicine (HFV-135), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4913.

SUPPLEMENTARY INFORMATION: Rhone-Poulenc, Inc., P.O. Box 125, Black Horse Lane, Monmouth Junction, NJ 08852, filed a supplemental NADA (39-417) providing for deletion of the requirement that complete feeds and feed supplements containing decoquinate for use in cattle bear the statement "Do not feed to breeding animals." The supplemental application is approved and § 558.195(d) is amended to delete that required statement. The basis for approval is discussed in the freedom of information summary.

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

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

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

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

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

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

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

§ 558.195 [Amended]

2. Section 558.195 *Decoquinate* is amended in paragraph (d) in the table under "Limitations" in the entry "22.7 mg per 100 lb of body weight per day (0.5 mg per kilogram)" by revising "Do not feed to breeding animals or cows producing milk for food" to read "Do not feed to cows producing milk for food."

Dated: October 14, 1987.

Richard A. Carnevale,

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

[FR Doc. 87-24177 Filed 10-19-87; 8:45 am]

BILLING CODE 4160-01-M

Proposed Rules

Federal Register
Vol. 52, No. 202
Tuesday, October 20, 1987

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.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1 CFR Ch. III

Draft Recommendation; Medicare Program; National Coverage Determinations

AGENCY: Administrative Conference of the United States.

ACTION: Request for comments.

SUMMARY: The Committee on Regulation of the Administrative Conference of the United States is considering the following draft recommendation pertaining to the process for issuing national coverage determinations under the Medicare program. The draft recommendation is addressed to the Health Care Financing Administration of the Department of Health and Human Services and to Congress. The Committee requests public comment on this draft recommendation by November 6, 1987. The Committee is basing this recommendation on a study by Professor Eleanor Kinney of the University of Indiana School of Law. Copies of Professor Kinney's draft report are available upon request. Future meetings of the Committee will be announced.

DATES: Written comments must be received by noon on Friday, November 6, 1987. (Comments received after that date will be sent to the committee and considered to the extent possible.) Comments should be addressed to Sara Gordon, Office of the Chairman, Administrative Conference of the United States, 2120 L Street, NW., Suite 500, Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: Sara Gordon, Office of the Chairman, Administrative Conference of the United States, 2120 L Street NW., Suite 500, Washington, DC 20037. Telephone: (202-254-7065.

Committee on Regulation—Draft Recommendation on National Coverage Determinations Under the Medicare Program

In 1986, the Administrative Conference undertook a broad overview of the administrative procedures employed by the Federal Government (primarily the Health Care Financing Administration within the Department of Health and Human Services) in administering and deciding appeals under the Medicare program. Recommendation 86-5, *Medicare Appeals*, 1 CFR 305.86-5, urged the Health Care Financing Administration (HCFA) to improve its system for publishing, updating, and making accessible the standards, guidelines and procedures used in making coverage and payment determinations in the Medicare program. The recommendation also suggested some improvements in the administrative appeals system and listed some fruitful areas for further research.

This recommendation builds on 86-5 by focusing on a major aspect of the Medicare program; the making of policy concerning what aspects of medical care are covered by (and therefore may be reimbursed by) the Medicare program. At the implementation level these determinations must be made every day on a case-by-case basis by Medicare contractors (peer review organizations, carriers and fiscal intermediaries such as Blue Cross). In most of these cases the coverage question involves a determination of whether an item or service was medically necessary for the individual or was furnished in the appropriate setting. Typically, the Medicare contractor has considerable discretion in ruling on individual claims although such discretion is bounded by policy pronouncements made in various ways by HCFA. If an individual claim for reimbursement is denied by the Medicare contractor, the claimant (whether a beneficiary or provider of care) may (if the claim exceeds the statutory minimum) appeal the denial to an administrative law judge (ALJ) and then to federal district court. However, recent legislative restrictions have severely limited claimants opportunities to challenge coverage determinations in court or before an ALJ. Moreover, it is difficult for equipment manufacturers (who sometimes have a significant financial stake in coverage policy) to participate in or challenge national coverage determinations.

HCFA makes coverage policy in a number of ways.[1] In some cases Medicare contractors refer questions about new procedures or technology to the HCFA regional or national office which makes an informal judgment for application in that case. In other cases HCFA may decide to make a "national coverage determination" which applies in all future similar cases. Since the beginning of the program HCFA (and its predecessor agency) have made about 200 such national determinations and the number is growing each year. Such rulings are published either in the **Federal Register** or the Medicare Coverage Issues Manual. However, other coverage policies are only discernable from other manuals that are less widely available.

Although the making of these national coverage determinations constitutes rulemaking, HCFA does not use a notice-and-comment procedure in most cases. HCFA's Bureau of Eligibility, Reimbursement and Coverage will normally simply make rulings on coverage determinations referred from contractors unless it determines that a medical question is presented. In such cases the question is referred to the in-house HCFA Physicians Panel which meets periodically, in private, to decide on these referrals. The Physicians Panel may recommend a further referral to the Public Health Service's Office of Health Technology Assessment (OHTA). Most referrals to OHTA are in the form of an informal inquiry, without public notice, after which OHTA simply conducts an in-house investigation and reports back to HCFA. Requests for full OHTA assessments, on the other hand, usually result in a Federal Register notice, and widespread consultation with affected groups. In either event OHTA makes a recommendation to HCFA which then makes and publishes the determination. Only then are the OHTA findings disclosed.

Except in these "formal OHTA assessments," beneficiaries, providers and manufacturers have no opportunity

[1] HCFA's procedures for making national coverage policy have not been published until April 29, 1987 when under court order, the agency issued a Notice in the **Federal Register** describing its process (though not its criteria) and sought comments.

to participate in this policymaking process. Nor are the criteria used by HCFA and the Medicare contractors in making this policy identified or published. Moreover, once the policy is announced, opportunities to challenge it have been severely circumscribed by the 1986 Omnibus Budget Reconciliation Act. (Pub. L. 99-509, § 9341; 42 U.S.C.A. § 1395ff(b)(3) (1987)). The Act provides that administrative law judges may not review national coverage determinations in administrative appeals. It also limits judicial review by providing that national coverage determinations may not be held unlawful on the grounds of violation of the APA or lack of opportunity for public comment, and further provides that reviewing courts cannot overturn a denial based on coverage determinations without first remanding the case back to HHS for supplementation of the record.

In Recommendation 86-5, the Conference recommended that "HHS should introduce more openness and regularity" into these important determinations through "(1) Development of published decisional criteria; (2) providing for notice and inviting comments in such cases, both in HCFA's decisionmaking process and in the process by which [OHTA] supplies recommendations to HCFA; and (3) providing for internal administrative review or reconsideration of such decisions." The Conference commends the recent HCFA notice and request for comments on its procedures as a good first step, but urges that further steps be taken to open up the decisional criteria and procedure to public participation and also urges Congress to remove the statutory impediments to review of the reasonableness and the procedural fairness of such determinations.

Recommendation

1. Publication of Procedures and Criteria Through Rulemaking

The Health Care Financing Administration (HCFA) should continue its recent steps toward describing and seeking comments upon the process it uses for making national coverage determinations in the Medicare program. HCFA should follow its recent informational notice by initiating a notice-and-comment rulemaking proceeding setting forth its proposed procedures, as well as all decisional criteria for making national coverage determinations.

2. Elements of the National Coverage Determination Process

HCFA's proposed and final rule on national coverage determinations procedures and criteria should:

(a) Specify the process by which HCFA selects coverage questions that will be considered in this process;

(b) Identify and describe what type of coverage issues will be left to Medicare contractors and HCFA regional offices to decide;

(c) Provide for a procedure guaranteeing the public an opportunity to comment prior to promulgation [2] of public input for *all* national coverage policies whether or not the determination is referred to the HCFA Physicians Panel or to the Office of Health Technology Assessment;

(d) Establish internal management controls (including deadlines for completing action and a monitoring systems) to assure the timely processing of requests from Medicare contractors and petitions filed by beneficiaries, providers and other affected persons for initiation of a national coverage determination,[3]

(e) Address techniques for encouraging the HCFA Physicians Panel and the Office of Health Technology Assessment to respond expeditiously to referrals;

(f) Identifies all publications in which coverage policy will be published, and establishes a system by which those publications are made reasonably accessible to beneficiaries and other affected groups.

3. Use of Negotiated Rulemaking

In addition to providing for a national coverage decisionmaking process that accords beneficiaries, providers, equipment manufacturers and other interested parties an opportunity to have input into the formulation of specific national coverage determinations, HCFA should also consider use of a negotiated rulemaking procedure [4] for certain determinations.

[2] Where the agency finds the pre-promulgation opportunity for public input is impractical, the policy should nevertheless be published with an opportunity for post-adoption comments. The agency should then re-evaluate the policy after receiving comments. See ACUS Recommendation 76-5, *Interpretive Rules of General Applicability and Statement of General Policy*, 1 CFR 305.76-5.

[3] See ACUS Recommendation 86-6, *Petitions for Rulemaking*, Para. 2(d), 1 CFR 305.86-6 (2)(d).

[4] See ACUS Recommendations 82-4 and 85-5, *Procedures for Negotiating Proposed Regulations*, 1 CFR 305.82-4, 85-5.

4. Modification of Recent Legislative Impediments to Administrative and Judicial Review

Congress should reconsider the recent statutory restrictions it placed upon administrative and judicial review of national coverage determinations. Specifically:

(a) Congress should eliminate the provision (42 U.S.C.A. § 1395ff(b)(3)(A)) that restricts administrative law judges from not reviewing national coverage determinations in administrative appeals or, alternatively, Congress should modify it be specifying that this limitation only apply to those national coverage determinations that are properly published and indexed, and that have been issued after an adequate opportunity for public comment.

(b) Congress should eliminate the provision (42 U.S.C.A. § 1395ff(b)(3)(B)) that prohibits judicial review challenges based on the grounds that the agency did not comply with procedures mandated by the Administrative Procedure Act or that the agency had provided an inadequate opportunity for public comment.

(c) Congress should eliminate the provision (42 U.S.C.A. § 1395ff(b)(3)(C)) that limits reviewing courts' ability to review the validity of a national coverage determination applied in a particular case without first remanding the case to the agency for supplementation of the record.

Jeffrey S. Lubbers,

Research Director.

October 16, 1987.

[FR Doc. 87-24288 Filed 10-20-87; 8:45 am]

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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 792

Employee Responsibility and Conduct

AGENCY: National Credit Union Administration.

ACTION: Proposed rule.

SUMMARY: This proposed rule amends Part 792 of NCUA's Rules and Regulations entitled Employee Responsibility and Conduct. Although this proposal is much more extensive than the present regulation, it does not impose any new requirements on NCUA employees. Rather, the provisions of the proposed rule are a compilation of various statutory, regulatory, and policy requirements which apply to all Federal employees. Minor modifications have

been made which take into account the nature of NCUA employment.

DATE: Comments must be received on or before December 21, 1987.

ADDRESS: Send comments to Becky Baker, Secretary of the Board, National Credit Union Administration, 1776 G Street, NW., Washington, DC 20456.

FOR FURTHER INFORMATION CONTACT: James J. Engel, Deputy General Counsel, at the above address, or telephone: (202) 357-1030.

SUPPLEMENTARY INFORMATION:

Background

NCUA's present regulation, Part 792, dealing with employee conduct and responsibility adopts, for the most part, the relevant portions of the Office of Personnel Management's (OPM) regulations. However, there are many other requirements which govern the conduct of Federal employees. These are presently set forth in criminal statutes, the Ethics in Government Act of 1978, additional OPM regulations, current NCUA regulations, Executive Orders, Comptroller General Decisions, Office of Government Ethics opinions, and the NCUA Personnel and Travel Manuals. In order to assist NCUA employees in maintaining the high standards of conduct expected of them, the NCUA Board has determined that these various requirements should be consolidated into a single regulation.

The proposed regulation does not affect federally-insured credit unions. It only affects the Agency's internal personnel regulations. If the NCUA Board chose, it could issue the regulation to each employee and would not have to issue it for public comment in the **Federal Register**. However, the NCUA Board is seeking public comment to determine if there are any other issues it should look at. In addition, the Board believes that if the public is aware of the requirements Federal employees are subject to, then they will know there are certain things they should not offer to NCUA employees.

Regulatory Procedures—Regulatory Flexibility Act and Paperwork Reduction Act

The NCUA Board has determined that the proposed rule is not subject to the requirements of either Act since it deals with internal personnel procedures.

List of Subjects in 12 CFR Part 792

Employee responsibility and conduct, Employee ethics, Employee conflict of interest.

By the National Credit Union Administration Board, this 8th day of October, 1987.

Becky Baker,

Secretary, NCUA Board.

Accordingly, NCUA proposes to revise Part 792 of its regulations as follows:

PART 792—Employee Responsibility and Conduct

Subpart A—General Provisions

Sec.
792.101 Scope.
792.102 Purpose.
792.103 Definitions.

Subpart B—Ethical and Other Conduct and Responsibilities of Employees

792.201 General prohibitions.
792.202 Gifts, meals, entertainment and favors.
792.203 Travel expenses and travel promotional material.
792.204 Use of Government property.
792.205 Use of official information.
792.206 Teaching, writing, lecturing and other activities.
792.207 Gambling, betting and lotteries.
792.208 Indebtedness.
792.209 General conduct prejudicial to the Government.
792.210 Employment by NCUA of relatives.
792.211 Other statutory provisions.

Subpart C—Financial Interest and Reporting of Financial Interest and Employment

792.301 Outside employment and other activity.
792.302 Financial interests and transactions.
792.303 Statements of employment and financial interests—form and content.
792.304 Employees required to submit statements.
792.305 Employee's complaint on filing requirements.
792.306 Time and place for submission of employees' statement.
792.307 Supplementary statements.
792.308 Interests of employees' relatives.
792.309 Information not known by employees.
792.310 Information not required.
792.311 Confidentiality of employee's statements.
792.312 Effect of employees' statements on other requirement.
792.313 Financial disclosure reports under the Ethics in Government Act.
792.314 Specific provisions for special government employees.

Subpart D—Ethical and Other Conduct and Responsibilities of Special Government Employees

792.401 Special Government employees.

Subpart E—Post Employment Conflict of Interest

792.501 Purpose and scope.
792.502 Definitions.
792.503 Restrictions on all former employees and special Government employees from acting as representative in a particular matter in which the employee or special Government employee personally and substantially participated.
792.504 Two-year restriction on any former government employee acting as representative in a particular matter for which the employee had official responsibility.
792.505 Two-year restriction on a former senior employee assisting in representing in a matter in which the employee participated personally and substantially.
792.506 One-year restriction on a former senior employee's agency on a particular matter, regardless of prior involvement.

Subpart F—Administrative Provisions

792.601 Employee responsibility, counseling and distribution of regulation.
792.602 Designation of ethics officer, alternate ethics officer and deputy ethics officer.
792.603 Sanctions.
792.604 Appeal of remedial or disciplinary actions.

Authority: E.O. 11222, 3 CFR 1964-65 Comp., p. 306, 5 CFR 735.104, 18 U.S.C 207.

Subpart A—General Provisions

§ 792.101 Scope.

This part establishes the policies and procedures of the National Credit Union Administration (NCUA) with regard to the ethical and other standards of conduct and responsibilities for employees and special Government employees, the reporting of financial interests and outside employment, and post-employment activities.

§ 792.102 Purpose.

In order to ensure the proper performance of NCUA business and to maintain public confidence in Government, NCUA employees and special Government employees are expected to maintain high standards of honesty, integrity, impartiality and conduct. They are also expected, through informed judgment, to avoid misconduct, conflicts of interest, and the appearance of such conflicts.

§ 792.103 Definitions.

(a) "Conflict of interest" means any clash between the individual's duties as an employee or special Government employee and his private pecuniary interest.

(b) "Employee" means an employee of NCUA, but does not include a special Government employee.

(c). A "special Government employee" means one who is retained, designated, appointed or employed by NCUA to perform temporary duties, with or without compensation, for a time not to

exceed 130 days during any period of 365 consecutive days, on either a full-time or intermittent basis; but it does not mean one who is retained or employed by NCUA in its capacity as conservator or liquidating agent.

(d) "Person" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

Subpart B—Ethical and Other Conduct and Responsibilities of Employees

§ 792.201 General prohibitions.

An employee shall avoid any action whether or not specifically prohibited by this part, which might result in, or create the appearance of:

(a) Using NCUA employment for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding NCUA's efficiency or effectiveness;

(d) Losing complete independence or impartiality;

(e) Making an NCUA decision outside official channels; or

(f) Adversely affecting the public's confidence in the integrity of NCUA.

§ 792.202 Gifts, meals, entertainment and favors.

(a) Except as provided in paragraph (b) of this section, an employee cannot solicit or accept, directly or indirectly, any gift, gratuity, favor, meal, entertainment, loan, or any other thing of monetary value, for himself or for any other person or entity, from:

(1) An insured credit union or credit union seeking Federal insurance;

(2) A credit union trade association or state league;

(3) An organization affiliated with an insured credit union, trade association or league; or

(4) Any other person that does, or is seeking to do business with NCUA, or has an interest that can be substantially affected by an NCUA employee's performance or nonperformance of duty.

(b) The prohibitions of paragraph (a) of this section do not apply:

(1) Where it is clear from the circumstances that personal or family relationships are the sole motivating factors and that business or financial interests are not motivating factors. "Personal" relationships that are formed due to Government employment, i.e., individuals becoming friends because of business relationships, are not the basis for an exception from the prohibitions enumerated in paragraph (a) of this section;

(2) To the acceptance of food, refreshments and accompanying entertainment of nominal value on infrequent occasions in the ordinary course of an official conference, official meeting or other official function at which the employee is properly in attendance. For example, a luncheon or dinner provided to participants at a league annual meeting or convention may be accepted by an NCUA employee who is properly in attendance as agency representative. An employee, however, cannot be taken to lunch or dinner outside the context of the meeting, for instance, by a credit union manager or league official.

(3) To the acceptance of unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars, commemorative paper weights, pins, or conference packages given to all attendees, and other items of nominal intrinsic value.

(4) To the acceptance of loans from federally insured credit unions to finance proper and usual activities of an employee, provided the employee is given terms no more favorable than would be available in like circumstances to persons who are not employees of NCUA, (unless otherwise restricted by § 792.302).

(c) Whenever an employee receives an unsolicited gift or other item of monetary value, the acceptance of which is prohibited by paragraph (a) of this section, the gift or item shall be returned to the sender, or otherwise disposed of as directed by the Ethics Officer. The cost of returning such gift or item shall be borne by NCUA.

(d) An employee cannot solicit a contribution from another employee for a gift to an official superior, make a donation for, or as a gift to, an official superior, or accept a gift from an employee receiving less pay, unless it is a voluntary gift of nominal value or a donation of a nominal amount made on a special occasion such as marriage, illness or retirement.

(e) An employee, or spouse or dependent of an employee, cannot accept a gift, present, decoration, or other thing from a foreign government, except as permitted by 5 U.S.C. 7342.

§ 792.203 Travel expenses and travel promotional material.

(a) Expenses of travel, lodging and subsistence incurred by an employee while on official duty shall be paid for or reimbursed by NCUA (in accordance with the NCUA Travel Manual.) An employee cannot accept payment or reimbursement for such expenses from any private source.

(1) For the purpose of this section, "subsistence" does not include food or refreshments accepted on infrequent occasions in the ordinary course of an official function as permitted by § 792.202(b)(2).

(2) The provisions of this section do not prohibit, or require a report of, the acceptance of travel, lodging or subsistence provided by family members or personal friends as permitted by § 792.202(b)(1).

(b) Employees are obligated to account for any travel promotional material received from private sources incident to the performance of official duties. Any such promotional materials tendered to the employee are viewed as having been received on behalf of the Agency, whether or not any portion was earned by private travel, and must be relinquished to the Agency in accordance with the procedures outlined in the NCUA Travel Manual. Where the employee had to spend money to enter a travel promotional program discussed herein, the Agency shall reimburse the employee's documented out-of-pocket expenses if those expenses are less than the discount received by the employee from the provider. For example, if the employee spends $25 to enter a program and, as a result, the Agency has received a benefit because his airline fare was reduced from $400 to $300 solely as a result of his entering the program, then the employee should be reimbursed for the cost of entering the program only, and not for the actual savings which accrued to the Agency.

(1) Travel promotional materials include bonus flights, reduced-fare coupons, cash, merchandise, gifts, credits toward future free or reduced costs of services or goods, received by employees in connection with official travel and based on the purchase of a ticket or other services, such as car rental or hotel accommodations. Employees may keep gifts or merchandise of nominal intrinsic value as permitted by § 792.202(b)(3).

(2) Compensation received from having been denied boarding on an airplane is considered liquidated damages for the airline's failure to furnish accommodations for confirmed reserved space due NCUA and must be relinquished to NCUA, according to the procedures outlined in the NCUA Travel Manual.

(3) Compensation received by an employee who voluntarily gives up a reserved seat may be retained by the employee provided that any additional travel expense, beyond that which would have normally been incurred had the seat not been voluntarily relinquished, must be offset against the payment received by the employee. To the extent the employee's travel is

delayed during official duty hours because of the voluntary relinquishment of his seat, the employee is to be charged annual leave for the additional hours.

(4) Items such as free upgrade to first class, membership in executive clubs, and check-cashing privileges, which can only be used by the employee and cannot be used by NCUA, may be retained by the employee. However, other non-transferable travel promotional materials, such as an airline ticket, which can only be used by that employee, must be turned over to the Agency for use by that employee.

§ 792.204 Use of Government property.

An employee cannot directly or indirectly use, or allow the use of NCUA property, of any kind, including property leased to the NCUA, for other than officially approved activities. An employee has a duty to protect and conserve NCUA property, including equipment, supplies and other property entrusted or issued to the employee. This duty also imposes an obligation on the employee to take appropriate action where the employee is aware that others are using NCUA property in a manner which violates this provision.

§ 792.205 Use of official information.

(a) An employee cannot, directly or indirectly, use or allow the use of information which is obtained as a result of his or her NCUA employment, but which has not been made available to the general public in order to engage in any financial transaction or to further a private interest. Material which has not been made available to the general public includes material which would be released to a person under a Freedom of Information request.

(b) An employee cannot maintain, disclose or otherwise use Agency records containing personal information about any other person in a manner which violates the Privacy Act, 5 U.S.C. 552a, or Subpart B of Part 790 of the NCUA Rules and Regulations.

(c) An employee cannot disclose, in any manner, or to any extent not authorized by law, any information coming to him in the course of his employment or official duties, or by reason of any examination or investigation, which information concerns or relates to confidential business information of a federally-insured credit union, or any other entity subject to examination or regulation by NCUA. (18 U.S.C. 1905)

§ 792.206 Teaching, writing, lecturing and other activities.

(a) NCUA employees are encouraged to engage in teaching, writing, and lecturing, provided, however:

(1) An employee cannot publish any material, speak before any credit union or other organization, whether public or private, or teach on matters involving NCUA unless the employee receives the prior approval, and prior clearance of material to be published, from the appropriate Regional or Office Director.

(2) An employee cannot use in any teaching, writing, lecturing or speaking engagement information obtained as a result of his NCUA employment, unless the information is available to the general public, or will be made available on request, or unless the Chairman gives written authorization of the use, upon the determination that the use of the information is in the public interest.

(3) An employee cannot receive any compensation or other thing of monetary value for any speech, lecture, publication, teaching assignment or similar engagement, the subject matter of which either relates substantially to matters involving the responsibilities, programs or operations of NCUA, or contains information that is not otherwise available to the general public.

(b) An employee cannot accept any money or anything of monetary value from a private source as compensation for service to NCUA (18 U.S.C. 209), except as permitted by § 792.202(b).

§ 792.207 Gambling, betting and lotteries.

An employee cannot participate, while on NCUA-owned or leased property, or while on duty for NCUA, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket.

§ 792.208 Indebtedness.

An employee must pay each just financial obligation in a proper and timely manner. For the purpose of this section, a "just financial obligation" means one acknowledged by the employee or reduced to judgment by a court or one imposed by law, such as Federal, state or local taxes. "In a proper and timely manner" means in a manner which the Agency determines does not, under the circumstances, reflect adversely on NCUA or in a manner such that NCUA will not be asked to assist in the collection of the obligations.

§ 792.209 General conduct prejudicial to the Government.

An employee shall not engage in criminal, infamous, dishonest, immoral or notoriously disgraceful conduct, or other conduct prejudicial to NCUA or to the Government.

§ 792.210 Employment by NCUA of relatives.

(a) For the purposes of this section:

(1) A "relative" is any person related to an NCUA official as parent, step-parent, child, step-child, brother, sister, step-brother, step-sister, half-brother, half-sister, spouse, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law or sister-in-law;

(2) An "official" is any employee who has authority to appoint, employ, promote or advance employees or to recommend anyone for appointment, employment, promotion or advancement at NCUA;

(3) A "supervisor" is any employee whose position requires independent judgment to appoint, employ, promote, advance, assign, direct, reward, transfer, suspend, discipline, remove, adjust grievances, or furlough any person or to recommend any such action.

(b) An NCUA official cannot:

(1) Appoint, employ, promote or advance any relative to a position at NCUA;

(2) Advocate a relative's appointment, employment, promotion or advancement at NCUA; or

(3) Appoint, employ, promote, or advance a relative of another NCUA official if the official has advocated the relative's appointment, employment, promotion, or advancement.

(c)(1) No employee may be a supervisor of any relative.

(2) Whenever any employee becomes a supervisor of a relative, the employee shall report that fact, in writing, to the appropriate Regional or Office Director. That Director, in consultation with the Director of Personnel and the Ethics Officer, shall determine whether the relative's position may be removed from the scope of the supervisor's authority, taking into consideration the nature of the supervisor's position, the operational needs of the office or division and the potential for conflicts of interest or the appearance thereof. If it is determined that it is not feasible to remove the relative's position from the scope of the supervisor's authority, the appropriate director, the Personnel Director and the Ethics Officer shall determine whether the relative may be assigned to another position at NCUA which is outside the scope of the supervisor's authority.

§ 792.211 Other statutory provisions.

NCUA employees shall be familiar with the statutory provisions listed below. These place various restrictions on NCUA employees and are not covered in this regulation. A copy of each of the provisions listed below shall be provided to each new employee and shall be reviewed annually by the Ethics Officer and updated as required.

(a) Prohibitions relating to bribery, conflicts of interest and graft (18 U.S.C. 201 *et seq.*).

(b) Prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

(c) Prohibition against disloyalty and striking (5 U.S.C. 7311; 18 U.S.C. 1918).

(d) Prohibition against employment of a member of a communist organization (50 U.S.C. 784).

(e) Prohibition against the disclosure of classified information (18 U.S.C. 798; 50 U.S.C. 783).

(f) Prohibition against the habitual use of intoxicants to excess (5 U.S.C. 7352).

(g) Prohibition against the misuse of a government vehicle (31 U.S.C. 1349).

(h) Prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(i) Prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(j) Prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(k) Prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(l) Prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(m) Prohibition against embezzlement of Government money or property (18 U.S.C. 641); failing to account for public money (18 U.S.C. 643); and embezzlement of the money or property of another person in the possession of any employee by reason of his or her employment (18 U.S.C. 654).

(n) Prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(o) Prohibition against political activities (Subchapter III of Chapter 73 of Title 5—the Hatch Act and 18 U.S.C. 602, 603, 606 and 607).

(p) Prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

(q) The "Code of Ethics for Government Service," which prescribes general standards of conduct (Pub. L. 96-303, 94 Stat. 855-856).

(r) Prohibition against the acceptance of excessive honorariums by any elected or appointed officer or employee (2 U.S.C. 441i).

Subpart C—Financial Interest and Reporting of Financial Interest and Employment

§ 792.301 Outside employment and other activity.

(a) An employee cannot engage in employment or other activity outside the scope of his NCUA employment which is not compatible with the full and proper discharge of the employee's duties and responsibilities to NCUA. Employment or activity which is not compatible with the employee's duties and responsibilities to NCUA includes, but is not limited to, that which results in, or creates an appearance of, a conflict of interest or impairs the employee's physical or mental capacity to perform the duties and responsibilities of his or her position with NCUA. Such employment or activity may include, but is not limited to:

(1) Service, with or Without compensation as a director, committee person, officer, employee, consultant or teller of an election of a Federal or state credit union. NCUA employees may, however, become members of Federal and state credit unions in the usual manner.

(2) Service, with or without compensation, for any of the organizations enumerated in § 792.202(a)(1) through (4) or for any of their officers, directors or employees.

(3) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of a conflict of interest.

(b) An employee who engages in, or intends to engage in outside employment or activity has the responsibility of reporting all such employment or activity to the Regional or Office Director. If the Regional or Office Director believes a conflict or the appearance of a conflict exists, the Ethics Officer should be consulted.

(c) If a member of an employee's immediate family (spouse, child, brother, sister or other person residing in employee's household) becomes employed by an organization listed in § 792.202(a), such employment shall be reported to the Regional or Office Director. Generally, employees will not be assigned to specific matters concerning the organization where an employee's immediate family member is employed until a determination is made that there is no conflict of interest. This subsection does not apply to NCUA employees whose positions are strictly clerical.

§ 792.302 Financial interests and transactions.

(a) An employee cannot:

(1) Have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with NCUA duties and responsibilities; or

(2) Engage in, directly or indirectly, a financial transaction as a result of, or primarily relying on, information obtained through his NCUA employment; or

(3) Participate personally and substantially in any decision, approval, disapproval, recommendation, rendering of advice, investigation or examination or other action in which the employee, employee's spouse, minor child, partner or organization in which the employee serves as an officer, director, trustee, partner or employee or any person or organization with whom he is negotiating or has an arrangement concerning prospective employment, has a financial interest, unless:

(i) The financial interest is specifically permitted by this Part;

(ii) The employee receives the prior written determination of the Ethics Officer, who shall consult with the appropriate director, that the interest is too inconsequential to affect the integrity of the employee's service to NCUA; or

(iii) If, by general rule or Regulation published in the **Federal Register**, the financial interest has been exempted from the requirements of this section as being too remote or too inconsequential to affect the integrity of an NCUA employee's services.

Otherwise, an employee shall disqualify himself from participation in any matter in which he has a financial interest by advising, in writing, both the Ethics Officer and the appropriate director or, in the case of a Board Member, the Chairman, that disqualification is required by this section.

(b) When an employee participates personally and substantially in any matter of a general or policy nature affecting all credit unions, the following shall not be considered financial interests for which he would have to disqualify himself:

(1) Member accounts, including share, share certificate, share draft, or similar type accounts; or

(2) Loans granted, held, or serviced by a federally-insured credit union.

Such financial interests are deemed, pursuant to 18 U.S.C. 208(b)(2), to be too remote or too inconsequential to affect the integrity of an NCUA employee's services when considering general policy matters. This waiver, however,

does not apply to any action by NCUA that is directed at or applicable to a specific credit union in which the employee, or other person or organization referred to in § 792.301(a)(3) holds a financial interest (18 U.S.C. 208(a)). For example, an examiner must disqualify himself from examining, and a Board Member must disqualify himself from any administrative or other action involving a specific credit union in which they, their spouses or minor children are members. In another example, the contracting officer must disqualify himself in the awarding of a particular contract where his spouse is a partner in one of the firms bidding on the proposal.

§ 792.303 Statements of employment and financial interests - form and content.

(a) The statements of employment and financial interests required under this subpart for use by employees and special Government employees shall contain, as a minimum, the information required by the formats prescribed by OPM in the Federal Personnel Manual. These shall be made available by the Personnel Office to those employees required to submit statements.

(b) [Reserved]

§ 792.304 Employees required to submit statements.

(a) In order to assist managers and supervisors in the scheduling of employees for assignments and in monitoring compliance with the provisions of this part, the following employees shall fill out the Statement of Employment and Financial Interests:

(1) All examiners;

(2) All supervisory examiners;

(3) All regional office employees, grade 13 and above;

(4) All Washington Office Directors, Deputy Directors and Department Directors;

(5) All employees, whether in the Regional or Washington Office, who participate personally and substantially in the procurement of products or services for the Agency, whether by decision, approval, disapproval, recommendation, or the rendering of advice.

(6) All attorneys in the Office of General Counsel; and

(7) Board Members and their staff

The Ethics Officer may require any other employee whose position can affect a credit union, a trade association or any affiliated organization to file a statement.

§ 792.305 Employee's complaint on filing requirement.

An employee may request review through NCUA's grievance procedure of a complaint that the employee's position has been improperly included as one requiring the submission of a statement of employment and financial interest.

§ 792.306 Time and place for submission of employees' statement.

Regional Directors and Washington Office employees who are required to submit Statements of Employment and Financial Interests shall submit them to the Ethics Officer. Regional staff shall submit their statements to the appropriate Regional Director. All statements must be submitted no later than:

(a) Ninety days after the effective date of the Agency regulations issued under this Part if employed on or before that effective date; or

(b) Thirty days after his entrance on duty, but not earlier than ninety days after the effective date, if appointed after that effective date.

§ 792.307 Supplementary statements.

Changes in, or additions to, the information contained in an employee's statement of employment and financial interests shall be reported in a supplementary statement as of June 30 each year. If no changes or additions occur, a negative report is required. Notwithstanding the filing of the annual report required by this section, each employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflicts-of-interest provisions of section 208 of Title 18, United States Code and Subpart C of this part.

§ 792.308 Interests of employees' relatives.

The interest of a spouse, minor child, or other member of an employee's immediate household is considered to be an interest of the employee. For the purpose of this section, "member of an employee's immediate household" means those blood relatives who are residents of the employee's household.

§ 792.309 Information not known by employees.

If any information required to be included on a statement of employment and financial interests or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information on his behalf.

§ 792.310 Information not required.

This subpart does not require an employee to submit on a statement of employment and financial interests or supplementary statement any information relating to the employee's connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization or a similar organization not conducted as a business enterprise. For the purpose of this section, educational and other institutions doing research and development or related work involving grants of money from or contracts with the Government are deemed "business enterprises" and are required to be included in an employee's statement of employment and financial interest.

§ 792.311 Confidentiality of employee's statements.

NCUA shall hold each statement of employment and financial interests, and each supplementary statement, in confidence. To insure this confidentiality, only the Ethics Officer, or Deputy Officers, or the appropriate Regional Directors, or the Internal Auditor in the course of a properly authorized audit, are authorized to review and retain the statement. These employees are responsible for maintaining the statements in confidence and shall not allow access to, or allow information to be disclosed from, a statement except to carry out the purpose of this part. NCUA may not disclose information from a statement except as OPM or the Agency head may determine for good cause shown.

§ 792.312 Effect of employees' statements on other requirement.

The statements of employment and financial interests and supplementary statements required of employees are in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, order, or regulation. The submission of a statement or supplementary statement by an employee does not permit him or any other person to participate in a matter in which his or the other person's participation is prohibited by law, order, or regulation.

§ 792.313 Financial disclosure reports under the Ethics in Government Act.

In addition to the reporting requirements imposed by this part, individual Board Members, employees at or above the grade 16 level and employees whose positions are excepted from competitive service by reason of being of a confidential or

policy-making character (unless otherwise excluded by the Office of Government Ethics) must also file financial disclosure reports (SF 278) in accordance with the requirements of the Ethics in Government Act and regulations of the Office of Government Ethics, 5 CFR Part 734.

§ 792.314 Specific provisions for special Government employees.

(a) Each special Government employee shall submit a statement of employment and financial interests which reports:

(1) All other employment; and

(2) The financial interests of the special Government employee and relatives (as defined in § 792.308) in any federally insured credit union that may be affected by, or is otherwise related to, the purpose or function of the special employment.

(b) The Chairman may waive the requirement in paragraph (a) of this section in the case of a special Government employee who is not a consultant or an expert when the Agency finds that the duties of the position held by that special Government employee are of a nature and at such a level of responsibility that the submission of the statement by the incumbent is not necessary to protect the integrity of the Government.

(c) A statement of employment and financial interest required to be submitted under this section shall be submitted not later than the time of employment of the special Government employee as provided in the Agency regulation. Each special Government employee shall keep his statement current throughout his employment with NCUA by the submission of supplementary statements.

Subpart D—Ethical and Other Conduct and Responsibilities of Special Government Employees

§ 792.401 Special Government employees.

(a) Pursuant to 5 CFR 735.104(f), NCUA hereby adopts the provisions in the following sections of 5 CFR Part 735: Sections 735.302, 735.303(a), 735.304, 735.305(a).

(b) Special Government employees of NCUA may teach, lecture, or write in a manner not inconsistent with 5 CFR 735.203(c).

(c) Pursuant to 5 CFR 735.305(b), NCUA authorizes the same exceptions concerning gifts, entertainment and favors for special Government employees as are authorized for employees by Subpart B, § 792.202(b) of this regulation.

(d) All special Government employees shall acquaint themselves with each statute that relates to their ethical and other conduct as special employees of NCUA and of the Government. In addition to the statutes cited in the body of the regulation in this part, the attention of each special Government employee is directed to the statutory provisions listed in Subpart B, § 792.211 of this regulation. Special Government employees are not subject to 18 U.S.C. 209 set forth in Subpart B, § 792.206(b) of this part.

Subpart E—Post Employment Conflict of Interest

§ 792.501 Purpose and scope.

(a) The purpose of this subpart is to provide basic information regarding the restrictions on post employment activity established by Title V of the Ethics in Government Act of 1978 (18 U.S.C. 207), and to provide guidance to former NCUA employees and to NCUA employees prior to their terminating employment. Violations of the provisions of this subpart are punishable by fines of up to $10,000 or imprisonment for not more than two years, or both.

(b) This subpart applies to special Government employees, but it does not apply to an individual performing services for the United States as an independent contractor under a personal services contract.

(c) Former employees are not restricted from accepting employment from any source, but are restricted from participating in certain activities listed below.

§ 792.502 Definitions.

(a) "United States" or "Government" means any department, agency, court, court-martial, or any civil, military or naval commission of the United States, the District of Columbia, or any officer or employee thereof.

(b) "Agency" includes an Executive Department, a Government corporation and an independent establishment of the Executive Branch, which includes an independent commission.

(c) "Senior Employee" means an officer or employee designated by the Director, Office of Government Ethics (OGE) and appearing on the list published and periodically updated by OGE in 5 CFR 737.33. Generally, a senior employee is one who occupies a position in the "Executive Level" or Senior Executive Service (SES).

(d) "Particular matter involving a specific party" means any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest. Such a matter typically involves a specific proceeding affecting the legal rights of the parties or a transaction or related set of transactions between identifiable parties. For example, if a Regional Office employee responsible for denying a field of membership (FOM) expansion for XYZ FCU is later employed by XYZ FCU, he may not present an appeal to NCUA on behalf of the FCU regarding the particular FOM he was responsible for denying. Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of a general nature is not a "particular matter involving a specific party." Therefore, a former NCUA employee may represent another person in connection with a particular matter involving a specific party even if rules or policies which he or she had a role in establishing are involved in the proceeding.

(e) "Participate personally and substantially" means to participate directly and significantly by decision, approval, disapproval, recommendation, the rendering of advice or investigation.

(f) "Official Responsibility" means direct administrative or operating authority to approve, disapprove, or otherwise direct government action.

(g) "Represent" means to knowingly act on behalf of another, including acting as an agent or attorney, in any formal or informal appearance before the Government or, with the intent to influence, to make any oral or written communication to the Government.

§ 792.503 Restrictions on all former employees and special Government employees from acting as representative in a particular matter in which the employee or special Government employee personally and substantially participated.

(a) This is a lifetime prohibition that applies to all former employees. An employee or special Government employee may not, after his Government employment has ended, knowingly represent anyone other than the United States before the Government:

(1) In conjunction with any matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest; and

(2) In which the former employee participated personally and substantially while employed by the Government.

(b) The purpose of this provision is to preclude any former employee who substantially participates in a particular matter while employed by the Government from later "switching sides" and representing a non-Government party in the same matter. Except as provided in § 792.505(a) regarding the two-year restriction on former senior employees, a former employee may provide in-house assistance, such as advice and counsel, to the non-Government employer in connection with the representation. It is the communication with the intent to influence or the representation before the Government relating to the particular matter that is forbidden to the former Government employee.

§ 792.504 Two-year restriction on any former Government employee acting as representative in a particular matter for which the employee had official responsibility.

(a) In addition to the lifetime prohibition, an employee or special Government employee may not, within two years after his Government employment has ended, knowingly represent anyone other than the United States before the Government:

(1) In conjunction with any matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest; and

(2) Which was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility.

(b) The statutory two-year period is measured from the date when the employee's responsibility in a particular area ends, not from the termination of Government service, unless the two occur simultaneously. The prohibition applies to all particular matters which were subject to his responsibility in the one-year period before the termination of that responsibility.

§ 792.505 Two-year restriction on a former senior employee assisting in representing in a matter in which the employee participated personally and substantially.

(a) In addition to all of the other prohibitions imposed by this subpart, a former senior employee may not, for a period of two years after his Government employment has ended, knowingly aid, counsel, advise, consult or assist in representing anyone other than the United States by personal presence at any formal or informal appearance before the Government:

(1) In conjunction with any matter in which the United States is a party or has a direct and substantial interest; and

(2) In which he participated personally and substantially as an officer or employee.

(b) The statutory two-year period is measured from the date of termination of employment in the particular Senior Employee Position held by the former employee when he or she participated personally and substantially in the matter involved.

§ 792.506 One-year restriction on a former senior employee's transactions with former agency on a particular matter, regardless of prior involvement.

(a) In addition to all of the other restrictions imposed by this subpart, a former senior employee (other than a special Government employee who serves for fewer than sixty days in a calendar year) may not, for a period of one year after his Government employment has ended, knowingly represent anyone other than the United States before the agency or before any officer or employee of the agency in which he served as an officer or employee:

(1) In conjunction with any particular matter, whether or not involving a specific party or parties; and

(2) Which is pending before such agency or in which such agency has a direct and substantial interest.

(b) The purpose of this Part is to prevent the possible use of personal influence, based upon past Government affiliation, to facilitate the transaction of business. Prior involvement in a particular matter is not required, nor are specific parties necessary in order for the prohibition to apply.

(c) The prohibition of paragraph (a) of this section, shall not apply to appearances, communications, or representation by a former Senior Employee, who is:

(1) An elected official of a State or local government, acting on behalf of such government, or

(2) Whose principal occupation or employment is with:

(i) An agency or instrumentality or a State or local government, acting on behalf of such government, or

(ii) An accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or

(iii) A hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1954, and the appearance, communication, or representation is on behalf of such government, institution, hospital or organization.

(d) The statutory one-year period is measured from the date when the individual's responsibility as a senior employee in a particular agency ends, not from the termination of Government service, unless the two occur simultaneously.

Subpart F—Administrative Provisions

§ 792.601 Employee responsibility, counseling and distribution of regulation.

(a) Each employee is responsible for being familiar with and complying with the provisions of this part. NCUA's Ethics Officer and Deputy Ethics Officers shall be available for counseling and guidance as to the statutes and regulations affecting employee responsibility and conduct, including interpretation of this part.

(b) The Ethics Officer shall ensure that a copy of this part is provided to each new employee and special Government employee at the time of his entrance on duty. All employees and special Government employees shall be provided with a copy of this rule within 90 days after it has been finally approved by the NCUA Board. The Ethics Officer shall annually distribute to each employee and each special Government employee a reminder of the basic provisions of this part, together with a list of the names, office addresses and office phone numbers of the Ethics Officer, the Alternate Ethics Officer and Deputy Ethics Officers, who shall be available for counseling and guidance. New employees and special Government employees shall be provided with a copy of this list at the time of their entrance on duty.

§ 792.602 Designation of ethics officer, alternate ethics officer and deputy ethics officer.

(a) NCUA's ethics program shall be coordinated and managed by the Ethics Officer. The Deputy General Counsel of NCUA shall act as the Ethics Officer.

(b) The Chairman shall appoint an Alternate Ethics Officer, who shall act as the Ethics Officer in the absence of the Ethics Officer.

(c) The Ethics Officer shall appoint one or more Deputy Ethics Officers, to whom the Ethics Officer may delegate duties and responsibilities under this part.

(d) All Officers appointed under this section shall be qualified and in a position to give authoritative advice and guidance to each employee and special employee who seeks advice and guidance on questions of conflicts of interest and on other matters covered by this part.

§ 792.603 Sanctions.

Any violation of this part by an employee or special employee may be cause for remedial or disciplinary action, which may be in addition to any penalty prescribed by law. Disciplinary action may include, but is not limited to, oral or written warning or admonishment, reprimand, suspension, or removal from office. Any such action will be taken in accordance with applicable law, executive order, regulation and procedures set forth in Chapter 8 of the NCUA Personnel Manual. Remedial action, when appropriate, may include, but is not limited to, divestment of conflicting interests, changes in assigned duties, or disqualification for a particular assignment.

§ 792.604 Appeal of remedial or disciplinary actions.

An employee or special employee may appeal any remedial or disciplinary action imposed under this part to the Chairman within 20 days of receipt of notice of such determination. Any such appeal shall be in writing and shall contain a statement of reasons therefor. The Chairman will review the matter and shall provide written notice to the employee of his determination within 20 days.

[FR Doc. 87-24210 Filed 10-19-87; 8:45 am]
BILLING CODE 7535-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 87-NM-135-AD]

Airworthiness Directives: Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to amend an existing airworthiness directive (AD), applicable to certain Boeing Model 747 series airplanes, which currently requires the inspection for cracking and repair or replacement, as necessary, of the pylon midspar attach fitting horizontal clevis to prevent possible separation of the pylon and engine from the wing. This amendment would increase the repetitive inspection interval from 10,000 flight hours to 12,000 flight hours or 4,000 landings, whichever occurs first. In addition, this amendment would delete certain airplanes from the AD effectively. This action is prompted by additional service experience and further assessment which indicates that these relieving actions would not have an adverse effect on safety.

DATES: Comments must be received no later than December 18, 1987.

ADDRESSES: Send comments on the proposal in duplicate to Federal Aviation Administration, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 87-NM-135-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable service information may be obtained from the Boeing Commerical Airplane Company, P.O. Box 3707, Seattle, Washington 98124. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or Seattle Aircraft Certification Office, FAA, Northwest Mountain Region, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara J. Baillie, Airframe Branch, ANM-120S; telephone (206) 431-1927. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168,

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 should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposal contained in this Notice may be changed in light of the comments received. 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.

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention; Airworthiness Rules Docket No. 87-NM-135-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

On January 28, 1987, the FAA issued AD 87-04-13, Amendment 39-5546 (52 FR 3420: February 4, 1987), to require inspection for cracking and repair or replacement, as necessary, of the pylon midspar attach fitting horizontal clevis on certain Boeing Model 747 airplanes. Continued operation with cracks could result in possible separation of the pylon and engine from the wing. The AD, based on Boeing Service Bulletin 747-54-2118, dated July 25, 1986, requires repetitive ultrasonic inspections at 10,000 flight hour intervals.

The FAA has reviewed and approved Boeing Service Bulletin 747-54-2118, Revision 1, dated May 21, 1987, which deletes certain Model 747 airplanes equipped with General Electric CF6 engines from the effectivity and increases the repetitive inspection interval from 10,000 flight hours to 12,000 flight hours or 4,000 landings, whichever occurs first. The elimination of certain airplanes from the effectivity is prompted by the determination that the mid-spar fittings incorporated in these airplanes at production are not prone to corrosion or premature fatigue cracking. The increase in repetitive inspection intervals is based on service experience and additional data analysis by the manufacturer which indicated that these relieving actions would not have an adverse effect on safety.

Since this condition is likely to exist or develop on other airplanes of this same type design, the FAA proposes to amend AD 87-04-13 to require inspection and replacement or repair, as necessary, in accordance with the service bulletin previously mentioned.

It is estimated that 160 airplanes of U.S. registry would be affected by this AD. Since this action would decrease the number of airplanes affected by the AD and increase the repetitive inspection interval, there is no additional cost impact to U.S. operators.

For these reasons, the FAA has determined that this document (1) involves a proposed regulation which is not under Executive Order 12291, and (2) is not a significant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities because few, if any, Boeing Model 747 airplanes are operated by small entities.

A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

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

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

2. By amending AD 87-04-13, Amendment 39-5546 (52 FR 3420; February 4, 1987), to revise the effectivity paragraph and paragraph A. as follows:

Boeing: Applies to Model 747 series airplanes, listed in Boeing Service Bulletin 747-54-2118, Revision 1, dated May 21, 1987, certificated in any category. Compliance required as indicated, unless previously accomplished.

To detect cracking of engine pylon midspar attach fittings, accomplish the following:

A. Within 5,000 flight hours after the effective date of this AD (March 13, 1987) or prior to the accumulation of 20,000 flight hours, whichever occurs later, unless accomplished within the last 5,000 flight hours, and at intervals thereafter not to exceed 12,000 flight hours or 4,000 landings, whichever occurs first, perform an ultrasonic inspection for cracks initiating at the aft-most two fastener holes in both pylon midspar fittings on the inboard nacelle pylons on airplanes listed in Groups 1 through 5, and on the outboard nacelle pylons on airplanes listed in Group 1, in accordance with Boeing Service Bulletin 747-54-2118, dated July 25, 1986, or later FAA approved revisions.

Issued in Seattle, Washington, on October 5, 1987.

Frederick M. Isaac,

Acting Director, Northwest Mountain Region.

[FR Doc. 87-24188 Filed 10-19-87; 8:45 am]

BILLING CODE 4910-13-M

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Ch. II

Lawn Darts; Advance Notice of Proposed Rulemaking; Request for Comments and Data

AGENCY: Consumer Product Safety Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Based on available data, the Commission has preliminarily determined that there may be an unreasonable risk of injury associated with lawn darts which may be sufficiently severe to warrant regulatory action by the Commission. Lawn darts are devices intended to be used outdoors by being thrown upward and striking the ground point first. A regulation, issued in 1970 by the Food and Drug Administration under the Federal Hazardous Substances Act ("FHSA") and now administered by the Commission, currently bans lawn darts, except for those intended for adult use that (1) are labeled to warn against use by children, (2) include instructions for safe use, and (3) are not sold by toy stores or by store departments dealing predominantly in toys or other children's articles. Despite these restrictions, which are intended to ensure that lawn darts are sold only for use as a game of skill by adults, serious injuries and deaths to children contine to occur as children continue to play with lawn darts. In addition, the extent to which lawn darts are being sold in ways that violate the current regulations appears to have increased in the past few years.

This advance notice of proposed rulemaking ("ANPR") commences a rulemaking proceeding that could result in additional restrictions on the sale of lawn darts or could result in a ban on the manufacture, sale, and distribution of lawn darts. This notice asks for comments on whether such actions would be best accomplished by revoking or amending the present exemption to the FHSA ban, which allows the sale of lawn darts under the conditions described above, or whether action should be taken under the Consumer Product Safety Act, either in addition to revoking or amending the FHSA exemption or in place of such action. In addition, this notice specifically invites any person to submit (1) an existing standard that addresses the risk of injury associated with lawn darts that could be used as a proposed regulation or (2) a statement of intention to develop or modify a voluntary standard to address the risk of injury associated with lawn darts, along with a plan for doing so.

DATE: Comments in response to this ANPR are due no later than December 21, 1987.

ADDRESSES: Comments should be mailed, preferably in five (5) copies, to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207, telephone (301) 492-6800, or delivered to the Office of the Secretary, Consumer Product Safety Commission, Room 528, 5401 Westbard Avenue, Bethesda, Maryland.

FOR FURTHER INFORMATION CONTACT: Elaine Tyrrell, Project Manager, Office of Program Management and Budget, Consumer Product Safety Commission, Washington, DC 20207, telephone (301) 492-6554.

SUPPLEMENTARY INFORMATION:

A. Background

The Consumer Product Safety Commission was created in May of 1973. Prior to that time, the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. 1261-1276, was administered by the Food and Drug Administration ("FDA"). The FHSA provides that the term "banned hazardous substance" includes "any toy, or other article intended for use by children, which is a hazardous substance." The Child Protection and Toy Safety Act of 1969 (83 Stat. 187-190) amended the FHSA to provide that any toy or other article intended for use by children may be classified as a hazardous substance if it is determined that the article presents an electrical, mechanical, or thermal hazard. Pursuant to this authority, the FDA, on November 17, 1970, proposed, among other things, to declare that lawn darts are banned toys because they present a mechanical hazard and an unreasonable risk of injury. 35 FR 17664.

The FDA received only one comment concerning the proposal to determine that lawn darts present a mechanical hazard. That comment stated that the large outdoor-type darts are intended for use by adults as an outdoor sport or game. The comment contended that suitable labeling can be devised to inform parents or other adults of the necessity of carefully supervising children if they are to be permitted to play the game and to give other information relating to the safety of all nonplayers in the immediate area.

After considering this comment, the FDA determined in its final rule, published December 19, 1970, that "lawn darts and other similar sharp-pointed toys usually intended for outdoor use and having the potential for causing puncture wound injury, or other injury" presented a mechanical hazard within the meaning of the FHSA. 35 FR 19266. However, the final rule also provided that the following types of lawn darts would not be included within the term "banned hazardous substance":

Lawn darts and similar sharp-pointed articles not intended for toy use and

marketed solely as a game of skill for adults, provided such articles:

(i) Bear the following statement on the front of the panel of the carton and on any accompanying literature:

Warning: Not a toy for use by children. May cause serious or fatal injury. Read instructions carefully. Keep out of the reach of children.

Such statement shall be printed in a sharply contrasting color within a borderline and in letters at [least] one-quarter inch high on the main panel of the container and at least one-eighth inch high on all accompanying literature.

(ii) Include in the instructions and rules clear and adequate directions and warnings for safe use including a warning against use when any person or animal is in the vicinity of the intended play or target area.

(iii) Are not sold by toy stores or store departments dealing predominantly in toys and other children's articles.

35 FR 19266, 19267.

A petition for judicial review of this regulation was filed by a lawn dart manufacturer, and the regulation was upheld. *R. B. Jarts, Inc.* v. *Richardson*, 438 F.2d 846 (2d Cir. 1971).

Since May of 1973, when the responsibility for administering the FHSA was transferred to the Commission, the Commission has periodically inspected samples of lawn dart labeling and instructions and surveyed marketing practices for lawn darts to determine whether the manufacturers, importers, and sellers of lawn darts are complying with the Commission's regulations under the FHSA.

The ban of lawn darts is codified in § 1500.18(a)(4) of Title 16 of the Code of Federal Regulations (CFR). The exemption quoted above for those lawn darts that have the specified labeling and instructions and that are not marketed in toy stores or in store departments dealing predominantly in children's articles is codified at 16 CFR 1500.86(a)(3).

In 1984, the Commission received reports that—lawn darts were being sold in certain toy stores. As a result, the Commission's staff inspected at least 77 retail stores and found seven stores that were selling lawn darts in violation of the ban and exemption. Of the seven violative retail stores, six were toy stores, and three of these were part of the same nationwide chain. Products of four lawn dart importers had labeling violations. The retail sales and labeling violations discovered by these violations were corrected, and the Commission issued a consumer safety alert in July 1985 warning of the hazards of letting children play with lawn darts.

In June 1987, the Commission's staff examined the labeling on lawn darts marketed by 14 firms, and products from all 14 firms were found to have labeling violations. Products of eight of the firms were considered to have serious labeling violations, *i.e.*, no required warning statement on the front panel of the package. Other labeling violations included one or more of the following: The type size of the required warning statement was smaller than that specified in the exemption, the warning statement was absent from the instructions or was not printed within the borderline as required, and the instructions lacked clear and adequate directions and warnings for safe use.

In addition, Commission field investigators visited 122 retail stores around the country. Included in the 122 stores were 36 toy stores, 60 variety or department stores, and 26 sporting goods stores. Fifty-three of the stores were selling lawn darts, and 18 of these were displaying the product with or in close proximity to toys or sporting goods intended primarily for children.

As a result, the Commission's compliance staff met on July 17, 1987, with importers and manufacturers of lawn darts, with a representative from the Sporting Goods Manufacturers Association in attendance. At that meeting, the staff discussed five voluntary actions that could be taken by the firms to help assure compliance with the exemption from the ban and to increase consumer awareness of the hazards associated with lawn darts in the hands of children. As a result of this meeting and subsequent requests from industry members for samples of acceptable actions, the Commission believes that lawn dart manufacturers and importers should take the following voluntary actions while the question of regulatory options is being considered by the Commission:

1. The front panel warning label should be modified to make it more conspicuous and readable. The requested modifications include placing the signal word "warning" in upper case letters in type size at least ⅜ inch high, in black on an orange "window" that includes the international alert symbol (an exclamation point on a black triangular background). The message words should be in upper and lower case black letters, in type size at least ¼ inch high, on white. Each sentence should be started at the left side, and the sentence "Keep out of reach of children" should be before "Read instructions carefully," with a space between these two instructions and the preceding description of the hazard. The recommended front panel warning label reads as follows:

Warning

Not a toy for use by children.
May cause serious or fatal head injury.
Keep out of reach of children.
Read instructions carefully.

2. Place a warning label on one fin of each lawn dart in a color that contrasts with the fin. (The industry attendees at the July 17, 1987, meeting indicated that they would achieve contrast by means other than color, such as by contrasting texture.) The recommended label would state:

Warning:

Not a toy for use by children.
Can cause serious or fatal head injury.
Keep children away from throwing area.

The signal word should be in upper case letters in type size at least ¼ inch high. The message words should be in upper and lower case letters in type size at least 3/16 inch high.

3. Change the design of lawn darts to prevent modification, or include a warning against modification with the instructions. The Commission recommends the following language for warning consumers against modifying lawn darts:

Warning:

Do not modify or change the lawn dart in any way.
Modification or changes can make the dart more hazardous.

This labeling should be printed in type size at least ⅛ inch high. The signal word should be in all upper case letters, while the remainder of the statement may appear in both upper and lower case.

4. Include with each shipment of lawn darts to retailers information on how to display lawn darts. The Commission recommends the following statement:

Important Safety Information

It is ILLEGAL to sell lawn darts in toy stores or in store departments which sell toys or other articles for children.
DO NOT display lawn darts in sporting goods departments near sports equipment intended primarily for children.
Promote lawn darts for ADULT USE ONLY.
Children have been injured and killed by lawn darts.

The heading should appear in upper case letters in at least ½ inch type size, and the remainder of the notice should appear in upper and lower case letters in at least ½ inch type size.

5. Stop packaging lawn darts in combination sets with other games.

After the meeting on July 17, 1987, the staff wrote to all known lawn dart importers and to the known domestic manufacturer and the company that

distributes his products. These letters went both to those that attended the meeting and to those that did not attend. The letters described the five voluntary actions and asked the firms to state in writing whether they were willing to take the actions requested. A total of 20 firms received letters, including additional importers of lawn darts that were identified between July and September.

Nineteen of the firms have responded in writing or by telephone. Seven firms stated that they would carry out the five requests (except for the contrasting color on lawn dart fins); several of these firms requested additional slight modifications of the terms.

Two major firms stated in writing that they would carry out only the first four requests. Of these two, one importer stated that the firm would not stop distributing lawn darts in combination sets. The second firm, another importer, stated that the firm would stop distributing combination sets only if the CPSC banned the sale of lawn darts in combination sets. This firm also stated that it was in favor of the Commission making mandatory all of the voluntary actions which were requested.

Two firms stated general support for the voluntary actions the compliance staff had requested, but did not address the specific requests. Eight firms stated that they intended to stop importing lawn darts.

On July 30, 1987, the Commission issued a news release about lawn dart injuries and deaths. In the release, the Commission provides details on the ban, the exemption, and the hazard and resulting injuries. The release urges consumers to keep lawn darts away from children and asks consumers to report violations of the ban or exemption to the Commission.

On October 1, 1987, the Commission met to consider what actions are appropriate to address the continuing injuries and deaths to children that occur when children play with lawn darts. The major options under consideration included:

1. To direct the staff to enforce the ban and its exemption vigorously.

2. To direct the staff to continue to work with industry and to monitor industry compliance with the voluntary actions recommended to industry representatives at the July 17, 1987, meeting.

3. To direct the staff to develop an advance notice of proposed rulemaking ("ANPR") to propose an amendment to the exemption to require the voluntary actions that were requested of the industry at the July 17, 1987, meeting.

4. To direct the staff to develop an ANPR to ban all lawn darts and other similar sharp-pointed toys usually intended for outdoor use and having the potential for causing puncture would injury.

By a unanimous vote, the Commission decided at its October 1, 1987, meeting to issue an ANPR indicating that the Commission may, among other actions, either require the five actions requested of industry at the July 17, 1987, meeting with the staff or ban all lawn darts and similar pointed objects usually intended for outdoor use and having the capacity for causing puncture wound injuries. The latter action would include the possibility of revoking the current exemption from the 1970 ban. Whatever action ultimately would be taken would take into account the results of a surveillance program to be conducted by the Commission's staff three months after publication of the ANPR; the object of the surveillance would be to determine if the industry is in substantial compliance with the existing regulations and with the actions requested at the July 17, 1987, meeting described above. The Commission's final action would further depend upon an evaluation of whether such voluntary or mandatory standards, if enforced, could be expected to protect consumers from unreasonable risk of injuries. In addition, the ANPR would include inquiries to the public which will enable the Commission to obtain information relevant to whether the current exemption should be revoked or amended. The staff was further directed to vigorously enforce the current FHSA provisions on lawn darts and to issue a consumer alert annually.

In addition, the Commission will request the U.S. Customs Service to consider including lawn darts in the Operation Toyland program. This will enable CPSC and the Customs Service to jointly examine incoming shipments of lawn darts. Those which fail to comply with the labeling provisions of the exemption will be seized by the Customs Service.

The staff also was directed to begin immediately preparing an injury update, human factors, analysis, economic cost/benefit report, possible medical evaluation of data, and other relevant data and analysis that will be needed to determine whether further regulatory action for lawn darts is appropriate.

B. The Product

Lawn darts are devices that are intended to be used outdoors and that are designed so that when they are thrown into the air they will contact the ground point first. Often, lawn darts are used in a game where the darts are thrown at a target or other feature on the ground. A lawn dart typically might be about a foot in length and weight perhaps half a pound.

The tip of the lawn dart often consists of a rod about ¼ inch in diameter, with a rounded end. Although the tip is not necessarily sharp enough to present an obvious danger of puncture, the momentum of the dart in flight, when impact occurs with the tip of the dart, can be sufficient to cause puncture or fracture wounds that can cause serious injury or death.

The Commission staff estimates that at least 500,000 lawn dart sets are sold annually. One domestic manufacturer, a distributor of that manufacturer's products, and 18 importers of lawn darts have been identified. Several firms also have been identified as major distributors or private labelers. Because of the ease of importing the product, it is possible that there are additional private label imports being marketed in this country.

Lawn darts are available in sets by themselves and in combination sets with other lawn games; *e.g.*, badminton and volleyball. In sets by themselves, the retail prices for lawn darts range from about $4.00 to $10.00. The average price is about $5.00 per set. Consumers may consider lawn darts that are packaged in combination with other sporting goods equipment to be as safe as the other games in the package, and it appears that consumers would be likely to consider lawn darts as appropriate for children if the other games are appropriate for children.

C. Risk of Injury

The risk that the Commission intends to address in this proceeding is that of punctures, fractures, and lacerations to children caused by lawn darts being used by children. As mentioned above, the potential for these devices to cause these types of injuries is not necessarily obvious to parents or other adults who might buy these items or allow their children to play with them, much less to the children themselves.

The Commission's staff estimates that about 6,100 injuries from lawn darts were treated in U.S. hospital emergency rooms between January 1978 and December 1986. This represents an average of 675 injuries per year treated in emergency rooms. Approximately 57% of the injuries involved the head, face, eye, or ear; nearly 8% of the injuries were fractures or puncture wounds. Approximately 3.4% of the injured victims were hospitalized (on the average, less than approximately 25 per

year), including all of the injuries reported as fractures. Approximately 81% of the victims were under age 15; over 50% of the victims were under age 10. In addition, Commission records dating back to at least 1970 show that at least three children have been killed by injuries associated with lawn darts.

In the 18 lawn dart injury reports for which information about the user of the lawn darts was available, the majority of the reports indicated that children were playing with the lawn darts, despite the ban and exemption which were developed to keep the product out of the hands of children.

D. Regulatory Alternatives Under Consideration

The potential hazards associated with lawn darts and the compliance of this product with the existing regulations have received much attantion and publicity during the past few months. The recent death of a seven-year-old girl and the related information presencted at Congressional hearings have raised questions about the adequacy of this existing ban with its broad exemption.

The main question to be decided by the Commission is whether additional restrictions on the sale of lawn darts, such as those discussed in the July 17, 1987, meeting between the industry and the Commission's compliance staff, will be adequate to keep the product out of the hands of children or whether this goal can be achieved only be stopping the sale of the product. Whichever of these approaches is deemed ultimately to be the most appropriate, there is the additional question of whether it can be achieved by voluntary actions on the part of the industry or whether a regulation will be required to ensure that children do not use this product. The various alternatives are discussed below

Prohibition of sale versus additional restrictions on sale. The object of this proceeding is to ensure that lawn darts are kept out of the hands of children. From the injuries and deaths that have occurred since the FDA issued the ban and exemption that allowed the sale of lawn darts with certain labels and instructions, and that were not marketed in toy stores or store departments that predominantly sold children's articles, it appears that the existing limitations on the sale of lawn darts may be insufficient. The additional limitations discussed at the July 17, 1987, meeting between the industry and the Commission's compliance staff, if uniformly adopted, should be more effective in avoiding purchase of the product by children or by adults at the immediate instigation of children. Also, the labels should help inform adults before purchase that the product is not suitable for children. In addition, the labels and instructions should better communicate to adults the need to keep the product away from children.

It is not clear, however, that even these additional restrictions on the sale of lawn darts would be adequate to keep the product out of the hands of children. It can be argued that the product has such a strong inherent appeal to children, who cannot be supervised at every moment, that they will use the product regardless of warnings on the packages or on the darts themselves or in the instructions. On the other hand, it may be that increased restrictions, coupled with increased efforts by the Commission's staff to ensure that the exemption is not violated, would reduce the risk adequately, so that the more drastic regulatory alternative of a ban would not be necessary. The Commission solicits comment on the likely efficacy of additional restriction on the sale of lawn darts to adequately recedue the risk to children from this product. Comments on the specific terms of the five actions requested of the lawn dart industry are also sought.

Statutory remedies. At present, the Commission has not decided which, if any, regulatory option it may elect to address the risks of injury associated with lawn darts. The following is a discussion of the statutory alternatives available to the Commission.

If lawn darts as a class are deemed to be articles intended for use by children, the darts, would be regulated under the provisions of the FHSA for mechanical hazards of children's products. Sec. 2(f)(1)(D) of the FHSA, 15 U.S.C. 1261(f)(1)(D); sec. 30(d) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. 2079(d). If at least some lawn darts were deemed to be children's products, while other lawn darts might not be children's products, a regulatory proceeding to address all lawn darts could be conducted either under both the CPSA and the FHSA or under the CPSA alone, after a finding that it is in the public interest to do so as provided in section 30(d) of the CPSA.

An article intended for use by children which has been declared by rule to be a hazardous substance is banned under section 2(q)(1)(A) of the FHSA, 15 U.S.C. 1261(q)(1)(A), unless exempted. Since a general ban of lawn darts already exists under 16 CFR 1500.18(a)(4), to effect a ban of law darts under the FHSA the Commission would revoke the exemption at 16 CFR 1500.86(a)(3).

The Commission is authorized, under section 7 of the CPSA, to promulgate a mandatory consumer product safety standard which sets forth certain performance requirements for a consumer product or which sets forth certain requirements that a product be marked or accompanied by clear and adequate warnings or instructions. 15 U.S.C. 2056. A performance, warning, or instruction standard must be reasonably necessary to prevent or reduce an unreasonable risk of injury. In addition, if the Commission finds that no feasible consumer product standard under section 7 would adequately protect consumers from an unreasonable risk of injury associated with lawn darts, the Commission may promulgate a rule under section 8 of the CPSA declaring some or all lawn darts to be banned products. 15 U.S.C. 2057.

The procedures and requisite findings to accomplish any of the mandatory regulatory alternatives under consideration under either or both acts are essentially the same; both acts use a three-stage rulemaking procedure. At each stage of the rulemaking, the Commission is required to consider certain topics and make specified findings, particularly about the status of voluntary standards and about the costs and benefits of the contemplated rule.

The requirements for promulgating a mandatory rule are set out in section 9 of the CPSA, 15 U.S.C. 2058, and section 3(f) of the FHSA, 15 U.S.C. 1262(f). An advance notice of proposed rulemaking ("ANPR") is the first step of a regulatory proceeding that could lead to a safety rule. The second step is the issuance of a proposed rule followed by public comment. The third step is the issuance of a final rule. If the Commission decides after this ANPR to proceed with a mandatory standard, its staff could develop a proposed rule. In the alternative, any interested person may, in response to this ANPR, submit an existing standard as a proposed mandatory safety standard. In either case, the Commission would proceed with a proposed and a final rule, under the second and third rulemaking steps.

However, it may not be necessary to proceed to the second and third rulemaking steps. If the Commission determines that a voluntary standard developed in response to the ANPR is likely to eliminate or adequately reduce the risk of injury, and that it is likely that there will be substantial compliance with such voluntary standard, both the CPSA and the FHSA require that the Commission terminate the rulemaking proceeding.

Voluntary standards. The Commission is unaware of any existing voluntary standard that would eliminate or adequately reduce the risk of injury identified in subsection C above. Any person is invited to submit to the Commission a statement of intention to modify or develop a voluntary safety standard to address the risk of injury identified in subsection C above, together with a plan to modify or develop the standard.

Any plan submitted with a statement of intention to develop a voluntary standard should include, to the extent possible, a description of how interested groups and persons will be notified that a proceeding to modify or develop a voluntary standard is underway; a description of how the views of interested groups and people will be incorporated into the standard; a detailed discussion of how the development of the standard will proceed; a realistic estimate of the length of time that will be required to develop the standard; a detailed schedule for the various stages of the development process; a list of the people expected to participate in the standard's development, along with a description of their backgrounds and experience; and a description of any facilities or equipment that will be used during the project.

Other actions. The Commission could also require actions other than the ones described above. These other actions include: Actions to address imminent hazards under section 12 of the CPSA, 15 U.S.C. 2061, or under section 3(e)(2) of the FHSA, 15 U.S.C. 1262(e)(2); corrective actions to address defective products under section 15 of the CPSA, 15 U.S.C. 2064, or section 15(c) of the FHSA, 15 U.S.C. 1274(c); a rule issued under section 27(e) of the CPSA, 15 U.S.C. 2076(e), to require manufacturers to provide performance and technical data related to the performance and safety of lawn darts to the Commission or to prospective purchasers of lawn darts; and dissemination of safety information by the Commission.

E. Solicitation of Public Input

This ANPR is the first stage in the Commission's consideration of what regulatory action, if any, to take with respect to lawn darts. As discussed above, the Commission may decide to pursue alternatives other than rulemaking to address the risks associated with lawn darts. Members of the public are encouraged to submit their comments to the Commission on any aspect of the various alternatives discussed above.

All comments and submissions should be provided to the Office of the Secretary, at the address given at the beginning of this notice, no later than December 21, 1987.

Dated: October 15, 1987.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

List of Relevant Documents

Memorandum from Schmeltzer, D., AED/CA, to Noble, D., Director, OPMB, "Lawn Darts," dated July 15, 1987.

Attachment A—Proposed Ban of Lawn Darts, *Federal Register,* Vol. 35, No. 223, November 17, 1970.

Final rule on Lawn Dart Ban and Exemption, *Federal Register,* Vol. 35, No. 246, December 19, 1970.

Attachment B—Memorandum from Karels, T.R. ECSS, to Nelson, C., CARM, "Lawn Darts—PSA #2804", dated June 22, 1987, (Restricted).

Attachment C—Memorandum from Kennedy, J., EPHF, to Nelson, C., CARM, "PSA 2826; Lawn darts in Combination Game Sets," July 13, 1987, (Restricted).

Memorandum from Tinsworth, D., EPHA, to Tyrrell, E., EX-PB, "Lawn Dart Injury Data", August 21, 1987.

Memorandum from Ray, D., and Bennett, L., ECPA, to Tyrrell, E., OPMB, "Lawn Dart Accident Costs," August 4, 1987.

News Release: "Lawn Darts Can Cause Serious or Fatal Head Injuries and Death", Released July 30, 1987.

Memorandum from Poth, B., CARM, to Tyrrell, E., OPMB, "Lawn Darts Options Package", August, 1987.

Memorandum from Walton, W.W. ES, to Tyrrell, E., EXPM, "Lawn Darts—Option Package", August 28, 1987.

Memorandum from Ulsamer, A.G., to Tyrrell, E.A., EX-PB, "HS Recommendations on Lawn Darts", August 20, 1987.

Memorandum from Koeser, R., to Tyrrell, E.A., OPMB, "Lawn Dart Options Package", August 19, 1987.

Memorandum from Ray, D.R., ECPA, to Teyrrell E., OPMB "Lawn Darts", August 27, 1987.

Petition from David A. Snow asking that the CPSC ban lawn darts (Petition HP 87-3), received in the Office of the Secretary, September 23, 1987.

[FR Doc. 87-24240 Filed 10-19-87; 8:45 am]

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 28

[Docket No. R-87-1344; FR-2310]

Implementation of Program Fraud Civil Remedies Act of 1986

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement the Program Fraud Civil Remedies Act of 1986 by establishing administrative procedures for imposing civil penalties and assessments against persons who file false claims or statements while applying for certain benefits provided by the Federal Government.

DATE: Comments due December 21, 1987.

ADDRESS: Interested persons are invited to submit comments regarding this rule to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection during regular business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Patricia M. Black, Assistant General Counsel for Inspector General and Administrative Proceedings, Office of General Counsel, Room 10266, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. Telephone: (202) 755-7200. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On October 21, 1986, the President signed the Omnibus Reconciliation Act of 1986, which enacted the Program Fraud Civil Remedies Act of 1986 (PFCRA), Pub. L. 99-509. PFCRA establishes in HUD, among other authorities, administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to the Department or its agents. In general, anyone who, with knowledge or reason to know, submits a false, fictitious, or fraudulent claim or statement to HUD is liable for a penalty of up to $5,000 per claim and an assessment of up to double damages. However, § 28.5(c) of the proposed rule reflects the Act's restricted applicability with respect to certain beneficiaries under any housing assistance program for lower income families or for elderly or handicapped persons administered by HUD. Under this section, the ultimate beneficiary of such programs (examples of which are listed below) may be held liable for a false claim or statement relating to such benefits only if the false claim or statement is made in making application for such benefits and is made with respect to that beneficiary's

eligibility to receive such benefits. For purposes of the rule, we have designated such ultimate beneficiaries as those individuals who come within the definition of "family" as stated in the Housing Act of 1937, 42 U.S.C. 1437a. This definition includes elderly and handicapped persons. The rule, in keeping with PRCRA also provides for hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

Examples of the types of programs through which beneficiaries would be liable under § 28.5(c) are as follows:

United States Housing Act of 1937 (42 U.S.C. 1437)
- Section 8 Lower-Income Rental Assistance
- Sections 23 and 10(c)—Leased Housing
- Section 202—Direct Loans for Housing for the Elderly and Handicapped
- Section 17—Rental Rehabilitation and Development Grants
- Section 14—Comprehensive Improvement Assistance
- Turnkey III
- Section 4, 5, and 9 Public Housing
- Indian Housing—Rental Housing, Mutual Help Homeownership Opportunity, Section 8

National Housing Act (12 U.S.C. 1702)
- Section 235—Low Income Home Ownership Program
- Section 236—Insurance of Below Market Rate Mortgages

Housing and Urban Development Act of 1965 (12 U.S.C. 1701)
- Section 101 Rent Supplements

The general structure of a PFCRA investigation by HUD would be as follows: PFCRA authorizes investigations of false claims and statements by HUD's "investigation official", who is the Inspector General. Cases would be initially referred to HUD's "reviewing official" for evaluation and approval, then to the Attorney General for Department of Justice approval. HUD's reviewing official would be the Associate General Counsel for Program Enforcement. (Of course, the Department of Justice could elect to bring the case itself in court under the False Claims Act.) If the Department of Justice approves the use of PFCRA, the case would be referred to an ALJ for a formal hearing on the record. The rule would provide for an appeal of the ALJ's decision to the authority head and then to the U.S. District Court. PFCRA states that the civil penalties and assessments it provides are in addition to any other remedy prescribed by law. Hence, this rule would not preclude imposition of individual program sanctions that are permitted.

The Department of Health and Human Services (HHS) was assigned the responsibility for heading a task force to draft the model regulation because of their experience in trying cases before Administrative Law Judges under their Civil Monetary Penalties Law, 42 U.S.C. 1320a-7a. The Department's rule follows closely the model issued by HHS with only minor variations to accommodate HUD's organizational and program structure.

Other Matters

National Environmental Policy Act. A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50, which implement section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4321-4347). The Finding is available for public inspection during regular business hours in the Office of the Rules Docket Clerk, Room 10276, 451 Seventh Street, SW., Washington, DC 20410-0500.

Executive Order 12291. This rule would not constitute a major rule as that term is defined in section 1(b) of the Executive Order on Federal Regulation issued by the President on February 17, 1981. Analysis on the rule indicates that it would not: (1) Have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act. As required by section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601), the Undersigned hereby certifies that this rule would not have a significant economic impact on a substantial number of small entities because it would merely establish procedures for imposing civil money penalties and assessments against those persons who have violated existing requirements for obtaining benefits provided by the Federal Government. It would not impose any new requirements on participants in those programs.

Semiannual Agenda. This rule was listed as item number 878 in the Department's April 27, 1987, Semiannual Regulatory Agenda (52 FR 14363), published in accordance with Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects in 24 CFR Part 28

Program fraud, Civil remedies.

Accordingly, the Department proposes to amend Title 24, Subtitle A, of the Code of Federal Regulations by adding a new Part 28 to read as follows:

PART 28—IMPLEMENTATION OF THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986

Sec.

28.1 Purpose.
28.3 Definitions.
28.5 Basis for civil penalties and assessments.
28.7 Investigation.
28.9 Review by the reviewing official.
28.11 Prerequisities for issuing a complaint.
28.13 Complaint.
28.15 Service of complaint.
28.17 Answer.
28.19 Default upon failure to file an answer.
28.21 Referral of complaint and answer to the ALJ.
28.23 Notice of hearing.
28.25 Parties to the hearing.
28.27 Separation of functions.
28.29 Ex parte contacts.
28.31 Disqualification of reviewing official or ALJ.
28.33 Rights of parties.
28.35 Authority of the ALJ.
28.37 Prehearing conferences.
28.39 Disclosure of documents.
28.41 Discovery.
28.43 Exchange of witness lists, statements, and exhibits.
28.45 Subpoenas for attendance at hearing.
28.47 Protective order.
28.49 Fees.
28.51 Form, filing and service of papers.
28.53 Computation of time.
28.55 Motions.
28.57 Sanctions.
28.59 The hearing and burden of proof.
28.61 Determining the amount of penalties and assessments.
28.63 Location of hearing.
28.65 Witnesses.
28.67 Evidence.
28.69 The record.
28.71 Post-hearing briefs.
28.73 Initial decision.
28.75 Reconsideration of initial decision.
28.77 Appeal to authority head.
28.79 Stays ordered by the Department of Justice.
28.81 Stay pending appeal.
28.83 Judicial review.
28.85 Collection of civil penalties and assessments.
28.87 Right to administrative offset.
28.89 Deposit in Treasury of United States.
28.91 Compromise or settlement.
28.93 Limitations.

Authority: Program Fraud Civil Remedies Act of 1986, Pub. L. 99-509.

§ 28.1 Purpose.

This part:

(a) Establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to Federal authorities or to their agents, and

(b) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 28.3 Definitions.

ALJ means an Administrative Law Judge in HUD appointed pursuant to 5 U.S.C. 3105 or detailed to HUD pursuant to 5 U.S.C. 3344.

Authority head means the Secretary or Under Secretary of the Department of Housing and Urban Development.

Benefits means, in the context of "statement," anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan insurance or guarantee.

Claim means any request, demand, or submission made to—

(a) HUD for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) A recipient of property, services, or money from HUD or to a party to a contract with HUD—

(1) For property or services if the United States—

(i) Provided the property or services;

(ii) Provided any portion of the funds for the purchase of the property or services; or

(iii) Will reimburse the recipient or party for the purchase of the property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse the recipient or party for any portion of the money paid on the request or demand; or

(c) HUD which as the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under § 28.13.

Defendant means any person alleged in a complaint under § 28.13 to be liable for a civil penalty or assessment under § 28.5.

Government means the United States Government.

HUD means the Department of Housing and Urban Development.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by § 28.19 or § 28.73, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General of the Department of Housing and Urban Development or an officer or employee of the Office of the Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Knows or has reason to know, means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, and submits, and causes to be made, presented, or submitted. As the context requires, making or made, shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association, or private organization, and includes the plural of the term.

Representative means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico, or other representative meeting the qualifications of a non-attorney representative found at 24 CFR Part 26 and designated by a party in writing.

Reviewing official means the General Counsel of the Department or his or her designee who is—

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organizational unit of HUD in which the investigating official is employed; and

(c) Is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant or cooperative agreement, loan, or benefit from, HUD, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under the contract or the grant or cooperative agreement, loan, or benefit, or if the Government will reimburse the State, political subdivision, or party for any portion of the money or property under the contract or for the grant or cooperative agreement, loan, or benefit.

§ 28.5 Basis for civil penalties and assessments.

(a) *Claims.* (1) A person shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 except as provided in paragraph (c) of this section, when that person makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement that asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that—

(A) omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of the omission, and

(C) Is a statement in which the person making the statement has a duty to include the material fact; or

(iv) Is for payment for the provision of property or services that the person has not provided as claimed.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to HUD, to a recipient, or to a party when the claim actually is made to an agent, fiscal intermediary, or other entity, including any State or political subdivision of a State, acting for or on behalf of HUD, the recipient, or the party.

(4) Each claim for property, services, or money is subject to a civil penalty without regard to whether the property, services, or money actually is delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section also shall be subject to an assessment of not more than twice the amount of the claim or that portion of the claim that is determined to be in violation of

paragraph (a)(1) of this section. This assessment shall be in lieu of damages sustained by the Government because of the claim.

(b) *Statements.* (1) A person shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each statement, except as provided in paragraph (c) of this section, when that person makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in the statement; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement;

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to HUD when the statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision of a State, acting for or on behalf of HUD.

(c)(1) In the case of any claim or statement made by any individual relating to any of the benefits listed in paragraph (c)(2) of this section, the individual may be held liable for penalties and assessments under this section where the benefits are received by the individual or individual's family only if the claim or statement is made by the individual with respect to the individual's or individual's family's eligibility to receive benefits, in the course of making application for the benefits.

(2) For purposes of this paragraph (c), "benefits" shall be defined as any instance wherein funds administered by the Secretary of HUD directly or indirectly permit lower income families or elderly or handicapped persons to reside in housing which othewise would not be available to them. These instances include but are not limited to housing made available in whole or in part under the following enabling legislation and through the following commonly named programs:

(i) United States Housing Act of 1937 (42 U.S.C. 1437)
- Section 8 Lower-Income Rental Assistance
- Sections 23 and 10(c)—Leased Housing
- Section 202—Direct Loans for Housing for the Elderly and Handicapped
- Section 17—Rental Rehabilitation and Development Grants
- Section 14—Comprehensive Improvement Assistance Turnkey III
- Section 4, 5, and 9 Public Housing
- Indian Housing—Rental Housing, Mutual Help Homeownership Opportunity, Section 8

(ii) National Housing Act (12 U.S.C. 1702)
- Section 235—Low Income Home Ownership Program
- Section 236
- Insurance of Below Market Rate Mortgages

(iii) Housing and Urban Development Act of 1965 (12 U.S.C. 1701)
- Section 101 Rent Supplements

(d) No proof of specific intent to defraud is required to establish liability under this section.

(e) Where it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(f) Where it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 28.7 Investigation.

(a) If an investigating official concludes that a subpoena under 31 U.S.C. 3804(a) is warranted—

(1) The subpoena shall notify the person to whom it is addressed of the authority under which it is issued and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving the subpoena shall be required to tender to the investigating official or to the person designated to receive the documents a certification that the documents sought have been produced, or that the documents are not available and the reasons they are not available, or that the documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of the investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or for other civil relief, or to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§ 28.9 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 28.7(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under §28.5, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under §28.13.

(b) The notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of §28.5;

(5) A statement of any exculpatory or mitigating circumstances known by the reviewing official or the investigating official that may relate to the claims or statements; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§28.11 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under §28.13 only if—

(1) The Department of Justice approves the issuance of a complaint in a written statement as described in 31 U.S.C. 3803(b)(1); and

(2) In the case of allegations of liability under §28.5(a) with respect to a claim, the reviewing official determines that, with respect to the claim or to a group of related claims submitted at the same time the claims is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of §28.5(a) does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (*e.g.*, grant or cooperative agreement,

loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join, in a single complaint against a person, claims that are unrelated or that were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§28.13 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant as provided in §28.15.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from those claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer, and to be represented; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal as provided in §28.19.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§28.15 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by a delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual serving the complaint by delivery;

(2) United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgement of receipt by the defendant or his representative.

§ 28.17 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

§ 28.19 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 28.17(a), the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve a notice on the defendant in the manner prescribed in § 25.15, indicating that an initial decision will be issued under this section.

(c) The ALJ shall asume the facts alleged in the complaint to be true, and if such facts establish liability under § 28.5, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, the defendant, by failing to file a timely answer waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, in the motion, the defendant demonstrates extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw any initial decision made under paragraph (c) of this section and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 28.75.

(h) The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

(i) If the defendant files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.

(j) The authority head shall decide expeditiously, based solely on the record before the ALJ, whether extraordinary circumstances excuse the defendant's failure to file a timely answer.

(k) If the authority head decides that extraordinary cicumstances excused the defendant's failure to file a timely answer, the authority head shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the authority head decides that the defendant's failure to file a timely answer is not excused, the authority head shall reinstate the intitial decision of the ALJ, which shall become final and binding upon the parties 30 days after the authority head reinstates the decision.

§ 28.21 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 28.23 Notice of hearing.

(a) When the ALJ receives the compliant and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 28.15. At the same time, the ALJ shall send a copy of the notice to the representative for the Government.

(b) The notice shall include—

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the ALJ determines to be appropriate.

§ 28.25 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and HUD.

(b) A private plaintiff under the False Claims Act may participate in these

proceedings to the extent authorized under 31 U.S.C. 3730(c)(5).

§ 28.27 Separation of functions.

(a) The investigating offical, the reviewing official, and any employee or agent of HUD who takes part in investigating, preparing, or presenting a particular case may not, in that case or in a factually related case—

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or in the review of the initial decision by the authority head, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to or subject to the supervision or direction of the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section the representative for the Government may be employed anywhere in HUD, including in the offices of either the investigating official or the reviewing official.

§ 28.29 Ex parte contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 28.31 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. The motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) The motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or those objections shall be considered to have been waived.

(d) The affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of those facts. It shall be accompanied by a certificate of the representative of record that is made in good faith.

(e) Upon the filing of a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the authority head may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

§ 28.33 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law which shall be made part of the record;

(e) Present evidence relevant to the issue at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 28.35 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

§ 28.37 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact or the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 28.39 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 28.7(b) are based, unless such documents are subject to a privilege

under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or the investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information need be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 28.9 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of documents subject to the provisions of this section. The motion may only be filed with the ALJ following the filing of an answer in accordance with § 28.17.

§ 28.41 Discovery.

(a) The following types of discovery are authorized;

(1) Requests for production of documents for inspection and copying;

(2) Requests for admission of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and §§ 28.43 and 28.45, the term "documents" includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) Motions for discovery. (1) A party seeking discovery may file a motion with the ALJ. The motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion, or a motion for a protective order as provided in § 28.47.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 28.47.

(e) Depositions. (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 28.15.

(3) The deponent may file with the ALJ, within ten days of service, a motion to quash the subpoena or a motion for a protective order.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 28.43 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 28.65(b). At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is not prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be regarded as authentic for the purpose of admissibility at the hearing.

§ 28.45 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual also may require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. The request shall specify any documents to be produced and shall designate the witnesses and describe their addresses and locations with sufficient particularity to permit the witnesses to be found.

(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 28.15. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service, or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 28.47 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition, after being sealed, be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, or other administrative investigation not be disclosed, or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes, to be opened as directed by the ALJ.

§ 28.49 Fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in a United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the authority, a check for witness fees and mileage need not accompany the subpoena.

§ 28.51 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title for the action, the case number assigned by the ALJ, and a designation of the paper (e.g., motion to quash subpoena).

(3) Every pleading and paper shall be signed by and shall contain the address and telephone number of, the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of the document on every other party. Service upon any party of any document other than those required to be served as prescribed in § 28.15 shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid and addressed, to the party's last known address. When a party is represented by a representative service shall be made upon the representative, in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 28.53 Computation of time.

(a) In computing any period of time under this part or in an order issued under this part, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

§ 28.55 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses to the motion has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny the motion without awaiting a response.

§ 28.57 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonable relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, regard each matter about which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with the order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with the request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 28.59 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 28.5 and, if so, the appropriate amount of any such civil penalty or assessment, considering any aggravating or mitigating factors.

(b) HUD shall prove the defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) Unless otherwise ordered by the ALJ for good cause shown, the hearing shall be open to the public.

§ 28.61 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and, upon appeal, the authority head should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments imposed. Because of the intangible costs of fraud, the expense of investigating fraudulent conduct, and the need to deter others who might be similaryl tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the authority head in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the cost of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude the misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding, to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the authority head from considering any other factors that in any given case may mitigate or aggrevate the offense for which penalties and assessments are imposed.

§ 28.63 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 28.65 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any written statement admitted must be provided to all other parties along with the last known addresss of the witness, in a manner which allows sufficient time for other parties to subpoena the witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 28.43(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) make the interrogation and presentation effective for the ascertainment of the truth,

(2) avoid needless consumption of time, and

(3) protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witnesses may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 28.67 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, e.g., to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ in accordance with § 28.47.

§ 28.69 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the authority head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ in accordance with § 28.47.

§ 28.71 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any

party may file a post-hearing brief. The ALJ shall fix the time for filing post-hearing briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 28.73 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate § 28.5;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 28.61.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the authority head. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the authority head, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 28.75 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claims to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief. The discovery of additional material evidence and a demonstration of reasonable grounds for the failure to present such evidence at the hearing may be a basis for such motion.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revising initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the authority head in accordance with § 28.77.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with § 28.77.

§ 28.77 Appeal to authority head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal the initial decision to the authority head by filing a notice of appeal with the authority head in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if another party files a motion for reconsideration under § 28.75, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The authority head may extend the initial 30-day period for an additional 30 days if the defendant files with the authority head a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the authority head and the time for filing motions for reconsideration under § 28.75 has expired, the ALJ shall forward the record of the proceeding to the authority head.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the authority head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any initial decision.

(k) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the authority head serves the defendant with a copy of the authority head's decision, a determination that a defendant is liable under § 28.5 is final and is not subject to judicial review.

§ 28.79 Stays ordered by the Department of Justice.

If at any time the Attorney General of the United States or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to the claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 28.81 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.

(b) No administrative stay is available following a final decision of the authority head.

§ 28.83 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessments under this part, and specifies the procedures for judicial review.

§ 28.85 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for collection actions.

§ 28.87 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 28.83 or § 28.85, or any amount agreed upon in a compromise or settlement under § 28.91, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes then or later owing by the United States to the defendant.

§ 28.89 Deposit in Treasury of United States.

All amounts collected as a result of actions taken under this part shall, except as provided in 31 U.S.C. 3806(g), be deposited as miscellaneous receipts in the Treasury of the United States.

§ 28.91 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The authority head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 28.83 or during the pendency of any action to collect penalties and assessments under § 28.85.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 28.83 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the authority head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 28.93 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 28.15 within 6 years after the date on which the claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under § 28.19(b) shall be regarded as a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

Dated: September 28, 1987.

Samuel R. Pierce, Jr.,

Secretary.

[FR Doc. 87-24281 Filed 10-19-87; 8:45 am]

BILLING CODE 4210-32-M

POSTAL SERVICE

39 CFR Part 111

Use of International Air Mail Envelopes, Cards and Postal Stationery for Domestic Mail Service

AGENCY: Postal Service.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the Domestic Mail Manual to prohibit international airmail envelopes, cards and postal stationery (those having a red-and-blue border), from use for domestic mail services. Envelopes with red-and-blue borders may be used for international mail, but only for airmail items. When customers attempt to use such envelopes for domestic destinations (not presently prohibited), the distinctive markings may cause postal employees to cull such mail for international airmail service. When the mistake is ultimately discovered, the mail must be rehandled to direct it to the domestic service, resulting in delay of the mail plus the cost of the rehandling. If this rule is adopted, envelopes with red-and-blue borders addressed to a domestic destination will be returned to the sender.

DATE: Comments must be received on or before November 20, 1987.

ADDRESS: Written comments should be mailed or delivered to the Director, Office of Classification and Rates Administration, U.S. Postal Service, 475 L'Enfant Plaza West SW., Washington, DC 20260-5360. Copies of all written comments will be available for inspection and photocopying between 9 a.m. and 4 p.m. Monday through Friday, at the above address.

FOR FURTHER INFORMATION CONTACT: Leo F. Raymond, (202) 268-5199.

SUPPLEMENTARY INFORMATION: Current regulations do not limit the use of red-and-blue bordered envelopes, cards and postal stationery solely to international air mail. However, these postal items have a format which permits their quick identification and routing into the international air mail processing system. Consequently, customers who use them for domestic service (in the belief it will expedite handling or delivery) not only do so inappropriately but also can cause needless additional handling for the Postal Service. Further, such pieces not only do not receive expedited domestic service, but may in fact be delayed if they are mistakenly culled for processing in the international mail system and then have to be redirected back to the domestic mailstream. Accordingly, the Postal Service proposes to amend part 129.4 of the Domestic Mail Manual to prohibit the use of red-and-blue bordered envelopes in domestic mail service.

Although exempt by 39 U.S.C. 410(a) from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553 (b), (c)), regarding proposed rulemaking, the Postal Service invites public comment on the following proposed amendments to the Domestic Mail Manual, which is incorporated by reference in the Code of Federal Regulations. See 39 CFR 111.1.

List of Subjects in 39 CFR Part 111

Postal Service.

PART 111—[AMENDED]

1. The authority citation in 39 CFR Part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 3001-3011, 3201-3219, 3403-3406, 3621, 5001.

PART 129—ENVELOPES AND CARDS

2. Revise 129.4 to read as follows:

129.4 Bordered Envelopes, Cards and Postal Stationery.

.41 Green-Border Envelopes and Cards.

Envelopes and cards bearing a green border may be used only for First-Class Mail. All envelopes and cards bearing a green border shall be charged postage equivalent to the First-Class rate. When printed on letter-size mail (128.2), green borders should not enter the bar code area as defined in 122.33.

.42 Red-and-Blue-Border Envelopes, Cards and Postal Stationery.

Envelopes, cards and postal stationery bearing a red-and-blue border of any type, including bars, stripes and parallelograms, may be used only for international air mail. All envelopes, cards and postal stationery bearing a red-and-blue border, and addressed to an international destination, shall be charged postage equivalent to the international air mail rate. All such pieces addressed to a domestic destination will be returned to the sender.

An appropriate amendment to 39 CFR Part 111 to reflect these changes will be published if the proposed rule is adopted.

Fred Eggleston,

Assistant General Counsel, Legislative Division.

[FR Doc. 87-24216 Filed 10-19-87; 8:45 am]

BILLING CODE 7710-12-M

DEPARTMENT OF THE INTERIOR

43 CFR Part 4

Department Hearings and Appeals Procedures

AGENCY: Office of Hearings and Appeals, Interior.

ACTION: Proposed rule.

SUMMARY: The Department of the Interior proposes to revise requirements of its regulation 43 CFR 4.411, *Appeal; how taken, mandatory time limit,* in order to preserve appeals where an appellant mistakenly files his notice of appeal either with the Interior Board of Land Appeals or in the wrong office of the Bureau of Land Management, rather than in the office of the officer who made the decision which is the subject of the appeal. The proposed revision provides, with one exception, that a timely notice of appeal which is misfiled either with the Interior Board of Land Appeals or in the wrong office of the Bureau of Land Management will be considered to have been filed in the proper office on the date it is misfiled. The proposed rule does not change the requirement that the notice of appeal be timely filed.

DATE: Written comments on the proposed rule must be received by November 19, 1987.

ADDRESS: Written comments on this proposed rulemaking should be mailed or hand-delivered to the Director, Office of Hearings and Appeals, 4015 Wilson Blvd., Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Frances A. Patton, Special Counsel to the Director, Office of Hearings and Appeals, 4015 Wilson Blvd., Arlington, VA 22203; Telephone: (703) 235-3810 (not toll free).

SUPPLEMENTARY INFORMATION: To facilitate handling of misfiled notices of appeal by the Interior Board of Land Appeals and the Bureau of Land Management, the proposed revision includes language to be added to 43 CFR 4.411(b) (governing content of the notice of appeal), requiring an appellant to specify the office of the person who rendered the decision being appealed. The proposed revision recites that this requirement may be satisfied by the appellant's attaching a photocopy of the appealed decsion to the notice of appeal. The proposal expressly denies relief to a would-be appellant where he complicates handling of the misfiling by failing to comply with directive to identify the office of the person who rendered the decision that he wishes to appeal. By so doing, potential for abusive dilatory filing tactics is removed.

Federal Paperwork Reduction Act

The proposed rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

Executive Order 12291

Because the proposed rule will only set forth the details of procedures for the manner of taking appeals to the Interior Board of Land Appeals, the Department of the Interior has determined that it is not major and does not require a regulatory impact analysis.

Regulatory Flexibility Act

The Department of the Interior has also determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that the proposed rule will not have a significant economic effect on a substantial number of small entities because it will only set forth the details of procedures for the manner of taking appeals to the Interior Board of Land Appeals.

National Environmental Policy Act

The Office of Hearings and Appeals has determined, on the basis of the categorical exclusion of regulations of a procedural nature set forth at 516 DM 2 Appendix 1, section 1.10 that the proposed rule will not significantly affect the quality of the human environment.

Drafting

The proposed rule was drafted by Wm. Philip Horton, Chief Administrative Judge, Interior Board of Land Appeals, Office of Hearings and Appeals.

List of Subjects in 43 CFR Part 4

Administrative practice and procedure.

Dated: August 4, 1987.

Paul T. Baird,

Director, Office of Hearings and Appeals.

Accordingly, it is proposed to amend 43 CFR Part 4 as follows:

PART 4—[AMENDED]

43 CFR Part 4 is amended as follows:

1. The authority citation for Part 4 continues to read:

Authority: R.S. 2478, as amended, 43 U.S.C. 1201, unless otherwise noted.

Subpart E—Special Rules Applicable to Public Land Hearings and Appeals

2. In § 4.411, paragraph (b) is revised, paragraph (c) is redesignated as paragraph (d) and (d) is revised, and a new paragraph (c) is added to read as follows:

§ 4.411 Appeal; how taken, mandatory time limit.

* * * * *

(b) The notice of appeal must give the serial number or other identification of the case and must identify the office of the officer rendering the decision being appealed. These requirements may be satisfied by attaching a photocopy of the appealed decision to the notice of appeal. The notice of appeal may include a statement of reasons for the appeal, a statement of standing if required by § 4.412(b), and any arguments the appellant wishes to make.

(c) Except as otherwise provided in this subparagraph, if the notice of appeal is mistakenly filed either with the Board or in the wrong office of the Bureau of Land Management, the office receiving the misfiling shall note on the notice of appeal the date on which it was received and promptly transmit it to

the office of the officer who made the decision being appealed. The notice shall be deemed to have been filed in the correct office on the date so noted. However, if the notice of appeal does not identify the office of the officer rendering the decision being appealed as required by § 4.411(b), the notice shall be returned to the sender, and any subsequent refiling shall be deemed to have been accomplished on the date the notice is filed in the correct office.

(d) No extension of time will be granted for filing the notice of appeal. If a notice of appeal is filed after the grace period provided in § 4.401(a), the notice of appeal will not be considered and the case will be closed by the officer from whose decision the appeal is taken. If the notice of appeal is filed during the grace period provided in § 4.401(a) and the delay in filing is not waived, as provided in that section, the notice of appeal will not be considered and the appeal will be dismissed by the Board.

Frances A. Patton,

Certifying Officer.

[FR Doc. 87-24228 Filed 10-19-87; 8:45 am]

BILLING CODE 4310-79-M

Notices

Federal Register
Vol. 52, No. 202
Tuesday, October 20, 1987

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 COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of initiation of antidumping and countervailing duty administrative reviews.

SUMMARY: The Department of Commerce has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings. In accordance with the Commerce Regulations, we are initiating those administrative reviews.

EFFECTIVE DATE: October 20, 1987.

FOR FURTHER INFORMATION CONTACT: William L. Matthews or Richard W. Moreland, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-5253/2786.

SUPPLEMENTARY INFORMATION:

Background

On August 13, 1985, the Department of Commerce ("the Department") published in the **Federal Register** (50 FR 32556) a notice outlining the procedures for requesting administrative reviews. The Department has received timely requests, in accordance with §§ 353.53a(a)(1), (a)(2), and 355.10(a)(1) of the Commerce Regulations, for administrative reviews of various antidumping and countervailing duty orders and findings.

Initiation of Reviews

In accordance with §§ 353.53a(c) and 355.10(c) of the Commerce Regulations, we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews no later than October 31, 1988.

Antidumping duty proceeding and firms	Periods to be reviewed
Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada:	
Fortress Allatt	09/01/86—08/31/87
General	09/01/86—08/31/87

Countervailing duty proceeding	Periods to be reviewed
Fresh Cut Roses from Israel	10/01/85—09/30/86
Lime from Mexico	01/01/86—12/31/86
Lamb Meat from New Zealand	04/01/86—03/31/87
Steel Wire From New Zealand	06/16/86—03/31/87

Interested parties are encouraged to submit applications for administrative protective orders as early as possible in the review process.

These initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930 (19 U.S.C. 1675(a)) and §§ 353.53a(c) and 355.10(c) of the Commerce Regulations (19 CFR 353.53a(c), 355.10(c)).

Gilbert B. Kaplan,

Acting Assistant Secretary for Import Administration.

Date: October 12, 1987.

[FR Doc. 87-24238 Filed 10-19-87; 8:45 am]
BILLING CODE 3510-DS-M

[A-583-401]

Revocation of Antidumping Duty Order; Bicycle Tires and Tubes From Taiwan

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of revocation of antidumping duty order.

SUMMARY: The U.S. International Trade Commission has determined that an industry in the United States would not be materially injured, or threatened with material injury, by reason of imports of bicycle tires and tubes from Taiwan covered by the antidumping duty order if the order were to be modified or revoked.

As a result, the Department of Commerce is revoking the antidumping duty order on bicycle tires and tubes from Taiwan.

EFFECTIVE DATE: September 4, 1987.

FOR FURTHER INFORMATION CONTACT: Edward F. Haley or Robert J. Marenick, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone (202) 377-5289/5255.

SUPPLEMENTARY INFORMATION:

Background

On June 12, 1984, the Department of Commerce ("the Department") published in the **Federal Register** (49 FR 24157) an antidumping duty order on bicycle tires and tubes from Taiwan.

On April 2, 1987, the U.S. International Trade Commission ("the ITC"), at the request of counsel on behalf of the Taiwan producers of bicycle tires and tubes, instituted an investigation of bicycle tires and tubes from Taiwan under section 751(b) of the Tariff Act of 1930 ("the Tariff Act"). As a result of its investigation, the ITC determined (52 FR 33660, September 4, 1987) that an industry in the United States would not be materially injured, or threatened with material injury, by reason of imports of bicycle tires and tubes from Taiwan covered by the antidumpting duty order if the order were to be modified or revoked.

Scope of the Review

Imports covered by the review are shipments of bicycle tires and tubes, currently classifiable under items 772.4800 and 772.5700 of the Tariff Schedules of the United States Annotated.

Revocation of the Order

The Department, as administering authority, revokes the antidumping duty order for all exports of bicycle tires and tubes from Taiwan. This revocation applies to all entries of this merchandise entered, or withdrawn from warehouse, for comsumption on or after September 4, 1987. The Department will instruct the Customs Service to proceed with liquidation of this merchandise without regard to antidumpting duties.

Unappraised entries of bicycle tires and tubes from Taiwan made prior to September 4, 1987 and covered by the order remain unaffected by this notice. These entries are subject to appraisement under the antidumping duty order as required by section 751 of the Tariff Act.

If a review is requested, the Department will conduct an administrative review of shipments of bicycle tires and tubes from Taiwan to the United States during the period June 1, 1987 through September 4, 1987, the effective date of revocation. These results will be published in a subsequent notice.

This revocation is in accordance with section 751(c) of the Tariff Act (19 U.S.C. 1675(c)).

Gilbert B. Kaplan,

Acting Assistant Secretary for Import Administration.

Date: October 12, 1987.

[FR Doc. 87-24239 Filed 10-19-87; 8:45 am]

BILLING CODE 3510-DS-M

[A-588-041]

Final Results of Antidumping Duty Administrative Review; Synthetic Methionine from Japan

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On September 3, 1987 the Department of Commerce published the preliminary results of its administrative review of the antidumping finding on synthetic methionine from Japan. The review covers four manufacturers and/or exporters and one third-country reseller of this merchandise to the United States and the period July 1, 1985 through June 30, 1986. The review indicates the existence of dumping margins during the period.

We gave interested parties an opportunity to comment on our preliminary results. Based on our analysis of the comment received, the final results are unchanged from those presented in our preliminary results.

EFFECTIVE DATE: October 20, 1987.

FOR FURTHER INFORMATION CONTACT: Dennis U. Askey or John R. Kugelman, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2923/3601.

SUPPLEMENTARY INFORMATION:

Background

On September 3, 1987, the Department of Commerce published in the **Federal Register** (52 FR 33464) the preliminary results of its administrative review of the antidumping finding on synthetic methionine from Japan (38 FR 18392, July 10, 1973). The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

Imports covered by this review are shipments of synthetic methionine other than L methionine. Synthetic methionine is an amino acid produced in two grades, DL methionine national formula grade (used for research and pharmaceutical purposes) and L methionine feed grade (used as a food additive). Both grades of synthetic methionine are currently classifiable under item 425.0430 of the Tariff Schedules of the United States Annotated and Harmonized System item number 2922.42.50.

Analysis of Comment Received

We gave interested parties an opportunity to comment on the preliminary results. We received a comment from Mitsui & Co. Ltd.

Comment: Mitsui states there is no evidence in the public record indicating any involvement by Mitsui in Central Soya's U.S. sales. Mitsui also asks to review the proprietary data contained in the official files to determine if they contain evidence of any such involvement.

Department's Position: While the public record is sketchy, the petitioner's proprietary information indicates that Mitsui sold this merchandise to Central Soya; neither Mitsui nor Central Soya furnished any evidence to the contrary. The Department permits access to proprietary information only under the strict limitations of an administrative protective order ("APO"). Since Mitsui did not request an APO, we cannot allow it access to any proprietary information.

Final Results of the Review

Based on our analysis of the comment received, the final results of review are the same as those presented in the preliminary results of review and we determine that the following margins exist for the period July 1, 1985 through June 30, 1986:

Manufacturer/Exporter/Third-Country Reseller (country)	Margin (Percent)
Nippon Kayaku	[1] 48.0
Nippon Soda/Mitsui	[1] 3.35
Nippon Soda/Mitsui/Central Soya (Canada)	79.0
Sumitomo Chemical	[1] 0

[1] No shipments during the period.

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. The Department will issue appraisement instructions directly to the Customs Service.

Further, as provided for in section 75(a)(1) of the Tariff Act, a cash deposit of estimated antidumping duties based on the above margins shall be required for these firms.

For any future entries of this merchandise from a new exporter, not covered in this or prior administrative reviews, whose first shipments occurred after June 30, 1986 and who is unrelated to any reviewed firm or any previously reviewed firm, a cash deposit of 3.35 percent shall be required. This is in accordance with our practice of not using the most recently reviewed rate as a basis for a cash deposit for new shippers when we have based the most recent rate on best information available.

These deposit requirements are effective for all shipments of Japanese synthetic methionine entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.53a of the Commerce Regulations (19 CFR 353.53a).

Gilbert B. Kaplan,

Acting Assistant Secretary for Import Administration.

Date: October 12, 1987.

[FR Doc. 87-24236 Filed 10-19-87; 8:45 am]

BILLING CODE 3510-DS-M

[A405-071]

Preliminary Results of Antidumping Duty Administrative Review; Viscose Rayon Staple Fiber From Finland

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative review.

In response to a request by the petitioner, the Department of Commerce has conducted an administrative review of the antidumping finding on viscose rayon staple fiber from Finland. The review covers Kemira Oy Sateri and the period March 1, 1986 through February 28, 1987. The review indicates the existence of a dumping margin during the period.

As a result of the review, the Department has preliminarily determined to assess antidumping duties

equal to the calculated differences between United States price and foreign market value.

Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: October 20, 1987.

FOR FURTHER INFORMATION CONTACT: Barbara Victor or David P. Mueller, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-5222/2923.

SUPPLEMENTARY INFORMATION:

Background

On July 9, 1987 the Department of Commerce ("the Department") published in the **Federal Register** (52 FR 25899) the final results of its last administrative review of the antidumping finding on viscose rayon staple fiber from Finland (44 FR 17156, March 21, 1979). The petitioner requested in accordance with § 353.53a(a) of the Commerce Regulations that we conduct an administrative review. We published the notice of initiation on April 22, 1987 (52 FR 13268). The Department has now conducted that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

The United States has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. Congress is considering legislation to convert the United States to this Harmonized System ("HS") by January 1, 1988.

In view of this, we will be providing both the appropriate *Tariff Schedule of the United States* ("TSUS") item numbers and the appropriate HS item numbers with our product descriptions on a test basis, pending Congressional approval. As with the TSUS, the HS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

We are requesting petitioners to include the appropriate HS item numbers as well as the TSUS item numbers in all new petitions filed with the Department. A reference copy of the proposed Harmonized System schedule is available for consultation in the Central Records Unit, Room B-099, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230. Additionally, all Customs offices have reference copies, and petitioners may contact the Import Specialist at their local Customs office to consult the schedule.

Imports covered by the review are shipments of viscose rayon staple fiber, except solution dyed, in noncontinuous form, not carded, not combed and not otherwise processed, wholly of filaments (except laminated filaments and plexiform filaments), currently classifiable in TSUSA items 309.4320 and 309.4325. This product is currently classifiable under HS item numbers 5504.10.00 and 5504.90.00.

The review covers Kemira Oy Sateri and the period March 1, 1986 through February 28, 1987.

United States Price

In calculating United States price the Department used purchase price, as defined in section 772 of the Tariff Act of 1930 ("the Tariff Act"). Purchase price was based on the delivered, packed price to unrelated purchasers in the United States. We made adjustments for handling, foreign inland freight, ocean freight and insurance. No other adjustments were claimed or allowed.

Foreign Market Value

In calculating foreign market value the Department used home market price, as defined in section 773 of the Tariff Act, since there were sufficient sales of such or similar merchandise in the home market. Home market price was based on the ex-factory price to unrelated purchasers in the home market. We made adjustments for a cash discount and differences in credit expenses. No other adjustments were claimed or allowed.

Preliminary Results of the Review

As a result of our comparison of United States price to foreign market value, we preliminarily determine that the following margin exists:

Manufacturer	Time period	Margin (percent)
Kemira Oy Sateri	3/1/86-2/28/87	1.58

Interested parties may submit written comments on these preliminary results within 30 days of the date of publication of this notice, and may request disclosure and/or an administrative protective order within 5 days after the date of publication. Any request for a hearing must be made no later than 10 days after the date of publication. Any hearing, if requested, will be held 45 days after the date of publication or the first workday thereafter. The Department will publish the final results of the administrative review including the results of its analysis of any such comments or hearing.

The Department shall determine, and the Customs Service shall assess antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentage stated above. The Department will issue appraisement instructions directly to the Customs Service.

Further, as provided in section 751(a)(1) of the Tariff Act, a cash deposit of estimated antidumping duties of 1.58 percent based on the above margin shall be required. For any future entries of this merchandise from a new exporter not covered in this or prior administrative reviews, whose first shipments occurred after February 28, 1987 and who is unrelated to any reviewed firm or any other previously reviewed firm, a cash deposit of 1.58 percent shall be required. These deposit requirements are effective for all shipments of Finnish viscose rayon staple fiber entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 353.53a of the Commerce Regulations (19 CFR 353.53a).

Gilbert B. Kaplan,

Acting Assistant Secretary for Import Administration.

Date: October 12, 1987.

[FR Doc. 87-24237 Filed 10-19-87; 8:45 am]

BILLING CODE 3510-DS-M

[C-201-001]

Leather Wearing Apparel From Mexico; Final Results of Countervailing Duty Administrative Review

AGENCY: International Trade Administration, Import Administration, Commerce.

ACTION: Notice of final results of countervailing duty administrative review.

SUMMARY: On August 19, 1987, the Department of Commerce published the preliminary results of its administrative review of the countervailing duty order on leather wearing apparel from Mexico. The review covers the period July 1, 1984 through December 31, 1985 and 12 programs.

We gave interested parties an opportunity to comment on the preliminary results. We received no comments. Based on our analysis, the final results of the review are the same as the preliminary results.

EFFECTIVE DATE: October 20, 1987.

FOR FURTHER INFORMATION CONTACT: Stephen Nyschot or Paul McGarr, Office

of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230, telephone: (202) 377-2786.

SUPPLEMENTARY INFORMATION:

Background

On August 19, 1987, the Department of Commerce ("the Department") published in the **Federal Register** (52 FR 31059) then preliminary results of its administrative review of the countervailing duty order on leather wearing apparel from Mexico (46 FR 21357, April 10, 1981). The Department has now completed this administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of Review

Imports covered by this review are shipments of Mexican leather wearing apparel, currently classifiable under items 791.7620, 791.7640, and 791.7660 of the Tariff Schedules of the United States Annotated. These products include leather coats and jackets for men, boys, women, girls and infants, and other leather apparel products including leather vests, pants and shorts. Also included are outer leather shells and parts and pieces of leather wearing apparel. These products are currently classifiable under item 4203.10.40—O of the Harmonized System.

The review covers the periods July 1, 1984 through December 31, 1984 ("the 1984 period"), and January 1, 1985 through December 31, 1985 ("the 1985 period") and 12 programs: (1) FOMEX; (2) FOGAIN; (3) CEPROFI; (4) FONEI; (5) Bancomext loans; (6) Article 15 loans; (7) import duty reductions and exemptions; (8) state tax incentives; (9) NDP preferrential discounts; (10) delay of payments on loans; (11) delay of payments to PEMEX of fuel charges; and (12) CEDI.

Final Results of Review

We gave interested parties an opportunity to comment on the preliminary results. We received no comments.

As a result of our review, we determine the total bounty or grant during the 1984 period to be zero for 19 firms and 3.35 percent *ad valorum* for all other firms. We determine the total bounty or grant during the 1985 period to be zero for 20 firms and 2.96 percent *ad valorem* for all other firms.

The following 19 firms received zero benefits during the 1984 and 1985 periods:

(1) Antonio Hurtado
(2) Confecciones de Piel Reno, S.A.
(3) Creaciones Italianas de Mexico, S.A.
(4) Elegance de Baja California, S.A.
(5) Fernando Nila
(6) Fidel Ruiz
(7) Hector Garcia
(8) Jesus Hernandez
(9) Jesus Jasso
(10) Jesus Rivera
(11) Jose Mora
(12) Jose Salcedo
(13) Jose Sotelo
(14) Juan Manuel Hernandez
(15) Karen Internacional, S.A. de C.V.
(16) Manufacturas Industriales de Nogales, S.A.
(17) Raymundo Diaz
(18) Rocio Gallardo
(19) Rosa Ramos

In addition, the rate for Manufacturera Baja de Articulos de Piel was zero during the 1985 period.

The Department will instruct the Customs Service to liquidate, without regard to countervailing duties, shipments of this merchandise from the 19 firms listed above and to assess countervailing duties of 3.35 percent of the f.o.b. invoice price on shipments from all other firms exported on or after July 1, 1984 and on or before December 31, 1984, and to liquidate, without regard to countervailing duties, shipments of this merchandise from Manufacturera Baja de Articulos de Piel and the 19 firms and to assess countervailing duties of 2.96 percent of the f.o.b. invoice price on shipments from all other firms exported on or after January 1, 1985 and on or before December 31, 1985.

Further, the Department will instruct the Customs Service to waive cash deposits of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, on shipments of this merchandise from Manufacturera Baja de Articulos de Piel and 18 of the 19 firms listed above (with the exception of Creaciones Italianas de Mexico, S.A.), and, due to the change in the FOMEX interest rates and a FOGAIN loan to Creaciones Italianas de Mexico, S.A., to collect a cash deposit of estimated countervailing duties of 1.74 percent of the f.o.b. invoice price on shipments from Creaciones Italianas de Mexico, S.A. and all other firms entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. This deposit requirement and waiver shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 355.10.

Gilbert B. Kaplan,
Acting Assistant Secretary, Import Administration.
October 12, 1987.

[FR Doc. 87-24241 Filed 10-19-87; 8:45 am]
BILLING CODE 3510-DS-M

National Telecommunications and Information Administration

Frequency Management Advisory Council Meeting

AGENCY: National Telecommunications and Information Administration, Commerce.

ACTION: Notice of open meeting, frequency management advisory council.

SUMMARY: In accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2, notice is hereby given that the Frequency Management Advisory Council (FMAC) will meet from 9:30 a.m. to 4:00 p.m. on November 9, 1987, in Room 1605 at the United States Department of Commerce, 14th Street and Pennsylvania Avenue NW., Washington, DC. (Public entrance to the building is on 14th Street between Pennsylvania Avenue and Constitution Avenue.)

The Council was established on July 19, 1965. The objective of the Council is to advise the Secretary of Commerce on radio frequency spectrum allocation matters and means by which the effectiveness of Federal Government frequency management may be enhanced. The Council consists of 15 members whose knowledge of telecommunications is balanced in the functional areas of manufacturing, analysis and planning, operations, research, academia and international negotiations.

The principal agenda items for the meeting will be:

(1) ITU conference preparation for High Frequency, Mobile, Space World Administrative Radio Conferences.

(2) Proposed NTIA policy on allocation of multifunction spread spectrum systems.

(3) Proposed NTIA policy on Federal Government trunked land mobile radio.

(4) Preliminary considerations for space station frequency availability.

(5) Proposed NTIA Policy on Spectrum Management Improvement Implementation Plan.

(6) Recent developments relative to radio frequency radiation exposure guidelines.

The meeting will be open to public observations. A period will be set aside for oral comments or questions by the public which do not exceed 10 minutes each per member of the public. More extensive questions or comments should be submitted in writing before November 5, 1987. Other public statements regarding Council affairs may be submitted at any time before or after the meeting. Approximately 20 seats will be available for the public on a first-come first-served basis.

Copies of the minutes will be available on request 30 days after the meeting.

FOR FURTHER INFORMATION CONTACT: Inquiries may be addressed to the Executive Secretary, FMAC, Mr. Michael W. Allen, National Telecommunications and Information Administration, Room 4706, U.S. Department of Commerce, 14th Street and Pennsylvania Avenue NW., Washington, DC 20230, telephone 202-377-0805.

Date: October 15, 1987.

Michael W. Allen,

Executive Secretary, FMAC, National Telecommunications and Information Administration.

[FR Doc. 87-24178 Filed 10-19-87; 8:45 am]

BILLING CODE 3510-60-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Amendment of Import Levels and a Guaranteed Access Level for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Jamaica

October 15, 1987.

The Chairman of the Committee for the Implementation of Textile Agreements (CITA), under the authority contained in E.O. 11651 of March 3, 1972, as amended, and the President's February 20, 1986 announcement of a Special Access Program for textile products assembled in participating Caribbean Basin beneficiary countries from fabric formed and cut in the United States, pursuant to the requirements set forth in 51 FR 21208 (June 11, 1986) and 52 FR 26057 (July 10, 1987), has issued the directive published below to the Commissioner of Customs to be effective on October 21, 1987. For further information contact Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, please refer to the Quota Status Reports which are posted on the bulletin boards of each Customs port. For information on embargoes and quota re-openings, please call (202) 377-3715.

Summary

In the letter published below, the Chairman of the Committee for the Implementation of Textile Agreements directs the Commissioner of Customs to increase the previously established import limits for Categories 338/339/638/639 and 347/348/647/648, produced or manufactured in Jamaica and exported during the sixteen-month period which began on September 1, 1986 and extends through December 31, 1987, and the guaranteed access level for man-made fiber textile products in Category 632, for the period June 1, 1987 through December 31, 1987.

Background

A CITA directive dated March 27, 1987 (52 FR 10398) established, among other things, import limits for certain cotton and man-made fiber textile products in Categories 338/339/638/639 and 347/348/647/648, produced or manufactured in Jamaica and exported during the sixteen-month period which began September 1, 1986 and extends through December 31, 1987.

A further directive dated April 16, 1987 (52 FR 13281) established guaranteed access levels for properly certified textile products in Category 632, among others, assembled in Jamaica from fabric formed and cut in the United States.

During consultations held on July 31, 1987 between the Governments of the United States and Jamaica, agreement was reached to further amend their Bilateral Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textile Agreement of August 27, 1986, as amended, to convert the designated consultation level for cotton and man-made fiber textile products in Category 338/339/638/639 to a specific limit and to increase the designated consultation level for cotton and man-made fiber textile products in Category 347/348/647/648, produced or manufactured in Jamaica and exported during the sixteen-month period which began on September 1, 1986 and extends through December 31, 1987.

In addition, the two governments further agreed to increase the guaranteed access level for man-made fiber textile products in Category 632 for properly certified textile products assembled in Jamaica from fabrics formed and cut in the United States during the period which began on June 1, 1987 and extends through December 31, 1987.

A description of the textile categories in terms of T.S.U.S.A. numbers was published in the **Federal Register** on December 13, 1982 (47 FR 55709), as amended on April 7, 1983 (48 FR 15175), May 3, 1983 (48 FR 19924), December 14, 1983, (48 FR 55607), December 30, 1983 (48 FR 57584), April 4, 1984 (49 FR 13397), June 28, 1984 (49 FR 26622), July 16, 1984 (49 FR 28754), November 9, 1984 (49 FR 44782), July 14, 1986 (51 FR 25386), July 29, 1986 (51 FR 27068) and in Statistical Headnote 5, Schedule 3 of the Tariff Schedules of the United States Annotated (1987).

Adoption by the United States of the Harmonized Commodity Code (HCC) may result in some changes in the categorization of textile products covered by this notice. Notice of any necessary adjustments to the limits affected by adoption of the HCC will be published in the **Federal Register.**

Arthur Garel,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

October 15, 1987.

Commissioner of Customs,

Department of the Treasury, Washington, D.C. 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive of March 27, 1987, concerning certain cotton and man-made fiber textile products, produced or manufactured in Jamaica and exported during the sixteen-month period which began on September 1, 1986 and extends through December 31, 1987.

Effective on October 21, 1987 the directive of March 27, 1987 is hereby amended to increase the levels for cotton and man-made fiber textile products in the following categories:[1]

Category	Amended 16-month level
338/339/638/639	575,000 dozen.
347/348/647/648	725,000 dozen.

This directive also amends, but does not cancel, the directive of April 16, 1987, concerning certain cotton and man-made fiber textile products, exported from Jamaica which are not certified in accordance with the certification requirements for products assembled in Jamaica from fabric formed and cut in the United States.

Effective on October 21, 1987, the directive of April 16, 1987 is hereby amended to increase the guaranteed access level for man-made fiber textile products in Category 632 for the agreement period which began on June 1, 1987 and extends through December 31, 1987 to a level of 2,000,000 dozen pairs.

[1] The limits have not been adjusted to reflect any imports exported after August 31, 1986.

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,

Arthur Garel,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 87-24217 Filed 10-19-87; 8:45 am]

BILLING CODE 3510-DR-M

DEPARTMENT OF DEFENSE

Department of the Air Force

USAF Scientific Advisory Board; Meeting

October 13, 1987.

The USAF Scientific Advisory Board Minuteman III Penetration Aids Study will meet on 13 November 1987, at the Pentagon, Washington, DC from 8:00 a.m. to 5:00 p.m. The purpose of this meeting is to review, discuss and evaluate the effectiveness of penetration aids being developed for the Minuteman III.

This meeting will involve discussions of classified defense matters listed in section 552b(c) of Title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

For further information, contact the Scientific Advisory Board Secretariat at 202-697-4811.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 87-24200 Filed 10-19-87; 8:45 am]

BILLING CODE 3910-01-M

Department of the Army

National Board for the Promotion of Rifle Practice; Open Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), announcement is made of the following committee meeting:

Name of Committee: National Board for the Promotion of Rifle Practice.

Date of Meeting: December 8, 1987.

Place: Ramada Renaissance Hotel, Washington Dulles International Airport, 13869-71 Park Center Road, Herndon, Virginia 22071.

Time: 1330-1600.

Proposed Agenda

1. Open Prayer and Pledge of Allegiance to the Flag.
2. **Federal Register** Notice of the Meeting.
3. Roll Call.
4. Rewrite of regulations.
5. Report on rifles in Excellance in Competition (EIC) Matches.
6. Update on inclusion of the 9mm pistol in EIC competition.
7. Update on ammunition used in EIC matches.
8. Update on conduct of the 1987 National Matches.
9. Report on revision of the Small Arms Firing School Training.
10. Update on issue, receipt, and storage of small arms ammunition by Civilian Marksmanship Program organizations.
11. Report on the National Matches.
12. Report on the National Guard Youth Program.
13. Report on the Budget Review/Presentation.
14. Closing Prayer.

This meeting is open to the public.

Persons desiring to attend the meeting should contact Ms. Sue E. Keown or Ms. Rita G. Cooper at (202) 272-0810 prior to 23 November 1987 to arrange admission.

M.S. Gilchrist,

Colonel, Armor Executive Officer, NBPRP.

[FR Doc. 87-24205 Filed 10-19-87; 8:45 pm]

BILLING CODE 3710-08-M

National Board for the Promotion of Rifle Practice Budget Committee; Open Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), announcement is made of the following committee meeting:

Name of Committee: National Board for the Promotion of Rifle Practice Budget Committee.

Date of Meeting: December 8, 1987.

Place: Ramada Renaissance Hotel, Washington Dulles International Airport, 13869-71 Park Center Road, Herndon, Virginia 22071.

Time: 0930-1130.

Proposed Agenda

1. **Federal Register** Notice of the Meeting.
2. Roll Call.
3. Review of Fiscal Year 1987 Budget.
4. Gramm Rudman Holling.
5. Support Agreements.
6. Benefits of Civilian Marksmanship Support Detachment Under the Director of Civilian Markmanship.
7. Cost of GBL's for Leg Matches.
8. Fiscal Year 1988 Budget and Obligation Plan.
9. Fiscal Year 1899-90 and Out-Year Budgets.

This meeting is open to the public.

Persons desiring to attend the meeting should contact Ms. Sue E. Keown or Ms Rita G. Cooper at (202) 272-0810 prior to 23 November 1987 to arrange admission.

M. S. Gilchrist,

Colonel, Armor Executive Officer, NBPRP.

[FR Doc. 87-24204 Filed 10-19-87; 8:45 am]

BILLING CODE 3710-08-M

DEPARTMENT OF EDUCATION

Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Director, Information Technology Services, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATE: Interested persons are invited to submit comments on or before November 19, 1987.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: 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 Margaret B. Webster, Department of Education, 400 Maryland Avenue SW., Room 5624, Regional Office Building 3, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Margaret B. Webster, (202) 732-3915.

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, Information Technology Services, 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) Agency form

number (if any); (4) Frequency of collection; (5) The affected public; (6) Reporting burden; and/or (7) Recordkeeping burden; and (8) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Margaret Webster at the address specified above.

Dated: October 15, 1987.

Carlos U. Rice,

Director for Information Technology Services.

Office of Special Education and Rehabilitative Services

Type of Review: EXTENSION
Title: Application for the RSA Discretionary Program
Agency Form Number: RSA 424
Frequency: Annually
Affected Public: State or local governments; businesses or other for-profit; non-profit institutions
Reporting Burden:
Responses: 1170
Burden Hours: 46,800
Recordkeeping:
Recordkeepers: 0
Burden Hours: 0
Abstract: This form will be used by States and public or non-profit organizations to apply for grants under the Rehabilitation Act of 1873, as amended. The Department uses the application information to make grant awards.

Office of Elementary and Secondary Education

Type of Review: NEW
Title: Application for Assistance under the Stewart B. McKinney Homeless Assistance Act
Agency Form Number: A10–14P
Frequency: Annually
Affected Public: State or local governments
Reporting Burden:
Responses: 52
Burden Hours: 26
Recordkeeping:
Recordkeepers: 52
Burden Hours: 520
Abstract: This form will be used by State agencies to apply for funding under the Stewart B. McKinney Homeless Assistance Act. The Department uses the information collected to make grant awards.

Office of Educational Research and Improvement

Type of Review: NEW
Title: FRSS—Survey on Vocational Education
Agency Form Number: G50–41P
Frequency: Nonrecurring
Affected Public: State or local governments
Reporting Burden:
Responses: 51
Burden Hours: 34
Recordkeeing:
Recordkeepers: 0
Burden Hours: 0
Abstract: The purpose of this survey is to collect current information on how States allocate funds under the Perkins Act and how they administer Vocational Education programs. The survey is in direct response to a Congressional mandate to describe and evaluate the effects of the Perkins Act and make recommendations for the reauthorization of Federal support to Vocational Education.

Type of Review: NEW
Title: Teacher Status Information for the Schools and Staffing Survey's Teacher Follow-Up Survey
Agency Form Number: G50–42P
Frequency: On occasion
Affected Public: Individuals or households; State or local governments; businesses or other for-profit; non-profit institutions; small businesses or organizations
Reporting Burden:
Responses: 276
Burden Hours: 69
Recordkeeping:
Recordkeepers: 0
Burden Hours: 0
Abstract: The survey will obtain teacher status information from schools that participated in the 1987 Schools and Staffing field test. The Department will use this information for sampling purposes.

Office of Management

Type of Review: REINSTATEMENT
Title: GEPA 406A: State Uses of Federal Funds Under State-Administered Federal Education Programs
Agency Form Number: P75–7P
Frequency: Annually
Affected Public: State or local governments
Reporting Burden:
Responses: 51
Burden Hours: 2,550
Recordkeeping Burden:
Recordkeepers: 0
Burden Hours: 0
Abstract: This survey will collect information from State educational agencies on how Federal funds are distributed under Federal State-administered education programs. The Department uses this information for an annual report to Congress mandated by section 406A of the General Education Provisions Act.

[FR Doc. 87–24229 Filed 10–19–87; 8:45 am]
BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

National Petroleum Council; Coordinating Subcommittee on Petroleum Storage and Transportation; Meeting

Notice is hereby given of the following meeting:

Name: Coordinating Subcommittee on Petroleum Storage and Transportation of the National Petroleum Council.

Date and Time: Friday, November 6, 1987, 9:00 a.m.

Place: Amoco Oil Company, Rooms Two & Three, Third Floor, 200 East Randolph Drive, Chicago, Illinois.

Contact: Margie D. Biggerstaff, U.S. Department of Energy, Office of Fossil Energy (FE–1), Washington, DC 20585, Telephone: 202/586–4695.

Purpose of the Parent Council: To provide advice, information, and recommendations to the Secretary of Energy on matters relating to oil and gas or the oil and gas industries.

Purpose of the Meeting: Discuss study assignment & task group assignments.

Tentative Agenda

—Opening remarks by the Chairman and Government Cochairman.
—Discuss study assignment.
—Review task group assignments.
—Discuss any other matters pertinent to the overall assignment from the Secretary of Energy.

Public Participation: The meeting is open to the public. The Chairman of the Subcommittee on Petroleum Storage & Transportation is empowered to conduct the meeting in a fashion that will, in his judgment, facilitate the orderly conduct of business. Any member of the public who wishes to file a written statement with the Subcommittee will be permitted to do so, either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Ms. Margie D. Biggerstaff at the address or telephone number listed above. Requests must be received at least 5 days prior to the meeting and reasonable provisions will be made to include the presentation on the agenda.

Transcripts: Available for public review and copying at the Public Reading Room, Room 1E–190, Forrestal Building, 1000 Independence Avenue SW., Washington, DC, between 9:00 a.m. and 4:00 p.m. Monday through Friday, except Federal holidays.

J. Allen Wampler,

Assistant Secretary, Fossil Energy.

[FR Doc. 87–24251 Filed 10–19–87; 8:45 am]
BILLING CODE 6450–01–M

Economic Regulatory Administration

[ERA Docket No. 87-28-NG]

Tennessee Gas Pipeline Co.; Order Approving Authorization To Import Natural Gas

AGENCY: Economic Regulatory Administration, DOE.

ACTION: Notice of order granting authorization to import certain quantities of natural gas from Canada and conditionally authorizing import of certain additional quantities.

SUMMARY: The Economic Regulatory Administration (ERA) of the Deparment of Energy (DOE) gives notice that it has issued an order in ERA Docket No 87-28-NG granting authorization to Tennessee Gas Pipeline Company (Tennessee) to import from TransCanada PipeLines Limited progressively increasing quantities of Canadian natural gas—from 5,000 to 125,000 Mcf per day—for a scheduled term from November 1, 1987, to October 31, 2002. Except for the first 5000 Mcf per day to be imported through existing facilities, the order is conditioned upon the completion and approval by the DOE of an environmental review of the construction of the new facilities needed to transport the additional quantities authorized for import during the later years of the term.

A copy of this order is available for inspection and copying in the Natural Gas Division Docket Room, GA-076, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-9478. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, October 9, 1987.

Constance L. Buckley,

Director, Natural Gas Division, Office of Fuels Programs, Economic Regulatory Administration.

[FR Doc. 87-24252 Filed 10-19-87; 8:45 am]

BILLING CODE 6450-01-M

Proposed Remedial Orders; Clark Oil and Refining Corp., et al.

AGENCY: Economic Regulatory Administration, DOE.

ACTION: Notice of issuance of proposed remedial orders to Clark Oil & Refining Corporation; Apex Oil Company; Novelly Oil Company; Goldstein Oil Company; and Apex Holding Company.

I. Introduction

Pursuant to 10 CFR 205.192 the Economic Regulatory Administration ("ERA"), Department of Energy ("DOE") hereby gives notice that four Proposed Remedial Orders ("PROs") were issued on July 8, 1987 to Clark Oil & Refining Corporation, Apex Oil Company, Novelly Oil Company, Goldstein Oil Company and Apex Holding Company, 8182 Maryland Avenue, Clayton, Missouri 63105. The impact of the alleged violations is nationwide. In accordance with 10 CFR 205.192, a copy of the Proposed Remedial Orders with confidential information, if any, deleted, may be obtained from the DOE Freedom of Information Room, U.S. Department of Energy, 1000 Independence Avenue, SW., Room 1E-190, Washington, DC 20585.

Clark Oil & Refining Corporation ("Clark") is a refiner engaged in the production and the refining of crude oil and the marketing of petroleum products. Clark was therefore subject to the Mandatory Petroleum Price and Allocation Regulations ("Regulations") which were in effect until January 28, 1981. The ERA conducted an audit of Clark Oil & Refining Corporation and determined that the firm violated the Regulations. The ERA has reason to believe that Clark Oil & Refining Corporation and the other entities named herein share liability for the violations alleged in the PROs. ERA discusses below the proposed orders for which notice of issuance is hereby given, and also discusses, as pertinent, remedial portions of a proposed order previously issued.

ERA recognizes that the total amount of Clark's refund liability cannot be finally determined until all of the cost-related cases are decided.

II. Issuance of Proposed Remedial Orders

1. Proposed Remedial Order No. RCKB00101

This PRO charges Clark with failing to establish and maintain appropriate classes of purchaser and May 15, 1973 weighted average selling prices applicable to those classes, during the period September 1973 through December 1979. As a remedy for these violations, the PRO directs Clark to recalculate maximum allowable prices (determining May 15, 1973 prices in accordance with the PRO), recompute lawful recoveries consistent with the equal application/deemed recovery rule, refile its Refiners Monthly Cost Allocation Reports, and identify and refund any resulting overcharge. As an alternative remedy, the PRO proposes that Clark refund the differences between the correct and incorrect May 15, 1973 prices multiplied by the applicable sales volumes, totalling $45,170,345, plus interest. As a third alternative, the PRO proposes that Clark perform a recalculation for the period prior to September 1, 1974, and refund the differences between correct and incorrect May 15, 1973 prices for the post-September 1, 1974 period.

2. Proposed Remedial Order No. RCKL000A1

This PRO alleges that Clark improperly calculated certain non-product costs in the areas of interest, overhead, maintenance, additives, depreciation, refinery fuel, refinery labor, taxes, pollution control, and utilities. For the period September 1973 through December 1979, these improper calculations resulted in an overstatement of costs of approximately $40,353,000. This PRO also alleges that Clark's improper calculation of its non-product costs likely continued throughout 1980 until the end of the regulatory period on January 28, 1981. The violation amount for this period is unquantified.

As a remedy for these violations, in the PRO, ERA has recalculated Clark's non-product cost increases for the audit period and has directed Clark to submit new schedules using the recomputed costs and to refund any overcharges, plus interest, generated as a result of the recalculations. In addition, the PRO requires Clark to provide appropriate information and make necessary recalculations for the post-audit period.

3. Proposed Remedial Order No. RCKH016A1

This PRO alleges that Clark improperly failed to report and excluded its out-charter ton-miles in calculating its "cost-per-ton-mile," which was then carried forward to distort other aspects of the net-cost formula, and ultimately the "A" factor. For the period 1977 through 1979, these improprieties resulted in an overstatement of foreign crude oil marine transportation costs of $65,635,938.00. This PRO alleges that Clark failed to report, and excluded out-charter ton-miles from its calculations throughout 1980 until the end of the regulatory period on January 28, 1981. The violation for this period is unquantified.

As a remedy for these violations, in the PRO, ERA has recalculated Clark's foreign crude oil marine transportation costs for the audit period and has directed Clark to submit new schedules using the recomputed costs and to refund any overcharges, plus interest, generated as a result of the recalculations. In addition the PRO

requires Clark to provide appropriate information and make necessary recalculations for the post-audit period.

4. Proposed Remedial Order No. RCKH001A1

This PRO alleges that Clark paid bribes to influence foreign officials to give the firm preferential treatment in connection with its purchases of crude oil and that Clark improperly included these payments in its calculations of its landed costs of crude oil.

The proposed order would require that Clark recalculate its costs of crude oil to eliminate the amount of these payments, determine the amount of overcharges, if any, that resulted from its inclusion of the subject amount in its cost calculations, and make any necessary refunds.

Previously Issued Proposed Remedial Order

1. Proposed Remedial Order No. RCKH00300 (Office of Hearings and Appeals No. HRO-0249) (Federal Energy Regulatory Commission No. RO86-5-000, appeal withdrawn October 1, 1986)

This PRO was issued to Clark Oil & Refining Corporation and Apex Oil Company on April 30, 1979, as amended on August 1, 1984. On October 10, 1985, the Office of Hearings and Appeals ("OHA") issued a Remedial Order, 13 DOE ¶ 83,039 (1985), finding that Clark Oil & Refining Corporation failed to reduce its crude costs to reflect a payment of $82,500 to Clark by Texaco for use of Clark's fee-free licenses to import foreign crude oil in December 1973. In addition to the Remedial Order, OHA issued two Special Report Orders requiring Clark to revise its DOE forms to delete the $82,500 in overstated crude costs and to search its records for additional information relating to other sales or exchanges of Clark's fee-free import licenses.

On September 25, 1986, Apex Oil Company and Clark Oil & Refining Corporation ("Apex/Clark") executed an agreement with DOE providing that (1) Apex/Clark would perform a reduced search of its records for documents pertaining to other exchanges or sales of fee-free import licenses and provide such information to DOE within 12 months of its notice to withdraw its FERC appeals, which was filed on October 1, 1986; and (2) Within six months of the date of any Remedial Order issued by OHA in Case No. RCKB00101, or within two years of the filing of the notice to withdraw its FERC appeal, Apex/Clark will adjust its DOE forms to reflect the $82,500 in overstated crude costs.

IV. Notice of Objection

In accordance with 10 CFR 205.193, any aggrieved person may file a Notice of Objection to any or all of the proposed orders described in Section II above with DOE's Office of Hearings and Appeals, within 15 days after the date of this publication. A person who fails to file a Notice of Objection shall be deemed to have admitted the findings of fact and conclusions of law stated in the proposed orders. If a Notice of Objection is not filed in accordance with § 205.193, the proposed order may be issued as a final Remedial Order.

All Notices of Objection, Statements of Objections, Responses, Replies, Motions, and other documents required to be filed with the Office of Hearings and Appeals shall be sent to: Office of Hearings and Appeals, U.S. Department of Energy, Room 1E-234, 1000 Independence Avenue SW., Washington, DC 20585.

Copies of all Notices of Objection, Statements of Objections and all other documents filed by an aggrieved person or other participant shall be served on the same day as filed, on the following person in each of the identified PRO proceedings pursuant to 10 CFR 205.193(c): Jeffrey R. Whieldon, Associate Solicitor, Economic Regulatory Administration, U.S. Department of Energy, 1000 Independence Avenue SW., Room 3H-017, Washington, DC 20585.

Issued in Washington, DC, this 7th day of October 1987.

Marshall A. Staunton,

Administrator, Economic Regulatory Administration.

[FR Doc. 87-24253 Filed 10-19-87; 8:45 am]

BILLING CODE 6450-01-M

Office of Energy Research

Energy Research Advisory Board; Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770), notice is hereby given of the following meeting:

Date and Time: November 4, 1987—9:00 a.m.-5:00 p.m., November 5, 1987—9:00 a.m.-12:30 p.m.

Place: Department of Energy, 1000 Independence Avenue SW., Room 8E-089 Washington, DC 20585

Contact: John E. Metzler, Executive Director, Energy Research Advisory Board, Department of Energy, Office of Energy Research, ER-6, 1000 Independence Avenue SW., Washington, DC 20585 Telephone: (202) 586-5444

Purpose of the Board: To advise the Department of Energy (DOE) on the overall research and development conducted in DOE and to provide long-range guidance in these areas to the Department.

Tentative Agenda: The specific agenda items and times are subject to last minute changes. Visitors planning to attend for a specific topic should confirm the time prior to and during the date of the meeting.

November 4, 1987

9:00 a.m. Business Items
- —Approval of August Meeting Minutes
- —Schedule of ERAB Meetings for 1988
- —Follow-up on the Geosciences Report
- —Follow-up on the Physics Report
- —Follow-up on the Magnetic Fusion Report

9:30 a.m. Carbon Dioxide and the Greenhouse Effect
10:30 a.m. Break
10:45 a.m. Alternative Fuels Study
11:30 a.m Briefing on DOE Activities of Interest to ERAB
12:00 Noon Lunch
1:00 p.m. Review of Energy Competitiveness Study
3:15 p.m. Break
3:30 p.m. Review of Energy Competitiveness Study
4:50 p.m. Public Comment (10 minute rule)
5:00 p.m. Adjourn

November 5, 1987

9:00 a.m. Progress on Research and Technology Utilization Study
10:00 a.m. Progress on Education Panel
11:00 a.m. Concluding Discussion on R&D Initiatives for Energy Competitiveness
11:45 a.m. Other Business
12:20 p.m. Public Comment (10 minute rule)
12:30 p.m. Adjourn

Public Participation: The meeting is open to the public. The Chairman of the Board is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contract John Metzler at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation on the agenda.

Transcripts: The transcripts of the meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E-190, Forrestal Building, 1000 Independence Aveune, SW., Washington, DC, between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal Holidays.

Issued at Washington, DC, on October 15, 1987.

J. Robert Franklin,

Deputy Advisory Committee Management Officer.

[FR Doc. 87-24254 Filed 10-19-87; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket Nos. ER88-15-000, et al.]

Duquesne Light Co., et al.; Electric Rate and Corporate Regulation Filings

October 9, 1987.

Taken notice that the following filings have been made with the Commission:

1. Duquesne Light Company

[Docket No. ER88-15-000]

Take notice that on October 2, 1987, Duquesne Light Company (DLC) tendered for filing a proposed change in its FERC Municipal Electric Resale Service Tariff for Pitcairn, Pennsylvania. DLC requested that the proposed rate schedule change become effective as of July 1, 1987. The proposed change would decrease revenues from jurisdictional sales by $12,434.33, based on the twelve-month period ending June 30, 1987, to reflect the decrease in the Federal income tax rate.

DLC states that copies of the filing were mailed to the Pennsylvania Public Utility Commission and to the Secretary of the Borough of Pitcairn on September 30, 1987.

Comment date: October 26, 1987, in accordance with the Standard Paragraph E at the end of this notice.

2. Consolidated Edison Company of New York, Inc.

[Docket No. ER88-12-000]

Take notice that on October 5, 1987, Consolidated Edison Company of New York, Inc. (Con Edison) tendered for filing an agreement dated April 24, 1987 and an implementing rate schedule providing for the delivery by Con Edison of power and energy purchased by the County of Westchester Public Utility Service Agency (COWPUSA) and sold by COWPUSA to COWPUSA's commercial and industrial electricity consumers in Westchester County in New York State. Under the agreement, Con Edison will deliver no more than ten megawatts of firm power and associated energy to no more than ten industrial or commercial electric consumers in Westchester County.

The rate schedule filed by Con Edison was approved by the New York State Pubic Service Commission (NYPSC) by orders dated July 16, 1987 and September 9, 1987. Con Edison is requesting permission to put this rate schedule into effect as of July 17, 1987, the date the NYPSC authorized the schedule to go into effect.

A copy of this filing has been served upon COWPUSA and the NYPSC.

Comment date: October 26, 1987, in accordance with Standard Paragraph E at the end of this notice.

3. Idaho Power Company

[Docket No. ER88-13-000]

Take notice that on October 5, 1987, Idaho Power Company tendered for filing in compliance with the Federal Energy Regulatory Commission's Order of October 7, 1978, a summary of sales made under the Company's 1st Revised FERC Electric Tariff, Volume No. 1 (Supersedes Original Volume No. 1) during August 1987, along with cost justification for the rate charged. This filing includes the following supplements:

Pacific Power & Light Co., Supplement No. 22
Utah Power & Light Co., Supplement No. 68
Montana Power Co., Supplement No. 54
Washington Water Power Co., Supplement No. 52
Sierra Pacific Power & Light Co., Supplement No. 67
Puget Sound Power & Light Co., Supplement No. 31
Pacific Gas & Electric Co., Supplement No. 27
Portland General Electric Co., Supplement No. 56

Comment date: October 26, 1987, in accordance with Standard Paragraph E at the end of this notice.

4. Oklahoma Gas and Electric Company

[Docket No. ER87-627-000]

Take notice that on October 5, 1987, Oklahoma Gas and Electric Company (OG&E), P.O. Box 321, Oklahoma City, Oklahoma, 73101, tendered for filing Revised Sheet Nos. 4, 7 and 11 to its FERC ELECTRIC TARIFF, 1st Revised Volume No. 1. The revised rates are contained in proposed Rate Schedules WM-1, WM-2, and WC-1 applicable to municipalities and cooperatives, respectively. Also proposed is a change in the rates charged for wheeling and transmission service agreements with Southwestern Power Administration (SWPA) and Western Farmers Electric Cooperative, Inc., (WFEC) and services provided by the Company to the Oklahoma Municipal Power Authority (OMPA).

The decreased rates that have been proposed by the Company are being made to reflect the decrease in the corporate income tax rate pursuant to the Tax Reform Act of 1986, and are proposed to be effective with usage on and after July 1, 1987

OG&E states that copies of the tariff, rate schedules and the entire filing have been sent to its municipal and cooperative customers, to SWPA, to WFEC, and to OMPA. A complete set of the filing has also been sent to the Corporation Commission of the State of Oklahoma and the Arkansas Public Service Commision.

Comment date: October 26, 1987, in accordance with Standard Paragraph E at the end of this notice.

5. Southwestern Electric Power Company

[Docket No. ER88-14-000]

Take notice that on October 5, 1987, Southwestern Electric Power Company (SWEPCO), tendered for filing pursuant to the Commission's Order No. 475, a reduction in its demand charge for full requirements service applicable to the City of Siloam Springs, Arkansas to become effective July 1, 1987. The decrease reflects the impact on SWEPCO's revenue requirements of the lowered Federal corporate income rate enacted by the Tax Reform Act of 1986. SWEPCO calculated such impact pursuant to formulas contained in § 35.27 of the Commission's regulations. Had the proposed demand rate been in effect for the twelve months ended June 30, 1987, SWEPCO would have collected approximately $300,600 less in revenues for Siloam Springs in such period.

Comment date: October 26, 1987, in accordance with Standard Paragraph E at the end of this notice.

6. Wisconsin Electric power Company, and Upper Peninsula Power Company

[Docket No. EC88-3-000]

Taken notice that on October 6, 1987, Wisconsin Electric Power Company (Wisconsin Electric) and Upper Peninsula Power Company (Power Company) tendered for filing an application for an order of the Federal Energy Regulatory Commission pursuant to section 203 of the Federal Power Act authorizing Wisconsin Electric to purchase from Power Company certain of its transmission facilities which are

used primarily for the purpose of transmitting power and energy from Upper Peninsula Generating Company's Presque Isle Power Plant. The facilities which will be purchased for $3.8 million will have an estimated net book value of approximately $1.5 million as of December 31, 1987. the applicants state that the transaction is necessary to implement Wisconsin Electric intention to purchase the Presque Isle Power Plant from Generating Company and integrate it into its systems.

Comment date: October 26, 1987, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb

Secretary.

[FR Doc. 87-24197 Filed 10-19-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. EL87-67-000]

Availability of Staff Working Paper; Regulation of Independent Power Producers

October 9, 1987.

Notice is hereby given that a preliminary staff working paper exploring the technical policy issues associated with regulations of independent power producers will be available no later than Wednesday, October 14, 1987 This paper was previously expected to be released by October 9, 1987

Kenneth F. Plumb,

Secretary

[FR Doc. 87-24272 Filed 10-19-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. QF87-679-000]

Application For Commission Certification of Qualifying Status of a Cogeneration Facility; Cogeneration Partners of America

October 8, 1987.

On September 23, 1987, Cogeneration Partners of America (Applicant), of Metroview Corporate Center, 333 Thornall Street, Edison, New Jersey 08837 submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration will be located at the Bellevue, Broad and Walnut Streets, Philadelphia, Pennsylvania 19102. The facility will consist of one dual fuel engine generator, and a heat recovery steam generator. Thermal energy recovered from the facility will be used for heating and cooling of the office/hotel complex located in the historic district of Philadelphia. The electric power production capacity of the facility will be 1,558 kW. The primary energy source will be natural gas. The installation of the facility is expected to commence on or about November 1987.

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition 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. All such petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on the applicant. 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 petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc 87-24273 Filed 10-19-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. QF87-265-001]

Application for Commission Recertification of Qualifying Status of a Cogeneration Facility; Indeck Energy Services, Inc.

October 9, 1987.

On September 21, 1987, Indeck Energy Service, Inc. (Applicant), of 1111 South Willis Avenue, Wheeling, Illinois 60090 submitted for filing an application for recertification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility will be located in Buffalo, New York and will consist of a combustion turbine generator, a heat recovery steam generator, and an extraction/condensing turbine generator. Thermal energy recovered from the facility in the form of steam will be used for space heating and as process steam in the production of plastic film and sheet products. The electric power production capacity of the facility as originally proposed was to be 49.0 MW. The primary energy source will be natural gas. The facility is expected to go into service February 1, 1989.

By order issued May 27, 1987, the Director of the Office of Electric Power Regulation granted certification of the facility as a cogeneration facility under Docket No. QF87-265-000.

The recertification is requested due to changes in the net electric power production capacity and process steam characteristics. The net electric power production capacity will increase to 49.9 MW.

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition 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. All such petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on the applicant. 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 petition to intervene. Copies of this filing are on file

with the Commission and are available for public inspection.

Kennerth F. Plumb,

Secretary.

[FR Doc. 87-24274 Filed 10-19-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP88-007-000]

Application; East Tennessee Natural Gas Co.

October 15, 1987.

Take notice that on October 2, 1987, East Tennessee Natural Gas Company (East Tennessee) P.O. Box 10245, Knoxville, Tennessee 37939-0245, filed an application in Docket No. CP88-007-000 pursuant to section 7 of the Natural Gas Act requesting authority to construct and operate facilities and to rearrange the maximum daily quantities of its customers and to increase and decrease the contract authorizations of some of its customers, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

East Tennessee proposes to rearrange the maximum daily quantities (MDQ) of some of its customers within existing contract demand and to increase and decrease the MDQ's of other customers by a total of 6,575 Mcf. A summary of the changes is attached as an appendix.

East Tennessee states that it would be required to construct and operate 0.63 miles of six-inch loop in Blount County, Tennessee to implement the proposed rearrangement of MDQ's. East Tennessee estimates the cost of the facilities to be $220,000, which would be financed from funds on hand.

East Tennessee indicates it would supply the increased requirements from deliverability from local producers.

Any person desiring to be heard or to make any protest with reference to said application should on or before November 5, 1987, filed with 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 participates as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Producer, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for East Tennessee to appear or be represented at the hearing.

Kenneth F. Plumb,

Secretary.

EAST TENNESSEE NATURAL GAS COMPANY PRESENT AND PROPOSED REARRANGEMENT OF MAXIMUM DAILY QUANTITIES (MDQ) BY DELIVERY POINTS AND CHANGES IN CONTRACT DEMANDS

	Column (1)	(2)	(3)	(4)	(5)
Line No.	Customer	Delivery point	Present (CP86-505) MDQ	Increase (decrease)	Proposed MDQ and contract demand
1	Town of Algood	Algood	500	50	550
2	Total—Contract Demand		500	50	550
3	Chattanooga Gas Company	Chattanooga East	12,000	(2,000)	10,000
4		Chattanooga North	10,000		10,000
5		Signal Mountain	3,000		3,000
6		Volunteer Ordinance	1,000		1,000
7		Cleveland	16,000		16,000
8		Chattanooga Access	3,000		3,000
9		Ooltewah	2,000		2,000
10	Total—Contract Demand		47,000	(2,000)	45,000
11	City of Cookeville	Cookeville	5,080	120	5,200
	Total—Contract Demand		5,080	120	5,200
12	Citizens Gas Utility District	Oneida	1,000	(1,000)	0
13		Wartburg	1,742	1,000	2,742
14	Total—Contract Demand		2,742	0	2,742
15	Elk River Public Utility District	Tullahoma	4,055		4,055
16		Estill Springs	4,450	623	5,073
17		AEDC	1,012		1,012
18		Sewanee	1,260		1,260
19	Total—Contract Demand		10,777	623	11,400
20	City of Jamestown	Jamestown	1,300	100	1,400
21	Total—Contract Demand		1,300	100	1,400
22	City of Lenoir Cioty	Lenoir City	3,453	363	3,816
23	Total—Contract Demand		3,453	363	3,816
24	City of Livingston	Livingston	1,751	110	1,861
25	Total—Contract Demand		1,751	110	1,861
26	City of Loudon	Loudon	3,700		3,700
27		Vonore	300	100	400
28	Total—Contract Demand		4,000	100	4,100
29	Town of Madisonville	Madisonville	1,000	50	1,050
30	Total—Contract Demand		1,000	50	1,050
31	Mt. Pleasant Gas System	Mt. Pleasant #1	1,371	369	1,740

EAST TENNESSEE NATURAL GAS COMPANY PRESENT AND PROPOSED REARRANGEMENT OF MAXIMUM DAILY QUANTITIES (MDQ) BY DELIVERY POINTS AND CHANGES IN CONTRACT DEMANDS—Continued

	Column (1)	(2)	(3)	(4)	(5)
Line No.	Customer	Delivery point	Present (CP86-505) MDQ	Increase (decrease)	Proposed MDQ and contract demand
32		Mt. Pleasant #2	410	350	760
33	Total—Contract Demand		1,781	719	2,500
34	City of Rockwood	Rockwood	2,852	100	2,952
35	Total—Contract Demand		2,852	100	2,952
36	City of South Pittsburg	South Pittsburg #1	3,155		3,155
37		South Pittsburg #2		800	800
38	Total—Contract Demand		3,155	800	3,955
39	City of Sweetwater	Sweetwater	2,680	120	2,800
40	Total—Contract Demand		2,680	120	2,800
41	United Cities Gas Company—Zone I	Columbia West	2,280	65	2,345
42		Columbia North	4,708	(118)	4,590
43		Spontex	200	107	307
44		Lynchburg	1,100	(876)	224
45		Lynchburg Portable	150	(105)	45
46		Motlow	140	(80)	60
47		Maryville/Alcoa	6,360	68	6,428
48		Rockford	2,020	(60)	1,960
49		Rockford North	100	6	106
50		Maryville East	1,200	902	2,102
51		Maryville Port.—South	100	(27)	73
52		Shelbyville	3,620	544	4,164
53	Total—Contract Demand—Zone I		21,978	426	22,404
54	United Cities Gas Company—Zone II	Bristol #1	7,938	(1,988)	5,950
55		Morristown	5,840	205	6,045
56		Lowland	0	10	10
57		Blountville	882	648	1,530
58		Johnson City East	5,507	(954)	4,553
59		Johnson City West	3,563	240	3,803
60		Morton	272	258	530
61		Kingsport South	4,850	(299)	4,551
62		Kingsport North	79	46	125
63		Greeneville	3,701	440	4,141
64		Elizabethton	3,002	1,480	4,482
65		Gray Station	247	(142)	105
66		Tri City Airport	175	(119)	56
67		Miller Park	0	16	16
68		Boones Creek	0	11	11
69	Total—Contract Demand—Zone II		36,056	(148)	35,908
70	United Cities Gas Company—Zone III	Bristol #2	0	2,021	2,021
71		Pulaski	2,053	281	2,334
72		Wytheville	2,370	(162)	2,208
73		Blacksburg	6,134	(1,407)	4,727
74		Marion	2,185	174	2,359
75		Marion North	300	(39)	261
76		Marion East	300	(236)	64
77		Radford	4,517	(715)	3,802
78		Radford East	0	108	108
79		Abingdon	1,433	(466)	967
80		Abingdon West	1,641	463	2,104
81		Abingdon East	400	430	830
82		Dublin	1,672	(16)	1,656
83		Glade Spring	82	(11)	71
84		Chilhowie	275	(99)	176
85	Total—Contract Demand—Zone III		23,362	326	23,688
86	Total—Contract Demand United Cities		81,396	604	82,000
87	Jefferson-Cocke County Utility District	Jefferson City	2,684	516	3,200
88		Newport	4,046	0	4,046
89	Total—Contract Demand		6,730	516	7,246
90	Unicoi County Utility District	Erwin	2,500	500	3,000
91	Total—Contract Demand		2,500	500	3,000
92	Aluminum Company of America	Alcoa North	10,300	(7,061)	3,239
93		Alcoa West	1,200	(1,200)	0
94		Alcoa South	6,500	8,261	14,761
95	Total—Contract Demand		18,000	0	18,000
96	Olin Corporation (R)	Charleston	1,200	400	1,600
97	Total—Contract Demand		1,200	400	1,600
98	Stauffer Chemical Company	Mt. Pleasant	700	50	750
99	Total—Contract Demand		700	50	750
100	Union Carbide Corporation	Columbia	0	2,500	2,500
101	Total—Contract Demand		0	2,500	2,500
102	Department of Energy	A Station	700	1,200	1,900
103		B Station	600	(100)	500
104		C Station	100	50	150
105	Total—Contract Demand		1,400	1,150	2,550
106	AFG Industries, Inc.	Blue Ridge	2,200	(600)	1,600

EAST TENNESSEE NATURAL GAS COMPANY PRESENT AND PROPOSED REARRANGEMENT OF MAXIMUM DAILY QUANTITIES (MDQ) BY DELIVERY POINTS AND CHANGES IN CONTRACT DEMANDS—Continued

	Column (1)	(2)	(3)	(4)	(5)
Line No.	Customer	Delivery point	Present (CP86-505) MDQ	Increase (decrease)	Proposed MDQ and contract demand
107		Greenland	5,100	600	5,700
108	Total—Contract Demand		7,300	0	7,300

[FR Doc. 87-24275 Filed 10-19-87; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. CI87-784-000 and CI87-796-000]

Applications for Limited-Term Abandonment With Pregranted Abandonment and Blanket Limited-Term Certificate with Pregranted Abandonment; Hawthorne Oil and Gas Corp.

October 15, 1987.

Take notice that on July 22, 1987, as supplemented on September 16, 1987, Hawthorne Oil and Gas Corporation (Hawthorne), 1717 St. James Place, Suite 200, Houston, Texas 77056, filed applications pursuant to section 7 of the Natural Gas Act, Part 157, and §§ 2.75 and 2.77 of the Commission's Regulations. Hawthorne, as a subsidiary of, and successor-in-interest to, OXOCO, requests in Docket No. CI87-796-000 a limited-term abandonment for a period of one year of four sales to Arkla Energy Resources, a division of Arkla, Inc. (Arkla). Two sales located in the Mathers Ranch Field, Hamphill County, Texas, were previously made under contracts dated February 26 and July 7, 1970, and are covered under Hawthorne's small producer certificate in Docket No. CS76-1068-003. Hawthorne requests pregranted abandonment authorization for a period of one year in order to sell the involved gas for resale in interstate commerce under its small producer certificate. Interest in two other sales located in the S.W. Mathers Ranch Field, Hemphill County, Texas, made under contracts dated August 9 and August 14, 1972, were attributable to OXOCO, whose interest in these sales is covered under certificate authority issued to MCR Oil Corporation of Texas (MCR) in Docket No. CI73-430 pursuant to the optional certificate procedures under § 2.75 of the Commission's Regulations, on file as MCR's FERC Gas Rate Schedule Nos. 6 and 7. Hawthorne's application in Docket No. CI87-784-000 requests a one-year blanket limited-term certificate with pregranted abandonment to cover its interest in the sales previously made under MCR's certificate in Docket No. CI73-430.

In support of its applications Hawthorne states it has been subject to substantial cutbacks in takes by Arkla and that it is subject to substantially reduced takes without payment. Furthermore, Hawthorne has obtained a temporary release of the gas covered by the subject contracts from Arkla in return for Hawthorne's waiver of Arkla's past take-or-pay liability and in return for Hawthorne's crediting of released gas sold to Arkla's future obligations. Hawthorne therefore requests that its applications be considered on an expedited basis, consistent with procedures established by Order Nos. 436 and 436-A, Docket No. RM85-1-000, at 18 CFR 2.77.[1] Estimated deliverability is 9,673 Mcf/day. The gas is NGPA section 104 optional procedure certificate gas (34%), 104 flowing gas (47%), 104 recompletion gas (3%), 104 post-1974 gas (11%), 104 1973-1974 biennium gas (2%) and section 108 gas (3%).

Since Hawthorne states that it is subject to substantially reduced takes without payment and has requested that its applications be considered on an expedited basis, all as more fully described in the applications, which are on file with the Commission and open to public inspection, any person desiring to be heard or to make any protests with reference to said applications should on or before 15 days after the date of publication of this notice in the **Federal Register**, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). 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 in the proceeding herein must file a petition to intervene in accordance with the Commission's rules.

Under the procedure herein provided for, unless otherwise adivsed, it will be unnecessary for Hawthorne to appear or to be represented at the hearing.

Kenneth F. Plumb,
Secretary.

[FR Doc. 87-24276 Filed 10-19-87; 8:45 am]
BILLING CODE 6717-01-M

[1] The United States Court of Appeals for the District of Columbia vacated the Commission's Order No. 436 on June 23, 1987. In vacating Order No. 436, the Court rejected challenges to the Commission's statement of policy in § 2.77 of its Regulations. Section 2.77 states that the Commission will consider on an expedited basis applications for certificate and abandonment authority where the producers assert they are subject to substantially reduced takes without payment.

[Docket No. EL88-1-000]

Filing; Indiana and Michigan Municipal Distributors Association and City of Auburn, Indiana v. Indiana Michigan Power Co.

October 14, 1987

Take notice that on October 5, 1987, Indiana and Michigan Municipal Distributors Association (IMMDA) and the City of Auburn, Indiana (Auburn) tendered for filing pursuant to section 206 of the Federal Power Act, 16 U.S.C. 824e, and to Rules 206 and 217 of the Federal Energy Regulatory Commission's (Commisison) Rules of Practice and Procedure, 18 CFR 385.206, 385.217 (1987), a Complaint against Indiana Michigan Power Company (IMP).

IMMDA and Auburn state that, due to changes in circumstances, the rates charged by IMP to IMMDA and Aubuarn, as approved by this Commission in accordance with a Settlement Agreement entered into among IMP and its wholesale customers, 33 FERC ¶ 61,090 (1985) are excessive, unjust, and unreasonable.

A copy of this filing has been served upon all affected parties.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211

and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before November 13, 1987. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. Answers to the complaint are also due on or before November 13, 1987.

Kenneth F. Plumb,

Secretary.

[FR Doc. 87-24277 Filed 10-19-87; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CI87-239-000]

Application on Behalf of Producer-Suppliers for Blanket Limited-Term Abandonment and Blanket Limited Term Certificate of Public Convenience and Necessity With Pregranted Abandonment; Northwest Central Pipeline Corp.

October 14, 1987

Take notice that on January 23, 1987, as supplemented on September 14, 1987, Northwest Central Pipline Corporation [1] (Applicant), P.O. Box 3288, Tulsa, Oklahoma 74101, filed an application pursuant to section 7 of the Natural Gas Act, as amended, and § 2.77 and Part 157 of the Commission's Regulations. The application requests on behalf of producer-suppliers selling gas to Applicant under contracts subject to the Commission's sales and abandonment jurisdiction an order (1) authorizing the blanket limited-term abandonment by Applicant's producer-suppliers of certain sales for resale of natural gas in interstate commerce, to the extent such gas is released by agreement between Applicant and its producer-suppliers, and (2) issuing a blanket limited-term certificate of public convenience and necessity authorizing the sale for resale in interstate commerce, with pregranted abandonment, of natural gas released by Applicant and for which the requested, blanket limited-term abandonment authorization is granted, all to be effective for a five-year term commencing with the effective date of the authorizations requested under the application.

Applicant states that its application is filed in conjunction with its general rate filing, filed simultaneously with the application, in which Applicant has proposed substantial rate, rare schedule and tariff revisions designed to, *inter alia*, implement nondiscriminatory, open-access transportation consistent with the Commission's Order Nos. 436, *et al.* Applicant states that during contract negotiations with producer-suppliers Applicant may agree to release temporarily gas supplies subject to the Commission's NGA sales and abandonment jurisdiction that are in excess of volumes required by Applicant for its current system requirements in order to allow the producer-suppliers to seek alternative markets for such excess gas. Applicant states that the abandonment and sales authorizations requested in the application are a prerequisite to mutually beneficial contractual modifications between Applicant and its producer-suppliers.

Applicant request that the abandonment authorization be specifically subject to Applicant's right to recall and purchase the released supplies at any time as required in Applicant's reasonable discretion to provide adequate service to its customers. Applicant further states that transportation by Applicant of gas subject to the application would occur under the terms of Applicant's blanket transportation authority or other NGA section 7 authorizations.

Applicant requests that in approving this application the Commission waive its regulations under the NGA as to the establishment and maintenance by producer-suppliers of rate schedules under Part 154 of the Commission's Regulations. Because sales under the blanket certificate requested herein may occur on an interruptible, short-term basis and entail frequent changes with regard to volume, purchaser, delivery points, mix of gas and other considerations, waiver is required to permit implementation of such sales without the need for constant rate schedule filings reflecting the conditions of each individual sale. The blanket sales certificate may be conditioned so that the rates charged in the authorized sales shall be the lesser of the contract price or the applicable maximum lawful price prescribed under the NGPA, including any rate the producer-suppliers have established the right to collect pursuant to Parts 273, 274, or 275 of the Commission's Regulations. Applicant also requests the waiver of § 157.30(b) and § 250.7 of the Commission's Regulations to the extent required to grant the abandonment authorization requested herein.

In addition, waiver is requested to allow automatic collection of the appropriate monthly escalations allowed under Part 271 of the Commission's Regulations including waiver of the requirement that producer-suppliers file blanket affidavits to cover such sales in accordance with § 154.94(h) of the Regulations. Applicant also requests that, to the extent producer-suppliers hereunder qualify for the collection of any applicable allowances under Section 110 of the NGPA, the Commission waive the blanket affidavit and other requirements under § 154.94(k) and Part 271 of the Commission's Regulations.

Applicant previously received authorization similar to that requested herein by order issued February 20, 1987, in Docket Nos. CI86-594-000 and CI86-596-000 (38 FERC ¶ 61,165 (1987)). Such applications were filed pursuant to a Stipulation and Agreement filed by Applicant in Docket Nos. RP86-32, *et al.*, which provided for Applicant's transition to a non-discriminatory, open access transporter pursuant to Order No. 436. In the February 20, 1987, order, the Commission found that Applicant's present and predicted deliverability substantially exceeds its projected market requirements and pipeline capacity. The Commission stated that Applicant's project deliverability was in excess of 288 Bcf/year for each year 1986-1989, and that its recent projection of sales in Docket No. RP86-68, *et al.*, was approximately 269 Bcf. On September 14, 1987, Applicant stated it had reviewed that settlement agreement in Docket Nos. RP86-32, *et al.*, as well as the authorizations issued in Docket Nos. CI86-594-000 and CI86-596-000, and as a result believes that the instant application should be processed and approved.

Accordingly, any person desiring to be heard or to make any protest with reference to said applications should on or before 15 days after the date of publication of this notice in the **Federal Register**, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a petition to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). 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 the proceeding herein must file a petition to intervene in accordance with the Commission's Rules.

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[1] Northwest Central states that on January 1, 1987, it changed its name to Williams Natural Gas Company.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicant to appear or to be represented at the hearing.

Kenneth F. Plumb,

Secretary.

[FR Doc. 87-24278 Filed 10-19-87; 8:45 am]

BILLING CODE 6717-01-M

Western Area Power Administration

Nevada Office of Community Services Conservation and Renewable Energy Mutual Assistance Program; Cooperative Agreement

AGENCY: Western Area Power Administration, DOE.

ACTION: The Western Area Power Administration/Nevada Office of Community Services Conservation and Renewable Energy Mutual Assistance Program (Program) notice of proposed Cooperative Agreement

SUMMARY: The Department of Energy announces that, pursuant to 10 CFR 600.7(b), eligibility for a cooperative agreement to develop and implement cofunded conservation and renewable energy (C&RE) activities for the State of Nevada (State) has been restricted to the Nevada Office of Community Services (NOCS) as the State Energy Office in support of electrical utilities and other Western Area Power Administration (Western) customers.

ADDRESS: Requests for further information should be submitted to the following address: Mr. Dan Bunch, Conservation Officer, Boulder City Area Office, Western Area Power Administration, P. O. Box 200, Boulder, City, NV 89005, (702) 477-3268.

SUPPLEMENTARY INFORMATION: The Western's C&RE Program is designed to ensure wise stewardship of the Federal hydropower resources and to encourage energy conservation and the development of renewable energy resources. To meet these ends, Western offers a number of C&RE Program activities to its customers, including educational workshops and seminars, equipment loan programs, and cost sharing of C&RE projects. Joint program sponsorship with State Energy Offices is one of the methods that Western uses to effectively deliver its C&RE activities to customers within its 15-State marketing area. Costs are normally shared on a 50/50 basis.

Western's Boulder City Area Office (BCAO) has cosponsored joint C&RE activities with the NOCS in Nevada since 1982. Programs cosponsored to date include a series entitled Energy Efficient Builder's Seminars, irrigation workshops, and the Nevada Energy Forum. Such joint participation mutually benefits the State of Nevada and the Federal Government through the pooling of resources to provide cost-effective activities in Nevada.

The NOCS is committed to promoting energy efficiency and renewable energy development in Nevada. Its resources, technical ability, and Statewide credibility put it in the best position to manage this cooperative programs.

Solicitation Number: DE-RP65-87WG02333.

Scope of Project: The Western/NOCS C&RE Mutual Assistance Program is designed to allow joint sponsorship of C&RE activities within the State of Nevada by Western and the NOCS. The Program will provide cost-shared funding for the development and implementation of C&RE activities in three general categories: (1) Technology development and transfer, (2) public information and (3) economic analysis of C&RE Projects. Activities funded under this Program may include, but are not limited to: Educational workshops and seminars on energy efficiency and renewable energy; State, regional, and national C&RE conferences; energy efficiency tests and monitoring; C&RE publication development; energy efficiency demonstration and evaluation projects; economic analysis of C&RE projects; and community energy management activities.

Issued in Golden, Colorado, October 7, 1987.

William H. Clagett,

Administrator.

[FR Doc. 87-24255 Filed 10-19-87; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[OPP-180745; FRL-3279-4]

Receipt of Application for an Emergency Exemption From Montana To Use Strychnine; Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of receipt.

SUMMARY: EPA has received a public health exemption request from the Montana State Department of Livestock (hereinafter referred to as "Applicant") to use strychnine alkaloid (CAS 57-24-0) in egg baits for control of rabid skunks. EPA, in accordance with 40 CFR 166.24, is required to issue a notice of receipt and, time permitting, to solicit public comment before making the decision whether to grant the exemption.

DATE: Comments must be received on or before November 4, 1987.

ADDRESS: Three copies of written comments, bearing the identification notation "OPP-180745" should be submitted by mail to:

Information Services Section, Program Management and Support Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

In person, bring comments to: Room 236, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Information submitted in any comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information." Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain Confidential Business Information must be provided by the submitter for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments filed pursuant to this notice will be available for public inspection in Room 236, Crystal Mall No. 2, 1921 Jefferson Davis Highway, Arlington, VA, from 8 a.m. to 4 p.m, Monday throught Friday, except legal holidays.

FOR FURTHER INFORMATION CONTACT:

By mail: Jim Tompkins, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

Office location and telephone number: Room 716D, Crystal Mall 2, 1921 Jefferson Davis Highway, Arlington, VA, (703-557-1806).

SUPPLEMENTARY INFORMATION: Pursuant to section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), the Administrator may, at his discretion, exempt a State or Federal agency from any registration provision of FIFRA if he determines that emergency conditions exist which require such exemption.

The Applicant has requested the Administrator to issue a public health exemption for the use of strychnine in eggs to control rabid skunks. Montana has been authorized emergency exemptions for this use for the past 13 years.

In 1972, EPA cancelled the registrations of strychnine products used

for predator control, including the use of strychnine to control skunks (37 FR 5718). Last year's exemption request was, therefore, subject to EPA's Subpart D regulations, 40 CFR 164.130 to 164.133, in addition to the regulations at 40 CFR Part 166 governing the issuance of exemptions under section 18.

The Administrator has previously determined that substantial new evidence does exist in connnection with the registration request and 1986 emergency exemption request, as published in the **Federal Register** of June 13, 1986 (51 FR 21617). Accordingly, a hearing to reconsider whether to modify the prior cancellation order to permit the use of strychnine for controlling skunks to suppress rabies in areas where rapid animals have been found was held on October 7, 1986, as announced in the **Federal Register** of August 8, 1986 (51 FR 28623).

As a result of the hearing, the Order, suspending the registration of strychnine, sodium cyanide, and sodium fluoroaluminate ("1080") for predator uses, has been modified to permit the registration of strychnine to reduce populations of skunks as a means of suppressing the spread of of rabies to humans and domestic animals.

The Applicant has applied, under section 3 of FIFRA, for registration of strychnine in egg baits to control rabid skunks. The Applicant in conjunction with the State of Wyoming is currently generating the data necessary to support the registration of this use of strychnine.

The Applicant has requested the use of strychnine for the purpose of suppressing local populations of skunks, the main carrier of rabies, thereby reducing the opportunity for exposure of humans, domestic animals, and susceptible wild species to rabies. The Applicant considers the incidence of rabies to be at a level which poses an unacceptable threat to public health.

The proposed control program involves use of strychnine egg baits which contain, 0.035 gram of actual strychnine alkaloid.

Placement of strychnine treated eggs is limited to land within a 5-mile radius of a site where a laboratory-confirmed rabid skunk has been found. The number of strychnine egg baits may not exceed: 1,200 eggs in any treatment area, 150 eggs per any square mile, or two eggs per site. Strychnine egg baits will be placed in such skunk habitats as follows: Skunk dens, holes, garbage dumps, road culverts, junk piles, and under non-occupied buildings. All strychnine egg baits will be stamped with the word "poison" in three locations and will contain green food coloring to warn people of their toxic nature. Baits will be covered at all times and checked no less than once a week. Warnign signs will be posted at all points commonly used for access to the treatment area. Strychnine egg baits will be placed only on land where written permission has been obtained from the landowner. Placement or removal of strychnine egg baits will be under the direct supervision of certified commercial applicators of restricted use pesticides.

The regulations governing section 18 require publication of a notice in the **Federal Register** of receipt of an application that proposes use of a pesticide if such pesticide was the subject of a notice under section 6(b) of FIFRA and was subsequently cancelled and is intended for a use that poses a risk similar to the risk posed by the pesticide which was the subject of the notice. The regulations also provide for the opportunity for public comment.

Accordingly, interested persons may submit written views on this subject to the Program Management and Support Division at the address given above.

The Agency will review and consider all comments received during the comment period in determining whether to issue this public health exemption.

Dated: October 5, 1987.

Edwin F. Tinsworth,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 87-24213 Filed 10-19-87; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL RESERVE SYSTEM

Community Group, Inc. et al.; Applications To Engage de Novo in Permissible Nonbanking activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 6, 1987.

A. **Federal Reserve Bank of Atlanta** (Robert E. Heck, Vice President) 104 Marietta Street NW., Atlanta, Georgia 30303:

1. *Community Group, Inc.*, Jasper, Tennessee; to engage *de novo* through its subsidiary, Community Financial Corporation, Chattanooga, Tennessee, in the business of originating, packaging and servicing Small Business Administration and Farmers Home Administration guaranteed loans pursuant to § 225.25(b)(1) of the Board's Regulation Y.

B. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Community Banchshares, Inc.*, Chillicothe, Missouri; to engage *de novo* in direct lending activities pursuant to § 225.25(b)(1) of the Board's Regulation Y. Comments on this application must be received by November 10, 1987.

Board of Governors of the Federal Reserve System, October 14, 1987.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 87-24179 Filed 10-19-87; 8:45 am]

BILLING CODE 6210-01-M

First National Hayes Center Corp., 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 November 10, 1987.

A. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *First National Hayes Center Corp.*, Hayes Center, Nebraska; to acquire 47.1 percent of the voting shares of American State Bank, McCook, Nebraska.

2. *Security Bancshares, Inc.*, Ness City, Kansas; to become a bank holding company by acquiring 80 percent of the voting shares of First State Bank, Ness City, Kansas. Comments on this application must be received by November 5, 1987.

Board of Governors of the Federal Reserve System, October 14, 1987.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 87-24181 Filed 10-19-87; 8:45 am]

BILLING CODE 6210-01-M

Change in Bank Control Notice; Acquisition of Shares of Banks or Bank Holding Companies; Donald R. LaCamp

The notificant listed below has applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The 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 November 4, 1987.

A. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Donald R. LaCamp*, Concordia, Kansas; to acquire an additional 3.84 percent of the voting shares of Cloud County Bancshares, Inc., Concordia, Kansas, and thereby indirectly acquire Cloud County Bank & Trust, Concordia, Kansas.

Board of Governors of the Federal Reserve System, October 14, 1987.

Jams McAfee,

Associate Secretary of the Board.

[FR Doc. 87-24180 Filed 10-19-87; 8:45 am]

BILLING CODE 6210-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Social Security Demonstration Project; Exclusion of Certain Support and Maintenance Assistance for Supplemental Security Income Purposes

I hereby determine and announce a demonstration project to exclude certain support and maintenance assistance received by Supplemental Security Income (SSI) claimants. This project is for the period October 1, 1987–March 31, 1988.

Authority

This project is being authorized under the provisions of section 1110 of the Social Security Act (the Act).

For Additional Information Contact

Ms. Judy Rhoades, Office of Supplemental Security Income, Social Security Administration, 3-0-1 Operations Building, 6401 Security Boulevard, Baltimore, Maryland 21235, telephone (301) 965-5656.

Purpose

The Purpose of this demonstration is twofold. First, this demonstration will avoid disruption in the receipt of an individual's SSI benefits due to the expiration of section 1612(b)(13), as amended by section 2639(b) of Pub. L. 98-369, the Deficit Reduction Act of 1984. Section 1612(b)(13) provides that support and maintenance assistance, including certain home energy assistance, which is provided on or after October 1, 1984 and before October 1, 1987, will not be counted as income if it has been certified by a State as both provided on the basis of need and (1) provided in kind by a private nonprofit organization, or (2) provided in cash or in kind by an entity providing home energy whose revenues are derived on a rate-of-return basis regulated by a State or Federal governmental body, a supplier of home heating gas or oil, or a municipal utility providing home energy.

Because this exclusion from income has expired, we would be required to count this assistance, since Congress has not yet extended the exclusion. There is legislation pending to extend the exclusion. When this legislation is enacted, individuals who had their benefits reduced or suspended because of the expiration of the exclusion will have their benefits increased or reinstated. Such a result would be confusing and disruptive to claimants. Also, the elimination and reinstatement of the exclusion would be disruptive to the Social Security Administration in the administration of the SSI program. Therefore, continuation of the exclusion under the project will facilitate the administration of the SSI program.

The second purpose of this demonstration is to test whether increased private sector assistance can stabilize the costs of the SSI program, by reducing the need for general benefit increases or increases in the allowable income and resource limits. Consequently, this project will promote the objectives of title XVI of the Act by testing this hypothesis.

Background

Under the law and regulations prior to May 1, 1983, the effective date of section 404 of Pub. L. 98-21, (the Social Security Amendments of 1983), support and maintenance assistance, other than certain home energy assistance which was excluded under section 128 of Pub. L. 97-377 and section 545(a) of Pub. L. 97-424, provided to an aged, blind, or disabled individual, was counted as income in determining whether the individual was eligible for SSI benefits and the amount of his or her benefits. Section 128, which was effective beginning December 18, 1982, stated that no funds provided under it could be used to reduce or deny SSI payments because of the receipt of certain home energy assistance. Section 128 expired September 30, 1983. Section 545(a) of Pub. L. 97-424 added a new section 1612(b)(13) to the Act to provide that certain home energy assistance not be counted as income for SSI purposes. Section 545(a) was enacted on January

6, 1983, to be effective February 1, 1983 through June 30, 1985.

Section 404 of Pub. L. 98-21, enacted April 20, 1983 and effective from may 1, 1983 through September 30, 1984, amended section 1612(b)(13) of the Act. Section 2639 of Pub. L. 98-369, enacted July 18, 1984 and effective from October 1, 1984 through September 30, 1987 made the same changes to section 1612 (b)(13) of the Act as did section 404 of Pub. L. 98-21. The provisions of section 1612(b)(13), as amended by section 2639 of Pub. L. 98-396 provided that certain support and maintenance assistance will not be counted as income when determining an individual's eligibility for and the amount of SSI payments. Support and maintenance includes assistance to meet the costs of home energy.

Under this statute and implementing regulations, in order for the exclusion to apply, the support and maintenance assistance must be certified in writing by the apporpriate State agency as both provided on the basis of need and (1) provided in kind by a private nonprofit agency, or (1) furnished in cash or in kind by a supplier of home heating oil or gas, by an entitty providing home energy whose revenues are primarily derived on a rate-of-return basis regulated by a State or Federal governmental entity, or by a municipal utility providing home energy. This satutory exclusion expired September 30, 1987.

Demonstration Project Provisions

The following support and maintenance assistance received by SSI claimants on or after October 1, 1987 and before April 1, 1988, will be excluded from income are not considered to be resources for SSI purposes:

Support and maintenance assistance that is certified in writing by the appropriate State agency to be both based on need and (1) provided in kind by a private nonprofit agency; or (2) provided in cash or in kind by (i) a supplier of home heating oil or gas; (ii) a rate-of-return entity providing home energy; or (iii) a municipal utility providing home energy.

The following regulatory sections will continue to apply to this 6-month demonstration project; 20 CFR 416. 1124(c)(10), 416.1157, and 416.1201(a).

The claimant's consent for participating in this demonstration project is needed to satisfy a requirement in section 1110(b) of the Act. Consequently, a claimant's consent providing that the claimant's participation is voluntary and that he or she can revoke participation must be obtained in order for him or her to be eligible under the provisions of this project.

Waiver

To conduct this project, we are waiving section 1612(a)(2)(A) of the Act and 20 CFR 416.102, 416.1104, 416.1120 and 416.1121(h) of the regulations. which require support and maintenance to be counted as unearned income for SSI. We are also waiving section 1611 of the Act and 20 CFR 416.1201 of the regulations to the extend those provisions would otherwise require us to count the assistance as resources.

Paperwork Reduction Act

No provisions of this proposal impose reporting/recordkeeping requirements.

(Catalog of Federal Domestic Assistance Program No. 13.807—Supplemental Security Income; No. 13.812—Assistance Payment Research)

Approved: October 16, 1987.

Otis R Bowen,

Secretary of Health and Human Services.

[FR Doc. 87-24425 Filed 10-19-87; 8:45 am]

BILLING CODE 4190-11-M

Alcohol, Drug Abuse, and Mental Health Administration

Mental Health Behavioral Sciences Research Review Committee, Meeting; Correction

AGENCY: Alcohol, Drug Abuse, and Mental Health Administration.

ACTION: Correction Notice.

SUMMARY: Public notice was given in the **Federal Register** on September 14, 1987, Volume 52, No. 177, on page 34719 that the Mental Health Behavorial Sciences Research Review Committee, NIMH, would meet at the Canterbury Hotel. The notice is being corrected to read as follows:

Place: Guest Quarters Hotel, 7335 Wisconsin Avenue, Bethesda, MD 20814

All other information for this committee remains the same.

Dated: October 16, 1987.

Peggy W. Cockrill,

Committee Management Officer, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 87-24365 Filed 10-19-87; 8:45 am]

BILLING CODE 4160-20-M

Health Care Financing Administration

[BERC-41-CN]

Medicare Program; Changes to the DRG Classification System

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Correction notice.

SUMMARY: **Federal Register** document 87-19989, beginning on page 33143 of the issue of Tuesday, September 1, 1987 specified changes to the Medicare DRG classification system. This document corrects errors in the September 1, 1987 publication.

FOR FURTHER INFORMATION CONTACT: Betty Burrier, (301) 594-9773.

Corrections

1. On page 33157, in column 1, in the last paragraph listing the surgical hierarchy for MDC 8, the seventh line from the bottom of the page "Local Excision and Removal of Interal" is changed to "Local Excision and Removal of Internal".

2. On page 33161, in Table II, for procedure code 37.79 the DRG column, reading "117, 442, and 443", is changed to "117, 269, 270, 442 and 443."

(Catalog of Federal Domestic Assistance Program No. 13.774), Medicare—Supplementary Medical Assistance Program)

Dated: October 13, 1987.

James F. Trickett,

Deputy Assistant Secretary for Administrative and Management Services.

[FR Doc. 87-24249 Filed 10-19-87; 8:45 am]

BILLING CODE 4120-01-M

National Institutes of Health

Notice of Establishment and Reestablishment

Pursuant to the Federal Advisory Committee Act of October 6, 1972 [Pub. L. 92-463, 86 Stat. 770-776], and the Health Research Extension Act of 1985, November 20, 1985 [Pub. L. 99-158, section 402(b)(6)], the Director, NIH, announces the establishment of the Literature Selection Technical Review Committee, effective November 1, 1987, and the reestablishment, effective November 1, 1987, of the following committees:

Behavioral and Neurosciences Study Section
Biochemical Endocrinology Study Section
Chemical Pathology Study Section

Clinical Sciences Study Section
Mammalian Genetics Study Section
Microbial Physiology and Genetics Study Section
Neurological Sciences Study Section
Pathobiochemistry Study Section
Social Sciences and Population Study Section
Surgery and Bioengineering Study Section

Duration of these committees is continuing unless formally determined by the Director, NIH, that termination would be in the best public interest.

Dated: October 14, 1987.

William F. Raub,

Acting Director, NIH

[FR Doc. 87-24312 Filed 10-16-87; 12:50 pm]

BILLING CODE 4140-01-M

Consensus Development Conference on Magnetic Resonance Imaging

Notice is hereby given of the NIH Consensus Development Conference on "Magnetic Resonance Imaging," Sponsored by the Warren Grant Magnuson Clinical Center and the Office of Medical Applications of Research. The Conference will be held October 26-28, 1987, in the Masur Auditorium of the Warren Grant Magnuson Clinical Center (Building 10) at the National Institutes of Health, 9000 Rockville Pike, Bethesda, Maryland 20892.

MRI provides images of the internal structure of the body without the potential harm of radiation exposure or the need for contrast agents or other invasive procedures. MRI provides a number of advantages over other imaging methods, including increased tissue contrast and the ability to image of different planes.

The purpose of this conference is to establish the efficacy of MRI, determine clinical applications of the technology, and compare it to other imaging modalities, such as computed tomography (CT) and ultrasound.

Clinical areas of application to be explored include the head, neck, and spine—for which MRI is commonly recognized as the modality of choice—as well as the heart, vascular system, abdomen, pelvis, and musculoskeletal system. The conference will also address biological risks and future applications of the technology.

The conference will bring together biomedical investigators, clinicians, radiologists, other health professionals, and members of the public. Following a day and half of presentations by medical experts and audience discussion, a consensus panel will weigh the scientific evidence and write a draft statement in response to the following key questions:

- Are there contraindications to or risk of MRI?
- What are the technological advantages and limitations (disadvantages) of MRI?
- What are the clinical indications for MRI, and how does it compare to other diagnostic modalities?
- What are the directions for future research in MRI?

On the final day of the meeting, the consensus panel chairman will read the draft statement to the conference audience and invite comments and questions.

Information on the program may be obtained from: Sharon Feldman, Prospect Associates, 1801 Rockville Pike, Suite 500, Rockville, Maryland 20852, (301) 468-6555.

Dated: October 14, 1987.

William F. Raub,

Acting Director, NIH.

[FR Doc. 87-24313 Filed 10-16-87; 12:50 pm]

BILLING CODE 4140-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. N-87-1748]

Submission of Proposed Information Collection to OMB

AGENCY: Office of Administration, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

ADDRESS: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 755-6050. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal described below for the collection of information to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total number of hours needed to prepare the information submission; (8) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Copies of the proposed forms and other available documents submitted to OMB may be obtained from David S. Cristy, Reports Management Officer for the Department. His address and telephone number are listed above. Comments regarding the proposal should be sent to the OMB Desk Officer at the address listed above.

The proposed information collection requirement is described as follows:

Notice of Submission of Proposed Information Collection to OMB

Proposal: Public Housing Homeownership Demonstration Assessment.

Office: Policy Development and Research.

Description of the Need For the Information and Its Proposed Use: The information will be used to evaluate HUD's Public Housing Homeownership Demonstration program. The information is needed to learn the impacts of this demonstration on those involved and whether the purposes of the demonstration program are being achieved.

Form Number: None.

Respondents: Individuals or Households.

Frequency of Response: Single-Time.

Estimated Burden Hours: 572.

Status: New.

Contact: Earl W. Lindviet, (202) 755-6450 or John Allison, OMB (202) 395-6880.

Authority: Sec. 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; sec. 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: October 2, 1987.

John T. Murphy,

Director, Information Policy and Management Division.

[FR Doc. 87-24279 Filed 10-19-87; 8:45 am]

BILLING CODE 4210-01-M

Office of the Assistant Secretary for Policy Development and Research

[Docket No. N-87-1735; FR 2405]

RECLAIM Rehabilitation Demonstration

AGENCY: Office of the Assistant Secretary for Policy Development and Research, HUD.

ACTION: Announcement of RECLAIM Rehabilitation Demonstration.

SUMMARY: HUD is announcing a project to help America's cities make the rehabilitation of public and private-sector housing and infrastructure more efficient and cost effective. The project is called RECLAIM (Rehab Effectively through Comprehensive Local Action and Innovative Methods). It is intended to assist cities to make effective use of a number of innovative rehabilitation concepts which can help to streamline the rehabilitation process.

Among the concepts being examined in this effort are new techniques such as the use of geographic information systems and computer-aided design, drafting, and mapping to improve strategic planning for area-wide rehabilitation; review and modification of restrictive codes and other regulatory items; the use of innovative and cost saving rehabilitation technologies; and the development of new forms of creative financing for rehabilitation.

The results of these research efforts will be used to develop a catalog of innovative techniques and processes to assist cities across the country to adapt the various approaches to their situation and problems.

DATE: Comments are due on or before November 19, 1987.

ADDRESS: Interested persons are invited to submit comments to the Rules Docket Clerk, Office of the General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410. Comments should refer to the above docket number and title.

FOR FURTHER INFORMATION CONTACT: William A. Wisner, Office of Policy Development and Research, 451 Seventh Street SW., Room 8228, Washington, DC 20410. Phone (202) 755-4370 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The objective of RECLAIM is to investigate ways to reduce substantially the costs of building, neighborhood, and infrastructure rehabilitation through local public/private cooperation, technical innovation, citywide strategic planning, and innovative financing approaches.

In developing the RECLAIM concept, over the last year members of the HUD staff have met with mayors and other city officials and private-sector individuals in nine cities to discuss innovative approaches that they have used and others that they believe could be effective in carrying out rehabilitation programs. These cities include: Chattanooga, TN; Charleston, SC; Charlotte, NC; Columbus, OH; Detroit, MI; Indianapolis, IN; Providence, RI; Toledo, OH; and Trenton, NJ. These discussions have assisted HUD in defining the concepts to be explored in RECLAIM. Among the activities discussed are rehabilitation areas where HUD might provide advice and technical assistance. Examples include: (1) Identifying costly building codes that cities can modify; (2) using strategic planning techniques to solve substandard housing problems; and (3) providing technical information on innovative rehabilitation methods and materials. Other demonstration projects may evolve from the initial planning for this project.

Cities participating in RECLAIM must have a commitment from the mayor (or highest elected official) to providing full city support for the project, must involve effective participation of private-sector developer and financial interests, must have city neighborhoods and housing stock which are good candidates for rehabilitation efforts, and must display a willingness to implement innovative procedural, technical, and financial mechanisms.

As a condition of participation in the project, cities will be expected to contribute their own resources as required to carry out to selected activities. No special funding will be provided to participating cities.

HUD's contribution will be through assistance in identifying potential target areas of RECLAIM in each city, in determining the focus of the city strategy, and in the transfer of information from one city to another with similar problems. HUD also will help to identify appropriate existing departmental programs that could provide support to the city activities.

The Department's conversations with cities in regard to the concept of this Demonstration were primarily to assess their rehabilitation needs and to determine how HUD might assist in achieving them. Some or all of these cities may ultimately participate in this Demonstration. HUD will not enter into a memorandum of understanding or other agreement until at least thirty (30) days after the period provided for public comments has expired and all comments received have been fully considered. In the event that the Department's consideration of the comments gives rise to a significant change in any aspect of the RECLAIM activity, notice of the change will be published in the **Federal Register.** (If appropriate, the commencement of activities may be delayed as a result of comments, the activities may be modified, or additional public comment may be sought.)

The Catalog of Federal Domestic Assistance program number is: 14.506, Office of Policy Development and Research, General Research and Technology Activity.

Authority: Title V of the Housing and Urban Development Act of 1970 (12 U.S.C. 1701z-1).

Dated: October 13, 1987.

June Q. Koch,

Assistant Secretary for Policy Development and Research.

[FR Doc. 87-24280 Filed 10-19-87; 8:45 am]

BILLING CODE 4210-01-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chpater 35). Copies of the proposed information collection requirement and related forms and explanatory material may be obtained by contacting the Service's clearance officer at the phone number listed below. Comments and suggestions on the requirement should be made directly to the Service clearance officer and the OMB Interior Desk Officer, Washington, DC 20503, telephone 202-395-7340.

Title: A Study of Recall/Reference Period Bias in National Surveys of Fishing and Hunting

Abstract: This study will provide an empirical basis for evaluation of possible recall bias in National Surveys of Fishing and Hunting

resulting from use of a one-year recall period. Results will be used to evaluate possible methodologial changes in future surveys.
Respondents are individuals who fish and hunt.
Frequency: On occasion
Description of Respondents: Individuals and households
Annual Responses: 19,500
Annual Burden Hours: 2,353
Service Clearance Officer: James E. Pinkerton, 202-653-7499, Room 859, Riddell Building, U.S. Fish and Wildlife Service, Washington, DC 20240.

Date: September 24, 1987.

Phillip H. Dawson,

Acting Assistant Director—Policy, Budget, and Administration.

[FR Doc. 87-24206 Filed 10-19-87; 8:45 am]

BILLING CODE 4310-55-M

National Park Service

Appalachian National Scenic Trail Advisory Council; Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act that a meeting of the Appalachian National Scenic Trail Advisory Council will be held in Freeport, Maine, on November 6, from 8:30 a.m. to 4:00 p.m. The agenda of the meeting will include a review of current Appalachian Trail protection and management issues.

The meeting will be open to the public, although space will be limited. Persons will be accommodated on a first-come, first-served basis. Any person may file with the Council a written statement concerning the matters to be discussed.

Persons wishing further information concerning this meeting or who wish to submit written statements may contact Charles R. Rinaldi, Acting Project Manager, Appalachian Trail Project Office, Harpers Ferry, West Virginia 25425, at Area Code (304) 535-2346.

Minutes of the meeting will be available for public inspection four weeks after the meeting at the above address. Copies of the minutes will also be available from Room 3120, Interior Building, 18th and C Streets, NW., Washington, DC 20240, and at the headquarters of the Appalachian Trail Conference, Washington Street, Harpers Ferry, West Virginia 25425.

Dated: October 8, 1987.

Charles R. Rinaldi,

Acting Project Manager.

[FR Doc. 87-24221 Filed 10-19-87; 8:45 am]

BILLING CODE 4310-70-M

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before October 10, 1987. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evauation may be forwarded to the National Register, National Park Service, U.S. Department of the Interior, Washington, DC 20243. Written comments should be submitted by November 4, 1987.

Carol D. Shull,

Chief of Registration, National Register.

AMERICAN SOMOA

Western Division

A'a Village Site (AS34-33)
Maloata Village Site (AS34-34)
Tataga-Matau Fortified Quarry Complex (AS-34-10)

Eastern Division

Lepua, *Church of the Immaculate Coception,* Bounded by main rd, on S & the presbytery on N *Tulauta*
Fagatele Bay Site

FLORIDA

Collier County

Naples vicinity, *Keewaydin Club,* N end of Key Island

Santa Rosa County

Bagdad, *Bagdad Village Historic District,* Roughly bounded by Main, Water, & Oak Sts., Cobb & Woodville Rds., Cemetary, Pooley & School Sts.
Milton, *Milton Historic District,* US 90 & Blackwater River bounded by Berryhill, Willing, Hill, Canal, Margaret, & Susan Sts.

GEORGIA

Clarke County

Athens, *Reese Street Historic District,* Roughly bounded by Meigs, Finley, Broad, & Harris Sts.

MICHIGAN

Huron County

Port Hope, *First Methodist Episcopal Church (Port Hope MPS),* 451 Second St.
Port Hope, *Herman House (Port Hope MPS),* 405 Main St.
Port Hope, *Leuty, Isaac, House (Port Hope MPS),* 955 School St.
Port Hope, *Masonic Temple (Port Hope MPS),* 425 Main St.
Port Hope, *Melligan Store-Agriculture Hall (Port Hope MPS),* 432 Main St.
Port Hope, *Schlichting Building (Port Hope MPS),* 443 Main St.
Port Hope, *St. John's Lutheran Church (Port Hope MPS),* 527 Second St.
Port Hope, *Stafford, Frederick H, and Elizabeth, House (Port Hope MPS),* 489 Main St.
Port Hope, *Stafford, W. R. Flour Mill and Elevator (Port Hope MPS),* 310 Huron St.
Port Hope, *Stafford, W. R. Planning Mill Site (Port Hope MPS),* Huron St.
Port Hope, *Stafford, W. R. Saw Mill Site (Port Hope MPS),* Huron St.
Port Hope, *Stafford, W. R. Worker's House (Port Hope MPS),* 022 Cedar St.

MISSISSIPPI

Claiborne County

Port Gibson, *Sacred Heart Roman Catholic Church,* Grant Gulf Military Monument Park

Panola County

Como, *Holy Innocents' Episcopal Church,* Jct. of Main & Craig St.

OHIO

Hamilton County

Cincinnati, *Gerrard, Stephen A., Mansion,* 748 Betula Ave.

Highland County

Hillsboro, *Scott, William, House,* 338 W. Main St.

Lorain County

Amherst, *Central School,* 474 Church St.

Seneca County

Attica, *Omar Chapel,* OH 408

Wyandot County

Carey, *West End Elementary School,* 200 West St.

PENNSYLVANIA

Allegheny County

Castle Shannon, *Lindon Grove,* Grove Rd. at Library Rd. & Willow Ave.
Pittsburgh, *Eberhardt and Ober Brewery,* Troy Hill Rd. & Vinial St.
Pittsburgh, *Penn-Liberty Historic District,* Roughly bounded by French & Tenth Sts., Liberty & Penn Aves., & Nineth St.

Berks County

Reading, *Wanner, Peter, Mansion,* 1401 Walnut St.

Bucks County

Bristol, *Jefferson Land Association Historic District,* Bounded by Spring St., Jefferson Ave., Garden & Mansion Sts. & Beaver Dam Rd.
Langhorne (also in Bristol vicinity), *Langhorne Historic District,* Summit &

Marshall Aves., Pine St., Richardson AVe., & Green St.

Chester County

Kennett Square vicinity, *Wickersham, Gideon, Farmstead,* 750 Northbrook Rd.

Delaware County

Chester, *Delaware County National Bank,* 1 W. Third St.

Landsdowne, *Landsdowne Park Historic District,* W. Greenwood, Owen, W. Baltimore, Windermere, & W. Stratford Aves.

Radnor, *Wayne Hotel,* 139 E. Lancaster Ave.

Franklin County

Fort Loudon vicinity, *Donaldson, The Widow, Place,* 177 Bear Valley Rd.

Lackawanna County

Scranton, *Ad-Lin Building,* 600 Lindon St.

Philadelphia County

Philadelphia, *Physicians and Dentists Building,* 1831—1833 Chestnut St.

Philadelphia, *Seymour, Edward B., House,* 260 W. Johnson St.

RHODE ISLAND

Kent County

East Greenwich, *Weaver, Clement—Daniel Howland House,* 125 Howland Rd.

SOUTH CAROLINA

Anderson County

Anderson, *Anderson Downtown Historic District (Boundary Increase),* 402 N. Main St.

Belton, *Belton Standpipe,* McGee St.

Beaufort County

Pritchardville vicinity, *St. Luke's Church,* SC 170

Greenville County

Pelham Mills Site (38GR165)

Lexington County

Lexington, *Gunter—Summers House (Lexington County MRA),* 841 Center St.

TENNESSEE

Bedford County

Wartrace, *Sims, John Green, House,* Normandy Rd.

VIRGINIA

Hanover County

Studley vicinity, *Pine Slash,* VA 643

WASHINGTON

Clallam County

Port Angeles, *Blue Mountain School,* Blue Mountain Rd.

Port Angeles, *Paris, Joseph, House,* 101 E. Fifth St.

Port Angeles, *St. Andrew's Episcopal Church,* 206 S. Peabody St.

Skagit County

Anacortes, *California Fruit Store,* 909 Third St.

Anacortes, *Curtis Wharf,* Jct. of O Ave. & Second St.

Anacortes, *Great Northern Depot,* R Avenue & Seventh St.

Anacortes, *Marine Supply and Hardware Complex,* 202—218 Commercial Ave. & 1009 Second St.

Anacortes, *Semar Block,* 501 Q Ave.

Mt. Vernon, *Lincoln Theater and Commercial Block,* 301—329 Kincaid St. & 710—740 First St.

[FR Doc. 87-24230 Filed 10-19-87; 8:45 am]

BILLING CODE 4310-70-M

INTERSTATE COMMERCE COMMISSION

Forms Under Review by Office of Management and Budget

The following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35) is being submitted to the Office of Management and Budget for review and approval. Copies of the forms and supporting documents may be obtained from the Agency Clearance Officer, Ray Houser, (202) 275-6723. Comments regarding this information collection should be addressed to Ray Houser, Interstate Commerce Commission, Room 1325, 12th and Constitution Ave., NW., Washington, DC 20423 and to Gary Waxman, Office of Management and Budget, Room 3228 NEOB, Washington, DC 20503, (202) 395-7340.

Type of Clearance: Revision
Bureau/Office: Bureau of Accounts
Title of Form: Quarterly Report of Results of Operation
OMB Form No.: 3120-0002
Agency Form No.: QFR
Frequency: Quarterly
Respondents: Class I and Class II Motor Carriers of Property
No. of Respondents: 1,101
Total Burden Hrs.: 18,717
Brief Description of the need & proposed use: Data is used to assess industry growth, sudden changes in carriers financial stability and to identify changes and trends that may affect the National Transportation Industry.

Type of Clearance: Reinstatement
Bureau/Office: Bureau of Accounts
Title of Form: Annual Report of Class I and Class II Motor Carriers of Property
OMB Form No.: 3120-0032
Agency Form No.: M
Frequency: Annually
Respondents: Class I and Class II Motor Carriers of Property
No. of Respondents: 2,183
Total Burden Hrs.: 100,418
Brief Description of the need & proposed use: Data is used to assess industry growth, sudden changes in carriers financial stability and evaluating proposals for changes in ownership, control or merger of transportation companies.

Type of Clearance: Reinstatement
Bureau/Office: Bureau of Accounts
Title of Form: Annual Report of Class I and Class II Motor Carriers of Household Goods
OMB Form No.: 3120-0033
Agency Form No.: M-H
Frequency: Annually
Respondents: Class I and Class II Motor Carriers of Household Goods
No. of Respondents: 154
Total Burden Hrs.: 5,390
Brief Description of the need & proposed use: Data is used to assess industry growth, sudden changes in carriers financial stability and to identify changes and trends that may affect the National Transportation Industry.

Type of Clearance: Reinstatement
Bureau/Office: Bureau of Accounts
Title of Form: Uniform System of Accounts—Motor Carriers of Property
OMB Form No.: 3120-0106
Agency Form No.: N/A
Frequency: Quarterly/Annually
Respondents: Motor Carriers of Property
No. of Respondents: 2,337
Total Burden Hrs.: 329,517
Brief Description of the need & proposed use: Data is used to assess financial, operating, and equipment transaction records of motor carriers of property.

Noreta R. McGee,

Secretary.

[FR Doc. 87-24225 Filed 10-19-87; 8:45 pm]

BILLING CODE 7035-01-M

Motor Passenger Carriers; Summary Grant Notice for Application; DeCamp Holdings, Inc., et al.

MC-F-18682, filed September 14, 1987, DeCamp Holdings, Inc. (Holdings) (101 Greenwood Ave., Montclair, NJ 07042)—Control—West Hunterdon Transit, Inc. (WHT, Inc.), DeCamp Bus Lines (DeCamp Lines), and DeCamp Transit, Inc. (DeCamp Transit) (all of the same address). Representative: Edward F. Bowes, 7 Becker Farm Road, P.O. Box Y, Roseland, NJ 07068. Holdings (a non-carrier) seeks approval for its control of WHT, Inc. (a non-carrier). The transaction arises as a result of the purchase by WHT, Inc. of the operating authority of West Hunterdon Transit Co., Inc. (WHT Co., Inc.) (MC-123473), a motor carrier of passengers. Holdings, which is controlled by members of the DeCamp family, also controls motor passenger carriers DeCamp Bus Lines (MC-109312) and DeCamp Transit (MC-170393). That common control was approved in MC-F-15630. A related

application has been filed in MC-F-18681 for approval of the purchase by WHT, Inc. of the operating authority of WHT Co., Inc.

Decided: October 13, 1987.

By the Commission, Motor Carrier Board, Members, Hartley, Metz, and Thomas.

Noreta R. McGee,

Secretary.

[FR Doc. 87-24226 Filed 10-19-87; 8:45 am]

BILLING CODE 7035-01-M

Motor Passenger Carriers; Summary Grant Notice for Application; West Hunterdon Transit, Inc., et al.

MC-F-18681, filed September 14, 1987. West Hunterdon Transit, Inc., (WHT, Inc.) (101 Greenwood Ave., Montclair, NJ 07042)—Purchase—West Hunterdon Transit Co., Inc. (WHT Co., Inc.) (Routes 202 and 31 South, Flemington, NJ 08822). Representative: Edward F. Bowes, 7 Becker Farm Road, P.O. Box Y, Roseland, NJ 07068. WHT, Inc. (a non-carrier) seeks authority to purchase all of the authority of WHT Co., Inc. (MC-123473), and certain other assets. WHT, Co. Inc. is controlled by Jeanette S. Dilley. WHT, Inc. is controlled by DeCamp Holdings, Inc. (Holdings) (a non-carrier), that in turn is controlled by members of the DeCamp family. Holdings also controls motor passenger carriers DeCamp Bus Lines (DeCamp Lines) (MC-109312) and DeCamp Transit (MC-170393). That common control was approved in MC-F-15630. The operating rights of WHT Co., Inc. to be purchased by WHT, Inc. include nationwide special and charter operations authority, regular-route passenger authority between described points in Pennsylvania, New Jersey, and New York, and intrastate authority issued by the New Jersey Department of Transportation in Dockets 84-156 and 84-157, and Charter No. 398C. New Jersey intrastate authority in Charter No. 388C will be transferred to DeCamp Transit. DeCamp holds nationwide charter and special operations authority, and regular-route authority between described points in New York and New Jersey. It also holds New Jersey intrastate authority. DeCamp Transit holds nationwide charter and special operations authority. A related application has been filed in MC-F-18682 for approval of the control by Holdings of WHT, Inc., DeCamp Lines, and DeCamp Transit. In addition, WHT, Inc. has been granted temporary authority to lease the operating rights and other assets of WHT Co., Inc.

Decided: October 13, 1987.

By the Commission, Motor Carrier Board, Members, Hartley, Thomas, and Metz.

Noreta R. McGee,

Secretary.

[FR Doc. 87-24227 Filed 10-19-87; 8:45am]

BILLING CODE 7035-01-M

[Docket No. AB-55 (Sub-No. 215X)]

CSX Transportation, Inc.; Abandonment in Hagerstown, Washington County, MD; Exemption

CSX Transportation, Inc. has filed a notice of exemption under 49 CFR Part 1152, Subpart F—*Exempt Abandonments* to abandon its 0.53-mile line of railroad between milepost 23.35 and milepost 23.88 in Hagerstown, Washington County, MD.

Applicant has certified that: (1) No local traffic has moved over the line for at least 2 years and overhead traffic is not moved over the line; and (2) no formal complaint filed by a user of rail service on the line (or by a State or local governmental entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or any U.S. District Court, or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

Applicant has filed an environmental report which shows that no significant environmental or energy impacts are likely to result from this abandonment.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected pursuant to *Oregon Short Line R. Co.-Abandonment-Goshen,* 360 I.C.C. 91 (1979).

The exemption will be effective November 19, 1987 (unless stayed pending reconsideration). Petitions to stay must be filed by October 30, 1987, and petitions for reconsideration, including environmental, energy, and public use concerns, must be filed by November 9, 1987 with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative: Charles M. Rosenberger, 500 Water Street, Jacksonville, FL 32202.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio.*

A notice to the parties will be issued if use of the exemption is conditioned upon environmental or public use conditions.

Decided: October 8, 1987.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 87-23825 Filed 10-19-87; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF LABOR

The Steering Subcommittee of the Labor Advisory Committee for Trade Negotiations and Trade Policy; Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463 as amended), notice is hereby given of a meeting of the Steering Subcommittee of the Labor Advisory Committee for Trade Negotiations and Trade Policy.

Date, time and place: November 13, 1987, 9:30 a.m. Rm. S4215 A&B Frances Perkins, Department of Labor Building, 200 Constitution Avenue NW., Washington, DC 20210.

Purpose: To discuss trade negotiations and trade policy of the United States.

This meeting will be closed under the authority of section 10(d) of the Federal Advisory Committee Act. The Committee will hear and discuss sensitive and confidential matters concerning U.S. trade negotiations and trade policy.

For further information, contact: Fernand Lavallee, Executive Secretary, Labor Advisory Committee, Phone: (202) 523-6565, Signed at Washington, DC this 14th day of October 1987.

Christopher Hankin,

Acting Deputy Under Secretary, International Affairs.

[FR Doc. 87-24246 Filed 10-19-87; 8:45 am]

BILLING CODE 4510-28-M

Employment and Training Administration

Marathon Oil Co.; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In the matter of Marathon Oil Company, TA-W-19,032 Domestic Exploration Department, Houston, Texas; and TA-W-19,032A Domestic Exploration Department, Rocky Mountain Region, Casper, Wyoming.

In accordance with section 223 of the Trade Act of 1974, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on February 26, 1987

applicable to all workers of Marathon Oil Company's Domestic Exploration Department in Houston, Texas. The Certification was published in the **Federal Register** on March 24, 1987 (52 FR 9364).

Based on new information furnished by the company, the Office of Trade Adjustment Assistance, reviewed the certification. The additional information from the company revealed production and sales declines in 1986 compared to 1985 in the Rocky Mountain Region (formerly the Casper Division) of the Marathon Oil Company, Casper, Wyoming. Worker separations began in February, 1986. The Marathon Petroleum Company, a wholly-owned subsidiary of Marathon Oil Company, increased its crude oil imports in 1986 compared with 1985.

The intent of the certification is to cover all workers of Marathon Oil Company's Domestic Exploration Departments in Houston, Texas and Casper, Wyoming. The amended notice applicable to TA-W-19,032 is hereby issued as follows:

All workers of Marathon Oil Company, Domestic Exploration Department, Houston, Texas and Casper, Wyoming who became totally or partially separated from employment on or after January 13, 1986 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, DC, this 13th Day of October, 1987.

Stephen A. Wandner,

Deputy Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 87-24244 Filed 10-19-87; 8:45 pm]

BILLING CODE 4510-30-M

Santa Fe Energy Co.; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In the matter of Santa Fe Energy Company; Midland, Texas, TA-W-17,731; Amarillo, Texas, TA-W-17,731A; Houston, Texas, TA-W-17,731B; Tulsa, Oklahoma, TA-W-17,731C.

According to section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a certification of eligibility to apply for worker adjustment assistance on November 7, 1986 to workers and former workers of Santa Fe Energy Company, Midland, Texas. The Notice of Certification was published in the **Federal Register** on November 28, 1986 (51 FR 43099).

Because of inquiries from the Texas Employment Commission and from former production workers in other locations of the Santa Fe Energy Company who claimed that their unemployment was related directly to the increase of imported crude oil, the Department reviewed the findings on which its determination was based. The Department also obtained new evidence on production and employment from the company which supports the expansion of the original certification to other company locations.

Since the certification of the Midland, Texas workers, Santa Fe Energy workers in Denver, Colorado (TA-W-19,604) and Santa Fe Springs, California (TA-W-19,605) have become certified for adjustment assistance.

Further, additional findings show a substantial decrease in the production of crude oil, in barrels, in 1986 compared to 1985 in the Mid-Continent District, headquartered in Tulsa, Oklahoma and the Gulf Coast District headquartered in Houston, Texas. Company officials indicated that the separation of workers in November, 1985 at corporate offices in Amarillo and Houston, Texas was caused by a reduced demand for their services from Midland, Texas, and Santa Fe Springs, California. The Midland and Santa Fe Springs facilities accounted for a substantial reduction in activity at the Amarillo and Houston, Texas corporate offices.

Based on these findings the Department is amending the Midland, Texas certification to include all workers of the Amarillo, Texas and Houston, Texas corporate offices and all workers in the Mid-Continent and Gulf Coast Districts headquartered in Tulsa, Oklahoma and Houston, Texas, respectively, as eligible to apply for adjustment assistance.

The amended certification for TA-W-17,731 is hereby issued as follows:

All workers of the Santa Fe Energy Company, Midland, Texas who became totally or partially separated from employment on or after July 13, 1985 and all workers of the Santa Fe Energy Company, Amarillo, Texas, Houston, Texas and Tulsa, Oklahoma who became totally or partially separated from employment on or after November 1, 1985 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, DC, this 13th Day of October, 1987.

Robert O. Deslongchamps,

Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 87-24245 Filed 10-19-87; 8:45 am]

BILLING CODE 4510-30-M

Office of Federal Contract Compliance Programs

Bruce Church, Inc.; Reinstatement

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Notice of Reinstatement, Bruce Church, Inc.

SUMMARY: This notice advises that Bruce Church, Inc., has been reinstated as an eligible bidder on Federal contracts and subcontracts.

FOR FURTHER INFORMATION CONTACT: Jerry D. Blakemore, Director, Office of Federal Contract Compliance Programs, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-3325, Washington, DC 20210 (202-523-9475).

SUPPLEMENTARY INFORMATION: Bruce Church, Inc., Salinas, California, is, as of this date, reinstated as an eligible bidder on Federal contracts and subcontracts.

Signed: October 13, 1987, Washington, DC.

Jerry D. Blakemore,

Director.

[FR Doc. 87-24247 Filed 10-19-87; 8:45 pm]

BILLING CODE 4510-27-M

Occupational Safety and Health Administration

[V-84-4]

Interstate Lead Company, Inc.; Application for an Extension of Temporary Variance

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of location of hearing on application for an extension of temporary variance.

SUMMARY: In the August 14, 1987 **Federal Register** notice (52 FR 30463), OSHA announced that a hearing will be held in Birmingham, Alabama on the Interstate Lead Company, Inc. (ILCO) application for an extention of its temporary variance from the final medical removal trigger level under the Standard for Occupational Exposure to Lead (29 CFR 1910.1025(k)(1)(i)(D)). This notice provides the time, date, specific location of the hearing, and the name and address of the Administrative Law Judge presiding at the hearing.

DATE: The hearing will begin at 9:30 a.m. on Tuesday, December 1, 1987.

ADDRESSES: The hearing will be held at: Southeastern Program Service Center, Birmingham Room, 2001—12th Avenue North, Birmingham, Alabama 35285.

The name and address of the Administrative Law Judge is: Quentin P. McColgin, Office of Administrative Law Judges, Heritage Plaza, Suite 530, 111 Veterans Memorial Boulevard, Metairie, Louisiana 70005.

Authority: This notice was prepared under the direction of Nahum Litt, Chief Administrative Law Judge.

Signed at Washington, DC, this 14th day of October 1987.

Nahum Litt,

Chief Administrative Law Judge.

[FR Doc. 87-24248 Filed 10-19-87; 8:45 am]

BILLING CODE 4510-26-M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Humanities; Panel Meetings

AGENCY: National Endowment for the Humanities; NFAH.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463, as amended), notice is hereby given that the following meetings of the Humanities Panel will be held at the Old Post Office, National Endowment for the Humanities, 1100 Pennsylvania Avenue NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Stephen J. McCleary, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone 202/786-0322.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by grant applicants. Because the proposed meetings will consider information that is likely to disclose: (1) Trade secrets and commercial or financial information obtained from a person and privileged or confidential; (2) information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; or (3) information the disclosure of which would significantly frustrate implementation of proposed agency action, pursuant to authority granted me by the Chairman's meetings, dated January 15, 1978, I have determined that these meetings will be closed to the public pursuant to subsections (c)(4), (6) and (9)(B) of section 552b of Title 5, United States Code.

1. *Date:* November 2-3, 1987.
Time: 9:00 a.m. to 5:30 p.m.
Room: 430.
Program: This meeting will review applications for the Public Humanities Projects program, submitted to the Division of General Programs, for projects beginning after September 1987.

2. *Date:* November 2-3, 1987.
Time: 7:30 a.m. to 5:30 p.m.
Room: 415.
Program: This meeting will review applications for the Humanities Projects in Media, submitted to the Division of General Programs, for projects beginning after April 1, 1988.

3. *Date:* November 5-6, 1987.
Time: 9:00 a.m. to 5:30 p.m.
Room: 430.
Program: This meeting will review applications for the Humanities Projects in Libraries program, submitted to the Division of General Programs, for projects beginning after September 1987.

4. *Date:* November 5-6, 1987.
Time: 8:30 a.m. to 5:00 p.m.
Room: 415.
Program: This meeting will review applications for the Higher Education—Exemplary Projects, submitted to the Division of Education Programs, for projects beginning after April 1, 1988.

5. *Date:* November 9-10, 1987.
Time: 7:30 a.m. to 5:30 p.m.
Room: 415.
Program: This meeting will review applications for the Humanities Projects in Media, submitted to the Division of General Programs, for projects beginning after April 1, 1988.

6. *Date:* November 16-17, 1987.
Time: 8:30 a.m. to 5:00 p.m.
Room: 430.
Program: This meeting will review applications for Higher Education—Central Disciplines, submitted to the Division of Education Programs, for projects beginning after April 1, 1988.

7. *Date:* November 17-18, 1987.
Time: 7:30 a.m. to 5:30 p.m.
Room: 415.
Program: This meeting will review applications for the Humanities Projects in Media, submitted to the Division of General Programs, for projects beginning after April 1, 1988.

8. *Date:* November 19-20, 1987.
Time: 8:30 a.m. to 5:00 p.m.
Room: 315.
Program: This meeting will review applications for the Higher Education—Central Disciplines, submitted to the Division of Education Programs, for projects beginning after October 1, 1988.

9. *Date:* November 9, 1987.
Time: 8:30 a.m. to 5:30 p.m.
Room: 315.
Program: This meeting will review applications for Conferences, submitted to the Division of Research Programs, for projects beginning after October 1, 1988.

2. *Date:* November 6, 1987.
Time: 8:30 a.m. to 5:30 p.m.
Room: 315.
Program: This meeting will review applications for the Conferences, submitted to the Division of Research Programs, for projects beginning after October 1, 1988.

Stephen J. McCleary,

Advisory Committee Management Officer.

[FR Doc. 87-24212 Filed 10-19-87; 8:45 am]

BILLING CODE 7536-01-M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-275 and 50-323]

Pacific Gas and Electric Co., Diablo Canyon Nuclear Power Plant; Supplement to Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) has issued a Supplment to its original Enviromental Assessment and Finding of No Significant Impact issued on May 21, 1986 and published in the **Federal Register** on May 29, 1986 (51 FR 19430) regarding proposed amendments to the operating licenses authorizing modifications to the Diablo Canyon spent fuel pools. The modifications would increase the capacity of each pool from 270 fuel assemblies to 1324 fuel assemblies.

Identification of Proposed Action: The proposed action is an amendment to the operating licenses for Diablo Canyon Units 1 and 2 to authorize increased storage capacity of spent fuel by the installation of storage racks with closer spacing. The Supplement addresses the environmental impacts of conducting the conversion to the new spent fuel storage racks with spent fuel now stored in each spent fuel pool, which now are full of borated water ("wet reracking"). The original environmental assessment did not address this matter since the conversion was originally planned before the first refueling of each unit and therefore could be performed in dry empty spent fuel pools.

In addition, the supplement explains how the Final Generic Environmental Impact Statement on Handling and Storate of Spent Light Water Power Reactor Fuel (NUREG-0575, August 1979) was relied upon in the staff's

original site-specific environmental assessment. The supplement also briefly discusses severe beyond-design-basis accidents. Both of these discussions are in response to comments made by the U.S. Court of Appeals for the Ninth Circuit in *San Luis Obispo Mothers for Peace and the Sierra Club vs. NRC*, 799 F.2d 1268 (9th Cir. 1986).

Summary of Environmental Assessment: With respect to the matters discussed above, non-radiological environmental impacts due to the "wet reracking" are the same as those due to "dry" reracking, i.e., there are no additional environmental impacts due to this change, and the impacts are insignificant. As for radiological impacts, the consequences of fuel damage during the wet reracking are enveloped by the standard fuel handling accident previously evaulated. The wet reracking would generate additional contaminated waste, but its disposal would not create a significant radiological impact on the environment. The previous analyses of six alternatives is not impacted by the change to wet reracking; the alternatives considered continue to be inferior to reracking.

The supplement confirms the continued validity of the generic environmental impact statement and its site-specific applicability to recent environmental assessments at Surry, Robinson, and Diablo Canyon.

Beyond-design-basis accidents, such as a criticality accident and a zircalloy cladding fire caused by overheading due to a loss of pool water caused by pool failure, are very low probability accidents and are not viewed as reasonably foreseeable events. Therefore, further discussion of their impacts is not required or presented.

Finding of No Significant Impact: The Commission has reviewed the proposed changes and other matters discussed above relative to the requirements set forth in 10 CFR Part 51. Based upon the supplement to the environmental assessment, the Commission continues to conclude that there are no significant radiological or non-radiological impacts associated with the proposed action and that the proposed license amendments will not have a significant effect on the quality of the human environment. Therefore, the Commission reaffirms its determination, pursuant to 10 CFR 51.31, not to prepare an environmental impact statement for the proposed action.

For further details with respect to this action, see (1) The Environmental Assessment and Finding of No Significant Impact dated May 21, 1987 and related Notice published in the **Federal Register** on May 29, 1986 (51 FR 19430) and references cited therein, and (2) Supplement to the Safety Evaluation and the Environmental Assessment dated October 15, 1987 and references cited therein.

All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC 20555, and at the California Polytechnic State University Library, Government Document and Maps Department, San Luis Obispo, California 93407.

Dated at Bethesda, Maryland, this 15th day of October, 1987.

For the Nuclear Regulatory Commission.

Charles M. Trammel,

Project Manager, Division of Reactor Projects-III, IV, V and Special Projects.

[FR Doc. 87-24348 Filed 10-19-87; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-331]

Iowa Electric Light and Power Co., Duane Arnold Energy Center; Exemption

I

The Iowa Electric Light and Power Company (the licensee) is the holder of Facility Operating License No. DPR-49 which authorizes operation of Duane Arnold Energy Center (DAEC/the facility). The license provides, among other things, that the facility is subject to all rules, regulations, and Orders of the Nuclear Regulatory Commission (the Commission) now or hereafter in effect.

The facility is a boiling water reactor located at the licensee's site in Linn County, Iowa.

II

On November 19, 1980, the Commission published a revised § 50.48 and a new Appendix R to 10 CFR Part 50 regarding fire protection features of nuclear power plants. The revised § 50.48 and Appendix R became effective on February 17, 1981. Section III of Appendix R contains 15 subsections, lettered A through O, each of which specifies requirements for a particular aspect of the fire protection features at a nuclear power plant. One of the subsections, III.G, is the subject of the licensee's exemption requests.

Section III.G.2 of Appendix R requires that one train of cables and equipment necessary to achieve and maintain safe shutdown be maintained free of fire damage by one of the following means:

a. Separation of cables and equipment and associated non-safety circuits of redundant trains by a fire barrier having a 3-hour rating. Structural steel forming a part of or supporting such fire barriers shall be protected to provide fire resistance equivalent to that required of the barrier.

b. Separation of cables and equipment and associated non-safety circuits of redundant trains by a horizontal distance of more than 20 feet with no intervening combustible or fire hazards. In addition, fire detectors and an automatic fire suppression system shall be installed in the fire area.

c. Enclosure of cable and equipment and associated non-safety circuits of one redundant train in a fire barrier having a 1-hour rating. In addition, fire detectors and an automatic fire suppression system shall be installed in the fire area.

Subsection III.G.3 of Appendix R requires that where Subsection III.G.2 cannot be met, alternative or dedicated shutdown capability should be provided. Also, for areas where alternative or dedicated shutdown is provided, fire detection and a fixed fire suppression system shall be installed in the area, room, or zone under consideration.

By letter dated September 28, 1984, the licensee requested exemptions from Subsection III.G.2 of Appendix R. By letters dated October 31, 1984, October 21, 1986 and April 3, 1987, the licensee provided additional information regarding the exemption request. In the April 3, 1987 letter, the licensee provided information relevant to the "special circumstances" finding required by revised 10 CFR 50.12(a) (see 50 FR 50764). They combined the fire zones into separate categories, described the exemption request in each category and then presented the special circumstances for each category as follows:

Fire Zones: Water tight unlabeled doors between Fire Zones 1-D and 2-B (watertight door No. 203) and 1-D and 1-A (watertight door No. 202).

Description of Exemption Request: These doors are required to be both watertight and 3 hour rated. Underwriters Laboratories (UL) approved the doors as 3 hour rated if gasket material is not used. However, without the gaskets the doors are not watertight. Although there is no known gasket material which is 3 hour rated, Iowa Electric replaced the gasket material with gaskets made of Ferratex #8201 material which is used in U.S. Naval scuttles, doors and hatches located in missile blast areas and also on fume-tight doors in fire bulkheads.

Special Circumstances of 10 CFR 50.12: Iowa Electric believes that both special circumstances 10 CFR 50.12(a)(2)(ii) and (vi) apply to the requested exemption. Use of Ferratex #8201 gaskets makes the doors equivalent to 3 hour rated doors and literal compliance with that rating is not necessary to achieve the underlying purpose of the rule

(10 CFR 50.12(a)(2)(ii)). Furthermore, the licensee has made a good faith effort to locate a 3 hour rated gasket, but such material has not been developed (10 CFR 50.12(a)(2)(vi)).

Fire Zones: 1–C to 2–A/2–B; 1–D to 2–A/2–B; 2–A/2–B to 3–A/3–B, 3–C and 3–D; 2–D to 3–A/3–B; 3–A/3–B to 4–A/4–B; 7–E to 8–F, 8–G, 8–H and 8–J; 10–A to 11–A; 10–B to 11–A; 10–D to 11–A; 11–A to 12–A; 16–A/16–B to 16–B/16–A; 16–F to 16–A and 16–B; 17–A/17–B to 17–B/17–A; 17–C/17–D to 17–D/17–C.

Description of Exemption Request: Exemptions from the requirement to protect structural steel forming part of or supporting required fire barriers (exemption from Section III.G.2.a to 10 CFR Part 50, Appendix R) were requested for the fire zones identified above.

Special Circumstances of 10 CFR 50.12: Iowa Electric has demonstrated by analysis in the referenced letter that the peak temperature of the structural steel would not exceed the critical temperature of 1100 degrees F when exposed to fires postulated in the DAEC Fire Hazards Analysis. Therefore, protection of the structural steel is not necessary to achieve the underlying purpose of the rule (10 CFR 50.12(a)(2)(ii)).

Fire Zones: Open hatch between 3–B and 4–B (Fire Zone 3–B).

Description of Exemption Request: An exemption was requested from the requirement (exemption from Section III.G.2.a to 10 CFR Part 50, Appendix R) to provide a rated fire barrier at the hatch between Fire Zones 3–B and 4–B to separate redundant safe shutdown equipment.

Special Circumstances of 10 CFR 50.12: A rated fire barrier is not needed to achieve the underlying purpose of the rule because of the existence of deluge and partial zone suppression systems, low combustible loading and combustible distribution (10 CFR 50.12(a)(2)(ii)).

Fire Zones: 1–A, 1–C, 2–D, 3–A, 3–B, 4–A, 7–A, 7–C.

Description of Exemption Requests: Exemptions were requested for fire dampers located between Fire Zones 1–A and 1–C, 7–A and 7–C, 3–B and 4–A. Because of congestion and construction tolerances, the dampers cannot be installed totally "in accordance with the conditions of their listing and the manufacturer's installation instructions" as required by NFPA 90A, Article 3–3.7.2.1.

Exemptions were also requested from the requirements of Section III.G.2.a (also Section III.G.2.b for Fire Zone 1–A) of 10 CFR Part 50, Appendix R. The exemption request proposed the use of the flexible wrap manufactured by B & B insulators under the trade name "Hemyc". The use of the flexible "Hemyc" material provides protection equivalent to a complete 3 hour fire barrier.

Special Circumstances of 10 CFR 50.12: The ability of the fire barriers and fire dampers to function will be unimpaired by their installation. Thus, requiring in-situ testing of the dampers to meet the literal reading of NFPA 90A, Article 3–3.7.2.1 is not necessary to achieve the underlying purpose of the rule. The flexible "Hemyc" material has been shown, by extrapolation from 1 hour test data, to be equivalent to a 3 hour fire barrier and its use achieves the underlying purpose of the rule (10 CFR 50.12(a)(2)(ii)). For Fire Zone 1–A, Iowa Electric has demonstrated that exemption from full zone detection and automatic suppression is justified and requiring such is not necessary to achieve the underlying purpose of the rule (10 CFR 50.12(a)(2)(ii)).

Based on the above information and analysis, the Commission's staff concludes that "special circumstances" exist for the licensee's requested exemptions. See 10 CFR 50.12(a)(2)(ii) and (vi).

The following lists the specific exemption requests submitted by the licensee in their September 28, 1984 letter, supplemented by letters dated October 31, 1984 and October 21, 1986.

1. • Reactor Building, Elevation 716 feet, 9 inches, Torus Area, Fire Zone 1A. An exemption was requested from the specific requirements of Section III.G.2.a to the extent that it requires redundant safe shutdown cables and equipment be separated by a 3-hour rated fire barrier.

• Reactor Building, Elevation 757 feet, 6 inches, RHR Valve Room, Fire Zone 2D. An exemption was requested from the specific requirements of Section III. G. 2. a to the extent that it requires redundant safe shutdown cables and equipment be separated by a 3-hour rated fire barrier.

• Reactor Building, Elevation 786 feet, Laydown Area and Reactor Water Cleanup (RWCU) Area, Fire Zones 3A/3B. An exemption was requested from the specific requirements of Section III.G.2.a to the extent that it requires redundant safe shutdown cables and equipment be separated by a 3–hour rated fire barrier.

2. • Reactor Building, Elevation 716 feet, 9 inches, Torus Area, Fire Zone 1A. An exemption was requested from specific requirements of Section III.G.2.b to the extent that it requires automatic fire suppression and detection be installed throughout the fire area.

3. • Door No. 202 (Between Fire Zone 1D and Fire Zone 1A). An exemption was requested from the specific requirement of Section III.G.2.a to the extent that it requires redundant safe shutdown cables and equipment be separated by a 3-hour rated fire barrier.

• Door No. 203 (Between Fire Zone 1D and Fire Zone 2B). An exemption was requested from the specific requirement of Section III.G.2.a to the extent that it requires redundant safe shutdown cables and equipment be separated by a 3-hour rated fire barrier.

4. • Equipment Hatch Between Fire Zone 3B and Fire Zone 4B. An exemption was requested from the specific requirement of Section III.G.2.a to the extent that it requires redundant safe shutdown cables and equipment be separated by a 3-hour rated fire barrier.

5. • Fire Dampers FD–010 and FD–012 (Between Fire Zone 1A and Fire Zone 1C). An exemption was requested from the specific requirement of Section III.G.2.a to the extent that it requires redundant safe shutdown cables and equipment be separated by a 3-hour rated fire barrier.

• Fire Damper FD–021 (Between Fire Zone 7A and Fire Zone 7C). An exemption was requested from the specfic requirement of Section III.G.2.a to the extent that it requires redundant safe shutdown cables and equipment be separated by a 3-hour rate fire barrier.

• Fire Damper FD–111 (Between Fire Zone 3B and Fire Zone 4A). An exemption was requested from the specific requirement of Section III.G.2.a to the extent that it requires redundant safe shutdown cables and equipment be separated by a 3-hour rated fire barrier.

6. • Protection of exposed Structural Steel for Rated Barriers. An exemption was requested from the specific requirements of Section III.G.2.a to the extent that it requires structural steel forming part of or supporting fire barriers be protected to provide fire resistance equivalent to that required of the barrier.

In summary, the exemptions were requested for separating redundant trains by 3-hour rated fire barriers and for providing automatic fire suppression and detection systems. The exemptions for 3-hour rated fire barriers separating redundant trains included valve motor operators and flexible conduit not protected for 3 hours, watertight doors, and an open equipment hatch and fire dampers not installed in the configuration as they were fire tested. Fire Zone 1A does not contain automatic fire suppression and detection systems throughout the zone. Structural steel forming a part of or supporting required fire barriers in certain areas is not protected to a fire resistance equivalent to that of the barriers.

The licensee has provided alternative and/or acceptable levels of fire protection for areas containing redundant safe shutdown systems not separated from each other. Fire protection in areas with more than a neglible combustible load and containing safe shutdown equipment or cables consists of fire detectors and/or automatc fire suppression systems and portable extinguishers and hose stations.

The Commission's staff finds that there is reasonable assurance that a fire in these areas would be of low magnitude, promptly detected, and

extinguished. The low combustible loading in each area ensures that redundant safe shutdown equipment located in the adjoining areas will not be damaged before the fire brigade can extinguish the fire.

Based on the review of the licensee's analysis, the Commission's staff concludes that the installation of 3-hour fire rated enclosures around safe shutdown valve motor operators and the installation of an automatic fire suppression and detection system throughout Fire Zone 1A would not significantly increase the level of fire protection in these zones. Furthermore, the identified fire dampers and doors, equipment hatch, and unprotected structural steel provide a level of fire protection equivalent to the technical requirements of Section III.G of Appendix R. Additional details concerning the exemptions are provided in the Safety Evaluation issued concurrently.

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), (1) these exemptions as described in Section III are authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security; and (2) special circumstances 10 CFR 50.12(2)(ii)(iv) are present as discussed in III above. Therefore, the Commission hereby grants the aforementioned exemptions from the requirements of Section III.G of Appendix R to 10 CFR Part 50 as described in Section III above.

Pursuant to 10 CFR 51.32, the Commission has determined that granting these exemptions will have no significant impact on the environment (52 FR 37855).

A copy of the concurrently issued Safety Evaluation related to this action is available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC and at the local public document room located at Cedar Rapids Public Library, 500 First Street, SE, Cedar Rapids, Iowa 52401. A copy may be obtained upon written request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects—III, IV, V and Special Projects.

This Exemption is effective upon issuance.

For the Nuclear Regulatory Commission.

Dennis M. Crutchfield,

Director, Division of Reactor Projects—III,IV, V & Special Projects.

Dated at Bethesda, Maryland this 14th day of October 1987.

[FR Doc. 87-24235 Filed 10-19-87; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Boston Stock Exchange, Inc.

October 14, 1987.

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder, for unlisted trading privileges in the following stocks:

Arco Chemical Co.
Common Stock, $1.00 Per Value (File No. 7-0525)
Republic Gypsum Co.
Common Stock, $1.00 Per Value (File No. 7-0526)
Royal International Optical Corp.
Common Stock, $.10 Per Value (File No. 7-0527)
RTE Corp.
Common Stock, $1.00 Per Value (File No. 7-0528)
Rykoff-Sexton, Inc.
Common Stock, $.10 Per Value (File No. 7-0529)
Snyder Oil Partners, L.P.
Units of Limited Partnership (File No. 7-0530)
Stride-Rite Corp.
Common Stock, $1.00 Per Value (File No. 7-0531)
Sun Electric Corp.
Common Stock, $1.00 Per Value (File No. 7-0532)
Texfi Industries, Inc.
Common Stock, $1.00 Per Value (File No. 7-0533)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before November 4, 1987, written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 87-24262 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Boston Stock Exchange, Inc.

October 14, 1987.

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder, for unlisted trading privileges in the following stocks:

Armtek Corp.
Common Stock, $.50 Par Value (File No. 7-0534)
Best Buy Co.
Common Stock, $1.00 Par Value (File No. 7-0535)
Buckeye Partners L.P.
Depository Units, No Par Value (File No. 7-0536)
CBI Industries Inc.
Common Stock, $2.50 Par Value (File No. 7-0537)
Chyron Corp.
Common Stock, $.01 Par Value (File No. 7-0538)
Cleveland Cliffs Inc.
Common Stock, $1.00 Par Value (File No. 7-0539)
Countrywide Mortgage Investments Inc.
Common Stock, $.01 Par Value (File No. 7-0540)
First Fidelity Bancorporation
Common Stock, $6.25 Par Value (File No. 7-0541)
France Fund, Inc.
Common Stock, $.01 Par Value (File No. 7-0542)
Huff Corp.
Common Stock, $1.00 Par Value (File No. 7-0543)
Mark IV Industries, Inc.
Common Stock, $.01 Par Value (File No. 7-0544)
Keycorp
Common Stock, $5.00 Par Value (File No. 7-0545)
KN Energy, Inc.
Common Stock, $5.00 Par Value (File No. 7-0546)
Lamaur, Inc.
Common Stock, $3 ⅓ Par Value (File No. 7-0547)
Lamson-Sessions Co.
Common Stock, $5.00 Par Value (File No. 7-0548)

M.D.C. Asset Investors, Inc.
Common Stock, $1.00 Par Value (File No. 7-0549)
Murray Ohio Manufacturing Co.
Common Stock, $2.50 Par Value (File No. 7-0550)
NCH Corporation
Common Stock, $1.00 Par Value (File No. 7-0551)
Quanex Corporation
Common Stock, $5.00 Par Value (File No. 7-0552)
Pilgrim Regional Bankshares, Inc.
Common Stock, $.001 Par Value (File No. 7-0553)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before November 4, 1987, written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 87-24263 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Boston Stock Exchange, Inc.

October 14, 1987.

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder, for unlisted trading privileges in the following stocks:

Avemco Corp.
Common Stock, Common Stock, Par Value $.10 (File No. 7-0554)
QMS, Inc.
Common Stock, $.01 Par Value (File No. 7-0555)
United Stockyards Corp.
Common Stock, $.01 Par Value (File No. 7-0556)
Del-Val Financial Corp.
Common Stock, $1.00 Par Value (File No. 7-0557)
Global Natural Resources, Inc.
Common Stock, $.01 Par Value (File No. 7-0558)
Munford, Inc.
Common Stock, $1.00 Par Value (File No. 7-0559)
NCH Corp.
Common Stock, $1.00 Par Value (File No. 7-0560)
Toll Brothers, Inc.
Common Stock, $.01 Par Value (File No. 7-0561)
TGI Friday's, Inc.
Common Stock, $.01 Par Value (File No. 7-0562)
Telesphere International, Inc.
Common Stock, $.01 Par Value (File No. 7-0563)
Universal Food Corp.
Common Stock, $.10 Par Value (File No. 7-0564)
United Water Resources, Inc.
Common Stock, $3.50 Par Value (File No. 7-0565)
Wakenhut Corp.
Common Stock, $.10 Par Value (File No. 7-0566)
Zweig Fund, Inc.
Common Stock, $.10 Par Value (File No. 7-0567)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before November 4, 1987, written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 87-24264 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Boston Stock Exchange, Inc.

October 14, 1987.

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder, for unlisted trading privileges in the following stocks:

ACM Government Income Fund
Common Stock, $.01 Par Value (File No. 7-0568)
Furrs/Bishop Cafe—L.P.
Depository Preferred Units (File No. 7-0569)
Environmental Treatment Technology
Common Stock, $.10 Par Value (File No. 7-0570)
Battle Mountain Gold
Common Stock, $.10 Par Value (File No. 7-0571)
First Boston Income Fund
Common Stock, $.001 Par Value (File No. 7-0572)
E-II Holdings, Inc.
Common Stock, $.01 Par Value (File No. 7-0573)
Quest for Value Dual Purpose Fund
Common Stock, $.01 Par Value (File No. 7-0574)
Montedison S.P.S.
American Depository Shares (File No. 7-0575)
New World Entertainment
Common Stock, $.01 Par Value (File No. 7-0576)
Charles Schwab Corp.
Common Stock, $.01 Par Value (File No. 7-0577)
Motel 6—L.P.
Depository Units (File No. 7-0578)
Shelby Williams Industries, Inc.
Common Stock, $.05 Par Value (File No. 7-0579)
USLICO Corp
Common Stock, $1.00 Par Value (File No. 7-0580)
Valero Natural Gas Partners L.P.
Common Stock, No Par Value (File No. 7-0581)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before November 4, 1987, written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the

Securities and Exchange Commission, Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 87-24265 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Cincinnati Stock Exchange, Inc.

October 14, 1987.

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder, for unlisted trading privileges in the following securities:

Amax Gold, Inc.
Common Stock, $.01 Par Value (File No. 7-0585)
Amfac Inc. Preferred X,
$1.875 Cumulative Convertible Exchangeable Preferred, No Par Value (File No. 7-0586)
Banco Central, S.A.
American Depository Shares (File No. 7-0587)
Battle Mountain Gold Co.
Common Stock, $0.10 Par Value (File No. 7-0588)
British Petroleum PLC
Warrants (File No. 7-0589)
Consolidated Stores
Common Stock, $0.01 Par Value (File No. 7-0590)
Compania Telefonica Nacional De Espana S.A.
American Depositroy Shares (File No. 7-0591)
Computer Factory Inc.
Common Stock, $.01 Par Value (File No. 7-0592)
E-II Holdings, Inc.
Common Stock, No Par Value (File No. 7-0593)
Environmental Treatment & Technology
Common Stock, $0.10 Par Value (File No. 7-0594)
FMC Gold Co. PLC
Common Stock, $.01 Par Value (File No. 7-0595)
Formica Corp.
Common Stock, $.01 Par Value (File No. 7-0596)
Glaxo Holdings PLC
American Depository Receipts (File No. 7-0597)
(Lewis), Galoob Toys, Inc.
Common Stock, No Par Value (File No. 7-0598)
Global Govertment Plus Fund
Common Stock, $0.1 Par Value (File No. 7-0599)
Goldome
Common Stock, $1.00 Par Value (File No. 7-0600)
Lamaur Inc.
Common Stock, $.33⅓ Par Value (File No. 7-0601)
MBIA, Inc.
Common Stock, No Par Value (File No. 7-0602)
Medtrust
Shares of Beneficial Interest (File No. 7-0603)
Monarch Machine Tool Company
Common Stock, No Par Value (File No. 7-0604)
Neiman Marcus Group
Common Stock, $.01 Par Value (File No. 7-0605)
Nuveen Municipal Value Fund Inc.
Common Stock, $.01 Par Value (File No. 7-0606)
Scudder New Asia Fund Inc.
Common Stock, $.01 Par Value (File No. 7-0607)
Speciality Equipment Companies, Inc.
Common Stock, $.01 Par Value (File No. 7-0608)
Sprague Technologies
Common Stock, $1.00 Par Value (File No. 7-0609)
Tiffany & Co.
Common Stock, $.01 Par Value (File No. 7-0610)
TJX Co. Inc.
Common Stock, $.01 Par Value (File No. 7-0611)
The United Kingdom Fund, Inc.
Common Stock, $.01 Par Value (File No. 7-0612)
USX Corp. Preferred E
$3.50 Cumulative Convertible Exchangeable Preferred, No Par Value (File No. 7-0613)
Wickes Companies Inc.
Warrants (File No. 7-0614)
McGregor Sporting Goods
Common Stock, $.10 Par Value (File No. 7-0615)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before November 4, 1987, written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securties and Exchange Commission, Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 87-24266 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-25031; File No. SR-DTC-87-14]

Self-Regulatory Organizations; Depository Trust Co.; Filing and Immediate Effectiveness of Proposed Rule Change

Pursuant to section 19(b) of the Securities Exchange Act of 1934 ("Act"), notice is hereby given that on September 30, 1987, the Depository Trust Company ("DTC") filed with the Securities and Exchange Commission a proposed rule change. The proposal includes as eligible securities in DTC's Same-Day Funds Settlement ("SDFS") Service zero coupon bonds backed by U.S. Government securities ("zero coupon bonds"). The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

On July 9, 1987, the Commission approved, on a temporary basis, a DTC proposal that established DTC's SDFS Service.[1] The SDFS Service provides full depository and transaction settlement services for certain securities transactions settling in same-day funds. Initially, only transactions involving municipal notes with a maturity of one year or less were eligible for the SDFS Service. DTC stated that based upon initial performance and DTC participant ("Participant") requests it would consider expanding the SDFS Service to include other transactions.[2]

[1] Securities Exchange Act Release No. 24669 (July 9, 1987), 52 FR 26613 (July 15, 1987).

[2] Transactions to be included would involve the following securities: (1) Zero coupon bonds based

Continued

Based upon initial SDFS Service performance and Participant requests, DTC has decided to make zero coupon bonds eligible for the SDFS Service. During the first three months of the SDFS Service, the number of eligible municipal note issues and volume of transactions processed has gradually increased. DTC states that it has not experienced, nor is it aware that SDFS Participants and settling banks have experienced, any significant operational problems in using the SDFS Service during this time. Moreover, according to DTC, participants have requested that zero coupon bond transactions be eligible for the SDFS Service as soon as possible.

DTC represents that it has acted to ensure accurate collateralization of zero coupon bond transactions.[3] DTC will rely primarily on "haircuts" set by its bank lenders, which are obligated under a line of credit to lend DTC funds on SDFS securities. DTC has contracted with a third-party vendor of securities valuation information to obtain daily information on the value of zero coupon bonds. According to DTC, SDFS settlement prices as well as quotations from SDFS Participants would be additional information sources for determining the value of these securities.

DTC believes the proposed rule change is consistent with the requirements of the Act in that it promotes the prompt and accurate clearance and settlement of securities transactions that settle in same-day funds. Furthermore, DTC believes the proposal effects a change in the SDFS Service that (1) does not adversely affect the safeguarding of securities or funds in DTC's custody or control and (2) does not significantly affect the respective rights or obligations of DTC or persons using the SDFS Service.

The foregoing change has become effective, pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b-4. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

Interested persons are invited to submit written data, views and arguments concerning the submission within 21 days after the date of publication in the **Federal Register**. Persons desiring to make written comments should file six copies thereof with the Secretary of the Commission, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Reference should be made to File No. SR-DTC-87-14.

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change which are filed with the Commission, and all written communications relating to the proposed rule change between the commission and any person, other than those which may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC. Copies of the filing (SR-DTC-87-14) and of any subsequent amendments also will be available for inspection and copying at DTC's principal office.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Jonathan G. Katz.

Secretary.

Dated: October 15, 1987.

[FR Doc. 87-24258 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

on U.S. Government securities; (2) municipal bonds with short-term demand ("put") options; (3) collateralized mortgage obligations (CMOs), auction-rate and tender-rate preferred stock and notes, and (4) medium-term notes.

[3] DTC requires collateralization of each SDFS Service transaction. DTC tracks continously the value of each Participant's collateral by obtaining market value data from bank lenders, third-party vendors of that information, from its Participants, and from settlement values of SDFS securities transactions. On each SDFS Service transaction, DTC will "haircut" (or discount the value of) SDFS securities coming into a Participant's account. A receiving Participant must have sufficient collateral to cover the difference between the value paid for the SDFS securities and their discounted values.

[Release No. 34-25032; File No. SR-DTC-87-13]

Self-Regulatory Organizations; Depository Trust Co.; Filing and Immediate Effectiveness of Proposed Rule Change

Pursuant to section 19(b) of the Securities Exchange Act of 1934 ("Act"), notice is hereby given that on September 9, 1987, the Depository Trust Company ("DTC") filed with the Securities and Exchange Commission a proposed rule change that would eliminate a $40.00 disincentive fee charged for Same-Day Funds Settlement ("SDFS") deposits made between 12:00 noon and 1:00 p.m. at DTC. Under the proposal, fees for SDFS deposits during this time period will be the same as fees for other SDFS deposits.[1] The Commission is publishing this notice to solicit comments from interested persons.

On July 9, 1987, the Commission approved, on a temporary basis, a DTC proposal that established DTC's SDFS Service.[2] The SDFS Service provides full depository and transaction settlement services for certain securities transactions settling in same-day funds.[3] In establishing the SDFS Service, DTC established fees for SDFS transactions. Those fees included a $40.00 disincentive fee for SDFS deposits made between 12:00 noon and 1:00 p.m., the last hour of the day in which SDFS deposits can be made. This fee was imposed to discourage late SDFS deposits and decrease late SDFS deposit volume.

DTC believes late deposit volume is not a matter of concern during the SDFS pilot period and therefore proposes to eliminate the disincentive fee. DTC also believes the elimination of this disincentive fee will encourage Participants to use the SDFS service during the 12:00 noon to 1:00 p.m. period. Moreover, DTC believes this proposal is consistent with section 17A(b)(3)(D) of the Act because it provides for the equitable allocation of dues, fees, and other charges among its Participants.

The foregoing change has become effective, pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b-4. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

Interested persons are invited to submit written data, views and arguments concerning the submission within 21 days after the date of publication in the **Federal Register**. Persons desiring to make written comments should file six copies thereof with the Secretary of the Commission, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Reference should be made to File No. SR-DTC-87-13.

Copies of the submission, all subsequent amendments, all written

[1] $2.00 plus a charge after the first 10 certificates of $1.00 per group of 10 certificates with a maximum total deposit charge of $6.00.

[2] Securities Exchange Act Release No. 24669 (July 9, 1987), 52 FR 26613 (July 15, 1987).

[3] Currently, only transactions involving municipal notes with a maturity of one year or less are eligible for the SDFS Service. DTC plans to consider expanding the service to include other transactions.

statements with respect to the proposed rule change which are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those which may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room 450 Fifth Street, NW., Washington, DC 20549. Copies of the filing (SR-DTC-87-13) and of any subsequent amendments also will be available for inspection and copying at DTC's principal office.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

Dated: October 15, 1987.

[FR Doc. 87-24257 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-25017; File No. SR-MSRB-87-7]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Approving Proposed Rule Change

On August 20, 1987, the Muncipal Securities Rulemaking Board ("MSRB") submitted a proposed rule change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder to amend Rule G-12(e), G-12(e)(iii), G-15(c)(vi), and G-15(c) to correct cross references to the confirmation provisions of Rules G-12(c) and G-15(a) and to require delivery tickets to conform to descriptions required on confirmation.

In 1986, the MSRB amended RulesG-12(c) and G-15(a) on dealer and customer confirmation requirements to require a disclosure on the confirmation if securities are subject to federal taxation or the federal alternative minimum tax. Certain provisions of the rules were consequently renumbered. The proposed rule change would correct the cross-references in Rule G-12(e) and G-15(c) to the confirmation provisions, and would amend rules G-12(e)(iii) and G-15(c)(ii) to require delivery tickets to include the same designation regarding taxability and alternative minimum tax as are required under the confirmation provisions.

Notice of the proposed rule change was given in Securities Exchange Act Release No. 24867 (52 FR 34033). No comments were received regarding the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB, and, in particular, to the requirements of section 15B and the rules and regulations thereunder.

It is therefore ordered, pusuant to section 19(b)(2) of the Act, that the proposed rule change is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: October 13, 1987.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 87-24259 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

[Docket No. 34-25030; File No. SR-OCC-87-17]

Self-Regulatory Organization; Proposed Rule Change by the Options Clearing Corp. Relating to Margin and Clearing Fund Deposits of Candian Government Securities

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78(b)(1), notice is hereby given that on October 7, 1987 The Options Clearing Corporation filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Options Clearing Corporation ("OCC") preposes to permit for margin and Clearing Fund purposes deposits of securities issued or guaranteed by the Canadian government.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

While working with Canadian broker-dealers, OCC staff has become aware that the ability of these firms to use Canadian government securities for margin and Clearing Fund purposes would greatly facilitate their direct participation in OCC as well as stimulate Canadian investor interest in the U.S. options markets. In addition, enabling Canadian Clearing Members to deposit the Government securities that they have on hand with approved Canadian depositories would put them on a more equal footing with their U.S. counterparts. In response to these concerns, OCC has structured a proposal to ensure that expanding the pool of acceptable Government securities to include Canadian government securities would present no additional risks to the integrity and reliability of OCC's back-up system.

OCC proposes to accept Canadian government securities on the same basis as it currently accepts U.S. government securities. This would be consistent with SEC Rule 15c3-1(c)(2)(vi)(C), which provides that Canadian government debt obligations are to be treated the same as those of the U.S. government for net capital haircut purposes. Accordingly, the securities must mature within ten years, with those maturing within one year characterized as "short-term," and those with longer maturities considered "long-term." Short-term securities would be valued at the lesser of par or 100% of their current market value, while long-term would be valued at the lesser of par or 95% of their current market value. The conversion rate used for this valuation would be the exchange rate provided to OCC by its price vendor. Unlike U.S. securities, however, Canadian securities deposited for margin purposes would be valued daily to account for the fluctuating value of the Canadian dollar.

As in the U.S., OCC would accept deposits only from those Canadian banks acting as clearing banks. OCC is confident of its ability to rely on such banks to honor their commitments pursuant to such deposits. A pledge of Canadian government securities would be evidenced by a Margin Depository Receipt or Clearing Fund Depository Receipt issued to OCC by the depository bank. The existing U.S. Receipts would be modified to reflect differences

between U.S. and Canadian law with respect to such pledges.

The proposed rule change is consistent with the requirements of the Act and section 17A thereunder in that it will facilitate Canadian Clearing Members' access to OCC services, as well as investors' access to U.S. options markets, while assuring the safeguarding of securities and funds in the custody or control of OCC.

B. Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Except as indicated above, comments were not and are not intended to be solicited with respect to the proposed rule change and none was received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies there of with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission, and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by November 10, 1987.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: October 15, 1987.

Jonathan G. Katz,

Secretary.

[FR Doc. 87-24260 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-25016; File No. SR-Phlx-87-28)

Self-Regulatory Organizations; Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to the Extension of Foreign Currency Options Exercise Cut-Off Time

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1) ("Act"), notice is hereby given that on September 24, 1987, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Philadelphia Stock Exchange ("PHLX" or the "Exchange") pursuant to Rule 19b-4, hereby proposes the following rule change: (Brackets indicate deletions, italics indicate additions.)

OPTIONS RULES

* * * * *

Exercise of Option Contracts

Rule 1042. (a) No change.

(b) The exercise cut-off time for all member organizations shall be 5:30 p.m., New York time on the business day immediately prior to the expiration date. This is the latest time at which an exercise instruction for expiring option positions may be (1) prepared by a clearing member organization for positions in its proprietary trading account, (2) accepted by a clearing member organization from a non-clearing member, or (3) accepted by a member organization from any customer.

The term "exercise instruction," with respect to a customer, means the notice given to a member organization to exercise an option contract. The term "exercise instruction," with respect to a member organization or clearing member organization means either a notice not to exercise an option position which would automatically be exercised pursuant to Options Clearing Corporation Rule 805, or, a notice to exercise an option position which would not automatically be exercised pursuant to Options Clearing Corporation Rule 805. All exercise instructions must be time stamped at the time they are prepared by the receiving member organization.

Notwithstanding the foregoing, member organizations may receive exercise instructions after the exercise cut-off time but prior to expiration (i) in order to remedy mistakes made in good faith, (ii) to take appropriate action as the result of a failure to reconcile unmatched Exchange option transactions, [or] (iii) where exceptional circumstances relating to a customer's ability to communicate exercise instructions to the member organization (or the member organization's ability to receive exercise instructions) prior to such time warrant such aciton, *or (iv) with respect to foreign currency options.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statements of the Purpose of, and Statutory Basis for the Proposed Rule Change

The purpose of the proposed rule change is to allow the PHLX to extend the exercise cut-off time for PHLX traded foreign currency options. Currently pursuant to PHLX Rule 104 PHLX member organizations must submit exercise instructions for expiring options positions, including foreign currency options positions, no later than 5:30 p.m. New York time on the business day immediately prior to the expiration

date. The proposed rule change would extend this deadline for foreign currency options contracts by providing that Rule 1042 shall not apply to them. The proposed rule change is intended to permit persons wishing to exercise foreign currency options contracts to have as much time as possible to do so consistent with the rules of the Options Clearing Corporation ("OCC") because the cash markets underlying the PHLX foreign currency options contracts continue to trade after the general exercise cut-off time established pursuant to PHLX Rule 1042.

The Exchange believes that the proposed rule change is consistent with section 6(b)(5) of the Exchange Act, which provides in pertinent part, that the rules of the Exchange facilitate transactions in foreign currency options by enabling member organizations to set more optimal exercise cut-off times.

B. Self-Regulatory Organization's Statement on Burden on Competition

The PHLX does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or,

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by, November 10, 1987.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: October 9, 1987.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 87-24261 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Pacific Stock Exchange, Inc.

October 14, 1987.

The above named national securities exchange has filed application with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder, for unlisted trading privileges in the following securities:

Hartmarx Corporation
Common Stock, $2.50 Par Value (File No. 7-0515)
Hancock Fabrics, Inc.
Common Stock, $ .01 Par Value (File No. 7-0516)
Helmerich and Payne, Inc.
Common Stock, $ .10 Par Value (File No. 7-0517)
Stone Container Corporation
Common Stock, $1.00 Par Value (File No. 7-0518)
First Republic Bank Corporation
Common Stock, $5.00 Par Value (File No. 7-0519)
Rubbermaid Incorporated
Common Stock, $1.00 Par Value (File No. 7-0520)
Varity Corporation
Common Stock, No Par Value (File No. 7-0521)
E-II Holdings, Inc.
Common Stock, $ .01 Par Value (File No. 7-0522)
Newell Company
Common Stock, $1.00 Par Value (File No. 7-0523)
Ideal Basic Industries, Inc.
Common Stock, No Par Value (File No. 7-0524)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before November 4, 1987, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary

[FR Doc. 87-24267 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Philadelphia Stock Exchange, Inc.

October 14, 1987.

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder, for unlisted trading privileges in the following securities:

ARCO Chemical Company
Common Stock, $1.00 Per Value (File No. 7-0582)
Arrow Electronics, Inc.
Common Stock, $1.00 Per Value (File No. 7-0583)
First Republic Bank Corporation
Common Stock, $1.00 Per Value (File No. 7-0584)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before November 4, 1987, written data, views and arguments concerning the above-referenced application. Persons desiring to make

written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 87-24268 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-16049; 812-6587]

Daily Money Fund; Application

October 14, 1987.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 ("1940 Act").

Applicants: Daily Money Fund, Equity Portfolio: Growth, Equity Portfolio: Income, Fidelity Capital Trust, Fidelity Cash Reserves, Fidelity Congress Street Fund, Fidelity Contrafund, Fidelity Corporate Trust, Fidelity Daily Income Trust, Fidelity Destiny Portfolios, Fidelity Devonshire Trust, Fidelity Exchange Fund, Fidelity Financial Trust, Fidelity Fixed-Income Trust, Fidelity Fund, Fidelity Growth Company Fund, Fidelity High Income Fund, Fidelity Income Fund, Fidelity Institutional Cash Portfolios, Fidelity Investment Trust, Fidelity Magellan Fund, Fidelity Money Market Trust, Fidelity Puritan Trust, Fidelity Qualified Dividend Fund, Fidelity Securities Fund, Fidelity Select Portfolios, Fidelity Special Situations Fund, Fidelity Thrift Trust, Fidelity Trend Fund, Financial Reserves Fund, Income Portfolios, Plymouth Fund, The North Carolina Cash Management Trust, Variable Insurance Products Funds, and Zero Coupon Bond Fund.

Relevant 1940 Act Sections: Exemption requested under section 6(c) from the provisions of section 12(d)(3) of the 1940 Act and Rule 12d3-1 thereunder.

Summary of Application: Applicants seek a conditional order to permit them to invest in the equity and convertible debt securities of certain foreign issuers that in their most recent fiscal year derived more than 15% of their gross revenue from their activities as a broker, dealer, underwriter or investment adviser ("foreign securities companies").

Filing Date: The application was filed on December 31, 1986 and amended on August 4, 1987, September 21, 1987, and October 7, 1987.

Hearing or Notification of Hearing: If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m., on November 9, 1987. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicants with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicants: 82 Devonshire Street, Boston, Massachusetts 02109.

FOR FURTHER INFORMATION CONTACT: Joyce M. Pickholz, Staff Attorney, (202) 272-3046, or H.R. Hallock, Jr., Special Counsel, (202) 272-3030 (Division of Investment Management).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier who can be contacted at (800) 231-3282 (in Maryland (301) 258-4300).

Applicant's Representations

1. Each of the Applicants is registered or in registration as an open-end management investment company under the 1940 Act. Fidelity Management & Research Company ("FMR") is the investment adviser to each of the Applicants. It is requested that any order relating to the application also apply to any other investment companies or portfolios thereof which are advised by FMR and which in the future propose to make investments in the equity and/or convertible debt securities of foreign securities companies that meet the conditions and representations contained in the application.

2. Applicants wish to make portfolio investments in equity and convertible debt securities of foreign securities companies (i) that are listed and publicly traded on certain major foreign stock exchanges, and (ii) that meet the other conditions of quality and liquidity set forth in the application and summarized below. Applicants undertake that, before acquiring any such security, each Applicant's board of trustees will make the specific business decision to permit the Applicant to purchase such securities, as selected by the Applicant's investment adviser, because such purchases may benefit the Applicant and its investors. Applicants further undertake that each of them will invest in the equity and convertible debt securities of foreign securities companies only to the extent permitted by their then-current investment limitations.

3. Applicants' proposed acquisitions of securities issued by foreign securities companies will satisfy each of the requirements of Rule 12d3-1 under the 1940 Act except subparagraph (b)(4) thereof, which provides that "any equity security of the issuer * * * [must be] a 'margin security' as defined in Regulation T promulgated by the Board of Governors of the Federal Reserve System." Accordingly, the application seeks an exemption only from the "margin security" requirements of Rule 12d3-1.

4. The proposed conditions will assure that, in terms of breadth of market, availability of investment information, and character and permanence of the issuer, the securities in which Applicants propose to invest will be fully comparable, and in many respects superior in quality, to securities that fall within the definition of "margin security." Further, the relief requested would allow them to invest in the securities of foreign issuers that derive part of their revenue from securities related activities without first having to make difficult determinations whether or not a particular issuer is, in fact, a foreign securities company. Because many foreign issuers are integrated companies engaged in both financial and non-financial services, or provide both securities related and other financial services, it is often difficult to determine whether their revenues from securities related activities exceed 15 percent of their gross revenues. These difficulties in applying the Rule to foreign issuers potentially could exclude mutual funds from large segments of foreign markets. For instance, uncertainties concerning the nature and sources of revenues of foreign banks could cause mutual funds to forego investment in these institutions, which are estimated to represent more than 35% of the total Swiss market capitalization and approximately 14% of the total German market capitalization. Thus, Applicants propose to make *all* investments in the equity and/or

convertible debt securities of foreign issuers which may receive 15 percent or more of their revenue from securities related activities subject to the following conditions.

Applicants' Legal Analysis and Conditions

1. Applicants will acquire only those equity securities issued by foreign securities companies (or that underlie the convertible debt of such companies) that are listed on certain major foreign stock exchanges which meet certain standards for dept and liquidity ("Qualified Foreign Exchanges"). An exchange would be deemed a Qualified Foreign Exchange (1) if it is listed in the application,[1] and (2) if, at the end of its most recent calendar year (or at an earlier date if information is not yet publicly available with respect to the end of the most recent calendar year), it meets the following minimum criteria:

(1) The exchange has listed seurity shares of companies with a market value of at least 25 billion dollars;

(2) The exchange has a minimum of 150 companies with equity shares listed on the exchange;

(3) The exchange has had an average daily trading volume over the preceding six-month period of at least 25 million dollars;

(4) The exchange has had, in the previous year, a minimum turnover ratio of at least 20% of its total market capitilization.

Listing on a Qualified Foreign Exchange is the functional equivalent of listing on a U.S. national securities exchange and, accordingly, the securities so listed are fully comparable to "margin securities" for purposes of Rule 12d3-1 under the 1940 Act. Nevertheless, to assure the quality of Applicants' investments, Applicants propose as a further condition to the relief requested hereunder to acquire only those equity securities of foreign securities companies that, themselves, meet certain additional quality standards. These additional standards are collectively equal or superior to the standards applicable to an OTC margin stock. By limiting their investments to equity securities listed on certain major foreign stock exchanges that in terms of quality and liquidity are comparable to the largest of the U.S. national securities exchanges, and by imposing certain additional quality standards on the securities themselves, the conditions proposed exceed the quality standards applicable to a "margin security."

2. Applicants will purchase only those equity securities of foreign securities companies (or debt convertible into such securities) that meet the quality standards outlined below:

(1) Daily quotations for both bid and asked prices for the stock are continuously available to the general public;

(2) The stock has been publicly traded for at least six months;

(3) The issuer or a predecessor in interest has been in existence for at least three years;

(4) The issuer has at least $10 million of capital, surplus, and undivided profits;

(5) The issuer is required by exchange or governmental regulation publicly to file (i) reports of any important financial or structural corporate changes, (ii) semi-annual profit and loss statements, and (iii) annual reports of independently audited assets and liabilities, profits and losses, and changes in financial position;

(6) The issuer must have a minimum market capitalization of $20 million; and

(7) The equity securities must have (i) an average daily trading volume of at least 500 shares and (ii) an average daily trading volume equal in value to at least $25,000.

Applicants' Conclusions of Law

1. Notwithstanding that foreign issuers may be subject to different reporting, accounting and other standards from those applicable to domestic issuers, the 1940 Act does not prohibit investment companies from investing in, and many investment companies do invest in, the securities of foreign issuers. Rule 12d3-1 under the Act, however, in effect limits an investment company's ability to invest in securities of foreign securities companies. This limitation results from the requirement in Rule 12d3-1 that an eligible security of a securities company be a "margin security." Applicants will comply with all the other requirements of Rule 12d3-1. With respect to the "margin security" requirement, the conditions proposed in this application are fully as rigorous, and in certain respects more rigorous, than the standards applicable to a "margin security." Thus, the relief requested is fully consistent with the policies and purposes of Rule 12d3-1 under the 1940 Act and accordingly with the purposes of the 1940 Act.

2. The relief requested would advance the removal of artificial barriers to the international securities market and would lead to valuable international diversification in the portfolios of investment companies. Investors thereby would likely recognize important benefits, both from increased diversification and from access to international markets in which capital is permitted to flow freely without artificial restraints.

For the Commission, by the Division of Investment Management, under delegated authority.

Shirley E. Hollis,

Assistant Secretary.

[FR Doc. 87-24269 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

[1] The following foreign exchanges are so listed: Australia, Association of Exchanges; Belgium, Brussels; Brazil, Rio de Janeiro and Sao Paulo; Canada, Toronto; France, Paris; Germany, Federation of Exchanges (limited to the Frankfurt and Dusseldorf Exchanges); Hong Kong; Italy, Milan; Japan, Tokyo; Netherlands, Amsterdam; Spain; Sweden, Stockholm; Switzerland, Basel, Geneva, and Zurich; United Kingdom, London.

[Release No. IC-16051; 812-6811]

Templeton Funds, Inc.; Application

October 14, 1987.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Amendment of Order of Exemption and Approval under the Investment Company Act of 1940 ("the 1940 Act").

Applicants: Templeton Funds, Inc. ("Funds, Inc."), Templeton Growth Fund, Inc. ("Growth Fund") Templeton Income Fund ("Income Fund"), Templeton Global Funds, Inc. ("Global Funds") (collectively, the "Funds"), and Securities Fund Investors, Inc. ("SFI") (collectively, the "Applicants").

Relevant 1940 Act Sections: Approving certain transactions pursuant to section 11(a).

Summary of Application: Applicants seek an order amending a Commission Order dated May 20, 1983 ("1983 Order") (Release No. 40-13259), which amended certain previous orders of the Commission (Release No. 40-10172 and 40-10192, dated March 22, 1978 and April 6, 1978, respectively) ("1978 Orders"). The requested amended order would approve certain exchange offers to be made between existing Funds, or which may be made between future Funds, or future investment companies distributed by SFI, on a basis other than the relative net asset values of the shares to be exchanged.

Filing Date: This application was filed on August 4, 1987 and amended on September 22, October 9, and October 13, 1987.

Hearing or Notification of Hearing: If no hering is ordered, the application will be granted. Any interested person may request a hearing on the application or ask to be notified if a hering is ordered. Any requests must be received by the

SEC by 5:30 p.m., on November 9, 1987. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicants with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretry of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, c/o Keith W. Vandivort, Esq., 1730 Pennsylvania Avenue, NW., Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Fran Pollack-Matz, Staff Attorney (202) 272-3024 or Karen L. Skidmore, Special Counsel (202) 272-3023, Division of Investment Management.

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier, (800) 231-3282 (in Maryland (301) 258-4300).

Applicants' Representations

1. Each of the Funds is registered as an open-end management investment company under the 1940 Act. Funds, Inc. and Global Funds are managed by Templeton, Galbraith and Hansberger Ltd. ("TGH"), a publicly traded company listed on The Stock Exchange, London. Growth Fund is managed by Templeton Investment Counsel Limited, a wholly-owned subsidiary of TGH. Income Fund is managed by Templeton Investment Counsel, Inc., a wholly-owned subsidiary of TGH. SFI, a wholly-owned subsidiary of TGH, acts as principal under writer for the Funds. Applicants have requested that any order issued by the Commission on this application also extend to all open-end investment companies which may be organized in the future which are distributed by SFI, provided that the shares of such investment companies are subject to the same exchange offers and have the loan characteristics described herein (the "Additional Funds").

2. Shares of each Fund are currently offered at their net asset value plus a sales charge. On purchases of less than $10,000, the maximum sales charge for shares of each of the Funds is 8.5% of the offering price, with the sales charge reduced on larger purchases at the same breakpoint for each Fund. As set forth in each Fund's prospectus, this sales charge is subject to reductions depending on the size and type of investment. There is no charge imposed on reinvestment of dividends and capital gains earned on shares of the Funds.

3. The 1978 Orders permitted Funds, Inc. to offer at relative net asset value, its shares in exchange for shares of the Reserve Fund, Inc. ("Reserve") and Templeton Growth Fund, Ltd ("Growth Fund, Ltd."). The 1983 Order clarified that the 1978 Orders continued to apply to Funds, Inc. even though it had changed its name and added a new series. The 1983 Order also extended the requested relief to any new series of common stock of Funds, Inc. that might be created in the future.

4. "No-Load Funds" as used hereinafter shall include each Additional Fund whose shares are issued with no sales charge; "Reduced Load Fund" as used hereinafter shall include each Additional Fund whose shares are sold with a charge above that of a No-Load Fund; and "Load Fund" as used hereinafter shall include an Additional Fund whose shares are sold with a sales charge above that of a Reduced Load Fund. Applicants propose to make offers of exchange of the Funds or Additional Funds pursuant to the following plan:

a. Shares of any Fund ("Initial Fund") that were not acquired by exchange for shares of another Fund, and reinvested shares accrued on such shares, may be exchanged ("Initial Exchange") for shares of any Fund ("Successor Fund") based on relative net asset value plus the sales charge applicable to the shares of the Successor Fund less the higher of (i) the sales charge, if any, the exchanging shareholder paid for the shares of the Initial Fund or (ii) the sales charge, if any, applicable to the Initial Fund at the time of the exchange.

b. Shares of any Fund ("Predecessor Fund") acquired after an Initial Exchange by one or a series of further exchanges for shares of one or more Funds, and reinvested shares accrued on the shares of such Predecessor Fund, may be exchanged for shares of any Successor Fund based on relative net asset value plus the sales charge applicable to the shares of the Successor Fund less the higher of (i) the total sales charge, if any, the exchanging shareholder paid with respect to the acquisition of the shares of the Initial Fund and all exchange transactions thereafter leading to the acquisition of the shares of the Predecessor Fund or (ii) the sales charge, if any, applicable to the Predecessor Fund at the time of the exchange.

5. Each of the foregoing transactions is subject to a $5.00 service charge payable to the Transfer Agent by the shareholder for each exchange. Also, the minimum amount which may be exchanged is $1,000, based upon the then current offering price of the shares to be exchanged.

6. Shareholders will be notified of the exchange privilege, including the possibility of a sales charge being applicable, through the Funds' prospectuses and by means of other communications, including sales literature and other advertising. Any such communication describing the exchange program will include notification of any administrative fee related thereto. If a shareholder advises any of the Applicants that he wishes to exchange his shares in a Fund for shares of a Successor Fund, the shareholder will be provided with a prospectus of such Successor Fund. In the event that the Applicants decide to discontinue the proposed exchange privilege, however, no notice thereof will be provided to the shareholders of the Funds other than through the next subsequent effective prospectuses of the Funds.

7. Dealers and others who distribute the Funds' shares will receive the same commission upon the exchange of shares of a No Load Fund acquired by direct purchase for shares of a Load or Reduced Load Fund, as they would for distributing a Load or Reduced Load Fund directly; they will not receive a commission for any other exchange transaction. SFI acknowledges that the payment of the sales charge to a dealer on the exchange of No Load shares for shares of a Load or Reduced Load Fund may provide sufficient economic incentive for dealers to initiate such exchanges for their own benefit.

However, Applicants state that, while dealers will be notified of the exchange program, dealers or other persons involved in the distribution of the Funds' shares will not receive advice from SFI as to the suitability of an investment in a Fund, will not actively solicit exchanges, and will not contact investors by telephone to notify them of the exchange privilege. Moreover, SFI requires by the terms of its dealer agreement that a participating dealer make its books and records available to SFI and further agrees to comply with all applicable federal and state laws and rules, as well as the rules and regulations of all agencies having jurisdiction.

Applicant's Legal Conclusions

1. The proposed exchange plan is fair and equitable to shareholders of all of the Funds while at the same time giving such shareholders flexibility in their financial planning. The amendment to the 1983 Order requested herein is in the

public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act. Further the requested amendment to the 1983 Order, for the foregoing reasons, should permit exchange offers on the basis described in the proposed exchange plan to holders of shares of Additional Funds for which SFI may act in the future as principal underwriter, to the extent any such Additional Fund has sales charge features consistent with those described herein and offers the same exchange privileges described herein.

2. The proposed amendment to the 1983 order and specifically the proposed formula used to calculate sales loads is consistent with the provisions of proposed Rule 11a-3 recently published by the Commission, but not yet adopted, Release No. 40-15494 (December 23, 1986).

Applicants' Condition

If the requested order is granted, Applicants agree to the following conditions:

Applicants will comply with the provisions of Rule 11a-3, as such proposed Rule may be modified, upon its adoption by the Commission.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 87-24270 Filed 10-19-87; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF TRANSPORTATION

Aviation Proceedings; Agreements Filed During the Week Ending October 9, 1987

The following agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. 408, 409, 412, and 414. Answers may be filed within 21 days of date of filing.

Docket No. 45184

Parties: Friendship Air Alaska, Inc., Ryan Air Service, Inc., Peninsula Airways, Inc., Wilbur's Incorporated, Frontier Flying Service, Inc., and Cape Smythe Air Force, Inc.

Date Filed: October 7, 1987.

Subject: Application of Friendship Air Alaska, Inc. pursuant to section 412 of the Act requests authority to discuss a possible cooperative working arrangement with other carriers.

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 87-24202 Filed 10-19-87; 8:45 am]

BILLING CODE 4910-62-M

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ended October 9, 1987

The following applications for certificates of public convenience and necessity and foreign air carrier permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 et. seq.). The due date for answers, conforming application, or motion to modify scope are set forth below for each application. Following the answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket No. 45181

Date Filed: October 5, 1987.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: November 2, 1987.

Description: Application of Hong Kong Dragon Airlines Limited d/b/a Dragonair, pursuant to section 402 of the Act and Subpart Q of the Regulations applies for a foreign air carrier permit to engage in foreign air transportation between Hong Kong and Guam.

Docket No. 45185

Date Filed: October 8, 1987.

Due Date of Answers, Conforming Applications, or Motions to Modify Scope: November 5, 1987.

Description: Joint Application of Continental Airlines, Inc. and People Express Airlines, Inc., pursuant to section 401 of the Act and Subpart Q of the Regulations requests a renewal of the certificate of public convenience and necessity for Route 383 authorizing them to provide foreign air transportation of persons, property and mail between Newark, New Jersey, on the one hand, and London, United Kindom, on the other hand.

Docket No. 45188

Dated Filed: October 8, 1987.

Due Date for Answers, Conforming Applications, or Motions to Modify Scope: November 5, 1987.

Description: Application of Lineas Aereas Trans Costa Rica, S. A. pursuant to section 402 of the Act and Subpart Q of the Regulations applies for a foreign air carrier permit to engage in air transportation of property and mail between points in Costs Rica and Miami, Florida, Houston, Texas, San Juan, Puerto Rico, Los Angeles, California and New York, New York.

Docket No. 40683

Dated Filed: October 9, 1987

Due Date for Answers, Conforming Applications, or Motions to Modify Scope: November 6, 1987.

Description: Application of Northwest Airlines, Inc. pursuant to section 401 of the Act and Subpart Q of the Regulations, applies for renewal of its certificate of public convenience and necessity for Route 378 (U.S. -People's Republic of China).

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 87-24203 Filed 10-19-87; 8:45 am]

BILLING CODE 4910-62-M

Office of the Secretary

Minority Business Resource Center Advisory Committee; Cancellation and Rescheduling of Meeting

This notice is given to advise of the cancellation of the Minority Business Resource Center Advisory Committee meeting originally scheduled to be held Monday, November 16, 1987. Notice of meeting was published in the **Federal Register** issue of October 14, 1987 (FR 87-23746).

Notice is hereby given of the rescheduling of said meeting for Wednesday, November 18, 1987, at 5:30 p.m. at the Hyatt Regency Miami, 400 SE 2nd Avenue, Tuttle Room South, Miami, FL 33131. The agenda for the meeting remains the same as published in the issue of October 14, 1987.

Attendance is open to the interested public but limited to the space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to attend and persons wishing to present oral statements should notify the Minority Business Resource Center not later than the day before the meeting. Information pertaining to the meeting may be obtained from Ms. Josie Graziadio, Office of Small and Disadvantaged Business Utilization, 400 7th Street SW., Washington, DC 20590, telephone (202) 366-1930. Any number of the public may present a written statement to the Committee at any time.

Issued in Washington, DC, on October 15, 1987.

Amparo B. Bouchey,

Director, Office of Small and Disadvantaged Business Utilization.

[FR Doc. 87-24215 Filed 10-19-87; 8:45 am]

BILLING CODE 4910-62-M

Federal Aviation Administration

[Summary Notice No. PE-87-27]

Petition for Exemption; Summary of Petitions Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provision governing the application, processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATE: Comments on petitions received must identify the petition docket number involved and must be received on or before November 9, 1988.

ADDRESS: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-204), Petition Docket No. _____, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-204), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3132.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on October 8, 1987.

Denise D. Hall,

Acting Manager, Program Management Staff.

PETITIONS FOR EXEMPTION

Docket No.	Petitioner	Regulations affected	Description of relief sought
25312	Million Air Charters of Houston	14 CFR 135.169 and 25.853	To allow petitioner to operate certain aircraft without complying with the seat cushion flammability standards of § 25.853 for a period of 3 years beyond the implementation date of November 26, 1987.
25333	Horizon Air	14 CFR 121.312(b) and 25.853(c)	To allow petitioner to operate certain aircraft without complying with the seat cushion flammability standards of § 25.853 for a period of 3 years beyond the implementation date of November 26, 1987.
25352	Turbine Air Management, Inc.	14 CFR 91.191(a)(4) and 135.156(b)	To allow petitioner to operate a Hawker Siddley 125 (HS-125) airplane in extended overwater operations with one VLF/Omega Long-Range Navigation System (LRNS) and one High-Frequency (HF) Communication System.
25356	Milwaukee Jet	14 CFR 135.169 and 25.853	To allow petitioner to operate certain aircraft without complying with the seat cushion flammability standards of § 25.853 for an unspecified period of time beyond the implementation date of November 26, 1987.
25360	MST Aviation, Inc.	14 CFR 135.169 and 25.853	To allow petitioner to operate permanently certain aircraft without complying with the seat cushion flammability standards of § 25.853 after the implementation date of November 26, 1987.
25381	Ohio University Avionics Engineering Center	14 CFR 91.31(a)	To allow petitioner to operate a Beechcraft Bonanza, Model A-36, Serial Number 1491, beyond certain limitations presented in the pilot's operating handbook for this aircraft. The petition specifically concerns operation of the aircraft under icing conditions.
25384	VIP Jets International, Inc.	14 CFR 135.169(a), 25.853(c), and 121.312(b).	To allow petitioner to operate certain aircraft without complying with the seat cushion flammability standards of § 25.853 for a period of 48 months beyond the implementation date of November 26, 1987.
25390	Airbus Industrie	14 CFR 145.71, 145.73(a), and 43.3	To allow petitioner to become a certificated foreign repair station and perform maintenance, preventive maintenance, repair, and alteration work during and beyond the warranty period on the aircraft it manufactures and on the appliances thereof, for those aircraft under U.S. registration without limitation as to where such aircraft operate.

PETITIONS FOR EXEMPTION

Docket No.	Petitioner	Regulations affected	Description of relief sought disposition
23647	Embry-Riddle Aeronautical University	14 CFR 141.65	An extension of Exemption No. 3859 to allow petitioner to continue to recommend graduates of its certificated flight instructor courses for flight instructor certificates and ratings without taking the Federal Aviation Administration (FAA) written or flight tests. *GRANTED, September 28, 1987.*
25168	Evergreen International Airlines, Inc.	14 CFR 121.583(a)(8)	To allow petitioner to transport employees and dependents on DC-8 cargo flights. *GRANTED, September 28, 1987.*
25197	Crew Concepts, Inc.	14 CFR 135.411(a) and 135.429(c)	To allow petitioner to operate its Bell 205/212 series helicopters without performing certain aircraft modifications and without complying with certain performance, operations, and maintenance requirements. *DENIED, September 30, 1987.*
25207	Socata	14 CFR 43.3(a), 145.71, and 145.73	To allow Socata to perform preventive maintenance, maintenance, rebuilding, alteration, and optional equipment fiting on Socata's manufactured aircraft under an FAA type certificate. *GRANTED, September 29, 1987.*
25227	Northwest Airlines, Inc.	14 CFR 121.433(c)	To allow petitioner to merge the recurrent training of former Republic Airlines pilots with its 1988 annual recurrent training. *DENIED, September 29, 1987.*

[FR Doc. 87-24183 Filed 10-19-87; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Date: October 15, 1987.

The Department of Treasury has made revisions and resubmitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding these information collections should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Room 2224, Main Treasury Building, 15th and Pennsylvania Avenue NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545-0704
Form Number: 5471, Schedules M, N, and O
Type of Review: Resubmission
Title: Information Return With Respect to a Foreign Corporation

Description: Form 5471 and its related schedules are used by U.S. persons that have an interest in a foreign corporation. The form is used to report income from the foreign corporation. The form and schedules are used to report a U.S. person's acquisition of a 5-percent interest in a foreign corporation; and to report income and deductions of a foreign personal holding company. The IRS uses Form 5471 to determine if U.S. persons have correctly reported income from the foreign corporation.

Respondents: Individuals or households, Businesses or other for-profit
Estimated Burden: 135,868 hours

OMB Number: 1545-0998
Form Number: 8615
Type of Review: Resubmission
Title: Computation of Tax of Children Under Age 14 Who Have More Than $1,000 of Unearned Income

Description: Under section 1(i), children under age 14 who have unearned income may be taxed on part of that income at their parent's tax rate. Form 8615 is used to see if any of the child's unearned income is taxed at the parent's rate and, if so, to figure the child's tax on his or her unearned income and earned income, if any.

Respondents: Individuals or households
Estimated Burden: 604,200 hours
Clearance Officer: Garrick Shear, (202) 535-4297, Room 5571, 1111 Constitution Avenue NW., Washington, DC 20224
OMB Reviewer: Milo Sunderhauf, (202) 395-6880, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503

Lois K. Holland,
Departmental Reports Management Officer.

[FR Doc. 87-24232 Filed 10-19-87; 8:45 am]
BILLING CODE 4810-25-M

Office of the Secretary

List of Countries Requiring Cooperation With an International Boycott

In order to comply with the mandate of section 999(a)(3) of the Internal Revenue Code of 1954, the Department of the Treasury is publishing a current list of countries which may require participation in, or cooperation with, an international boycott [within the meaning of section 999(b)(3) of the Internal Revenue Code of 1954]. The list is the same as the prior quarterly list published in the **Federal Register.**

On the basis of the best information currently available to the Department of the Treasury, the following countries may require participation in, or cooperation with, an international boycott [within the meaning of section 999(b)(3) of the Internal Revenue Code of 1954].

Bahrain
Iraq
Jordan
Kuwait
Lebanon
Libya
Oman
Qatar
Saudi Arabia
Syria
United Arab Emirates
Yemen, Arab Republic
Yemen, People's Democratic Republic of

Date: October 14, 1987.

O. Donaldson Chapoton,
Assistant Secretary for Tax Policy.

[FR Doc. 87-24211 Filed 10-19-87; 8:45 am]
BILLING CODE 4810-25-M

[Supplement To Dept. Circ.; Public Debt Series No. 25-87]

Treasury Notes; Series AD-1989

Washington, September 30, 1987.

The Secretary announced on September 29, 1987, that the interest rate on the notes designated Series AD-1989, described in Department Circular—Public Debt Series—No. 25-87 dated September 17, 1987, will be 8½ percent. Interest on the notes will be payable at the rate of 8½ percent per annum.

Marcus W. Page,
Acting Fiscal Assistant Secretary.

[FR Doc. 87-24189 Filed 10-19-87; 8:45 am]
BILLING CODE 4810-40-M

[Amdt. to Dept. Circ. Public Debt Series No. 25-87]

8½ percent Treasury Notes: Series AD-1989

Washington, October 9, 1987.

Department of the Treasury Circular, Public Debt Series No. 25-87, dated September 17, 1987, as supplemented, descriptive of 8½ percent Treasury Notes of Series AD-1989, is hereby amended effective September 28, 1987.

The same-numbered paragraphs of Department of the Treasury Circular, Public Debt Series—No. 25-87, are hereby amended and replaced with the following paragraphs. The other terms and conditions remain unchanged.

3. Sale Procedures

3.1 Tenders will be received at Federal Reserve Banks and Branches and at the Bureau of the Public Debt, Washington, DC 20239, prior to 1:00 p.m., Eastern Daylight Saving time, Tuesday, September 29, 1987. Noncompetitive tenders as defined below will be considered timely if postmarked no later than Monday, September 28, 1987, and received no later than Wednesday, September 30, 1987.

5. Payment and Delivery

5.1 Settlement for the Notes allotted must be made at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on Notes allotted to institutional investors and to others whose tenders are accompanied by a guarantee as provided in section 3.5. must be made or completed on or before Wednesday, September 30, 1987. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury; or in Treasury bills, notes, or bonds maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for

the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

The foregoing Amendment was effected under authority of Chapter 31 of Title 31, United States Code. Notice and public procedures thereof are unnecessary as the fiscal policy of the United States is involved.

Marcus W. Page,

Acting Fiscal Assistant Secretary.

[FR Doc. 87-24190 Filed 10-19-87; 8:45 am]

BILLING CODE 4810-40-M

[Supplement to Dept. Circ.; Public Debt Series No. 26-87]

Treasury Notes: Series P-1991

Washington, October 7, 1987.

The Secretary announced on October 6, 1987, that the interest rate on the notes designated Series P-1991, described in Department Circular—Public Debt Series—No. 26-87 dated September 17, 1987, will be 9⅛ percent. Interest on the notes will be payable at the rate of 9⅛ percent per annum.

Marcus W. Page,

Acting Fiscal Assistant Secretary.

[FR Doc. 87-24191 Filed 10-19-87; 8:45 am]

BILLING CODE 4810-40-M

[Amdt. to Dept. Circ.; Public Debt Series No. 26-87]

9⅛ Percent Treasury Notes; Series P-1991

Washington, October 9, 1987.

Department of the Treasury Circular, Public Debt Series No. 26-87, dated September 17, 1987, as supplemented, descriptive of 9⅛% Treasury Notes of Series P-1991, is hereby amended effective September 28, 1987.

The same-numbered paragraphs of Department of the Treasury Circular, Public Debt Series—No. 26-87, are hereby amended and replaced with the following paragraphs. The other terms and conditions remain unchanged.

2. Description of Securities

2.1. The Notes will be dated October 15, 1987, and will accrue interest from that date, payable on a semiannual basis on March 31, 1988, and each subsequent 6 months on September 30 and March 31 through the date that the principal becomes payable. They will mature September 30, 1991, and will not be subject to call for redemption prior to maturity. In the event any payment date is a Saturday, Sunday, or other nonbusiness day, the amount due will be payable (without additional interest) on the next business day.

3. Sale Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches and at the Bureau of the Public Debt, Washington, DC 20239, prior to 1:00 p.m., Eastern Daylight Saving time, Tuesday, October 6, 1987. Noncompetitive tenders as defined below will be considered timely if postmarked no later than Monday, October 5, 1987, and received no later than Thursday, October 15, 1987.

3.6. Immediately after the deadline for receipt of tenders, tenders will be opened, followed by a public announcement of the amount and yield range of accepted bids. Subject to the reservations expressed in Section 4, noncompetitive tenders will be accepted in full, and then competitive tenders will be accepted, starting with those at the lowest yields, through successively higher yields to the extent required to attain the amount offered. Tenders at the highest accepted yield will be prorated if necessary. After the determination is made as to which tenders are accepted, an interest rate will be established, at a ⅛ of one percent increment, which results in an equivalent average accepted price close to 100.000 and a lowest accepted price above the original issue discount limit of 99.250. That stated rate of interest will be paid on all of the Notes. Based on such interest rate, the price on each competitive tender allotted will be determined and each successful competitive bidder will be required to pay the price equivalent to the yield bid. Those submitting noncompetitive tenders will pay the price equivalent to the weighted average yield of accepted competitive tenders. Price calculations will be carried to three decimal places on the basis of price per hundred, e.g., 99.923, and the determinations of the Secretary of the Treasury shall be final. If the amount of noncompetitive tenders received would absorb all or most of the offering, competitive tenders will be accepted in an amount sufficient to provide a fair determination of the yield. Tenders received from Government accounts and Federal Reserve Banks will be accepted at the price equivalent to the weighted average yield of accepted competitive tenders.

5. Payment and Delivery

5.1. Settlement for the Notes allotted must be made at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on Notes allotted to institutional investors and to others whose tenders are accompanied by a guarantee as provided in section 3.5. must be made or completed on or before Thursday, October 15, 1987. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury; in Treasury bills, notes, or bonds maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors no later than Tuesday, October 13, 1987. In addition, Treasury Tax and Loan Note Option Depositaries may make payment for the Notes allotted for their own accounts and for accounts of customers by credit to their Treasury Tax and Loan Note Accounts on or before Thursday, October 15, 1987. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

The foregoing Amendment was effected under authority of Chapter 31 of Title 31, United States Code. Notice and public procedures thereof are unnecessary as the fiscal policy of the United States is involved.

Marcus W. Page,

Acting Fiscal Assistant Secretary.

[FR Doc. 87-24192 Filed 10-19-87; 8:45 pm]

BILLING CODE 4810-40-M

[Supplement to Dept. Circ.; Public Debt Series No. 27-87]

Treasury Notes; Series G-1994

Washington, October 8, 1987.

The Secretary announced on October 7, 1987, that the interest rate on the notes designated Series G-1994, described in Department Circular—Public Debt Series—No. 27-87 dated September 17, 1987, will be 9½ percent. Interest on the notes will be payable at the rate of 9½ percent per annum.

Marcus W. Page,

Acting Fiscal Assistant Secretary.

[FR Doc. 87-24193 Filed 10-19-87; 8:45 am]

BILLING CODE 4810-40-M

[Amdt. to Dept. Circ.; Public Debt Series No. 27-87]

9½ Percent Treasury Notes; Series G-1994

Washington, October 9, 1987.

Department of the Treasury Circular, Public Debt Series No. 27-87, dated September 17, 1987, as supplemented, descriptive of 9½% Treasury Notes of Series G-1994, is hereby amended effective September 28, 1987.

The same-numbered paragraphs of Department of the Treasury Circular, Public Debt Series—No. 27-87, are hereby amended and replaced with the following paragraphs. The other terms and conditions remain unchanged.

2. Description of Securities

2.1. The Notes will be dated October 15, 1987, and will accrue interest from that date, payable on a semiannual basis on April 15, 1988, and each subsequent 6 months on October 15 and April 15 through the date that the principal becomes payable. They will mature October 15, 1994, and will not be subject to call for redemption prior to maturity. In the event any payment date is a Saturday, Sunday, or other nonbusiness day, the amount due will be payable (without additional interest) on the next business day.

3. Sale Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches and at the Bureau of the Public Debt, Washington, DC 20239, prior to 1:00 p.m., Eastern Daylight Saving time, Wednesday, October 7, 1987. Noncompetitive tenders as defined below will be considered timely if postmarked no later than Tuesday, October 6, 1987, and received no later than Thursday, October 15, 1987.

5. Payment and Delivery

5.1. Settlement for the Notes allotted must be made at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on Notes allotted to institutional investors and to others whose tenders are accompanied by a guarantee as provided in section 3.5. must be made or completed on or before Thursday, October 15, 1987. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury; in Treasury bills, notes, or bonds maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors no later than Tuesday, October 13, 1987. In addition, Treasury Tax and Loan Note Option Depositaries may make payment for the Notes allotted for their own accounts and for accounts of customers by credit to their Treasury Tax and Loan Note Accounts on or before Thursday, October 15, 1987. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

The foregoing Amendment was effected under authority of Chapter 31 of Title 31, United States Code. Notice and public procedures thereof are unnecessary as the fiscal policy of the United States is involved.

Marcus W. Page,

Acting Fiscal Assistant Secretary.

[FR Doc. 87-24194 Filed 10-19-87; 8:45 am]

BILLING CODE 4810-40-M

Bureau of Alcohol, Tobacco and Firearms

[Notice No. 645; Ref: ATF O 1100.63C]

Delegation to the Associate Director (Compliance Operations) and Regional Directors (Compliance) to Accept or Reject Offers in Compromise

1. Purpose.

This order delegates the authority to accept or reject certain offers in compromise of liabilities incurred under Chapters 51, 52, 53 and 78 of the Internal Revenue Code, and liabilities incurred under the Federal Alcohol Administration Act.

2. Cancellation.

ATF O 1100.63B, Delegation Order—Acceptance or Rejection of Offers in Compromise, dated November 17, 1978, is cancelled.

3. General.

The authority to accept or reject offers in compromise of liabilities arising under Chapters 51, 52, and 53, and sections 7652 and 7653 (Chapter 78) of Title 26 U.S.C., and the provisions of the Federal Alcohol Administration Act is vested in the Director, Bureau of Alcohol, Tobacco and Firearms, by Treasury Department Order No. 120-01 (formerly Order No. 221), dated June 6, 1972, and 26 CFR 301.7122.1.

4. Delegations.

Pursuant to the authority vested in the Director of ATF by Treasury Department Order No. 120-01, subject to the limitations contained in applicable regulations and procedures, there is hereby delegated the following authority relating to the offers in compromise of liabilities (other than forfeiture) arising under Chapters 51, 52, 53, and 78 of Title 26 U.S.C., and under the Federal Alcohol Administration Act.

a. Associate Director, Compliance Operations.

The Associate Director (Compliance Operations) is authorized to accept or reject offers in compromise of all liabilities not specifically delegated to regional directors (compliance) in paragraph 4b, arising from:

(1) Violations of Chapters 51, 52 and 53.

(2) Violations of sections 7652 and 7653 (Chapter 78) of Title 26 U.S.C., insofar as those sections relate to commodities subject to tax under Chapters 51, 52 and 53.

(3) Violations of the Federal Alcohol Administration Act.

(4) Cases which combine liabilities arising from violations of Chapter 51 of the IRC and of the FAA Act.

(5) Cases which are designated as national investigations/cases by the Associate Director (Compliance Operations).

Note: With respect to tax liability, the authority to accept or reject such offers in compromise is limited to cases in which the liability sought to be compromised (including any interest, additional amount, addition to the tax, or assessable penalty is less than $100,000.

b. Regional Directors (Compliance)

(1) Each regional director (compliance) is authorized to accept or reject offers in compromise of tax liabilities and penalties arising from:

(a) Chapter 51, Title 26 U.S.C., as follows:

1 Illegal production of untaxpaid distilled spirits, wines, or beer.

2 Failure to file returns of, or to pay, occupational taxes with respect to distilled spirits, wines, or beer.

(b) Chapter 53, Title 26 U.S.C. (failure to pay firearms making, transfer, and occupational taxes).

(2) Each regional director (compliance) is authorized to accept or reject offers in compromise of criminal liabilities of retail dealers in liquor arising from violations of the Internal Revenue laws relating to liquor, including the refilling or reuse of liquor bottles.

(3) Each regional director (compliance) is authorized to accept or reject offers in compromise of all liabilities arising from:

(a) Violations of Chapters 51, 52, and 53 and Sections 7652 and 7653 (Chapter 78) of Title 26 U.S.C. not enumerated in paragraphs 4b(1) and (2) as follows:

1 Cases in which the offer in compromise does not exceed $10,000 and the tax liability sought to be compromised does not exceed $20,000.

2 Cases that combine liabilities arising under Chapter 51 and the FAA Act where the tax liability sought to be compromised does not exceed $20,000.

3 Cases of late filed tax returns or late paid excise tax where the tax liability sought to be compromised does not exceed $50,000.

(b) Violations of the Federal Alcohol Administration Act where cases include an offer in compromise which does not exceed $10,000.

(4) The Regional director (compliance) in whose region the majority of violations occur will be the deciding official to accept or reject offers which compromise the liabilities of proprietors with plants in multiple regions. This authority does not include cases which are designated as national investigations/cases by the Associate Director (Compliance Operations).

Note: The tax liability to be compromised shall include any interest, additional amount, addition to tax, or assessable penalty.

5. Redelegation

The authority delegated herein may not be redelegated.

Approved: October 8, 1987.

Stephen E. Higgins,

Director.

[FR Doc. 87-24163 Filed 10-19-87; 8:45 am]

BILLING CODE 4810-31-M

Customs Service

Automated Surety Interface; Significant New Information Dissemination Product Pursuant to OMB Circular A-130; Solicitation of Comments

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

ACTION: Extension of comment period.

SUMMARY: This notice extends the period of time within which interested members of the public may submit comments concerning a new information dissemination product. The Customs Service, through its Automated Commercial System (ACS), is proposing an Automated Surety Interface. Under this program, Customs will furnish certain information to participating surety companies whose bonds cover Customs entries. This information is to be provided irrespective of any claim by Customs against the surety. For some time, disclosure of this information has been made to interested surety companies on a monthly basis. The ultimate goal of the program is a virtually simultaneous exchange of data between the surety company and Customs. As an interim step, Customs is presently conducting a pilot test under which certain data is being provided to a surety company on a weekly basis. It has been represented to Customs that payment by the sureties on claims for liquidated damages or additional duties will be expedited by eliminating the need for Customs to locate the bond and transmit a copy to the surety.

Customs recognized that some or all of this information may be considered to be confidential business information which is protected from disclosure under exemption (b)(4) of the Freedom of Information Act (FOIA). Accordingly, by notice published in the **Federal Register** on August 17, 1987 (52 FR 30762), Customs invited public comment on whether the disclosure of this information will cause competitive harm. Comments were to have been received on or before October 16, 1987. Customs has received a request to extend the comment period because additional time is required to prepare reasonably responsive comments. Customs believes the request has merit. Accordingly, the period of time for the submission of comments is being extended 30 days.

DATE: Comments are requested on or before November 16, 1987.

ADDRESS: Comments may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2324, 1301 Constitution Avenue, NW., Washington, DC 20229.

All comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9:00 a.m. and 4:30 p.m. on normal business days, at the address above.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: John E. Elkins, Chief, Disclosure Law Branch, (202) 566-8681. Operational Aspects: Jim Childress, Commercial System Division, (202) 343-0778.

Dated: October 15, 1987.

Harvey B. Fox,

Director, Office of Regulations and Rulings.

[FR Doc. 87-24386 Filed 10-19-87; 8:45 am]

BILLING CODE 4820-02-M

Fiscal Service

[Dept. Circ. 570, 1987 Rev., Supp. No. 3]

Surety Companies Acceptable on Federal Bonds; Dairyland Insurance Co.

A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued to the following company under sections 9304 to 9308, Title 31, of the United States Code. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 1987 Revision, on page 24609 to reflect this addition:

DAIRYLAND INSURANCE COMPANY. BUSINESS ADDRESS: 9501 East Shea Boulevard, Scottsdale, Arizona 85260-6719. UNDERWRITING LIMITATION [b]: *$5,833,000. SURETY LICENSES* [c]: CA, GA, ID, IA, KS, KY, ME, MD, MS, MT, NV, NM, NY, OH, OR, TN, TX, UT, WA, WV, WI, WY. INCORPORATED IN: Wisconsin, FEDERAL PROCESS AGENTS [d].

Certificates of Authority expire on June 30 each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (31 CFR Part 223). A list of qualified companies is published annually as of July 1 in Treasury Department Circular 570, with details as to underwriting limitations, areas in which licensed to transact surety business and other information.

Copies of the Circular may be obtained from the Surety Bond Branch, Finance Division, Financial Management Service, Department of the Treasury, Washington, DC 20226, telephone (202) 634-2214.

Mitchell A. Levine,

Assistant Commissioner, Comptroller Financial Management Service.

Dated: October 14, 1987.

[FR Doc. 87-24209 Filed 10-19-87; 8:45 am]

BILLING CODE 4810-35-M

THE WHITE HOUSE CONFERENCE FOR A DRUG FREE AMERICA

Meetings

SUMMARY: The White House Conference for a Drug Free America will host six regional meetings between November 1 and December 16, 1987 to facilitate the

gathering of information and to encourage contact between concerned individuals. Participation of individuals with a wide range of experience and interest in the fight against illegal drugs is being encouraged by the Conference staff, with a particular emphasis on anti-drug initiatives at the state and local level in both the public and private sector.

Participants from six to ten regionally grouped states will gather in the following host cities:

Omaha, Nebraska, November 1–4
Cincinnati, Ohio, November 15–18
Albuquerque, New Mexico, December 6–9
Los Angeles, California, November 8–11
Jacksonville, Florida, November 30–December 3
New York, New York, December 13–16

From February 28, 1988, through March 3, 1988, a national conference will be held in Washington, DC, which will enhance and expand upon the findings of the regional meetings, showcase the best of the nation's efforts, and highlight new proposals for combatting drug abuse in this country.

SUPPLEMENTARY INFORMATION: The White House Conference For a Drug Free America was mandated by the Anti-Drug Abuse Act of 1986, and established by President Reagan's Executive Order #12595, of May 5, 1987.

The Conference has a broader mandate to review and critically assess all areas of the drug abuse crisis in the U.S. It will bring together knowledgeable individuals from the public and private sectors who are concerned with drug abuse prevention, education, and treatment, and the production, trafficking and distribution of illicit drugs.

Through a series of meetings and forums, the Conference will focus public attention on effective methods of curbing drug abuse; look at the essential role of parents and family members in preventing drug abuse; explore ways to foster an attitude of intolerance of illicit drugs nationwide; and help eliminate both the supply and demand for these drugs.

Conferees are being appointed by the President on the basis of their experience and commitment to a drug free society. These include: Members of the President's Cabinet, state and local officials, business leaders, educators, religious leaders, sports commissioners, coaches and athletes, law enforcement officials, representatives of family groups, youth, and those working in drug abuse prevention, treatment, rehabilitation, and research.

Supporting the Chairman will be a series of Committees:

—Drug-Free Workplace
—Drug-Free Education
—Drug Abuse Treatment
—Drug-Free Sports
—Drug Law Enforcement
—Drug Abuse Prevention
—Drug-Free Transportation
—Drug-Free Public Housing
—International Drug Control
—Drug-Free Media and Entertainment

Location/Dates of Regional Meetings

(1) Date: November 1–4, 1987
Place: Red Lion Inn, 1616 Dodge Street, Omaha, Nebraska 68102
Time: 1:00 p.m. Nov. 1, 8:30 a.m. Nov. 2–4
Scope: Montana, Colorado, Iowa, Kansas, Missouri, Nebraska, North Dakota, South Dakota, Wyoming

(2) Date: November 8–11, 1987
Place: LAX Marriott, 5855 W. Century Boulevard, Los Angeles, CA 90045
Time: 1:00 p.m. Nov. 8, 8:30 a.m. Nov. 9–11
Scope: Alaska, California, Hawaii, Idaho, Nevada, Oregon, Utah, Washington

(3) Date: November 15–18, 1987
Place: Omni Netherland Plaza, 35 W. 5th Street, Cincinnati, Ohio 45202
Time: 1:00 p.m. Nov. 15, 8:30 a.m. Nov. 16–18
Scope: Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Ohio, Washington, D.C., West Virginia, Wisconsin

(4) Date: November 30–December 3, 1987
Place: Omni Jacksonville, 245 Water Street, Jacksonville Florida 32202
Time: 1:00 p.m. Nov. 30, 8:30 a.m. Dec. 1–3
Scope: Alabama, Florida, Georgia, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, Virgin Islands, Virginia

(5) Date: December 6–9, 1987
Place: Regent Albuquerque, 201 Marquette, NW., P.O. Box 1927, Albuquerque, New Mexico 87103
Time: 1:00 p.m. Dec. 6, 8:30 a.m. Dec. 7–9
Scope: Arizona, Arkansas, Louisiana, New Mexico, Oklahoma, Texas

(6) Date: December 13–16, 1987
Place: Marriott Marquis, 1535 Broadway at 45th Street, New York, New York
Time: 1:00 p.m. Dec. 13, 8:30 a.m. Dec. 14–16
Scope: Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont

Location/Date of National Conference

Date: February 28—March 3, 1988
Place: District of Columbia Convention Center, 900 9th Street NW., Washington, DC 20001
Time: 1:00 p.m. Feb. 28, 8:30 a.m. Mar. 1–3
Scope: Nationwide

Procedure: The Conference invites all interested parties to attend the meetings and/or submit written materials regarding any of the aforementioned aspects of drug abuse. Persons interested in providing written information should submit it to Lois Haight Herrington, Chairman, White House Conference For A Drug Free America, 726 Jackson Place, NW., Washington, DC 20503. If possible, all written information should be typed and submitted in duplicate. All written materials is due not later than February 1, 1988, but should be submitted as soon as possible for maximum consideration.

Conduct of Meetings: Registration for the meetings begins at 1:00 p.m. on the first day. The meetings, which will be open to the public, will begin at 8:30 a.m., each succeeding day. The Chairman of the Conference, or her designee, will preside at the meetings. Other members of the Conference will join the Chairman. The meetings will feature speeches, panel discussions, debates, "town hall" or open forum with panel and moderator discussions, and extensive workshop meetings. Any procedural rules needed for the proper conduct of the meetings will be announced by the presiding official.

Persons interested in registering for any of the meetings should call 1–800–423–7314. Persons interested in receiving additional information about the Conference should call (202) 254–4116 or write: The White House Conference For A Drug Free America, 726 Jackson Place, NW., Washington, DC 20503.

William H. Oltmann,

Deputy Executive Director, The White House Conference For A Drug Free America.

[FR Doc. 87–24283 Filed 10–19–87; 8:45 am]

BILLING CODE 3180-01-M

Sunshine Act Meetings

Federal Register
Vol. 52, No. 202
Tuesday, October 20, 1987

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).

CONSUMER PRODUCT SAFETY COMMISSION

"FEDERAL REGISTER" ANNOUNCEMENT OF PREVIOUS CITATION: Vol. 52, P 38039.

PREVIOUSLY ANNOUNCED TIME AND PLACE OF MEETING: Thursday, October 15, 1987.

CHANGES: Item concerning Lawn Darts added to Agenda.

Listed below is the Revised Agenda:

Commission Meeting, Thursday, October 15, 1987, 9:00 a.m.
Room 556, Westwood Towers, 5401 Westbard Avenue, Bethesda, MD

Open to the Public

1. *Lawn Darts*

The Commission will consider a draft advance notice of proposed rule making on lawn darts.

2. *16 CFR 1015.12*

The Commission will discuss the provisions of CPSC's Freedom of Information Act regulations concerning Congressional request for Commission documents.

3. *ATV Voluntary Standards*

The staff will brief the Commission on the status of the voluntary performance standard for all-terrain vehicles.

4. *LP Gas Automatic Control Valves*

The staff will brief the Commission on suggested changes to industry voluntary standards and codes relating to residential LP gas systems and automatic gas control valves.

For a recorded message containing the latest agenda information, call; 301-492-5709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, Md. 20207, 301-492-6800.

Sheldon D. Butts,
Deputy Secretary.

October 16, 1987.

[FR Doc. 87-24321 Filed 10-16-87; 1:42 pm]

BILLING CODE 6355-01-M

CONSUMER PRODUCT SAFETY COMMISSION

TIME AND DATE: 10:00 a.m., Thursday, October 22, 1987.

LOCATION: Room 556, Westwood Towers, 5401 Westbard Avenue, Bethesda, Md.

STATUS: Open to the Public.

MATTERS TO BE CONSIDERED:

1. Bunk Bed Petition, CP 86-2

The staff will brief the Commission on Petition CP 86-2, which requests the Commission to issue a consumer product safety standard for bunk beds.

Closed to the Public.

2. Compliance Status Report

The staff will brief the Commission on a Compliance Status Report.

3. Enforcement Matters OS #3800

The staff will brief the Commission on Enforcement Matter OS #3800.

For a recorded message containing the latest agenda information, call: 301-492-5709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, Md. 20207, 301-492-6800.

October 16, 1987.

Sheldon D. Butts,
Deputy Secretary.

[FR Doc. 87-24322 Filed 10-16-87; 1:42 pm]

BILLING CODE 6355-01-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 52 FR 36493, Tuesday, September 29, 1987.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 10:00 a.m. (Eastern Time) Monday, Octobr 19, 1987.

CHANGE IN THE MEETING: The Closed Session of the Meeting has been Canceled.

CONTACT PERSON FOR MORE INFORMATION: Cynthia C. Matthews, Executive Officer (Acting), Executive Secretariat, (202) 634-6748.

Cynthia C. Matthews,
Executive Officer (Acting), Executive Secretariat.

This notice issued October 16, 1987.

[FR Doc. 87-24387 Filed 10-16-87; 4:10 pm]

BILLING CODE 6750-06-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION:

DATE AND TIME: 9:30 a.m. (Eastern Time) Tuesday, October 27, 1987.

PLACE: Clarence M. Mitchell, Jr., Conference Room, Room No. 200-C on the Second Floor of the Columbia Plaza Building, 2401 "E" Street, NW., Washington, DC 20507.

STATUS: Part of the Meeting will be Open to the Public and Part will be Closed to the Public.

MATTERS TO BE CONSIDERED:

Open Session

1. Announcement of Notation Vote(s).
2. A Report on Commission Operations (Optional).
3. Proposed Pension Rulemaking Under section 4(f)(2) of the Age Discrimination in Employment Act.

Closed Session

Litigation Authorizations: General Counsel Recommendations.

Note.—Any matter not discussed or concluded may be carried over to a later meeting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions.

Please telephone (202) 634-6478 at all times for information on these meetings.

CONTACT PERSON FOR MORE INFORMATION: Cynthia C. Matthews, Acting Executive Officer on (202) 634-6748.

Cynthia Clarke Matthews,
Executive Officer (Acting) Executive Secretariat.

This notice issued October 16, 1987.

[FR Doc. 87-24385 Filed 10-16-87; 8:45 am]

BILLING CODE 6750-06-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 1:30 p.m. on Thursday, October 15, 1987, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session, by telephone conference call, to consider (1) matters relating to the possible failure of an insured bank, and (2) recommendations regarding administrative enforcement proceedings against insured banks.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), seconded by Mr. Dean S. Marriott, acting in the place and stead of Director Robert L. Clarke (Comptroller of the Currency), concurred

in by Chairman L. William Seidman, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting pursuant to subsections (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b (c)(6), (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

Dated: October 16, 1987.

Federal Deposit Insurance Corporation.

Margaret M. Olsen,

Deputy Executive Secretary.

[FR Doc. 87-24326 Filed 10-16-87; 3:07 pm]

BILLING CODE 6714-01-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of October 19, 26, November 2, and 9, 1987.

PLACE: Commissioners' Conference Room, 1717 H Street, NW., Washington, DC

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of October 19

Wednesday, October 21

10:00 a.m.
Briefing on Status of Unresolved Safety/Generic Issues (Public Meeting)

2:00 p.m.
Briefing on the Federally Funded Research Development Center (FFRDC) (Public Meeting)

Thursday, October 22

10:00 a.m.
Briefing on Emergency Planning Rule (Public Meeting)

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) a. Commission Review of ALAB-832 (Shoreham) (Tentative) (Postponed from October 16)

Week of October 26 (Tentative)

Wednesday, October 28

2:00 p.m.
Discussion/Possible Vote on Full Power Operating License for Palo Verde-3 (Public Meeting)

Thursday, October 29

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of November 2 (Tentative)

Tuesday, November 3

10:00 a.m.
Briefing on the Status of High Level Waste Issues (Public Meeting)

Wednesday, November 4

2:30 p.m.
Briefing on Integrated Safety Assessment Program (ISAP) (Public Meeting)

Thursday, November 5

2:00 p.m.
Discussion of Management-Organization and Internal Personnel Matters (Closed—Ex. 2 & 6)

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of November 9 (Tentative)

Monday, November 9

9:30 a.m.
Briefing on North Anna Steam Generator Tube Rupture Event (Public Meeting)

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.

To verify the status of meetings call (Recording)—(202) 634-1498.

CONTACT PERSON FOR MORE INFORMATION: Andrew Bates, (202) 634-1410.

Andrew L. Bates,

Office of the Secretary.

October 16, 1987.

[FR Doc. 87-24349 Filed 10-16-87; 3:25 pm]

BILLING CODE 7590-01-M

Corrections

Federal Register
Vol. 52, No. 202
Tuesday, October 20, 1987

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. 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 HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 87F-0294]

Sumitomo Chemical Co., Ltd.; Filing of Food Additive Petition

Correction

In notice document 87-23185 appearing on page 37525 in the issue of Wednesday, October 7, 1987, make the following correction:

In the third column, under **SUPPLEMENTARY INFORMATION**, in the 11th line, "clarifying in " should read "clarifying agent in".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ-940-07-4212-12; A-22698]

Realty Action; Arizona

Correction

In notice document 87-22606 beginning on page 36838 in the issue of Thursday, October 1, 1987, make the following correction:

On page 36839, in the first column, under T. 5 S., R. 10 E., in the first line, "SE½N½, S½" should read "S½N½, S½".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ-940-07-4212-12; A-21081]

Realty Action; Arizona

Correction

In notice document 87-22608 beginning on page 36837 in the issue of Thursday, October 1, 1987, make the following corrections:

1. On page 36838, in the third column, "T. 12 S., R. 327 E."should read "T. 12 S., R. 32 E.".
2. On the same page, in the third column, under T. 13 S., R. 30 E., in the second line, insert a comma after N½.

BILLING CODE 1505-01-D

federal register

Tuesday
October 20, 1987

Part II

Nonprocurement Debarment and Suspension; Notices of Proposed Rulemaking and Interim Final Rule

Small Business Administration
National Aeronautics and Space Administration
Department of Commerce
Department of State

International Development Cooperation Agency
- Agency for International Development

United States Information Agency
Department of the Treasury
Department of Justice
Department of Labor
Federal Mediation and Conciliation Service
Department of Defense
National Archives and Records Administration
Veterans Administration
General Services Administration
Federal Emergency Management Agency
National Science Foundation
National Foundation on the Arts and the Humanities
- National Endowment for the Arts
- National Endowment for the Humanities
- Institute of Museum Services

ACTION
Department of Agriculture
Department of the Interior
Department of Health and Human Services
Department of Transportation

SMALL BUSINESS ADMINISTRATION

13 CFR PART 145

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR PART 1265

DEPARTMENT OF COMMERCE

15 CFR PART 26

DEPARTMENT OF STATE

22 CFR PART 137

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

22 CFR PART 208

UNITED STATES INFORMATION AGENCY

22 CFR PART 513

DEPARTMENT OF THE TREASURY

26 CFR PART 601

DEPARTMENT OF JUSTICE

28 CFR PART 67

DEPARTMENT OF LABOR

29 CFR PART 98

FEDERAL MEDIATION AND CONCILIATION SERVICE

29 CFR PART 1471

DEPARTMENT OF DEFENSE

32 CFR PART 280

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR PART 1209

VETERANS ADMINISTRATION

38 CFR PART 44

GENERAL SERVICES ADMINISTRATION

41 CFR PART 101-50

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR PART 17

NATIONAL SCIENCE FOUNDATION

45 CFR PART 620

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts

45 CFR PART 1154

National Endowment for the Humanities

45 CFR PART 1169

Institute of Museum Services

45 CFR PART 1185

ACTION

45 CFR PART 1229

Nonprocurement Debarment and Suspension

AGENCIES: Department of Commerce, Department of Defense, Department of Labor, Department of State, Department of the Treasury, Department of Justice, ACTION, Agency for International Development, Federal Emergency Management Agency, Federal Mediation and Conciliation Service, General Services Administration, Institute of Museum Services, National Aeronautics and Space Administration, National Archives and Records Administration, National Endowment for the Arts, National Endowment for the Humanities, National Science Foundation, Small Business Administration, United States Information Agency, Veterans Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes a common regulation establishing among the Federal agencies shown above a uniform system of nonprocurement debarment and suspension.

DATE: To be assured of consideration, comments on the proposed rule must be received on or before December 21, 1987. Comments should refer to specific sections in the regulations.

ADDRESSES: See individual agencies below.

FOR FURTHER INFORMATION CONTACT: See individual agencies below.

SUPPLEMENTARY INFORMATION:

Background

Executive Order 12549, "Debarment and Suspension," was signed by President Reagan on February 18, 1986 and was published February 21, 1986 (51 FR 6370–71).

As part of the Administration's initiatives to curb fraud, waste, and abuse, the President's Council Integrity and Efficiency created an interagency task force to study the feasibility and desirability of a comprehensive debarment and suspension system encompassing the full range of Federal activities. The task force concluded, in its November 1982 report, that such a system was desirable and feasible.

As a result, the Office of Management and Budget (OMB) established an interagency Task Force on Nonprocurement Suspension and Debarment. This task force recommended in its November 1984 report that a governmentwide nonprocurement debarment and suspension system, similar to that currently in effect for procurement, be established. This could be the first step toward a comprehensive system, including both procurement and nonprocurement.

The Task Force on Nonprocurement Suspension and Debarment considered many issues in developing the proposed guidelines. It concluded that the system should be as compatible as possible with the procurement debarment and suspension system included in the Federal Acquisition Regulation (FAR), while fully addressing the needs and concerns of nonprocurement programs. As a result, the guidelines generally used the due process procedural structure of the FAR. Also, the proposed grounds for debarment and suspension were substantially similar to those in the FAR. The proposal combined the criteria common to the existing agency nonprocurement regulations with the criteria in the FAR.

On February 21, 1986, OMB published proposed guidelines covering the subjects indicated in section 6 of E.O. 12549, including: coverage, governmentwide criteria, and minimum due process procedures (51 FR 6372–79). They were prepared in regulation format as a minimum model rule to facilitate their use by the executive departments and agencies in preparing the agency regulations called for by section 3 of the Order.

OMB received 60 comments on the proposed guidelines. All comments were provided to the Task Force on Nonprocurement Suspension and Debarment for consideration in preparing the final guidelines which were issued on May 26, 1987 and published May 29, 1987 (52 FR 20360–69).

Section 3 of E.O. 12549 directs Federal agencies to issue regulations governing implementation of the Order; the regulations must be consistent with these guidelines. In order to comply with these instructions, the executive departments and agencies joining in this common rulemaking essentially have adopted the OMB guidelines verbatim with the exception of two areas, "Coverage" (§ _____.110(a)(1)) and "Responsibilities of Federal agencies" (§ _____.505(e)). Public comments are especially invited on these two sections which are discussed below.

The scope of the final OMB guidelines published on May 29, 1987 covered direct and indirect costs but left to agency discretion whether to limit coverage (that is, the responsibility to check the consolidated list and/or certification) to items charged as direct costs. This notice limits coverage in § _____.110(a)(1) only to direct cost activities because extending coverage to indirect costs is administratively complicated and may impose additional paperwork burden on the public.

Section _____.505(e) also has been expanded since publication of the final OMB guidelines. The guidelines published on May 29, 1987 allowed agency discretion to determine when agencies would require certification by nonprocurement participants. This notice requires certification by all nonprocurement participants receiving $25,000 or less. This is consistent with the small purchase threshold in the proposed governmentwide common rule for grants to state and local governments and with the Federal Acquisition Regulation (FAR).

Impact Analyses

Executive Order 12291

Executive Order 12291 requires that a regulatory impact analysis be prepared for "major" rules which are defined in the Order as any rule that has an annual effect on the national economy of $100 million or more, or certain other specified effects.

We do not believe that this regulation will have an annual economic impact of $100 million or more or the other effects listed in the Order. For this reason, we have determined that this regulation is not a major rule within the meaning of the Order.

Regulatory Flexibility Act of 1980

The Regulatory Flexibility Act (5 U.S.C. 605(b)) requires that, for each rule with a "significant economic impact on a substantial member of small entities," an analysis be prepared describing the rule's impact on small entities and identifying any significant alternatives to the rule that would minimize the economic impact on small entities.

We certify that this regulation will not have a significant economic impact on a substantial number of small entities.

In addition, the Regulatory Flexibility Act does not apply to this regulation because this regulation was not required to be promulgated as a proposed rule by the Administrative Procedure Act, 5 U.S.C. 553, or by any other law. The APA does not require publication of this proposed rule for public comment because it relates to loans, grants or other benefits. Matters "relating to loans, grants [or] benefits" are excepted from the APA, 5 U.S.C. 553(a)(2). Consequently, no Regulatory Flexibility Analysis has been or will be prepared.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 145

ADDRESS: Comments should be sent to: Robert B. Webber, General Counsel, 1441 L Street NW., Room 700, U.S. Small Business Administration, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Karin L. Genis, Attorney-Advisor, (202) 653-6649.

ADDITIONAL SUPPLEMENTARY INFORMATION: The Small Business Administration (SBA) is joining in the joint publication of regulations implementing Executive Order 12549, "Debarment and Suspension," signed by President Reagan on February 18, 1986. The Executive Order required the Office of Management and Budget (OMB) to develop guidelines for agency implementation of the Order. OMB issued its "Guidelines for Non-Procurement Debarment and Suspension" on May 26, 1987, which were published in the **Federal Register** on May 29, 1987 (52 FR 20360-69). The Guidelines were drafted in a form intended to serve as a model regulation for adoption by the affected agencies. The common rule printed below in today's **Federal Register** conforms with the OMB guidelines. While SBA proposes to adopt most provisions of the common rule, certain provisions are proposed to be modified to conform them to SBA's organization and programs. SBA proposes that certain of these changes be incorporated into the common rule. As described below, SBA believes these amendments will clarify the scope and improve the operation of the model regulations. SBA encourages the public to consider each proposed deviation from the common rule, and to advise SBA as to the appropriateness of including such revisions in the final regulation. Any comments on the model regulation or on any of the proposed revisions should be addressed to SBA as noted in the **ADDRESSES** portion of this rule.

SBA proposes to revise the definition of "covered transaction" in § _____.110(a)(1) of the common rule. The revised language is intended to enhance the clarity of this definition by distinguishing more clearly between primary covered transactions (those between the SBA and a participant) and a lower tiered covered transaction (those between a participant and a lower tier participant). The common rule also includes only direct cost transactions. SBA believes that the exclusion of indirect cost transactions is inappropriate. Both direct and indirect cost transactions between a participant and a lower tier participant who has been debarred, suspended or otherwise excluded in connection with a primary covered transaction equally involve the use of Federal source funds to benefit a non-responsible person. Neither should be tolerated, and neither should be beyond the reach of the regulation. The extent to which it is reasonable to routinely enforce the proscriptions elsewhere in the regulation is a separate question that SBA proposes to address by adding a new § 145.510, discussed below, setting forth the responsibilities of participants under the regulations. The common rule, as proposed, does not address participant responsibilities. SBA's proposed approach would clarify the purpose of this section, § _____.110(a)(1), as being only to identify the range of transactions covered by the regulations; enforcement procedures are addressed in §§ 145.505 and 145.510. SBA proposes that this change be incorporated into the common rule.

SBA's proposed new definition of covered transaction also differs from the language of the common rule in that it adds the phrase: ", any other formal agreements between the Agency and a person,". The purpose of this change is to recognize that SBA is involved in transactions that do not fall within any of those expressly enumerated in this provision, but which would also be covered by regulations. Such other transactions would include, for example, debenture guarantees with respect to Small Business Investment Companies and Certified Development Companies, or participation agreements between the Agency and surety bond companies or Preferred or Certified Lenders.

SBA also proposes to revise the language contained in § _____.110(a) of the common rule to reference specially covered activities of Department of Agriculture, Department of Housing and Urban Development and the Veterans Administration designated in those Agencies regulations implementing the Executive Order. These programs are expressly referenced in § _____.110(a)(2) of the common rule. SBA's change would delete the language in that paragraph of the common rule and substitute a general reference within paragraph (a) of this section. In consequence of this SBA further proposes to redesignate § _____.110(a)(1) as § 145.110(a);

§ _____.110(a)(3) as § 145.110(b);
§ _____.110(b) as § 145.110(c); and
§ _____.110(c) as § 145.110(d).

SBA proposes to delete the term "additional" before "affiliates" in § _____.110(b), redesignated here as § 145.110(c). This is to conform this provision to changes made below to § 145.120 and § 145.330(a).

SBA proposes to revise the definition of "Ineligible" in § 145.120 to make clear that only those persons determined to be ineligible pursuant to a governing statute, Executive Order or regulation will be referred to GSA for inclusion on the Consolidated List. SBA also proposes that this change be incorporated into the common rule. SBA believes the language of the common rule is over-broad. As defined in the common rule, "ineligible" persons would include all entities denied assistance pursuant to statutory or regulatory eligibility requirements because they fail to satisfy program eligibility criteria. For example, a company or individual denied a loan would qualify as "ineligible" under the common rule's definition solely because it did not satisfy SBA's statutory and regulatory credit requirements. Similarly, a company that was determined to be other than small would be "ineligible" under that definition. The consequence of this would be to flood the Consolidated List with the names of concerns and individuals whose "ineligibility" is peculiarly related to SBA's programs, without applicability or relevance to programs of other agencies. Consequently, SBA believes it would be inappropriate to include such entities and individuals on the Consolidated List, and proposes to revise the definition accordingly.

SBA proposes to delete the phrase ", including any subsidiary of any of the foregoing" from the definition of "Person" and to delete the definition of "Subsidiary" in its entirety in § _____.120, as contained in the common rule. The language is deleted here to make this provision consistent with changes made to § 145.330(a) (1) and (2), which distinguish debarment of a "person" from debarment of its "affiliates". The definition of "affiliates" in § 145.120 includes subsidiaries (and parents), so that it is unnecessary to define the term "Subsidiary" separately. Affiliates would be debarred together with a "person" only if specifically named and given notice of the proposed debarment. In the common rule, debarment of a person would automatically include debarment of all subsidiaries, unless otherwise specified by the debarring agency. SBA's proposed change would make this procedure consistent with the Agency's approach to size under Part 121 of title 13, Code of Federal Regulations.

SBA proposes to delete the phrase "that relates to the submission of bids or proposals" from § 145.305(a)(3). SBA believes this clause unnecessarily restricts the discretion of the Government to debar entities who have been convicted of violating the anti-trust laws. This change is also proposed for incorporation into the common rule.

SBA proposes that a new § 145.305(c)(7) be added to the regulation to recognize as an independent ground for debarment (and suspension) imposition of a civil penalty under the new Program Fraud Civil Penalties Act of 1986, codified at 31 U.S.C. 3801–12. Consistent with this change, SBA proposes to delete the word "or" at the end of § _____.305(c)(5), and to insert "; or" in place of the period at the end of § _____.305(c)(6). These changes are also proposed for incorporation into the common rule.

SBA proposes to revise proposed § _____.310(a) to state that "Agency employees shall promptly refer information constituting grounds for debarment to the cognizant debarring official for that official's consideration." SBA proposes to revise § _____.310(b) to read: "The Agency shall process debarment actions as informally as practicable, consistent with principles of fundamental fairness." These changes are intended to make the language of the common rule more Agency specific.

SBA proposes to delete the phrase "and the agency's specific procedures governing debarment decisionmaking" from § _____.310(b)(1)(iv). This language is unnecessary because SBA is adopting the procedures outlined in the Guidelines, and does not propose to augment those procedures.

SBA also proposes to revise § _____.310(b)(4)(ii)(B) to provide that the debarring official may refer the proposed debarment action to the Agency's Office of Hearings and Appeals to conduct further proceedings. SBA further proposes to revise § _____.310(b)(4)(ii)(C) to reference the procedural rules otherwise governing proceedings conducted by the Office of Hearings and Appeals at 13 CFR 135.35. These changes conform the regulation to the policies and procedures employed by SBA in connection with procurement debarment and suspension actions and integrate this process into the Agency's comprehensive regulations governing proceedings before its Office of Hearings and Appeals under 13 CFR Part 134.

SBA proposes to substitute the phrase "SBA shall not enter into any new covered transactions with" for the phrase "the debarring agency shall not make any new awards to" in § _____.315. The language in the common rule is borrowed from the procurement debarment and suspension regulations, and is not well suited for these regulations. Such change is also proposed generically for incorporation into the common rule. SBA also proposes to substitute "SBA" for "That agency" in the second sentence of this provision, to improve clarity.

SBA proposes to delete the words "or affiliate", "subsidiaries," and the comma after "divisions" from the first sentence of § _____.330(a)(1). The term "affiliate" is deleted to recognize that SBA does not intend the debarment of a person to automatically result in the debarment of an affiliate unless the procedures outlined in § _____.330(a)(2) are satisfied. "Subsidiaries" is deleted to recognize that such entities are included within the concept of "affiliate" as that term is defined in § _____.120, and in SBA's size regulations at 13 CFR 121.3(a). SBA also proposes to revise the end of this section to read "* * * individuals, division or organizational elements or to specified types of transactions." This change is to clarify the manner in which a debarment decision may be limited. SBA proposes these changes for inclusion in the common rule as well.

SBA proposes to delete the term "other" in § _____.330(a)(2), to make clear that only such affiliates as are specifically named and given notice of a proposed debarment will be affected by such action. This is necessary also due to the deletion of the term "affiliate" from § _____.330(a)(1). This approach would make SBA's non-procurement debarment and suspension procedures consistent with its approach to size under 13 CFR Part 121.

SBA proposes to revised proposed § _____.410(a) to state that "Agency employees shall promptly refer information constituting grounds for suspension to the cognizant suspending official for that official's consideration." SBA proposes to revise § _____.410(b) to read: "The Agency shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness." SBA further proposes to delete the phrase "and the agency's specific procedures governing suspension decisionmaking" from § _____.410(b)(1)(vi). These changes

are to recognize that SBA is adopting the model procedures outlined in the Guidelines as its procedures for suspension actions.

SBA also proposes to revise § _____.410(b)(4)(ii)(B) to state that the suspending official may refer the proposed suspension action to the Office of Hearings and Appeals to conduct further proceedings. SBA also proposes to revise § _____.410(b)(4)(ii)(C) to reference the procedural rules governing proceedings before the Agency's Office of Hearings and Appeals. These changes conform the regulation to the policies and procedures employed by SBA in connection with procurement debarment and suspension actions and integrate this process into the Agency's comprehensive regulations governing proceedings before its Office of Hearings and Appeals under 13 CFR Part 134.

SBA proposes to recaption § _____.505 to read: "*Responsibilities of SBA.*" SBA further proposes to revise § _____.505(a) to insert in place of "Each agency shall designate a liaison who" the following: "The Associate Deputy Administrator for Management and Administration shall serve as liaison between SBA and GSA, and". SBA also proposes to substitute "SBA" in place of "each agency" each time it appears in § _____.505(b)–(e) for greater clarity.

SBA proposes to revise § _____.505(e) to delete the limitation contained in the common rule that participants be required to provide certifications only where the transaction is below $25,000. This language in the common rule creates a void as to what action is necessary as to transactions exceeding $25,000. SBA understands that this provision is intended to establish the basis for enforcement of the regulation's proscription against doing business with debarred, suspended or otherwise excluded individuals. In view of this fact, SBA believes that the purpose of this regulation will not be realized if the certification requirement is so limited. The burden of disclosure is properly upon the party seeking to participate in a covered transaction. By requiring certifications by all participants, the enforcement of the proscription against doing business with debarred, suspended or otherwise excluded persons is more efficiently performed. The need for such an enforcement mechanism is equally strong for transactions over $25,000 as for those under $25,000. Consequently, SBA believes the certification requirement should be applied to all participants.

SBA proposes to add a new § 145.505(f) which advises the public that SBA will consult the Consolidated List to determine whether first tier participants in a Primary covered transaction have been debarred, suspended or otherwise excluded.

SBA further proposes to add a new § 145.510 which would establish a requirement that participants obtain certifications from lower tier participants. The new section would identify those circumstances in which participants will be required to consult the Consolidated List and when they may rely on the certifications obtained before entering into a covered transaction with a lower tier participant. SBA proposes that this section be included in the common rule as well. The common rule is silent in this area. SBA believes this guidance is needed to avoid unnecessary confusion and inadvertent violations by participants. The SBA specifically invites comments on this new provision, particularly on the extension of enforcement responsibilities to indirect as well as direct costs.

The proposed provision would require that participants obtain certifications from all lower tier participants prior to entering into a lower tier covered transaction. It further provides that the participant may rely upon the certification of a lower tier participant where the transaction involved has a cost of $25,000 or less. Where the transaction exceeds $25,000, the participant must consult the Consolidated List prior to entering into the lower tier covered transaction. The $25,000 figure used here is the same as the small purchase limitation employed in the Government contracting arena. Transactions above that limitation are of sufficient magnitude to warrant some further inquiry to verify the certification received. SBA believes that the requirement that the participant consult the Consolidated List is an appropriate further measure to require and is sufficient to assure compliance with the regulation without imposing too great a burden upon participants.

The provision also contains a requirement that each participant retain evidence of their compliance with this requirement for the same period they are otherwise required to retain financial records pertaining to the covered transaction. This is necessary to establish an audit trail.

SBA invites comment on these proposed modifications of the common rule, and on all other provisions of the common rule as they would apply to SBA programs.

List of Subjects in 13 CFR Part 145

Government-wide Nonprocurement Debarment and Suspension System.

SBA proposes to amend Title 13 of the Code of Federal Regulations as set forth below.

Dated: October 13, 1987.

James Abdnor,

Administrator.

1. Part 145 is added to read as set forth at the end of this document.

PART 145—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
145.100 Purpose.
145.105 Authority.
145.110 Scope.
145.115 Policy.
145.120 Definitions.

Subpart B—Effect of Action

145.200 Debarment or suspension.
145.205 Voluntary exclusion.
145.210 Ineligible persons.
145.215 Exception provision.
145.220 Continuation of current awards.
145.225 Failure to adhere to restrictions.

Subpart C—Debarment

145.300 General.
145.305 Causes for debarment.
145.310 Procedures.
145.315 Effect of proposed debarment.
145.320 Voluntary exclusion.
145.325 Period of debarment.
145.330 Scope of debarment.

Subpart D—Suspension

145.400 General.
145.405 Causes for suspension.
145.410 Procedures.
145.415 Period of suspension.
145.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

145.500 GSA responsibility.
145.505 Responsibilities of SBA.
145.510 Responsibilities of participants.

Authority: 15 U.S.C. 634(b)(6).

2. Newly added Part 145 is further amended as set forth below.

a. § 145.110 is revised to read as follows:

§ 145.110 Coverage.

These regulations establish rules and procedures under which the SBA may debar or suspend participants in covered transactions.

(a) *Covered transactions.* Covered transactions are domestic assistance transactions between SBA and a person, which include, except as noted in paragraph (b) of this section: grants, cooperative agreements, scholarships, fellowships, contracts of assistance,

loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreement subawards, subcontracts, and any other formal agreements between the SBA and a person. Covered transactions also include those transactions specially designated by the U.S. Department of Agriculture, the Department of Housing and Urban Development and the Veterans Administration in such agencies' regulations implementing Executive Order 12549. Such transactions are primary covered transactions. Covered transactions also include transactions at any lower tier, regardless of type (including subtier awards under awards which are statutory entitlement or mandatory awards), between a participant and a lower tier participant.

(b) *Exceptions.* The following transactions are not covered: statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory); benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted); incidental benefits derived from ordinary governmental operations; and other transactions where the application Executive Order 12549 and these regulations would be prohibited by law.

(c) *Relationship to other sections.* This section, § 145.110, describes the types of activities and transactions to which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action," § 145.200, sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants in the covered transactions described in § 145.110(a). Sections 145.330, "Scope of debarment," and 145.420, "Scope of suspension," govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(d) *Relationship to Federal acquisition activities.* Executive Order 12549 and these regulations do not apply to direct Federal acquisition activities. Debarment and suspension of Federal contractors and subcontractors are covered by the Federal Acquisition Regulation (FAR), 48 CFR Subpart 9.4. However, SBA will integrate its administration of these complementary debarment and suspension programs.

b. In § 145.120, the definitions of "Ineligible," and "Person" are revised and the definition of "Subsidiary" is being removed to read as follows:

§ 145.120 Definitions.

* * * * *

Ineligible. Excluded from participation by an agency in covered transactions pursuant to a determination of ineligibility under a statute, Executive Order, or regulation (other than Executive Order 12549 and its agency implementing regulations).

* * * * *

Person. Any individual, corporation, partnership, association, unit of government or legal entity, however organized.

* * * * *

c. In § 145.305, paragraph (a) introductory text is republished; paragraph (a)(3) is revised; paragraph (c) introductory text is republished; paragraph (c)(5) is amended by removing "or" at the end of the paragraph; paragraph (c)(6) is amended by removing the period at the end of the paragraph and inserting "; or"; and paragraph (c)(7) is added to read as follows:

§ 145.305 Causes for debarment.

* * * * *

(a) Conviction of or civil judgment for any offense indicating a lack of business integrity or honesty which affects the present responsibility of a participant, including but not limited to:

* * * * *

(3) Unlawful price fixing between competitors, allocation of customers between competitors, bid rigging, or any other violation of Federal or State antitrust laws.

* * * * *

(c) Any of the following causes:

* * * * *

(7) Imposition of a civil penalty under agency procedures implementing the Program Fraud Civil Penalties Act of 1986, 31 U.S.C. 3801–12.

* * * * *

d. In section 145.310, paragraphs (a) and (b) introductor text are revised; paragraph (b)(1) introductory text is republished; paragraph (b)(1)(iv) is revised; paragraph (b)(4) introductory text and (b)(4)(ii) are republished; and paragraphs (b)(4)(ii)(B) and (C) are revised to read as follows:

§ 145.310 Procedures.

(a) *Investigation and referral.* SBA employees shall promptly refer information constituting grounds for debarment to the cognizant debarring official for that official's consideration.

(b) *Decisionmaking process.* SBA shall process debarment actions as informally as practicable, consistent with principles of fundamental fairness. These procedures shall, at a minimum, provide the following:

(1) *Notice of proposed debarment.* A debarment proceeding shall be initiated by notice to the respondent advising:

* * * * *

(iv) Of the provisions of § 145.310(b)(1)–(b)(6);

* * * * *

(4) *Debarring official's decision.*

* * * * *

(ii) *Additional proceedings necessary.*

* * * * *

(B) The debarring official may refer the proposed debarment action to the Office of Hearings and Appeals to conduct further proceedings consistent with Part 134, and to issue recommended findings of fact and conclusions of law.

(C) The debarring official shall issue a final SBA decision consistent with the procedures in § 134.35.

* * * * *

e. Section 145.315 is revised to read as follows:

§ 145.315 Effect of proposed debarment.

Upon issuance of a notice of proposed debarment and until the final debarment decision is rendered, agencies shall not enter into any new covered transactions with the respondent. SBA may waive this exclusion pending a debarment decision upon a written determination by the debarring official identifying the reasons for doing so. In the absence of such a waiver or in the case of other agencies, the provisions of § 145.215 allowing exceptions for particular transactions may be applied.

f. In § 145.330, paragraph (a) is revised to read as follows:

§ 145.330 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person under these regulations constitutes debarment of all divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is (i) specifically named and (ii) given notice of the proposed debarment and an opportunity to respond (see § 145.310).

g. In § 145.410, paragraphs (a) and (b) introductory text are revised; paragraph (b)(1) introductory text is republished,

and paragraph (b)(1)(iv) is revised to read as follows:

§ 145.410 Procedures.

(a) *Investigation and referral.* SBA employees shall promptly refer information constituting grounds for suspension to the cognizant suspending official for that official's consideration.

(b) *Decisionmaking process.* SBA shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness. These procedures shall, at a minimum, provide the following:

(1) *Notice of suspension.* When a respondent is suspended, notice shall immediately be given:

* * * * *

(vi) Of the provisions of § 145.410(b)(1)–(b)(5); and

* * * * *

h. Section 145.505 is revised to read as follows:

§ 145.505 Responsibilities of SBA.

(a) The Associate Deputy Administrator for Management and Administration shall serve as liaison between SBA and GSA, and shall be responsible for providing GSA with current information concerning debarments, suspensions, determinations of ineligibility and voluntary exclusions taken by SBA. Until February 18, 1989, the liaison shall also provide GSA and OMB with information concerning all transactions in which SBA has granted exceptions under § 145.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, SBA shall advise GSA of the information set forth in § 145.500(b) and of the exceptions granted under § 145.215 within five working days after taking such actions.

(c) SBA shall establish procedures to provide for the effective dissemination and use of the list, in order to ensure that listed persons do not participate in any covered transaction in a manner inconsistent with that person's listed status, except as otherwise provided in this Part.

(d) SBA shall direct inquiries concerning listed persons to the agency that took the action.

(e) SBA shall require each participant in a covered transaction to certify whether the participant, or any person acting in a capacity listed in § 145.200(b) with respect to the participant or the particular covered transaction, is currently or within the preceding three years has been:

(1) Debarred, suspended or declared ineligible;

(2) Formally proposed for debarment, with a final determination still pending;

(3) Voluntarily excluded from participation; or

(4) Indicted, convicted, or had a civil judgment rendered against them for any of the offenses listed in § 145.305(a).

Adverse information on the certification need not necessarily result in denial of participation. However, the information provided by the certification, and any additional information requested by SBA, shall be considered in the administration of covered transactions.

(f) Before entering into any covered transaction, SBA shall consult the list to determine whether the prospective participant is listed, in order to ensure that listed persons do not participate in any covered transaction in a manner inconsistent with that person's listed status, except as otherwise provided in this part.

i. A new § 145.510 is added to read as follows:

§ 145.510 Responsibilities of participants.

The following requirements pertain to any lower tier covered transaction that is charged either as a direct or indirect cost to a primary covered transaction or to a lower tier covered transaction.

(a) Before entering into any lower tier covered transactions (including transactions involving the provision of counseling or training to an eligible small business) to which this part applies, participants shall require the prospective lower tier participant to certify whether such participant, or any person acting in a capacity listed in § 145.200(b) with respect to such lower tier participant or the particular lower tier covered transaction, is currently or within the preceding three years has been:

(1) Debarred, suspended or declared ineligible;

(2) Formally proposed for debarment, with a final determination still pending;

(3) Voluntarily excluded from participation; or

(4) Indicted, convicted, or had a civil judgment rendered against them for any of the offenses listed in § 145.305(a).

Adverse information on the certification need not necessarily result in denial of participation. However, the information provided by the certification, and any additional information requested by the higher tier participant, shall be considered in the administration of covered transactions.

(b) Before entering into any lower tier covered transactions over $25,000, participants shall consult the Consolidated List to determine whether the prospective lower tier participant is listed, in order to ensure that listed persons do not participate in any lower tier covered transaction in a manner inconsistent with that person's listed status, except as otherwise provided in these regulations. Participants are not required to consult the Consolidated List before entering into any lower tier transactions under $25,000; participants may rely on the certifications of lower tier participants.

(c) Participants shall direct inquiries regarding compliance with this section to the agency that is a party to the primary covered transaction.

(d) Participants shall retain evidence of their compliance with paragraphs (a) and (b) of this section for the same period of time required for financial records related to the covered transaction.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1265

ADDRESS: Office of Procurement, Code HP, NASA Headquarters, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Thomas J. Whelan, (202) 453–2114.

List of Subjects in 14 CFR Part 1265

Grants and cooperative agreements.

It is proposed that Title 14 of the Code of Federal Regulations be amended by adding Part 1265 as set forth at the end of this document.

Dale D. Myers,
Deputy Administrator.

PART 1265—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
1265.100 Purpose.
1265.105 Authority.
1265.110 Scope.
1265.115 Policy.
1265.120 Definitions.

Subpart B—Effect of Action

1265.200 Debarment or suspension.
1265.205 Voluntary exclusion.
1265.210 Ineligible persons.
1265.215 Exception provision.
1265.220 Continuation of current awards.
1265.225 Failure to adhere to restrictions.

Subpart C—Debarment

1265.300 General.
1265.305 Causes for debarment.
1265.310 Procedures.
1265.315 Effect of proposed debarment.
1265.320 Voluntary exclusion.
1265.325 Period of debarment.
1265.330 Scope of debarment.

Subpart D—Suspension

1265.400 General.
1265.405 Causes for suspension.
1265.410 Procedures.
1265.415 Period of suspension.
1265.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

1265.500 GSA responsibility.
1265.505 Responsibilities of Federal agencies.

Authority: 42 U.S.C. 2473; the National Aeronautics and Space Act of 1958, as amended; Executive Order 12549.

DEPARTMENT OF COMMERCE

15 CFR Part 26

ADDRESS: Comments should be sent to Robert M. McNamara, Room 6026, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Robert M. McNamara, Room 6026, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, Telephone: 377-5817.

ADDITIONAL SUPPLEMENTARY INFORMATION: If a statute limits the authority of the Secretary over an organization funded by the Department, that limitation may have the legal effect of excepting some transactions from this regulation. Only where a statute clearly limits the authority of the Secretary regarding a specific transaction will that transaction be viewed as excepted from this regulation.

Paperwork Reduction Act of 1980

This proposed rule does not contain a collection of information for purposes of the Paperwork Reduction Act.

Regulatory Flexibility Act of 1980

The Administrative Procedures Act (APA), 5 U.S.C. 553, does not require the Department to publish this proposed rule for public comment because it relates to grants, loans or benefits. Matters "relating to * * * loans, grants [or] benefits" are excepted from the APA, 5 U.S.C. 553(a)(2). Therefore, the Regulatory Flexibility Act does not apply to this rule because it is not required to be issued as a proposed rule by the APA or any other statute. Consequently, no Regulatory Flexibility Analysis has been or will be prepared.

List of Subjects in 15 CFR Part 26

Administrative practice and procedures, Debarment and suspension.

It is proposed that Title 15 of the Code of Federal Regulations be amended by adding Part 26 as set forth at the end of this document.

Sonya G. Stewart,
Director for Finance and Federal Assistance.

PART 26—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
26.100 Purpose.
26.105 Authority.
26.110 Scope.
26.115 Policy.
26.120 Definitions.

Subpart B—Effect of Action

26.200 Debarment or suspension.
26.205 Voluntary exclusion.
26.210 Ineligible persons.
26.215 Exception provision.
26.220 Continuation of current awards.
26.225 Failure to adhere to restrictions.

Subpart C—Debarment

26.300 General.
26.305 Causes for debarment.
26.310 Procedures.
26.315 Effect of proposed debarment.
26.320 Voluntary exclusion.
26.325 Period of debarment.
26.330 Scope of debarment.

Subpart D—Suspension

26.400 General.
26.405 Causes for suspension.
26.410 Procedures.
26.415 Period of suspension.
26.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

26.500 GSA responsibility.
26.505 Responsibilities of Federal agencies.

Authority: E.O. 12549, 51 FR 6370, 3 CFR 1987 Supp., p. 189.

DEPARTMENT OF STATE

22 CFR Part 137

ADDRESS: Comment should be sent to Office of the Procurement Executive, Room 227, SA-6, U.S. Department of State, Washington, DC 20520.

FOR FURTHER INFORMATION CONTACT: James Tyckoski, Office of the Procurement Executive (703) 875-7044.

ADDITIONAL SUPPLEMENTARY INFORMATION: The Department of State intends to incorporate the proposed rule as Part 137 of Title 22 of the Code of Federal Regulations. The Department has not previously promulgated regulatory coverage for a non-procurement debarment and suspension system.

List of Subjects in 22 CFR Part 137

Administrative practice and procedure, Grant programs-foreign relations, Grants administration, Reporting and recordkeeping requirements.

It is proposed that Title 22 of the Code of Federal Regulations be amended by adding Part 137 as set forth at the end of this document.

John J. Conway,
Procurement Executive.

Part 137—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
137.100 Purpose.
137.105 Authority.
137.110 Scope.
137.115 Policy.
137.120 Definitions.

Subpart B—Effect of Action

137.200 Debarment or suspension.
137.205 Voluntary exclusion.
137.210 Ineligible persons.
137.215 Exception provision.
137.220 Continuation of current awards.
137.225 Failure to adhere to restrictions.

Subpart C—Debarment

137.300 General.
137.305 Causes for Debarment.
137.310 Procedures.
137.315 Effect of proposed debarment.
137.320 Voluntary exclusion.
137.325 Period of debarment.
137.330 Scope of debarment.

Subpart D—Suspension

137.400 General.
137.405 Causes for suspension.
137.410 Procedures.
137.415 Period of suspension.
137.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

137.500 GSA responsibility.
137.505 Responsibilities of Federal agencies.

Authority: 22 U.S.C. 2658.

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

22 CFR Part 208

ADDRESS: Comments should be sent to Ralph C. Oser, GC/CCM, Office of the General Counsel, Room 6951 N.S., Agency for International Development, Washington, DC 20523.

FOR FURTHER INFORMATION CONTACT: Ralph C. Oser, (202) 647-8332.

ADDITIONAL SUPPLEMENTARY INFORMATION: The government-wide regulations have been supplemented by A.I.D. to give examples of specific A.I.D. transactions that are covered by the

regulation (§ 208.110(a)(4)) and to designate the officials authorized to suspend, debar and to grant exceptions (§§ 208.120 and 208.215).

List of Subjects in 22 CFR Part 208

Accounting, Administrative practice and procedures, Foreign aid grant programs—Foreign relations, Grants Administrator, Loan programs—Foreign relations.

Accordingly it is proposed to amend Title 22 of the Code of Federal Regulations as set forth below.

1. It is proposed to revise Part 208 to read as set forth at the end of this document.

PART 208—GOVERNMENT WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
208.100 Purpose.
208.105 Authority.
208.110 Scope.
208.115 Policy.
208.120 Definitions.

Subpart B—Effect of Action

208.200 Debarment or suspension.
208.205 Voluntary exclusion.
208.210 Ineligible persons.
208.215 Exception provision.
208.220 Continuation of current awards.
208.225 Failure to adhere to restrictions.

Subpart C—Debarment

208.300 General.
208.305 Causes for debarment.
208.310 Procedures.
208.315 Effect of proposed debarment.
208.320 Voluntary exclusion.
208.325 Period of debarment.
208.330 Scope of debarment.

Subpart D—Suspension

208.400 General.
208.405 Causes for suspension.
208.410 Procedures.
208.415 Period of suspension.
208.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

208.500 GSA responsibility.
208.505 Responsibilities of Federal agencies.

Authority: Section 621, Foreign Assistance Act of 1961, 22 U.S.C. 2381.

2. It is proposed to further amend newly revised Part 208 as follows:

a. Section 208.110 is amended by adding paragraph (a)(4) to read as follows. Paragraph (a) introductory text is republished.

§ 208.110 Coverage.

(a) *Covered Transactions.* These guidelines apply to Executive Branch assistance described below:

* * * * *

(4) *Examples of A.I.D. covered transactions:* A.I.D. specific covered transactions include A.I.D.-financed cooperating country contracts under A.I.D. Handbook 11, A.I.D.-financed commodity transactions under 22 CFR Part 201, the reimbursement for overseas freight charges under 22 CFR Part 202, and A.I.D.'s investment guarantee program.

b. In §208.120, the definition of "Debarring official" and "Suspending official" are amended by adding a sentence to the end of each definition to read as follows:

§ 208.120 Definitions.

* * * * *

Debarring Official * * * The A.I.D. debarring official is the Associate Assistant to the Administrator for Management (M/AAA/SER).

* * * * *

Suspending Official * * * The A.I.D. suspending official is the Associate Assistant to the Administrator for Management (M/AAA/SER).

* * * * *

c. In § 208.215, the current paragraph is designated (a) and a new paragraph (b) is added to read as follows:

§ 208.215 Exception Provision.

* * * * *

(b) The Associate Assistant to the Administrator for Management has authority to grant exceptions.

d. In § 208.305, paragraph (d) is revised to read as follows:

§ 208.305 Causes for debarment.

* * * * *

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of an A.I.D. participant (e.g. failure to furnish information in accordance with the terms of one or more agreement or subagreement, violation of regulation, offer or acceptance of a bribe or other illegal payment or credit, or commission of a fraudulent act).

R.T. Rollis, Jr.,

Assistant to the Administrator for Management.

UNITED STATES INFORMATION AGENCY

22 CFR Part 513

ADDRESS: Comments should be sent to: Charles N. Canestro, United States Information Agency, 301 Fourth Street SW., Washington, D.C. 20547, telephone (202) 485–8676.

FOR FURTHER INFORMATION CONTACT: Charles N. Canestro, United States Information Agency, 301 Fourth Street SW., Washington, DC 20547, telephone (202) 485–8676.

List of Subjects in 22 CFR Part 513

Grant monitoring, Grants administration, Ineligible grantees.

It is proposed that title 22 of the Code of Federal Regulations be amended by adding Part 513 as set forth at the end of this document.

Woodward Kingman,

Associate Director for Management.

Part 513—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
513.100 Purpose.
513.105 Authority.
513.110 Scope.
513.115 Policy.
513.120 Definitions.

Subpart B—Effect of Action

513.200 Debarment or suspension.
513.205 Voluntary exclusion.
513.210 Ineligible persons.
513.215 Exception provision.
513.220 Continuation of current awards.
513.225 Failure to adhere to restrictions.

Subpart C—Debarment

513.300 General.
513.305 Causes for debarment.
513.310 Procedures.
513.315 Effect of proposed debarment.
513.320 Voluntary exclusion.
513.325 Period of debarment.
513.330 Scope of debarment.

Subpart D—Suspension

513.400 General.
513.405 Causes for suspension.
513.410 Procedures.
513.415 Period of suspension.
513.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

513.500 GSA responsibility.
513.505 Responsibilities of Federal agencies.

Authority: E. O. 12549.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 601

ADDRESS: Comments should be sent to: Taxpayer Service Division, Taxpayer Information and Education Branch, TR:T:I—Room 7215, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Marion L. Butler, Taxpayer Information and Education Branch, telephone 202–566–4904 (not a toll-free number).

Lists of Subjects in 26 CFR Part 601

Administrative practice and procedure, Aged, Alcohol and alcoholic beverages, Arms and munitions, Cigars and cigarettes, Claims, Freedom of information, Taxes.

Proposed Amendments to the Statement of Procedural Rules

It is proposed that Title 26 of the Code of Federal Regulations, Part 601, be amended as follows:

PART 601—[AMENDED]

Paragraph 1. The authority for Part 601 continues to read as follows:

Authority: 5 U.S.C. 301 and 552.

Subpart I—[Redesignated as Subpart J]

Par. 2. Subpart I is redesignated Subpart J.

Par. 3. A new Subpart I is added to read as set forth at the end of this document.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

Subpart I—Common Rule for Nonprocurement Suspension and Debarment

General

601.901 (_____.100) Purpose.
601.902 (_____.105) Authority.
601.903 (_____.110) Scope.
601.904 (_____.115) Policy.
601.905 (_____.120) Definition.

Effect of Action

601.910 (_____.200) Debarment or suspension.
601.911 (_____.205) Voluntary exclusion.
601.912 (_____.210) Ineligible persons.
601.913 (_____.215) Exception provision.
601.914 (_____.220) Continuation of current awards.
601.915 (_____.225) Failure to adhere to restrictions.

Debarment

601.920 (_____.300) General.
601.921 (_____.305) Causes for debarment.
601.922 (_____.310) Procedures.
601.923 (_____.315) Effect of proposed debarment.
601.924 (_____.320) Voluntary exclusion.
601.925 (_____.325) Period of debarment.
601.926 (_____.330) Scope of debarment.

Suspension

601.930 (_____.400) General.
601.931 (_____.405) Causes for suspension.
601.932 (_____.410) Procedures.
601.933 (_____.415) Periods of suspension.
601.934 (_____.420) Scope of suspension.

Agency Responsibilities; Consolidated List

601.940 (_____.500) GSA responsibility.
601.941 (_____.505) Responsibilities of Federal agencies.

DEPARTMENT OF JUSTICE

28 CFR Part 67

ADDRESS: Comments should be sent to Gregory C. Brady, Department of Justice, Office of Justice Programs, 633 Indiana Ave., NW., Room 1268, Washington, DC 20531, (202) 724-6235.

FOR FURTHER INFORMATION CONTACT: Gregory C. Brady, (202) 724-6235.

ADDITIONAL SUPPLEMENTARY INFORMATION: This notice of proposed rulemaking for a uniform system of nonprocurement debarment and suspension proposes a common regulation that will be applicable to the nonprocurement assistance activities of the offices, bureaus, and divisions of the Department of Justice which have grant-making authority. These include: The Office of Justice Programs, the National Institute of Justice, the Bureau of Justice Assistance, the Office of Juvenile Justice and Delinquency Prevention, the Bureau of Justice Statistics, the National Institute of Corrections, the Bureau of Prisons, the U.S. Marshals Service, the Immigration and Naturalization Service, the Federal Bureau of Investigation, and the Drug Enforcement Administration. With respect to the Drug Enforcement Administration's authority to enter into contractual agreements with State and local law enforcement agencies under 21 U.S.C. 873(a)(7) to provide for cooperative enforcement and regulatory activities, the Attorney General will delegate the authority to grant exceptions, where warranted, under §_____.215 of this Notice to the Administrator, DEA, or his designee for the purposes of these section 873(a)(7) agreements.

Section _____.505(3) of this notice requires certification by only those nonprocurement participants receiving $25,000 or less. However, all participants in nonprocurement assistance emanating from the Department of Justice, regardless of dollar amounts, will be required to submit certifications. The Department believes that requiring certifications by all nonprocurement participants, in conjunction with reference to the list of ineligible organizations and persons by staff of the funding or awarding agency at whatever tier or level, will provide the ultimate protection against receipt of nonprocurement assistance by ineligible parties. The relatively small size of nonprocurement assistance provided by Department of Justice units and the limited tiers of funding associated with this assistance, usually no more than two or three levels, makes this approach feasible. Furthermore, the Department of Justice does not believe that requiring certifications from all participants will create a heavy paperwork burden because it is likely that the certifications will be achieved by a single-page form made available to prospective participants. Accordingly, the Department expressly solicits comments on its proposed § _____.505(e) effectuating this certification requirement.

List of Subjects in 28 CFR Part 67

Administrative practice and procedures, Grant programs—Law, Grants administration, Reporting and recordkeeping requirements.

It is proposed that Title 28 of the Code of Federal Regulations be amended as set forth below.

Edwin Meese III,

Attorney General.

1. Part 67 is added to read as set forth at the end of this document.

PART 67—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
67.100 Purpose.
67.105 Authority.
67.110 Scope.
67.115 Policy.
67.120 Definitions.

Subpart B—Effect of Action

67.200 Debarment or suspension.
67.205 Voluntary exclusion.
67.210 Ineligible persons.
67.215 Exception provision.
67.220 Continuation of current awards.
67.225 Failure to adhere to restrictions.

Subpart C—Debarment

67.300 General.
67.305 Causes for debarment.
67.310 Procedures.
67.315 Effect of proposed debarment.
67.320 Voluntary exclusion.
67.325 Period of debarment.
67.330 Scope of debarment.

Subpart D—Suspension

67.400 General.
67.405 Causes for suspension.
67.410 Procedures.
67.415 Period of suspension.
67.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

67.500 GSA responsibility.
67.505 Responsibilities of Federal agencies.

Authority: The Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3711, *et seq.* (as amended), Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. 5601, *et seq.* (as amended), Victims of Crime Act of 1984, 42 U.S.C. 10601, *et seq.* (as amended); 18 U.S.C. 4042; and 18 U.S.C. 4351–4353.

2. Newly added Part 67 is further amended by revising § 67.505(e) to read as follows:

§ 67.505 Responsibilities of Federal agencies.

* * * * *

(e) All participants in non-procurement assistance emanating from the Department of Justice shall be required to certify in writing whether the participant, or any person acting in a capacity listed in § 67.200(b) with respect to the participant or the particular covered transaction, is currently or within the preceding three years has been:

(1) Debarred, suspended or declared ineligible;

(2) Formally proposed for debarment, with a final determination still pending;

(3) Voluntarily excluded from participation; or

(4) Indicted, convicted, or had a civil judgment rendered against them for any of the offenses listed in § 67.305(a).

* * * * *

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 98

ADDRESS: Written comments shall be mailed to Janice M. Sawyer, Director of Administrative and Procurement Programs, Room S-1524, U.S. Department of Labor, Washington, DC 20210. Telephone: 202-523-6415.

FOR FURTHER INFORMATION CONTACT: Theodore Goldberg, Room S-1522, U.S. Department of Labor, Washington, DC 20210. Telephone: 202-523-9174.

List of Subjects in 29 CFR Part 98

Accounting, Administrative practice and procedures, Grant programs—debarment and suspension procedures, Grants administration, Insurance, Reporting and recordkeeping requirements.

It is proposed that Title 29 of the Code of Federal Regulations be amended by adding Part 98 as set forth at the end of this document.

Signed at Washington, DC, this 9th day of October, 1987.

William E. Brock,

Secretary of Labor.

PART 98—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
98.100 Purpose.
98.105 Authority.
98.110 Scope.
98.115 Policy.
98.120 Definition.

Subpart B—Effect of Action

98.200 Debarment or suspension.
98.205 Voluntary exclusion.
98.210 Ineligible persons.
98.215 Exception provision.
98.220 Continuation of current awards.
98.225 Failure to adhere to restrictions.

Subpart C—Debarment

98.300 General.
98.305 Causes for debarment.
98.310 Procedures.
98.315 Effect of proposed debarment.
98.320 Voluntary exclusion.
98.325 Period of debarment.
98.330 Scope of debarment.

Subpart D—Suspension

98.400 General.
98.405 Procedures.
98.415 Period of suspension.
98.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

98.500 GSA responsibility.
98.505 Responsibility of Federal agencies.

Authority: Executive Order 12549, 51 FR 6370; OMB Guidelines for Nonprocurement Debarment and Suspension, 52 FR 20360 (May 29, 1987).

FEDERAL MEDIATION AND CONCILIATION SERVICE

29 CFR Part 1471

ADDRESS: Comments should be sent to 2100 K Street, NW., Washington, DC 20427.

FOR FURTHER INFORMATION CONTACT: Lee A. Buddendeck, 653-5320.

List of Subjects in 29 CFR Part 1471

Grant programs, Grants administration.

It is proposed that Title 29 of the Code of the Federal Regulations be amended by adding Part 1471 as set forth at the end of this document.

Kay McMurray,

Director, Federal Mediation and Conciliation Service.

PART 1471—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
1471.100 Purpose.
1471.105 Authority.
1471.110 Scope.
1471.115 Policy.
1471.120 Definitions.

Subpart B—Effect of Action

1471.200 Debarment or suspension.
1471.205 Voluntary exclusion.
1471.210 Ineligible persons.
1471.215 Exception provision.
1471.220 Continuation of current awards.
1471.225 Failure to adhere to restrictions.

Subpart C—Debarment

1471.300 General.
1471.305 Causes for debarment.
1471.310 Procedures.
1471.315 Effect of proposed debarment.
1471.320 Voluntary exclusion.
1471.325 Period of debarment.
1471.330 Scope of debarment.

Subpart D—Suspension

1471.400 General.
1471.405 Causes for suspension.
1471.410 Procedures.
1471.415 Period of suspension.
1471.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

1471.500 GSA responsibility.
1471.505 Responsibilities of Federal agencies.

Authority: 29 U.S.C. 175a.

DEPARTMENT OF DEFENSE

32 CFR Part 280

ADDRESS: Office of the Under Secretary of Defense (Acquisition), Research and Advanced Technology/Research and Laboratory Management, Room 3E114, The Pentagon, Washington, DC 20301-3080.

FOR FURTHER INFORMATION CONTACT: Dr. Mark Herbst, (202) 694-0205

ADDITIONAL SUPPLEMENTARY INFORMATION: The Department of Defense proposes the following rule to govern debarment and suspension for grants, cooperative agreements, scholarships, fellowships, and other nonprocurement actions. This proposed rule is intended to apply to domestic nonprocurement programs only. By adopting this government-wide common

rule, the Office of the Secretary of Defense, the Military Departments and the Defense Agencies will establish uniform practices that also are consistent with those being established by other Executive Departments and Agencies.

The Department of Defense currently issues nonprocurement grants principally to academic institutions for the purposes of supporting research and development projects related to weapons systems and other military needs. The use of nonprocurement grants and procurement contracts for these purposes is specifically authorized by 10 U.S.C. 2358.

There are significant differences between the treatment of grantees under the proposed common rule and the treatment of contractors under the recently proposed revision to 48 CFR Subpart 9.4 of the Federal Acquisition Regulation (FAR) and DoD FAR Supplement (DFAR), as published in the **Federal Register** of July 31, 1987. The proposed revisions to the FAR and DFAR require certification for subcontracts over $25,000 and do not apply below the small purchase threshold of $25,000. Section —. 505(e) of the proposed common rule for nonprocurement requires checking the consolidated list for all covered transactions over $25,000 and certifying for covered transactions of $25,000 or less. DoD specifically invites public comment and recommends that the proposed common rule for nonprocurement be amended so that it requires certification for covered transactions over $25,000 and does not apply below $25,000. If this recommendation is adopted, the proposed rule for nonprocurement debarment and suspension will be amended accordingly.

A second difference between the proposed treatment for grantees and contractors involves the extent to which employees and other individuals are covered. Under §§ ___505(e) and 200(b) of the proposed common rule for nonprocurement, grantees and subgrantees must certify whether any debarred and suspended individuals are holding positions charged as direct costs under the transaction. This coverage of employees and others is more extensive than that in the proposed revisions to the FAR and DFAR, which will require contractors to certify that no debarred and suspended individuals are participating under the contract as "principals," defined as officers, directors, owners, partners and persons such as general managers or division heads having primary management or supervisory responsibilities. DoD specifically invites public comment and recommends that the proposed common rule for nonprocurement be amended so that coverage of individuals is limited to "principals," as in the proposed revision to the FAR and DFAR. If this recommendation is adopted, the proposed rule for nonprocurement debarment and suspension will be amended accordingly.

The Department of Defense believes that establishing a dollar threshold and limiting the coverage of individuals would have several beneficial effects. These changes would, in keeping with the Paperwork Reduction Act, avoid excessive record-keeping burdens for recipients and subrecipients of DoD grants. They also would be consistent with the recently proposed revision to the FAR and DFAR.

The Department also is aware that the Office of Management and Budget has initiated a task force to review the relationship between the proposed common rule on nonprocurement and the FAR and DFAR rules on debarment and suspension for procurement. This task force likely will consider whether debarment and suspension rules for procurement should be revised to make contractors subject to the more burdensome requirements in this common rule for grantees. Therefore, the Department also generally invites public comment regarding: (1) The desirability of applying rules for procurement similar to this common rule for nonprocurement; or (2) alternative ways to make debarment and suspension rules apply as equitably as possible to grantees and contractors.

List of Subjects in 32 CFR Part 280

Administrative practice and procedures, Grant programs, Grants Administration, Reporting and recordkeeping requirements.

It is proposed that Title 32 of the Code of Federal Regulations be amended as set forth below.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

October 9, 1987.

Amendment 1. It is proposed to add part 280 to read as set forth at the end of this document.

PART 280—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
280.100 Purpose.
280.105 Authority.
280.110 Scope.
280.115 Policy.
280.120 Definitions.

Subpart B—Effect of Action

280.200 Debarment or suspension.
280.205 Voluntary exclusion.
280.210 Ineligible persons.
280.215 Exception provision.
280.220 Continuation of current awards.
280.225 Failure to adhere to restrictions.

Subpart C—Debarment

280.300 General.
280.305 Causes for debarment.
280.310 Procedures.
280.315 Effect of proposed debarment.
280.320 Voluntary exclusion.
280.325 Period of debarment.
280.330 Scope of debarment.

Subpart D—Suspension

280.400 General.
280.405 Causes for suspension.
280.410 Procedures.
280.415 Period of suspension.
280.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

280.500 GSA responsibility.
280.505 Responsibilities of Federal agencies.

Authority: E.O. 12549, 51 FR 6370.

§ 280.505 [Amended]

Amendment 2. It is proposed to further amend the newly added Part 280 by removing the terms "participant" and "participants" everywhere in § 280.505(e) and replacing them with the phrases "recipient or subrecipient" and "recipients or subrecipients," respectively.

National Archives and Records Administration

36 CFR Part 1209

ADDRESS: Comments should be sent to the Director, Program Policy and Evaluation Division (NAA), National Archives and Records Administration, Washington, DC 20408.

FOR FURTHER INFORMATION CONTACT: Adrienne C. Thomas at 202-523-3214 (FTS 523-3214).

ADDITIONAL SUPPLEMENTARY INFORMATION: The National Historical Publications and Records Commission (NHPRC) makes grants, when funds are available, to State and local governments, historical societies, archives, libraries and associations for the preservation, arrangement and description of historical records and for a broad range of archival training and development programs. The Catalog of Federal Domestic Assistance number is 89.003.

List of Subjects in 36 CFR Part 1209

Administrative practice and procedure, Grant programs—Archives and Records, Grants administration, Reporting and recordkeeping requirements.

It is proposed that Title 36 of the Code of Federal Regulations be amended by adding Part 1209 as set forth at the end of this document.

Dated: September 24, 1987.

Claudine J. Weiher,

Acting Archivist of the United States.

PART 1209—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
1209.100 Purpose.
1209.105 Authority.
1209.110 Scope.
1209.115 Policy.
1209.120 Definitions.

Subpart B—Effect of Action

1209.200 Debarment or suspension.
1209.205 Voluntary exclusion.
1209.210 Ineligible persons.
1209.215 Exception provision.
1209.220 Continuation of current awards.
1209.225 Failure to adhere to restrictions.

Subpart C—Debarment

1209.300 General.
1209.305 Causes for debarment.
1209.310 Procedures.
1209.315 Effect of proposed debarment.
1209.320 Voluntary exclusion.
1209.325 Period of debarment.
1209.330 Scope of debarment.

Subpart D—Suspension

1209.400 General.
1209.405 Causes for suspension.
1209.410 Procedures.
1209.415 Period of suspension.
1209.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

1209.500 GSA responsibility.
1209.505 Responsibilities of Federal agencies.

Authority: 44 U.S.C. 2104.

VETERANS ADMINISTRATION

38 CFR Part 44

ADDRESS: Comments should be sent to: The Administrator of Veterans Affairs (271A), 810 Vermont Avenue NW., Washington, DC 20420. All written comments received will be available for public inspection only in the Veterans Services Unit, Room 132 of the above address, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays) until December 31, 1987.

FOR FURTHER INFORMATION CONTACT: Gail A. Gompf, Director, Office of Intergovernmental Affairs (00A1), Veterans Administration, 810 Vermont Avenue NW., Washington, DC 20420 (202) 233-3116.

ADDITIONAL SUPPLEMENTARY INFORMATION: These proposed regulations codify the OMB guidelines pursuant to Executive Order 12549. Veterans Administration (VA) programs affected by these proposed regulations include, but are not limited to, affiliation agreements (38 U.S.C. 4101(b); agencies training counseling staffs at VA Regional Offices; exchange of medical information agreements under 38 U.S.C. 5054(a) and (b); health professional scholarships authorized by 38 U.S.C. 4141–4146; insurance; loan guaranty; provision of training to non-DM&S personnel by Regional Medical Education Centers (RMECs) authorized by 38 U.S.C. 4123(b); State contracts with individuals or organizations for the acquisition or construction of a State home using State home grant funds; State cemetery grants; and vocational rehabilitation and education.

In the area of vocational rehabilitation and education, for example, several programs would be affected. These proposed regulations would apply to facilities to which the VA pays training costs for veterans pursuing vocational rehabilitation programs. Also included would be agencies and organizations for which the VA authorizes grants to conduct rehabilitation research and provide training to enhance the skills of counseling and rehabilitation staff, and employers who are receiving payments that represent a portion of a veteran-trainee's wage under the Veterans' Job Training Act (VJTA).

The VA may currently disapprove job training programs when the agency discovers irregularities in them. Under these proposed regulations, the VA could debar offending employers as well. Further, if an employer were debarred or suspended by another agency, even for reasons unrelated to job training, that employer would be unable to participate in VJTA programs, unless specifically excepted from sanctions under 38 CFR 44.215.

Similarly, in the loan guaranty program, the proposed regulations would affect all nonprocurement program participants, including lenders, builders, participants in the manufactured home loan program (manufacturers, dealers and park operators), fee appraisers, and real estate sales brokers and agents, and their employees. VA may currently impose sanctions on any lender who has failed to maintain adequate loan accounting records, or to demonstrate proper ability to service loans adequately or to exercise proper credit judgment or has willfully or negligently engaged in practices otherwise detrimental to the interest of veterans or the Government. A lender who has been suspended or debarred is thereafter barred from making or acquiring by purchase any VA guaranteed loans. In addition, VA suspends or debars on a reciprocal basis lenders who have been denied the benefits of participation in programs administered by the Secretary of Housing and Urban Development (HUD). Under these proposed regulations, lenders who have been debarred or suspended by other agencies would be unable to participate in the VA loan guaranty program. For example, a lender denied participation in the housing loan programs of the Farmers Home Administration would be unable to participate in the VA Home Loan program, unless specifically excepted under 38 CFR 44.215.

Also, builders and real estate sales brokers and agents who are debarred or suspended by other agencies would be unable to participate in VA appraisal agreements. Under 38 U.S.C. 1804(b), VA may currently refuse to appraise any dwelling owned, sponsored or to be constructed by any person identified with housing previously sold to veterans as to which substantial deficiencies have been discovered or where the type of contracts or sale or methods and practices pursued in relation to the marketing of units were unfair or unduly prejudicial to veterans. VA may also refuse to appraise dwellings where the builder or broker has been denied participation in HUD programs. Under these proposed regulations, dwellings constructed or sold by builders or brokers debarred or suspended by other agencies would not be available for appraisal by the VA, unless a specific exception were granted under 38 CFR 44.215.

In the Department of Medicine and Surgery (DM&S), States which qualify are awarded VA grants for construction and acquisition of State veterans home facilities. A suspension or debarment action could arise in a number of situations involving a construction firm with which a State contracts. For instance, there might be fraud or a criminal offense on the part of the contractor in obtaining that public contract. In addition, affiliation agreements, health professional

scholarships, the training of non-DM&S personnel by RMECs, and exchange of medical information agreements would all be susceptible to investigation and referral for suspension or debarment by the VA for willful or material failure of the second party to adhere to terms of the agreement. In each of these situations, the transgressions of the participants could invoke the proposed regulations on debarment and suspension.

The proposed rules do not impose paperwork or recordkeeping burdens. Only some participants in covered transactions under the rules are small entities for purposes of the Regulatory Flexibility Act. Moreover, only those participants involved in debarment or suspension proceedings would be affected. Consequently, less than a substantial number of small entities will be affected by these rules.

List of Subjects in 38 CFR Part 44

Accounting, Administrative practice and procedures, Agreements, Grant programs—State cemetery and State veterans homes, Insurance, Loan guaranty, Reporting and recordkeeping requirements, Scholarships, Veterans, Vocational rehabilitation and Education.

It is proposed that Title 38 of the Code of Federal Regulations be amended by adding Part 44 as set forth at the end of this document.

Approved: September 25, 1987.

By direction of the Administrator.

James E. DeWire,

Chief of Staff.

PART 44—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)

Subpart A—General

Sec.

44.100 Purpose.
44.105 Authority.
44.110 Scope.
44.115 Policy.
44.120 Definitions.

Subpart B—Effect of Action

44.200 Debarment or suspension.
44.205 Voluntary exclusion.
44.210 Ineligible persons.
44.215 Exception provision.
44.220 Continuation of current awards.
44.225 Failure to adhere to restrictions.

Subpart C—Debarment

44.300 General.
44.305 Causes for debarment.
44.310 Procedures.
44.315 Effect of proposed debarment.
44.320 Voluntary exclusion.
44.325 Period of debarment.
44.330 Scope of debarment.

Subpart D—Suspension

44.400 General.
44.405 Causes for suspension.
44.410 Procedures.
44.415 Period of suspension.
44.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

44.500 GSA responsibility.
44.505 Responsibilities of Federal agencies.

Authority: E.O. 12549 (51 FR 6370); 38 U.S.C. 210(c)

GENERAL SERVICES ADMINISTRATION

41 CFR Part 101-50

ADDRESS: Comments should be sent to: General Services Administration (FBP), Washington, DC 20406.

FOR FURTHER INFORMATION CONTACT: Mr. Stanley M. Duda, Director, Property Management Division, (703) 557-1240.

ADDITIONAL SUPPLEMENTARY INFORMATION: To promote the uniform and effective administration of the program for the donation of surplus Federal personal property as provided for in section 203(j) of the Federal Property and Administrative Services Act of 1949, as amended, the General Services Administration (GSA) proposes to adopt the uniform model regulation published herein and will promulgate it at 41 CFR Part 101-50. The model regulation provides details that do not exist under GSA's present implementing regulations.

List of Subjects in 41 CFR Part 101-50

Administrative practice and procedures, Federal surplus property.

It is proposed that Title 41 of the Code of Federal Regulations be amended by adding Part 101-50 as set forth at the end of this document.

Date: October 13, 1987.

Donald C. J. Gray,

Commissioner, Federal Supply Service.

PART 101-50—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)

Subpart 101-50.1—General

Sec.

101-50.100 Purpose.
101-50.105 Authority.
101-50.110 Scope.
101-50.115 Policy.
101-50.120 Definitions.

Subpart 101-50.2—Effect of Action

101-50.200 Debarment or suspension.
101-50.205 Voluntary exclusion.
101-50.210 Ineligible persons.
101-50.215 Exception provision.
101-50.220 Continuation of current awards.
101-50.225 Failure to adhere to restrictions.

Subpart 101-50.3—Debarment

101-50.300 General.
101-50.305 Causes for debarment.
101-50.310 Procedures.
101-50.315 Effect of proposed debarment.
101-50.320 Voluntary exclusion.
101-50.325 Period of debarment.
101-50.330 Scope of debarment.

Subpart 101-50.4—Suspension

101-50.400 General.
101-50.405 Causes for suspension.
101-50.410 Procedures.
101-50.415 Period of suspension.
101-50.420 Scope of suspension.

Subpart 101-50.5—Agency Responsibilities; Consolidated List

101-50.500 GSA responsibility.
101-50.505 Responsibilities of Federal agencies.

Authority: Sec. 205(c), 63 Stat. 390 (40 U.S.C. 486(c)); and E.O. 12549.

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 17

ADDRESS: Comments should be sent to Office of the Comptroller, Policy Division, Room 721, Federal Emergency Management Division, Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Arthur E. Curry, Office of the Comptroller Policy Division (202) 646-3718.

ADDITIONAL SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency intends to incorporate the proposed rule as Part 17 of Title 44 of the Code of Federal Regulations.

Though the agency has never issued formal Assistance Standards in the Code of Federal Regulations, it did issue guidance for its recipients in FEMA's Financial Assistance Guidelines, CPG 1-32. These guidelines were issued to all of our assistance programs with the exception of the Disaster Program. FEMA will develop and issue implementing administrative procedures and automated programs pertaining to disaster grants and loans in view of the magnitude of the disaster relief program, the number of grants involved, and the number of individuals and local government affected.

List of Subjects in 44 CFR Part 17

Accounting, Administrative practice and procedures, Grant programs—civil defense, disaster, hazardous materials and fire training, Grants Administration, Insurance, Reporting and recordkeeping requirements.

It is proposed that Title 44 of the Code of Federal Regulations be amended by adding Part 17 as set forth at the end of this document.

Michael McCansland,

Financial Policy Specialist, Office of the Comptroller.

PART 17—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
17.100 Purpose.
17.105 Authority.
17.110 Scope.
17.115 Policy.
17.120 Definition.

Subpart B—Effect of Action

17.200 Debarment or suspension.
17.205 Voluntary exclusion.
17.210 Ineligible persons.
17.215 Exception provision.
17.220 Continuation of current awards.
17.225 Failure to adhere to restrictions.

Subpart C—Debarment

17.300 General.
17.305 Causes for debarment.
17.310 Procedures.
17.315 Effect of proposed debarment.
17.320 Voluntary exclusion.
17.325 Period of debarment.
17.330 Scope of debarment.

Subpart D—Suspension

17.400 General.
17.405 Causes for suspension.
17.410 Procedures.
17.415 Period of suspension.
17.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

17.500 GSA responsibility.
17.505 Responsibilities of Federal agencies.

Authority: Reorg. Plan No. 3 1978; EO 12549 51 FR 6370.

NATIONAL SCIENCE FOUNDATION

45 CFR Part 620

ADDRESS: Comments should be sent to Office of General Counsel, Room 501, 1800 G Street NW., Washington, DC 20550.

FOR FURTHER INFORMATION CONTACT: Arthur J. Kusinski, Assistant General Counsel, (202) 357-9435.

List of Subjects in 45 CFR Part 620

Administrative practice and procedures, Grant Administration, Reporting and recordkeeping requirements.

It is proposed that Title 45 of the Code of Federal Regulations be amended by adding Part 620 as set forth at the end of this document.

Arthur J. Kusinski,

Assistant General Counsel.

PART 620—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
620.100 Purpose.
620.105 Authority.
620.110 Scope.
620.115 Policy.
620.120 Definitions.

Subpart B—Effect of Action

620.200 Debarment or suspension.
620.205 Voluntary exclusion.,
620.210 Ineligible persons.
620.215 Exception provision.
620.220 Continuation of current awards.
620.225 Failure to adhere to restrictions.

Subpart C—Debarment

620.300 General.
620.305 Causes for debarment.
620.310 Procedures.
620.315 Effect of proposed debarment.
620.320 Voluntary exclusion.
620.325 Period of debarment.
620.330 Scope of debarment.

Subpart D—Suspension

620.400 General
620.405 Causes for suspension.
620.410 Procedures.
620.415 Period of suspension.
620.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

620.500 GSA responsibility.
620.505 Responsibilities of Federal agencies.

Authority: Executive Order 12459; and section 11(a) of the National Science Foundation Act of 1950, as amended (42 U.S.C. section 1870(a)).

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts

45 CFR Part 1154

ADDRESS: Comments should be sent to Arthur Warren, Deputy General Counsel, National Endowment for the Arts, 1100 Pennsylvania Avenue NW., Washington, DC 20506, (202-682-5418).

FOR FURTHER INFORMATION CONTACT: Arthur Warren or Laurence Baden, Grants Officer (202-682-5403), 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

ADDITIONAL SUPPLEMENTARY INFORMATION: Section 505(e) of the proposed regulation, as explained in the common preamble, directs federal agencies to require participants in covered transactions to either check all such transactions against the list of suspended or bebarred participants or, for transactions at or below the proposed small purchase threshold of $25,000, to certify whether a participant in a covered transaction is suspended or debarred.

The National Endowment for the Arts specifically requests public comment on establishing a dollar threshold level for undertaking such action for covered transactions. Below this threshold level, participants would not be required to provide certification (or to refer to the suspended and debarred list) to determine whether those with whom they are doing business have been suspended or debarred on a government-wide basis. We recommend that this threshold level be set at $25,000. If such a threshold were adopted, § _____.505(e) of the regulation would be amended accordingly.

The National Endowment for the Arts believes that establishing such a threshold would have several beneficial effects. It would, in keeping with the Paperwork Reduction Act, avoid excessive record-keeping burdens for grantees and subrecipients. Also, it would be consistent with the debarment and suspension procedures proposed for procurement activities subject to the Federal Acquisition Regulation (FAR) (*see* 52 FR 28642). These proposed amendments to the FAR would require certification for subcontracts over $25,000 but would exempt subcontracts at a below the small purchase threshold of $25,000 from such procedures. Consistency with the procedures for procurement activities under the FAR is important in light of the goal established in Executive Order 12549 of coordinating nonprocurement suspension and debarment procedures with those for procurement-based suspension and debarment.

Therefore, the National Endowment for the Arts recommends that § _____.505(e) of the proposed government-wide regulation on nonprocurement suspension and debarment be revised to adopt from the proposed FAR suspension and debarment amendments the small purchase threshold of $25,000 as the threshold for the certification requirements.

It is proposed that Title 45 of the Code of Federal Regulations be amended by

adding Part 1154 as set forth at the end of this document.

Peter J. Basso,

Deputy Chairman for Management, National Endowment for the Arts.

PART 1154—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

1154.100 Purpose.
1154.105 Authority.
1154.110 Scope.
1154.115 Policy.
1154.120 Definition.

Subpart B—Effect of Action

1154.200 Debarment or suspension.
1154.205 Voluntary exclusion.
1154.210 Ineligible persons.
1154.215 Exception provision.
1154.220 Continuation of current awards.
1154.225 Failure to adhere to restrictions.

Subpart C—Debarment

1154.300 General.
1154.305 Causes for debarment.
1154.310 Procedures.
1154.315 Effect of proposed debarment.
1154.320 Voluntary exclusion.
1154.325 Period of debarment.
1154.330 Scope of debarment.

Subpart D—Suspension

1154.400 General.
1154.405 Causes for suspension.
1154.410 Procedures.
1154.415 Period of suspension.
1154.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

1154.500 GSA responsibility.
1154.505 Responsibilities of Federal agencies.

Authority: 20 U.S.C. 959(a)(1).

National Endowment for the Humanities

45 CFR Part 1169

ADDRESS: Comments should be sent to Stephen J. McCleary, Deputy General Counsel, 1100 Pennsylvania Avenue NW., Room 530, Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Stephen J. McCleary, Deputy General Counsel, 1100 Pennsylvania Avenue NW., Room 530, Washington DC. 20506.

List of Subjects in 45 CFR Part 1169

Accounting, Administrative practice and procedures, Claims, Grants programs, Grant administration.

It is proposed that Title 45 of the Code of Federal Regulations be amended by adding Part 1169 as set forth at the end of this document. Part 1169 is added to subchapter D.

John Agresto,

Deputy Chairman.

Part 1169—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
1169.100 Purpose.
1169.105 Authority.
1169.110 Scope.
1169.115 Policy.
1169.120 Definitions.

Subpart B—Effect of Action

1169.200 Debarment or suspension.
1169.205 Voluntary exclusion.
1169.210 Ineligible persons.
1169.215 Exception provision.
1169.220 Continuation of current awards.
1169.225 Failure to adhere to restrictions.

Subpart C—Debarment

1169.300 General.
1169.305 Causes for debarment.
1169.310 Procedures.
1169.315 Effect of proposed debarment.
1169.320 Voluntary exclusion.
1169.325 Period of debarment.
1169.330 Scope of debarment.

Subpart D—Suspension

1169.400 General.
1169.405 Causes for suspension.
1169.410 Procedures.
1169.415 Period of suspension.
1169.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

1169.500 GSA responsibility.
1169.505 Responsibilities of Federal agencies.

Authority: 20 U.S.C. 959(a)(1).

Institute of Museum Services

45 CFR Part 1185

ADDRESS: Comments should be sent to Lois Burke Shepard, Institute of Museum Services, 100 Pa. Ave. NW., Room 510, Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Rebecca Danvers (202) 786-0539.

List of Subjects in 45 CFR Part 1185

Accounting, Administrative practice and procedures, Grant programs—Museums, national boards, Grants Administration, Insurance, Reporting and recordkeeping requirements.

It is proposed that Title 45 of the Code of Federal Regulations be amended by adding Part 1185 as set forth at the end of the document.

Lois Burke Shepard,

Director.

PART 1185—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
1185.100 Purpose.
1185.105 Authority.
1185.110 Scope.
1185.115 Policy.
1185.120 Definitions.

Subpart B—Effect of Action

1185.200 Debarment or suspension.
1185.205 Voluntary exclusion.
1185.210 Ineligible persons.
1185.215 Exception provision.
1185.220 Continuation of current awards.
1185.225 Failure to adhere to restrictions.

Subpart C—Debarment

1185.300 General.
1185.305 Causes for debarment.
1185.310 Procedures.
1185.315 Effect of propsed debarment.
1185.320 Voluntary exclusion.
1185.325 Period of debarment.
1185.330 Scope of debarment.

Subpart D—Suspension

1185.400 General.
1185.405 Causes for suspension.
1185.410 Procedures.
1185.415 Period of suspension.
1185.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

1185.500 GSA responsibility.
1185.505 Responsibilities of Federal agencies.

Authority: 20 U.S.C. 961-68.

ACTION

45 CFR Part 1229

ADDRESS: Comments should be sent to Kirby L. McCollum, Chief, Grants Management Branch, ACTION, 806 Connecticut Avenue NW., Room P-403, Washington, DC 20525.

FOR FURTHER INFORMATION CONTACT: Kirby L. McCollum 202-634-9150.

List of Subjects in 45 CFR Part 1229

Accounting, Administrative practice and procedures, Grant programs, Volunteer services, Grants administration, Insurance, Reporting and recordkeeping requirements.

It is proposed that Title 45 of the Code of Federal Regulations be amended by

adding Part 1229 as set forth at the end of this document.

Donna M. Alvarado,

Director.

PART 1229—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.

1229.100 Purpose.
1229.105 Authority.
1229.110 Scope.
1229.115 Policy.
1229.120 Definitions.

Subpart B—Effect of Action

1229.200 Debarment or suspension.
1229.205 Voluntary exclusion.
1229.210 Ineligible persons.
1229.215 Exception provision.
1229.220 Continuation of current awards.
1229.225 Failure to adhere to restrictions.

Subpart C—Debarment

1229.300 General.
1229.305 Causes for debarment.
1229.310 Procedures.
1229.315 Effect of proposed debarment.
1229.320 Voluntary exclusion.
1229.325 Period of debarment.
1229.330 Scope of debarment.

Subpart D—Suspension

1229.400 General.
1229.405 Causes for suspension.
1229.410 Procedures.
1229.415 Period of suspension.
1229.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

1229.500 GSA Responsibility.
1229.505 Responsibilities of Federal agencies.

Authority: Pub. L. 93–113; 42 U.S.C. 4951 et seq.; 42 U.S.C. 5060.

PART._____—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.

_____.100 Purpose.
_____.105 Authority.
_____.110 Scope.
_____.115 Policy.
_____.120 Definitions.

Subpart B—Effect of Action

_____.200 Debarment or suspension.
_____.205 Voluntary exclusion.
_____.210 Ineligible persons.
_____.215 Exception provision.
_____.220 Continuation of current awards.
_____.225 Failure to adhere to restrictions.

Subpart C—Debarment

_____.300 General.
_____.305 Causes for debarment.
_____.310 Procedures.
_____.315 Effect of proposed debarment.
_____.320 Voluntary exclusion.
_____.325 Period of debarment.
_____.330 Scope of debarment.

Subpart D—Suspension

_____.400 General.
_____.405 Causes for suspension.
_____.410 Procedures.
_____.415 Period of suspension.
_____.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

_____.500 GSA responsibility.
_____.505 Responsibilities of Federal agencies.

Authority:_____.

Subpart A—General

§ _____.100 Purpose.

(a) Executive Order 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a system for debarment and suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits. Debarment or suspension of a participant in a program by one agency shall have government-wide effect. Section 6 of the Order authorizes the Office of Management and Budget (OMB) to issue guidelines concerning the Order.

(b) These regulations implement sections 3 and 6 of Executive Order 12549 by:

(1) Prescribing the programs and activities that are covered by the Order;

(2) Prescribing the government-wide criteria and government-wide minimum due process procedures that Federal agencies shall use in implementing the Order;

(3) Providing for the listing of debarred and suspended participants, participants who voluntarily exclude themselves from participation in covered transactions, and participants declared ineligible (see the definition of "ineligible" in § _____.120);

(4) Setting forth the consequences of the actions under paragraph (b)(3) of this section;

(5) Offering such other guidance as necessary for the effective implementation and administration of the Order.

(c) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

(d) The procedures set forth in §§ _____.310 and _____.410 are the minimum due process procedures which agencies must follow. However, agencies are free to supplement them in any way not inconsistent with those sections.

§ _____.105 Authority.

These regulations are issued pursuant to Executive Order 12549 of February 18, 1986.

§ _____.110 Coverage.

(a) *Covered transactions.* These regulations apply to Executive branch domestic assistance described below:

(1) *General.* Covered transactions (whether by a Federal agency, recipient, subrecipient, or intermediary) include, except as noted in paragraph (a)(3) of this section: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements; subawards, subcontracts and transactions at any tier that are charged as direct costs, regardless of type (including subtier awards under awards which are statutory entitlement or mandatory awards); and, specially covered activities identified in paragraph (a)(2) of this section.

(2) *Specially covered activities.* In addition to those transactions identified in paragraph (a)(1) of this section, participants in the loan, loan guarantee, and insurance programs of the Departments of Agriculture and Housing and Urban Development and of the Veterans Administration, and in the interstate land sales and manufactured housing programs of the Department of Housing and Urban Development are subject to these guidelines. Also, those in business relationships with such participants with respect to such programs are subject to these guidelines, whether or not their participation involves the actual receipt of Federal funds.

(3) *Exceptions.* The following transactions are not covered: statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory); benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted); incidental benefits derived from ordinary governmental operations; and, other transactions where the application of Executive Order 12549 and these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section, § _____.110, describes the types of activities and transactions to which a debarment or suspension under the regulations will apply. Subpart B, Effect of Action, § _____.200, sets forth the consequences of a debarment or suspension. Those consequences would

obtain only with respect to participants in the covered transactions and activities described in § _____.110. Sections _____.330, Scope of debarment, and § _____.420, Scope of suspension, govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which additional affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal acquisition activities.* Executive Order 12549 and these regulations do not apply to direct Federal acquisition activities. Debarment and suspension of Federal contractors and subcontractors are covered by the Federal Acquisition Regulation (FAR), 48 CFR Subpart 9.4. However, agencies are encouraged to integrate their administration of these complementary debarment and suspension programs.

§ _____.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to effectuate this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

§ _____.120 Definitions.

Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliate. Persons are affiliates of one another if, directly or indirectly, one owns, controls, or has the power to control the other, or a third person owns, controls, or has the power to control both.

Agency. Any executive department, military department or defense agency, or other agency of the executive branch, excluding the independent regulatory agencies.

Consolidated List. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about participants who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

Control. The power to exercise, directly or indirectly, a controlling influence over the management, policies, or activities of a person, whether through the ownership of voting securities, through one or more intermediary persons, or otherwise. For purposes of actions under these regulations, a person who owns or has the power to vote more than 25 percent of the outstanding voting securities of another person, or more than 25 percent of total equity if the other person has no voting securities, is presumed to control. Such presumption may be rebutted by evidence. Other indicia of control include, but are not limited to: interlocking management or ownership; identity of interests among family members; shared facilities and equipment; common use of employees; and, establishment, following the debarment, suspension, or other exclusion of a participant, of an organization or entity which is to operate in the same business or activity and to have substantially the same management, ownership, or principal employees as the debarred, suspended or excluded participant.

Conviction. A judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

Debarment. An action taken by a debarring official in accordance with agency regulations implementing Executive Order 12549 to exclude a person from participating in covered transactions. A person so excluded is "debarred."

Debarring official. An agency head or a designee authorized by the agency head to impose debarment.

Indictment. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible. Excluded from participation in covered transactions, programs, or agreements pursuant to statutory, Executive order, or regulatory authority other than Executive Order 12549 and its agency implementing and supplementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the equal employment opportunity acts and Executive orders, or the environmental protection acts and Executive orders.

Legal proceedings. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

Notice. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

Participant. Any person who submits proposals for, receives an award or subaward or performs services in connection with, or reasonably may be expected to be awarded or to perform services in connection with, a covered transaction. This term also includes any person who conducts business with a Federal agency as an agent or representative of another participant.

Person. Any individual, corporation, partnership, association, unit of government or legal entity however organized, including any subsidiary of any of the foregoing.

Preponderance of the evidence. Proof by information that, compared, with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Proposal. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking a benefit, directly or indirectly, under a covered transaction.

Respondent. A person against whom a debarment or suspension action has been initiated.

Subsidiary. Any corporation, partnership, association or legal entity however organized, owned or controlled by another person.

Suspending official. An agency head or a designee authorized by the agency head to impose suspension.

Suspension. An action taken by a suspending official in accordance with agency regulations implementing Executive Order 12549 to immediately exclude a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal or debarment proceedings as may ensue. A person so excluded is "suspended."

Voluntary exclusion. A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

Subpart B—Effect of Action

§ _____.200 Debarment or suspension.

(a) Except to the extent prohibited by law, a person's debarment or suspension shall be effective throughout the executive branch of the Federal Government. Except as provided in § _____.215, persons who are debarred or suspended under these provisions are excluded from participation in all covered transactions of all agencies for the period of their debarment or suspension. Accordingly, agencies and participants shall not make awards to or agree to participation by such debarred or suspended persons during such period.

(b) In addition, persons who are debarred or suspended are excluded from participation in or under any covered transaction in any of the following capacities: as an owner or partner holding a controlling interest, director, or officer of the participant; as a principal investigator, project director, or other position involved in management of the covered transaction; as a provider of federally-required audit services; in any other position to the extent that the incumbent is responsible for the administration of Federal funds; or in any other position charged as a direct cost under the covered transaction.

§ _____.205 Voluntary exclusion.

Participants who accept voluntary exclusions under § _____.320 are excluded in accordance with the terms of their settlements; their listing, pursuant to Subpart E, is for informational purposes. Awarding agencies and participants must contact the original action agency to ascertain the extent of the exclusion.

§ _____.210 Ineligible persons.

Persons who are ineligible are excluded in accordance with the applicable statutory, Executive order, or regulatory authority.

§ _____.215 Exception provision.

An agency may grant an exception permitting a debarred, suspended, or excluded person to participate in a particular transaction upon a written determination by the agency head or authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549. However, the Order states that it is the President's intention that exceptions to this policy should be granted only infrequently. Exceptions should be reported in accordance with § _____.505.

§ _____.220 Continuation of current awards.

(a) Notwithstanding the debarment, suspension, voluntary exclusion or ineligible status of any person, agencies and participants may continue agreements in existence at the time the person was debarred, suspended, declared ineligible or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend the duration of current agreements with any person who is debarred, suspended, declared ineligible or under a voluntary exclusion, except as provided in § _____.215.

§ _____.225 Failure to adhere to restrictions.

Doing business with a debarred, suspended or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended or otherwise excluded from participation in such transaction, except as permitted under these regulations, may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

Subpart C—Debarment

§ _____.300 General.

The debarring official may debar a participant for any of the causes in § _____.305, using procedures established in accordance with § _____.310. The existence of a cause for debarment, however, does not necessarily require that the participant be debarred; the seriousness of the participant's acts or omissions and any mitigating factors should be considered in making any debarment decision.

§ _____.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ _____.300 and _____.310 for:

(a) Conviction of or civil judgment for any offense indicating a lack of business integrity or honesty which affects the present responsibility of a participant, including but not limited to:

(1) Fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement;

(2) Bribery, embezzlement, false claims, false statements, falsification or destruction of records, forgery, obstruction of justice, receiving stolen property, or theft; or

(3) Unlawful price fixing between competitors, allocation of customers between competitors, bid rigging, or any other violation of Federal or State antitrust laws that relates to the submission of bids or proposals.

(b) Violation of the terms of a public agreement so serious as to affect the present responsibility of a participant, including but not limited to:

(1) A willful or material failure to perform under one or more public agreements;

(2) A history of substantial noncompliance with the terms of one or more public agreements; or

(3) A willful or material violation of a statutory or regulatory provision or requirement applicable to a public agreement.

(c) Any of the following causes:

(1) Debarment or equivalent exclusionary action by any public agency or instrumentality for causes substantially the same as provided for by § _____.305;

(2) Doing business with a debarred, suspended or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended or otherwise excluded from participation in such transactions;

(3) Conduct indicating a lack of business integrity or honesty which affects the present responsibility of a participant;

(4) Loss or denial of the right to do business or practice a profession under circumstances indicating a lack of business integrity or honesty or otherwise affecting the present responsibility of a participant;

(5) Failure to pay a debt (including disallowed costs and overpayments) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted; or

(6) Violation of a material provision of a voluntary exclusion or of any settlement of a debarment or suspension action.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a participant.

§_____.310 Procedures.

(a) *Investigation and referral.* Agencies shall establish procedures for the prompt reporting, investigation, and referral to the debarring official of

matters appropriate for that official's consideration.

(b) *Decisionmaking process.* Agencies shall establish procedures governing the debarment decisionmaking process that are as informal as practicable, consistent with principles of fundamental fairness. These procedures shall, at a minimum, provide the following:

(1) *Notice of proposed debarment.* A debarment proceeding shall be initiated by notice to the respondent advising:

(i) That debarment is being considered;

(ii) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(iii) Of the cause(s) relied upon under §_____.305 for proposing debarment;

(iv) Of the provisions of §_____.310(b)(1)–(b)(6) and the agency's specific procedures governing debarment decisionmaking;

(v) Of the effect of the proposed debarment pending a final debarment decision; and

(vi) Of the potential effect of a debarment.

(2) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(3) *Additional proceedings as to disputed material facts.* (i) In actions not based upon a conviction or judgment, if it is found that there exists a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents.

(ii) A transcribed record of any additional proceedings shall be made available at cost to the respondent, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

(4) *Debarring official's decision*—(i) *No additional proceedings necessary.* In actions based upon a conviction or judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(ii) *Additional proceedings necessary.* (A) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(B) The debarring official may refer matters involving disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(C) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(5) *Standard of evidence.* In any contested action, the cause for debarment must be established by a preponderance of the evidence. In any contested action in which the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(6) *Notice of debarring official's decision.* (i) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(A) Referring to the notice of proposed debarment;

(B) Specifying the reasons for debarment;

(C) Stating the period of debarment, including effective dates; and

(D) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or a designee authorized by an agency head makes the determination referred to in _____.215.

(ii) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

§_____.315 Effect of proposed debarment.

Upon issuance of a notice of proposed debarment and until the final debarment decision is rendered, the debarring agency shall not make any new awards to the respondent. That agency may waive this exclusion pending a debarment decision upon a written determination by the debarring official identifying the reasons for doing so. In the absence of such a waiver, the provisions of § _____.215 allowing exceptions for particular transactions may be applied.

§_____.320 Voluntary exclusion.

A participant and an agency may enter into a settlement providing for the exclusion of the participant. Such exclusion shall be entered on the Consolidated List (see Subpart E).

§_____.325 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, a debarment should not exceed three years. Where circumstances warrant, a longer or indefinite period of debarment may be imposed. If a suspension precedes a debarment, the suspension period may be considered in determining the debarment period.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of § _____.310 shall be followed to extend the debarment.

(c) The debarring official may reduce the period or scope of debarment, upon the respondent's request, supported by documentation, for reasons such as:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

§ _____.330 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person or affiliate under Executive Order 12549 constitutes debarment of all its subsidiaries, divisions, and other organizational elements unless the debarment decision is limited by its terms to one or more specifically identified individuals or organizational elements or to specific types of transactions.

(2) The debarment action may include any other affiliate of the participant that is (i) specifically named and (ii) given notice of the proposed debarment and an opportunity to respond (see § _____.310).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be presumptive evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be presumptive evidence of such knowledge, approval or acquiescence.

Subpart D—Suspension

§ _____.400 General.

(a) The suspending official may suspend a participant for any of the causes in § _____.405 using procedures established in accordance with § _____.410.

(b) Suspension is a serious action to be imposed on the basis of adequate evidence of one or more of the causes set out in § _____.405 when it has been determined that immediate action is necessary to protect the public interest.

§ _____.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ _____.400 and _____.410 upon adequate evidence:

(1) To suspect the commission of an offense listed in § _____.305(a); or

(2) That a cause for debarment under § _____.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ _____.410 Procedures.

(a) *Investigation and referral.* Agencies shall establish procedures for the prompt reporting, investigation, and referral to the suspending official of matters appropriate for that official's consideration.

(b) *Decisionmaking process.* Agencies shall establish procedures governing the suspension decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures shall, at a minimum, provide the following:

(1) *Notice of suspension.* When a respondent is suspended, notice shall immediately be given:

(i) That suspension has been imposed;

(ii) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(iii) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(iv) Of the cause(s) relied upon under § _____.405 for imposing suspension;

(v) That the suspension is for a temporary period pending the completion of an investigation and such legal or debarment proceedings as may ensue;

(vi) Of the provisions of § _____.410(b)(1)–(b)(5) and the agency's specific procedures governing suspension decisionmaking; and

(vii) Of the effect of the suspension.

(2) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(3) *Additional proceedings as to disputed material facts.* (i) If it is found that there exists a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents, unless—

(A) The action is based on an indictment, conviction or judgment, or

(B) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(ii) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, unless the repondent and the agency, by mutual agreement, waive the requirement for a transcript.

(4) *Suspending official's decision.* The suspending official may modify or terminate the suspension (for example, see § _____.325(c) for the reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(i) *No additional proceedings necessary.* In actions (A) based on an indictment, conviction, or judgment, (B) in which there is no genuine dispute over material facts, or (C) in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(ii) *Additional proceedings necessary.* (A) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(B) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(C) The suspending official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(5) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent and any affiliates involved.

§ _____.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of investigation and any ensuing legal or debarment proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or debarment proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§ _____.420 Scope of suspension.

The scope of a suspension shall be the same as the scope of debarment (see § _____.330), except that the procedures of § _____.410 shall be used in imposing a suspension.

Subpart E—Agency Responsibilities; Consolidated List

§ _____ .500 GSA responsibility.

(a) GSA shall compile, maintain, and distribute a list of all participants who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, voluntarily excluded, and ineligible participants in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§ _____.505 Responsibilities of Federal agencies.

(a) Each agency shall designate a liaison who shall be responsible for providing GSA with current information concerning debarments, suspensions, voluntary exclusions and ineligibilities taken by that agency. Until February 18, 1989, the liaison shall also provide GSA and OMB with information concerning all transactions in which the agency has granted exceptions under § _____.215 permitting participation by debarred, suspended, or excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, each agency shall advise GSA of the information set forth in § _____.500(b) and of the exceptions granted under § _____.215 within five working days after taking such actions.

(c) Each agency shall establish procedures to provide for the effective dissemination and use of the list, in order to ensure that listed persons do not participate in any covered transaction in a manner inconsistent with that person's listed status, except as otherwise provided in these regulations.

(d) Each agency shall direct inquiries concerning listed persons to the agency that took the action.

(e) Each agency shall require participants in covered transactions at or below the proposed small purchase threshold of $25,000 to certify whether the participant, or any person acting in a capacity listed in § _____.200(b) with respect to the participant or the particular covered transaction, is currently or within the preceding three years has been:

(1) Debarred, suspended or declared ineligible;

(2) Formally proposed for debarment, with a final determination still pending;

(3) Voluntarily excluded from participation; or

(4) Indicted, convicted, or had a civil judgment rendered against them for any of the offenses listed in § _____.305(a).

Adverse information of the certification need not necessarily result in denial of participation. Agencies shall establish procedures to ensure that information provided by the certification, and any additional information they may require, is considered in the administration of covered transactions.

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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 3015

Uniform Federal Assistance Regulations on Nonprocurement Debarment and Suspension

AGENCY: Office of the Secretary, USDA.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to amend the Department of Agriculture's Uniform Federal Assistance Regulations by adding regulations on nonprocurement debarment and suspension Executive Order 12549 requires executive departments and agencies to issue these regulations consistent with guidelines issued by the Office of Management and Budget.

DATE: To be assured of consideration, comments on the proposed rule must be received on or before December 21, 1987. Comments should refer to specific sections in the regulation.

ADDRESS: Comments should be addressed to Gerald Miske, Supervisory Program Analyst, Office of Finance and Management, Financial Management Division, USDA, Room 1369—South Building, 14th and Independence Avenue SW., Washington, DC 20250. Comments received may be inspected at Room 1369-S, between 8:00 a.m. and 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Gerald Miske (Supervisory Program Analyst), (202) 382-1553.

SUPPLEMENTARY INFORMATION:

Background

Executive Order 12549 was signed by President Reagan on February 18, 1986, and was published February 21, 1986 (51 FR 6370-71).

As part of the Administration's initatives to curb fraud, waste, and abuse, the President's Council on Integrity and Efficiency created an interagency task force to study the feasibility and desirability of a comprehensive debarment and suspension system encompassing the full range of Federal activities. The task force concluded, in its November 1982 report, that such a system was desirable and feasible.

As a result, the Office of Management and Budget (OMB) established an interagency Task Force on Nonprocurement Suspension and Debarment. This Task Force recommended in its November 1984 report that a Governmentwide nonprocurement debarment and suspension system, similar to that currently in effect for procurement, be established.

The Task Force considered many issues in developing the proposed guidelines. It concluded that the system should be as compatible as possible with the procurement and suspension system included in the Federal Acquisition Regulation (FAR), while fully addressing the needs and concerns of nonprocurement programs. As a

result, the guidelines generally used the due process procedural structure of the FAR. Also, the proposed grounds for debarment and suspension were subtantially similar to those in the FAR. The proposal combined the criteria common to existing agency nonprocurement regulations with the criteria in the FAR.

On February 21, 1986, OMB published guidelines (51 FR 6372–79) covering the subjects indicated in section 6 of Executive Order 12549, including coverage, Governmentwide criteria, and minimum due process procedures. OMB received 60 comments on the proposed guidelines. All comments were provided to the task force for consideration in preparing the final guidelines which were published May 29, 1987.

Section 3 of Executive Order 12549 directs Federal agencies to issue regulations governing the implementation of the Order which must be consistent with the OMB guidelines. These proposed regulations are consistent with the content of the OMB guidelines. However, certain provisions have been added, deleted, or merged for purposes of clarification, simplification, identification of internal responsibilities, and insertion of items omitted from the OMB guidelines. Those changes are discussed below.

Summary of Changes

Renumbering. Due to differences between the USDA proposed regulation and the OMB guidelines, including the consolidation of some provisions, and in order to be consistent with the established system for numbering sections in Part 3015, the section numbers in this proposed regulation are different from the section numbers used in the OMB guidelines. For ease of reference, therefore, the table of contents and the section headings contain a parenthetical reference to the corresponding section in the OMB guidelines.

Minimum requirements. The OMB guidelines provide that Federal agencies should establish procedures for investigation and referral of appropriate matters to the Debarring/Suspending Offical (DSO) for the debarment/suspension decisionmaking process, and that agencies should establish procedures for the effective dissemination and use of the consolidated list of debarred and suspended participants. Sections 3015.414 and 3015.419 of these regulations propose minimum requirements for each of the procedures. The minimum requirements will be used by USDA agencies in developing their own procedures in those areas.

Coverage. The scope of the final OMB guidelines covered both direct and indirect costs but left to agency discretion whether to limit coverage to only items charged as direct costs. This proposed rule limits coverage in § 3015.401(a)(1) to direct cost activities only.

Certification. The OMB guidelines allowed for agency discretion in determining when to require certification by participants. In the use of this authority, USDA proposes that:

(1) Subrecipients at all levels will be required to certify that they have not been debarred or suspended regardless of dollar amount.

(2) In agreements with USDA recipients:

—For covered transactions under $25,000 in direct costs, USDA agencies will require recipients to clarify that they have not been debarred or suspended; and

—For covered transactions of $25,000 or more in direct costs, USDA agencies are required to check the Governmentwide consolidated list of debarred or suspended persons.

Consolidation. This proposed regulation combines sections of the OMB guidelines. The specific OMB sections that were merged are:

§§ _____.300 and _____.400 were combined and are found in § 3015.411;

§§ _____.310 and _____.410 were combined and are found in § 3015.414; and

§§ _____.330 and _____.420 were combined and are found in § 3015.417.

USDA proposes that the following provisions be added to this regulation that are not included within the OMB guidelines:

Voluntary exclusion. The OMB guidelines did not specify the period during which a voluntary exclusion settlement could be reached. The Department has included in § 3015.406 that the DSO and the participant may enter into a settlement agreement providing for voluntary exclusion at any point in the process prior to the final decision by the DSO.

Submission in opposition. There was no provision in the OMB guidelines for dealing with the situation where the respondent fails to timely provide any submission in opposition. The Department has included in § 3015.414(b)(4)(i)(A) that the action will be considered final in such a case.

Department of Justice (DOJ) coordination. The OMB guidelines provided for coordinative efforts with DOJ only in suspension actions. USDA believes that protection of the Federal Government's interest in debarment actions is of equal importance. In §§ 3015.414(b)(3)(i)(B) and 3015.414(b)(4)(i)(C), the Department has specified coordination with DOJ on debarment as well as on suspension actions. Additionally, § 3015.414(a)(4)(ii) provides that the Department's Office of the General Counsel will be the point of information exchange with DOJ.

DOJ advice on additional proceedings. Section 3015.414(b)(3)(i)(B) provides that if DOJ advises against additional proceedings to determine disputed facts, then the action being taken by USDA would be stopped with USDA retaining the right to proceed at a later date. Alternatively, the action may be permitted to proceed if it is determined that there is enough evidence to proceed without using facts that DOJ has advised would prejudice its pending legal proceedings.

Appeals. The OMB guidelines did not include an appeal mechanism. Agriculture has provided for an appeal procedure that allows an administrative appeal by the debarred or suspended participant. Upon request, a DSO's decision on debarment or suspension actions will be reviewed by an unbiased entity as a final step in fairness to the participant.

Impact Analyses

Executive Order 12291

Executive Order 12291 requires that a regulatory impact analysis will be required for "major" rules which are defined in the Order as any rule that has an annual effect on the national economy of $100 million or more, or certain other specified effects.

We do not believe that this regulation will have an annual economic impact of $100 million or more or the other effects listed in the Order. For this reason, we have determined that this regulation is not a major rule within the meaning of the Order.

Regulatory Flexibility Act of 1980

The Regulatory Flexibility Act (5 U.S.C. 605(b)) requires that, for each rule with a "significant economic impact on a substantial number of small entities," an analysis be prepared describing the rule's impact on small entities and identifying any significant alternatives to the rule that would minimize the economic impact on small entities. It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 7 CFR Part 3015

Grant programs (Agriculture), Intergovernmental relations.

Issued at Washington, DC October 15, 1987.
Richard E. Lyng,
Secretary of Agriculture.

PART 3015—UNIFORM FEDERAL ASSISTANCE REGULATIONS

Accordingly, USDA proposes to amend 7 CFR Part 3015 as set forth below:

1. The authority citation for Part 3015 is revised to read as follows:

Authority: 5 U.S.C. 301 Subpart W also issued under Executive Order 12549, 51 FR 6370, 3 CFR 1986 Comp., p. 189.

2. It is proposed that Part 3015 be amended by adding Subpart W to read as follows:

* * * * *

Subpart W—Nonprocurement Debarment and Suspension

Sec.
3015.400 (_____.100) Purpose.
3015.401 (_____.110) Coverage.
3015.402 (_____.115) Policy.
3015.403 (_____.120) Definitions.
3015.404 (_____.200) Effect of debarment or suspension.
3015.405 (_____.315) Effect of proposed debarment.
3015.406 (_____.205 and _____.310) Effect of voluntary exclusion.
3015.407 (_____.210) Effect of declaring persons ineligible.
3015.408 (_____.215) Exception provision.
3015.409 (_____.220) Continuation of current awards.
3015.410 (_____.225) Failure to adhere to restrictions.
3015.411 (_____.300 and _____.400) Debarment/suspension—general.
3015.412 (_____.305) Causes for debarment.
3015.413 (_____.405) Causes for suspension.
3015.414 (_____.310 and _____.410) Procedures.
3015.415 (_____.325) Period of debarment.
3015.416 (_____.415) Period of suspension.
3015.417 (_____.330 and _____.420) Scope of debarment/suspension actions.
3015.418 (_____.500) General Services Administration (GSA) responsibilities for the consolidated list.
3015.419 (_____.505) Responsibilities of USDA—consolidated list.
3015.420 Appeal of debarment/suspension decisions.

Subpart W—Nonprocurement Debarment and Suspension

§ 3015.400 (_____.100) Purpose.

The purpose of this subpart is to establish Departmentwide regulations to implement Executive Order 12549 (Order), "Debarment and Suspension." The Order provides that, to the extent permitted by law, executive departments and agencies shall participate in a system for debarment and suspension from programs and activities involving Federal financial assistance and benefits. Debarment or suspension of a participant in a program by one agency shall have Governmentwide effect. Section 6 of the Order authorizes the Office of Management and Budget (OMB) to issue Governmentwide criteria and set forth other details related to the effective administration of the guidelines. Section 3 of the Other requires executive departments and agencies to issue regulations implementing the provisions of the Order. The Department believes these regulations are consistent with the minimum requirements of the OMB guidelines published in the **Federal Register** (FR) at 52 FR 20360 on May 29, 1987.

§ 3015.401 (_____.110) Coverage.

(a) *Covered transactions.* These regulations apply to the types of domestic assistance transactions described below:

(1) *General.* Except as noted in paragraph (a)(3) of this section, covered transactions (whether by a Federal agency, recipient, subrecipient, or intermediary) include grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements; subawards, subcontracts and transactions at any tier that are charged as direct costs; subtier awards under awards which are statutory entitlement or mandatory awards; and specially covered activities identified in paragraph (a)(2) of this section.

(2) *Specially covered activities.* In addition to those transactions identified in paragraph (a)(1) of this section, participants in the loan, loan guarantee, and insurance programs of the Department of Agriculture are subject to these regulations. Also, those in business relationships with such participants with respect to such programs are subject to these regulations, whether or not their participation involves the actual receipt of Federal funds.

(3) *Exceptions.* The following transactions are not covered: statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory); benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not themselves excepted); incidental benefits derived from ordinary governmental operations; and, other transactions where the application of Executive Order 12549 and these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section describes the types of activities and transactions to which a debarment or suspension under these regulations will apply. Section 3015.404 sets forth the consequences of a debarment or suspension with respect to participants in the covered transactions and activities described in § 3015.401. Section 3015.417 governs the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which additional affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal acquisition activities.* Executive Order 12549 and these regulations do not apply to direct Federal acquisition activities. Debarment and suspension of the Federal contractors and subcontractors are covered by the Federal Acquisition Regulation (FAR), 48 CFR Subpart 9.4.

§ 3015.402 (_____.115) Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary action, that taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. USDA agencies may impose debarment or suspension for the causes set forth in § 3015.412 and 3015.413 and in accordance with the procedures set forth in § 3015.414.

§ 3015.403 (_____.120) Definitions.

"Adequate evidence." Information sufficient to support the reasonable belief that a particular act or omission has occurred.

"Affiliate." Persons are affiliates of one another if, directly or indirectly, one owns, controls, or has power to control the other, or a third person owns, controls, or has the power to control both.

"Agency." Any organizational unit of the U.S. Department of Agriculture with authority delegated in 7 CFR Part 2 to administer programs of Federal financial and nonfinancial assistance.

"Appeals Officer." Any administrative law judge of the Office of Administrative Law Judges, Department of Agriculture.

"Consolidated list." A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about participants who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

"Control." The power to exercise, directly or indirectly, a controlling influence over the management, policies, or activities of a person, whether through the ownership of voting securities, through one or more intermediary persons, or otherwise. For purposes of actions under these regulations, a person who owns or has the power to vote more than 25 percent of the outstanding voting securities of another person, or more than 25 percent of total equity if the other person has no voting securities, is presumed to control. Such presumption may be rebutted by evidence. Other indications of control include, but are not limited to: interlocking management or ownership; identity of interests among family members; shared facilities and equipment; common use of employees; and, establisment, following the debarment, suspension, or other exclusion of a participant, of an organization or entity which is to operate in the same business or activity and to have substantially the same managment, ownership, or principal employees as the debarred, suspended, or excluded participant.

"Conviction." A judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

"Debarment." An action taken by a DSO in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is "debarred."

"Debarring/Suspending Official (DSO)." Each Under Secretary, Assistant Secretary, or agency head who has been delegated authority in Part 2 of this title to carry out a covered transaction, is authorized to act as a Debarring/Suspending Official in connection with such covered transaction. The Debarring/Suspending Official will be referred to as the DSO throughout this regulation.

"Indictment." Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

"Ineligible." Excluded from participation in covered transactions, programs, or agreements pursuant to statutory, Executive Order, or regulatory authority other than Executive Order 12549 and this regulation, and agency regulations supplementing this regulation. For example, excluded pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the equal employment opportunity acts and Executive orders, or the environmental protection acts and Executive orders.

"Legal proceedings." Any criminal proceeding or any civil judicial proceeding to which the Federal government or a State or local goverment or quasi-governmental authority is a party. The term includes appeals from such proceedings.

"Notice." A written communication sent by certified mail, return receipt requested, to the last known address of a party, its identified counsel, its agent for service or process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

"Participant." Any person who submits proposals for, receives an award or subaward or performs services in connection with, or reasonably may be expected to be awarded or to perform services in connection with, a covered transaction. This term also includes any person who conducts business with a Federal agency as an agent or representative of another participant.

"Person." Any individual, corporation, partnership, association, unit of government or legal entity however organized, including any subsidiary of any of the foregoing.

"Preponderance of the evidence." Proof by information that compared with that opposing it, leads to the conclusin that the fact at issue is more probably true than not.

"Proposal." A solicited or unsolicited bid, application, request, invitation to consider, or similar communication by or on behalf of a person seeking a benefit, directly or indirectly, under a covered transaction.

"Respondent." A person against whom a debarment or suspension action has been initiated.

"Subsidiary." Any corporation, partnership, association, or legal entity, however organized, owned or controlled by another person.

"Suspension." An action taken by a DSO in accordance with these regulations to immediately exclude a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal or debarment proceedings as may ensue. A person so excluded is "suspended."

"Voluntary exclusion." A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

§ 3015.404 (_____.200) Effect of debarment or suspension.

(a) Except to the extent prohibited by law, a person's debarment or suspension shall be effective throughout the executive branch of the Federal Government. Except as provided in § 3015.408, persons who are debarred or suspended under these provisions are excluded from participation in all covered transactions of all agencies for the period of their debarment or suspension. Accordingly, agencies and participants shall not make awards to or agree to participation by such debarred or suspended persons during such period.

(b) In addition, persons who are debarred ort suspended are excluded from participation in or under any covered transaction in any of the following capacities: as an owner or partner holding a controlling interest, director, or officer of the participant; as a principal investigator, project director, or other position involved in management of the covered transaction; as a provider of Federally-required audit services; in any other position to the extent that the incumbent is responsible for the administration of Federal funds; or in any other position charged as a direct cost under the covered transaction.

§ 3015.405 (_____.315) Effect of proposed debarment.

Upon issuance of a notice of proposed debarment and until the final debarment decision is rendered, the debarring agency shall not make any new awards to the respondent. That debarring agency may waive this interim exclusion provision upon a written determination by the DSO identifying the reasons for doing so. In the absence of such a waiver, the provisions of § 3015.408 allowing exceptions for particular transactions may be applied.

§ 3015.406 (_____.205 and _____.320) Effect of voluntary exclusion.

At any point in the process under § 3015.414, prior to the final decision by the DSO, a participant and the DSO may enter into a settlement providing for the exclusion of the participant. Such exclusion shall be entered on the consolidated list for informational purposes (see §§ 3015.418 and 3015.419).

Participants who accept voluntary exclusions are excluded in accordance with the terms of their settlements.

§ 3015.407 (_____.210) Effect of declaring persons ineligible.

Persons who are ineligible are excluded pursuant to applicable statutory, Executive order, or regulatory authority. Their inclusion on the consolidated list is for informational purposes only.

§ 3015.408 (_____.215) Exception provision.

An agency may grant an exception permitting a debarred, suspended, or excluded person to participate in a particular transaction upon a written determination by the agency head or authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549. However, exceptions to this policy should be granted only infrequently. Exceptions should be reported in accordance with § 3015.419.

§ 3015.409 (_____.220) Continuation of current awards.

(a) Notwithstanding the debarment, suspension, voluntary exclusion or ineligible status of any person, USDA agencies and participants may continue agreements in existence at the time the person was debarred, suspended, declared ineligible or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) USDA agencies and participants shall not renew or extend the duration of current agreements with any person who is debarred, suspended, declared ineligible or under a voluntary exclusion, except as provided in § 3015.08.

§ 3015.410 (_____.225) Failure to adhere to restrictions.

Doing business with a debarred, suspended or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended, or otherwise excluded from participation in such transaction, except as permitted under these regulations, may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

§ 3015.411 (_____.300 and _____.400) Debarment/suspension—general.

A DSO may debar or suspend a participant for any of the causes in §§ 3015.412 and 3015.413 using procedures established in accordance with § 3015.414. The existence of a cause for debarment or suspension, however, does not necessarily require that the participant be debarred or suspended; the seriousness of the participant's acts or omissions and any mitigating factors should be considered in making any decision.

§ 3015.412 (_____.305) Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 3015.411 and 3015.414 for:

(a) Conviction of or a civil judgment for any offense indicating a lack of business integrity or honesty which affects the present responsibility of a participant, incuding but not limited to:

(1) Fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement;

(2) Bribery, embezzlement, false claims, false statements, falsification or destruction of records, forgery, obstruction of justice, receiving stolen property, or theft; or

(3) Unlawful price fixing between competitors, allocation of customers between competitors, bid rigging, or any other violation of Federal or State antitrust laws that relates to the submission of bids or proposals.

(b) Violation of the terms of a public agreement so serious as to affect the present responsibility of a participant, including but not limited to:

(1) A willful or material failure to perform under one or more public agreements;

(2) A history of substantial noncompliance with the terms of one or more public agreements; or

(3) A willful or material violation of a statutory or regulatory provision or requirement applicable to a public agreement.

(c) Any of the following causes:

(1) Debarment or equivalent exclusionary action by any public agency or instrumentality for causes substantially the same as provided for by this section;

(2) Doing business with a debarred, suspended, or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended or otherwise excluded from participation in such transactions;

(3) Conduct indicating a lack of business integrity or honesty which affects the present responsibility of a participant;

(4) Loss or denial of the right to do business or practice a profession under circumstances indicating a lack of business integrity or honesty or otherwise affecting the present responsibility of a participant;

(5) Failure to pay a debt (including disallowed costs and overpayments) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted; or

(6) Violation of a material provision of a voluntary exclusion or of any settlement of a debarment or suspension action.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a participant.

§ 3015.413 (_____.405) Causes for suspension.

(a) When it has been determined that immediate action is necessary to protect the public interest, suspension may be imposed in accordance with the provisions of §§ 3015.411 and 3015.414 upon adequate evidence:

(1) To suspect the commission of an offense listed in § 3015.412(a); or

(2) That a cause for debarment under § 3015.412 may exist.

(b) Indictment may constitute adequate evidence for purposes of suspension actions.

§ 3015.414 (_____.310 and _____.410) Procedures.

(a) *Investigation and referral.* USDA agencies shall establish procedures for the prompt reporting, investigation, and referral to their respective DSOs of matters appropriate for that DSO's consideration. At a minimum, these procedures shall provide that:

(1) The decision to utilize agency personnel, the Office of the Inspector General, or other appropriate resources to conduct the investigation and develop the documentation required by paragraph (a)(2) of this section is the responsibility of the agency.

(2) Basic documentation is developed that includes but is not limited to:

(i) The name of the specific respondent(s) against whom the action is being proposed or taken;

(ii) The reason(s) for proposing the debarment or imposing the suspension;

(iii) The specific causes for action from §§ 3015.412 and 3015.413;

(iv) A short narrative stating the facts and/or describing other evidence supporting the reason(s) for wanting to debar or suspend;

(v) The recommended time period for the debarment/suspension;

(vi) The potential effect and/or consequences that the action will have on the respondent(s);

(vii) Signature of the person recommending the action; and

(viii) Copies of any relevant support documentation identified under this section.

(3) The DSO shall be responsible for deciding whether or not to proceed with the action.

(4) The Office of the General Counsel (OGC) is responsible for:

(i) Reviewing documentation and notices for legal sufficiency, and

(ii) Coordinating any actions with the Department of Justice (DOJ).

(b) *Due process requirements.* USDA agencies shall establish procedures governing due process that are as informal as practicable and consistent with principles of fundamental fairness. These procedures shall, at a minimum, provide the following:

(1) *Notice to the respondent.* Any proceeding shall be initiated by notice to the respondent(s) signed by the DSO, and transmitted by certified mail, return receipt requested. The OGC will be consulted on all proposed actions prior to the notice being sent to the respondent. The notice shall include the following information:

(i) The specific suspension action taken and/or debarment action proposed;

(ii) The reasons for the action or proposed action in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based. In setting out the reasons, USDA agencies must take care to protect the Federal Government's interest in any current or future litigation;

(iii) The cause(s) relied upon under §§ 3015.412 and 3015.413 for the action or proposed action;

(iv) USDA's regulation and any agency specific regulations governing due process;

(v) The immediate effect of the suspension and/or proposed debarment action; and

(vi) The potential effect of the final debarment decision when such action is proposed.

(2) *Submission in opposition.* Within 30 days after receipt of the notice, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension and/or proposed debarment.

(3) *Additional proceedings as to disputed material facts.*

(i) If it is found that there exists a genuine dispute over facts material to the action, respondent(s) shall be afforded an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents, unless—

(A) The action is based on a conviction, judgment, or, for suspension actions only, an indictment. In all such cases, the action would be decided as specified under paragraph (b)(4)(i)(B) of this section.

(B) A determination is made by the DSO, after coordination with OGC, on the basis of DOJ advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the action would be prejudiced. In this case the action would be stopped as provided under paragraph (b)(4)(i)(C) of this section. Alternatively, if the DSO determines, after consultation with OGC, that there is enough evidence to proceed without using the facts that DOJ has advised would prejudice its contemplated legal proceedings, the DSO may proceed with the proposed action.

(ii) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

(4) *DSO's decision.* The DSO's decision shall be rendered in accordance with the following provisions:

(i) *No additional proceedings necessary.*

(A) In actions where respondent(s) fail(s) to timely provide any submission in opposition, the action will be considered decided; or

(B) In all actions—

(1) Based on a conviction, judgment, or in the instance of suspension action only, an indictment, or

(2) In which there is no genuine dispute over material facts.

The decision under paragraphs (b)(4)(i)(A) and (b)(4)(i)(B) of this section shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the DSO extends the period for good cause.

(C) In actions in which additional proceedings to determine disputed material facts have been denied on the basis of DOJ advice. In this case, the DSO shall stop the action immediately. The agency, however, reserves the right to proceed with the action when the DOJ completes its legal proceedings or is satisfied that the action will no longer prejudice their proceedings.

(ii) *Additional proceedings necessary.*

(A) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The DSO shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(B) The DSO may refer matters involving disputed material facts to another official for findings of fact. The DSO may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(C) The DSO's decision shall be made after the conclusion of the proceedings with respect to disputal facts.

(5) *Standard of evidence.* The standards of evidence are:

(i) For debarment, the cause must be established by a preponderance of the evidence. In any debarment action which is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(ii) For suspension, the cause must be established by adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the participant. In any suspension action based upon an indictment or conviction, the standard of evidence shall be deemed to have been met.

(6) *Notice of DSO's decision.* Prompt written notice, of any decision, shall be signed by the DSO and sent to the respondent(s) and affiliates involved, by certified mail, return receipt requested. OGC will be consulted on the action the DSO plans to take at any time prior to sending the notice. The notice shall include the following:

(i) Reference to the previously issued notice of action taken or proposed;

(ii) The reason(s) for the action taken in this notice;

(iii) The effective date(s) of the action taken in this notice and, where appropriate, the period of the action; and .

(iv) Advice that the debarment or suspension action is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or a designee authorized by an agency head makes a determination referred to in § 3015.408.

§ 3015.415 (_____.325) Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, a debarment should not exceed three years. Where circumstances warrant, a longer or indefinite period of debarment may be imposed. If a suspension precedes a debarment, the suspension period may be considered in determining the debarment period.

(b) The DSO may extent an existing debarment for an additional period, if that Official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the same facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is found to be necessary, the procedures of § 3015.414 shall be followed to extend the debarment.

(c) The DSO may reduce the period or scope of debarment upon the respondent's request, supported by documentation, for reasons such as:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the DSO deems appropriate.

§ 3015.416 (_____.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of investigation and any ensuing legal or debarment proceedings, unless terminated sooner by the DSO or as provided in paragraph (b) of this section.

(b) If the legal or debarment proceedings are not initiated within 12 months after the date of suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The DSO shall notify the DOJ, through OGC, of the impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§ 3015.417(_____.330 and _____.420) Scope of debarment/suspension actions.

(a) *Scope in general.* (1) The scope of a suspension shall be the same as the scope of a debarment as set forth in this section.

(2) Debarment of a person or affiliate under this regulation constitutes debarment of all its subsidiaries, divisions, and other organizational elements unless the decision is limited by its terms to one or more specifically identified individuals or organizational elements or to specific types of transactions.

(3) The debarment action may include any other affiliate of the participant that is (i) specifically named and (ii) given notice of the action taken or proposed and an opportunity to respond (see § 3015.414).

(b) *Imputing conduct.* For purposes of determining the scope, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be presumptive evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be presumptive evidence of such knowledge, approval, or acquiescence.

§ 3015.418 (_____.500) General Services Administration (GSA) responsibilities for the consolidated list.

(a) GSA shall compile, maintain, and distribute a list of all participants who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be eligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, voluntarily excluded, and ineligible participants in alphabetical order, with cross-reference when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the official responsible for initiating the action.

§ 3015.419 (_____.505) Responsibilities of USDA—consolidated list.

(a) Each USDA agency that takes or plans to take debarment or suspension action(s) shall designate a liaison who shall be responsible for providing GSA with current information concerning debarments, suspensions, voluntary exclusions and ineligibilities taken by USDA agencies. Until February 18, 1989, USDA agencies shall also provide GSA and OMB with information, in writing, concerning all transactions in which a USDA agency has granted exceptions under § 3015.408 permitting participation by debarred, suspended, or excluded persons.

(b) USDA agencies shall provide the Office of Finance and Management with copies of the information requested in § 3015.418(b) and, until February 18, 1989, information concerning exceptions granted under § 3015.408. Such information shall be submitted in writing and shall be sent within five working days of taking such actions.

(c) Unless an alternative schedule is agreed to by GSA, the USDA agency liaison shall advise GSA of the information set forth in § 3015.418(b) and of the exceptions granted under § 3015.408 within five working days after taking such actions. All communications with GSA regarding additions, deletions, or changes to the consolidated list shall be in writing.

(d) Each USDA agency shall establish procedures to provide for the effective dissemination of the consolidated list to agency personnel responsible for making awards or otherwise involving participants in programs using Federal funds.

(e) Each USDA agency shall establish procedures to provide for the effective use of the consolidated list, in order to

ensure that listed persons do not participate in any covered transaction in a manner inconsistent with that person's listed status, except as provided in these regulations. At a minimum, the following shall apply:

(1) For covered transactions of $25,000 or more in direct costs, USDA agency personnel must check the consolidated list to be sure that they do not make awards to or otherwise involve debarred or suspended persons in affected programs. The list will be available by a subscription through the Government Printing Office.

(2) When checking the consolidated list, it is up to the USDA agency to determine whether it is in the best interest of the Federal Government to allow persons that have been identified on the list as voluntarily excluded, pending debarment, or ineligible under other authorities, to participate in Federal programs. USDA agencies may seek further information on the listed action.

(f) In seeking further information, USDA agencies shall direct inquiries concerning listed persons to the executive department or agency that took the action to put them on the list.

(g) For covered transactions under $25,000 in direct costs, USDA agencies shall establish procedures for certification. Such certificate procedures shall provide that a person who is a direct recipient of Federal funds shall be required to certify as to whether he/she, or any person acting in a capacity listed in § 3015.404(b) with respect to the person or the particular covered transaction, is currently or within the preceding three years has been:

(1) Debarred, suspended or declared ineligible;

(2) Formally proposed for debarment, with a final determination still pending;

(3) Voluntarily excluded from participating; or

(4) Indicated, convicted, or had a civil judgment rendered against him/her for any of the offenses listed in §3015.412(a). Adverse information on the certification need not necessarily result in denial of participation. The information provided by the certification, and any additional information USDA agencies may require, shall be considered in the administration of covered transactions as follows:

(i) If a person is debarred or suspended, USDA shall not allow that person to participate in affected programs, except as indicated in § 3015.408.

(ii) If a person indicates he/she has been declared ineligible, formally proposed for debarment with a final determination still pending, voluntarily excluded from participation, or indicted, convicted, or had a civil judgment rendered against them for any of the offenses listed in § 3015.412(a), the USDA agency may determine whether it is in the best interest of the Federal government to allow that person to participate in programs using Federal funds.

(h) USDA agencies shall inform their recipients that subrecipients at all levels must certify to the recipient from whom they receive funds, as to whether the subrecipient or any person acting in a capacity listed in § 3015.404(b) with respect to those subrecipients or the particular covered transaction, is currently or with the preceding three years has been:

(1) Debarred, suspended or declared ineligible;

(2) Formally proposed for debarment, with a final determination still pending;

(3) Voluntarily excluded from participation; or

(4) Indicted, convicted, or had a civil judgment rendered against them for any of the offenses listed in § 3015.412(a). Adverse information on the certification need not necessarily result in denial of participation. The information provided by the certification, and any additional, information required, shall be considered in the administration of covered transactions in accordance with paragraphs (g)(4)(i) and (ii) of this section.

(i) USDA agencies shall notify GSA and OFM in writing of debarment or suspension decisions overturned on appeal under § 3015.420.

§ 3015.420 Appeal of debarment/suspension decisions.

(a) If a decision to debar or suspend is made by a DSO under § 3015.414(b)(4), the respondent may appeal this decision to the Office of Administrative Law Judges (OALJ) by filing the appeal in writing to the Hearing Clerk, OALJ, United States Department of Agriculture, Washington, DC 20250. The appeal must be filed within 30 days of receiving the decision rendered under § 3015.414 and it must specify that the decision by the DSO was:

(i) Not in accordance with law;

(ii) Not based on the applicable standard of evidence; or

(iii) Arbitrary and capricious and an abuse of discretion.

(b) The Appeals Officer will base his/her decision solely upon the administrative record.

(c) Within 90 days of the date the appeal is filed with USDA's OALJ Hearing Clerk, the Appeals Officer will notify the respondent(s) in writing and the DSO who took the action being appealed of his/her decision in the appeal. The notice must specify the reason(s) for the decision made by the Appeals Officer.

(d) The Appeals Officer's decision is final and is not appealable within USDA.

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DEPARTMENT OF THE INTERIOR

43 CFR Part 12

Nonprocurement Debarment and Suspension

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes a regulation establishing a uniform system of nonprocurement debarment and suspension. This implements the Office of Management and Budget Guidelines for Nonprocurement Debarment and Suspension.

DATE: Comments must be received on or before December 21, 1987.

ADDRESS: William Opdyke, Chief, Policy and Regulations Branch, Division of Acquisition and Grants, Office of Acquisition and Property Management, Department of the Interior, 18th and C Streets NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: William Opdyke, Chief, Policy and Regulations Branch, Division of Acquisition and Grants, Office of Acquisition and Property Management, telephone (202) 343-3433.

SUPPLEMENTARY INFORMATION: Executive Order 12549, "Debarment and Suspension," was signed on February 18, 1986. The Order directs Federal executive branch departments and agencies to participate in a system for nonprocurement debarment or suspension under which an agency's debarment and suspension of a nonprocurement program participant will have government-wide effect.

Pursuant to section 6 of the Order, the Office of Management and Budget (OMB) transmitted a memorandum to executive departments and agencies setting forth guidelines which prescribe program coverage, government-wide criteria, minimum due process procedures, and other guidelines for implementation of this system.

Section 3 of the Order directs agencies to issue regulations to implement the system which are consistent with the guidelines. These proposed regulations

implement the guidelines, with the exception that the term, "contracts of assistance" has been deleted from § 12.110 (a)(1) which identifies covered transactions because the Department does not engage in these types of transactions. An additional term, "primary participant" has been defined in § 12.120 because the term is used in the description of the certification process. The title of § 12.320 has been changed to "Voluntary exclusion settlement," and the title of § 12.505 has been changed to "Responsibilities of the Department of the Interior." The Department has chosen to cover both indirect as well as direct cost transactions for the purpose of suspension or debarment.

As part of the certification process described in § 12.505 (e)(1), bureaus and offices have to ensure that all potential primary participants complete and submit a certification before further action is taken. However, the Department is not proposing to require certifications from participants for indirect cost transactions. A number of the participants in programs administered by the Department are State agencies or entities with which there is a continuing relationship. For these types of participants, it is proposed that an annual certification be permitted to eliminate the administrative burden imposed by individual certifications for each transaction. Comments are requested on the use of such a certification.

Executive Order 12291 and the Regulatory Flexibility Act

The Department of the Interior has determined this document is not a major rule under E. O. 12291 and certifies this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

Paperwork Reduction Act

If necessary, the information collection requirements contained in 43 CFR 12.505 will be submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 et seq. The collection of this information will not be required until it has been approved by the Office of Management and Budget. Comments on the information collection requirements should be submitted to Pamela Barr, Desk Officer, Office of Management and Budget, Office of Information and Regulatory Affairs, 726 Jackson Place, Room 3201, Washington, DC 20503, as well as to the Departmental address listed above.

List of Subjects in 43 CFR Part 12

Cooperative agreements, Grants administration, Grant program.

It is proposed that Title 43 of the Code of Federal Regulations be amended as set forth below.

Joseph W. Gorrell,

Principal Deputy Assistant Secretary—Policy, Budget and Administration.

Date: September 29, 1987.

PART 12—ADMINISTRATIVE REQUIREMENTS AND COST PRINCIPLES FOR ASSISTANCE PROGRAMS

1. The authority citation for Part 12 is revised to read as follows:

Authority: 5 U.S.C. 301; Pub. L. 98-502; OMB Circular A-128; OMB Circular A-102; Executive Order 12549 of February 18, 1986.

2. Part 12 is amended by adding Subpart D to read as set forth below:

Subpart D—Nonprocurement Debarment and Suspension

General

Sec.
12.100 Purpose.
12.105 Authority.
12.110 Scope.
12.115 Policy.
12.120 Definitions.

Effect of Action

12.200 Debarment or suspension.
12.205 Voluntary exclusion.
12.210 Ineligible persons.
12.215 Exception provision.
12.220 Continuation of current awards.
12.225 Failure to adhere to restrictions.

Debarment

12.300 General.
12.305 Causes for debarment.
12.310 Procedures.
12.315 Effect of proposed debarment.
12.320 Voluntary exclusion settlement.
12.325 Period of debarment.
12.330 Scope of debarment.

Suspension

12.400 General.
12.405 Causes for suspension.
12.410 Procedures.
12.415 Period of suspension.
12.420 Scope of suspension.

Agency Responsibilities; Consolidated List

12.500 GSA responsibility.
12.505 Responsibilities of the Department of the Interior.

Subpart D—Nonprocurement Debarment and Suspension

General

§ 12.100 Purpose.

(a) Executive Order 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a system for debarment and suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits. Debarment or suspension of a participant in a program by one agency shall have government-wide effect. Section 6 of the Order authorizes the Office of Management and Budget (OMB) to issue guidelines concerning the Order. Section 3 of the Order directs Federal agencies to issue regulations governing implementation of the Order.

(b) These regulations implement section 3 of Executive Order 12549 by:

(1) Prescribing the programs and activities that are covered by the Order;

(2) Prescribing the criteria and government-wide minimum due process procedures that the Department of the Interior shall use in implementing the Order;

(3) Providing for the listing of debarred and suspended participants, participants who voluntarily exclude themselves from participation in covered transactions, and participants declared ineligible (see the definition of "ineligible" in § 12.120);

(4) Setting forth the consequences of the actions under paragraph (b)(3) of this section; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the Order.

(c) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

(d) The procedures set fort in §§ 12.310 and 12.410 are the due process procedures to be followed by the Department of the Interior.

§ 12.105 Authority.

These regulations are issued pursuant to Executive Order 12549 of February 18, 1986.

§ 12.110 Scope.

(a) *Covered transactions.* These regulations apply to Executive branch domestic assistance described below:

(1) *General.* Covered transactions (whether by a Federal agency, recipient, subrecipient, or intermediary) include, except as noted in paragraph (a)(2) of this section: grants, cooperative agreements, scholarships, fellowships, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreement subawards, subcontracts and transactions at any tier that are charged as direct or indirect costs, regardless of type (including

subtier awards under awards which are statutory entitlement or mandatory awards).

(2) *Exceptions.* The following transactions are not covered: statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory); benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted); incidental benefits derived from ordinary governmental operations; and, other transactions where the application of Executive Order 12549 and these regulations would be prohibited by law.

(b) *Relationship to other sections.* This § 12.110, describes the types of activities and transactions to which a debarment or suspension under the regulations will apply. Section 12.200 sets forth the consequences of a debarment or suspension. Those consequences would pertain only to participants in the covered transactions and activities described in § 12.110. Sections 12.330, scope of debarment, and 12.420, scope of suspension, govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which additional affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal acquisition activities.* Executive Order 12549 and these regulations do not apply to direct Federal acquisition activities. Debarment and suspension of Federal contractors and subcontractors are covered by the Federal Acquisition Regulation, 48 CFR Subpart 9.4. Department of the Interior policies and procedures governing the debarment and suspension of contractors, the listing of the debarred and suspended contractors, and dissemination of this listing are prescribed in 48 CFR Subpart 1409.4.

§ 12.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to effectuate this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. The Department imposes debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

§ 12.120 Definitions.

"Adequate evidence" means information sufficient to support the reasonable belief that a participation act or omission has occurred.

"Affiliate" means persons are affiliates of one another if, directly or indirectly, one owns, controls, or has the power to control the other, or a third person owns, controls, or has the power to control both.

"Agency" means any executive department, military department or defense agency, or other agency of the executive branch, excluding the independent regulatory agencies.

"Consolidated List" means a list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about participants who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

"Control" means the power to exercise, directly or indirectly, a controlling influence over the management, policies, or activities of a person, whether through the ownership of voting securities, through one or more intermediary persons, or otherwise. For purposes of actions under these regulations, a person who owns or has the power to vote more than 25 percent of the outstanding voting securities of another person, or more than 25 percent of total equity if the other person has no voting securities, is presumed to control. Such presumption may be rebutted by evidence. Other indicia of control include, but are not limited to: interlocking management or ownership; identity of interests among family members; shared facilities and equipment; common use of employees; and, establishment, following the debarment, suspension, or other exclusion of a participant, of an organization or entity which is to operate in the same business or activity and to have substantially the same management, ownership, or principal employees as the debarred, suspended or excluded participant.

"Conviction" means judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

"Debarment" means an action taken by the debarring official in accordance with these regulations implementing Executive Order 12549 to exclude a person from participating in covered transactions. A person so excluded is "debarred."

"Debarring official" means the Director, Office of Acquisition and Property Management who is authorized to impose debarment within the Department of the Interior.

"Indictment" means indictment for a criminal offense. Any information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

"Ineligible" means excluded from participation in covered transactions, programs, or agreements pursuant to statutory, Executive order, or regulatory authority other than Executive Order 12549 and these regulations; for example, excluded pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the equal employment opportunity acts and Executive orders, or the environmental protection acts and Executive orders.

"Legal proceedings" means any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

"Notice" means a written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service or process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

"Participant" means any person who submits proposals for, receives an award or subaward or performs services in connection with, or reasonably may be expected to be awarded or to perform services in connection with, a covered transaction. This term also includes any person who conducts business with a Federal agency as an agent or representative of another participant.

"Person" means any individual, corporation, partnership, association, unit of government or legal entity however organized, including any subsidiary of any of the foregoing.

"Preponderance of the evidence" means proof by information that, compared, with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

"Primary participant" means the person with whom the Interior agency

directly enters into a covered transaction.

"Proposal" means a solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking a benefit, directly or indirectly, under a covered transaction.

"Respondent" means person against whom a debarment or suspension action has been initiated.

"Subsidiary" means corporation, partnership, association or legal entity however organized, owned or controlled by another person.

"Suspending official" means the Director, Office of Acquisition and Property Management who is authorized to impose suspension within the Department of the Interior.

"Suspension" means an action taken by a suspending official in accordance with these regulations implementing Executive Order 12549 to immediately exclude a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal or debarment proceedings as may ensue. A person so excluded is "suspended."

"Voluntary exclusion" means a status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

Effect of Action

§ 12.200 Debarment or suspension.

(a) Except to the extent prohibited by law, a person's debarment shall be effective throughout the executive branch of the Federal Government. Except as provided in § 12.215, persons who are debarred or suspended under these provisions are excluded from participation in all covered transactions of all agencies for the period of their debarment or suspension. Accordingly, agencies and participants shall not make awards to or agree to participation by such debarred or suspended persons during such period.

(b) In addition, persons who are debarred or suspended are excluded from participation in or under any covered transaction in any of the following capacities: as an owner or partner holding a controlling interest, director, or officer of the participant; as a principal investigator, project director, or other position involved in management of the covered transaction; as a provider of federally-required audit services; in any other position to the extent that the incumbent is responsible for the administration of Federal funds; or in any other position charged as a direct cost under the covered transaction.

§ 12.205 Voluntary exclusion.

Participants who accept voluntary exclusions under § 12.320 are excluded in accordance with the terms of their settlements; their listing, pursuant to § 12.500, is for informational purposes. Awarding agencies and participants must contact the original action agency to ascertain the extent of the exclusion.

§ 12.210 Ineligible persons.

Persons who are ineligible are excluded in accordance with the applicable statutory, Executive order, or regulatory authority.

§ 12.215 Exception provision.

The Department of the Interior may grant an exception permitting a debarred, suspended, or excluded person to participate in a particular transaction upon a written determination by the Director, Office of Acquisition and Property Management stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549. However, the Order states that it is the President's intention that exceptions to this policy should be granted only infrequently. Exceptions are reported in accordance with § 12.505(b).

§ 12.220 Continuation of current awards.

(a) Notwithstanding the debarment, suspension, voluntary exclusion or ineligible status of any person, the Department and participants may continue agreements in existence at the time the person was debarred, suspended, declared ineligible or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) The Department and participants shall not renew or extend the duration of current agreements with any person who is debarred, suspended, declared ineligible or under a voluntary exclusion, except as provided in § 12.215.

§ 12.225 Failure to adhere to restrictions.

Doing business with a debarred, suspended or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended or otherwise excluded from participation in such transaction, except as permitted under these regulations, may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

Debarment

§ 12.300 General.

The Director, Office of Acquisition and Property Management may debar a participant for any of the causes in §12.305, using procedures in §12.310. The existence of a cause for debarment, however, does not necessarily require that the participant be debarred; the seriousness of the participant's acts or omissions and any mitigating factors may be considered in making any debarment decision.

§ 12.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 12.300 and 12.310 for:

(a) Conviction of, or civil judgment for, any offense indicating a lack of business integrity or honesty which affects the present responsibility of a participant including but not limited to:

(1) Fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement;

(2) Bribery, embezzlement, false claims, false statements, falsification or destruction of records, forgery, obstruction of justice, receiving stolen property, or theft; or

(3) Unlawful price fixing between competitors, allocation of customers between competitors, bid rigging, or any other violation of Federal or State antitrust laws that relates to the submission of bids or proposals.

(b) Violation of the terms of a public agreement so serious as to affect the present responsibility of a participant, including but not limited to:

(1) A willful or material failure to perform under one or more public agreements;

(2) A history of substantial noncompliance with the terms of one or more public agreements; or

(3) A willful or material violation of a statutory or regulatory provision or requirement applicable to a public agreement.

(c) Any of the following causes:

(1) Debarment or equivalent exclusionary action by any public agency or instrumentality for causes substantially the same as provided for by § 12.305.

(2) Doing business with a debarred, suspended or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended or otherwise excluded from participation in such transactions;

(3) Conduct indicating a lack of business integrity or honesty which affects the present responsibility of a participant;

(4) Loss or denial of the right to do business or practice a profession under circumstances indicating a lack of business integrity or honesty or otherwise affecting the present responsibility of a participant;

(5) Failure to pay a debt (including disallowed costs and overpayments) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted; or

(6) Violation of a material provision of a voluntary exclusion or of any settlement of a debarment or suspension action.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a participant.

§ 12.310 Procedures.

(a) *Investigation and referral.* Whenever a cause for debarment, as listed in § 12.305, becomes known to a Department employee, the matter shall be referred to the head of the bureau, or other official designated by bureau procedures. The head of the bureau, or other designated official, shall consult with the Office of the Solicitor and the Office of Inspector General, as appropriate, and submit a formal recommendation which documents the cause for debarment to the Director, Office of Acquisition and Property Management.

(b) *Decisionmaking process.* The decisionmaking process shall be as informal as practicable, consistent with principles of fundamental fairness.

(1) *Notice of proposed debarment.* Based upon review of the recommendation to debar and consultation with the Office of the Solicitor and Office of Inspector General, as appropriate, the Director, Office of Acquisition and Property Management shall initiate proposed debarment by immediately sending a notice to the respondent advising:

(i) That debarment is being considered;

(ii) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(iii) Of the cause(s) relied upon under § 12.305 for proposing debarment;

(iv) Of the provisions of § 12.310(b)(1)–(b)(6) and the specific procedures governing debarment decisionmaking under this § 12.310;

(v) Of the effect of the proposed debarment pending a final debarment decision; and

(vi) Of the potential effect of a debarment.

(2) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(3) *Additional proceedings as to disputed material facts.* (i) In actions not based upon a conviction or judgment, if it is found that there exists a genuine dispute over facts material to the proposed debarment the Director, Office of Acquisition and Property Management, shall afford the respondent(s) an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the Department of the Interior presents.

(ii) The hearing shall be conducted by a hearing official designated by the Director, Office of Hearings and Appeals and shall be held at a location convenient to the parties as determined by the hearing official. The proceedings shall be conducted expeditiously and in such a manner that the respondent will have a full opportunity to present all information pertinent to the proposed debarment. A transcribed record of the hearing shall be made available at cost to the respondent, unless the respondent and the Department, by mutual agreement, waive the requirement for a transcript.

(4) *Debarring official's decision.* (i) No additional proceedings necessary. In actions based upon a conviction or judgment, or in which there is no genuine dispute over material facts, the Director, Office of Acquisition and Property Management shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the Director, Office of Acquisition and Property Management extends this period for good cause.

(ii) *Additional proceedings necessary.* In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared by the hearing official. The Director, Office of Acquisition and Property Management may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous. The Director, Office of Acquisition and Property Management shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(5) *Standard of evidence.* In any contested action, the cause for debarment must be established by a preponderance of the evidence. In any contested action in which the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(6) *Notice of debarring official's decision.* (i) If the Director, Office of Acquisition and Property Management decides to impose debarment, the respondent shall be given prompt notice:

(A) Referring to the notice of proposed debarment;

(B) Specifying the reasons for debarment;

(C) Stating the period of debarment, including effective dates; and

(D) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless the Director, Office of Acquisition and Property Management makes the determination referred to in § 12.215.

(ii) If the Director, Office of Acquisition and Property Management decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

§ 12.315 Effect of proposed debarment.

Upon issuance of a notice of proposed debarment and until the final debarment decision is rendered, the Department of the Interior shall not make any new awards to the respondent. The Department of the Interior may waive this exclusion pending a debarment decision upon a written determination by the Director, Office of Acquisition and Property Management, identifying the reasons for doing so. In the absence of such a waiver, the provisions of § 12.215 allowing exceptions for particular transactions may be applied.

§ 12.320 Voluntary exclusion settlement.

A participant and the Department of the Interior may enter into a settlement providing for the exclusion of the participant. Such exclusion shall be entered on the Consolidated List (see § 12.500).

§ 12.325 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, a debarment should not exceed three years. Where circumstances warrant, a longer or indefinite period of debarment may be imposed. If a suspension precedes a debarment, the suspension period may be considered in determining the debarment period.

(b) The Director, Office of Acquisition and Property Management may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of § 12.310 shall be followed to extend the debarment.

(c) The Director, Office of Acquisition and Property Management may reduce the period or scope of debarment, upon the respondent's request, supported by documentation, for reasons such as:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the Director, Office of Acquisition and Property Management deems appropriate.

§ 12.330 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person or affiliate under Executive Order 12549 constitutes debarment of all its subsidiaries, divisions, and other organizational elements unless the debarment decision is limited by its terms to one or more specifically identified individuals or organizational elements or to specific types of transactions.

(2) The debarment action may include any other affiliate of the participant that is (i) specifically named and (ii) given notice of the proposed debarment and an opportunity to respond (see § 12.310).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be presumptive evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any office, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be presumptive evidence of such knowledge, approval or acquiescence.

Suspension

§ 12.400 General.

(a) The Director, Office of Acquisition and Property Management may suspend a participant for any of the causes in § 12.405 using procedures in § 12.410.

(b) Suspension is a serious action to be imposed on the basis of adequate evidence of one or more of the causes set out in §12.405 when it has been determined that immediate action is necessary to protect the public interest.

§ 12.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§12.400 and 12.410 upon adequate evidence:

(1) To suspect the commission of an offense listed in §12.305(a); or

(2) That a cause for debarment under § 12.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 12.410 Procedures.

(a) *Investigation and referral.* Whenever a cause for suspension, as listed in §12.305, becomes known to a Department employee, the matter shall be referred to the head of the bureau, or other official designated by bureau procedures. The head of the bureau, or other designated official, shall consult with the Office of the Solicitor and the Office of Inspector General, as appropriate, and submit a formal recommendation which documents the cause for suspension to the Director, Office of Acquisition and Property Management.

(b) *Decisionmaking process.* The suspension decisionmaking process shall be as informal as practicable consistent with principles of fundamental fairness.

(1) *Notice of suspension.* Based upon review of the recommendation to suspend and consultation with the Office of the Solicitor and the Office of Inspector General, as appropriate, the Director, Office of Acquisition and Property Management shall initiate suspension by immediately sending a notice to the respondent advising:

(i) That suspension has been imposed;

(ii) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(iii) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(iv) Of the cause(s) relied upon under § 12.405 for imposing suspension;

(v) That the suspension is for a temporary period pending the completion of an investigation and such legal or debarment proceedings as may ensue;

(vi) Of the provisions of § 12.410(b)(1)–(b)(5) and the specific procedures governing suspension decisionmaking under this § 12.410; and

(vii) Of the effect of the suspension.

(2) *Submission in opposition.* Within 30 days after the receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(3) *Additional proceedings as to disputed material facts.* (i) If it is found that there exists a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the Department of the Interior presents, unless—

(A) The action is based on an indictment, conviction or judgment, or

(B) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based

on the same facts as the suspension would be prejudiced.

(ii) The hearing shall be conducted by a hearing official designated by the Director, Office of Hearings and Appeals and shall be held at a location convenient to the parties as determined by the hearing official. The proceedings shall be conducted expeditiously and in such manner that each respondent will have a full opportunity to present all information considered pertinent to the suspension. A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, unless the respondent and the agency, by mutual agreement waive the requirement for a transcript.

(4) Suspending official's decision. The Director, Office of Acquisition and Property Management may modify or terminate the suspension (for example, see § 12.325(c) for the reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(i) No additional proceedings necessary. In actions (A) based on an indictment, conviction, or judgment, (B) in which there is no genuine dispute over material facts, or (C) in which additional proceedings to detemine disputed material facts have been denied on the basis of Department of Justice advice, the Director, Office of Acquisition and Property Management shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the Director, Office of Acquisition and Property Management extends this period for good cause.

(ii) Additional proceedings necessary. In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared by the hearing official. The Director, Office of Acquisition and Property Management may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous. The Director, Office of Acquisition and Property Management, shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(5) *Notice of suspending official's decision.* Prompt written notice of the decision of the Director, Office of Acquisition and Property Management shall be sent to the respondent and any affiliates involved.

§ 12.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of investigation and any ensuing legal or debarment proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or debarment proceedings are not inititiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The Director, Office of Acquisition and Property Management shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12 month period expires, to give that Department an opportunity to request an extension.

§ 12.420 Scope of suspension.

The scope of a suspension shall be the same as the scope of debarment (see § 12.330), except that the procedures of § 12.410 shall be used in imposing a suspension.

Agency Responsibilities; Consolidated List

§ 12.500 GSA responsibility.

(a) GSA shall compile, maintain, and distribute a list of all participants who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, voluntarily excluded, and ineligible participants in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§ 12.505 Responsibilities of the Department of the Interior.

(a) The Division of Acquisition and Grants, Office of Acquisition and Property Management is the liaison responsible for providing GSA with current information concerning debarments, suspensions, voluntary exclusions and ineligibilities taken by the Department of the Interior. Until February 18, 1989, the Division of Acquisition and Grants, Office of Acquisition and Property Management shall also provide GSA and OMB with information concerning all transactions in which the Department of the Interior has granted exceptions under § 12.215 permitting participation by debarred, suspended, or excluded persons.

(b) The Department of the Interior shall advise GSA of the information set forth in § 12.500(b) and of the exceptions granted under § 12.215 within five working days after taking such actions.

(c) The Division of Acquisition and Grants, Office of Acquisition and Property Management, is responsible for the effective dissemination and use of the list in order to ensure that listed persons do not participate in any covered transaction in a manner inconsistent with that person's listed status, except as otherwise provided in these regulations.

(d) (1) Monthly issues of the consolidated list shall be disseminated in accordance with bureau procedures to all appropriate assistance management offices.

(2) Any supplements to monthly lists shall be furnished to each bureau headquarters office by the Division of Acquisition and Grants, Office of Acquisition and Property Management. Each bureau shall, in accordance with bureau procedures, maintain list supplements at a central location and issue instructions requiring assistance management offices to contact this location in order to obtain current information.

(3) Inquiries concerning listed persons shall be made to the office that took the action.

(4) Other parties interested in obtaining subscriptions to the list should contact the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238, or FTS 783-3238.

(e) (1) Bureaus and offices shall ensure that all potential primary participants complete and submit the certification in Appendix A before further action is taken. Bureaus and offices may rely upon an annual certification submitted by potential primary participants when a continuing

relationship has been established with the entity. Adverse information on the certification need not necessarily result in a denial of participation. The completed certification shall be included in the official file established for the transaction.

(2) Participants at each level shall receive completed certifications (Appendix A to this section) from next lower tier participants (subawardees) before the subaward is made.

(3) Such certifications need not be submitted for indirect cost transactions.

Appendix A to § 12.500—Certification Regarding Debarments, Suspension, Voluntary Exclusions, Ineligibilities

1. The participant certifies that within the preceding three years from the date of this certification it, or any person acting as an owner or partner holding a controlling interest, director, or office of the participant; as a principal investigator, project director, or other position involved in management of the proposal; as a provider of federally-required audit services; in any other position to the extent that the incumbent is responsible for the administration of federal funds; or in any other position charged as a direct cost under this proposal within the preceding three years from the date of this certification:

(a) Has ( ) has not ( ) been debarred, suspended, or declared ineligible from the award of a public contract pursuant to Subpart 9.4 of the Federal Acquisition Regulation (48 CFR Subpart 9.4);

(b) Has ( ) has not ( ) been debarred, suspended, or voluntarily excluded from participation pursuant to Executive Order 12549;

(c) Has ( ) has not ( ) been formally proposed for debarment under (a) or (b) above with a final determination still pending; or

(d) Has ( ) has not ( ) been indicted, convicted, or had a civil judgment rendered against it for any of the following offenses:

(i) Fraud or a criminal offense in connection with obtaining or attempting to obtain or performing a public or private agreement.

(ii) Bribery, embezzlement, false claims, false statements, falsification or destruction of records, forgery, obstruction of justice, receiving stolen property, or theft; or

(iii) Unlawful price fixing between competitors, allocation of customers between competitors, bid rigging, or any other violation of Federal or State antitrust laws that relates to the submission of bids or proposals.

(2) The participant certifies that it will not knowingly enter into any subcontracts or subawards under this transaction with any party who, at the time of award, is debarred, suspended, or voluntarily excluded from award of public domestic assistance pursuant to Executive Order 12549.

(3) The participant may rely upon the certification of a prospective subcontractor or subawardee, that it is not debarred, suspended, or voluntarily excluded from award of public domestic assistance pursuant to Executive Order 12549, unless it has knowledge that the certification is erroneous.

(4) By submitting this certification the participant agrees to make immediate notification, in writing, of any revision of the above certification to the party to whom the certification is submitted based on changed circumstances from the date of submission.

(5) A certification that any of the items in 1 above exist will not necessarily result in a denial of participation but will be considered in determining the participant's responsibility.

(6) Any intentionally false statement in this certification is a violation of law punishable under 18 U.S.C. 1001.

Name of participant

Signature of participant

Date

[FR Doc. 87-24068 Filed 10-19-87; 8:45 am]
BILLING CODE 4310-RF-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 76

Government-wide Debarment and Suspension (Nonprocurement)

AGENCY: Office of the Secretary, HHS.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This NPRM proposes the HHS implementation of government-wide debarment and suspension system for assistance program.

ADDRESS: Written comments should be sent to Barbara S. Wamsley, Director, Office of Assistance Policy and Systems Review, Department of Health and Human Services, Room 513-D, 200 Independence Ave. SW., Washington, DC 20201.

DATES: Comments must be received on or before December 21, 1987.

FOR FURTHER INFORMATION CONTACT: Neil Steyskal, Division of Assistance and Cost Policy, Department of Health and Human Services, Room 513-D, 200 Independence Ave. SW., Washington, DC 20201. Telephone (202) 245-0729.

SUPPLEMENTARY INFORMATION: On May 29, 1987, OMB published Guidelines for Nonprocurement Debarment and Suspension, 52 FR 20360, under Executive Order 12549. The Guidelines prescribe the coverage of the required government-wide system and minimum due process procedures. Executive Order 12549 requires Federal agencies to issue implementing regulations consistent with the OMB Guidelines.

The coverage of the system includes all types of financial assistance (grants, cooperative agreements, loans, etc.) and extends to employment and subawards under that assistance (§ 76.110). The due process procedures parallel those of the Federal Acquisition Regulation (48 CFR Chapter 1) (§§ 76.310 and 76.410).

Major Choices

1. Coverage of indirect cost transactions: § ____.110(a)(1) of OMB Guidelines gives Federal agencies the choice of whether to include indirect cost transactions for purposes of enforcement actions. Adoption of this course would require participants (grantees, subgrantees, contractors of grantees, etc.) to take action to exclude debarred and suspended persons when the costs of their participation would be allocated, through indirect cost or cost allocation procedures, to a Federal award.

We propose to include indirect cost transactions in the coverage of the HHS rules because grantees vary widely in their indirect cost practices. Under some not uncommon organizational arrangements, well over a simple majority of the grantee's contracts (but not subgrants) may be charged indirectly to Federal awards. We believe it is inappropriate to pay Federal funds, either directly or indirectly, to debarred persons.

2. Use of certifications: § ____.505(e) of the OMB Guidelines requires that Federal agencies establish certification requirements in their regulations. We propose to require submission of certifications by participants at any tier (grantee or below) which are not State or local govenrments (exclusive of their hospitals or institutions of higher education). This is because we believe that debarment of a State or local government agency will be extremely rare.

3. Procedures: For both debarment (§ 76.310(b)(4)(i)) and suspension (§ 76.410(b)(4)(i)(A)) the debarring or suspending official, under certain circumstances, bases a final decision on the administrative record, without the need for a fact finding process, e.g., a conviction or civil judgment for a debarrable offense. We propose to add debarment by any public agency as an additional circumstances, because we believe it to be substantially equivalent.

Executive Order 12291

The Department has determined that this rule is not a "major rule" under Executive Order 12291. Although the regulations will prohibit debarred and suspended entities from participation in Federal awards, this will have no effect on the total amounts of Federal dollars

awarded to the class of responsible, eligible entities, and the number of excluded entities will be insubstantial. Therefore the regulation will not affect a substantial number of small entities, and a regulatory impact analysis is not required.

Paperwork Reduction Act

This rule imposes no additional reporting/recordkeeping requirements requiring clearance by OMB.

Regulatory Flexibility Act

Pursuant to the provisions of 5 U.S.C. 605(b), for the reasons set forth above, I hereby certify that this rule will not have a significant impact on a substantial number of small entities. Therefore a regulatory flexibility analysis is not required by 5 U.S.C. 603.

Catalog of Federal Domestic Assistance (CFDA)

Although debarment and suspension will affect general eligibility under all covered assistance programs (during the period of debarment or suspension), it is not practicable to list all affected programs because of the great number covered.

List of Subjects in 45 CFR Part 76

Debarment and suspension, Grant programs—health, Grant programs—social programs.

Dated: September 22, 1987.

Otis R. Bowen,

Secretary of Health and Human Services.

For the reasons set forth in the preamble, 45 CFR Part 76 is revised to read as follows:

PART 76—GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)

Subpart A—General

Sec.
76.100 Purpose.
76.110 Coverage.
76.115 Policy.
76.120 Definitions.

Subpart B—Effect of Action

76.200 Debarment or Suspension.
76.205 Voluntary Exclusion.
76.210 Ineligible persons.
76.215 Exception provision.
76.220 Continuation of current awards.
76.225 Failure to adhere to restrictions.

Subpart C—Debarment

76.300 General.
76.305 Causes for debarment.
76.310 Procedures.
76.315 Effect of proposed debarment.
76.320 Voluntary exclusion.
76.325 Period of debarment.
76.330 Scope of debarment.

Subpart D—Suspension

76.400 General.
76.405 Causes for suspension.
76.410 Procedures.
76.415 Period of suspension.
76.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

76.500 GSA responsibility.
76.505 Responsibilities of Federal agencies.

Authority: 5 U.S.C. 301.

Subpart A—General

§ 76.100 Purpose.

(a) Executive Order 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a system for debarment and suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits. Debarment or suspension of a participant in a program by one agency shall have government-wide effect.

(b) This part implements Executive Order 12549 by:

(1) Prescribing the programs and activities that are covered;

(2) Prescribing the criteria and due process procedures that HHS will use in implementing the Order;

(3) Providing for the listing of debarred and suspended participants, participants who voluntarily exclude themselves from participation in covered transactions, and participants declared ineligible (see the definition of "ineligible" in § 76.120);

(4) Setting forth the consequences of the actions taken under the government-wide system.

(c) Although this part covers the listing of ineligible participants and the effect of that listing, it does not prescribe policies and procedures governing declarations of ineligibility.

§ 76.110 Coverage.

(a) *Covered transactions.* This part applies to executive branch domestic assistance transactions described below:

(1) *General.* Covered transactions (whether by a Federal agency, recipient, subrecipient, or intermediary) include, except as noted in paragraph (a)(3) of this section: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements; subawards and transactions at any tier that are charged as direct or indirect costs, regardless of type (including subtier awards under awards which are statutory entitlement or mandatory awards); and specially covered activities identified in paragraph (a)(2) of this section.

(2) *Specially covered activities.* In addition to those transactions identified in paragraph (a)(1) of this section, certain programs of the Departments of Agriculture and Housing and Urban Development and of the Veterans Administration are covered in those agencies' regulations.

(3) *Exceptions.* Statutory entitlement or mandatory awards (but not discretionary subawards under these programs), benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted), incidental benefits derived from ordinary governmental operations, and other transactions where the application of Executive Order 12549 and these rules would be prohibited by law are not covered.

(b) *Relationship to other sections.* Section 76.110 describes the types of activities and transactions to which a debarment or suspension will apply. Subpart B, Effect of action, § 76.200 sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants in the transactions and activities described in § 76.110. Sections 76.330, Scope of debarment and 76.420, Scope of suspension, govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which additional affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal acquisition activities.* Executive Order 12549 and the regulations of this part do not apply to direct Federal acquisition activities. Debarment and suspension of Federal contractors and subcontractors are covered by the Federal Acquisition Regulation (FAR), 48 CFR Subpart 9.4. However, as far as possible HHS will integrate the administration of these complementary debarment and suspension programs.

§ 76.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to effectuate this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. HHS and other Federal agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in this part.

§ 76.120 Definitions.

Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliate. Persons are affiliates of one another if, directly or indirectly, one owns, controls, or has the power to control the other, or a third person(s) owns, controls, or has the power to control both.

Agency. Any executive department, military department or defense agency, or other agency of the executive branch (including agencies of HHS), excluding the independent regulatory agencies.

Consolidated List. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about participants who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations and those who have been determined to be ineligible.

Control. The power to exercise, directly or indirectly, a controlling influence over the management, policies, or activities of a person, whether through the ownership of voting securities, through one or more intermediary persons, or otherwise. For purposes of actions under these regulations, a person who owns or has the power to vote more than 25 percent of the outstanding voting securities of another person, or more than 25 percent of total equity if the other person has no voting securities, is presumed to control. This presumption may be rebutted by evidence. Other indicia of control include, but are not limited to: interlocking management or ownership; identity of interests among family members; shared facilities and equipment; common use of employees; and, establishment, following the debarment, suspension, or other exclusion of a participant, of an organization or entity which is to operate in the same business or activity and to have substantially the same management, ownership, or principal employees as the debarred, suspended or excluded participant.

Conviction. A judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of *nolo contendere.*

Debarment. An action taken by a debarring official to exclude a person from participating in assistance transactions. A person so excluded is "debarred."

Debarring official. In HHS the Deputy Assistant Secretary for Procurement, Assistance and Logistics.

HHS. The Department of Health and Human Services.

Indictment. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible. Excluded from participation in covered transactions, programs or agreements pursuant to statutory, Executive order, or regulatory authority other than Executive Order 12549 and its agency implementing and supplementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the equal employment opportunity acts and Executive orders, or the environmental protection acts and Executive orders.

Legal proceedings. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from these proceedings.

Local government. A county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of government (whether or not incorporated as a nonprofit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Notice. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

Participant. Any person who submits proposals for, receives an award or subaward or performs services in connection with, or reasonably may be expected to be awarded or to perform services in connection with, a covered transaction. This term also includes any person who conducts business with a Federal agency as an agent or representative of another participant.

Person. Any individual, corporation, partnership, association, unit of government or legal entity however organized, including any subsidiary of any of the foregoing.

Preponderance of the evidence. Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Proposal. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking a benefit under a covered transaction, whether directly or indirectly.

Respondent. A person against whom a debarment or suspension action has been initiated.

State. Any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments.

Subaward. An award, at any tier, of a contract, grant or other agreement made by a participant. A person that receives a subaward is a "subawardee."

Subsidiary. Any corporation, partnership, association or legal entity however organized, owned or controlled by another person.

Suspending official. In HHS the Deputy Assistant Secretary for Procurement, Assistance and Logistics.

Suspension. An action taken by a suspending official to immediately exclude a person from participating in covered transactions for a termporary period, pending completion of an investigation and such legal or debarment proceedings as may ensue. A person so excluded is "suspended."

Voluntary exclusion. A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

Subpart B—Effect of Action

§ 76.200 Debarment or suspension.

(a) Except to the extent prohibited by law, a person's debarment shall be effective throughout the Executive branch of the Federal Government. Except as provided in § 76.215, persons who are debarred or suspended under this part are excluded from participation in all covered transactions of all agencies for the period of their debarment or suspension. Accordingly, agencies and participants shall not make awards or subawards to or agree to participation by the debarred or

suspended persons during the debarment or suspension period.

(b) In addition, persons who are debarred or suspended are excluded from participation in or under any covered transaction in any of the following capacities: as an owner or partner holding a controlling interest, director, or officer of the participating person; as a principal investigator, project director, or other position involved in management of the covered transaction; as a provider of Federally-required audit services; in any other position to the extent that the incumbent is responsible for the administration of Federal funds; or in any other position charged as a direct cost at any tier under the covered transaction.

§ 76.205 Voluntary exclusion.

Participants who accept voluntary exclusions under § 76.320 are excluded in accordance with the terms of their settlements; their listing, pursuant to Subpart E, is for informational purposes. Awarding agencies and participants must contact the original action agency to ascertain the extent of the exclusion.

§ 76.210 Ineligible persons.

Persons who are ineligible are excluded in accordance with the applicable statutory, Executive order, or regulatory authority.

§ 76.215 Exception provision.

HHS may grant an exception permitting a debarred, suspended, or excluded person to participate in a particular covered transaction upon a written determination by the debarring official stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549. However, the Order states that it is the President's intention that exceptions to this policy should be granted only infrequently. Exceptions will be reported in accordance with § 76.505.

§ 76.220 Continuation of current awards.

(a) Notwithstanding the debarment, suspension, voluntary exclusion or ineligible status of any person, HHS and participants may continue covered transactions in existence at the time the person was debarred, suspended, declared ineligible or voluntarily excluded. A decision by HHS as to the type of termination action, if any, to be taken will be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend the duration of current covered transactions with any person who is debarred, suspended, declared ineligible or under a voluntary exclusion, except as provided in § 76.215.

§ 76.225 Failure to adhere to restrictions.

Doing business with a debarred, suspended or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended or otherwise excluded from participation in the transaction, except as permitted under these regulations, may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

Subpart C—Debarment

§ 76.300 General.

The debarring official may debar a participant for any of the causes in § 76.305, using procedures established in accordance with § 76.310. The existence of a cause for debarment, however, does not necessarily require that the participant be debarred; the seriousness of the participant's acts or omissions and any mitigating factors should be considered in making any debarment decision.

§ 76.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 76.300 and 76.310 for:

(a) Conviction of or civil judgment, whether judicial or administrative, for any offense indicating a lack of business integrity or honesty which affects the present responsibility of a participant, including but not limited to:

(1) Fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement;

(2) Bribery, embezzlement, false claims, false statements, falsification or destruction of records, forgery, obstruction of justice, receiving stolen property, or theft; or

(3) Unlawful price fixing between competitors, allocation of customers between competitors, bid rigging, or any other violation of Federal or State antitrust laws that relates to the submission of bids or proposals.

(b) Violation of the terms of a public agreement so serious as to affect the present responsibility of a participant, including but not limited to:

(1) A willful or material failure to perform under one or more public agreements;

(2) A history of substantial noncompliance with the terms of one or more public agreements; or

(3) A willful or material violation of a statutory or regulatory provision or requirement applicable to a public agreement.

(c) Any of the following causes:

(1) Debarment or equivalent exclusionary action by any public agency or instrumentality for causes substantially the same as provided for by § 76.305;

(2) Doing business with a debarred, suspended or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended or otherwise excluded from participation in the transaction;

(3) Conduct indicating a lack of business integrity or honesty which affects the present responsibility of a participant;

(4) Loss or denial of the right to do business or practice a profession under circumstances indicating a lack of business integrity or honesty or otherwise affecting the present responsibility of a participant;

(5) Failure to pay an uncontested debt (including disallowed costs and overpayments) owed to any Federal agency or instrumentality or, if contested, provided that the debtor's legal and administrative remedies have been exhausted; or

(6) Violation of a material provision of a voluntary exclusion or of any settlement of a debarment or suspension action.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a participant.

§ 76.310 Procedures.

(a) *Investigation and referral.* Whenever an apparent cause for debarment becomes known, the appropriate HHS agency shall prepare a report summarizing the circumstances and forward it through appropriate channels, with a written recommendation, to the debarring official. The debarring official shall initiate an investigation as appropriate.

(b) *Decisionmaking process.* Decisionmaking procedures shall be as informal as practicable, consistent with principles of fundamental fairness.

(1) *Notice of proposed debarment.* A debarment proceeding shall be initiated by notice to the respondent advising:

(i) That debarment is being considered;

(ii) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(iii) Of the cause(s) relied upon under § 76.305 for proposing debarment;

(iv) Of the HHS procedures governing debarment decisionmaking by providing a copy of this Part 76;

(v) Of the effect of the proposed debarment pending a final debarment decision; and

(vi) Of the potential effect of a debarment.

(2) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(3) *Additional proceedings as to disputed material facts.*

(i) In actions not based upon a conviction, civil judgment or debarment by a public agency, if it is found by the debarring official that there exists a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person HHS presents.

(ii) A transcribed record of any additional proceedings shall be made available at cost to the respondent, unless the respondent and HHS, by mutual agreement, waive the requirement for a transcript.

(4) *Debarring official's decision.*—(i) *No additional proceedings necessary.* In actions based upon a conviction, civil judgment or debarment by a public agency, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(ii) *Additional proceedings necessary.* (A) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(B) The debarring official may refer matters involving disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(C) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(5) *Standard of evidence.* In any contested action, the cause for debarment must be established by a preponderance of the evidence. In any contested action in which the proposed debarment is based upon a conviction, civil judgment, or debarment by a public agency, the standard shall be deemed to have been met.

(6) *Notice of debarring official's decision.*—(i) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(A) Referring to the notice of proposed debarment;

(B) Specifying the reasons for debarment;

(C) Stating the period of debarment, including effective dates; and

(D) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or a designee authorized by an agency head makes the determination referred to in § 76.215.

(ii) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

§ 76.315 Effect of proposed debarment.

Upon issuance of a notice of proposed debarment and until the final debarment decision is rendered, HHS shall not make any new awards to the respondent. HHS may waive this Department-wide exclusion pending a debarment decision upon a written determination by the debarring official identifying the reasons for doing so. In the absence of a waiver, the provisions of § 76.215 allowing exceptions for particular covered transactions may be applied.

§ 76.320 Voluntary exclusion.

A participant and HHS may enter into a settlement providing for the exclusion of the participant. Such exclusion shall be entered on the Consolidated List (see Subpart E).

§ 76.325 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, a debarment should not exceed three years. Where circumstances warrant, a longer term of debarment may be imposed, up to an indefinite period. If a suspension precedes a debarment, the suspension period may be considered in determining the debarment period.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of § 76.310 shall be followed to extend the debarment.

(c) The debarring official may reduce the period or scope of debarment, upon the respondent's request, supported by documentation, for reasons such as:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

§ 76.330 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person under Executive Order 12549 constitutes debarment of all its subsidiaries, divisions, and other organizational elements unless the debarment decision is limited by its terms to one or more specifically identified individuals or organizational elements or to specific types of covered transactions.

(2) The debarment action may include any affiliate of the respondent that is specifically named and given notice of the proposed debarment and an opportunity to respond (see § 76.310).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be presumptive evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may

be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be presumptive evidence of such knowledge, approval or acquiescence.

Subpart D—Suspension

§ 76.400 General.

(a) The suspending official may suspend a participant for any of the causes in § 76.405 using procedures established in § 76.410.

(b) Suspension is a serious action to be imposed on the basis of adequate evidence of one or more of the causes set out in § 76.405 when it has been determined that immediate action is necessary to protect the public interest.

§ 76.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 76.400 and 76.410 upon adequate evidence:

(1) To suspect the commission of an offense listed in § 76.305(a); or

(2) That a cause for debarment under § 76.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 76.410 Procedures.

(a) *Investigation and referral.* Whenever an apparent cause for suspension becomes known, the appropriate HHS agency shall prepare a report summarizing the circumstances and forward it through appropriate channels, with a written recommendation, to the suspending official. The suspending official shall initiate an investigation as appropriate.

(b)(1) *Decisionmaking process.* Decisionmaking procedures shall be as informal as practicable, consistent with principles of fundamental fairness. When a respondent is suspended, notice shall immediately be given:

(i) That suspension has been imposed;

(ii) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(iii) Describing any irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(iv) Of the cause(s) relied upon under § 76.405 for imposing suspension;

(v) That the suspension is for a temporary period pending the completion of an investigation and any legal or debarment proceedings as may ensue;

(vi) Of the HHS procedures governing suspension decisionmaking by providing a copy of this Part 76; and

(vii) Of the effect of the suspension.

(2) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(3) *Additional proceedings as to disputed material facts.*

(i) If it is found by the suspending official that there exists a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents, unless—

(A) The action is based on an indictment, conviction, civil judgment, or debarment by a public agency; or

(B) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(ii) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, unless the respondent and HHS, by mutual agreement, waive the requirement for a transcript.

(4) *Suspending official's decision.* The suspending official may modify or terminate the suspension (for example, see § 76.325(c) for the reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(i) *No additional proceedings necessary.* In actions—

(A) Based on an indictment, conviction, civil judgment, or debarment by a public agency;

(B) In which there is no genuine dispute over material facts, or

(C) In which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice,

the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(ii) *Additional proceedings necessary.* (A) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(B) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(C) The suspending official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(5) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent and any affiliates involved.

§ 76.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of investigation and any ensuing legal or debarment proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or debarment proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§ 76.420 Scope of suspension.

The scope of a suspension shall be the same as the scope of a debarment (see § 76.330).

Subpart E—Agency Responsibilities; Consolidated List

§ 76.500 GSA responsibility.

(a) Under the government-wide implementation of Executive Order 12549, GSA will compile, maintain, and distribute a list of all participants who have been debarred, suspended, or voluntarily excluded under Executive Order 12549, and those who have been determined to be ineligible.

(b) At a minimum, this list will indicate:

(1) The names and addresses of all debarred, suspended, voluntarily excluded, and ineligible participants in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§ 76.505 Responsibilities of Federal agencies.

(a) Under the government-wide implementation of Executive Order 12549, each agency will designate a liaison who shall be responsible for providing GSA with current information concerning debarments, suspensions, voluntary exclusions and ineligibilities taken by that agency. Until February 18, 1989, the liaison will also provide GSA and OMB with information concerning all transactions in which the agency has granted exceptions under § 76.215 permitting participation by debarred, suspended, or excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, each agency will advise GSA of the information set forth in § 76.500(b) and of the exceptions granted under § 76.215 within five working days after taking such actions.

(c) HHS participants may obtain the list from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(d) Inquiries concerning listed persons shall be directed to the agency that took the action.

(e)(1) Under HHS covered transactions, all participants at any tier except State and local governments (exclusive of their hospitals and institutions of higher education) shall submit, to the party from whom they have received or will receive an award or subaward (or to their employer, as appropriate) a certification substantially equivalent to the one below. Certifications shall be submitted before award or employment if possible.

I certify that_____
(name of participant)
and, to the best of my knowledge, information and belief, all persons acting in a capacity listed in 45 CFR 76.200(b) (Attached) with respect to the participant or the particular covered transaction are not currently, nor within the preceding three years have been:

(i) Debarred, suspended or declared ineligible;

(ii) Formally proposed for debarment, with a final determination still pending;

(iii) Voluntarily excluded from participation; or

(iv) Indicted, convicted, or had a civil judgment rendered against them for any of the offenses listed in 45 CFR 76.305(a) (Attached).

I understand that knowingly and willfully submitting a false or misleading certification shall constitute grounds for, and may lead to, termination of participation and/or legal actions as appropriate.

_____

Unqualified certification.

_____

Qaulified certification. (Attach explanation.)

_____

Signature, Name and Title.

_____

Date.

(2) In those instances where a certification shows that a participant is currently debarred or suspended, they are ineligible to participate. Participants receiving other adverse information shall treat it in the same manner as other employment and contract records in accordance with applicable law.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 29

[OST Docket No. 45208]

Nonprocurement Debarment and Suspension

AGENCY: Office of the Secretary, DOT.

ACTION: Interim Final Rule.

SUMMARY: This interim final rule adopts rules concerning nonprocurement debarment and suspension in accordance with OMB Guidelines.

DATES: Effective November 19, 1987. To be assured of consideration, comments on the rule must be received on or before December 21, 1987. Comments should refer to specific sections in the regulations.

ADDRESS: Send comments on the rule to Documentary Services Division, C-55, Attention Docket No. 45208, Room 4107, Department of Transportation, 400 Seventh Street SW., Washington DC 20590. Comments are available for public examination at that address Monday through Friday, except Federal holidays, from 9:00 to 5:00 p.m. e.s.t.

FOR FURTHER INFORMATION CONTACT: Paul B. Larsen, Office of the General Counsel (C-10), U.S. Department of Transportation, Washington, DC 20590; (202) 366-9167.

SUPPLEMENTARY INFORMATION: As part of the Admininstration's initiatives to curb fraud, waste, and abuse, the President's Council on Integrity and Efficiency created an interagency task force to study the feasibility and desirability of a comprehensive debarment and suspension system encompassing the full range of Federal activities. The task force concluded, in its November 1982 report, that such a system was desirable and feasible.

As a result, the Office of Management and Budget (OMB) established an interagency Task Force on Nonprocurement Suspension and Debarment. This task force recommended in its November 1984 report that a governmentwide nonprocurement debarment and suspension system, similar to that currently in effect for procurement, be established. The Task Force concluded that the system should be as compatible as possible with the procurement debarment and suspension system included in the Federal Acquisition Regulation (FAR), while fully addressing the needs and concerns of nonprocurement programs. Following further efforts of the Task Force to shape a proposed system for use by all Executive agencies, the President issued on February 18, 1986, Executive Order 12549, "Debarment and Suspension." Simultaneously with the publication of the Executive Order on February 21, 1986, OMB published proposed guidelines for use by the Executive agencies (51 FR 6372-79). The guidelines were prepared in regulation format as a minimum model rule to facilitate the preparation of the agency regulations. The guidelines generally used the due process procedural structure of the FAR. Also, the proposed grounds for debarment and suspension were substantially similar to those in the FAR.

OMB received sixty comments on the proposed guidelines. All comments were provided to the Task Force on Nonprocurement Suspension and Debarment for consideration in preparing the final guidelines that were issued on May 26, 1987 and published May 29, 1987 (52 FR 20360-69).

Section 3 of E.O. 12549 directs Federal agencies to issue regulations governing implementation of the Order; the regulations must be consistent with the OMB guidelines. In order to comply with these instructions, the Department of Transportation has generally adopted the OMB guidelines verbatim. Most of the changes are the result of the need to adapt the guidelines to the Department's organization.

At the present time, the Office of the Secretary and the operating administrations within the Department of Transportation have procedures for suspending and debarring individuals or companies doing business with recipients of DOT financial assistance when those individuals or companies have been involved in fraud or other improper practices affecting their present responsibility. 49 CFR Part 29. Suspensions or debarments of participants initiated before the effective date of the rule adopted herein shall be governed by those current regulations. The rule adopted herein will apply to suspensions and debarments of individuals and companies initiated after the effective date of this rule regardless of the date of the cause giving rise to initiation of the action.

This rule contains no provisions applicable to debarment and suspension in direct government contracting. It adopts a flexible procedure that will assure a party of fair opportunity to challenge a suspension or debarment. At the same time the parties to a proceeding under the rule will not be bound by formal rules of evidence or procedure. The rule generally covers DOT financial assistance. Suspensions and debarments will be effective throughout DOT and the executive branch of the Federal Government. Furthermore, persons excluded by other agencies will also be excluded from participation in DOT non-procurement programs.

A suspension or debarment will be initiated by notice to the persons affected. New awards may not be made to respondents. The suspension or debarment includes persons, their affiliates, subsidiaries, and other organizational elements.

The DOT Assistant Secretary for Administration will collect and provide the General Services Administration (GSA) with information concerning DOT suspensions, debarments, voluntary exclusions and ineligibilities. All participants in covered transactions will be required to certify whether persons have been suspended, declared ineligible, proposed for debarment, voluntarily excluded, indicted, covicted or had civil judgment rendered against them.

The Department will not extend reciprocity to suspensions and debarments of other agencies until this interim rule is replaced by a final rule. The purpose is to achieve government-wide effect at approximately the same time as other agencies implement their final rules.

The final OMB guidelines left to agency discretion whether to limit the coverage of agency rules to items charged as direct costs or to cover indirect costs as well. The Department has opted for the coverage of both direct and indirect costs because of its favorable experience with the broader coverage under its current regulations. The Department does not want its funds to benefit delinquent indirect contractors and does not want to assume the administrative burden of distinguishing between direct and indirect cost. It does not require that action be brought where only indirect costs are at issue, but it permits actions to be brought in especially aggravated circumstances.

The OMB guidelines authorized debarment on the basis of a conviction of, or a civil judgment for, offenses indicating a lack of business integrity or honesty affecting the present responsibility of a participant. The Department has decided, in addition, to specify that debarment is appropriate on the basis of a determination of liability pursuant to agency procedures under the Program Fraud Civil Remedies Act of 1986 (Pub. L. 99-509, 31 U.S.C. 3801-3812). That Act makes administrative remedies available to Federal agencies

in cases involving false claims or false statements. Defendants in such actions are afforded the opportunity for a full adversarial hearing before an Administrative Law Judge.

Reason for Adoption of an Interim Final Rule

This rule is exempt from the notice and comment provisions of the Administrative Procedure Act. In any event, we have decided not to issue this document as a notice of proposed rulemaking because we believe that it would be contrary to the public interest to delay the effectiveness of this rule. Our rule mirrors OMB's final guidelines. The Department believes that the public has had a fair opportunity to comment on the substance of this rule through OMB's publication of proposed guidelines in February 1986 (51 FR 6372). Second, the Department has an urgent need to clarify the current DOT suspension and debarment rule so that fraudlent actions can be stopped. This interim final rule clarifies that bids shall not be solicited from persons affected by the rule and that the rule applies to insurance companies. Furthermore, the Department needs to include final determinations under the Program Fraud Civil Penalties Act (31 U.S.C. 3801 et seq.) within the definition of civil judgment under the rule. The Department is asking for public comments and those comments will be considered before a final rule is adopted.

Regulatory Evaluation

This regulation is classified as a "non-major" regulation under Executive Order 12291. This regulation also has been evaluated under the Department of Transportation's Regulatory Policies and Procedures. The regulation is not significant under those procedures, and its economic impact is expected to be so minimal that a further economic evaluation is not warranted.

Regulatory Flexibility Act Determination

I certify that this regulation would not have a significant economic impact on a substantial number of small entities. As stated above, the economic impact of the rule is expected to be minimal. In this connection, debarment and suspension measures are triggered only by serious misconduct and, therefore, are avoidable. The Department has no reason to believe that small entities, in particular, would be seriously affected by this rule.

Environmental Impact

This regulation does not require an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321, et seq.)

List of Subjects in 49 CFR Part 29

Administrative practice and procedure, Government contracts, Loan programs—transportation, Grant programs—transportation, Fraud.

Accordingly, the Department of Transportation hereby adopts a revised Part 29 of the Regulations of the Office of the Secretary (49 CFR Part 29) to read as set forth below:

PART 29—DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

Subpart A—General

Sec.
29.100 Purpose.
29.105 Authority.
29.110 Coverage.
29.115 Policy.
29.120 Definitions.
29.125 Savings clause.

Subpart B—Effect of Action

29.200 Debarment or suspension.
29.205 Voluntary exclusion.
29.210 Ineligible persons.
29.215 Exemption provision.
29.220 Continuation of current awards.
29.225 Failure to adhere to restrictions.

Subpart C—Debarment

29.300 General.
29.305 Causes for debarment.
29.310 Procedures.
29.315 Effect of proposed debarment.
29.320 Voluntary exclusion.
29.325 Period of debarment.
29.330 Scope of debarment.

Subpart D—Suspension

29.400 General.
29.405 Causes for suspension.
29.410 Procedures.
29.415 Period of suspension.
29.420 Scope of suspension.

Subpart E—General

29.500 Information collection and dissemination.
29.505 Participant certification requirements.

Authority: E.O. 12549; OMB Guidelines for Nonprocurement Debarment and Suspension, 52 FR 20360, May 29, 1987; and section 322 of title 49, United States Code.

Subpart A—General

§ 29.100 Purpose.

(a) Executive Order 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a system for debarment and suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits. Section 1(a) of the Order provides that debarment or suspension of a participant in a program by one agency shall have government-wide effect. Section 6 of the Order authorizes the Office of Management and Budget (OMB) to issue guidelines concerning the Order. Those Guidelines (entitled "Guidelines for Government-wide Debarment and Suspension (Non-Procurement)") (OMB Guidelines) were published at 52 FR 20360 May 29, 1987.

(b) This part implements section 3 of Executive Order 12549 and the OMB Guidelines by:

(1) Prescribing the programs and activities that are covered by the Order;

(2) Prescribing the criteria and minimum due process procedures that the Department will use in implementing the Order;

(3) Providing for the compilation and dissemination of pertinent information concerning debarred and suspended participants, participants who voluntarily exclude themselves from participation in covered transactions, and participants declared ineligible (see the definition of "ineligible in § 29.120); and

(4) Setting forth the consequences of the actions under paragraph (b)(3) of this section.

§ 29.105 Authority.

This part is issued pursuant to Executive Order 12549 of February 18, 1986, the OMB Guidelines, and section 322 of title 49, United States Code.

§ 29.110 Coverage.

(a) *Covered transactions.* (1) *General.* Covered transactions (whether by a Federal agency, recipient, subrecipient, or intermediary) include, except as noted in paragraph (a)(2) of this section: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements, including subawards, subcontracts and transactions at any tier that are charged as direct or indirect costs, regardless of type (including subtier awards under awards which are statutory entitlement or mandatory awards).

(2) *Exceptions.* The following transactions are not covered: statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory); benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted); incidental benefits derived from ordinary governmental operations; and other transactions where the application of Executive Order 12549, the OMB Guidelines, and this part would be prohibited by law.

(b) *Relationship to other sections.* This section, § 29.110, describes the

types of activities and transactions to which a debarment or suspension under this part will apply. Subpart B, Effect of Action, § 29.200, sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants in the covered transactions and activities described in § 29.110. Section 29.330, Scope of debarment, and § 29.420, Scope of suspension, govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which additional affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal acquisition activities.* Executive Order 12549, the OMB Guidelines, and this part do not apply to direct Federal acquisition activities. Debarment and suspension of Federal contractors and subcontractors are covered by the Federal Acquisition Regulation (FAR). 48 CFR Subpart 9.4.

§ 29.115 Policy.

(a) In order to protect the public interest, it is the policy of the Department to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and this part, are appropriate means to effectuate this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Debarment or suspension may be imposed for the causes and in accordance with the procedures set forth in this part.

§ 29.120 Definition.

Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliate. Persons are affiliates of one another if, directly or indirectly, one owns, controls, or has the power to control the other, or a third person owns, controls, or has the power to control both.

Agency. Any executive department, military department or defense agency, or other agency of the executive branch, excluding the independent regulatory agencies.

Civil judgment or judgment. The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, agreement, stipulation, or otherwise, creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

Consolidated List. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about participants who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and the OMB Guidelines, and those who have been determined to be ineligible.

Control. The power to exercise, directly or indirectly, a controlling influence over the management, policies, or activities of a person, whether through the ownership of voting securities, through one or more intermediary persons, or otherwise. For purposes of actions under this part, a person who owns or has the power to vote more than 25 percent of the outstanding voting securities of another person, or more than 25 percent of total equity if the other person has no voting securities, is presumed to control. Such presumption may be rebutted by evidence. Other indicia of control include, but are not limited to: interlocking management or ownership; identity of interests among family members; shared facilities and equipment; common use of employees; and establishment, following the debarment, suspension, or other exclusion of a participant, of an organization or entity which is to operate in the same business or activity and to have substantially the same management, ownership, or principal employees as the debarred, suspended or excluded participant.

Conviction. Conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

Debarment. An action taken by a debarring official in accordance with agency regulations implementing Executive Order 12549 (including his part) to exclude a person from participating in covered transactions. A person so excluded is "debarred."

Debarring official. The head of a Departmental operating administration or, with respect to programs administered by the Office of the Secretary, the Assistant Secretary for Administration, any of whom may delegate any of his or her functions under this part and authorize successive delegations.

Indictment. Indictment for a criminal offense. Any information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible. Excluded from participation in covered transactions, programs, or agreements pursuant to statutory, Executive order, or regulatory authority other than Executive Order 12549 and its agency implementing and supplementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the equal employment opportunity acts and Executive orders, or the environmental protection acts and Executive orders.

Legal proceedings. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

Notice. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service or process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the Department.

Participant. Any person who submits proposals for, receives an award or subaward or performs services in connection with, or reasonably may be expected to be awarded or to perform services in connection with, a covered transaction. This term also includes any person who conducts business with the Department as an agent or representative of another participant.

Person. Any individual, corporation, partnership, association, unit of government or legal entity however organized, including any subsidiary of any of the foregoing.

Preponderance of the evidence. Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Proposal. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking a benefit, directly or indirectly, under a covered transaction.

Respondent. A person against whom a debarment or suspension action has been initiated.

Subsidiary. Any corporation, partnership, association or legal entity however organized, owned or controlled by another person.

Suspending official. The head of a Departmental operating administration or, with respect to programs administered by the Office of the Secretary, the Assistant Secretary for Administration, any of whom may delegate any of his or her functions under this part and authorize successive delegations.

Suspension. An action taken by a suspending official in accordance with agency regulations implementing Executive Order 12549 (including this part) to immediately exclude a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal or debarment proceedings as may ensue. A person so excluded is "suspended."

Voluntary exclusion. A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

§ 29.125 Savings clause.

Any debarment or suspension initiated before the effective date of this part shall be governed by Part 29 of the Department's regulations as Part 29 existed immediately before the effective date of this part.

Subpart B—Effect of Action

§ 29.200 Debarment or suspension.

(a) Except to the extent prohibited by law, a person's debarment or suspension shall, under Executive Order 12549 and the OMB Guidelines, be effective throughout the executive branch of the Federal Government. Except as provided in § 29.215, persons who are debarred or suspended by any departmental debarring or suspending official or by any other agency are excluded for the period of their debarment or suspension from participation in all covered transactions of the Department and, under Executive Order 12549 and the OMB Guidelines, all covered transactions of all agencies. Provided that debarments and suspensions by agencies other than the Department of Transportation shall not be effective throughout this Department until such time when the interim rule is replaced by a final rule. At such time, Departmental employees and participants may not, in connection with any covered transaction of the Department, make awards or agree to participation by such debarred or suspended persons during such period.

(b) In addition, persons who are debarred or suspended by any Departmental debarring or suspending official or by any other agency are excluded from participation in any of the following capacities in or under any covered transaction of the Department and, under Executive Order 12549 and the OMB Guidelines, any covered transaction of all agencies: as an owner or partner holding a controlling interest, director, or officer of the participant; as a principal investigator, project director, or other position involved in management of the covered transaction; as a provider of federally required audit services; in any other position to the extent that the incumbent is responsible for the administration of Federal funds; or in any other position charged as a direct cost under the covered transaction.

§ 29.205 Voluntary exclusion.

Participants who accept voluntary exclusions under § 29.320 are excluded in accordance with the terms of their settlements; their listing, pursuant to Subpart E of this part and the OMB Guidelines, is for informational purposes. Awarding officers and participants must contact the original action agency to ascertain the extent of the exclusion.

§ 29.210 Ineligible persons.

Persons who are ineligible are excluded in accordance with the applicable statutory, Executive order, or regulatory authority.

§ 29.215 Exception provision.

A suspending or debarring official may grant an exception permitting a debarred, suspended, or excluded person to participate in a particular transaction upon a written determination by such official stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549. Exceptions to this policy should be granted only infrequently. Exceptions shall be reported in accordance with § 29.500.

§ 29.220 Continuation of current awards.

(a) Notwithstanding the debarment, suspension, voluntary exclusion or ineligible status of any person, agreements in existence at the time the person was debarred, suspended, declared ineligible or voluntarily excluded may continue in existence.

(b) Departmental employees and participants shall not renew or extend the duration of current agreements with any person who is debarred, suspended, declared ineligible or under a voluntary exclusion, except as provided in § 29.215.

§ 29.225 Failure to adhere to restrictions.

Doing business with a debarred, suspended or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended or otherwise excluded from participation in such transaction, except as permitted under this part, may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

Subpart C—Debarment

§ 29.300 General.

The debarring official may debar a participant for any of the causes in § 29.305, using procedures in § 29.310. The existence of a cause for debarment, however, does not necessarily require that the participant be debarred; the seriousness of the participant's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

§ 29.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 29.300 and 29.310 for:

(a) Conviction of or civil judgment for any offense indicating a lack of business integrity or honesty which affects the present responsibility of a participant, including but not limited to:

(1) Fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement;

(2) Bribery, embezzlement, false claims, false statements, falsification or destruction of records, forgery, obstruction of justice, receiving stolen property, or theft; or

(3) Unlawful price fixing between competitors, allocation of customers between competitors, bid rigging, or any other violation of Federal or State antitrust laws that relates to the submission of bids or proposals.

(b) Violation of the terms of a public agreement so serious as to affect the present responsibility of a participant, including but not limited to:

(1) A willful or material failure to perform under one or more public agreements;

(2) A history of substantial noncompliance with the terms of one or more public agreements; or

(3) A willful or material violation of a statutory or regulatory provision or requirement applicable to a public agreement.

(c) Any of the following causes:

(1) Debarment or equivalent exclusionary action by any public agency or instrumentality for causes

substantially the same as provided for by § 29.305;

(2) Doing business with a debarred, suspended or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended or otherwise excluded from participation in such transactions;

(3) Conduct indicating a lack of business integrity or honesty which affects the present responsibility of a participant;

(4) Loss of denial of the right to do business or practice a profession under circumstances indicating a lack of business integrity or honesty or otherwise affecting the present responsibility of a participant;

(5) Failure to pay a debt (including disallowed costs and overpayments) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted; or

(6) Violation of a material provision of a voluntary exclusion or of any settlement of a debarment or suspension action.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a participant.

§ 29.310 Procedures.

(a) *Investigation and referral.* Anyone may contact the appropriate Departmental debarring official concerning the existence of a cause under this subpart. The debarring official shall review the matter and may also refer the matter to the Office of Inspector General for investigation. However, circumstances that involve possible criminal or fraudulent activities shall first be reported to the Office of Inspector General.

(b) *Decisionmaking process.* The decisionmaking process shall be as informal as practicable, consistent with principles of fundamental fairness and shall, at a minimum, provide the following:

(1) *Notice of proposed debarment.* A debarment proceeding shall be initiated by notice to the respondent advising:

(i) That debarment is being considered;

(ii) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(iii) Of the cause(s) relied upon under § 29.305 for proposing debarment;

(iv) Of the provisions of § 29.310(b);

(v) Of the effect of the proposed debarment pending a final debarment decision; and

(vi) Of the potential effect of a debarment.

(2) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(3) *Additional proceedings as to disputed material facts.* (i) In actions not based upon a conviction or judgment, if it is found that there exists a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any witness the Department presents.

(ii) A transcribed record of any additional proceedings shall be made available at cost to the respondent, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

(4) *Debarring official's decision*—(i) *No additional proceedings necessary.* In actions based upon a conviction or judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(ii) *Additional proceedings necessary.* (A) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(B) The debarring official may refer matters involving disputed material facts to another official not under the supervision of the debarring official for findings of fact. Such official may be, but is not restricted to, a Contract Appeals Board judge or an administrative law judge. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(C) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(5) *Standard of evidence.* In any contested action, the cause for debarment must be established by a preponderance of the evidence. In any contested action in which the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(6) *Notice of debarring official's decision.* (i) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(A) Referring to the notice of proposed debarment;

(B) Specifying the reasons for debarment;

(C) Stating the period of debarment, including effective dates; and

(D) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless a Departmental debarring official makes a determination under § 29.215 or the head of another agency or his or her designee makes such a determination under a comparable regulation.

(ii) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment on the same grounds by any other agency.

§29.315 Effect of proposed debarment.

Upon issuance of a notice of proposed debarment by a Departmental debarring official and until the final debarment decision is rendered, new awards may not be made to the respondent. This exclusion may be waived pending a debarment decision upon a written determination by the debarring official identifying the reasons for doing so. In the absence of such a waiver, the provisions of § 29.215 allowing exceptions for particular transactions may be applied.

§ 29.320 Voluntary exclusion.

A participant and a debarring official may enter into a settlement providing for the exclusion of the participant. Information of such exclusion shall be transmitted to the General Services Administration (GSA) for entry on the Consolidated List (see Subpart E).

§ 29.325 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, a debarment should not exceed three years. Where circumstances warrant, a longer or indefinite period of debarment may be imposed. If a suspension precedes a

debarment, the suspension period may be considered in determining the debarment period.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of §29.310 shall be followed to extend the debarment.

(c) The debarring official may reduce the period or scope of debarment, upon the respondent's request, supported by documentation, for reasons such as:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

§ 29.330 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person or affiliate under Executive Order 12549 constitutes debarment of all its subsidiaries, divisions, and other organizational elements unless the debarment decision is limited by its terms to one or more specifically identified individuals or organizational elements or to specific types of transactions.

(2) The debarment action may include any other affiliate of the participant that is (i) specifically named and (ii) given notice of the proposed debarment and an opportunity to respond (see § 29.310).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be presumptive evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be presumptive evidence of such knowledge, approval or acquiescence.

Subpart D—Suspension

§ 29.400 General.

(a) The suspending official may suspend a participant for any of the causes in § 29.405 using procedures in § 29.410.

(b) Suspension is a serious action to be imposed on the basis of adequate evidence of one or more of the causes set out in § 29.405 when it has been determined that immediate action is necessary to protect the public interest.

§ 29.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 29.400 and 29.410 upon adequate evidence:

(1) To suspect the commission of an offense listed in § 29.305(a); or

(2) That a cause for debarment under § 29.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 29.410 Procedures.

(a) *Investigation and referral.* Anyone may contact the appropriate Departmental suspending official concerning the existence of a cause under this subpart. The suspending official shall review the matter and may also refer the matter to the Office of Inspector General for investigation. However, circumstances that involve possible criminal or fraudulent activities shall first be reported to the Office of Inspector General.

(b) *Decisionmaking process.* The decisionmaking process shall be as informal as practicable, consistent with principles of fundamental fairness and shall, at a minimum, provide the following:

(1) *Notice of suspension.* When a respondent is suspended, notice shall immediately be given:

(i) That suspension has been imposed;

(ii) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(iii) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the evidence of the Federal or any other level of government;

(iv) Of the cause(s) relied upon under § 29.405 for imposing suspension;

(v) That the suspension is for a temporary period pending the completion of an investigation and such legal or debarment proceedings as may ensue;

(vi) Of the provisions of § 29.410(b); and

(vii) Of the effect of the suspension.

(2) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(3) *Additional proceedings as to disputed material facts.* (i) If it is found that there exists a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any witness the Department presents, unless—

(A) The action is based on an indictment, conviction or judgment, or

(B) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Govenment in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(ii) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

(4) *Suspending official's decision.* The suspending official may modify or terminate the suspension (for example, see § 29.325(c) for the reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition, on the same grounds, or suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(i) *No additional proceedings necessary.* In actions (A) based on an indictment, conviction, or judgment, (B) in which there is no genuine dispute over material facts, or (C) in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(ii) *Additional proceedings necessary.* (A) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(B) The suspending official may refer matters involving disputed material facts to another official not under the supervision of the suspending official for findings of fact. Such an official may be, but is not restricted to, a Contract Appeals Board judge or an administrative law judge. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(C) The suspending official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(5) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent and any affiliates involved.

§ 29.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of investigation and any ensuing legal or debarment proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or debarment proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§ 29.420 Scope of suspension.

The scope of a suspension shall be the same as the scope of debarment (see § 29.330), except that the procedures of § 29.410 shall be used in imposing a suspension.

Subpart E—General

§ 29.500 Information collection and dissemination.

(a) The Assistant Secretary for Administration shall act as liaison with GSA respecting GSA's responsibilities under subpart E of the OMB Guidelines (maintenance of Consolidated List). The Assistant Secretary shall maintain and provide GSA with current information concerning debarments, suspensions, voluntary exclusions and ineligibilities taken by the Department. Until February 18, 1989, the Assistant Secretary shall also provide GSA and OMB with information concerning all transactions in which the Department has granted exceptions under § 29.215 permitting participation by debarred, suspended, or excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the Assistant Secretary shall, within five working days after the Department takes each action, advise GSA of the information set forth below and of the exceptions granted under § 29.215:

(1) The names and addresses of all debarred, suspended, voluntarily excluded, and ineligible participants in alphabetical order, with cross references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The name and telephone number of the Departmental point of contact for the action.

(c) In order to ensure that listed persons do not participate in any covered tansaction in a manner inconsistent with their listed status:

(1) The Assistant Secretary shall establish procedures applicable to obtaining, maintaining, distributing, and using list information;

(2) Each administrator of a Departmental operating administration shall designate a liason officer responsible for assisting the Assistant Secretary in keeping list information current and shall establish procedures applicable to the distribution and use of list information; and

(3) The Assistant Secretary and each administrator shall establish procedures for the dissemination and use of information concerning participants whose debarment has been proposed by a Departmental debarring official (See §§ 29.315 and 29.310(b)(6)(ii)).

§ 29.505 Participant certification requirements.

(a) All participants are required to certify whether the participant, or any person acting in a capacity listed in § 29.200(b) with respect to the participant or the particular covered transaction, is currently or within the proceeding three years has been:

(1) Debarred, suspended or declared ineligible;

(2) Formally proposed for debarment, with a final determination still pending;

(3) Voluntarily excluded from participation, or

(4) Indicted, convicted, or had a civil judgment rendered against them for any of the offenses listed in § 29.305(a).

(b) Adverse information in the certification need not necessarily result in denial of participation. Information provided by the certification and any additional information required of participants shall be considered in the administration of covered transactions.

Issued in Washington, DC, on October 16, 1987.

Jim Burnley,

Deputy Secretary of Transportation.

[FR Doc. 87-24311 Filed 10-19-87; 8:45 am]

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Part III

Federal Home Loan Bank Board

Regulations Required by the Competitive Equality Banking Act of 1987

FEDERAL HOME LOAN BANK BOARD

12 CFR Part 571

[No. 87-1038]

Applications Processing Guidelines

Date: October 2, 1987.

AGENCY: Federal Home Loan Bank Board.

ACTION: Policy statement; solicitation of comments.

SUMMARY: The Federal Home Loan Bank Board ("Board"), as operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC" or the "Corporation"), pursuant to section 410 of the Competitive Equality Banking Act of 1987, is adopting a policy statement that promulgates guidelines concerning processing of applications filed with the Board. This policy statement sets forth maximum time periods for approval of completed applications filed with the Board.

EFFECTIVE DATE: October 9, 1987. Comments on the policy statement must be received on or before December 9, 1987.

ADDRESS: Send comments to Director, Information Services Section, Office of Secretariat, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552.

FOR FURTHER INFORMATION CONTACT: Gary A. Gegenheimer, Attorney, (202) 377-6575; John A Buchman, Assistant Deputy Director, (202) 377-6963; V. Gerard Comizio, Director, (202) 377-6411, Corporate and Securities Division, or Julie L. Williams, Deputy General Counsel for Securities and Corporate Structure, (202) 377-6459, Office of General Counsel; Cindy L. Hausch, Financial Analyst, (202) 377-7488; Patrick Berbakos, Assistant Director, (202) 377-6720, Office of District Banks, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552; Cheryl A. Martin, Financial Analyst, (202) 778-2651; Richard W. Wissinger, Deputy Assistant Director, (202) 778-2608; Office of Regulatory Policy, Oversight and Supervision, Federal Home Loan Bank System, 900 Nineteenth Street NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION: On August 10, 1987, President Reagan signed into law the Competitive Equality Banking Act of 1987 ("CEBA"), Pub. L. 100-86, 101 Stat. 552. The CEBA addresses a number of important issues relating specifically to the thrift industry, including the recapitalization of the FSLIC, emergency acquisitions of troubled thrift institutions, and potential areas for improvement in the examination and supervisory processes. Among the provisions contained in the CEBA is section 410, which directs the Board in section 410(a) to promulgate guidelines providing that each completed application filed with the Board or the FSLIC (other than an application submitted under section 408(g) of the National Housing Act ("NHA"), 12 U.S.C. 1730a(g), concerning holding company indebtedness) shall be deemed to be approved as of the end of the period prescribed by such guidelines unless the Board or the FSLIC approves or disapproves the application before the end of the period.

Section 410(b) of the CEBA amends section 408(g) of the NHA to provide that any completed application submitted for approval under that subsection shall be deemed to be approved 60 days after the filing of such completed application, unless the FSLIC approves or disapproves the application prior to the expiration of that period. Under section 410(c) of the CEBA, the Board also is required to submit a report to Congress before October 9, 1987, containing the abovementioned applications processing guidelines required to be promulgated by the Board under section 410(a). Section 410(d) of the CEBA provides that the guidelines required to be promulgated under section 410(a) shall take effect on October 9, 1987, i.e., at the end of the 60 day period beginning on August 10, 1987, the date of enactment of the CEBA.

Accordingly, the Board is today issuing this policy statement, which promulgates guidelines setting forth maximum time periods for approval of completed applications filed with the Board. The Board is concurrently transmitting a report to Congress containing the guidelines adopted today, as required by section 410(c). The Board notes that the guidelines adopted today are being promulgated in final form. However, the Board also is soliciting comments from interested parties as to how the Board's current regulations related to regulatory applications review and processing, as well as the guidelines adopted today, may be further streamlined. Comments should be submitted within 60 days of the effective date of this policy statement.

A. Completed Applications to Which These Guidelines Apply

Section 410 of the CEBA, by its terms, applies to all completed "applications" under the Board's regulations. Congress did not, however, expressly define the term "applications" regarding the nature and type of applications intended to be within the scope of section 410(a). A review of Board regulations, which generally are contained in Chapter V of Title 12 of the Code of Federal Regulations, reveals numerous activities of federally chartered or insured institutions that require the prior (and, in most cases, written) approval of the Board, often acting through the Principal Supervisory Agents ("PSAs") of the Federal Home Loan Bank System pursuant to delegated authority or through the Board's Washington staff. Other proposed activities require prior notification to the Board and may be undertaken by the institution unless the Board or the PSA, pursuant to delegated authority, raises an objection or, in some cases, withholds approval within a certain prescribed period of time. In some cases in which the PSA's approval is withheld, the matter may be referred to the Board for final decision. Certain of these "referred" matters have time deadlines incorporated into the regulations, such that the institution's request is deemed approved if the Board does not act within a certain period of time. Others, however, have no such timeframes.

In determining which applications and other requests for approval should be governed by this policy statement, the Board has attempted to be as broad and inclusive as possible to be consistent with the perceived Congressional intent to expedite applications processing, and has omitted only those matters, discussed below, that the Board believes do not appear to appropriately fall within the scope of section 410.

1. Litigation and Enforcement Activities

Specifically, in paragraph (a) of the policy statement, the Board is excluding from coverage requests submitted in connection with the Board's litigation and enforcement activities, such as permanent and temporary cease-and-desist and removal/prohibition orders (including requests for termination or modification of, or requests for approval submitted pursuant to, such orders), or agreements reached pursuant to the terms of a settlement of litigation. Similar requests relating to supervisory agreements and consent merger agreements are also excluded from coverage. In this regard, the Board notes that cease-and-desist orders often contain provisions that require that the institution in question restrict certain of its activities (*e.g.*, construction lending) and/or engage in certain transactions only after obtaining the prior written approval of the Supervisory Agent. Similar provisions are often contained in supervisory agreements between

insured institutions and the Corporation (through the Supervisory Agent) and in resolutions voluntarily executed by an institution's board of directors giving the PSA the authority to negotiate a merger or acquisition of the institution and consenting to the appointment of a conservator or receiver for the institution if the Corporation should deem it appropriate to take such action. These provisions are not uniformly imposed by regulation on all insured institutions, but instead are included in enforcement or supervisory documents on a case-by-case basis when a need for institutional restrictions is perceived in a particular set of circumstances. The activities that are restricted by cease-and-desist orders and supervisory agreements typically are those areas in which regulatory problems have been noted and thus can include both routine and complex transactions. Moreover, the great majority of such orders and agreements are obtained through negotiation with the institutions or individuals involved. The Board therefore believes that it would be inappropriate to establish standardized timetables in this area, because maximum flexibility must be retained in the negotiation process, as well as in determining what (if any) specific approval procedures may be appropriate for different types of restricted activities. Accordingly, these items are not covered by this policy statement. The Board is, of course, aware that timely decisions are of great importance in the operation of the business of insured institutions and expects that Supervisory Agents will respond to supervisory and enforcement-related requests for approval in a timely fashion.[1]

2. FSLIC Transactions Involving Troubled or Insolvent Thrifts

In addition, requests submitted in connection with mergers or acquisitions of insured institutions accomplished with FSLIC assistance and requests for non-standard supervisory forbearances in connection with a FSLIC-assisted merger or acquisition of an insured institution, in the view of the Board, are not within the scope of section 410(a). Such requests would include those for Board approval of mergers and acquisitions involving FSLIC assistance, insurance of accounts of an interim association in a FSLIC case, and the extension of non-standard supervisory forbearances by the PSA in connection with a merger or acquisition under 12 CFR 563.22(e)(1)(i).

FSLIC assistance in a merger or acquisition is authorized under section 406(f)(1)–(4) of the NHA, 12 U.S.C. 1729(f)(1)–(4), within the "sole discretion" of the FSLIC, and upon "such terms and conditions" as it may prescribe. In these situations, the FSLIC is contemplated by the NHA to be, and actually is, the moving or initiating party in the merger or acquisition, using the assistance authority of section 406(f) to forestall, or as a substitute for, the more costly liquidation process. Accordingly, in such cases, the FSLIC is directly involved in the merger or acquisition of the institution very early in the process and to a much greater degree than is normally the case in a non-assisted transaction. The Board believes that maximum flexibility must be retained in this area in order to enable the FSLIC to take all steps that may be necessary to prevent the failure of insured institutions and to arrange acquisitions of troubled institutions that involve the least cost to the insurance fund. In addition, requests for FSLIC assistance are often competitive, with several potential acquirors submitting proposals to assume control of a given institution with the aid of the FSLIC. In such cases, the Board must choose between several alternatives and must weigh a number of factors in determining which proposal will be most advantageous. Automatic approval of such a request after a given period would therefore create a contradictory result, because it could force the Corporation to approve a merger or acquisition solely because a given request for assistance was the first one submitted, without regard to whether the particular transaction is in the best interests of the FSLIC or of the institution involved. Accordingly, such requests are also excluded from the timeframes set forth in this policy statement.[2]

Similarly, requests related to action taken by the Corporation in connection with (or in order to prevent) the failure of an insured institution, in the Corporation's view, are not contemplated by the term "applications" in section 410(a). These would include offers to purchase assets of the Corporation acquired pursuant to section 406(f)(1)–(4) of the NHA or from a receiver, applications for the payment of insurance or transfer of accounts pursuant to section 405(b) of the NHA, 12 U.S.C. 1728(b), and requests in connection with authorizations by the Corporation of emergency thrift acquisitions pursuant to section 408(m) of the NHA, 12 U.S.C. 1730a(m). In this regard, the Corporation notes that the guidelines apply only to applications made to it in its corporate capacity and not in its capacity as conservator, receiver, or other legal custodian of an insured institution.

3. Regulations with specified applications time periods and procedures.

Finally, a number of applications and requests for approval already contain specific regulatory timetables. For example, notices of intention to acquire control of insured institutions pursuant to the Change in Savings and Loan Control Act, 12 U.S.C. 1730(q) (the "Control Act"), are governed by the detailed procedures contained in Part 574, which are derived from the Control Act itself.[3] The guidelines promulgated in this policy statement are not intended to supersede any pre-existing applications processing time periods and/or procedures currently contained in the FSLIC regulations. Thus, where a regulation establishes procedures for processing an application or request for approval, and/or contains specific timeframes for automatic approval unless an application is objected to or disapproved, those regulatory provisions will continue to govern the matters to which they apply. In cases in which a regulation establishes a procedure but not a timetable, the procedure set forth in the regulation will continue to apply, but will be subject to the time periods promulgated in this policy statement.

[1] Similarly, pursuant to section 407 (g) and (h) of the NHA, 12 U.S.C. 1730 (g) and (h), and section 5(d)(4)(D) and 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(d)(4)(D) and (5)(A), individuals may, under certain circumstances, be removed from their positions at federally insured or chartered institutions and prohibited from further participation in the conduct of the affairs of the institution involved. By statute, such individuals may not vote for a director or serve or act as officers, directors, or employees of insured institutions without the prior written approval of the Board or the Corporation. 12 U.S.C. 1464(d)(12)(A); 1730(p)(1). Such requests for approval are also excluded from the coverage of this policy statement.

[2] The purchase of Net Worth Certificates by the Corporation is another method of aiding insured institutions that is committed to the Corporation's discretion by Congress in § 406(f)(5) of the NHA, 12 U.S.C. 1729(f)(5). Part 572 of the Corporation's regulations provides detailed standards and guidelines for the handling of requests for the purchase of Net Worth Certificates by the Corporation. Accordingly, such requests are not covered by this policy statement.

[3] The Board will shortly be adopting amendments to its acquisition of control regulations, Part 574, designed to streamline further the regulatory processing of the wide range of acquisition of control filings made with the Board under Part 574, including, but not limited to, holding company applications, change in control notices, and rebuttals of control and concerted action by revising the current regulatory application processing time periods and procedures consistent with the guidelines adopted today.

Except as specifically noted in paragraph (a), all other applications or requests for approval submitted subsequent to the date of this policy statement pursuant to the Bank Board's regulations will be governed by the time periods set forth in this policy statement.

B. Applications Submitted for Review

Paragraph (b) of the policy statement provides that an application (or notice) must be submitted on the proper form designated by the Corporation and otherwise in compliance with the applicable filing requirements. In this regard, the Board notes that if an application is incorrectly submitted (*e.g.*, if a copy of the application is not filed with all of the specified persons or offices), the applicable periods for review set forth in the guidelines will not commence until the application is properly filed.

C. Acceptance of Applications for Processing.

Section 410(a) of the CEBA requires that the Board promulgate guidelines providing that each completed application (other than an application regarding holding company indebtedness) will be deemed to be approved at the end of the time period prescribed under such guidelines, unless the Board (or the FSLIC) has approved or disapproved the application before the expiration of that period. Similarly, section 410(b) of the CEBA amends section 408(g) of the NHA to provide that each completed application for approval of holding company indebtedness shall be deemed to be approved as of the end of the 60-day period beginning on the date such application was filed, unless the FSLIC approves or disapproves the application prior to the end of the 60-day period. Thus, with regard to both categories, a completed application is a prerequisite to the commencement of the period within which approval must be granted or denied.

Reflecting this requirement, paragraph (c) states that the period for Corporation review will not commence until the application (or notice) is deemed complete. Under this provision, the Corporation or its delegate must make a determination as to whether an application is complete within 30 days after the application is properly submitted to all appropriate offices. During this period of time, the Corporation may (1) request any additional information that may be required to complete the application, (2) deem the application complete and commence its period for review, or (3) if the application is found to be materially deficient or substantially incomplete, refuse to accept the application for filing and return it to the applicant. Upon expiration of the 30-day period, the application will automatically be deemed to be complete unless it has been returned or additional information has been specifically requested by such date.

The information that will be required in order for an application to be deemed complete will necessarily depend on the type of application involved. In this regard, potential applicants and their professional advisors should take care to submit applications in accordance with the requirements of all applicable regulations and are also encouraged to consult the Board's Washington staff or, as appropriate, the District Bank staff in preparing applications for submission to the Board.

In the event that any additional information is requested, paragraph (c) provides that the applicant must respond fully to the request within 30 days. Failure to respond within such time period may cause the application to be treated as having been withdrawn or may provide grounds for denial by the Corporation or its delegate. If the requested additional information is submitted in a timely manner, the Corporation must make a determination as to its completeness and notify the applicant whether any further additional information will be required within 15 calendar days after the information is received; otherwise, the application will be deemed to be complete at the end of the 15 calendar day period.

Paragraph (c) also provides that, with respect to additional information requests following the initial request, the inquiries must be limited to (1) those matters derived from or prompted by information furnished in response to the provious request, or (2) information that either was not reasonably available from the applicant, was concealed, or pertains to developments subsequent to the initial request. In those situations in which this second type of information is being requested after the application has been deemed complete, the Corporation or its delegate may revoke such determination and deem the application incomplete until the requested information is submitted and, upon receipt of the additional information, recommence processing the application as of that time.

D. Corporation Review Timeframes

Paragraphs (d), (e), and (f) of the policy statement set forth the periods of time within which the Corporation or its delegate must review a completed application and advise the applicant of the Corporation's determination. Paragraph (d) provides that once an application is deemed complete and no additional information is subsequently requested, the Corporation must either approve or disapprove the application within a review period of either 60 or 90 days, depending upon the type of application that has been submitted and particular delegations of authority. If the PSA (or the Supervisory Agent) is authorized to act upon the application (pursuant to authority delegated by the Corporation or by express terms of a regulation), the maximum applicable review period will be 60 days. In addition, for all applications or notices filed under the Board's accquisition of control regulations, including holding company applications, change in control notices, and rebuttals of control or concerted action, regardless of whether delegated or not, the maximum review period will be 60 days.[4] For all other applications that are not delegated, the maximum time period for review of a completed application will be 90 days.[5] Finally, where more than one type of application is required for a proposed transaction or activity, the paragraph provides that the maximum review period for all such applications will be the amount of time prescribed for the application having the longest review period. Failure by the Corporation or its delegate to act upon the application by the end of the Applicable 60 or 90 day period will cause the application to be deemed automatically approved (or, in the case of a notice, not disapproved) unless the review period has been extended pursuant to either paragraph (e) or paragraph (f).[6] To enhance

[4] The Control Act specifically requires that, with certain exceptions, a determination regarding a notice filed thereunder must be made within 60 days, or the notice is deemed not disapproved. 12 U.S.C. 1730(q).

[5] The Board stresses that the 90 day period for review sets forth a *maximum* review period. Generally the maximum review period may be required for applications processes that have longer review periods, such as, for example, applications for permission to organize, applications for insurance of accounts, applications for chartering of an interim federal or state insured institution, or applications for Federal Home Loan Bank membership. However, the Board will continue to endeavor to process applications that in the past have been subject to shorter timeframes for review in those shorter timeframes.

[6] Where a regulation prescribes a procedure for submission of protests on an application following publication of notice of a proposed activity after the application has been deemed complete (*e.g.*, 12 CFR 543.2), the automatic approval process will be discontinued until the issues relating to the protest are resolved. In this situation, the review period will not commence until the Corporation or its delegate informs the applicant that a protest has been deemed to be not "substantial" or that such issues have been resolved.

internal efficiency, the Board also will continue to improve its efforts to monitor applications processing internally and will continue to identify and define specific processing goals and monitoring systems with the objective of reducing processing times below those set forth in these guidelines. In addition, the Board is currently undertaking additional regulatory and other initatives designed to further streamline and improve the regulations and procedures governing the various types of applications filed with the Board.

Under paragraph (e), the Corporation or its delegate may extend the review period by an additional 30 days, thereby increasing the period within which a determination must be made to either 90 or 120 days. If the Corporation or its delegate does elect to extend the review period in this manner, it must notify the applicant of the extension at least 30 days prior to the expiration of the applicable period for review of a complete application. The Corporation believes that this limitation on extensions of the review period in accordance with this provision will facilitate an applicant's preparations for consummation of a proposed transaction or commencement of a planned activity by providing the applicant with sufficient advance notice of the date by which a final determination (or automatic approval) can be expected.

A second exception to the standard review timetables is set forth in paragraph (f). This provision states that in those situations in which any member of the Board, the General Counsel, Executive Director, the Executive Director of the Office of Regulatory Policy, Oversight and Supervision, or Executive Director for Policy believes that an application or notice raises a significant issue of law or policy warranting additional time for consideration, the Board member or such official may designate the application as ineligible for automatic approval by notifying the applicant to that effect and informing the applicant of the law or policy issue raised before the expiration of the applicable review period. The Corporation would anticipate utilizing this type of extension on an infrequent basis and only where, due to the novel, unique, and/or complex nature of the application, the Corporation would be unable to complete its review within the prescribed period of time. It is therefore the Corporation's view that inclusion of this exception in the guidelines will provide the Corporation with a degree of flexibility that is fully consistent with the legislative mandate contained in section 410 of the CEBA.

Final Regulatory Flexibility Analysis

Pursuant to section 3 of the Regulatory Flexibility Act, 5 U.S.C. 604, the Board is providing the following regulatory flexibility analysis:

1. *Need for and objectives of the rule.* These elements have been incorporated into the Board's discussion set forth in the **SUPPLEMENTARY INFORMATION** section.

2. *Issues raised by comments and agency assessment and response.* As explained in the **SUPPLEMENTARY INFORMATION** section, the Board is issuing the policy statement in final form without prior opportunity for comment, although the Board is soliciting post-promulgation public comment. Accordingly, at this time, there are no issues raised by comments that require Board assessment and response.

3. *Significant alternatives minimizing small-entity impact and agency response.* The applications processing guidelines will have no disproportionate impact on small institutions or other entities. The guidelines do not alter or supersede any pre-existing regulations regarding processing of applications, but rather only establish time periods within which action by the Corporation is required on completed applications submitted pursuant to Corporation regulations.

List of Subjects in 12 CFR Part 571

Accounting, Bank deposit insurance, Savings and loan associations.

Accordingly, the Federal Home Loan Bank Board hereby amends Part 571, Subchapter D, Chapter V, Title 12, *Code of Federal Regulations*, as set forth below.

SUBCHAPTER D—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

PART 571—STATEMENTS OF POLICY

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

Authority: Sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402–403, 407, 48 Stat. 1256–1257, 1260, as amended (12 U.S.C. 1725–1726, 1730); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–48 Comp., p. 1071.

2. Amend Part 571 by adding a new § 571.12 to read as follows:

§ 571.12 Applications processing guidelines.

(a) *General.* Section 410 of Title IV of the Competitive Equality Banking Act of 1987, Pub. L. 100–86, 101 Stat. 552, 620, section 410 generally requires that the Federal Home Loan Bank Board ("Board"), as operating head of the Federal Savings and Loan Insurance Corporation (hereinafter collectively referred to as the "Corporation"), "promulgate guidelines which provide that with respect to each type of completed application" filed by any person for approval by the Corporation, the application "shall be deemed to be approved" as of the end of the period prescribed under such guidelines unless the Corporation approves or disapproves such application before the end of such period (section 410(a)). To comply with these requirements and to ensure the timely processing of applications and notices throughout the Federal Home Loan Bank System, the Board hereby sets forth guidelines for the processing of completed applications and notices (hereinafter collectively referred to as "applications") filed with the Corporation or its delegate subsequent to October 9, 1987. This section does not apply to applications submitted under section 408(g) of the National Housing Act, 12 U.S.C. 1730a(g) ("NHA"), involving holding company indebtedness; requests for Corporation assistance or assistance payments in connection with a merger, acquisition or restructuring of an insured institution pursuant to section 406(f)(1)–(4) of the NHA, 12 U.S.C. 1729(f)(1)–(4); requests in connection with Corporation authorizations of emergency thrift acquisitions pursuant to section 408(m) of the NHA, 12 U.S.C. 1730a(m); requests submitted in connection with cease-and-desist orders issued under section 407(e)(1) of the NHA, 12 U.S.C. 1730(e)(1) or 5(d)(2)(A) of the Home Owners Loan Act, 12 U.S.C. 1464(d)(2)(A) ("HOLA"), temporary cease-and-desist orders issued pursuant to section 407(f)(1) of the NHA, 12 U.S.C. 1730(f)(1) or section 5(d)(3)(A) of the HOLA, 12 U.S.C. 1464(d)(3)(A), removal and/or prohibition orders issued pursuant to section 407(g)(4) or (h)(1) of the NHA, 12 U.S.C. 1730(g)(4) or (h)(1), or section 5(d)(4)(D) or (5)(A) of the HOLA, 12 U.S.C. 1464(d)(4)(D), or (5)(A), temporary suspension orders issued pursuant to section 407(g)(5) or (h)(1) of the NHA, 12 U.S.C. 1730(g)(5) or (h)(1), or section 5(d)(4)(C) of the HOLA, 12 U.S.C. 1464(d)(4)(C), supervisory agreements, consent merger resolutions, or documents negotiated in settlement of litigation (including requests for termination or modification of, or for approval pursuant to such orders, agreements, resolutions or documents), or similar litigation or enforcement matters; or requests for non-standard

supervisory forbearances pursuant to 12 CFR 563.22(e)(1)(i). In addition, where other Corporation or Board regulations establish specific procedures for processing of applications or set forth specific time periods for automatic approval of applications unless such applications are disapproved or objections are raised, the provisions of those regulations are controlling with respect to the matters to which they pertain. Where a regulation sets forth a procedure for processing an application but does not contain a time period pursuant to which such application is to be processed, the application will be processed under the procedure established by the regulation, but will be subject to the time periods contained in this policy statement.

(b) *Applications submitted for review.* An application submitted to the Corporation or its delegate for processing shall be submitted on the designated form of application and shall comply with all applicable regulations and guidelines governing the filing of such application.

(c) *Accepting applications for processing.* (1) Within 30 calendar days of receipt of a properly submitted application for processing, the Corporation or its delegate shall (i) request additional information to complete the application, (ii) deem the application to be complete, or (iii) return the application if it is deemed by the Corporation or its delegate to be materially deficient and/or substantially incomplete. Failure by the Corporation or its delegate to act as described in paragraph (c)(1) (i), (ii), or (iii) of this section within 30 calendar days of receipt of an application for processing shall result in the filed application being deemed complete, thereby commencing the period for review.

(2) Failure by an applicant to respond fully to a written request by the Corporation or its delegate for additional information within 30 calendar days of the date of such request may be deemed to constitute withdrawal of the application, or may be treated as grounds for denial of the application or issuance of a notice of disapproval of a notice.

(3) The period for review by the Corporation or its delegate of an application will commence on the date that the application is deemed complete. The Corporation or its delegate shall notify an applicant as to whether the application is deemed complete within 15 calendar days after the timely filing of any additional information furnished in response to any initial or subsequent request by the Corporation or its delegate for additional information. If the Corporation or its delegate fails to notify an applicant within such time, the application shall be deemed to be complete as of the expiration of such 15 day period; *provided,* that where an applicant requests a waiver of a requirement that certain information be supplied, the application shall not be deemed to be complete until a final determination is made on the waiver request.

(4) After additional information has been requested and supplied, the Corporation or its delegate may request additional information only with respect to matters derived from or prompted by information already furnished, or information of a material nature that was not reasonably available from the applicant at the time of the application, was concealed, or pertains to developments subsequent to the time of the Corporation's initial request for additional information. With regard to information of a material nature that was not reasonably available from the applicant, was concealed at the time an application was deemed to be complete, or pertains to developments subsequent to the time an application was deemed to be complete, the Corporation or its delegate may request such additional information as it considers necessary and, at its option, may deem the application not to be complete until such additional information is furnished and may cause the review period to commence upon receipt of such additional information.

(d) *Failure by the Corporation to approve or deny an application or to disapprove a notice.* (1) If, upon expiration of the applicable period for review of any complete application to which this policy statement applies, or any extension of such period, the Corporation or its delegate has failed to approve or deny such application (or, in the case of a notice, to disapprove such notice), the application shall be deemed to be approved, or, in the case of a notice, not disapproved, by the Corporation or its delegate. For purposes of the previous sentence, the applicable period for review shall be (i) 60 calendar days for an application that is eligible for action by a Principal Supervisory Agent or a Supervisory Agent or for any application or notice submitted pursuant to Part 574 of the Corporation's regulations, or (ii) 90 calendar days for any other application.

(2) In the event that more than one application is being submitted in connection with a proposed transaction or other action, the applicable period for review of all such applications shall be the review period for the application having the longest period for review.

(e) *Extension of time for review.* The applicable period for review of an application deemed to be complete may be extended by the Corporation or its delegate for 30 days beyond the time period for review set forth in paragraph (d) of this section. The Corporation or its delegate shall notify an applicant at least 30 days prior to the expiration of the applicable period for review of a complete application that such review period is being extended for 30 days and shall state the general reasons therefor.

(f) *Extension of time for Corporation review of applications raising significant issues of law or policy.* In those situations in which an application presents a significant issue of law or policy, the applicable period for review of such application also may be extended by any member of the Corporation or its General Counsel, Executive Director, Executive Director for Policy, or the Executive Director of the Office of Regulatory Policy, Oversight and Supervision of the Federal Home Loan Bank System beyond the time period for review set forth in paragraph (d) of this section or any extension thereof pursuant to paragraph (e) of this section until such time as the Corporation acts upon the application. In such cases, such member of the Corporation or designate or such official or designate shall provide written notice to an applicant not later than the expiration of the time period set forth in paragraph (d) of this section or any extension thereof pursuant to paragraph (e) of this section that the period for review is being extended in accordance with this paragraph, which notice shall also state the general reason(s) therefor.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 87-23663 Filed 10-19-87; 8:45 am]

BILLING CODE 6720-01-M

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12 CFR Parts 545, 561, 563, 563c, and 570

[No. 87-1047A]

Definition of Regulatory Capital; Delay of Effective Date

Date: October 5, 1987.

AGENCY: Federal Home Loan Bank Board.

ACTION: Final rule; delay of effective date.

SUMMARY: The Federal Home Loan Bank Board ("Board"), as the operating head of the Federal Savings and Loan

Insurance Corporation is delaying the effective date of its final rule concerning the Definition of Regulatory Capital. The final rule was published in the **Federal Register** on May 15, 1987 (52 FR 18340). The effective date was given as January 1, 1988. The Board is delaying this effective date until January 1, 1989 and could modify this date further as explained in the preamble to a proposed rule entitled Uniform Accounting Standards, Board Res. No. 87-1047, published elsewhere in this issue of the **Federal Register.**

EFFECTIVE DATE: The effective date of this final rule is delayed until January 1, 1989. This effective date could be modified further as explained in greater detail in the proposed rule; Uniform Accounting Standards, Board Res. No. 87-1047, published elsewhere in this issue of the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Christina M. Gattuso, Acting Regulatory Counsel, (202) 377-6649, Deborah Dakin, Assistant Director, (202) 377-6445, Regulations and Legislation Division, Office of General Counsel, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552; or W. Barefoot Bankhead, Professional Accounting Fellow, (202) 778-2538, Carol Larson, Professional Accounting Fellow, (202) 778-2535, Office of Regulatory Policy, Oversight and Supervision, Federal Home Loan Bank System, 900 Nineteenth Street NW., Washington, DC 20006.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 87-23775 Filed 10-19-87; 8:45 am]

BILLING CODE 6720-01-M

FEDERAL HOME LOAN BANK BOARD

12 CFR Parts 563 and 571

[No. 87-1039]

Appraisal Policies and Practices of Insured Institutions and Service Corporations; Withdrawal of Proposed Amendment

Date: October 2, 1987.

AGENCY: Federal Home Loan Bank Board.

ACTION: Proposed rule; withdrawal.

SUMMARY: On May 5, 1987, the Federal Home Loan Bank Board ("Board") proposed to amend its regulations to adopt a rule and a statement of policy governing appraisal policies and practices of institutions insured by the Federal Savings and Loan Insurance Corporation. *See* Board Res. No. 87-528, 52 FR 18386 (May 5, 1987). At that time, the Board solicited comment on its proposed rule and statement of policy. The Board initially set a 60-day comment period that expired on July 14, 1987, but extended this comment period until September 1, 1987, in order to ascertain the effect of final recapitalization legislation on the proposed rule and policy statement. *See* 52 FR 27219 (July 20, 1987).

The Competitive Equality Banking Act of 1987 ("CEBA"), Pub. L. No. 100-86, 101 Stat. 552, was signed into law on August 10, 1987, during the comment period on the proposed rule and statement of policy. Section 402 of CEBA requires the Board to promulgate an appraisal standard "which is consistent with the appraisal standard established by the Federal banking agencies." CEBA, tit. iv, sec. 402 (a) and (b). In order to comply with the mandate of CEBA, the Board today is withdrawing the proposed rule and statement of policy contained in its Resolution No. 87-528. In their stead, the Board is proposing to adopt a new rule and statement of policy pertaining to appraisal standards that the Board believes are consistent with the appraisal policies of the Federal banking agencies.

DATE: This withdrawal is effective October 2, 1987.

FOR FURTHER INFORMATION CONTACT: Kathy L. Kresch, Attorney, (202) 377-6417, Joan S. van Berg, Attorney, (202) 377-7023, or Karen Knopp O'Konski, Acting Director, (202) 377-7240, Regulations and Legislation Division, Office of General Counsel, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552; or Diana Garmus, Policy Analyst, (202) 778-2515, Office of Regulatory Policy, Oversight, and Supervision, Federal Home Loan Bank System, 900 Nineteenth Street NW., Washington, DC 20006.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 87-23660 Filed 10-19-87; 8:45 am]

BILLING CODE 6720-01-M

12 CFR Parts 563 and 571

[No. 87-1040]

Appraisal Policies and Practices of Insured Institutions and Service Corporations

Dated: October 2, 1987.

AGENCY: Federal Home Loan Bank Board.

ACTION: Proposed rule.

SUMMARY: The Federal Home Loan Bank Board ("Board"), as operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC"), is proposing to adopt a rule and a statement of policy pertaining to appraisal policies and practices of institutions insured by the FSLIC ("insured institutions") and service corporations of such institutions consistent with the requirements of the Competitive Equality Banking Act of 1987 ("CEBA"), Pub. L. No. 100-86, 101 Stat. 552. This proposal replaces the Board's previous proposal, published in May, which is withdrawn. Section 402 of CEBA requires that the Board adopt an appraisal standard "which is consistent with the appraisal standard established by the Federal banking agencies." CEBA, tit. iv. sections 402 (a) and (b). This proposed rulemaking requires the management of insured institutions and service corporations to develop and implement prudent appraisal policies and procedures.

The Board is also proposing to adopt a statement of policy to accompany the proposed rule. The statement of policy sets forth the appraisal standards that the Board recommends to management for consideration in the development of the appraisal policies and procedures required by the proposed rule. The Board invites public comment on all aspects of the proposed rule and policy statement.

DATE: Comments must be received on or before November 19, 1987.

ADDRESS: Send comments to Director, Information Services Section, Office of the Secretariat, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552. Comments will be available for inspection at this address.

FOR FURTHER INFORMATION CONTACT: Kathy L. Kresch, Attorney, (202) 377-6417, Joan S. van Berg, Attorney, (202) 377-7023, or Karen Knopp O'Konski, Acting Director, (202) 377-7240, Regulations and Legislation Division, Office of General Counsel, Patricia Rudolph, Visiting Scholar, (202) 377-7298, Office of Policy and Economic Research, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552; or Diana Garmus, Policy Analyst, (202) 778-2515. Office of Regulatory Policy, Oversight, and Supervision, Federal Home Loan Bank System, 900 Nineteenth Street NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION: The soundness of mortgage loans and real estate investments made by insured institutions and service corporations depends upon the adequacy of the loan underwriting used to support these transactions. An appraisal report is one of several essential components of the loan underwriting process. Accordingly, § 563.17-1 of the Board's regulations requires that the records of a loan secured by real estate include "[o]ne or more written appraisal reports, prepared at the request of the lender or its agent . . . by a person or persons duly appointed and qualified as appraisers by the board of directors of such lender, disclosing the market value of the security offered by the borrower and containing sufficient information and data concerning the appraised property to substantiate the market value of the security described in such report. . . ." 12 CFR 563.17-1(c)(1)(iv). To date, standards for compliance with 12 CFR 563.17-1 have been issued in the form of "R" Memoranda by the Office of Regulatory Policy, Oversight and Supervision ("ORPOS") of the Federal Home Loan Bank System.

On May 5, 1987, the Board proposed to adopt a rule and a statement of policy to incorporate in its regulations appraisal standards to be used by insured institutions and service corporations in complying with regulatory requirements. 52 FR 18386 (May 15, 1987) (the "May proposal"). The May proposal was published with a 60-day comment period that was scheduled to expire on July 14, 1987. On July 14, 1987, however, the Board extended the comment period to September 1, 1987, in order to ascertain the effect of final recapitalization legislation on the proposed rule and policy statement. 52 FR 27219 (July 20, 1987). On August 10, 1987, the Competitive Equality Banking Act of 1987 ("CEBA"), Pub. L. No. 100-86, 101 Stat. 552, was signed into law.

CEBA directs the Board to implement an appraisal standard consistent with

the appraisal standards of the Federal banking agencies.[1] The Board has reviewed its May proposal and has concluded that significant modifications to both its structure and content are necessary in order to accomplish CEBA's mandate in the most effective way. Therefore, in a separate document, also published today, the Board is withdrawing the proposed rule and statement of policy adopted on May 5, 1987. *See* Board Res. No. 87-1039. It is, instead, proposing to adopt a new rule and statement of policy consistent with the appraisal principles employed by the Federal banking agencies.

The Board has received many comments in response to its May proposal and notes that some of these will be rendered moot by its action today. The Board will continue to consider comments received in response to the May proposal to the extent they are relevant. The Board invites commenters to revise their comments to the May proposal and solicits new comments on all aspects of today's proposed rule and statement of policy. The Board also notes that it intends to hold a public hearing on this proposal together with others adopted pursuant to CEBA's requirements. Details of this hearing are contained in a Notice published elsewhere in today's edition of the **Federal Register**. The hearing will occur during the comment period, which is set for 30 days so that the Board can complete the process of issuing regulations within the 150-day deadline prescribed by CEBA. *See.* CEBA, tit. iv, sec. 402(d).

1. Statutory Authority

Pursuant to section 402(a) of CEBA, the Board is required to establish, by regulation, an appraisal standard for Federal associations "which is consistent with the appraisal standard established by the Federal banking agencies." CEBA, tit. iv, sec. 402(a), section 9(a)(2). Section 402(b) requires that the Board promulgate a regulation establishing an identical appraisal standard for state-chartered, FSLIC-insured institutions.[2] CEBA, tit. iv, sec. 402(b), section 415(a)(2).

CEBA's specific directive that the Board establish appraisal standards by regulation is consistent with the Board's existing statutory mandate to promote home financing according to principles of safety and soundness. Among the paramount purposes of Title IV of the National Housing Act ("NHA") (12 U.S.C. 1724-30) and the Federal Home Loan Bank Act ("Bank Act") (12 U.S.C. 1421-29) is the development and maintenance of a system of sound and economical home financing. An additional, closely related purpose of the NHA is protection of the FSLIC insurance fund from exposure to undue risk. The appraisal standards proposal is designed to enable the Board to carry out both statutory objectives.

Moreover, the Board is authorized by sections 403(b) and 407(m) of the NHA to conduct examinations of insured institutions and their service corporations. 12 U.S.C. 1626(b), 1730(m). The Board believes that carefully documented appraisals are essential to accurate evaluation of the asset portfolio of an insured institution or service corporation. The proposed rule pertaining to appraisal policies and practices of insured institutions and their service corporations therefore comports with the Board's statutory authority to examine and evaluate the asset protfolios of insured institutions and their service corporations.

2. The Board's Appraisal Standards to Date

The Board's first appraisal guidelines were issued as R-Memorandum 41, on June 6, 1977, by its Office of Examinations and Supervision ("OES" now ORPOS). At that time, the thrift industry had suggested that the Board emphasize the importance of the appraisal process in prudent loan underwriting. Moreover, the Board's experience with problem loans had revealed that when a loan underwriter did not receive market-based appraisal information, loans were based upon inaccurate collateral valuations and, consequently, upon inappropriate underwriting assumptions. In the worst cases, deficient underwriting was directly responsible for losses sustained by insured institutions. The Board responded by issuing R-41 and its progeny.

The appraisal documentation requirement of R-41 was not new to the industry in 1977. An appraisal report containing a detailed description of the appraiser's reasoning in arriving at an estimate of value had been a requisite portion of a loan record at least since the adoption of 12 CFR 563.17-1 in 1963. This requirement was continually revised and expanded in R-41a, issued September 15, 1977, R-41a-1, issued March 1, 1979, R-41b, issued March 12, 1982, and R-41c, issued September 11, 1986.

R-41c updated, revised, and replaced R-41b. R-41c elaborated upon the appraisal guidelines of R-41b, adding to its appraisal management procedures, requirements used by the leading national appraisal organizations. Additionally, R-41c updated the definition of market value to be consistent with the terminology adopted by the Federal Home Loan Mortgage Corporation ("Freddie Mac") and the Federal National Mortgage Association ("Fannie Mae"). On February 26, 1987, ORPOS issued a memorandum clarifying R-41c. *See* Memorandum from William L. Robertson to Professional Staff, Examinations and Supervision (Feb. 27, 1987). *See* 52 FR 18396 (May 15, 1987).

In the preamble to the May proposal, the Board discussed its present appraisal standards set forth in Memorandum R-41c, as clarified, in detail. *See* 52 FR 18387-18388. The May proposal was explicitly intended to codify the R-41c approach to appraisal standards. Toward that end, it contained detailed instructions for insured institutions concerning the responsibility of management and the contents of an acceptable appraisal report, an approach that differs from the approach used by the Federal banking agencies. The hallmark of the Federal banking agencies' appraisal practices is the placement squarely on management of responsibility for developing and maintaining adequate appraisal standards. In the banking system, management is afforded discretion to develop policies best suited to the needs of the particular regulated institution. Today's proposal is intended to follow that model.

3. The Proposed Rule

CEBA requires the Board to adopt appraisal standards that are consistent with those of the Federal banking agencies. Although the Federal banking agencies have not adopted written appraisal standards, Board staff discussions with representatives of those agencies have disclosed that the Board's May proposal was more detailed than their appraisal principles. Therefore, the proposed rule substantially modifies the Board's historical approach to the management of appraisal practices set forth in the series of "R" Memoranda and the May proposal discussed above. In this regard,

[1] Section 402 of CEBA defines "Federal banking agencies" to include the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation.

[2] Pursuant to 12 CFR 561.1, the term "insured institution" is defined as a Federal association or a state-chartered, FSLIC-insured savings and loan association. Therefore, an amendment to the Board's regulations governing all FSLIC-insured institutions will effectuate the statutory amendments to the HOLA and the NHA made by CEBA.

the Board, in seeking to achieve consistency with the appraisal principles endorsed by the Federal banking agencies, has determined to revise and restructure its appraisal standards. With the exception of certain requirements that management must meet with respect to all appraisals, the proposed rule does not set forth the specific indicia of an acceptable appraisal. Rather, the rule instructs the management of each insured institution to develop, implement, and maintain appraisal policies and practices. The accompanying proposed statement of policy offers guidance to management concerning relevant and accepted appraisal standards to be considered in the development of an institution's appraisal policies and guidelines.

The Board believes that because the proposal emphasizes the exercise of discretion by management rather than the individual components of an acceptable appraisal, it will promote flexibility in achieving compliance with the Board's appraisal policies. The Board is also of the opinion that its new approach, consistent with the appraisal principles endorsed by the Federal banking agencies, will foster both cost efficiency in the appraisal process and competitive equality with the banking industry.

The shift to management of the burden to develop, implement, and maintain adequate appraisal standards does not signal a retreat from the Board's strong policy in favor of encouraging sound underwriting practices, including appraisal standards. Consistent with this policy and the Board's statutory enforcement authority,[3] an institution may be subject to enforcement action either for a violation of any final appraisal regulation or if the appraisal standards it adopts do not comport with principles of safety and soundness.

a. Introduction

The proposed rule begins with the Board's statement of the purpose of the rule. In the interest of safety and soundness, it is incumbent upon management to maintain prudent loan underwriting policies. Appraisals are an essential component of the loan underwriting process because appraisal reports contain the estimates of the value of collateral held or assets owned that lending decisions are based upon. Therefore, under the proposal, management would be responsible for the development, implementation, and maintenance of appraisal practices and procedures in accordance with the Board's regulation.

b. Definitions

The definitional section of the proposed rule includes definitions of the few terms that are crucial to the comprehension and application of its proposed appraisal regulation. "Management" is defined as the directors and officers of an institution as those terms are defined in existing Board regulations. *See* 12 CFR 561.31 and 561.32. This section also includes the definition of "market value," upon which the Board proposes to base estimates of value in an appraisal report. This definition is identical to the definition of market value adopted by Fannie Mae and Freddie Mac.

c. Responsibilities of management

The proposed rule contains a section entitled Responsibilities of Management that addresses the obligations of management to develop, adopt, and implement appraisal policies. This section emphasizes the Board's view that management should have discretion in establishing appraisal policies; these policies must be designed, however, to ensure that appraisals accepted by the institution reflect professional competence and report estimates of market value upon which the institution's lending decisions can be based. To achieve these results, the proposed rule sets forth three appraisal standards that, at a minimum, must be included in the appraisal policies of every insured institution and service corporation. The accompanying proposed statement of policy also recommends appraisal standards that management should consider in fulfilling this responsibility.

First, the proposed rule provides that management must require every appraisal to be based upon the definition of market value set forth in the regulation. As noted above, this market value definition is identical to the definition of market value adopted by both Fannie Mae and Freddie Mac. It contemplates the consummation of a sale as of a specified date and the passing of title from buyer to seller under open and competitive market conditions requisite to a fair sale. In the Board's view, this definition of market value is an accurate measure of the economic potential of security property because in most troubled real estate loans the lender must sell the security in order to recover its invested funds. The Board solicits comment on whether to continue to use the term "market value" in its apraisal regulation.[4]

Second, the proposal provides that management must require an appraisal to be presented in a narrative format. In this regard, the proposed rule requires an appraisal report to be sufficiently descriptive to enable a reviewer readily to ascertain the estimated value reported and the rationale for that estimate. The analysis of the value estimate reported must be commensurate in its detail and depth with the complexity of the real estate appraised. The Board believes that this requirement affords management the discretion to determine the adequacy of an appraisal based upon the characteristics of the collateral appraised. Moreover, this requirement promotes cost efficiency in the preparation of appraisal reports by permitting management to accept shorter, less detailed, and therefore less costly appraisal reports on uncomplicated properties.

Third, the Board believes that the reasonableness of an estimate of the market value of collateral in an appraisal report must be considered in the context of prior sales of the property that occurred in a recent time frame. Threfore, the proposed rule provides that management must require that an appraisal contain a sales history of the real estate appraised. Specifically, an appraisal on one-to-four family residential property that is not prepared on a form approved by Fannie Mae or Freddie Mac must disclose and analyze prior sales that occurred within one year of the date that the appraisal report was prepared. With respect to all other types of property, the appraisal must disclose and analyze any prior sales of the property that occurred within three years of the date the appraisal was prepared.

The proposed rule also requires management to develop and adopt guidelines and to institute procedures pertaining to the hiring of appraisers. In this regard, it instructs management to consider factors including, but not limited to, an appraiser's professional education, type of experience, and membership in professional appraisal

[3] The NHA provides that the FSLIC may take enforcement action, if an institution violates a regulation or if it commits an unsafe or unsound practice. 12 U.S.C. 1730(e). This is, of course, only a partial list of items that may justify enforcement action. *Id.*

[4] In the Board's view, "market value" means "fair value" as that term is used in its Classification of Assets proposal, Board Res. No. 87-1042, and in its proposal on Troubled Debt Restructuring, Board Res. No. 87-1046. The Board does not mean to imply, however, that an institution should base its allowances for loan losses on fair value if the appropriate basis for loan loss allowances is net realizable value in accordance with Statement No. 5 of the Financial Accounting Standards Board.

organizations in formulating hiring guidelines and determining whether to employ an appraiser. The Board continues to believe that for one-to-four family residential properties, management may approve an appraisal company in lieu of individual appraisers. It is, however, incumbent upon management to determine that the appraisal company's standards for hiring appraisers parallel the institution's hiring guidelines.

Furthermore, the Board believes that management is responsible for not only establishing an institution's appraisal policies and hiring appraisers but also for continual oversight of the provision of appraisal services to the institution by fee or staff appraisers. In this regard, it is incumbent upon management to ensure that appraisals consistently report estimates of market value of collateral that adequately support an institution's lending decisions. Therefore, the proposed rule provides that management must review the performances of all appraisers for accuracy and compliance with the institution's appraisal policies at least once every six months.

Additionally, the Board is aware that an institution's underwriting policies and procedures will invariably change over time. Therefore, the Board strongly recommends that management periodically review an institution's appraisal practices to ensure consistency with current underwriting standards.

Finally, there is no requirement in today's rule that an institution's board of directors formally adopt the appraisal policies and practices developed by management. The Board is specifically soliciting comment on whether such a requirement is necessary.

d. Exemptions

The Board is of the opinion that narrative appraisal reports are unnecessary for certain types of properties. The proposed rule therefore exempts from the appraisal requirements to be established by management appraisals on existing or proposed one-to-four family and existing multi-family properties, prepared on the forms approved by Fannie Mae and Freddie Mac, in compliance with their appraisal standards. Although the Fannie Mae appraisal standards are more comprehensive than those of Freddie Mac, the Board has determined that compliance with either set of appraisal standards, in conjunction with the use of approved forms, will satisfy the requirements of the proposed rule.

This section of the proposal also exempts from the appraisal requirements to be established by management any appraisals on commercial and industrial loans that are prepared on the form report approved by the Board. The Board encourages use of this form because the preparation of narrative appraisals for small commercial and industrial loans is neither cost- nor time-efficient.

4. Description of the Proposed Statement of Policy

The Board believes that the management of insured institutions and service corporations is best qualified to develop appraisal policies that meet the needs of their institutions. Management's policies will be measured according to whether they comport with principles of safety and soundness. The policy statement proposed today is intended to serve as guidance about what constitutes adequate appraisal standards—that is, what standards comport with principles of safety and soundness. An institution could, however, adopt appraisal policies different from those set forth in the policy statement and still be consistent with principles of safety and soundness, so long as such policies are designed to consistently produce fair and accurate appraisals. The Board recommends that management consider the appraisal standards set forth in this proposed statement of policy in developing appraisal standards for their institutions.

The appraisal standards contained in the Appraisal Management and Appraisal Content sections of the proposed statement of policy are standards that were in part contained in the May proposal and the "R" Memoranda discussed above. It is the Board's experience that compliance with the appraisal standards contained herein will result in appraisals that report reliable estimates of collateral value upon which institutions can base lending decisions. Over the years, the Board has periodically updated the appraisal standards contained in this proposed statement of policy in response to market fluctuations and industry developments. The Board plans to continue this process of analysis and revision so that the guidance offered in the policy statement will stay current.

Finally, the Board notes that section 407 of CEBA requires it to issue supervisory guidelines "establishing an appraisal review system to avoid overly optimistic or conservative appraisals with the goal of achieving appraisals that are more consistent in reflecting underlying values." Section 407 also requires the Board to create an informal procedure for review of certain appraisal decisions. The Board is studying how best to implement these requirements, and expects to issue the necessary guidelines and establish appropriate procedures shortly. It plans, however, to accomplish these objectives through action separate from this rulemaking.

5. Solicitation of Comments

In placing this proposal before the public, the Board's objective is to initiate a process of comment and analysis that will enable the Board to adopt appraisal standards consistent with those of the Federal banking agencies. The Board has, moreover, designed this proposal to promote safety and soundness throughout the thrift industry. The Board solicits public comment on all aspects of the proposed rule.

The Board notes that its policy statement is proposed as an interpretative rule, which is not subject to the notice and comment provisions of the Administrative Procedure Act. 5 U.S.C. 553 *et seq.* The Board believes, however, that because the rule and the policy statement are closely related, the public interest will best be served by considering comment on the policy statement in conjunction with the rule that it is proposing to adopt. In this regard, the Board solicits comment on all aspects of the proposed rule and statement of policy and specifically asks whether the structures of either should in any way be reorganized. As noted earlier, the Board invites commenters to revise any comments they have submitted in response to the May proposal.

Initial Regulatory Flexibility Analysis

Pursuant to section 3 of the Regulatory Flexibility Act, 5 U.S.C. 603, the Board is providing the following initial regulatory flexibility analysis:

1. *Reasons, objectives, and legal basis underlying the proposed rule.* These elements are incorporated above in **SUPPLEMENTARY INFORMATION.**

2. *Small entities to which the proposed rule would apply.* The proposed rule would apply to all insured institutions without regard to size.

3. *Impact of the proposed rule on small entities.* All institutions, including small ones, should benefit from the safety and soundness resulting from investments in loans secured by property that has been valued in compliance with the revised appraisal standards set forth in the proposal. Moreover, inasmuch as the intent of the proposed rule is to require all institutions to adopt and maintain sound

underwriting standards including adequate appraisal standards, there is no disproportionate or adverse impact on small institutions.

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

5. *Alternatives to the proposed rule.* In the above **SUPPLEMENTARY INFORMATION,** the Board is soliciting comment on the rule as proposed.

List of Subjects in 12 CFR Parts 563 and 571

Accounting, Bank deposit insurance, Investments, Reporting and recordkeeping requirements, Savings and loan associations.

Accordingly, the Federal Home Loan Bank Board hereby proposes to amend Parts 563 and 571, Subchapter D, Chapter V, Title 12, *Code of Federal Regulations,* as set forth below.

SUBCHAPTER D—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

PART 563—OPERATIONS

1. The authority citation for Part 563 continues to read as follows:

Authority: Sec. 1, 47 Stat. 725, as amended (12 U.S.C. 1421 *et seq.*); sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 5B, 47 Stat. 727, as added by sec. 4, 80 Stat, 824, as amended (12 U.S.C. 1425b); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 2, 48 Stat. 128, as amended (12 U.S.C. 1462); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 401–407, 48 Stat. 1255–1260, as amended (12 U.S.C. 1724–1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., 1071.

2. Amend Part 563 by adding a new § 563.17–1a to read as follows:

§ 563.17–1a Appraisal policies and practices of insured institutions and service corporations.

(a) *Introduction.* The soundness of an insured institution's mortgage loans and real estate investments, and those of its service corporation(s), depends to a great extent upon the adequacy of the loan underwriting used to support these transactions. An appraisal standard is one of several critical components of a sound underwriting policy because appraisal reports contain estimates of the value of collateral held or assets owned. This rule sets forth the responsibilities of management to develop, implement, and maintain appraisal standards in determining compliance with the appraisal requirements of §§ 563.17–1 and 563.17–2 of this Part.

(b) *Definitions.*

For purposes of this section:

(1) "Management" means: the "directors" and "officers" of an insured institution as those terms are defined in §§ 563.31 and 561.32 of this chapter, respectively;

(2) "Market value" means: (i) The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: (A) buyer and seller are typically motivated; (B) both parties are well informed or well advised, and each acting in what he considers his own best interest; (C) a reasonable time is allowed for exposure in the open market; (D) payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and (E) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

(ii) Adjustments to the comparables must be for special or creative financing or sales concessions. No adjustments are necessary for those costs that are normally paid by sellers as a result of tradition or law in a market area; these costs are readily indentifiable since the seller pays these costs in virtually all sales transactions. Special or creative financing adjustments can be made to the comparable property by comparisons to financing terms offered by a third party institution lender that is not already involved in the property or transaction. Any adjustment should not be calculated on a mechanical dollar for dollar cost of the financing or concession, but the dollar amount of any adjustment should approximate the market's reaction to the financing or concessions based on the appraiser's judgment.

(c) *Responsibilities of management.* An appraisal is a critical component of a loan underwriting or real estate investment decision. Therefore, management shall develop, implement, and maintain appraisal policies to ensure that appraisals reflect professional competence and to facilitate the reporting of estimates of market value upon which institutions may rely to make lending decisions. To achieve these results:

(1) Management shall develop written appraisal policies that it shall implement in consultation with other appropriate personnel. These policies shall include, but are not limited to, all of the following requirements.

(i) Appraisals shall be based upon the definition of market value as set forth in paragraph (b)(2) of this section.

(ii) Appraisals shall be presented in a narrative format. An appraisal shall be sufficiently descriptive to enable a reviewer readily to ascertain the estimated value and the rationale for that estimate. The analysis of the market value estimate reported shall be commensurate in its detail and complexity with the complexity of the real estate appraised.

(iii) Appraisals shall disclose, analyze, and report in reasonable detail any prior sales of the property being appraised that occurred within the following time periods:

(A) For one-to-four family residential property, one year preceding the date when the appraisal was prepared;

(B) For all other property, three years preceding the date when the appraisal was prepared.

(2) Management shall develop and adopt guidelines and institute procedures pertaining to the hiring of appraisers to perform appraisal services for the insured institution. These guidelines shall set forth specific factors to be considered by management including, but not limited to, an appraiser's professional education, type of experience, and membership in professional appraisal organizations in determining whether to employ an appraiser.

(3) Management shall periodically, but at least semiannually, review the performance of all approved appraisers for compliance with (i) the institution's appraisal policies and procedures; (ii) section 571.1b of this subchapter; and (iii) the reasonableness of the value estimates reported.

(d) *Exemptions.* The requirements of paragraph (c)(1) of this section shall not apply with respect to:

(1) Appraisals on existing or proposed one-to-four family and existing multi-family properties prepared on forms approved by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation in compliance with the appraisal standards approved by those agencies. This exemption does not apply to proposed tract developments; or

(2) Appraisals on nonresidential properties prepared on form reports approved by the Board and completed in accordance with the applicable instructional booklet.

PART 571—STATEMENT OF POLICY

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

Authority: Sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402–403, 407, 48 Stat. 1256–1257, 1260, as amended (12 U.S.C. 1725–1726, 1730); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–48 Comp., p. 1071.

4. Amend Part 571 by adding a new § 571.1b to read as follows:

§ 571.1b Appraisal policies and practices of insured institutions and service corporations.

(a) *Purpose.* The purpose of this section is to offer to the management of insured institutions and service corporations the Board's views on appraisal policies and practices that comport with principles of safety and soundness. This section is intended as guidance. It is not prescriptive, nor does it have the force and effect of law. Therefore, insured institutions and service corporations may adopt appraisal standards different from those set forth in this section, however, and still be consistent with the principles of safety and soundness.

(b) *Definitions.*

For purposes of this section:

(1) "Management" shall have the meaning given in § 563.17–1a(b)(1) of this subchapter.

(2) "Market value" shall have the meaning given in § 563.17–1a(b)(2) of this subchapter.

(3) "Market value as is on appraisal date" means an estimate of the market value of a property in the condition observed upon inspection and as it physically and legally exists without hypothetical conditions, assumptions, or qualifications as of the date the appraisal is prepared;

(4) "Market value as if complete on appraisal date" means the market value of a property with all proposed construction, conversion, or rehabilitation hypothetically completed, or under other specified hypothetical conditions as of the date of the appraisal. With regard to properties wherein anticipated market conditions indicate that stabilized occupancy is not likely as of the date of completion, this estimate of value shall reflect the market value of the property as if complete and prepared for occupancy by tenants;

(5) "Market value upon completion of construction" means the prospective market value of a property on the date that construction is completed, based upon market conditions forecast to exist as of that completion date;

(6) "Market value upon reaching stabilized occupancy" means the prospective market value of a property at a point in time when all improvements have been physically constructed and the property has been leased to its optimum level of long term occupancy.

(c) *Appraisal management.* Management is obligated by regulation to take reasonable steps to ensure that all appraisals used to support credit and investment decisions report accurate values upon which to base lending decisions. Acceptable appraisals may include the following features:

(1) Management should provide appraisers with a letter of engagement that contains a legal description of the property, the interest to be appraised, the different value estimates requested, and copies of both the Corporation's requirements and the institution's written guidelines. Management should attach to the letter of engagement information pertinent to the property that is necessary to comply with these requirements to the extent that this information is available. Such information should include, but is not limited to, financing data, leases, purchase agreements, and profit and loss statements of the security property;

(2) Appraisals should be sufficiently current to reduce the likelihood that material changes in actual market conditions may have occurred by the time the loan or investment decision is made;

(3) Appraisals should reflect the market value of the rights in realty offered as security or as part of the transaction. All other values or interests appraised should be clearly labeled and segregated, e.g., value of chattels, value of financing terms, business value, funishings, fixtures, and equipment value;

(4) Appraisals should report the cost, income, and market approaches to market value unless the appraiser fully explains and supports the rationale for eliminating one or more approaches to such value;

(5) Appraisals should analyze and report in reasonable detail:

(i) Any current agreement of sale, option, or listing of the property being appraised if such information is available to the appraiser in the normal course of business;

(ii) A history of comparable sales used. If the subject property is located in a market where many of the sales prices of comparable properties have been increasing or decreasing at a rate faster than the growth or decline of the local economy, or the real estate inflation rate, such sales analysis should cover the time period of the multiple transactions and address artificially altered sales prices;

(6) An appraisal of a proposed project, improvement, or change in use should be based upon the most recent plans and specifications. If material changes in the plans and specifications could significantly reduce the estimated collateral value after a loan or investment decision has been made, management should take steps to ensure that a current estimate of value is established based on the final plans and specifications for the project. This may be satisfied by having the original appraiser recertify his value or by obtaining a new appraisal based on the final plans and specifications;

(7) Appraisal reports should contain a property supported estimate of the highest and best use of the property appraised that is consistent with the definition of market value set forth in paragraph (b)(2) of this section. Such estimate should be prepared whether or not the proposed use of the property is in fact the highest and best use. This highest and best use estimate should consider the effect on use and value of such factors as existing land use regulations, reasonably probable modifications of land use regulations, economic demand and supply, physical adaptability of the property, documentable property value trends, and optimal usage of the property. In addition, the appraisal should consider the effect on the property being appraised of anticipated public or private improvements, located on or off the site, to the extent that market actions reflect such anticipated improvements as of the appraisal date. Where appropriate, and in all cases involving proposed construction, development, or changes in use, the appraiser should specifically address, consider, and support the anticipated economic feasibility and cite all significant market data used in developing his conclusions. Such analyses should be presented in sufficient detail to support the appraiser's forecast of the probable success of the proposed use and should indicate whether this is in fact the highest and best use of the project. Moreover, if a market or economic feasibility study is prepared by someone othen than the appraiser, the appraiser should set forth the reasoning and rationale for accepting or rejecting that study, or any portion thereof;

(8) Appraisals on all properties should report an estimate of "market value as is

on appraisal date" as that term is defined in paragraph (b)(3) of this section;

(9) Appraisals on all properties wherein a portion of the overall real property rights or physical assets would typically be sold to their ultimate users over a future time period should report the following estimates of value: (i) "market value as is on appraisal date" as defined in paragraph (b)(3) of this section; (ii) "market value as if complete on appraisal date" as defined in paragraph (b)(4) of this section; and (iii) "market value upon completion of construction" as defined in paragraph (b)(5) of this section. Valuations involving such properties must fully reflect all appropriate deductions and discounts as well as the anticipated cash flows to be derived from the disposition of the asset over time. Appropriate deductions and discounts are considered to be those that reflect all expenses associated with the disposition of the realty as well as the cost of capital and entrepreneurial profit;

(10) Appraisals on all properties wherein anticipated market conditions indicate stabilized occupancy is not likely as of the date of completion should report the following estimates of value: (i) "market value as is on appraisal date" as defined in paragraph (b)(3) of this section ; (ii) "market value as if complete on appraisal date" as defined in paragraph (b)(4) of this section; (iii) market value upon completion of construction as defined in paragraph (b)(5) of this section; and (iv) "market value upon reaching stabilized occupancy on the date of stabilization" as defined in paragraph (b)(6) of this section. Such valuations should fully reflect the anticipated pattern of income and pertinent operating expenses during the absorption period as well as the impact upon the value estimates of rental and other concessions;

(11) Appraisals should reflect, in the valuation of fractional interests in the real estate, the accepted premise that it is inappropriate to arrive at the value of the whole by simply summing the fractional interests. Similarly, it is also inappropriate to arrive, without market support, at the value of a fractional interest in the real estate by merely subdividing the value of the whole into proportional parts. All anaylses involving fractional interests in the real estate, where the combined value of all interests or estates is not reported, should establish with market evidence whether the terms and conditions of the agreement creating the estate or fractional interest reflect market rates and terms.

(d) *Appraisal content.* The content of each appraisal accepted by an institution should follow generally accepted and established appraisal practices as reflected in the appraisal standards of the nationally recognized professional appraisal organizations. Specifically, each appraisal should:

(1) Be totally self-contained, with no pertinent information withheld, and not misleading so that when read by any third party, the appraiser's logic, reasoning, judgment, and analysis in arriving at a final conclusion indicate to the reader the reasonableness of the market value reported;

(2) Unequivocally identify, by legal description or otherwise, the real estate being appraised as this information is provided to the appraiser by management (management is obliged to ensure, prior to funding, that the appraised real estaste is described in a manner consistent with the description found in the institution's evidence of debt or encumbrance);

(3) Identify the property rights being appraised;

(4) Describe all salient features of the property being appraised;

(5) State that the purpose of the appraisal is to estimate market value as defined in paragraph (b)(2) of this section;

(6) Set forth the effective date(s) of the value conclusion(s) and the date of the report;

(7) Set forth the appraisal procedures followed and the data considered that support the reasoning, analyses, adjustments, opinions, and conclusions (including highest and best use) arrived at by the appraiser;

(8) As it relates to market comparable date analysis, be presented so that:

(i) It contains descriptive information presented with sufficient detail to demonstrate that the transactions were conducted under the terms and conditions of the definition of value being estimated, or have been adjusted to meet such conditions; have a highest and best use equivalent to the best use of the subject property; and that the selected properties are physically and economically comparable to the subject property; and

(ii) It includes a presentation and explanation of adjustments used in the analysis together with the appropriate market support.

(9) Contain a summary of actual annual operating statements for existing income-producing properties made available to the appraiser by the lender and/or borrower, together with a supported forecast of the most likely future financial performance. If the appraiser is told that actual operating statements are unavailable, the appraiser should identify the source of this information. The appraiser should report current rents and current vacancies;

(10) Set forth all material assumptions and limiting conditions that affect the analyses, opinions, and conclusions in the report. Such assumptions and limiting conditions may not result in either a non-market value estimate or one so limited in scope that the final product will not represent a complete appraisal. A summary of all such assumptions and limiting conditions shall be presented in one separate section within the appraisal;

(11) Include in the appraiser's certification (i) a statement that the appraiser has no present or prospective interest in either the property being appraised or with the parties involved; and (ii) a statement indicating that to the best of the appraiser's ability, the analyses, opinions, and conclusions were developed and the report was prepared in accordance with the standards and reporting requirements of the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 87-23661 Filed 10-19-87; 8:45 am]

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12 CFR Parts 525, 583, 584

[No. 87-1041]

Qualified Thrift Lender Test; Savings and Loan Holding Company Amendments; Federal Home Loan Bank Advances

Date: October 2, 1987.

AGENCY: Federal Home Loan Bank Board.

ACTION: Proposed rule.

SUMMARY: The Federal Home Loan Bank Board ("the Board"), as the operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC" or "Corporation") is proposing to amend its regulations governing savings and loan holding companies to implement the qualified thrift lender test recently enacted in the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 ("CEBA"). The CEBA amends section 408 of the National Housing Act, 12 U.S.C. 1730a, also

commonly known as the Savings and Loan Holding Company Act ("the SLHC Act"), to provide that the current exemption from the nonthrift activity restrictions for unitary savings and loan holding companies will be available only where the subsidiary institution, the accounts of which are insured by the FSLIC ("insured institution"), meets the new qualified thrift lender test. The CEBA also amends Section 10 of the Federal Home Loan Bank Act ("FHLBank Act"), 12 U.S.C. 1430, to reduce the eligibility for advances from the Federal Home Loan Banks ("FHLBanks") of member insured institutions that do not meet the qualified thrift lender test.

This proposed regulation sets forth the new qualified thrift lender test, which requires that an insured institution must maintain 60 percent of its tangible assets in housing and housing-related investments in order for the institution to have Qualified Thrift Lender ("QTL") status. The proposed regulations also implement the new statutory limitations on eligibility for advances and permissible holding company activities where an institution fails to maintain its QTL status.

DATE: Comments must be received by November 19, 1987.

ADDRESS: Send comments to Director, Information Services Section, Office of the Secretariat, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552. Comments will be available at this address for public inspection.

FOR FURTHER INFORMATION CONTACT: Christina M. Gattuso, Acting Regulatory Counsel (202-377-6649), Andrew C. Gilbert, Attorney (202-377-6441), Nancy M. Lytle, Attorney (202-377-6077), Regulations and Legislation Division, Office of General Counsel; Richard C. Pickering, Deputy Director (202-377-6770), Robert Pomeranz, Senior Policy Analyst (202-377-6730), Office of Policy and Economic Research; Thomas Sheehan, Director, Policy Analysis Division, Office of District Banks (202-377-6351); Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552; Linda S. Hallerman, Professional Accounting Fellow (202-778-2536), Office of Regulatory Policy, Oversight and Supervision; Federal Home Loan Bank System, 900 Nineteenth Street NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION:

I. Introduction; Statutory Authority

Section 104(c)(1) of the CEBA amends section 408 of the National Housing Act (12 U.S.C. 1730a) by adding a new subsection (o) entitled "Qualified Thrift Lender Requirements." CEBA, tit. I, sec. 104(c)(1), section 408(o). This provision sets forth a QTL test for all insured institutions, including both state-chartered and federal associations.

As stated in the legislative history of the CEBA, Congress' objective in promulgating the QTL provisions was one of "committing insured institutions to the unique, congressionally defined role of providing housing-related finance." H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 137 (1987). The key component of the QTL test is whether the institution's "actual thrift investment percentage" equals or exceeds 60 percent of its tangible assets on an average basis over time; that is, whether the institution consistently invests the stated majority of its tangible assets in certain "qualified thrift investments." Generally, these qualified investments are related to domestic real estate or manufactured housing but they include other assets that are incidental to the thrift's housing-related investments.

In addition to setting forth the QTL test and defining necessary terms, section 104(c) of CEBA provides a special transition period for state-chartered savings banks and a five-year disqualification for any institution that fails to maintain its QTL status. Moreover, certain exceptions and exemptions may be granted by the FSLIC. Finally, the CEBA requires the FSLIC to adopt regulations implementing the requirements of the QTL test that must be effective on or before January 1, 1988.

The CEBA provides that an insured institution's ability to qualify as a thrift lender may affect its ability to obtain advances from its FHLBank as well as the ability of any holding company parent and nonthrift affiliates of the institution to engage in certain nontraditional thrift activities. In particular, section 105 of the CEBA provides that member institutions that do not have QTL status will be eligible for advances only to the extent that they hold qualified thrift investments. Moreover, section 104(b) of the CEBA provides that the current exemption for unitary thrift holding companies from the activities restrictions in the Act will now be available only if the subsidiary thrift institution meets the QTL test. This dual impact of the QTL test is discussed in detail below.

II. Description of the Proposal

A. Definition of Qualified Thrift Lender

Section 104(c)(1) of the CEBA, provides that an insured institution shall have QTL status if the institution's qualified thrift investments equal or exceed 60 percent of the institution's total tangible assets, "on an average basis in 3 out of every 4 quarters and 2 out of every 3 years." Section 104(c) defines the term "qualified thrift investments" as the sum of (1) the aggregate amount of loans, equity positions, or securities held by the insured institution (or any subsidiary thereof) that are "related to domestic residential real estate or manufactured housing;" (2) the value of property used by the institution or its subsidiary in the conduct of the business of the institution or its subsidiary; (3) the types of liquid assets required to be maintained under section 5A of the FHLBank Act, 12 U.S.C. 1425a; and (4) 50 percent of the dollar amount of residential mortgages originated by the institution or its subsidiary and sold within 90 days of origination. CEBA, tit. I, sec. 104(c), section 408(o)(5)(B). The aggregate amount of the assets described in the latter two categories may not exceed 10 percent of the institution's tangible assets.

Beyond these specific statutory requirements, Congress has left to the Board fairly broad discretion to implement the requirements of the QTL test. In addition to the basis objective of "committing insured institutions to the unique, congressionally defined role of providing housing-related finance," Congress expressed its concern that the Board be "especially cognizant of the dangers of evasion that may be represented by various options for the calculation of the QTL test." H.R. Conf. Rep. No. 261 at 137. Congress charged the Board with adopting "regulations that minimize, to the extent feasible and without imposing undue burden on insured institutions, the risk of evasions of the QTL test." *Id.*

The Board proposes to accomplish its mandate under the CEBA by addiing to its regulations a new § 583.27.[1] Among the issues addressed by this proposal are the definition of housing-related investments (the major component of qualified thrift investments) and the implementation of the QTL test in a manner that is neither retroactive in effect nor unduly burdensome for institutions. As proposed, § 583.27(a)

[1] Although the QTL test affects both the area of advances, which is governed by Part 525, and the area of permissible activities for holding companies under Part 584, the new QTL regulation is placed in Part 583, the definitional regulations implementing the SLHC Act. This placement is consistent with Congress' action in the CEBA of introducing the QTL test through an amendment to section 408 of the SLHC Act. As discussed below, the changes to Part 525 proposed today incorporate by reference the QTL test in proposed section 583.27.

would implement the general QTL test and would define terms such as actual thrift investment percentage, tangible assets, and qualified thrift investments for purposes of the QTL test. The Board request comment on these as well as any other issues raised by the following discussion of the new regulation.

1. Housing-Related Investments

For purposes of the QTL test, the Board is proposing to enumerate those investments that are "related to domestic residential real estate and manufactured housing." In fashioning this list, the Board has taken a flexible approach consistent with the indications of congressional intent noted above. The Board is concerned that no investment be excluded if it meets the statutory criterion of being housing-related. Moreover, this inclusive approach will minimize disruption to industry efforts at building profitability and net worth. Thus, the Board has attempted to be as comprehensive as possible by including all types of investments currently made by insured institutions that may be viewed as related to their traditional role of encouraging thrift and facilitating private home ownership.

The list of housing-related investments in proposed § 583.27(c) includes all forms of home mortgages, home improvement loans, and loans made on the security of residential real estate or manufactured housing. Similarly, the list includes all investments acquired by the institution through foreclosure and liquidation of any of the aforementioned investments, as well as any other equity interests held by the institution and its subsidiaries in residential real estate. Definitions of key terms, such as home mortgage, residential real estate, and manufactured housing, are tied to existing definitions contained in federal statutes and regulations that are generally understood by and accessible to the entire industry.[2] In the Board's view, this approach is the best way to accomplish its goal of including all investments that traditionally and commonly are understood to be related to the provision of housing finance.

In addition to the more traditional housing related investments discussed above, proposed paragraph (c) also includes other types of investments that have become an essential and vital part of the housing finance marketplace. In particular, paragraph (c) includes stocks, bonds, and other securities issued or guaranteed by the FHLBanks, the newly established Financing Corporation, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Government National Mortgage Association and obligations issued by the FSLIC. These agencies and quasi-governmental instrumentalities play an important role in facilitating the modern housing finance market. Congress often has recognized the crucial importance of the secondary mortgage market and has sought to promote participation in it by private parties, including insured institutions. *See, e.g.*, Secondary Mortgage Market Enhancement Act of 1984, Pub. L. No. 98-440, 98 Stat. 1689 (1985).

Indeed, the CEBA, by its own terms, evidences congressional recognition of the significant role played by thrifts in the secondary mortgage market, as well as the importance of that market in securing affordable home finance. Specifically, section 104(c)(1) includes, as a component of qualified thrift investments, a portion of the dollar value of new mortgages originated by the institution and sold into the secondary market. CEBA, tit. I, sec. 104(c)(1), section 408(o)(5)(B). Thus, in this light, the Board does not hesitate to include all forms of mortgage-related securities as housing-related investments under proposed § 583.27(c). For example, these securities include pass-through participation type certificates as well as pay-through bonds. This would include, but is not limited to, any portion or tranche of a collateralized mortgage obligation or REMIC. It also includes any type of derivative product currently existing or hereafter created, such as so-called residual or stripped securities (assuming such instruments are an authorized and permissible part of the institution's portfolio.) The aforementioned securities are meant to be illustrative and not exhaustive of the types of qualifying investments in the continually evolving mortgage-related securities marketplace.

As proposed, § 583.27(c)(10) includes as qualified investments any investment in a corporation, partnership, or trust whose primary activities include servicing residential real estate loan portfolios, developing residential real estate housing located in any State, or any other housing related activities such as domestic residential loan origination or the sale of residential loans. A company is considered to have its primary activity in such activities if it derives more than half its annual gross revenues from such activities. The Board recognized that servicing a mortgage loan portfolio is an important thrift activity particularly in connection with the secondary market. Moreover, such activities clearly are related to the provision of housing finance.

The Board specifically solicits comment on whether an investment in an entity that derives less than 50 percent of its primary revenue from housing related investments should be treated as a qualified thrift investment to the degree to which such entity derives its reserves from housing-related activities. For example, if a company derives 30 percent of its revenues from housing related activities, should a thrift be permitted to count 30 percent of its investment in this company as a housing-related investment.

Similarly, some institutions have become increasingly involved in providing financing (which may take the form of a debt issuance or an equity investment) to firms that develop real estate. If the real estate project involves the development of domestic residential real estate, then the investment is sufficiently related to the provision of residential housing to be included as a qualified thrift investment. The Board is aware that some of these investments may involve acquisition, development, and construction loans. The Board is proposing that, for purpose of this rule, land loans, as defined in 12 CFR 561.18, on a particular project could not be counted toward meeting the 50 percent test under paragraph (c)(10) until actual construction of residential housing has begun. This treatment is consistent with the treatment of land loans under Board regulations regarding equity risk investments (12 CFR 563.9-8, *as amended*) and regulatory capital (12 CFR 563.13 (1987)). *See* 52 FR 23787, 23800 (June 25, 1987) (final rule on equity risk investment); 51 FR 3365, 33581 (Sept. 22, 1986) (final rule on minimum capital requirements). The Board, however, specifically requests comments on whether such investments should be included before actual construction begins if an insured institution can document the residential purpose of the loan. Commenters may also wish to address what would be adequate documentation under these circumstances.

Moreover, as proposed, the regulation would allow an institution to count any investments in state housing corporations and community

[2] The definitions referenced in the regulation are themselves comprehensive, including, for example, leaseholds, condominiums, cooperatives and mixed business/residential property. Moreover, since the statute specifies "domestic" real estate or manufactured housing, the regulation requires a connection between the investment and any "State". Among the various existing alternative definitions of "State," the Board again selected the most comprehensive. *Compare* 12 U.S.C. 1464(c)(5) *with* 12 CFR 521.11 (1987).

development projects. Also included in the proposal would be investments in obligations of any state or political subdivision that are issued for the purpose of providing financing for residential housing or incidental services. The term incidental services is intended to include municipal projects that are related to the public financing and maintenance of housing, for example, municipal bonds floated for the purpose of constructing or repairing a neighborhood sewage system. The Board specifically requests comment as to the inclusion of this category of investments.

The Board notes that proposed paragraph (c) is not intended to expand, contract, or otherwise affect an institution's investment authority under relevant statutes and regulations. Specifically, insured institutions may only invest in those assets listed in paragraph (c) to the extent they have independent legal authority, under either law or regulation, to make such investments. To the extent an institution has independent legal authority to make an investment, section 583.27(c) sets forth those investments that may be counted as qualified thrift investments for purposes of meeting the QTL test.

Finally, consistent with the flexible approach taken here, proposed paragraph (c)(11) expressly provides that the Office of Regulatory Policy, Oversight and Supervision ("ORPOS") may issue T-Memoranda that list particular investments that qualify as housing-related investments under paragraph (c) but are not specifically listed in the regulation. This approach is similar to the approach taken in ORPOS Memorandum T-2-3h (April 25, 1985) with respect to liquid assets and permissible investments for Federal associations. The Board intends that this provision will update its guidance to the industry and will help keep implementation of the regulation as current as possible to accommodate rapidly changing market conditions and innovations, particularly in the area of asset securitization.

2. Other Types of Qualified Thrift Investments

In addition to the housing-related component described above, the statutory definition of qualified thrift investments contains several other components. These include (1) property used by the institution or its subsidiary in the conduct of its business; (2) liquid assets of the type required to be maintained under section 5A of the Federal Home Loan Bank Act (12 U.S.C. 1425a), and (3) 50 percent of the dollar amount of mortgages originated by the institution or its subsidiary and sold within 90 days of origination. Under the statute, the latter two categories of investments may be counted as qualified investments only up to a combined aggregate amount not to exceed ten percent of the institution's tangible assets. As proposed, §§ 583.27(b)(ii) and (iii) mainly track and condense the statutory language of the CEBA. *See* CEBA, tit. 1, sec. 104(c)(1), section 408(o)(5)(B)(ii), (iii), (6). These provisions are fairly self-explanatory with certain clarifications added where appropriate.

First, § 583.27(b)(3)(i) specifies that the calculation of the aggregate amount of all housing-related loans, equity positions and securities of the institution and its subsidiary is based on the aggregate net amount of such investments as reported on an institution's monthly and quarterly reports to the Board. Thus, any such investment would not include contra assets such as loan allowances or discounts. Accrued interest on an eligible investment, however, would be included.

Second, § 583.27(b)(3)(ii) specifies that the book value of business property used by the institution or its subsidiary, as opposed to other measures such as market value, is the basis on which to determine the value of the business property. As used in this section, book value means the historical cost of the asset, *i.e.*, the actual amount paid at the date of acquisition, less depreciation. *See* Accounting Principles Board, *Opinion No. 12.* In the Board's view, the book value of an institution's business property is an appropriate measure for purposes of this regulation because it is the basis on which institutions carry such fixed assets on their financial statements and reports to the Board.

Third, paragraph (b)(3)(iii)(A) references 12 CFR 523.10, the Board's regulation that lists investments that qualify as liquid assets pursuant to section 5A of the Federal Home Loan Bank Act. The Board notes that institutions should consult ORPOS Memorandum T-2-3h, dated April 25, 1985, which lists specific assets that qualify as liquid assets for purposes of § 523.10.

The Board notes that the CEBA only permits the inclusion of the institution's liquid assets and not those of its subsidiaries. The Board assumes that the omission of subsidiaries with regard to liquid assets is deliberate since liquid assets maintained under section 5A of the FHLBank Act (12 U.S.C. 1425a) may include particular investments, such as certain corporate debt or commercial paper, that are completely unrelated to housing finance. In possible contrast to the holding of such investment by some subsidiary, when such an investment is held by the insured institution itself, as required by the liquidity statute, it is related to the ongoing conduct of the institution's business as a thrift business. Indeed, the liquidity statute, section 5A of the FHLBank Act, is itself only applicable to insured institutions, not to their subsidiaries. Thus, § 583.27(b) tracks the statutory language and excludes investments of the type required by the liquidity statute where these are held by a subsidiary as opposed to the insured institution itself.

Finally, paragraph (b)(3)(iii)(B) specifies that only those mortgages sold by the thrift or its subsidiary during the calendar quarter for which the actual thrift investment percentage is being calculated may be counted as qualified thrift investments for any given quarter.

3. Tangible Assets

As proposed § 583.27(b)(2) defines total tangible assets as total unconsolidated assets of the insured institution minus goodwill and any other intangibles such as purchased mortgage loan servicing rights, purchased deposit base and branch network, and leasehold improvements net of accumulated depreciation. In setting forth the QTL test and in defining "actual thrift investment percentage," the CEBA does not specify that total tangible assets are to be calculated on a consolidated or unconsolidated basis. CEBA, tit. I, sec. 104(c), section 408(o)(1), (5)(A). In the implementing regulations, the Board proposes to require such calculations on an unconsolidated basis; *i.e.*, only assets of the institution itself, as opposed to any subsidiaries, need be included in the calculation of total tangible assets. The Board believes that such an interpretation is most consistent with the letter and spirit of the QTL test.

Other sections of the statute expressly provide for consolidation of any subsidiaries of the institution. There is no indication that the omission is anything but deliberate in the case of tangible assets. Indeed, it does not appear to the Board that Congress intended to limit the activities of authorized subsidiaries primarily to ventures that are housing-related—a possible consequence were these assets to be consolidated with the parent thrift institution. Indeed, the statutory and regulatory authorizations for insured institutions having service corporations and operating subsidiaries presumes that much of this authority will be used for non-housing related ventures.

4. Effective Date and Implementation

Section 104(c)(1) of the CEBA provides that the institution shall have QTL status if its actual thrift investment percentage continues to equal or exceed 60 percent "on an average basis in 3 out of every 4 quarters and 2 out of every 3 years." CEBA, tit. I, sec. 104(c)(1), section 408(o)(1)(B). The legislative history gives little guidance as to how this provision should be implemented. *See* H.R. Conf. Rep. No. 261 at 136. The CEBA, however, directs that these regulations must be effective on or before January 1, 1988, the date on which all insured institutions must begin to comply with the new QTL provisions. Moreover, these new regulations must "minimize, to the extent feasible and without imposing an undue burden on insured institutions, the risks of evasion of the QTL test." *Id.* at 137.[3] Finally, the CEBA provides a penalty of five years' disqualification for any institution that fails to maintain its status as a QTL. CEBA, tit. I, sec. 104(c)(1), section 408(o)(4).

The Board proposes to implement these provisions in the manner set forth in § 583.27(a) (1) and (2). Under paragraph (1), all institutions are deemed to have QTL status as of January 1, 1988. This is the effective date of the QTL regulation and the date from which all relevant data can now be compiled and compliance calculated. As an alternative, the Board might have directed that a "snapshot" be taken on that date to ascertain which institutions would have QTL status on the basis of the newly promulgated definitions and calculations set forth in § 583.27. The Board believes, however, that as a practical matter, and as a matter of prudent regulation, this approach would constitute an undue and unfair burden to those institutions and their holding companies that would thereby suffer the consequences of not having QTL status, especially given the mandatory five year disqualification that would follow. An institution cannot know with any acceptable degree of certainty how to comply with the new QTL provisions until final promulgation of this regulation. Such promulgation and the concomitant exercise of discretion by the Board are expressly provided by Congress. Furthermore, the statutory requirement that an institution meet the 60 percent level on an average basis over a period of years seems to belie any interpretation that QTL be determined by a single "snapshot" on January 1, 1988.

As of the January 1, 1988 effective date then, insured institutions are responsible for tracking data according to new reporting schedules now being prepared by Board staff. The first reports for the new QTL investment schedule will be made for the calendar quarter ending March 31, 1988. Under section 583.27(a)(1) an institution would lose its QTL status at the close of any calendar quarter during which the institution had failed to maintain its actual thrift investment percentage at or above 60 percent, which failure made it mathematically impossible for the institution to meet the 60 percent test during three out of every four calendar quarters *for each of* two out of every three calendar years. Thus, the earliest point at which an institution would lose its QTL status is June 30, 1989, assuming the institution fails the 60 percent test in at least two of the quarters in the first year and in the first two quarters of the second year following January 1, 1988.[4]

The Board has preliminarily determined that newly chartered insured institutions should receive the same treatment as existing institutions; that is, they will be deemed to have QTL status as of the date of their charter. Counting from the first full reporting quarter following the charter, and looking towards the successive three calendar month periods thereafter, the *de novo* institution would lose its QTL status at the close of any calendar quarter during which the institution's investment percentage fell below 60 percent, and which shortfall made it impossible for the institution to meet the 60 percent test during three out of every four calendar quarters for each of two out of every three twelve month periods following the charter. The Board intends to give *de novo* institutions the same benefit of a prospective phase-in enjoyed by existing institutions. However, the Board also realizes that under this alternative calculations and monitoring will not necessarily occur on the same calendar year cycle as with existing institutions. The Board specifically requests comments and suggestions for how best to implement this aspect of the proposal.

In order to prevent evasions, the proposed regulation directs that compliance be monitored on a calendar year and quarterly-reporting basis. Calculations of actual thrift investment percentages are to be made on an average basis by taking the sum of an institution's qualifying thrift investments at the end of the calendar quarter being measured and at the end of each of the three immediately preceding months, and dividing by the sum of the institution's total tangible assets at the end of these same four months. While the Board believes that its approach will minimize evasions of the statutory requirement, it specifically solicits comment on whether a PSA should be authorized to calculate the average based on dates other than those listed in the regulation, if the PSA determines that the institution is engaging in transactions to remove certain assets from its books temporarily for purposes of meeting the QTL test. The Board also requests comment and suggestions on alternative ways in which to implement the averaging requirement.

In the Board's view, the approach taken in the proposed regulation appears to be the most reasonable way to implement the new QTL test. The Board requests comment on these important aspects of the proposed regulation, and the Board welcomes suggestions as to alternative approaches as well as estimates as to the impact of the provisions under the various alternatives.

5. FSLIC Exceptions; Special Phase-In For Certain Institutions

Section 104(c) of the CEBA allows a ten-year transition to QTL status for institutions chartered as state savings banks or cooperatives before October 15, 1982. Proposed § 583.27(d) implements these provisions. CEBA, tit. I, section 104(c)(1), section 408(o)(2). The statutory language is tracked and somewhat condensed in the proposed regulation.

Under section 104(f) of the CEBA, a state savings bank or cooperative bank that is insured by the Federal Deposit Insurance Corporation may be deemed an insured institution if the FSLIC, upon application, determines that the bank is a qualified thrift lender. The Board believes that such state savings institutions, and any holding company, would enjoy the potential benefits of the special ten year phase-in described above, assuming it met the relevant criteria of § 583.27(d). The Board specifically requests comment on this provision and its implementation.

The statute also gives the FSLIC the authority to grant temporary exceptions from the QTL test. These provisions are contained in paragraph (c) of the

[3] "Specifically, these regulations should provide that compliance with the qualified thrift lender requirements be determined on the basis of data that accurately and currently reflect investments made by insured institutions, and should prevent or disregard short-term investment portfolio changes designed to evade or circumvent the intent of the QTL test." *id.*

[4] In effect, the proposal contemplates a phase-in of the QTL test. In the Board's view, such a phase-in is consistent with the letter and spirit of the CEBA. *See* S. Rep. No. 19, 100th Cong., 1st Sess. 39 (1987).

proposed regulation. By the terms of the statute, such exceptions are temporary and limited to extraordinary circumstances, when, for example, mortgage demand is depressed to such an extent that an institution cannot meet the asset composition requirement; or to facilitate acquisitions and mergers under sections 406(f) and 408(m) of the National Housing Act. The Board requests comment as to other types of "extraordinary circumstances" for which the FSLIC appropriately could grant exemptions.

B. Savings and Loan Holding Companies

The SLHC Act originally was enacted to give the Board comprehensive authority over savings and loan holding companies ("S&L holding companies") and their subsidiaries and to guard against the potential conflicts of interest that were thought to exist in the holding company structure. *See* S. Rep. No. 354, 90th Cong., 1st Sess. 1–2 (1967). The Board's regulations at Parts 574, 583 and 584 implement this authority.

A S&L holding company is a company that directly or indirectly controls an insured institution, *i.e.*, a FSLIC-insured institution or a federally chartered bank insured by the Federal Deposit Insurance Corporation. *See* 12 U.S.C. 1730a(1)(D). There are generally two types of holding companies. A "unitary" S&L holding company is a holding company that directly or indirectly controls only a single subsidiary insured institution. Subject to two relatively minor conditions,[5] a unitary S&L holding company and its nonthrift subsidiaries traditionally have enjoyed the authority to engage in a broad range of business activities unrelated to the provision of housing finance. 12 CFR 584.2–2 (1987).

A multiple S&L holding company is a holding company that directly or indirectly controls two or more insured institutions. 12 CFR 583.12 (1987). In contrast to a unitary S&L holding company, a multiple S&L holding company historically has been subject to stringent statutory restrictions on its activities that generally are required to be closely related to the activities of their subsidiary insured institutions. 12 U.S.C. 1730a(c) (1) & (2) (1982 & Supp. III 1985); 12 CFR 584.2, 584.2–1 (1987). Before the CEBA's enactment and pursuant to its authority under the SLHC Act to designate additional permissible activities, the Board permitted multiple S&L holding companies, subject to certain limitations, to engage in additional activities such as certain real estate activities, data processing and insurance underwriting. *See* 12 CFR 584.2–1 (1987), for a comprehensive list of permissible activities.

Section 104(b) of the CEBA completely revises section 408 of the SLHC Act, 12 U.S.C. 1730a(c), which governs the activities of S&L holding companies, to apply the new qualified thrift lender test to S&L holding company activities.[6] First, the CEBA preserves the current exemption from the nonthrift activity restrictions in the SLHC Act for unitary holding companies (or subsidiaries thereof) if the subsidiary insured institution meets the QTL test. CEBA, tit. I, sec. 104(b), section 408(c)(3). The CEBA also exempts from the nonthrift activity restrictions those S&L holding companies (or subsidiaries thereof) that control more than one insured institution if all, or all but one, of such institutions were acquired pursuant to a supervisory acquisition, and all the subsidiary insured institutions meet the QTL test. *Id.*

With respect to multiple S&L holding company activities, section 104(b) of the CEBA restricts such companies to those activities that were permissible for multiple S&L holding companies as of March 5, 1987, as well as additional activities determined by the Federal Reserve Board to be permissible for bank holding companies under section 4(c)(8) of the Bank Holding Company Act, subject to any Board limitations and restrictions. Effectively, the CEBA deleted from the SLHC Act the authority of the Board to approve new activities for multiple S&L holding companies and substituted for it the authority for S&L holding companies to engage, subject to Board approval, in those activities deemed permissible for bank holding companies. *Compare* 12 U.S.C. 1730a(c)(2)(F) (1982 & Supp. III 1985) *with* CEBA, tit. I, sec. 104(b), section 408(c)(2)(F).

As a result of the CEBA amendments to the SLHC Act, the Board is required to amend its Regulations for Savings and Loan Holding Companies, 12 CFR Parts 583, 584. As discussed above, the Board proposes to amend Part 583 to include the qualified thrift lender test. Part 584 would be amended to reflect the effect of the QTL test on the permissible activities of S&L holding companies. This effect is directed mainly to the activities of what are now commonly known as unitary S&L holding companies. Part 584 would contain new restrictions, exemptions, and grandfathering provisions applicable to S&L holding companies and also would incorporate the CEBA's prescribed list of permissible activities for S&L holding companies. In order to track the statutory language of the CEBA, which does not use the terms "multiple" or "unitary", the proposed regulation refers to "exempt and grandfathered S&L holding companies" and "S&L holding companies," which are those that are neither exempt nor grandfathered.

1. S&L Holding Company Activities

The Board today is proposing to amend section 584.2 concerning prohibited holding company activities to reflect the new limitations on nonthrift activities for S&L holding companies. In accordance with the statutory requirement, section 584.2(b) would prohibit an S&L holding company or its nonthrift subsidiaries from commencing or continuing any activities other than: (1) those activities set forth in CEBA tit. I, sec. 104(b), § 408(c)(2)(A)–(E); (2) those activities already approved by the Board through regulation as permissible activities in 12 CFR 584.2; 584.2–1 (1987); and (3) those nonbanking activities permissible for bank holding companies pursuant to regulations issued by the Federal Reserve Board under section 4(c)(8) of the Bank Holding Company Act ("BHCA nonbanking activities").[7]

The proposal would require a S&L holding company to conform its existing activities to the new limitations set forth in section 104(b) within two years after August 10, 1987, *i.e.*, by August 10, 1989, or the date on which the company becomes an S&L holding company, whichever is later. CEBA, tit. I, sec. 104(b), § 408(c)(1)(C). This grace period for compliance is not available to S&L holding companies that received approval to acquire control of an insured institution between March 5, 1987 and August 10, 1987 (the date of enactment of the CEBA). *Id.* section 408(c)(6)(A). Pursuant to section 104(b)(6)(A), such companies are required to conform their activities as of August 10, 1987, to the new list of

[5] These conditions are (1) the company may not engage in activities for the purpose or effect of evading applicable laws and (2) the company must qualify as a domestic building and loan association under section 7701(a)(19) of the Internal Revenue Code. *See* 12 U.S.C. 1730a(a), (n) (1982 & Supp. III 1985); 12 CFR 584.2, 584.2–1 (1987).

[6] Title I of the CEBA makes various other amendments to the SLHC Act that may necessitate changes to Board regulations. The Board today is only proposing the changes necessary to implement the effect of the QTL test on S&L holding company activities. The Board anticipates, however, that it will at some later date propose other changes to Parts 574, 583 and 584 which may be necessary to implement other sections of Title I.

[7] As discussed below, special application procedures are required for S&L holding companies to engage in these newly authorized activities.

permissible activities for S&L holding companies. *Id.*

2. *Exempt and Grandfathered S&L Holding Company Activities*

As discussed above, section 104(b) of the CEBA amends section 408(c) of the Act to provide that the current exemption from nonthrift activity restrictions for unitary S&L holding companies will be available only if the subsidiary insured institution meets the QTL test. In addition, section 104(b) of the CEBA exempts from the activity restrictions any S&L holding company (or any subsidiary thereof) that controls more than one insured institution, if all, or all but one, of the subsidiary insured institutions of such company were acquired under sections 408(m) or 406(f) of the Act *and* all of the subsidiary insured institutions of such company satisfy the QTL test (collectively "exempt S&L holding companies"). *Id.* section 408(c)(3). It also exempts foreign S&L holding companies with respect to activities conducted exclusively in a foreign country. *Id.* section 408(c)(7).

As described above, proposed § 583.27 would set forth the QTL test and would provide that an insured institution must have 60 percent or more of its tangible assets in housing and related investments in order to maintain its QTL status. If the subsidiary insured institution meets the QTL test, its parent S&L holding company would continue to have no limits on its nonthrift activities conducted directly or indirectly through a subsidiary.[8]

Section 104(b) of the CEBA provides certain grandfather rights for those S&L holding companies that received approval to acquire an insured institution prior to March 5, 1987. *Id.* Section 408(c)(6)(B). Specifically, the CEBA grandfathers the activities in which such an S&L holding company was engaged on March 5, 1987. The legislative history specifically indicates that this provision applies to a unitary S&L holding company whose subsidiary thrift does not meet the QTL test. It is the Board's view that this grandfather provision also applies to those S&L holding companies that became multiple S&L holding companies by virtue of receiving approval to acquire troubled thrifts prior to March 5, 1987. The Board believes that its view is consistent with the CEBA in that section 104(b) exempts such multiple S&L holding companies from the limitations on activities. *See id.* section 408(c)(3)(B). Thus, it follows that these same holding companies also should be afforded grandfather status under the CEBA. *See id.* section 408(c)(6)(B).

Pursuant to the CEBA, these grandfathered S&L holding companies maintain their grandfathered status so long as: (1) The holding company does not acquire any additional insured institutions other than troubled thrifts pursuant to sections 406(f) and 408(m) of the National Housing Act; (2) any insured institution subsidiary continues to meet the test under section 7701(a)(19) of the Internal Revenue Code;[9] (3) the holding company does not engage in any new activity in which it was not engaged on March 5, 1987, and that is not included among the permissible activities identified in existing section 584.2–1; (4) any insured institution subsidiary does not increase the number of its business locations (other than increases on account of acquiring troubled thrifts); and (5) any insured institution subsidiary does not permit or incur any overdraft at a Federal Reserve Bank on behalf of an affiliate. Upon the occurrence of any of those events, these S&L holding companies lose their grandfathered status and become subject to the limitations on S&L holding company activities. *Id.* section 408(c)(1)(C).

Not only may S&L holding companies lose their grandfathered status, but section 104(b) of the CEBA also provides that the FSLIC may terminate any grandfathered activity. *Id.* section 408(c)(6)(D). Before terminating any such activity, the FSLIC must afford the S&L holding company opportunity for a hearing. *Id.* Any decision to terminate a grandfathered activity must be based on a finding that (1) such termination is necessary to prevent conflicts of interest or unsafe and unsound practices, or (2) the termination is in the public interest. *Id.*

Additionally, section 104(b) of the CEBA provides a grace period for certain holding companies whose insured institution subsidiaries fail to maintain qualified thrift lender status. This grace period is available to (1) any unitary S&L holding company and (2) a unitary S&L holding company that becomes a multiple holding company as a result of acquiring troubled thrifts. *Id.* section 408(c)(5). The grace period permits such holding companies, upon a showing of good cause, up to three years to comply with the activities limitations on S&L holding companies. *Id.*

The Board today is proposing to add a new section 584.2a that would parallel section 104(b) of the CEBA. Paragraph (a)(1) of proposed § 584.2a describes those S&L holding companies that are exempt from the nonthrift activities restrictions provided that their insured institution subsidiaries meet the QTL test. If the subsidiary insured institutions of such companies fail the QTL test, the companies lose their exemption and must conform their activities to those prescribed for S&L holding companies. Consistent with the CEBA, proposed § 584.2a(a)(2) provides for a grace period of up to 3 years for any such company, upon a showing of good cause. Paragraph (b) would set forth the grandfather rights applicable to certain S&L holding companies that acquired insured institutions prior to March 5, 1987.

Paragaph (c) would set forth the authority of the FSLIC to terminate, after an opportunity for a hearing, any such grandfathered activity of a grandfathered S&L holding company. The Board proposes that the FSLIC makes an initial finding that grounds exist for termination and, upon such a finding, the FSLIC would notify the affected company, which in turn may request a hearing. In this regard, the Board specifically requests comment on what type of procedures should be adopted for such hearings.

3. Permissible S&L Holding Company Activities and New Nonthrift Activities

In light of the CEBA, the Board today is proposing to make a technical amendment to existing § 584.2–1, which describes permissible activities for multiple holding companies and their nonthrift subsidiaries as promulgated under the "proper incident" authority of prior section 408(c)(6) of the SLHC Act. This authority has been deleted by the CEBA but the activities listed in existing § 584.2–1 remain intact although the FSLIC cannot add any additional activities to the list. *See id.* section 408(c)(2)(F)(ii). The technical amendment would add a reference to § 584.2–1 to conform it to the CEBA provisions.

As discussed above, the CEBA also provides that, with prior Board approval, S&L holding companies may engage in those nonbanking activities

[8] The S&L holding company would be subject to the CEBA's moratorium, however. This moratorium is in effect until March 1, 1988, and prohibits any new affiliations between insured thrift institutions and firms engaged principally in certain securities activities. CEBA, tit. I, sec. 106.

[9] In order to qualify for tax treatment as a domestic building and loan association, a thrift institution must: (1) be a FSLIC-insured institution or be subject to supervision and examination by state or federal authority having supervisory powers over such associations; (2) be principally engaged in the business of acquiring the savings of the public and investing in loans; and (3) devote 60 percent of its total assets to certain investments listed in section 7701(a)(919). 26 U.S.C 7701(a)(19) (1982 & Supp. III 1985).

that the Board of Governors of the Federal Reserve System ("FRB") has determined "by regulation" to be permissible for bank holding companies under section 4(c) of the Bank Holding Company Act ("BHC Act") *Id.* section 408(c)(2)(F)(i). This effectively permits S&L holding companies to engage in the same nonbanking activities as bank holding companies, thereby effecting an "equalization" of bank holding company and S&L holding company powers.

The nonbanking activities in which bank holding companies may engage are listed in the FRB's Regulation Y at 12 CFR 225.25 (1987). These activities (currently numbering twenty-four) were promulgated under the FRB's authority under section 4(c)(8) of the BHC Act to approve certain activities considered so closely related to banking as to be properly incident thereto.[10] Under the same authority, the FRB also may approve by order additional nonbanking activities proposed by applicants that are not included in the § 225.25 list ("unlisted activities"). *See* 12 CFR 225.23 (a)(3) & (d)(2). The FRB periodically initiates a rulemaking to incorporate into the section 225.25 list those unlisted activities approved by order. While the CEBA specifically refers to those bank holding company activities that the FRB has approved by regulation, the legislative history is silent on whether Congress also intended to authorize those activities approved by order under the FRB's regulations. While the Board has initially determined to include both listed and unlisted activities as permissible nonthrift activities, it specifically requests comment on whether such unlisted activities are properly included within the scope of the regulation.

The CEBA specifies that this new authority to engage in BHC nonbanking activities is subject to prior approval by the FSLIC. CEBA, tit. I, sec. 104(b), section 408(c)(2)(F)(i). The CEBA further gives the FSLIC discretion to prohibit or limit any of these new activities.[11] As indicated above, the Board proposes initially to authorize all the BHC nonbanking activities set forth in 12 CFR 225.25 as permissible nonthrift activities as well as those activities approved by order of the FRB under § 225.25(d)(2). Based on its experience in implementing this provision, the Board reserves the right to limit or restrict such activities.

Based on the authority of section 17 of the Federal Home Loan Bank Act,[12] the Board proposes to delegate responsibility to approve applications to engage in these new activities to the Principal Supervisory Agent ("PSA") of the district in which the insured institution is located. In the Board's view this represents the most efficient allocation of its limited resources and will give the Board the opportunity to observe the degree of interest institutions show in engaging in these activities. Under the proposal, the PSAs will make initial determinations concerning these applications unless the PSA, upon notice to the applicant, refers the application to the FSLIC because it raises issues of law or policy inappropriate for resolution by the PSA. Proposed § 584.2-2 (b) and (c) set forth the Board's recommended scheme for consideration of applications under this section. The specific procedures and time frames would follow those set forth in the new guidelines for application processing required by section 410 of the CEBA which the Board also adopted today. *See* Board Res. No. 87-1038, published elsewhere in this issue of the **Federal Register** (to be codified at 12 CFR 571.12).

As proposed, § 584.2-2 sets forth the factors that the CEBA requires to be taken into consideration in reviewing such applications: (1) Whether the activity would be expected to produce benefits to the public; (2) the managerial resources of the companies involved and (3) the adequacy of the financial resources, including capital, of the companies involved. *See id.* section 408(c)(4)(B).

In evaluating applications under this section, the PSAs will be directed to take these factors into account. Pursuant to the authority in section 104(b)(4)(C) to distinguish between *de novo* applications and acquisitions of a going concern, the Board proposes that § 584.2-2 will specify that an application to engage in activities *de novo* is presumed to result in benefits to the public through increased competition unless the record demonstrates otherwise. *Id.* section 408(c)(4)(C). As required by the CEBA, the PSA will issue a written decision containing the reasons for its approval or disapproval of the application. *Id.* section 408(c)(4)(D). If the application is referred to the FSLIC because it raises issues of law or policy, the FSLIC shall act on the application in accordance with the procedures set forth at 12 CFR 571.12. *See* Board Res. No. 87-1038. The Board notes that, to the extent an activity is listed both in § 584.2-1 and § 225.25, an applicant need only follow the notice procedures set forth in § 584.2-1 and is not required to file an application to engage in such activity pursuant to proposed § 584.2-2. In this regard, the Board solicits comment on whether the notice procedures under § 584.2-1 should be revised to track the new guidelines for applications set forth in § 571.12.

C. Impact of the QTL Test on Eligibility for FHLbank System Advances

Section 105 of the CEBA amends section 10 of the FHLBank Act, 12 U.S.C. 1430, by adding a new paragraph (e) entitled: "Reduced Eligibility For Advances For Certain Members That Are Not Qualified Thrift Lenders." This new paragraph provides that, except for certain exemptions, a member of the FHLBank System that is not a qualified thrift lender may not receive advances in excess of the amount determined by multiplying the amount that the member otherwise would be able to receive by the member's actual thrift investment percentage. The latter component has the same meaning it has given in the QTL provisions section 104(c)(1) of the CEBA; *i.e.*, the percentage of an institution's total tangible assets that constitute qualified thrift investments. CEBA, tit. I, sec. 104(c)(1), section 408(o)(5)(A). The first component, the member's general eligibility for advances, is determined under section 10(c) of the FHLBank Act. That paragraph, which is unchanged by CEBA, limits the aggregate outstanding advances to a member made by its FHLBank to twenty times the amounts paid in by the member for its capital stockholdings in the FHLBank. Subject to that upper limit, the statute leaves to each FHLBank the discretion to determine particular applications for advances based upon the Bank's credit and collateral requirements.

Thus, for example, if a member institution holds $5 million in FHLBank capital stock, it generally would be eligible for up to $100 million in FHLBank advances, subject to the Bank's credit and collateral requirements. If the institution is not a QTL, however, it would be eligible for these advances only to the extent it holds qualified thrift investments. If its actual thrift investment percentage is 50 percent, it would be eligible for $50 million. To obtain the same $100 million

[10] *See* 12 U.S.C. 1843(c)(8) (1982 & Supp. III 1985). 12 CFR 225.25(a).

[11] Of course, the FSLIC would be required to do this on a continuing basis every time the FRB determines to add new activities to the 12 CFR 225.25 list.

[12] Section 17 of the FHLBank Act provides as follows: "the Board may from time to time make such provision as it deems appropriate authorizing the performance by any officer, employee, agent or administrative unit thereof of any function of the Board (including any function of the Federal Savings and Loan Insurance Corporation) * * *" 12 U.S.C. 1437(a) (1982 & Supp. III 1985).

advance limit, it would have to double its FHLBank capital stockholdings to $10 million. Otherwise, until it regains QTL status (which would take five years), the disqualified member must increase its actual thrift investment percentage in order to increase proportionately its eligibility for advances.

The Board proposes to implement section 105 by amending the Board's existing regulation 12 CFR 525.1, which sets forth several limitations on advances. As amended, § 525.1(b) would track the language of the statute and incorporate by reference the new QTL regulation in proposed § 583.27, discussed above. The Board notes that a non-QTL member can increase its stock in its FHLBank and thereby increase its twenty-to-one ceiling under section 10(c) of the FHLBank Act. Thus, the Board requests comment on whether the regulation is a sufficient enough constraint on the amount of advances.

New paragraph 525.1(c) incorporates the exceptions to the new limitations on advances for non-QTL members. This paragraph also tracks the language of the statute with the exception of § 525.1(c)(4). The statutory exemptions contained in section 104 of the CEBA specifically include certain state-chartered savings banks insured by the FSLIC as well as state-chartered savings banks insured by the FDIC. CEBA, tit. I, sec. 105, section 10(e)(2). The general statutory rule, set forth in section 105, begins with the phrase: "Except as the Board may prescribe. * * *" Notwithstanding the generality of these express statutory terms, the CEBA Conference Report states that this phrase is intended for the specific purpose of authorizing the Board "to exempt an institution from the QTL test requirement for obtaining Federal Home Loan Bank advances in situations in which severe financial conditions threaten the stability of the institution." H.R. Conf. Rep. No. 261 at 141. In light of this specific clarification in the legislative history, the Board proposes to incorporate this particular ground for exemption at § 525.1(c)(4).

Finally, it should be noted that these amendments to the Bank Act are intended by Congress to apply only prospectively. H.R. Conf. Rep. No. 261 at 141. Thus, the proposed regulatory amendments do not affect advances made, or to be made, pursuant to binding agreements that were entered by FHLBank prior to August 10, 1987, the date of enactment of the CEBA.

Solicitation of Comments

The Board solicits comment on all aspects of these proposed regulations. To facilitate the processing of comments the Board requests that any comments on this proposal clearly reference the Board Resolution Release Number of this proposal.

Pursuant to the rulemaking policies and procedures of 12 CFR 508.13, as supplemented by Board Res. No. 80-584, 45 FR 73135 (Sept. 23, 1980), the Board is providing for a 30-day rather than a 60-day public comment period because section 104(c)(3) of the CEBA requires prompt Board action by January 1, 1988, the effective date of these regulations. Finally, the Board intends to conduct a hearing on this proposal, together with others required by the CEBA. Details of this hearing are provided in a notice published elsewhere in today's edition of the **Federal Register**.

Initial Regulatory Flexibility Analysis

Pursuant to section 3 of the Regulatory Flexibility Act, 5 U.S.C. 603, the Board is providing the following regulatory flexibilty analysis

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

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

3. *Impact of the proposed rule on small institutions.* The proposed rule would not have a substantial impact on small insured institutions.

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

5. *Alternatives to the proposed rule.* There are no alternatives that would be less burdensome than the proposal in addressing the concerns expressed in the **"SUPPLEMENTARY INFORMATION"** set forth above.

List of Subjects in 12 CFR Parts 525, 583, and 584

Credit, Federal home loan banks, Government securities, Holding companies, Savings and loan associations, Securities.

Accordingly, the Board hereby proposes to amend Part 525, Subchapter B, Parts 583 and 584, Subchapter F, Chapter V, Title 12, *Code of Federal Regulations,* as set forth below.

SUBCHAPTER B—FEDERAL HOME LOAN BANK SYSTEM

PART 525—ADVANCES

1. The authority citation for Part 525 is revised to read as follows, and the authority citations located at the ends of the sections are removed.

Authority: Sec. 10, 47 Stat. 731, as amended (12 U.S.C. 1430); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); Reorg. Plan No. 3 of 1947. 12 FR 4981, 3 CFR, 1943–1948 Comp., p. 1071.

2. Revise § 525.1 to read as follows:

§ 525.1 Limitation on advances.

(a) *General.* Unless otherwise authorized by the Board, a Bank shall not make advances to any member in excess of the limits set forth in § 563.8(b) of this chapter.

(b) *Reduced eligibility for advances for certain members that are not qualified thrift lenders.* A member that is not a qualified thrift lender, as defined in § 583.27 of this chapter, may not receive advances in excess of the amount that is the product of:

(1) The total amount of advances that such member would be eligible to receive without reference to the qualified thrift lender test contained in § 583.27, and

(2) The member's actual thrift investment percentage, as defined in § 583.27.

(c) *Exceptions.* Paragraph (b) of this section does not apply to:

(1) A savings bank as defined in section 3(g) of the Federal Deposit Insurance Act; or

(2) An insured institution that was chartered as a savings bank under State law before October 15, 1982; or

(3) An insured institution that acquired its principal assets from an institution that was chartered before as a savings bank under State law before October 15, 1982; or

(4) Any insured institution whose financial stability the Board finds to be threatened by severe financial conditions.

SUBCHAPTER F—REGULATIONS FOR SAVINGS AND LOAN HOLDING COMPANIES

PART 583—DEFINITIONS

3. The authority citation for Part 583 is revised to read as follows, and the authority citations located at the ends of the sections are removed.

Authority: Sec. 2, 48 Stat. 128, as amended (12 U.S.C. 1462); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 401–403, 405–407, 48 Stat. 1255–1257, 1259–1260, as amended (12 U.S.C. 1724–1726, 1728–1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR 1943–1948 Comp., p. 1071.

4. Amend Part 583 by adding a new § 583.27 to read as follows:

§ 583.27 Qualified thrift lender status.

(a) *General test.* For purposes of Parts 525 and 584 of this chapter an insured institution shall be a qualified thrift lender ("QTL") if the institution's actual thrift investment percentage (as defined in paragraph (b)(1) of this section) equals or exceeds 60 percent.

(1) As of January 1, 1988, an insured institution shall be deemed to have QTL status and shall maintain its status as a QTL so long as the institution's actual thrift investment percentage continues to equal or exceed 60 percent during three (3) out of every four (4) calendar quarters in each of two (2) out of every three (3) calendar years. For purposes of this paragraph (a)(1), calculations of the actual thrift investment percentage shall be made on an average basis by taking the sum of an institution's qualified thrift investments at the end of the calendar quarter being measured and at the end of each of the three immediately preceding months, and dividing by the sum of the institution's total tangible assets at the end of each of these same four months.

(2) An institution shall lose its QTL status at the close of the quarter during which the institution has failed to maintain its actual thrift investment percentage at or above 60 percent, which failure makes it mathematically impossible for the institution to meet the 60 percent actual thrift investment percentage test during three out of every four calendar quarters for each of two out of every three calendar years on a continuous basis.

(3) An insured institution that fails to maintain its status as a qualified thrift lender may not thereafter be a qualified thrift lender for a period of five (5) years from the close of the quarter on which the institution lost its QTL status.

(b) *Definitions:* For purposes of determining whether an insured institution is a qualified thrift lender, the following terms are defined as stated:

(1) "Actual thrift investment percentage" means the percentage determined by dividing the amount of an insured institution's qualified thrift investments (as defined in paragraph (b)(3) of this section) by the total amount of the institution's tangible assets (as defined in paragraph (b)(2) of this section).

(2) "Total tangible assets" of an institution means the total assets of the insured institution minus goodwill and any other intangible assets, including, but not limited to, purchased mortgage loan servicing rights, purchased deposit base and branch network, and leasehold improvements net of accumulated depreciation.

(3) "Qualified thrift investments" means, with respect to any insured institution, the sum of:

(i) The aggregate net amount of all investments (including loans, equity positions, or securities) held by such institution (or any subsidiary of such institution) that are related to domestic residential real estate or manufactured housing as defined in paragraph (c) of this section;

(ii) The book value of property used by such institution or subsidiary in the conduct of the business of such institution or subsidiary: and

(iii) An aggregate amount not to exceed ten percent of such institution's tangible assets of: (A) the liquid assets of the type required to be maintained under section 5A of the Federal Home Loan Bank Act (12 U.S.C. 1425a) and set forth in 12 CFR 523.10 of this Chapter, and (B) 50 percent of the dollar amount of residential mortgage loans originated by the insured institution or its subsidiary and sold within 90 days of origination, *provided that* these mortgage loans were sold during the calendar quarter for which the actual thrift investment percentage is being measured.

(c) *Housing related investments.* For purposes of the definition contained in paragraph (b)(3)(i) of this section, investments that are "related to domestic residential real estate or manufactured housing" include the following:

(1) Any home mortgage, as defined in 12 CFR 521.6, provided that the home or other dwelling unit is located in any State;

(2) Any loan made on the security of liens upon residential real estate, located in any State, or any loan made for the repair, equipping, alteration, or improvement of any residential real property located in any State;

(3) Any investment in manufactured home chattel paper and interests therein, where the underlying security is either manufactured, sold, or used in any State. "Manufactured home and "manufactured home chattel paper" shall have the same definitions as contained in 12 CFR 545.45;

(4) Any investment in any property acquired through the liquidation or in foreclosure of investments described in paragraphs (c) (1), (2) and (3) of this section; and any other equity interest investment in residential real estate or residential real property;

(5) Any investment in any state housing corporation as defined in 12 CFR 571.8; in any obligations of or issued by any State or any political subdivision thereof that is issued for the purpose of providing financing for residential housing or incidental services; and in any community development investment of the type described in 12 CFR 545.41;

(6) Investments in the stock of a Federal Home Loan Bank or obligations issued by the Corporation, the Federal Home Loan Bank System, or the Financing Corporation, or in the stock of the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation;

(7) Investments in mortgages, obligations, or other securities that are or ever have been sold by the Federal Home Loan Mortgage Corporation pursuant to section 305 or 306 of the Federal Home Loan Mortgage Corporation Act;

(8) Investments in obligations, participations, securities, or other instruments of, issued by, or fully guaranteed as to principal and interest by, the Federal National Mortgage Association or the Government National Mortgage Association;

(9) Investments in any other mortgage-backed securities, including mortgage pass-through certificates, mortgage-backed bonds, and mortgage pay-through bonds, as well as any derivative mortgage-related security that is created by disaggregating and repackaging the cash flows to be received as payments on mortgages and traditional mortgage-backed securities;

(10) Any investment in a corporation, partnership, or trust whose primary activity is servicing residential real estate loan portfolios, developing residential real estate housing located in any State, or any other domestic housing related activities such as residential loan origination or selling residential real estate loans. A company that derives more than 50 percent of its annual gross revenues from such activities is presummed to have a primary activity in such housing related activity; and

(11) Any investment that the Office of Regulatory Policy Oversight and Supervision hereafter identifies by T-Memorandum as a housing related investment for purposes of this regulation.

For the purposes of this paragraph (c), the terms "State," "residential real estate," and "residential real property" shall have the same definitions that are stated for these terms in section 5(c)(5) of the Home Owners' Loan Act, as amended, 12 U.S.C. 1464(c)(5). The inclusion of any investment as a "qualified thrift investment" under this regulation is not intended to expand, contract, or otherwise affect the permissibility of investments as

determined for any institution under other relevant state and federal statutes or regulations.

(d) *Special phase-in for certain institutions.* (1) Any insured institution that was chartered as a savings bank or a cooperative bank under State law before October 15, 1982, or whose principal assets were acquired from such a state savings bank or cooperative bank chartered before October 15, 1982, shall be deemed to have the status of a qualified thrift lender through December 31, 1997, *provided that*:

(i) The institution's actual thrift investment percentage does not decrease below the actual thrift investment percentage calculated for the institution on August 10, 1987; and

(ii) The amount by which—

(A) The actual thrift investment percentage of such institution on the dates indicated in paragraph (d)(2) exceeds

(B) The actual thrift investment percentage of such institution on August 10, 1987, is equal to or greater than the applicable percentage (as indicated in paragraph (d)(2)) of the amount by which 60 percent exceeds the actual thrift investment percentage of such institution on August 10, 1987:

(2) The applicable percentage referenced in paragraph (d)(1) of this section is 25 percent on 2/10/90; 50 percent on 8/10/92; and 75 percent on 2/10/95.

(e) *Exceptions.* Notwithstanding paragraph (a) of this section, the Corporation may grant such temporary and limited exceptions from the minimum actual thrift investment percentage requirement contained in paragraph (a) as the Corporation deems necessary if—

(1) The Corporation determines that extraordinary circumstances exist, such as when the effects of high interest rates reduce mortgage demand to such a degree that an insufficient opportunity exists for an insured institution to meet such investment requirements; or

(2) The Corporation determines that (i) the grant of any such exception will facilitate an acquisition under sections 406(f) or 408(m) of the National Housing Act, as amended, and (ii) the acquired institution will comply with the transition requirements of paragraph (d) of this section.

PART 584—REGULATED ACTIVITIES

5. The authority section for Part 584 continues to read as follows:

Authority: Sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 2, 48 Stat. 128, as amended (12 U.S.C. 1462); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); sec. 401–403, 405–407, 48 Stat. 1255–1257, 1259–1260, as amended (12 U.S.C. 1724–1728, 1728–1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., p. 1071.

6. Amend § 584.2 by revising the heading of the section; and by revising paragraphs (b) and (c) to read as follows:

§ 584.2 Prohibited activities.

* * * * *

(b) *Unrelated business activity.* No savings and loan holding company or subsidiary thereof that is not an insured institution shall commence, or continue for more than 2 years after August 10, 1987, or the date on which such company becomes a savings and loan holding company, whichever is later, any business activity other than (1) furnishing or performing management services for a subsidiary of such company; (2) conducting an insurance agency or an escrow business; (3) holding, managing, or liquidating assets owned by or acquired from a subsidiary insured institution; (4) holding or managing properties used or occupied by a subsidiary insured institution; (5) acting as trustee under deed of trust; or (6) any other activity (i) that is permissible for bank holding companies pursuant to 12 CFR 225.25, subject to the limitations and requirements of § 584.2–2 of this subchapter; or (ii) any activity set forth in section § 584.2–1, subject to the limitations therein.

Notwithstanding the provisions of this paragraph (b), any savings and loan holding company that, between March 5, 1987 and August 10, 1987, received approval pursuant to 12 U.S.C. 1730a (e) to acquire control of an insured institution shall not continue any business activity other than those activities set forth in this paragraph (b) after August 10, 1987.

(c) *Service corporation subsidiaries of insured institutions.* Until further notice by order or regulation, the Corporation hereby approves without application the furnishing or performing of such services or engaging in such activities as are specified in § 545.74 of this chapter, as now or hereafter in effect, if such service or activity is conducted by a service corporation subsidiary of a subsidiary insured institution of a savings and loan holding company and if such service corporation has legal power to do so.

* * * * *

7. Amend Part 584 by adding a new § 584.2a to read as follows:

§ 584.2a. Exempt and grandfathered savings and loan holding companies.

(a) *Exempt savings and loan holding companies.* (1) The following savings and loan holding companies are exempt from the limitations of § 584.2(b) of this Part:

(i) Any savings and loan holding company (or subsidiary of such company) that controls only one insured institution, if the insured institution subsidiary of such company is a qualified thrift lender as defined in § 583.27 of this subchapter.

(ii) Any savings and loan holding company (or subsidiary thereof) that controls more than one insured institution if all, or all but one of the insured institution subsidiaries of such company were acquired pursuant to an acquisition under §§ 408(m) or 406(f) *and* all of the insured institution subsidiaries of such company are qualified thrift lenders as defined in § 583.27 of this subchapter.

(2) Any savings and loan holding company referred to in paragraph (a)(1) of this section whose subsidiary insured institution(s) fails to qualify as a qualified thrift lender pursuant to § 583.27 may not commence, or continue, any service or activity other than those permitted under § 584.2(b) of this Part, *except that,* the Corporation may allow, for good cause shown, such company (or subsidiary thereof) up to 3 years to comply with the limitations set forth in § 584.2(b).

(b) *Grandfathered activities for certain savings and loan holding companies.* Notwithstanding § 584.2(b) of this Part and subject to paragraph (c) of this section, any S&L holding company that received approval prior to March 5, 1987, under 12 U.S.C. 1730a(e) to acquire control of an insured institution may engage, directly or indirectly or through any subsidiary (other than a subsidiary insured institution of such company) in any activity in which it was lawfully engaged on March 5, 1987, *Provided that:*

(1) The holding company does not, after August 10, 1987, acquire control of a bank or an additional insured institution, other than an insured institution acquired pursuant to §§ 408(m) or 406(f) of the National Housing Act;

(2) Any insured institution subsidiary of the holding company continues to qualify as a domestic building and loan association under section 7701(a)(19) of the Internal Revenue Code of 1986 after August 10, 1987;

(3) The holding company does not engage in any business activity other

than those included in the permissible activity identified in § 584.2(b) of this part and in which it was not engaged on March 5, 1987;

(4) Any insured institution subsidiary of the holding company does not increase the number of locations from which such insured institution conducts business after March 5, 1987, other than an increase due to a transaction under sections 408(m) or 406(f) of the National Housing Act; *and*

(5) Any insured institution subsidiary of the holding company does not permit any overdraft (including an intra-day overdraft) or incur any such overdraft in its account at a Federal Reserve bank, on behalf of an affiliate, unless such overdraft results from an inadvertent computer or accounting error that is beyond the control of both the insured institution subsidiary and the affiliate.

(c) *Termination by the corporation of grandfathered activities.* Notwithstanding the provisions of paragraph (b) of this section, the Corporation may, after opportunity for hearing, terminate any activity engaged in under paragraph (b) of this section upon determination that such action is necessary (1) to prevent conflicts of interest; (2) to prevent unsafe or unsound practices; or (3) is in the public interest.

(d) *Foreign holding company.* Any savings and loan holding company organized under the laws of a foreign country as of June 1, 1984 (including any subsidiary thereof which is not an insured institution) that controls a single insured institution on August 10, 1987, shall not be subject to any restrictions in 12 U.S.C. 1730a(c) with respect to activities conducted exclusively in a foreign country.

8. Amend § 584.2-1 by revising the heading of the section; and by revising paragraph (a) to read as follows:

§ 584.2-1 Prescribed services and activities of savings and loan holding companies.

(a) *General.* For the purpose of § 584.2(b)(6)(ii), the activities set forth in paragraph (b) of this section are permissible services and activities for savings and loan holding companies or subsidiaries thereof that are neither insured institutions nor service corporation subsidiaries of subsidiary insured institutions. Services and activities of service corporation subsidiaries of savings and loan holding company subsidiary insured institutions are prescribed by § 584.2(d) of this subchapter. Notwithstanding and without regard to any other provision of this section other than this sentence, a savings and loan holding company and any noninsured subsidiary thereof, other than a service corporation, may invest in the types of securities specified in §§ 523.10 and 545.71 of this chapter without regard to any limitation therein as to amount of maturity.

* * * * *

9. Revise the heading and the text of § 584.2-2 to read as follows:

§ 584.2-2 Permissible nonbanking activities of savings and loan holding companies.

(a) *General.* For purposes of § 584.2(b)(6)(i) of this part, the services and activities permissible for bank holding companies pursuant to 12 CFR 225.23 or 225.25, are deemed to be permissible services and activities for savings and loan companies, or subsidiaries thereof that are neither insured institutions nor service corporation subsidiaries of subsidiary insured institutions: *Provided however,* that no such savings and loan holding company or subsidiary thereof shall commence, either *de novo* or by an acquisition (in whole or in part) of a going concern, any activity described in this paragraph (a) without the prior approval of the Corporation pursuant to paragraph (c) of this section.

(b) *Procedures for applications.* Applications to commence any activity prescribed under paragraph (a) of this section shall be filed with the Principal Supervisory Agent of the Federal Home Loan Bank District in which the insured institution subsidiary is located. Applications shall be addressed to the Office of Regulatory Policy, Oversight and Supervision and to the Supervisory Agent of the district in which the principal office of a subsidiary insured institution is located. The Principal Supervisory Agent (or his designee) shall act upon such application pursuant to the guidelines set forth in 12 CFR 571.12 unless, the PSA, upon notice to the applicant, refers the application to the Corporation because it raises issues of law of policy inappropriate for resolution by the PSA. Where the PSA has referred an application to the Corporation, the Corporation will act on such application pursuant to the guidelines set forth at 12 CFR 571.12.

(c) *Factors considered in acting on applications.* In evaluating an application filed under this paragraph (c), the PSA and the Corporation shall consider whether the performance by the applicant of the activity 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 interest, or unsound financial practices). This consideration includes an evaluation of the financial and managerial resources of the applicant, including its subsidiaries, and of any company to be acquired, and the effect of the proposed transaction on those resources.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 87-23655 Filed 10-19-87; 8:45 am]

BILLING CODE 6720-01-M

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12 CFR Parts 561, 563, and 571

[No. 87-1042]

Classification of Assets

Date: October 2, 1987.

AGENCY: Federal Home Loan Bank Board.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Federal Home Loan Bank Board ("Board"), as operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC"), is proposing to revise its regulations governing the classification of assets of insured institutions consistent with the requirements of the Competitive Equality Banking Act of 1987 ("CEBA"). CEBA requires that the Board establish an asset classification system consistent with the asset classification practices of the Federal banking agencies. This proposed rule broadens the scope of the existing rule and ensures the use of broader, but judicious, examiner discretion in the classification of assets, consistent with the asset classification practices of the bank regulatory agencies.

Specifically, the proposal employs the existing classification categories of Substandard, Doubtful, and Loss, but significantly alters the consequences of these classifications with respect to valuation allowance requirements and their effect on minimum captial requirements.[1] Assets classified Substandard would no longer be treated as scheduled items, and twenty percent of the value of such assets would therefore not be included in calculating the contingency component of an insured institution's minimum regulatory capital requirement. Moreover, the

[1] N.B. This proposal refers to specific and general "allowances for loan losses" or to "valuation allowances," instead of "reserves," since the former designations are more consistent with accepted accounting terminology.

Board would no longer require institutions to establish specific valuation allowances for assets classified Doubtful. With respect to assets classified Substandard or Doubtful, if the examiner concludes that the existing aggregate valuation allowances established by the institution are inadequate, the examiner would determine the need for, and extent of, any increase necessary in the insured institution's general allowances for loan losses, subject to review by the Principal Supervisory Agent ("PSA") or his designee. For the portion of assets classified Loss, the Board would no longer require institutions to establish specific allowances for losses of 100 percent of the amount classified. Instead, institutions will be required to charge off 100 percent of the amount of an asset, or portion of an asset, classified Loss. Consistent with CEBA, today's proposal deletes the Board's scheduled item regulation, thus broadening the scope of the classification of assets regulation to encompass those items formerly included in scheduled items. Today's proposal also requires insured institutions to classify their own assets and to establish prudent general allowances for loan losses. The Board is soliciting public comment on all aspects of the proposed rule.

DATE: Comments must be received on or before November 19, 1987.

ADDRESS: Send comments to: Director, Information Services Section, Office of the Secretariat, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552. Comments will be available for public inspection at this address.

FOR FURTHER INFORMATION CONTACT: Daniel G. Lonergan, Staff Attorney, (202) 377-6458, Joan S. van Berg, Staff Attorney, (202) 377-7023, Karen Knopp O'Konski, Acting Director, (202) 377-7240, Regulations and Legislation Division, Office of General Counsel; Jane W. Katz, Senior Policy Analyst, (202) 377-6782, Office of Policy and Economic Research, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552; Edward J. Taubert, Associate Director—Policy, (202) 778-2511, or Francis E. Raue, Policy Analyst, (202) 778-2517, Office of Regulatory Policy, Oversight and Supervision, Federal Home Loan Bank System, 900 Nineteenth Street NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION: The Board, as operating head of the FSLIC, is authorized pursuant to section 403(b) of the National Housing Act ("NHA"), to conduct examinations of institutions the accounts of which are insured by the FSLIC ("insured institutions"). 12 U.S.C. 1726(b). Pursuant to this authority, the Board has the responsibility to examine and evaluate insured institutions' assets, to require reporting, and to prescribe the treatment of such assets for regulatory evaluation purposes. In addition, the NHA requires insured institutions to establish and maintain reserves in accordance with Board regulations. *Id.*

The Competitive Equality Banking Act of 1987 ("CEBA"), Pub. L. No. 100-86, 101 Stat. 552, was signed into law on August 10, 1987. Section 402 of CEBA requires that the Board establish an asset classification scheme consistent with the classification practices established by the Federal banking agencies.[2] On May 5, 1987, the Board proposed for public comment a revision of the classification of assets regulation "to encourage greater exercise of discretion, judgment, and flexibility by both supervisory and examination staff, to integrate the classification system with other regulations prescribing treatment of problem assets, . . . and to achieve greater conformity with the classification practices of the bank regulators." 52 FR 18369, 18371 (May 15, 1987) ("May proposal"). The Board originally set a 60-day comment period for the May proposal, but extended this comment period until September 1, 1987. *See* 52 FR 27218 (July 20, 1987). Because CEBA became law during this comment period, the Board has decided to repropose its May proposal, in order to incorporate revisions consistent with CEBA's mandate that the Board adopt a classification scheme consistent with the classification practices of the Federal banking agencies. As is discussed in greater detail *infra*, all comments received in response to the May proposal will be preserved and considered in issuing any final rule on the classification of assets.

A. Description of Existing Rule and May Proposal

Today's proposal is consistent with both the requirements of CEBA and the Board's intent to move toward an asset classification scheme more consistent with the classification practices of the Federal banking regulators. This proposal reflects the Board's recognition that methods of evaluating asset quality should be modified in light of significant changes in thrifts' investment authority in the last five years. Section 325 of the Garn-St Germain Depository Institutions Act of 1982, Pub. L No. 97-320, 96 Stat. 1469, amended section 5(c)(1)(R) of the Home Owners Loan Act of 1933, 12 U.S.C. 1464(c)(1)(R), to authorize federally-chartered savings and loan associations and mutual savings banks to invest in secured or unsecured loans for commercial, corporate, business, or agricultural purposes within specified limits. The Board promptly promulgated regulations in 1983 to implement this new commercial lending authority for federal institutions. *See* 12 CFR 545.46. Moreover, many states subsequently granted to state-chartered institutions the authority to engage in commercial lending activity.

The Board's then-existing asset classification system, which had been primarily designed to address the requirements of home lending, emphasized the timely receipt of periodic payments and other features inherent in loans secured by real estate. Because of Board concern that this system of asset classification was not attuned to the characteristics of the newly authorized type of lending, and was thus not appropriately suited to gauge the condition of a given asset, the Board sought a better method of evaluating the condition of these loans.

On June 21, 1985, the Board proposed for public comment a new method of classifying certain commercial loans and a revision of its regulation governing examiners' reevaluation of real estate. Board Res. No. 85-504, 50 FR 27290 (July 2, 1985). The Board's proposal adopted the basic asset classification concepts contained in the "Uniform Agreement on the Classification of Assets and Appraisal of Securities Held by Banks" ("Uniform Agreement"), issued in revised form on May 7, 1979, as a Joint Statement of the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and Conference of State Bank Supervisors. In short, the proposed scheme classified problem assets as Substandard, Doubtful, or Loss, consistent with the Federal banking agencies, and prescribed treatment of each problem asset depending on the category to which it was assigned.[3] The proposal

[2] Section 402 of CEBA defines "Federal banking agencies" to include the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation.

[3] These categories are defined in detail in the existing regulation and policy statement. *See* 12 CFR 561.16c(b), 571.1a(a). Generally, assets classified Substandard are inadequately protected by the current net worth and paying capacity of the obligor or of the collateral pledged, and have a well-defined weakness or weaknesses. Assets classified Doubful have all of the weaknesses inherent in

Continued

also sought to revise the appraisal provisions in the Board's examinations and audit regulation to provide for the "automatic" classification of assets with a nonconforming or nonexistent appraisal. *See* 12 CFR 563.17-2(b).

On December 9, 1985, the Board adopted as a final rule the proposed classification of assets scheme with some modifications. This regulation, currently in effect, employs the classification categories of the Uniform Agreement, *i.e.*, Substandard, Doubtful, and Loss. Assets classified Substandard are treated as scheduled items, thus increasing the contingency component of an institution's minimum regulatory capital requirement under section 563.13 by an amount equal to 20 percent of the dollar amount of the Substandard assets. *See* 12 CFR 563.13(b)(4)(ii)(B). *See also* 12 CFR 561.16(c)(1). In effect, this classification serves to increase an insured institution's capital requirement by 20 percent of the value of assets classified Substandard, since the contingency component is added to an institution's liability component (minus the maturity matching credit) to determine the minimum regulatory capital requirement. 12 CFR 563.13(b). Assets classified Doubtful require the establishment of specific allowances for loan losses of up to 50 percent of the amount of the asset so classified. *See* Office of Regulatory Policy, Oversight and Supervision ("ORPOS") Memorandum No. SP 68 (Aug. 14, 1986) (Attachment 2). Assets classified Loss require the establishment of specific allowances for loan losses of 100 percent of the book value of assets or portions of assets classified Loss. This scheme permits assets to be "split" for classification purposes; different portions of the same asset may be classified under different categories or may remain unclassified. 12 CFR 571.1a.

The Board's December 1985 rule also authorized examiners to reevaluate assets in accordance with the newly adopted classification system, as reflected in 12 CFR 563.17-2(b). Section 563.17-2(b) was amended to provide that a reevaluation of real estate must be based on an appraisal, except in the following instances: (1) If a loan or investment requires an appraisal under the Board's rules, but the institution has no appraisal in its files, the asset is to be classified Doubtful; (2) if there is an appraisal in the institution's files that does not conform with the Board's appraisal standards, or if the examiner determines that the assumptions underlying an appraisal (even one that was in compliance when made) are demonstrably incorrect, such assets are to be classified Substandard; and (3) if the examiner and the District Appraiser determine that the assumptions underlying an appraisal are demonstrably incorrect, rendering the appraisal inaccurate, and the asset has an additional weakness inherent in an asset classified Substandard, the asset is to be classified Doubtful. In promulgating this final rule, the Board emphasized that its supervisory experience indicated that continued reliance on reappraisals as the sole mean for classifying problem reals estate assets was not advisable.

The Board also amended § 563.17-2(c) to require adjustments to the book value of assets deemed to be overvalued on the institution's books as a result of asset re-evaluation. At the direction of its supervisory agent, an institution must make such an adjustment to the book value by establishing a specific valuation allowance in an amount equal to the overvaluation.

Although the Board adopted the above classification of assets scheme as a final rule, the Board also provided an additional 60-day comment period to solicit further public comment on the general scope of the classification system that, in its final form, encompassed all assets except consumer loans, loans secured by one-to-four family, owner-occupied homes, and securities. Because these comments are potentially relevant to the revisions proposed today pursuant to CEBA, these comments will be briefly summarized.

In response to its solicitation of comments on the scope of the final rule, the Board received fifty-six comment letters. Of these fifty-six letters, only thirty addressed the scope of the classification of assets regulation, while the remainder addressed aspects of the final rule on which comment had not been solicited. Forty-four of the letters were received from insured institutions. Of the remainder, seven letters were received from industry trade associations, two were received from state agencies, one was received from a law firm representing 20 insured institutions, one was received from a mortgage insurance company, and one letter was received from a private citizen.

Although the comments received in response to the scope of the final rule were generally supportive, several criticisms and suggestions were made by more than one commenter. Several commenters recommended that the Board broaden the scope of the regulation specifically to include loans on the security of one-to-four family, owner-occupied homes. Several other commenters objected to the breadth of the scope of the final rule, specifically criticizing its application to loans secured by real estate. These commenters generally argued that because loans made on the security of real property are inherently less risky than commercial loans, such loans should not fall within the rule. Several other commenters contended that the rule should properly apply only to those institutions that are of "substantial supervisory concern" to the Board and threaten the industry, and that the Board should not "overregulate" all insured institutions for the excesses of a few.

One trade association commenter supported the broadened scope of the rule contingent upon further regulatory modifications, including granting supervisory personnel discretion to establish loan loss allowance requirements below the stated percentages to take into account the lower loss levels associated with loans secured by real estate. In view of the fact that further comment is solicited in this proposal, however, the Board has decided to defer responding to these comments and will consider them together with any additional comments it receives.

After over a year of experience with the existing rule, promulgated December 9, 1985, the Board concluded that further revision of the classification regulation was necessary. Thus, on May 15, 1987, the Board proposed revisions to the asset classification scheme that would afford examiners and supervisory staff greater flexibility and discretion and would generally achieve greater conformity with the classification practices of the Federal banking agencies. Specifically, this proposal would have broadened the scope of the regulation to encompass debt and equity securities, and would have imposed an affirmative duty upon insured institutions to classify their own assets and establish appropriate valuation allowances. More importantly, the proposal provided that Substandard assets would no longer receive scheduled item treatment, and Doubtful assets would no longer require the establishment of specific reserves. Under the proposal, if assets were classified Substandard or Doubtful and the examiner concluded that the general valuation allowances established by the institution were inadequate, the

those classified Substandard, with the added characteristic that the weaknesses make collection or liquidation in full highly questionable and improbable. Assets classified Loss are considered uncollectible and of such little value that their continuance as assets without establishment of a specific allowance for loan losses is not warranted.

examiner would determine the need for, and extent of, any increase necessary in the insured institution's general valuation allowances. Under the May proposal, assets, or portions of assets, classified Loss would continue to require the establishment of specific valuation allowances of 100 percent of the value of such assets, or be charged off.

As noted, the enactment of CEBA during the comment period of the May proposal has necessitated that the Board repropose the classification of assets regulation incorporating provisions mandated by this recently enacted statute. Because one of the Board's goals in issuing the May proposal was to establish an asset classification system that more closely conformed to the classification practices of the Federal banking agencies, many elements of the May proposal have been retained in today's proposal. For this reason, it is unnecessary to summarize the May proposal in greater detail in this proposal.

In response to the May proposal, however, the Board received 74 comments, most of which offered qualified support for the proposed revisions. Fifty-four comments were received from insured institutions; nine comments were received from industry trade associations; one comment was received from a securities broker' one comment was received from a professional society of financial managers; 3 comments were received from mortgage insurers; and 6 other comments were received from interested societies representing economists, executives, home builders, and others. Generally, commenters expressed concern with respect to three provisions of the May proposal: the examiner-supervisory staff relationship and examiner discretion; the inclusion of debt and equity securities within the scope of the classification regulation; and the inclusion of an augmented minimum capital requirement based on the extent of classified assets.

In proposing the following revisions to the existing classification of assets regulations, the Board has also considered these comments submitted in response to the May proposal. Because the Board is soliciting comment in this proposal on many of the same issues and approaches that were contained in the May proposal, however, the Board will preserve and defer responding to such comments untial a final rule is issued, when any new comments received will be considered and addressed as well.

B. Objectives of the Proposal

The Board's current classification regulation became effective on January 30, 1986. Thus, the Board, the Federal Home Loan Bank System supervisory staff, and the field examination staff have had well over a year of experience with the rule. This experience suggests that modifications to the rule are in order. More importantly, section 402 of CEBA specifically requires that the Board establish an asset classification system consistent with the asset classification practices established by the Federal banking agencies. By adopting this proposal, the Board again seeks to encourage the greater exercise of discretion, judgment, and flexibility by both supervisory and examination staff, to integrate the classification system with other regulations prescribing treatment of problem assets, and to achieve greater conformity with the classification practices of the bank regulators.

Upon further consideration, the Bank Board believes that the existing classification system could be construed to constrain unduly the exercise of judgment, flexibility, and discretion by both supervisory agents and examiners. As written, certain portions of the provisions bearing on asset classification rely heavily on appraisals of collateral. For example, the Board's regulation governing re-evaluation of assets imposes a requirement that, when reevaluation is necessary, most assets should be classified based on an appraisal done in conformity with Board standards, 12 CFR 563.17-2. *See also* ORPOS Memorandum No. R-41c (Sept. 11, 1986). Similarly, the Board's Statement of Policy on classification of assets requires that the amount of specific allowances for loan losses for assets classified Doubtful or Loss be based on a conforming appraisal. 12 CFR 571.1a.

The approach implicit in today's proposal—that is, the introduction of greater flexibility into the classification process—is consistent with the practices of the banking regulatory agencies. As a matter of course, bank examiners exercise informed judgment both in determining whether to classify an asset and in determining the appropriate amounts of allowances for loan losses to be maintained by a bank whose portfolio contains classified assets. This classification approach will encourage the examiner to identify weaknesses inherent in the institution's ongoing lending strategies and practices, in addition to quantifying current problems.

The Board believes that classification is a crucial tool for reducing the risk exposure of both insured institutions and the FSLIC insurance fund. Identification of problem assets enables the FSLIC, through the examination process, to require institutions to maintain adequate allowances for loan losses to help insulate the FSLIC from loss. The classification process can serve a second, invaluable function. It can reveal lending patterns or deficiencies in portfolio administration that are consistently causing collectibility problems for an institution. Once the examiner identifies such patterns or deficiencies, his or her discussions with management can focus on avoiding practices that have resulted in the necessity for classifying existing assets. In this way, the classification process can serve a preventative, as well as a protective, function.

The Board's original classification of assets proposal contained language that would have made reliance on an appraisal in re-evaluating real estate merely permissive, in order to allow for evaluations that take into consideration other economic factors that directly affect the immediate value of the assets from the insured institution's point of view. Board Res. No. 85-504, 50 FR 27290 (July 2, 1985). Most commenters opposed this position. "They believed that the proposal might lead to arbitrary decision-making by examiners because it was highly subjective and, consequently, they believed that it would give examiners too much discretionary authority." 50 FR 53280 (summary of comments). The Board responded to these comments by requiring appraisals to support re-evaluation of most assets and by providing for the automatic classification of assets unsupported by a conforming appraisal. 12 CFR 563.17-2.

The Board continues to believe that an appraisal of collateral that follows accepted appraisal methodology is an important factor in an examiner's assessment of the risk of nonpayment associated with assets in an insured institution's portfolio. Risk of nonpayment is also dependent upon other factors, however. These factors include the overall risk involved in the project or business being financed; the nature and degree of the collateral security; the character, capacity, financial responsibility, and record of the borrower; and the feasibility and probability of orderly liquidation of the asset. Of necessity, the institution's or the examiner's arrival at a valuation based on all the relevant factors will involve the exercise of some subjective

judgment. The Board recognizes the importance of an appraisal; however, it believes the value of the collateral should not be the sole determinant of asset valuation where, for example, the borrower has other resources for repayment against which the lender has legal recourse. This approach is consistent with the classification practices of the Federal banking agencies.

The Board does not believe that the examiner's exercise of discretion and judgment will result in arbitrary valuation. Several reasons support this conclusion. First, valuation allowances should be established in accordance with Generally Accepted Accounting Principles ("GAAP"), which is consistent with CEBA. CEBA, tit. iv, sec. 402(a), section 9(c). While allowances established in accordance with GAAP are based on subjective judgment, guidelines do exist in accounting literature to assist in providing appropriate reserves. Additionally, all insured institutions are required to submit annual audited financial statements. This, along with the institution's and the examiner's review, provides a third source of review that should result in the establishment of fair and adequate valuation allowances.

Second, the Board notes that additional training has been available to the examiners, especially since July 1985 when the Board transferred its field examination force to the twelve Federal Home Loan Bank districts under the authority of the PSAs. Nationwide, senior examination and supervisory staff have been instructed as to the background and intent of the classification regulations and have received training on individual asset classification and asset review concerns. Currently, only the most experienced examiners classify assets. Based on more than one and one-half years of experience with the classification system, these examiners are continuing to become even more proficient. Also, classification advice is being obtained from banking regulators on an ongoing basis.

Third, today's proposal does not give unreviewable discretion to examiners, but retains the current approach of vesting the PSA with authority to review and disapprove or modify the examiner's classification and valuation of assets, although these determinations will generally be made by the examiner, subject to review by the supervisory agent. Effective control measures are employed whereby examiners' supervisors and supervisory staff review all classifications to preclude any arbitrary classifications. Lastly, section 407 of CEBA requires the Board to establish an informal review procedure under which an insured institution can obtain review by an independent arbiter and the PSA of the classification and valuation allowance determinations of the examiner and supervisory agent. CEBA, tit. iv, sec. 407(d), section 22A. This review procedure, which is to be established shortly and will be separate from this rulemaking, will also minimize the risk of arbitrary valuation.

C. Description of Proposal

1. Scope

The Board is proposing to broaden the scope of the classification of assets regulation to encompass "securities" (debt and equity) as defined in § 561.41 of the Board's regulations, as well as loans secured by owner-occupied "homes," as defined in § 541.14; "slow loans," as defined in § 561.16; "slow consumer credit," as defined in § 561.16a; "consumer credit classified as a loss" under § 561.16b; and real estate owned as presently described under § 561.15. In issuing the existing rule, the Board earlier alluded to the desirability of including securities within the scope of the regulation, but recognized the need to review further the implications of such an expansion of coverage. 50 FR 53275, 53279 (Dec. 31, 1985). In light of further staff consideration and supervisory experience, and pursuant to CEBA's clear mandate that the Board prescribe regulations establishing an asset classification system "which is consistent with the asset classification systems established by the Federal banking agencies," the Board believes it appropriate and necessary to include securities in its asset classification scheme. [4]

The inclusion of debt and equity securities in the classification scheme is consistent with the practices of the Federal banking agencies, which consider such securities to be classifiable assets under their respective asset classification schemes. With respect to securities rated in the top four investment grades ("investment grade" securities) or unrated securities of equivalent quality, the Board proposes to treat these assets in conformance with the Uniform Agreement. With regard to sub-investment quality securities (*i.e.*, securities evidencing investment characteristics that are distinctly or predominantly riskier), which generally include securities in grades below the four highest grades and unrated securities of equivalent quality, it is the Board's position that these securities should not automatically be classified merely because the security is unrated or has not been rated within the top four investment grades. Included within this category would be high-yield or "junk bonds." [5] ORPOS will issue supervisory and examination guidelines addressing the appropriate classification procedures for these assets.

In proposing to encompass owner-occupied homes, slow loans, consumer credit, consumer credit classified as loss, and real estate owned within the scope of the classification regulation, the Board is departing from its current practice of affording such assets "scheduled item" treatment under § 561.15. Scheduled item treatment, which was intended to factor into the calculation of minimum regulatory capital those assets whose value may not be fully realizable, is not a classification category employed by the Federal banking agencies and would thus appear inconsistent with section 402(a) of CEBA. In fact, section 407 of CEBA, which requires the Board to issue guidelines providing improvements and flexibility in the supervisory process, specifically requires the promulgation of guidelines "eliminating the scheduled item system except as such system relates to 1-to-4 family residences." CEBA, tit. iv, sec. 407(b)(4).

In proposing the existing classification of assets scheme in 1985, the Board recognized that the then-existing scheme evolved primarily to classify owner-occupied home loans, and was thus keyed to the timely receipt of periodic

[4] Consistent with the practices of the Federal banking agencies and the broadened scope of the proposal, insured institutions must establish liabilities for off-balance-sheet items in accordance with GAP as described in Statement of Financial Accounting Standards No. 5, *Accounting for Contingencies* ("FASB-5"). FASB-5, which is published elsewhere in this issue as an attachment to the Troubled Debt Restructuring proposal, Board Res. No. 87-1046 (Oct. 5, 1987), provides that an estimated loss shall be accured when it is probable that an asset has been impaired or a liability incurred, and the amount of loss can be reasonably estimated. Generally, while valuation allowances are established for assets, liabilities are established for off-balance-sheet items. Institutions shall record liabilities for such items when off-balance-sheet loss becomes probable and estimable.

[5] The Board notes that pursuant to section 1201 of CEBA, Congress has mandated that a study be conducted on high-yield bonds by the Comptroller General, in consultation with the federal banking agencies and certain other federal agencies. The statute required that a report containing the results of the study be transmitted to Congress no later than February 10, 1988. The Board recognizes that the results of such study might provide relevant information on the appropriate classification status of high-yield bonds as investments. Therefore, when this report is completed, the Board will revisit its position on such investments if necessary.

payments. In light of industry experience with such loans and other regulatory protections applicable to an institution's mortgage lending, an objective, timeliness-of-payments classification scheme was determined to be well-suited to loans for one-to-four family, owner-occupied homes, traditional consumer loans, and other specified types of lending. The Board drew a distinction, however, between one-to-four family, owner-occupied dwellings and non-owner occupied dwellings, because the source of payments received on a mortgage from an owner-occupant is derived primarily from earnings of a family member. The risk of nonpayment on owner-occupied dwellings was perceived to be diminished because of the substantial costs, both monetary and psychological, imposed by eviction. Non-owner occupied loans, however, were deemed to be more risky since cash flows to service these mortgages could be derived from sources that are less reliable over time. 50 FR 53278 (Dec. 31, 1985). Thus, only one-to-four family, owner-occupied home loans were "classified" under the slow loan-scheduled item treatment of § 561.15 and § 561.16. [6]

Through discussions with representatives of the Federal banking agencies, the Board's staff has learned that these agencies do not classify home mortgage loans in a manner differing appreciably from either their classification policy for assets generally or from the slow loan-scheduled item treatment found in the Board's regulations. Both the Board and the Federal banking agencies primarily look to payment delinquency/cash flow in examining such assets, although the Board's slow loan regulations is arguably the more specific approach. The greater specificity of the Board's regulations is explained in large measure by the historically large role played by the savings and loan industry with respect to this type of lending, when contrasted with the commercial banking industry's relative lack of exposure to home mortgage lending.

The specific contractual delinquency standards and other factors set forth in the slow loan regulation have proven to be a rational and effective approach to gauging the risk of nonpayment with respect to the savings and loan industry's high volume of home mortgage loans. Moreover, these standards have been employed with relatively minor revision for many years and are understood by the industry and supervisory personnel. For this reason, the Board is reluctant to depart from the slow loan-scheduled item treatment for 1-to-4 family, owner-occupied home loans. At the same time, however, the Board is cognizant of Congressional intent, as reflected in CEBA, that the Board establish a classification scheme consistent with the classification practices of the Federal banking agencies.

Consistent with the approach of the banking agencies to discourage "automatic" classifications and encourage case-by-case discretion when appropriate, the Board is proposing to eliminate, consistent with the deletion of scheduled items, an automatic or mandatory classification approach to those assets constituting slow loans. Although the slow loan provision as set forth in § 561.16 will be retained, and examiners will continue to apply this provision in examining the 1-to-4 family, owner-occupied home loan portfolio, assets constituting slow loans may be classified under § 563.16c. Such classification will not mandate a 20 percent increase in an institution's minimum regulatory capital, as would be the case under the existing scheduled item treatment. *See* 12 CFR 563.13(b)(4).

The Board is of the view that the complete deletion of scheduled item treatment—including one-to-four family, owner-occupied home loans—is consistent with section 407 of CEBA. Under the existing classification regulation, Substandard assets and scheduled items receive identical treatment: both *increase* minimum regulatory capital by 20 percent. Under the proposal (and consistent with CEBA), Substandard assets will now require general valuation allowances, which count *toward* regulatory capital. As discussed in more detail *infra*, many assets that were formerly scheduled items will likely be classified Substandard. To continue to require one-to-four family, owner-occupied home loans to be treated as scheduled items under a cursory reading of section 407 would actually penalize those institutions engaging in such home lending, in light of the stricter, capital-based treatment for scheduled items relative to the proposal's more flexible general allowance treatment for Substandard assets. Such a penalty could discourage home lending and would be patently inconsistent with the historical role of this industry to provide home mortgage lending. The Board believes that this could not have been the intent of Congress. Furthermore, a partial retention of the scheduled item regulation would result in a more fragmented classification scheme. Thus, the Board is proposing to delete its scheduled items regulation completely.

The proposal's deletion of scheduled items pursuant to section 407 of CEBA also requires that the scope of the § 561.16c classification scheme be broadened to encompass "slow consumer credit," which currently receives scheduled item treatment under § 561.16a, as well as "slow consumer credit classified as a loss," addressed under § 561.16b. In 1980, pursuant to the recommendation of the Federal Financial Institutions Examination Council ("FFIEC"), the Federal banking agencies adopted a uniform policy for the classification of installment credit based on delinquency status. On November 18, 1980, the Board promulgated § 561.16a and § 561.16b for the express purpose of implementing this FFIEC-recommended uniform policy. 45 FR 76104 (Nov. 18, 1980). Thus, there is no inconsistency between the Board and the Federal banking agencies with respect to the classification of consumer credit; all classify consumer credit on the basis of the same delinquency formula.

For this reason, § 561.16a and § 561.16b are being retained, notwithstanding the elimination of scheduled items. In applying delinquency standards identical to those contained in the Board's § 561.16a and § 561.16b slow consumer credit regulations, the Federal banking agencies routinely classify assets exceeding such limits Substandard or Loss, respectively, although the banking examiners do make exceptions to this practice where the bank being examined can clearly demonstrate that repayment will occur irrespective of delinquency status (*e.g.*, loans well secured by collateral and in the process of collection, or loans supported by valid guaranties or insurance). In classifying consumer credit, Board examiners will apply § 561.16a and § 561.16b, which already provide for consideration of such mitigating factors.

Real property acquired by an insured institution by foreclosure or deed in lieu of foreclosure ("REO") is presently treated as a scheduled item under § 561.15(c). In light of today's proposed elimination of the scheduled item regulation, such assets will be classifiable under proposed § 561.16c.

Through discussions with representatives of the Federal banking agencies, Board staff has learned that

[6] Owner, occupied home loans are "classified" under a two-step process under Board regulation. Section 561.15 defines "scheduled items" to include slow loans. Section 561.16 defines slow loans, specifically setting forth at what point a loan secured by an owner-occupied home is deemed "slow."

the banking agencies generally classify REO Substandard, absent mitigating circumstances such as the fact that the property is subject to an agreement of sale or is generating sufficient income to carry the asset. Currently under § 561.15, REO is treated as a scheduled item, largely due to the circumstances of its acquisition (*i.e.*, the fact that the property was acquired by the institution due to inadequate demand). To ensure consistency with the Federal banking agencies, the Board is proposing to treat REO as an asset that may be classified under the § 561.16c classification scheme.

Under existing § 563.17-2, institutions must appraise REO when it is treated as a scheduled item under section 561.15. The Board believes that such an appraisal is necessary in order to assess the fair value of the property at the time of acquisition. The fair value of REO at the date of acquisition then becomes the carrying value of the property. However, in order to be consistent with the banking agencies, under proposed § 563.17-2, the Board will not only require appraisals at the time of foreclosure, but also will require that the property be appraised annually, in order to ascertain whether the property has declined in value. This will require the institution or examiner to recognize additional losses if, subsequent to the date of acquisition, the Net Realizable Value is less than the carrying value of such properties, rather than permit the maintenance of an asset at book value when a loss is probable and estimable.[7] Consistent with the practices of the Federal banking agencies, a letter from a qualified appraiser certifying that the property has not declined in value from the value stated in the previous appraisal will satisfy the annual appraisal requirement, subject to examiner review and acceptance. If the examiner, however, determines that the letter is not adequate, he or she may require an appraisal prepared in accordance with the appraisal requirements set out at § 563.17-1 and § 563.17-2. ORPOS will issue supervisory and examination guidelines addressing the appropriate classification procedures for these assets.

The elimination of scheduled items pursuant to secti•n 407 of CEBA also requires that certain other assets, currently encompassed by § 561.15, be classifiable under § 561.16c. Section 561.15(e) currently includes "securities upon which one or more interest or principal payments due have not been paid" as scheduled items. Moreover, paragraphs (f) through (j) of the existing scheduled item regulation pertain to deposits in, or loans to, a bank or savings and loan under the control (or in the possession) of supervisory authorities; assets acquired in an exchange for a scheduled item; assets transferred to a service corporation or other corporation in which the insured institution has an investment;[8] amounts invested in personal property; and the unpaid balances of loans secured by, and any contract for the sale of, personal property, if the unpaid balance exceeds any applicable lending limitation or 100 percent of the wholesale value. Under the proposal, such assets will be classifiable under the § 561.16c classification scheme. ORPOS will issue supervisory and examination guidelines addressing the appropriate classification procedures for these assets as well. The Board solicits specific comment on the extent to which this classification treatment is appropriate.

2. Effect of Classification

Under today's proposal, the categories to which problem assets may be classified—Substandard, Doubtful, and Loss—would remain the same as they are in the current classification regulation. 12 CFR 561.16c(b). The Board reiterates that, as under the existing rule, a portion of an asset may remain unclassified, or may be classified under a different category than the remainder of the asset. Moreover, this proposal would retain without change the factors used to determine the proper category or categories to which an asset should be classified, except in cases of certain "automatic" classifications related to appraisal deficiencies. 12 CFR 571.1a; *see* discussion at subheading 6, *infra*, "Deletion of automatic classification for failure to comply with appraisal requirements." This proposal would, however, amend both the classification rule and policy statement to change the effect of classification for the three asset classification categories.

The proposal would no longer require treating assets classified Substandard as scheduled items. For assets classified Doubtful, establishing specific allowances for loan losses would no longer be required; instead, in cases where assets are classified Substandard or Doubtful, the proposal would authorize the examiner to direct the establishment of general allowances for loan losses based on the assets classified and the overall quality of the asset portfolio. These valuation allowances would be required to be established in accordance with GAAP. Moreover, in cases where an examiner has classified an asset or a portion of an asset Loss, the institution would be required to charge off 100 percent of the amount of the asset or portion so classified. These charge-offs would also be required to be established in accordance with GAAP.

In examining an institution's asset portfolio, the examiner will consider the systems and internal controls employed by the institution in classifying assets. By examining those assets classified and the allowances for loan losses established pursuant to the institution's self-classification, the examiner can determine the effectiveness of, and the institution's adherence to, its classification procedures and methods of evaluation and determine the need to require additional valuation allowances.

This proposed classification and valuation allowance scheme is consistent with both the requirements of CEBA and the classification practices of the Federal banking agencies.

Section 402 of CEBA amends both the Home Owners Loan Act of 1933 ("HOLA"), 12 U.S.C. 1461, and the NHA to require that any amount that an insured institution holds in any account as a general loss allowance may be treated, at the institution's option, as capital of the association for purposes of determining regulatory capital. Under today's proposal, once assets have been classified Substandard or Doubtful, the thrift examiner would review the adequacy of the insured institution's aggregate general allowances for loan losses and, if necessary, direct the institution to increase these aggregate allowances. Although the establishment of these allowances would reduce

[7] "Net Realizable Value" is defined in the AICPA's Audit and Accounting Guide for Savings and Loan Associations.

[8] This raises a related issue. Section 407 of the NHA provides that, in making examinations of insured institutions, examiners appointed by the Board shall have the power, on behalf of the FSLIC, to make such examinations of the affairs of all affiliates of such institutions as shall be necessary to disclose fully the relations between such institutions and their affiliates, and the effect of such relations upon insured institutions, 12 U.S.C. 1730(m)(1). The Board is of the opinion that in order to protect adequately both the FSLIC and parent institutions from risk, the parent must, incident to its self-classification procedure, set aside adequate valuation allowances to the extent an affiliate possesses assets requiring classification and poses a risk to such institution.

The Board is of the opinion that where an affiliate is holding assets that pose a risk to the parent (*e.g.*, where the affiliate is 100 percent owned or where the parent guarantees obligation(s) of the affiliate), such assets may pose a sufficient risk of loss to the parent to warrant classification and the establishment of valuation allowances. Consequently, to protect against such loss, the parent shall consider such assets when it classifies its assets and shall establish valuation allowances appropriately reflecting the level of risk posed by an affiliate to the parent institution.

GAAP capital, the institution could include general allowances for loan losses in determining its regulatory capital, as is permitted by the Federal banking regulators and as is required under section 402 of CEBA. Thus, under the proposal, an increase in general allowances would lead to a different capital result than would the current allocation of specific allowances for Doubtful items, since specific valuation allowances for loan losses do not qualify as regulatory capital. *See* 12 CFR 561.13(a).[9]

The treatment of items classified Loss under this proposal is a departure from the existing classification regulation. If an asset or a portion thereof is classified Loss, an institution shall charge off 100 percent of the amount of the asset or portion so classified. This treatment is consistent with the classification practices of the Federal banking agencies.

In Attachment 1 to this proposal, the Board is providing a simple example of the accounting consequences of classification under today's proposal. Readers are advised that this example is intended only to illustrate the operation of the proposed scheme under risk analysis reporting. Insured institutions should not rely upon it to predict the consequences of classification on their own capital positions.

In the May 1987 proposal, the Board sought to amend § 563.13, governing regulatory capital, to provide for the imposition of an increased minimum capital requirement on the basis of the quality of an institution's overall portfolio, consistent with the practices of the Federal banking agencies. Section 406 of CEBA provides the FSLIC with the same authority currently held by the Federal bank regulators under Section 908 of the International Lending Supervision Act of 1983, 12 U.S.C. 3907, with respect to minimum capital requirements. Specifically, section 406 provides that the Board may establish case-by-case minimum levels of capital for associations "at such amount or at such ratio or capital-to-assets as the Board determines to be necessary or appropriate for such association in light of the particular circumstances of the association." Pursuant to this statutory authority, the Board will shortly propose regulations to implement such a case-by-case minimum capital requirement. Board Res. No. 87-1045 (Oct. 5, 1987). For this reason, the Board deems it unnecessary to address this issue in this proposal. The Board solicits specific comments as to the removal of this case-by-case capital provision from the classification of assets proposal.

The amendments contained in today's proposal indicate that GAAP is to be applied in setting the amount of valuation allowances for loan losses. The Board believes that such an approach is consistent with the requirements of CEBA and the Board's goal of achieving similar flexibility in the administration of its classification system.[10] In adopting this approach, the Board recognizes its responsibility to ensure that examiners receive necessary training.

3. Assets deserving Special Mention.

Under current thrift examination practice, examiners use a category designated "Loans Subject to Comment." This category is intended to identify assets that do not warrant adverse classification at the time of the examination, but that possess credit deficiencies or potential weaknesses that deserve management's close attention. In order to comply with CEBA's mandate that the Board implement an asset classification scheme that is consistent with the classification practices of the Federal banking agencies, the Board is proposing to adopt a "Special Mention" category, which will include those assets that do not justify a classification of Substandard, but do constitute undue and unwarranted credit risks to the institution.

The Board believes that the adoption of this Special Mention category under § 561.16c(e) will promote, through self-classification, the identification and monitoring of those assets that have potential weaknesses that may, if not checked or corrected, weaken the asset or inadequately protect the institution's financial position at some future date.

4. Self-Classification and Reporting

The Board also is proposing, consistent with the May proposal, to amend § 561.16c to require that insured institutions independently review their asset portfolios, classify their assets, and set aside appropriate valuation allowances on the basis of such self-classification. This amendment merely sets forth as a regulatory requirement what is commonly regarded as a prudent institutional management policy. This process of self-classification is already widely observed throughout the banking industry and is thus consistent with CEBA.[11]

Pursuant to the Board's authority, as operating head of the FSLIC, to prescribe the manner in which an insured institution reports its affairs to the FSLIC, 12 CFR 563.18, the Board is proposing to require that an institution reflect its self-classification of assets in its quarterly reports to the Board, in the form of aggregate totals of assets in each of the three asset classification categories. As reflected in § 561.16c(c)(2), an institution's failure to classify its assets reasonably and in good faith, and to establish appropriate valuation allowances, will be a factor considered by the examiner and supervisory personnel in determining any necessary valuation allowances. Such reports will be reviewed by supervisory personnel to ensure that they accurately reflect an institution's self-classification and reflect a self-classification procedure performed reasonably and in good faith. Although these reports are subject to § 563.18, and may be reviewed to ensure consistency with safe and sound practice, it is not the Board's intention to penalize an institution for good faith efforts to self-classify.

5. Delegations and Interpretations

This portion of the classification regulation would remain substantially unchanged. The Principal Supervisory Agent would retain primary authority over the examiner's classification of an asset, the examiner's directives with respect to the appropriate amount of valuation allowances to be established, and the acceptability of an appraisal made in connection with the re-evaluation of an asset. As set forth in § 561.16c(f)(4), this authority may be delegated to a Supervisory Agent. It should also be noted that the proposed amendment would substitute a delegation to ORPOS for the previous delegation to the Board's former Office of Examination and Supervision ("OES"), although this amendment is not intended to circumscribe the Office of General Counsel's authority to issue legal interpretations with respect to the classification regulations. *See* Board Res. No. 86-755, 51 FR 27165, 27167 (July 24, 1986) (codified at 12 CFR 522.90)

[9] The Board is also proposing a technical revision of § 571.1a(a) to clarify that the eight Substandard characteristics set forth in this paragraph do not constitute an exclusive listing of such possible characteristics.

[10] It should be noted that the Board continues to believe that factors such as the coverage of a loan by private mortgage insurance should be taken into account in determining the appropriate allowances for loan losses when the probability of a full insurance payment is substantial. *See* 12 CFR 571.1a(b)(3).

[11] This self-classification and reporting requirement should not pose a particular problem for insured institutions using GAAP financial reporting, since the proposed method of setting aside allowances for loan losses is generally consistent with GAAP.

(ORPOS succeeds to all delegations of authority from Board to OES).

6. Deletion of Automatic Classification for Failure To Comply With Appraisal Requirements

The Board also is proposing to amend § 563.17-2 pertaining to the re-evaluation of assets. The proposal would delete those provisions of § 563.17-2(b) requiring "automatic" or mandatory classification where the appraisal is absent or does not conform with the Board's appraisal requirements, or where the assumptions underlying the appraisal are demonstrably incorrect. While the Board recognizes the importance of a properly conducted appraisal to an examiner's assessment of the risk of nonpayment associated with a particular asset, this amendment is consistent with the Board's recognition that risk of nonpayment is dependent upon other factors as well. Therefore, the Board is proposing to delete this automatic classification mechanism to provide examiners with sufficient flexibility and discretion to consider these other factors, and to promote consistency between the Board's classification of assets scheme and the classification practices of the Federal banking agencies. This is also consistent with GAAP and the Board's intention to afford examiners adequate discretion to determine the necessity of, and appropriate reliance on, a reappraisal, subject to review by the PSA.

7. Classifying Restructured Loans

Section 402 of CEBA amends the HOLA and the NHA to provide that, in establishing an asset classification system consistent with the classification practices of the Federal banking agencies, the Board shall provide that the PSA may determine whether to classify a restructured loan that is nonperforming, or with respect to which the borrowers have otherwise failed to remain in compliance with the repayment terms. It must be noted that in a separate resolution the Board also is proposing to implement CEBA's requirement that the Board prescribe uniform accounting standards. In addition to this accounting proposal, the Board is also proposing a detailed policy statement that, pursuant to section 402 of CEBA, authorizes and discusses the use of Statement of Financial Accounting Standards Numbers 5 and 15 in the restructuring of troubled debt.

In broadening the scope of the § 561.16c classification regulation to encompass all assets or portions thereof held by an insured institution, the Board specifically intends that restructured loans will be classifiable, consistent with section 402 of CEBA and with the practices of the Federal banking agencies. The Board recognizes that some risk of nonpayment may remain after a troubled debt restructuring. To the extent that a risk of nonpayment or collectibility questions remain after restructuring or become manifest during the pendency of the loan, examiners will conduct a credit analysis to determine whether the restructured loan should be classified and whether any valuation allowances should be established. Such restructured loans will be classifiable under § 561.16c after consideration has been given to the existence of other types of collateral or other reliable means of repayment. As a result of staff discussions with Federal banking agency representatives, the Board believes this approach to be consistent with the Federal banking agencies' classification approach to restructured loans. ORPOS will issue supervisory and examination guidelines addressing the appropriate classification procedures for such restructured loans.

8. Technical Questions

In light of the proposal's deletion to the requirement of specific valuation allowances for assets classified Doubtful, questions arise as to the appropriate treatment of existing specific valuation allowances for assets classified Doubtful under the current regulation. Because the Board has defined regulatory capital to include general allowances, but not specific allowances, the transfer to allowances from the specific to the general category could cause some institutions to show an immediate improvement in their capital positions, even on paper, though they have not, in fact, acquired additional capital. In light of this potential problem, the Board solicits specific comment on whether existing specific allowances should be redesignated general allowances. Further, if the Board permits such a redesignation, commenters are asked to address whether the newly redesignated general reserves should count immediately for purposes of determining compliance with any of the Board's regulations that are tied to an institution's capital level. The Board solicits comment on when an institution can take advantage of any increase in regulatory capital that results from a redesignation of reserves, *e.g.*, after its next regularly scheduled exam, after a thorough and well considered self-examination, or at some other time.

9. Solicitation of Comment

The Board solicits comment on all aspects of this proposal without limitation. The Board will consider and respond to all comments received, as well as all comments received in response to the Board's May proposal. Although some of the latter comments have undoubtedly been addressed by changes made in this proposal pursuant to CEBA, the Board will defer responding to these comments in light of today's further solicitation of comment. The Board particularly encourages commenters to address the comparability of the classification scheme proposed today with the classification practices of the Federal banking agencies. Finally, the Board notes that it intends to hold a public hearing on this proposal, together with other proposals published in accordance with CEBA's requirements. Details of this hearing are provided in a notice published elsewhere in today's edition of the **Federal Register.**

Initial Regulatory Flexibility Analysis

Pursuant to section 3 of the Regulatory Flexibility Act, 5 U.S.C. 603, the Board is providing the following regulatory flexibility analysis:

1. *Reasons, objectives, and legal basis underlying the proposed rule.* These elements are incorporated above in **SUPPLEMENTARY INFORMATION:**

2. *Small entities to which the proposed rule would apply.* The proposed rule would apply to all insured institutions without regard to size.

3. *Impact of the proposed rule on small entities.* The Board believes that the proposed revision of its classification of assets scheme will not have a disparate effect on small entities. To the extent that small entities engage to a greater degree than larger insured institutions in one-to-four family, owner-occupied mortgage lending, the impact of the proposal would be liberalizing since the proposal no longer provides an automatic "classification" of such assets as scheduled items, nor a twenty percent increase to minimum regulatory capital for such scheduled items.

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

5. *Alternatives to the proposed rule.* In the above **SUPPLEMENTARY INFORMATION,** the Board is soliciting comment on the rule as proposed.

List of Subjects in 12 CFR Parts 561, 563 and 571

Accounting, Bank deposit insurance, Investments, Reporting and

recordkeeping requirements, and Savings and loan associations.

Accordingly, the Federal Home Loan Bank Board hereby proposes to amend Parts 561, 563, and 571, Subchapter D, Chapter V, Title 12, *Code of Federal Regulations*, as set forth below.

SUBCHAPTER D—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

PART 561—DEFINITIONS

1. The authority citation for Part 561, as proposed at 52 FR 18374 (May 15, 1987), continues to read as follows:

Authority: Sec. 1, 47 Stat. 725, as amended (12 U.S.C. 1421 *et seq.*); sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 5B, 47 Stat. 727, as added by sec. 4, 80 Stat. 824, as amended (12 U.S.C. 1425b); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 1, 48 Stat. 128, as amended (12 U.S.C. 1461 *et seq.*); secs. 401–407, 48 Stat. 1255–1260, as amended (12 U.S.C. 1724–1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., p. 1071.

2. Remove § 561.15 as proposed at 52 FR 18374 (May 15, 1987) and as it appears in 12 CFR 561.15, and reserve the section designation for future use:

§ 561.15 [Reserved]

3. Amend § 561.16c by revising paragraphs (a), (c), and (d), as proposed at 52 FR 18375 (May 15, 1987); by redesignating paragraph (e), as proposed at 52 FR 18375 (May 15, 1987), as the new paragraph (f) (the text for paragraph (f) is republished without change for the convenience of the reader); and by adding a new paragraph (e) to read as follows:

§ 561.16c. Classification of assets.

(a) *Scope.* The classification system described in this section applies to all assets or portions thereof held by an insured institution.

* * * * *

(c) *Implementation of classification system.* (1) In connection with examinations of an insured institution, the examiner shall have authority to identify problem assets and, if appropriate, classify them.

(2) Each insured institution shall classify its own assets on a regular basis. In addition to any other remedy available to the Board, an institution's failure to classify its assets in a reasonable manner and to set aside prudent valuation allowances, or to monitor portfolio risk with an effective self-classification procedure, will be considered by the examiner or the Principal Supervisory Agent in determining the amount of valuation allowances to be established by such institution.

(3) In its quarterly reports to the Corporation, each insured institution shall include aggregate totals of assets that the institution has classified in each of the three asset classification categories, and the aggregate general and specific valuation allowances established.

(d) *Effect of classification.* (1) When, pursuant to § 561.16c, an insured institution has classified one or more assets, or portions thereof, Substandard or Doubtful, the insured institution shall establish purdent general allowances for loan losses. When, pursuant to § 561.16c, an examiner has classified one or more assets of portions thereof Substandard or Doubtful and has determined that the existing valuation allowances are inadequate, the insured institution shall establish general allowances for loan losses in an appropriate amount as determined by the examiner, subject to approval of the Principal Supervisory Agent.

(2) When, pursuant to § 561.16c, either an insured institution or an examiner has classified one or more assets or assets or portions thereof Loss, the insured institution shall charge off 100 percent of the value of such asset or portions so classified.

(3) Allowances provided on classified assets should be established in accordance with Generally Accepted Accounting Principles.

(e) *Assets deserving special mention.* Assets that do not currently expose an insured institution to a sufficient degree of risk to warrant classification under paragraph (b) of this section but do possess credit deficiencies or potential weaknesses deserving management's close attention shall be designated "Special Mention." Special Mention assets have a potential weakness or pose an unwarranted financial risk that, if not corrected, could weaken the asset and increase risk in the future.

(f) *Delegations and interpretations.* (1) The Principal Supervisory Agent may approve, disapprove, or modify any classifications of assets made pursuant to § 561.16c and any amounts of allowances for loan losses established by insured institutions or required by examiners pursuant to § 561.16c.

(2) When an appraisal is required or made in connection with any re-evaluation of assets, the Principal Supervisory Agent may approve or reject the appraisal and any valuation related to it.

(3) The Office of Regulatory Policy, Oversight and Supervision of the Federal Home Loan Bank System, shall, from time to time, issue supervisory interpretations and other informational material regarding classification of assets. *See* § 571.1a of this subchapter containing the Corporation's statement of policy on the classification of assets.

(4) The Principal Supervisory Agent may delegate functions assigned under § 561.16c to a Supervisory Agent in the same Federal Home Loan Bank district.

PART 563—OPERATIONS

4. The authority citation for Part 563, as proposed at 52 FR 18375 (May 15, 1987), continues to read as follows:

Authority: Sec. 1, 47 Stat. 725, as amended (12 U.S.C. 1421 *et seq.*); sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 5B, 47 Stat. 727, as added by sec. 4, 80 Stat. 824, as amended (12 U.S.C. 1425b); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 2, 48 Stat. 128, as amended (12 U.S.C. 1462); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 401–407, 48 Stat. 1255–1260, as amended (12 U.S.C. 1724–1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., P. 1071.

5. Amend § 563.13 by revising paragraph (b)(4)(i)(D) to read as follows; and by deleting paragraph (b)(4)(ii)(B), and redesignating paragraphs (b)(4)(ii)(C) through (G) as new paragraphs (b)(4)(ii) (B) through (F), respectively:

§ 563.13 Regulatory capital requirement.

* * * * * * *

(b) *Minimum required amount.* * * *

(1) *General definitions.* * * *

(4) *Calculation of contingency component.*—(i) *Definitions.* * * *

(D) "Fixed reserve elements" means recourse liabilities and standby letters of credit.

* * * * * * *

6. Amend § 563.17–2 by revising paragraph (a); and by revising paragraph (b), as proposed at 52 FR 18375 (May 15, 1987), to read as follows:

§ 563.17-2 Re-evaluation of assets; adjustment of book value; adjustment charges.

(a) *Real estate owned.* An insured institution shall appraise each parcel of real estate owned at the time of the institution's acquisition of such property, and annually thereafter. A letter from a qualified appraiser certifying that the property has not declined in value from the value stated in the appraisal required at acquisition will satisfy the annual appraisal requirement, subject to examiner review and acceptance. The foregoing requirement shall not apply to any parcel of real estate that is sold and reacquired less than 12 months subsequent to the most recent appraisal

made pursuant to the preceding sentences. A dated, signed copy of each report of appraisal made pursuant to any provisions of this paragraph shall be retained in the institution's records.

(b) *Re-evaluation of other assets.* In connection with each examination of an insured institution or service corporation, the Board's examiner shall make such re-evaluation of such institution's or service corporation's assets (exclusive of insured or guaranteed loans) as deemed advisable or necessary. Any such re-evaluation of real estate may be based on an appraisal as provided by § 563.17-1, and re-evaluation of parcels of real estate that are simlar in all essential respects may be based on an appraisal of one or more of such parcels. When an appraisal is required, it shall conform with § 563.17-1a of the Board's regulations.

* * * * *

PART 571—STATEMENTS OF POLICY

7. The authority citation for part 571, as proposed at 52 FR 18375 (May 15, 1987), continues to read as follows:

Authority: Sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402-403, 407, 48 Stat. 1256-1257, 1260, as amended (12 U.S.C. 1725-1726, 1730); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943-38 Comp., p. 1071.

8. Amend § 571.1a by revising the last sentence of the introductory text of paragraph (a); by revising paragraph (b)(3); by revising paragraph (c); and by revising paragraph (d), as proposed at 52 FR 18375 (May 15, 1987) to read as follows:

§ 571.1a Classification of assets.

* * * * *

(a) *Substandard.* * * *. Assets classified Substandard may exhibit one or more of the following characteristics: * * *

(b) *Doubtful.* (1) * * *

(3) A Doubtful classification would most likely not be repeated at a subsequent examination because there should be enough time to resolve pending factors which may work to the strengthening of an asset. If pending events did not occur and repayment was deferred awaiting new developments, a Loss classification normally would be warranted. An entire asset should not be classified Doubtful if the probability of a partial recovery is substantial (for example, there is private mortgate insurance and the probability of full insurance payment is substantial).

(c) *Loss.* An asset classified Loss is considered uncollectible and of such little value that continuance as an asset of the institution is not warranted. A Loss classification does not mean that an asset does not have recovery or salvage value, but simply that it is not practical or desirable to defer writing off all or a portion of a basically worthless asset, even though partial recovery may be effected in the future.

(d) *Effect of classification.* (1) When, pursuant to § 561.16c of this subchapter, an insured institution has classified one or more assets, or portions thereof, Substandard or Doubtful, the insured institution shall establish prudent general allowances for loan losses. When, pursuant to § 561.16c of this subchapter, an examiner has classified one or more assets, or portions thereof, Substandard or Doubtful, and has determined that the existing valuation allowances are inadequate, the insured institution shall establish general allowances for loan losses in an appropriate amount as determined by the examiner.

(2) When, pursuant to § 561.16c of this subchapter, either an insured institution or an examiner has classified one or more assets or portions thereof Loss, the insured institution shall charge off 100 percent of the value of such asset or portions so classified.

(3) Allowances provided on classified assets should be established in accordance with Generally Accepted Accounting Principles.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

Note.—Attachments 1 and 2 will not appear in the *Code of Federal Regulations.*

Attachment 1

The following is an example of the application of the proposed classification of assets regulation to the books and records of a $1,000,000 association as noted in I. The association reviews its loan portfolio and classifies its assets which results in the amounts listed in II. The allowances established for substandard and doubtful assets of $12,500 are included in determining regulatory capital. This amount, and the $10,000 charge off amount (totalling $22,500), are charged aginst earnings in the current period as reflected in the balance sheet shown in III through a reduction to the capital accounts, both allowances and charge offs are established in accordance with GAAP.

I. The following information reflects the institution's balance sheet before classification of assets:

Loans	$900,000
Other Assets	100,000
Total Assets	$1,000,000
Deposits and Liabilities	$950,000
Capital	50,000
Total	$1,000,000

II. After the institution classifies its assets, allowances and charge-offs are established in the following manner:

Classification	*Amount classified*	*Allowances established*	*Amounts charged off*
Substandard	$50,000	[1]$5,000	
Doubtful	25,000	[1]7,500	
			12,500
Loss	10,000		[1,2]$10,000
Total Amount Charged Against Earnings			$22,500

[1]Allowances for loans losses or charge offs are established in accordance with generally accepted accounting principles (GAAP), FASB Statement No. 5 Accounting for Contingencies. Statement of Financial Accounting Standards No. 5, *Accounting for Contingencies*, provides that an estimated loss should be acquired when it is probable that the asset has been impaired and the amount of loss can be reasonably estimated.

[1]100% of the amount classified Loss is required to be charged off.

III. The following information reflects the institution's balance sheet after asset classification and the establishment of allowances and charge-offs:

Loans	[1]$890,000
Allowances for Loan Losses	[2](12,500)
Net Loans	877,500
Other Assets	100,000
Total Assets	$977,500
Deposits and Liabilities	$950,000
Capital	[3]27,500
Total	$977,500
* * * * *	
Regulatory Capital:	
Capital	$27,500
General Reserves	12,500
Total	$40,000
Regulatory Capital Requirement 950,000 x 3%	(28,500)
Regulatory Capital In Excess of Minimum Requirement	$11,500

[1] This amount represents the total loans ($900,000) minus the total amount charged off ($10,000).

[2] This amount represents the total sum of general allowances established for Substandard and Doubtful assets.

[3] This amount represents the beginning capital of $50,000 less the provision for loan losses of $22,500 ($12,500 general reserves plus $10,000 charged off).

Attachment 2

Federal Home Loan Bank Board—Office of Examinations and Supervision

MEMORANDUM

To: Principal Supervisory Agents August 14, 1986.

From: Francis M. Passarelli

Classification of Assets.

1. This memorandum reiterates the Board's policy and provides clarification for classification of assets and reevaluation of real estate pursuant to 12 CFR 561.16c and 563.17-2(b). The use of this memorandum should aid in efforts to ensure that asset evaluations receive consistent treatment nationwide.

2. It has always been the Board's intent that examination and supervision have maximum flexibility in classifying assets.

3. Principal Supervisory Agents are responsible for implementation and supervision of the classification of assets and reevaluation of real estate. The Principal Supervisory Agent has the final authority on all classifications and valuation reserves. It is the Board's intent that in exercising the discretion available to them under these regulations, the Principal Supervisory Agents may require less than a 50 percent valuation reserve, that is to say 1 to 50%, on Doubtful classifications taking into account appropriate credit and collateral factors, e.g., future prospects, performance, willingness and ability to pay, previous payment record (other than from an interest reserve) of the borrower, and management strength of the institution, its past experience in complying with supervisory directives, supervisory agreements or consent resolutions, and willingness to enter into a supervisory agreement or consent resolution geared toward resolving the problem at issue.

4. It is not the Board's intent that an entire asset be automatically classified because of a single weakness in the credit file. As indicated in the Statement of Policy (§ 571.1a) on classification of assets, it is incumbent upon examination and supervision to avoid classification of sound assets. This duty exists regardless of the type of asset or underwriting deficiency involved, e.g., the absence of any appraisal. Discretion and judgment should be exercised; if only part of the asset is at risk, only that part should be classified. Thus, consideration should be given to, among other things, the overall risk involved; the nature and degree of collateral security; the character, capacity, financial responsibility and record of the borrower; and the probability of orderly liquidation in accordance with the specified terms. Accordingly, an entire credit should not be classified as Doubtful when an analysis of the relevant factors shows that collection of a specific portion appears probable. It is The Principal Supervisory Agent who has the final authority on all classifications and valuation reserves.

5. An appraisal is only one factor to be weighed in credit analysis, and other factors, such as those discussed above in paragraph three, should be evaluated and weighed prior to determining a classification. Sound lending practices dictate that insured institutions obtain appraisals reflecting current market conditions. Memorandum R-41b is the definitive interpretation of the Board's appraisal requirements. The absence of an R-41b appraisal is a weakness because without an appraisal it is very difficult to make a sound credit judgment. The absence of an R-41b appraisal also suggests there may be a problem with the loan. Furthermore, this weakness may be considered unsafe and unsound, as a failure to reflect the asset's true value may result in misrepresentation of the institution's financial condition.

6. In classifying an asset the examiner should document all information required to support the classification and any valuation reserve. In those instances where the institution disputes the classification or the reserve, the examiner should have available the information supplied by the institution so that all documentation bearing on the classification and reserve is available for decision by the Principal Supervisory Agent.

Francis M. Passarelli,

Director.

cc: Professional Staff—Examinations and Supervision.

[FR Doc. 87-23656 Filed 10-19-87; 8:45 am]

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12 CFR Part 563

[No. 87-1044]

Capital Forbearance

Date: October 5, 1987.

AGENCY: The Federal Home Loan Bank Board.

ACTION: Proposed rule.

SUMMARY: The Federal Home Loan Bank Board ("Board"), as the operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC" or "Corporation"), is proposing regulations to implement section 404 of the Competitive Equality Banking Act of 1987, which provides that the Board shall establish a program of capital forbearance for well-managed, viable Federal associations and FSLIC-insured institutions if certain requirements are met. The proposal sets forth the requirements that institutions must meet to obtain forbearance under this program, the procedures for requesting forbearance, the procedures under which an applicant's Principal Supervisory Agent ("PSA") will consider such requests, the effect of forbearance, and the termination of a grant of forbearance.

DATE: Comments must be received on or before November 19, 1987.

ADDRESS: Send comments to Director, Information Services Section, Office of the Secretariat, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552. Comments will be available for inspection at this address.

FOR FURTHER INFORMATION CONTACT: Michael P. Scott, 202-778-2516, Policy Analyst, or Kevin O'Connell, 202-778-2615, Supervision, Office of Regulatory Policy, Oversight and Supervision, Federal Home Loan Bank System; Catherine McFadden, 202-377-6639, Thomas J. Delaney, 202-377-7054, Attorneys, or Jerome L. Edelstein, 202-377-7057, Acting Deputy Director, Regulations and Legislation Division, Office of General Counsel; C. Dawn Causey, 202-653-2624, Attorney, or Marianne E. Roche, 202-653-2609, Deputy Director, Office of Enforcement; Richard Brown, 202-377-6795, Economist, or Joseph A. McKenzie, 202-377-6763, Director, Policy Analysis Division, Office of Policy and Economic Research, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Summary of Statute

Section 404 of the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 ("CEBA"), provides that the Board, as operating head of the Federal Savings and Loan Insurance Corporation, adopt capital recovery regulations for regulating and supervising troubled but well-managed and viable insured institutions in a manner that will maximize the long-term

viability of the thrift industry at the lowest cost to the Corporation.

CEBA describes certain circumstances under which the Board is to extend capital forbearance. Thus, the Board is to consider whether an institution's weak capital condition is primarily the result of losses on loans or participations in loans, and either the value of the collateral for such loans has been adversely affected by economic conditions in designated economically depressed regions or the institution is a minority institution of which 50 percent or more of its loan assets are minority loans and 50 percent or more of its originated loans are construction or permanent loans for one-to-four family residences. In addition, the Board is to consider whether an institution's weak capital condition is the result of imprudent operating practices. Furthermore, to exercise capital forbearance, the Board must approve a capital recovery plan submitted by the institution and the institution must adhere to the plan and submit regular and complete reports on its progress in meeting its goals under the plan.

CEBA also provides the Board with discretionary authority to include provisions in the capital recovery regulations to extend capital forbearance to institutions with regulatory capital of less than 0.5 percent. In making capital forbearance available to such an institution, the Board is to consider whether an institution satisfies the same capital forbearance requirements set forth in the capital recovery regulations that pertain to institutions with regulatory capital of 0.5 percent or more and, in addition, whether the institution has reasonable and demonstrable prospects for returning to a satisfactory capital level.

The authority of the Board to extend capital forbearance under CEBA applies in the same manner for all insured institutions, whether federally or state chartered. Pursuant to section 416 of CFBA, authority to extend capital forbearance under the statute expires when the Financing Corporation established under section 302 completes all net new borrowing authority pursuant to that section.

II. Summary of Proposal

A. Purpose

The Board is proposing this regulation to maximize the long-term viability of the thrift industry at the lowest cost to the Corporation by implementing section 404 of CEBA to permit well-managed and viable institutions suffering capital impairment under certain conditions to obtain forbearance and to continue to operate.[1]

These proposed regulations set forth the considerations to be taken into account in granting capital forbearance and the procedures for institutions to follow in applying for capital forbearance. The proposal also sets forth the procedures that the Board or the Corporation and, under delegated authority, the applicant's PSA should follow in processing requests for forbearance and the factors to consider in determining whether such requests should be granted and, once granted, the circumstances under which forbearance may be terminated.

The proposal also provides that insured institutions granted forbearance will not be closed or be subject to supervisory or enforcement action for failing to meet their minimum capital requirements. To avoid termination of forbearance, however, such an institution must remain in compliance with its capital plan which is also an important element in determining its eligibility for forbearance. Moreover, the Board recognizes that institutions with deficient capital may have other problems that need to be addressed through supervisory or enforcement action. The proposal would clarify that the Board retains such authority.

B. Definitions

Paragraph (b) of the proposed regulation defines certain terms set forth in the substantive provisions of the regulation contained in paragraph (c). Therefore, these definitions are discussed in connection with the provisions of paragraph (c).

C. Qualifying for Capital Forbearance

For an institution to be granted and retain forbearance under the statute, it must meet the following four conditions: (1) have a weak capital condition linked to economic conditions in an economically depressed region; (2) submit and adhere to a capital recovery plan; (3) submit regular reports demonstrating its adherence to the plan; and (4) meet certain standards regarding its management and operating practices.

1. Weak Capital Condition Linked To Economically Depressed Region

a. Proposal. Pursuant to 12 U.S.C. 1437 (1982 & Supp. III 1985), the Board proposes to delegate the authority for evaluating and making final determinations regarding an institution's eligibility for capital forbearance to that institution's PSA. In addition, the PSA will have the authority to terminate grants of capital forbearance. In making this delegation, the Board proposes that each PSA be granted broad flexibility to evaluate each institution's eligibility for capital forbearance.

Proposed paragraph (c) sets forth the circumstances under which the PSA may determine that an institution is eligible for capital forbearance. These circumstances reflect those established by Congress in CEBA. Each PSA will evaluate requests for forbearance on the basis of the requirements set forth in CEBA and the particular circumstances of each applicant requesting capital forbearance.

Therefore, with certain exceptions for minority institutions, an applicant seeking forbearance must demonstrate that its weak capital condition is primarily the result of losses recognized on, the nonperforming status of, or the failure of borrowers to remain in compliance with the repayment terms of loans or participations in loans, the value of the collateral for which has been adversely affected by economic conditions in a designated economically depressed region.

The statute defines "economically depressed region" as, "a region within which real estate values have suffered serious declines due to severe economic conditions, such as a decline in energy or agricultural values or prices." When it passed the statute, Congress was concerned with downturns in local economies that could result in capital erosion. It intended that capital forbearance be made available to institutions suffering a weak capital condition as a result of the economic conditions that affect their operations. According to the Joint Explanatory Statement of the Conference Committee:

> this section provides a capital recovery program for thrift institutions suffering from a weakened financial condition primarily related to the depressed economy in the regional areas in which the institutions operate.

H. Rep. No. 100–261, 100th Cong., 1st Sess. 165 (1987).

Given the statutory language and legislative history, the Board is proposing that institutions applying for forbearance identify a geographical region (or regions) and demonstrate to the PSA that it is economically depressed. Under the proposed approach, a "geographical region" is any region that has established boundaries

[1] When effective, these regulations will supersede the prior capital forbearance policy statement adopted by the Board on February 26, 1987 (52 FP 6876 (March 5, 1987)). That policy statement, however, will continue to govern applications filed pursuant to its terms on or before December 31, 1987.

or is a Metropolitan Statistical Area. This approach permits any institution seeking forbearance to identify any specific region (or regions) within which its collateral is located. Having identified a region, the institution must then demonstrate to the PSA that real estate values have declined due to severe economic conditions that exist within that region.

The Board is proposing flexibility with regard to the evidence that the PSA may consider in making determinations regarding severe economic conditions. This evidence includes: increases in unemployment; decreases in personal income; and, in regions that are largely dependent on a single industry, evidence that such industry is undergoing economic problems, due to such factors as declining prices or income, that affect the economic health of the region. The impact of economic conditions on real estate values may be demonstrated based on a sampling of recognized indices or surveys reflecting changes in such values in the region, including appraisals for purposes of tax assessments. Alternatively, above average substandard loan ratios in the region, especially if the region is also suffering from high unemployment, may reflect a decline in real estate values in the region. The evidence that the PSA may consider is not limited to the foregoing; any other evidence that the PSA views as relevant and reliable may also be considered.

The Board seeks comment on this method of identifying regions and on the alternative method discussed below. The Board also requests comment on alternative factors that may be taken into account in determining whether a given region is economically depressed. Moreover, the Board is aware that declines in real estate values may be difficult to determine due to a scarcity of readily available, reliable data. The Board thus seeks comment on other methods of evaluating declines in real estate values.

Pursuant to CEBA, the Board is also proposing regulations to permit an insured institution to continue to operate and obtain capital forbearance if it has a weak capital condition that is primarily the result of losses recognized on its loans or its participation interests in loans, and it qualifies as a minority institution with 50 percent or more of its loans qualifying as minority loans or participations in minority loans, and 50 percent or more of its originated loans secured by one-to-four family residences.

By statute, the term "minority institution" is defined to mean that more than 50 percent of the ownership or control is held by minority individuals, and more than 50 percent of the net profit or loss accrues to minority individuals. The statute defines "minority individual" as any Black American, Native American, Hispanic American, or Asian American.

Institutions seeking forbearance must include in their request an explanation and documentation that, at the time of the request, they meet the tests set forth in the statute. The Board notes, however, that pursuant to the terms of the statute institutions cannot qualify for forbearance based on actions taken solely to qualify for forbearance.

The statute also permits the Board to grant capital forbearance to institutions with regulatory capital below 0.5 percent if the same requirements are met as those applicable to institutions with 0.5 percent regulatory capital or more and the institution has "reasonable and demonstrable prospects of returning to a satisfactory capital level." The Board proposes, in subparagraphs (c)(4) and (b)(3), that institutions may meet this standard by structuring their capital recovery plan, which is discussed generally in part C.2 of this preamble, without reliance on generalized hopes or expectations of economic improvements and other uncertain future events, and that such plan must set forth in detail a precise and readily attainable schedule for increasing regulatory capital through realistically achievable methods.

b. Alternative to Proposal. Alternatively, the Board could adopt regulations that more precisely define statutory terms and standards. If the PSA determines that an institution meets these standards, the institution is granted forbearance. Institutions that do not meet some of the standards could still qualify for forbearance on a case-by-case basis. To do so, the institution would present additional evidence to the PSA that shows that the institution qualifies for forbearance under the provisions of CEBA.

The Board seeks comment on the advisability of following this approach and on definitions that may be appropriate for the various statutory terms and standards.

For instance, such elaboration of the standards could specify that an institution has a "weak capital condition" if it fails to meet its applicable minimum capital requirement; that such condition is "primarily" the result of certain loan losses if more than 50 percent of the reduction in capital is attributable to such loan losses; that "losses on loans" include losses recognized as a result of establishment of a specific allowance following classification of an item as a loss under the Board's classification regulations, 12 CFR 561.16c, 561.17–2, or as a result of direct writedowns of loans under Statement Number 5 of the Financial Accounting Standards Board; that collateral values may be shown to be "adversely affected" by economic conditions based on a comparison of property appraisals; that "control" of an institution is determined with reference to the power to exercise voting rights; and, ownership of a mutual institution is held by the accountholders.

The Board requests comment on: whether such elaboration of the statutory terms and standards is necessary or appropriate; the suggestions put forth in the proposal; and, alternatives to those suggestions.

Additionally, the Board seeks comment on whether the term "loans and participations in loans" needs further definition and whether such term should include interests in mortgage pools where risk of loss is related to defaults in the underlying mortgages. The Board also seeks comment on whether limits should be placed on how far back an institution and the PSA can look in considering losses on loans. Possible alternatives are to consider loans made during a specific period of time, for instance, four years prior to the request; or, losses incurred since an institution last met its capital requirement; or, losses incurred while the region is economically depressed.

The Board also seeks comment on alternative approaches to identify economically depressed regions. One approach is to establish by regulation the specific criteria to be used to determine whether a geographical region should be designated as "economically depressed." The Board would then periodically publish a list of regions that, based on available indices, appear to satisfy these specific criteria and hence be so designated. This approach would also permit institutions to demonstrate that other regions should also be considered to be economically depressed. The criteria, rather than the list of regions, would of course be the definitive standard.

If the Board were to establish these specific criteria and subsequently designate specific regions, it might do so on a statewide basis. The economic activity in urban, suburban, and rural areas is frequently interconnected; therefore, the geographical areas encompassed by these economic linkages may not coincide with specific local geographical boundaries. These circumstances argue for designation of economically depressed regions on a relatively broad basis, rather than on

the county or MSA level. Data for most specific criteria are readily available and are relatively more reliable on the state level.

Following is an example of criteria that could be used to designate economically depressed regions. CEBA defines an economically depressed region as a "region within which real estate values have suffered serious declines due to severe economic conditions, such as a decline in energy or agricultural values or prices." Because reliable indices for statewide real estate values are difficult to obtain, the average of substandard loan ratios of insured institutions in a state could be used as a proxy for declines in real estate values. Similarly, a state's unemployment rate could be used as a proxy for severe economic conditions, and the percentage of income derived from a state's primary sector industries could be used as a proxy for dependency on agriculture or energy. These sets of data are readily available on an annual basis for states.

To be designated as "economically depressed," a state would need a substandard loan ratio above the national average. A state would *also* need *either* an unemployment rate above the national average *or* the percentage income derived from primary sector industries above the national average. Any state satisfying these requirements on a specified date would be included on the published list of regions that appear to satisfy the regulatory criteria as described two paragraphs above.

Under this alternative, the Board would annually publish before the beginning of the calendar year the list of states that meet the criteria discussed above. The Board realizes that additional data could be available to individual institutions that could show that regions other than these states also have experienced declines in real estate values due to severe economic conditions. An institution may present this data to its PSA on a case-by-case basis. If the PSA finds the data convincing and the other conditions for forbearance have been met, then the institution would be granted forbearance.

Comment is sought on all aspects of this approach, including whether the regions should be identified on a statewide basis or other bases, and the criteria to be used to designate economically depressed regions.

2. The Capital Plan

To be approved for capital forbearance, an applicant also must submit and receive approval of a plan for increasing its capital. The Board proposes in paragraph (d) that such plans may be approved if, at a minimum, they set forth a strategy, including forecasts and pro forma financial statements, to increase capital to required levels within five years of the date of the request. Further, such plans must contain a detailed description of the steps the insured institution will take to meet its requirements including such actions as capital infusions, mergers, and operating changes to increase regulatory capital or decrease asset size. The plan should also specifically describe lending and investment strategies during the forbearance period, asset-liability growth, dividend levels, and operating costs, including compensation of officers and directors. The PSA may require that the plan include other restrictions or requirements before approving the plan.

3. Submission of Reports

The statute further provides for insured institutions that have been granted forbearance to submit regular and complete reports on progress in meeting the goals set forth in the plan.

The Board proposes in paragraph (e) that such reports be filed at least semiannually. The PSA, however, is given authority to require more frequent reports if necessary to monitor the institution's compliance with its plan. Such reports must provide the PSA with a detailed ongoing evaluation of capital recovery progress and describe and explain the reasons for any deviations from the schedule, methods, operations, or goals set forth in the plan.

These reports, along with on-site examinations, when necessary and appropriate, of institutions which have been granted capital forbearance are an important tool for the PSA in determining whether an institution is adhering to its plan. Consequently, the Board is proposing in paragraph (g) that either failure to file timely and complete reports as required, or failure to comply with its capital plan, provides a basis for the PSA to terminate an institution's grant of forbearance. Other reasons for termination are set forth in the section of this preamble relative to termination of forbearance.

4. Management and Operating Practices

Congress sought to assure that capital forbearance, as provided by CEBA, would be available to well-managed institutions not suffering from weak capital condition as a result of imprudent operating practices.

During the Senate debate on CEBA, Senator Garn in a colloquy with Senator Proxmire, stressed that the capital forbearance provisions were not intended to provide a safe harbor for:

> [the] small minority of the industry, (which) has operated in an unsafe and unsound condition—often engaging in fraudulent and reckless investment strategies, self dealing, conflicts of interest and a whole host of otherwise repugnant business practices in violation of statutes, regulations, ethics, their fiduciary duties and plain decent business standards.

133 Cong. Rec. S11209–10 (daily ed. August 4, 1987) (statement by Senator Garn during colloquy with Senator Proxmire).

The regulation, therefore, provides in paragraphs (c) and (f) that an institution will not be approved for capital forbearance if the PSA determines that the institution is not well-managed or that the institution's weak capital condition is the result of imprudent operating practices. This determination is within the discretion of the PSA and may be based on a review of the institution's past and present management structure and operating practices, including the experience and past performance records of management officials. Such review may include materials submitted by the institution seeking forbearance, from past examination reports and the supervisory history of the institution, as well as any other relevant information concerning the institution or members of its management.

In paragraph (f)(1) the Board proposes a list of factors that the PSA may consider in determining whether an insured institution is not well-managed. None of these factors are necessarily dispositive of a request for forbearance, nor does the Board intend to limit the PSA's review to these factors. Among the factors that may be taken into account are management's record of operating the institution and whether this record indicates management's ability to guide successfully the institution through its present difficulties. Additionally, management's record of compliance with regulations, directives, agreements, and orders may be considered. An institution may be deemed not well-managed if its management does not timely recognize and correct regulatory violations, unsafe or unsound practices, or other weaknesses identified by examiners or supervision. Management's ability to operate the institution under fluctuating economic conditions is critical in assessing its ability successfully to guide the institution through its present difficulties. Management's ability to develop and implement the capital forbearance program is crucial in

evaluating the possibility that an institution can achieve its minimum capital requirements within the scheduled time. These factors and any others examined by the PSA may be considered with regard to service by any member of management at other insured institutions, commercial banks, or other financial institutions.

In reviewing the management structure of the institution, the PSA may review past, as well as present, management officials and their records and consider the length of tenure of present management officials. The PSA may consider the impact of recent changes in management that would result, in the PSA's opinion, in that institution's improving its quality of management.

In paragraph (f)(2), the Board proposes a list of factors that may be considered by the PSA in determining whether an institution's weak capital condition is the result of imprudent operating practices. In accordance with the statute, imprudent operating practices include practices that were speculative at the time they were undertaken, insider abuses, excessive operating expenses, excessive dividends, and actions taken solely for the purpose of qualifying for forbearance. The proposed regulation also provides that conflicts of interest, substandard underwriting practices, and unsafe or unsound practices also constitute imprudent operating practices. The PSA is not limited to these factors in his evaluation.

In determining whether imprudent operating practices prevent an institution from receiving capital forbearance, the PSA may also consider recent corrections of imprudent operating practices, significant management changes, and the likelihood that imprudent operating practices will continue.

A question arises, however, as to what standard may be appropriate in determining whether imprudent operating practices have resulted in an institution's having a weak capital condition, thus providing a basis for denial of forbearance. One approach is that forbearance may not be granted if losses as a result of imprudent operating practices were large enough to have been the sole cause of an institution's failure to meet its minimum capital requirement. The Board seeks comment on whether such a standard should be adopted and on any alternatives that may be appropriate.

Any determinations made pursuant to paragraph (f) are solely for purposes of determining whether an insured institution qualifies for capital forbearance. Such determinations are not binding on the Board and do not prevent the Board from bringing any future supervisory, enforcement or other legal actions against an institution. These determinations are not dispositive or relevant in any pending or future supervisory, enforcement or other legal actions. Therefore, for example, if a removal or prohibition proceeding was initiated against a management official of an institution that has been approved for capital forbearance, that individual may not claim, as a defense, that the institution, in connection with that approval, has been deemed to be well-managed and to have engaged in prudent operating practices.

D. Termination of Forbearance

Once the PSA determines that an institution qualifies for capital forbearance, it continues to qualify for up to five years until, in accordance with paragraph (g), the PSA determines that the institution should no longer qualify. In that paragraph, the Board proposes grounds for termination of capital forbearance. For the most part, these relate to changes in an institution's operations that were not contemplated or existing at the time capital forbearance was granted. The grounds for termination include: (1) An institution's failure to comply with its capital plan; (2) its failure to submit the reports required by paragraph (e); (3) a determination that the institution's regulatory capital was below, rather than at or above, 0.5 percent at the time forbearance was granted or otherwise was less than represented; and, (4) violations of any agreement with, or an order issued by, the Board or the Corporation.

In addition, the PSA may disqualify an institution from capital forbearance upon the discovery of information not available at the time the institution qualified, which indicates that forbearance should not have been granted. The PSA may terminate capital forbearance if: the institution engages in abusive, unsafe or unsound, or other imprudent practices; undergoes a change in control or material change in management that was not approved by the PSA; or, engages in practices inconsistent with achieving its minimum capital requirement.

The presence of these factors would not require automatic termination. The PSA has the discretion to determine whether forbearance should be terminated if one or more of these factors exist. Alternatively, the proposal provides that in the event termination is considered because an institution fails to comply with its capital plan, the PSA may permit the institution to revise its plan and, if the revised plan is acceptable, continue the grant of forbearance.

In addition, the Board requests comment on whether a grant of forbearance should be terminated based upon improvement in economic conditions in the region that was identified as economically depressed by the institution.

The Board also believes it would be advisable that before the PSA terminates forbearance, the institution should be so advised and, where circumstances allow, the PSA should provide the institution with an opportunity to address the reasons for termination. Finally, the Board proposes that any termination of capital forbearance must be contained in a written notice to the insured institution that sets forth the reasons for the termination. Such termination would take effect upon receipt by the institution of such notice. A decision by the PSA to terminate capital forbearance would be considered the final action of the Board or Corporation; however, comment is sought on this point. *See* Part F infra.

E. Status of Supervisory, Enforcement, and Other Actions During Capital Forbearance Participation

The legislative history is clear that administrative actions that are stayed during the period of capital forbearance are limited to those that relate to failure to adhere to minimum capital requirements. Other appropriate supervisory actions against institutions are unrestricted. As stated in the report of the Conference Committee:

> The capital recovery program is not intended to restrict any authority of the Bank Board to correct any fraud, criminal activity, imprudent operating practices or managerial incompetence.

H. Rep. No. 100–261, 100th Cong., 1st. Sess. 165 (1987). The granting of capital forbearance under CEBA is, therefore, not viewed as providing protection to an institution from all supervisory or enforcement actions.

Paragraph (h) addresses the status of supervisory, enforcement, and other actions against institutions that are operating under a grant of capital forbearance. While an insured institution is participating in the capital forbearance program, the Board and the Corporation will not issue a capital directive pursuant to section 406 of CEBA, institute supervisory or enforcement action to enforce the institution's minimum capital requirement, take action to terminate

the institution's insurance as a result of its weak capital condition, or place the insured institution in conservatorship or receivership based on the insured institution's inadequate capital. However, the Board and the Corporation recognize that institutions may suffer from other problems that must be addressed by supervisory or enforcement action. Therefore, the Board and the Corporation will not refrain from taking any appropriate action against a participating institution for matters other than inadequate capital, or from taking any appropriate action against any individual or entity, other than the institution, for any matter including inadequate capital. In fact, a supervisory agreement or a cease-and-desist order may be necessary for an institution receiving capital forbearance to address operating deficiencies. In addition, any existing agreements with, or orders against, the institution and all regulations that address, relate to, include a reference to, or otherwise concern regulatory capital are not changed or voided by an institution's capital forbearance status. The institution may, however, request a modification or termination of any order or agreement or a waiver or modified application of any regulation, in connection with, or subsequent to, qualifying for forbearance. Modification or termination of some of these actions may be carried out only by the Board, not the PSA. This may or may not be done in conjunction with the granting of forbearance.

F. Procedures

Section 416 of CEBA provides that the provisions relating to capital forbearance shall cease to be effective on the date that the Financing Corporation created pursuant to section 302 has completed all net new borrowing and provides a notice of such fact in the **Federal Register.**

The last date, however, on which the Financing Corporation can engage in net new borrowing is uncertain. Although CEBA sets an annual borrowing limit of $3.75 billion, the actual amount the Financing Corporation is able to borrow each year will be determined by a number of factors. If the Financing Corporation maximizes its borrowing, the shortest period of time in which it will exhaust its net new borrowing authority will be slightly more than 2 years. Notification that the Financing Corporation has achieved its net borrowing limit will be indicative of the termination of the Board's authority under CEBA to accept additional applications for capital forbearance. The expiration of the Board's authority to accept applications for capital forbearance under CEBA will not affect institutions whose applications were submitted before that time or those whose requests were previously approved.

The Board proposes that all requests for forbearance include a detailed showing that the applicant meets the requirements previously discussed and a plan that meets the requirements set forth in proposed paragraph (d).

Requests for capital forbearance will be processed in accordance with the Notice and Disapproval Procedures adopted by the Board on October 2, 1987.[2] If, however, within 30 days of a properly filed request, the PSA determines that an examination is necessary in connection with that request, the request will not be deemed complete until the examination is completed.

The Board proposes that denial of such request be in writing with a statement of the reasons for the denial. Any action taken by the PSA that results in a grant or denial of a request for capital forbearance, or the termination of forbearance, will be considered the final action of the Board or the Corporation. The Board, however, is considering alternatives to this approach, which include providing for Board review of PSA decisions or a process whereby a PSA decision can be appealed to the Board or its designee. Comments are sought on the advisability of such a review or appeal process and suggested alternatives.

G. Other Matters

The Board is also proposing to expand the existing waiver provision of the loans-to-one-borrower regulation at 12 CFR 563.9–3(b)(4), which has been too narrow to address the limitations imposed by the regulation on institutions with low capital levels. The proposal would enable the Board, or the PSA, in accordance with guidelines approved by the Board, to waive the loans-to-one-borrower limits in connection with resolving or managing a supervisory case. This would include assisted or non-assisted acquisitions approved by the Board or PSA and the daily supervisory oversight of the PSA over institutions with deficit capital. The Board contemplates that any institution granted capital forbearance would be a supervisory case and could request a waiver of the loans-to-one-borrower limits imposed by the regulation.

[2] Resolution No. 87–1038. A notice of those guidelines is published elsewhere in this issue of the **Federal Register.**

Finally, the Board advises that it does not anticipate that a denial of a request for capital forbearance will be followed by supervisory action or the appointment of a conservator or receiver. Rather, the Board expects that such an institution will be subject to the same supervisory treatment to which it would have been subjected had it not filed a request for forbearance.

III. Solicitation of Comment

The Board solicits comment on all aspects of this proposal without limitation and will consider all comments received. Furthermore, public hearings on this proposal, as well as all others adopted by the Board on October 2 and October 5, 1987, will be held on November 3 and 4, 1987. A notice of these hearings is provided elsewhere in this issue of the **Federal Register.**

IV. Initial Regulatory Flexibility Analysis

Pursuant to section 3 of the Regulatory Flexibility Act, 5 U.S.C. 603, the Board is providing the following initial regulatory flexibility analysis:

1. *Reasons, objectives, and legal basis underlying the proposed rule.* These elements are incorporated above in **SUPPLEMENTARY INFORMATION.**

2. *Small entities to which the proposed rule would apply.* The proposed rule would apply to all insured institutions without regard to size.

3. *Impact of the proposed rule on small entities.* All institutions, regardless of size, would be permitted to obtain capital forbearance as long as they are well-managed, viable institutions meeting the various requirements set forth in section 404 of CEBA as implemented by this proposal. Such institutions would be permitted to operate and not be subject to supervisory action as a result of failure to comply with capital requirements as long as they remain in compliance with their capital plan.

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

5. *Alternatives to the proposed rule.* In the above **SUPPLEMENTARY INFORMATION** the Board is soliciting comment on the rule as proposed.

List of Subjects in 12 CFR Part 563

Accounting, Bank deposit insurance, Investments, Reporting and recordkeeping requirements, Savings and loan associations.

Accordingly, the Federal Home Loan Bank Board hereby proposes to amend Part 563, Subchapter D, Chapter V, Title

12, *Code of Federal Regulations*, as set forth below.

SUBCHAPTER D—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

PART 563—OPERATIONS

1. The authority citation for Part 563 continues to read as follows:

Authority: Sec. 1, 47 Stat. 725, as amended (12 U.S.C. 1421 *et seq.*); sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 5B, 47 Stat. 727, as added by sec. 4, 80 Stat. 824, as amended (12 U.S.C. 1425b); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 2, 48 Stat. 128, as amended (12 U.S.C. 1462); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); sec. 401–407, 48 Stat. 1255–1260, as amended (12 U.S.C. 1724–1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., p. 1071.

2. Amend § 563.9–3 by revising paragraph (b)(4) to read as follows:

§ 563.9–3 Loans to one borrower.

* * * * *

(b) *Limitations*—(1) *Aggregate loans* * * *

(4) *Waiver.* The Board or the PSA, in accordance with guidelines approved by the Board, may waive the application of the limitations in this paragraph (b) to any loan in connection with the resolution or management of a supervisory case.

* * * * *

3. Amend Part 563 by adding a new § 563.47 to read as follows:

§ 563.47 Capital forbearance.

(a) *Purpose.* This section implements section 404 of the Competitive Equality Banking Act of 1987, Pub. L. No. 100–86, 101 Stat. 552, which requires that the Board and the Corporation adopt regulations for regulating and supervising troubled but well-managed and viable insured institutions so as to maximize the long-term viability of the thrift industry at the lowest cost to the Corporation by permitting qualifying institutions to continue to operate and be eligible for capital forbearance.

This section sets forth the procedures and the conditions under which an insured institution may qualify for capital forbearance and thereby not be subject to supervisory or enforcement action to enforce its minimum capital requirement or terminate its insurance or be placed in conservatorship or receivership based on the institution's inadequate regulatory capital. They also indicate the circumstances under which capital forbearance may be terminated.

(b) *Definitions.* When used in this section

(1) "*Economically depressed region*" means any geographical region with established political boundaries or a Metropolitan Statistical Area that has suffered severe economic conditions as determined by the Principal Supervisory Agent, whose consideration may include any or all of the following factors and any other data which are presented by an institution in support of a claim that a region is economically depressed:

(i) The economic base of the region is largely dependent on one particular employer or industry and that employer or industry is experiencing decline;

(ii) Increased unemployment in such region;

(iii) Real estate values have declined in such region as measured by a sampling of recognized indices or surveys measuring such values in that region;

(iv) Declines in personal income levels in such region; or,

(v) Increased substandard loan ratios of insured institutions in such region.

(2) "*Principal Supervisory Agent*" has the same meaning as supplied by § 541.18 of this chapter.

(3) "*Reasonable and demonstrable prospects*" means that the plan to meet specified capital levels sets forth in detail a precise and readily attainable schedule for increasing regulatory capital through realistically achievable methods and does not rely upon unrealistic predictions of economic improvements or other uncertain future events.

(c) *Qualifying for capital forbearance.* The Principal Supervisory Agent may permit insured institutions to continue to operate and obtain capital forbearance, except as provided in paragraphs (f) and (g) of this section, if

(1) The insured institution, at the time it submits its request for forbearance, has a weak capital condition;

(2) The insured institution's weak capital condition is primarily the result of losses recognized on, the nonperforming status of, or the failure of borrowers to otherwise remain in compliance with the repayment terms of loans or participations in loans that are:

(i) Secured by collateral whose value is determined, in the discretion of the Principal Supervisory Agent, to have been adversely affected by economic conditions in an economically depressed region; or

(ii) Made by a minority institution that has

(A) 50 percent or more of its loans qualify as minority loans or participations in minority loans; and

(B) 50 percent or more of its originated loans secured by one-to-four family residences;

(3) The insured institution submits and the Principal Supervisory Agent approves a capital plan that meets the requirements of paragraph (d) of this section for increasing the insured institution's regulatory capital to the required level; and

(4) The insured institution, if its capital as calculated in accordance with § 561.13 at the time it requests forbearance is less than 0.5 percent, demonstrates and the Principal Supervisory Agent determines, in his discretion, that the institution has evidenced in its plan reasonable and demonstrable prospects for achieving its required level of regulatory capital thereafter, but not later than five years after the date of the request for forbearance.

(d) *The capital plan.* The plan referred to in paragraph (c)(3) of this section must contain a detailed description of the steps the insured institution will take to meet its minimum capital requirements, including capital infusions, mergers, and operating changes to increase regulatory capital or decrease asset size. The plan should also address the insured institution's operations during the time it has capital forbearance, including lending and investment strategies, asset-liability growth, dividend levels, and compensation of directors and officers. The plan must include forecasts and pro forma financial statements and set forth a reasonable time frame for achieving minimum capital that is not to exceed 5 years. The Principal Supervisory Agent may require that the plan include other restrictions or requirements before approving the plan.

(e) *Reporting.* Any insured institution determined by the Principal Supervisory Agent to qualify for capital forbearance shall submit thorough and complete reports on such insured institution's progress in meeting the goals set forth in its capital plan. Such reports must provide the Principal Supervisory Agent with a detailed ongoing evaluation of capital recovery progress and explain any deviations from the schedule, methods, operations or goals set forth in the plan. These reports shall be submitted as frequently as required by the Principal Supervisory Agent, but not less than semiannually.

(f) *Management and operating practices.* The Principal Supervisory Agent must review the past and present management structure and operating practices of any insured institution that has submitted a request for capital forbearance and shall not approve that request if the Principal Supervisory Agent determines that the institution is not well-managed or that the institution's weak capital condition is

the result of imprudent operating practices.

(1) In determining whether an insured institution is not well-managed, the Principal Supervisory Agent may consider, among other things, the management's—

(i) Record of operating the insured institution, including those operating practices not reviewed under paragraph (f)(2) of this section;

(ii) Compliance with regulations, directives, agreements, and orders;

(iii) Timely recognition and correction of regulatory violations, unsafe or unsound practices, or other weaknesses identified through the examination or supervisory process;

(iv) Ability to operate the insured institution in changing economic conditions; and

(v) Ability to develop and implement the capital plan.

These factors may be considered with regard to service by any member of management at other insured institutions, commercial banks, or other financial institutions. The Principal Supervisory Agent also may take into account whether management has taken actions solely to qualify for capital forbearance.

(2) In determining whether the insured institution's weak capital condition is the result of imprudent operating practices, the Principal Supervisory Agent shall review the circumstances resulting in the institution's weak capital condition and determine whether they involve imprudent operating practices including, but not limited to:

(i) Practices that were speculative at the time they were undertaken;

(ii) Insider abuse and conflicts of interest;

(iii) The payment of excessive dividends;

(iv) Substandard underwriting of loans and investments;

(v) Unsafe or unsound practices within the meaning of 12 U.S.C. 1464(d)(2), 1730(e);

(vi) Excessive operating expenses; and

(vii) Actions taken solely to qualify for capital forbearance.

(3) Any determinations made pursuant to this paragraph (f) are solely for purposes of determining whether an insured institution qualifies for capital forbearance and are not binding or in any way dispositive of any pending or future supervisory, enforcement or other legal actions.

(g) *Termination of capital forbearance status.* (1) The Principal Supervisory Agent may determine that an institution does not qualify for capital forbearance or no longer qualifies for capital forbearance status, if:

(i) The institution fails to comply with its capital plan;

(ii) The institution undergoes a change in control or a material change in management that was not approved by the Principal Supervisory Agent;

(iii) The institution engages in practices inconsistent with achieving its minimum capital requirement;

(iv) Information is discovered that was not made available to the Principal Supervisory Agent at the time the institution qualified for capital forbearance and that indicates that forbearance should not have been granted;

(v) The institution's regulatory capital at the time of requesting forbearance was reported to be at least 0.5 percent, but is later found to have been below 0.5 percent;

(vi) The institution engages in abusive, unsafe or unsound, or other imprudent practices;

(vii) The institution violates an agreement with, or order issued, by the Board or Corporation; or

(viii) The institution fails to submit the reports required by paragraph (e) of this section.

(2) The Principal Supervisory Agent shall notify an insured institution in writing if it no longer qualifies for capital forbearance stating the reasons for the termination. Such termination shall take effect upon receipt of such notification by the insured institution.

(3) As an alternative to denying or terminating capital forbearance, the Principal Supervisory Agent may permit the insured institution to revise its plan, and if such revision is approved by the Principal Supervisory Agent, capital forbearance may be granted or continued.

(4) Any action by the Principal Supervisory Agent to terminate capital forbearance is deemed to be final action of the Board or Corporation.

(h) *Status of supervisory, enforcement and other actions during capital forbearance participation.* While an insured institution qualifies for capital forbearance, the Board and the Corporation will not issue a capital directive pursuant to 12 CFR 563.14-1, institute supervisory or enforcement action to enforce the institution's capital requirement, or take action to terminate the institution's insurance, or place the insured institution in conservatorship or receivership based on the insured institution's inadequate capital. However, the Board and the Corporation will not forbear from taking any appropriate action against the insured institution for matters other than inadequate capital, or any appropriate action against any other individual or entity other than the institution for any matter, including inadequate capital. All existing actions including supervisory agreements and orders remain in effect unless lawfully modified or terminated. In addition, the effectiveness of all regulations that address, relate to, or include a reference to regulatory capital or net worth remains the same as before forbearance was granted.

(i) *Procedures.* (1) An insured institution seeking capital forbearance must submit a written request to the Principal Supervisory Agent. The request must consist of:

(i) A detailed showing, including documentation, by the insured institution that it is eligible for capital forbearance because it meets the requirements of paragraphs (c) (1) through (4) and (f) of this section; and

(ii) A plan meeting the requirements of paragraph (d) of this section;

(2)(i) Requests for capital forbearance will be processed in accordance with Board Resolution No. 87-1038, unless within 30 days of the receipt of a properly filed request, the PSA notifies an institution that an examination is necessary in conjunction with its request, in which case the request will not be deemed complete until the examination is completed.

(ii) If the request is denied, the Principal Supervisory Agent shall notify the institution in writing and state the reasons for the denial.

(3) Any action by the Principal Supervisory Agent to grant or deny a request for forbearance is deemed to be final action of the Board or Corporation.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

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12 CFR Part 563

[No. 87-1045]

Minimum Regulatory Capital Requirements for Individual Insured Institutions

Date: October 5, 1987.

AGENCY: The Federal Home Loan Bank Board.

ACTION: Proposed rule.

SUMMARY: The Federal Home Loan Bank Board ("Board"), as the operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC" or "Corporation"), is proposing rules to

implement its authority to set and enforce regulatory capital requirements for all institutions the accounts of which are insured by the FSLIC ("insured institution(s)" or "institution(s)"). The Board is proposing these regulations pursuant to the authority granted it by Section 406 of the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 ("CEBA"), which was signed into law on August 10, 1987, and pursuant to its general authority to promulgate regulations under 12 U.S.C. 1437(a), 1725(a), and 1730.

This proposal would implement the authority granted the Board and the FSLIC by Section 406 of CEBA to vary the minimum regulatory capital requirements of an individual insured institution as may be necessary or appropriate in light of the particular circumstances of the insured institution. It would also establish procedures for implementing the authority granted by Section 406 to issue a directive and enforce a plan for increasing an individual insured institution's capital level. The Board requests comments on all aspects of this proposal. The Board notes that it intends to hold a public hearing on this proposal, together with other proposals published in accordance with CEBA's requirements. Details of this hearing are provided in a notice published elsewhere in today's edition of the **Federal Register.**

DATE: Comments must be received on or before November 19, 1987.

ADDRESS: Send comments to: Director, Information Services Section, Office of the Secretariat, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552. Comments will be available for public inspection at this address.

FOR FURTHER INFORMATION CONTACT: Jerilyn Rogin, Attorney-Advisor, (202) 377-7018, John F. Connolly, Deputy Director for Capital and Finance, (202) 377-6465, Regulations and Legislation Division, Office of General Counsel; Marianne Roche, Deputy Director, Office of Enforcement, (202) 653-2609; Donald G. Edwards, Director, Financial and Quantitative Analysis, (202) 377-6914, Edward A. Hjerpe III, Financial Economist, (202) 377-6976, Office of Policy and Economic Research, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552; or Edward J. Taubert, Associate Director for Policy, (202) 778-2511, Carol Larson, Professional Accounting Fellow, (202) 778-2535, Office of Regulatory Policy, Oversight and Supervision, Federal Home Loan Bank System, 900 Nineteenth Street NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION: The Board consistently expresses its conviction that achieving and maintaining adquate capital levels are crucial to the safety and soundness of insured institutions and the FSLIC deposit insurance fund. For example, in the preamble to its revised regulatory capital regulation, adopted last year,[1] the Board set forth comprehensive policy reasons for requiring insured institutions to increase their capital and for setting a minimum six percent capital requirement. It explained that the previous requirement did not provide adequate protection for insured institutions, their depositors, or the FSLIC fund. The Board continues to believe that it is imperative that all insured institutions achieve a minimum six percent capital level as quickly as feasible.[2]

The Board is also well aware that setting capital requirements using a uniform formula for all insured institutions may not be appropriate in all circumstances. For this reason, the capital regulation includes separate components that are intended to address the risk presented by the type and level of an individual insured institution's assets and liabilities. The capital regulation does not, however, include a mechanism that takes sufficient account of the continuously changing financial positions and exposure to risk of the more than three thousand individual insured institutions under the supervision of the Board.

With the enactment of Section 406 of CEBA, which amends both Section 5 of the Home Owner's Loan Act of 1933 ("HOLA"), 12 U.S.C. 1464, and Section 407 of the National Housing Act, ("NHA"), 12 U.S.C. 1730, Congress has explicitly empowered[3] the Board and the Corporation to exercise much more discretion with respect to the required capital levels of any given insured institution.[4] Sections 406(a) and 406(b) of CEBA provide, in part, that the Board may set the required captial level of insured institutions on a case-by-case basis as it "determines to be necessary or appropriate for such insured institution in light of the particular circumstances of the insured institution."

Since the passage of Section 908 of the International Lending Supervision Act of 1983 ("ILSA"), Pub. L. 98-181, 97 Stat. 1278, *codified at* 12 U.S.C. 3907, the federal banking regulators have had the explicit authority to set the minimum capital requirements of individual banks on a case-by-case basis. Pursuant to Section 908 of ILSA, the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), and the Federal Reserve Board ("FRB") have promulgated regulations requiring banking institutions generally to achieve and maintain a minimum acceptable ration of total captial to total assets of six percent, and a minimum primary captial ration of five and one-half percent of adjusted total assets.[5]

Section 908 of ILSA specifically provides, however, that the bank regulators may "establish such minimum levels of capital for a banking institution as the appropriate Federal banking agency, in its discretion, deems to be necessary or appropriate in light of the particular circumstances of the banking institution." ILSA at 908(a)(2).[6] In

[1] On August 15, 1986, the Board adopted its revised regulatory capital regulation [hereinafter, "capital regulation"] establishing the levels of capital required for all insured institutions. *See* Board Res. No. 86-857, 51 FR 33565-88 (Sept. 22, 1986), *codified at* 12 CFR 563.13 (1987).

[2] This subject was analyzed exhaustively by the Board's Office of Policy and Economic Research before adoption of the capital regulation. *See An Analysis of the Proposed Capital Requirements for Thrift Institutions: A Staff Economic Study* (Aug. 15, 1986). The Board hereby incorporates the discussion in the preambles to the proposed and final capital regulations concerning the reasons for attaining such levels. Board Res. No. 86-426, 51 FR 16550 (May 5, 1986); 51 FR at 33571-73.

[3] Section 403(b) of the NHA, 12 U.S.C. 1726(b), provides the FSLIC with express authority to require an institution, as a condition precedent to receiving account insurance from the FSLIC, to provide adequate reserves in a form satisfactory to the FSLIC. This authority over capital levels is similar to that granted by Section 406 of CEBA.

[4] All federal savings and loan associations and federal savings banks are chartered and regulated under the HOLA and the regulations promulgated thereto. Most of these same institutions are also insured by the FSLIC and required to comply with the NHA and its implementing regulations. Federal savings banks that are insured by the Federal Deposit Insurance Corporation are encompassed within the definition of insured institution in Section 561.1, unless expressly exempted by a specific regulation. In order to be consistent with and in proximity to the existing regulatory capital regulation that appears in Part 563 of the FSLIC regulations, this proposed rule is issued as a FSLIC regulation and would appear in Part 563. The Board, as operating head of the FSLIC, can implement the amendments to both the HOLA and the NHA in this way.

[5] The Board is aware that these banking regulators have recently proposed to revise their minimum capital requirements by proposing risk-based capital guidelines. The Board intends to monitor closely the progress of these regulatory initiatives, consistent with the intent of section 406 of CEBA.

[6] The legislative history of Section 908 of ILSA demonstrates that it was a specific legislative response to a judicial decision that brought into question the authority of a federal bank regulator to establish an individualized minimum capital requirement for a particular bank. *See First*

Continued

accordance with that statutory provision, the implementing regulations adopted by the federal banking agencies authorize the discretionary exercise of broad power to require different captial levels for individual institutions. For example, the OCC regulations set forth at 12 CFR 3.1 *et seq.* state that capital ratios higher than the generally applicable ratios may be appropriate for a newly chartered bank, a bank receiving special supervisory attention, or a bank having a high proportion of off-balance sheet risks. 12 CFR 3.10 (1987.[7]

With Section 406 of CEBA, which is closely patterned after Section 908 of ILSA, Congress has expressly provided the Board and the Corporation with the authority to vary insured institutions' minimum capital requirements on a case-by-case basis. Therefore, in accordance with the authority Congress explicitly conferred in the new legislation and in the interest of the safety and soundness of all insured institutions and the integrity of the FSLIC fund, the Board today is proposing to issue rules establishing procedures by which the Board, in its discretion, may increase the required capital level of any given insured institution as its particular circumstances may warrant.

Proposed Rule and Request for Comment

The Board believes that these proposed rules willl help to protect the FSLIC fund and insured institutions' depositors in the wake of the serious financial situtation that currently besets the depository insurance system. The Board is also of the opinion that this proposal comports with the Congressional mandate, set forth in Section 406 of CEBA, that the Board establish minimum capital requirements for insured institutions consistent with the other banking agencies' capital requirements. Congress held lengthy hearings and received extensive testimony on the public need for more effective supervision of FSLIC-insured institutions. In enacting Section 406 of CEBA, Congress granted the Board supplemental authority to strengthen its supervisory efforts. Moreover, Congress apparently views this authority as a critical component of the effective supervision of a federal system of deposit insurance where "capital is the touchstone of financial integrity and guardian of the guarantee of federal insurance."[8]

The Board notes that the rules proposed today are, in most respects, similar to rules implementing Section 908 of ILSA that have been adopted by the OCC, the FDIC, and the FRB. The rules adopted by these bank regulatory agencies were adopted in final form after full consideration of public comment. Thus, the Board believes they provide appropriate models for the Board's own proposed implementing regulations.

Section 406 of CEBA also provides that the Board shall require all insured institutions to achieve and maintain adequate capital consistent with the purposes of the capital requirements of the other banking agencies established pursuant to Section 908 of ILSA. The Board, therefore, requests comments at this time not only concerning this proposed rule, but also concerning the implementation of the statutory mandate contained in Section 406 of CEBA that the Board revise its general captial requirements for insured institutions consistent with the purposes of Section 908 of ILSA and with the federal bank regulators' captial requirements.[9]

Higher Capital Requirements for Individual Insured Institutions

The minimum capital requirements set forth in § 563.13 of the Board's regulations are intended to apply to sound institutions without significant risks or problems. More captial may be appropriate or necessary for individual institutions, such as those that have a high degree of exposure to interest-rate risk, credit risk, the risk associated with excessive growth, or the risk resulting from a poor underwriting record. As noted above, Section 406 of CEBA explicitly authorizes the Board to establish higher minimum capital levels for all insured institutions on a case-by-case basis [hereinafter referred to as "individualized minimum capital requirement(s)"].

The Board proposes to establish a procedure for setting individualized minimum capital requirements higher than those set forth in § 563.13. It provides for notification to institutions by their Principal Supervisory Agents ("PSA(s)") of their proposed individualized minimum capital requirements, subsequent response by insured institutions, and the establishment of individualized minimum capital requirements for institutions by their PSAs with the concurrence of the Federal Home Loan Bank System's Office of Regulatory Policy, Oversight and Supervision ("ORPOS"). The Board is proposing to delegate the authority to determine appropriate individualized minimum capital requirements for insured institutions to the PSAs because they and their staffs generally are most familiar with the specific financial, economic, and operational characteristics of insured institutions within their districts, which may reflect a need for increased capital. The concurrence of ORPOS is necessary before a higher minimum individualized capital requirement may be set because that office is responsible on the national level for matters relating to the examination and supervision of insured institutions and, through involvement in this process, can promote national uniform application of this authority to set individualized minimum capital requirements. In the further interest of national uniform application, the Board, from time to time, may establish policies and procedures to control the PSAs' exercise of their delegated authority under proposed § 563.14(b).

This proposed rule sets out examples of situations where higher minimum capital levels may be necessary or appropriate and examples of the factors that the PSAs might consider in deciding upon an appropriate individualized minimum capital requirement for an insured institution. These examples are not intended to be all inclusive, since it is not possible to predict exactly in advance each situation in which higher capital levels may be necessary or every factor that should be considered in a particular situation.[10] Generally, higher capital levels are necessary and will be required for insured institutions that are exposed to excessive risks or that require special supervisory attention.

The specific procedure proposed today for establishing individualized minimal capital requirements provides that an insured institution would have reasonable opportunity to respond to the notification of a proposed individualized

National Bank of Bellaire v. Comptroller of the Currency, 697 F.2d 674 (5th Cir. 1983).

[7] *See also* 12 CFR 325.1 *et seq.* and Appendix A to 12 CFR Part 225 (1987).

[8] 133 Cong. Rec. S11,208; S11,210 (daily ed. Aug. 4, 1987).

[9] On June 10, 1987, the Board proposed to amend the capital regulation to compute industry profitability by using the median return on assets of all insured institutions that are solvent under generally accepted accounting principles. 52 FR 23845 (June 25, 1987). In light of the statutory authority granted the Board by Section 406 of CEBA, the Board has determined to consider this proposal in conjunction with any other changes in the captial regulation it may propose in the future.

[10] The Board does not contemplate that capital requirements determined through the use of these factors will duplicate the incremental requirements under the contingency component of the capital regulation, § 563.13.

minimum capital requirement and to submit any supporting documentation once an individualized minimum capital requirement is proposed. The PSA would notify the insured institution in writing of the individualized minimum capital requirement that the PSA believes is appropriate for that insured institution, the incremental additions to capital comprising the schedule for reaching compliance with that new requirement, and an explanation of why that capital level is appropriate. The PSA would also, at that time, send ORPOS a copy of this written notification and the supporting documentation. The insured institution would have thirty days in which to respond to the PSA in writing unless the response period is shortened or extended for good cause, and the reason thereof stated in the notification. The PSA will send a copy of the original notification and the institution's response to ORPOS immediately upon receipt of the response.

The notice and response process would give the PSA and the insured institution the opportunity to communicate regarding the feasibility of the schedule and the incremental capital requirements comprising the compliance schedule. This period will also provide time for consultation between the PSA and ORPOS. Unless further information or clarification of the institution's response is required, a decision would be reached promptly after the close of the response period. The PSA would send his recommended decision and the basis for that decision to ORPOS, which must concur before the decision becomes effective and the insured institution is notified. Then the PSA would inform the insured institution of the PSA's decision and of the schedule under which the individualized minimum capital requirement must be achieved. The individualized minimum capital requirement would become effective upon receipt of that information by the institution. This proposed notification and response procedure for imposing individualized minimum capital requirements is intended to be informative and fair, while encouraging close cooperation between the PSAs at the district bank level and ORPOS at the national level.

Capital Directives

Section 406 of CEBA also authorizes the Board to issue a directive if an insured institution fails to meet its capital requirement ("capital directive"), whether it is the general requirement under § 563.3 alone or is an individualized minimum capital requirement under proposed § 563.14. If the Board is issuing a capital directive because an insured institution has violated § 563.13 or an agreement or order setting a specfic capital requirement for an individual institution, the Board would follow only those procedures for issuance of a capital directive that are set forth in proposed § 563.14–1. In this situation, the Board would not employ the notice and response procedure for setting an individualized minimum capital requirement under § 563.14. On the other hand, a capital directive may also be issued to an insured institution for failure to satisfy an individualized minimum capital requirement. Such a requirement must have been established pursuant to the notice-and-response procedure set forth in proposed § 563.14 before a capital directive or other enforcement action could be taken for an institution's failure to comply with such a requirement.

A capital directive will set forth a date by which the insititution must meet its minimum capital requirement, as established under § 563.13 or § 563.14 or in an agreement with or order issued by the Board or Corporation. It generally will require the institution to achieve interim levels of capital over time before that specified date and will require it to submit and adhere to a capital plan describing the means and a time schedule for achieving those capital levels. The capital directive may also require the institution to take other actions to achieve its capital requirement, including reducing its liability growth or asset size, limiting dividend payments, and taking any action authorized under § 563.13(d).

Pursuant to Section 406 of CEBA, capital directives and capital plans submitted pursuant to capital directives are enforceable under Section 5(d)(8) of the HOLA, 12 U.S.C. 1464(d)(8), or Section 407(k) of the NHA, 12 U.S.C. 1464(d)(8), or Section 407(k) of the NHA, 12 U.S.C. 1730(k), as appropriate, in the same manner and to the same extent as final cease-and-desist orders issued by the Board or Corporation. Therefore, these capital directives and capital plans may be enforced through petition to the appropriate United States district court or through the imposition of civil money penalties of up to $1000 a day against the institution or against any officer, director, or employee/agent or other person participating in the conduct of the affairs of that institution who violates the directive or the plan. *See* 12 U.S.C. 1464(d)(8) and 1730(k).

The enforceability of those capital directives and plans make them formal enforcement tools of the Board and the Corporation that are, in many respects, similar to cease-and-desist orders.[11] Because of the powerful and sensitive nature of formal enforcement powers, the Board wants to be certain that its capital directive authority is utilized in a uniform manner nationwide and with adequate and appropriate attention to the rights of the institutions involved. Therefore, the Board is proposing that its Office of Enforcement, in coordination with ORPOS, initiate the process of issuing a capital directive by notifying an insured institution of the Board's intent to issue a directive, review the institution's response to that notification (including requesting additional information if necessary), and recommend to the Board that it issue a capital directive. The Office of Enforcement has specialized knowledge and unique expertise in utilization of the Board's formal enforcement authority, and ORPOS has parallel experience and expertise concerning the examination and supervision of insured institutions.

The Office of Enforcement would send the insured institution a notice of intent to issue a capital directive that would include the reasons for issuing the capital directive, the contents of the proposed capital directive, and the incremental additions to capital comprising a schedule for compliance. The insured institution would have thirty days in which to respond in writing to the notice.

The insured institution's response could consist of either its own compliance plan or its recommendation of an alternative to the capital directive and a corresponding plan. The insured institution's response should include any information that the insured institution would have the Board consider in evaluating whether to issue a capital directive or in deciding what the provisions of the directive should be. An insured institution's failure to respond within the allotted time would be deemed to be a waiver of any objections to the issuance or contents of the proposed directive.

After the close of the insured institution's response period, or after receipt of the insured institution's response, if sooner, the Office of Enforcement in coordination with ORPOS would develop a recommendation for Board action. The Board would consider this

[11] A major difference between these capital directives and plans and cease-and-desist orders is that cease-and-desist orders may be issued only by consent or after notice and a hearing on the record. Capital directives may be issued by consent or after notice with no requirement for a hearing on the record.

recommendation as well as the institution's response and decide whether or not to issue a capital directive. This final decision, and the basis for the decision, would be provided to the insured institution. If a capital directive is to be issued, the Board would also decide whether it should be issued as originally proposed or in modified form.

Because of the critical importance of adequate capital to the soundness of an insured institution's operations and to containing risk to the FSLIC fund, the proposed procedure for issuance of a directive has been designed to reach a resolution in a prompt, fair manner. Furthermore, the Board intends activity to enforce capital directives in the event of noncompliance.

Forbearance

The regulation proposed today would give the Board the authority to establish and enforce individualized minimum capital requirements and to treat capital noncompliance as an unsafe and unsound practice. In Section 404 of CEBA, however, the Congress also mandated a capital forbearance policy.[12] Pursuant to that statutory mandate, the Board will promulgate regulations pursuant to which it will forbear from enforcing its capital requirements if otherwise sound insured institutions are temporarily unable to meet such requirements for certain statutorily specified reasons. Such institution's capital requirements under § 563.13 or under proposed section 563.14, if adopted in final form, would remain valid and would be unaffected by the Board's temporary forbearance from enforcing such capital requirements. It is compliance with the capital requirement, and not the establishment of the capital requirement, to which the capital forbearance policy will apply.

Relationship Between this Proposed Rule and other Regulations

Pursuant to Section 406 of CEBA, the Board is under a statutory requirement to establish minimum levels of capital for insured institutions consistent with the purposes of Section 908 of ILSA and the federal banking agencies' capital requirements. Pending further Board study and public comment on how such a statutory mandate is to be implemented, the Board intends that this proposed rule will, when finalized, function in tandem with the existing capital regulation, § 563.13. All insured institutions are currently required to comply with the Board's capital regulation set forth in § 563.13. Only those insured institutions for which an individualized minimum capital requirement has been established, however, would be required to comply with the proposed requirement under section 563.14.

The Board also wishes to clarify that the setting of an individualized minimum capital requirement under proposed section 563.14 is separate and distinct from the classification system and the arbiter process established by Section 407 of CEBA. This is the case even if the individualized minimum capital requirement is based upon an evaluation of the underwriting standards and general overall credit risk of an insured institution's portfolio. Section 407 of CEBA explicitly states that the arbiter process applies only to subsequent PSA review of individual determinations made by the PSA's staff members regarding appraisals of underwriting collateral, loan classifications, and loan loss reserves or allowances.

In addition, the Board proposes to amend the capital regulation, § 563.13, to make clear that references throughout Chapter V of Title 12 to regulatory capital levels or requirements should be deemed to require compliance with proposed §§ 563.14 and 563.14–1.

Initial Regulatory Flexibility Analysis

Pursuant to Section 3 of the Regulatory Flexibility Act, 5 U.S.C. 603, the Board is providing the following initial regulatory flexibility analysis:

1. *Reasons, objectives and legal basis underlying the proposed rule.* These elements are incorporated above in **SUPPLEMENTARY INFORMATION.**

2. *Small institutions to which the proposed rule would apply.* The Small Business Administration defines a small financial institution as "a commercial bank or savings and loan association, the assets of which, for the preceding fiscal year, do not exceed $100 million." 13 CFR 121.13(a) (1987). Therefore, small entities to which the rule would apply are the 1,651 insured institutions that had assets totaling $100 million or less as of December 31, 1986.

3. *Impact of the proposed rule on small institutions.* The rule would not impose any unnecessary financial, recordkeeping or administrative burden on small insured institutions. The proposal would authorize the Board and the Corporation to vary any insured institution's capital requirement on a case-by-case basis, require a plan from any insured institution for capital compliance, treat a failure to comply with a capital requirement as an unsafe and unsound practice, and issue a directive to enforce capital compliance. The proposed rule would treat small institutions in a manner similar to large ones. There would be no disproportionate economic or regulatory impact on small institutions.

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

5. *Alternatives to the proposed rule.* The Board is not aware of any alternatives that would be less burdensome than the proposed rule in addressing the concerns expressed in the **SUPPLEMENTARY INFORMATION** set forth above. The Board, however, specifically requests comments concerning appropriate alternatives to this proposed rule.

List of Subjects in 12 CFR Part 563

Bank deposit insurance, Investments, Reporting and recordkeeping requirements, Savings and loan associations.

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

SUBCHAPTER D—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

PART 563—OPERATIONS

1. The authority citation for Part 563 continues to read as follows:

Authority: Sec. 1, 47 Stat. 725, as amended (21 U.S.C. 1421 *et seq.*); sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 5B, 47 Stat. 727, as added by sec. 4, 80 Stat. 824, as amended (12 U.S.C. 1425b); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 2, 48 Stat. 128, as amended (12 U.S.C. 1462); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 401–407, 48 Stat. 1255–1260, as amended (12 U.S.C. 1724–1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., p. 1071.

2. Amend § 563.13 by revising paragraph (a) to read as follows:

§ 563.13 Regulatory capital requirement.

(a) *Scope.* This section sets forth the requirement for the maintenance by insured institutions, as defined in § 561.1 of this subchapter, of regulatory capital, as defined in § 561.13 of this subchapter. An insured institution's regulatory capital requirement under this section may be superseded or modified by an individualized capital requirement established under § 563.14. Any reference in this Chapter of Title 12 to

[12] The Board today is also issuing a proposed regulation relating to forbearance from its capital requirements, that may be considered in conjunction with this regulation. Board Res. No. 87–1044 (October 5, 1987).

compliance with capital requirements of § 563.13 shall be deemed to require compliance with this section as superseded or modified by an individualized minimum capital requirement established under § 563.14 or by a capital directive issued pursuant to § 563.14–1. Compliance with the requirements of this section and § 563.14, if applicable, shall be considered to be compliance with the reserve requirements of section 403(b) of the National Housing Act (12 U.S.C. 1726(b)).

* * * * *

3. Amend Part 563 by adding a new § 563.14 and § 563.14–1 to read as follows:

§ 563.14 Minimum regulatory capital requirements for individual insured institutions.

(a) *Purpose and scope.* The rules and procedures specified in this section apply to the establishment of an individualized minimum capital requirement for an insured institution that varies from the requirement that would otherwise apply to the insured institution under § 563.13. Pursuant to 12 U.S.C. 1464(s) and 1730(t), the Board, as operating head of the Corporation, delegates authority to the Principal Supervisory Agents ("PSA(s)") to establish, with the prior written concurrence of the Federal Home Loan Bank System's Office of Regulatory Policy, Oversight and Supervision ("ORPOS"), such individualized minimum capital requirements for insured institutions as are necessary or appropriate on a case-by-case basis in light of the particular circumstances of each insured institutions.

(b) *Appropriate considerations for establishing individualized minimum capital requirements.* Minimum capital levels higher than those required under § 563.13 may be appropriate for an individual insured institution. Increased individualized minimum capital requirements may be established upon a determination that the insured institution's capital is or may become inadequate in view of its circumstances. For example, higher capital levels may be appropriate for:

(1) An insured institution receiving special supervisory attention;

(2) An insured institution that has or is expected to have losses resulting in capital inadequacy;

(3) An insured institution that has a high degree of exposure to interest-rate risk, prepayment risk, credit risk, or similar risks; or a high proportion of off-balance sheet risk, especially standby letters of credit, recourse liabilities as defined in § 561.8 of this subchapter, equity risk investments as defined in § 563.9–8 of this subchapter; or nonresidential construction loans or land loans;

(4) An insured institution that has poor liquidity or cash flow;

(5) An insured institution that is growing rapidly, either internally or through acquisitions;

(6) An insured institution that may be adversely affected by the activities or condition of its holding company, affiliate(s), subsidiaries, or other persons or institutions with which it has significant business relationships, including concentrations of credit;

(7) An insured institution with a portfolio reflecting weak credit quality or a significant likelihood of financial loss, or that has loans in nonperforming status or on which borrowers fail to comply with repayment terms;

(8) An insured institution that has inadequate underwriting policies, standards, or procedures for its loans and investments; or

(9) An insured institution that has a record of operational losses that exceeds the average of other, similarly situated insured institutions, has management deficiencies; or has a poor record of supervisory compliance.

(c) *Standards for determination of appropriate individualized minimum capital requirements.* The appropriate minimum capital level for an individual insured institution cannot be determined solely through the application of a rigid mathematical formula or wholly objective criteria. The decision is necessarily based, in part, on subjective judgment grounded in agency expertise. The factors to be considered in the determination will vary in each case and may include, for example:

(1) The conditions or circumstances leading to the PSA's determination that a higher minimum capital requirement is appropriate or necessary for the insured institution;

(2) The exigency of those circumstances or potential problems;

(3) The overall condition, management strength, and future prospects of the insured institution and, if applicable, its holding company, subsidiary(ies), and/or, subsidiaries and/or affiliate(s);

(4) The insured institution's liquidity, capital and other indicators of financial stability, particularly as compared with those of similarly situated insured institutions; and

(5) The policies and practices of the insured institution's directors, officers, and senior management as well as the internal control and internal audit systems for implementation of such adopted policies and practices.

(d) *Procedures.*—(1) *Notification.* When a PSA determines that an individualized minimum capital requirement different from that set forth in § 563.13 is necessary or appropriate for a particular insured institution, the PSA will notify the insured institution in writing of its proposed individualized minimum capital requirement; the schedule for compliance with the new requirement; and the basis for determining that the higher individualized minimum capital requirement is necessary or appropriate for the insured institution. At the same time, the PSA will forward to ORPOS a copy of this notifying letter, along with the PSA's documentation supporting the need for such a higher capital requirement.

(2) *Response.* (i) The response should include any information that the insured institution wants the PSA to consider and ORPOS to review in deciding whether to establish or to amend an individualized minimum capital requirement for the insured institution, what the individualized capital requirement should be and, if applicable, what compliance schedule is appropriate for achieving the required capital level. The insured institution's response must be in writing and must be delivered to the PSA within 30 days after the date on which the insured institution was sent the notification. The PSA will then forward a copy of the insured institution's response to ORPOS. The PSA may extend the time period for good cause. The time period for response by the insured institution may, for good cause, be shortened:

(A) When, in the opinion of the PSA, the condition of the insured institution so requires, and the PSA informs the insured institution of the shortened response period in the notice;

(B) With the consent of the insured institution; or

(C) When the insured institution already has advised the PSA that it cannot or will not achieve its applicable minimum capital requirement.

(ii) Failure to respond within 30 days, or such other time period as may be specified by the PSA, shall constitute a waiver of any objections to the proposed individualized minimum capital requirement or to the schedule for complying with it.

(3) *Decision.* After expiration of the response period, the PSA will decide whether to propose that an individualized minimum capital requirement should be established for the insured institution based on a review of the insured institution's response and other relevant information,

and, if so, will decide upon the appropriate level of capital required and the schedule for compliance with this requirement. The PSA will sent a copy of his recommended final determination to ORPOS, which must concur before the decision becomes effective and is communicated to the insured institution. The PSA will provide the insured institution with notification of the individualized minimum capital requirement in writing, setting forth the decision and the basis of that decision. Upon receipt of this notification, the individualized minimum capital requirement becomes effective and binding upon the insured institution.

(4) *Failure to comply.* Failure to satisfy an individualized minimum capital requirement, or to meet any required incremental additions to capital under a schedule for compliance with such an individualized minimum capital requirement, shall constitute a legal basis for issuing a capital directive pursuant to § 563.14–1.

(5) *Change in circumstances.* If, after a decision is made under paragraph (d)(3) of this section, there is a change in the circumstances affecting the insured institution's capital adequacy or its ability to reach its required minimum capital level by the specified date, the PSA may, with the concurrence of ORPOS, amend further the individualized minimum capital requirement or the insured institution's schedule for such compliance. The PSA may decline to consider an insured institution's request for such changes that are not based on a significant change in circumstances or that are repetitive or frivolous. The PSA shall notify ORPOS of the request and the PSA's decision. Pending the PSA's reexamination of the original decision, that original decision and any compliance schedule established thereunder shall continue in full force and effect.

§ 563.14–1 Enforcement of minimum regulatory capital requirements for individual insured institutions.

(a) *Issuance of a Capital Directive.*—(1) *Purpose.* In addition to any other action authorized by law, the Board, as operating head of the Corporation, may, based on a recommendation of the Board's Office of Enforcement developed in coordination with the Federal Home Loan Bank System's Office of Regulatory Policy, Oversight and Supervision ("ORPOS") and the insured institution's Principal Supervisory Agent, issue a capital directive to an insured institution that does not have or maintain capital at or above its minimum capital requirement, no matter whether such requirement is established by application of § 563.13 or § 563.14, by a written agreement under 12 U.S.C. 1730(e) or 1464(d)(2), or as a condition for approval of an application. A capital directive may order an insured institution to: (i) achieve its minimum capital requirement by a specified date; (ii) adhere to the compliance schedule for achieving its individualized minimum (iii) submit and adhere to capital plan acceptable to the Board describing the means and a time schedule by which the institution shall achieve the applicable capital requirement; (iv) take other action, including but not limited to the reduction of assets or the rate of liability growth, or restrictions on the payment of dividends, to achieve the insured institution's capital requirement; (v) take any action authorized under § 563.13(d); or (vi) take a combination of any of these actions.

A capital directive issued under this section, including a plan submitted pursuant to a capital directive, is enforceable under 12 U.S.C. 1464(d)(8) and 12 U.S.C. 1730(k), as appropriate, in the same manner and to the same extent as an effective and outstanding cease and desist order which has become final under 12 U.S.C. 1464(d)(2) and 1730(e).

(2) *Notice of intent to issue capital directive.* The Office of Enforcement, in coordination with ORPOS, will determine whether to initiate the process of issuing a capital directive. The Office of Enforcement will notify an insured institution in writing by registered mail of its intention to issue a capital directive. The notice will state: (i) The reasons for issuance of the capital directive and (ii) the proposed contents of the capital directive.

(3) *Response to notice of intent.* (i) An insured institution may respond to the notice of intent by submitting its own compliance plan, or propose an alternative to the capital directive and plan. The response should also include any information that the insured institution wishes the Office of Enforcement to consider and ORPOS to review in deciding whether to recommend that the Board issue a directive and/or what the contents of that directive should be. The response must be in writing and delivered to the Office of Enforcement within 30 days after the date on which the insured institution received the notice. In its discretion, the Office of Enforcement may extend the response period for good cause. The Office of Enforcement may, for good cause, shorten the 30-day response period by the insured institution:

(A) When, in the opinion of the Office of Enforcement, the condition of the insured institution so requires, and the Office of Enforcement informs the insured institution of the shortened response period in the notice;

(B) With the consent of the insured institution; or

(C) When the insured institution already has advised the Office of Enforcement that it cannot or will not achieve its applicable minimum capital requirement.

(ii) Failure to respond within 30 days or such other time period as may be specified by the Office of Enforcement shall constitute a waiver of any objections to the proposed capital directive.

(4) *Decision.* After the closing date of the insured institution's response period, or upon receipt of the insured institution's response, if earlier, the Office of Enforcement shall consider the insured institution's response and may seek additional information or clarification of the response. Thereafter, the Board, based on a recommendation from the Office of Enforcement developed in coordination with ORPOS, shall determine whether or not to issue a capital directive and, if one is to be issued, whether it should be as originally proposed or in modified form.

(5) *Service and Effectiveness.* (i) Upon issuance, a capital directive will be served upon the insured institution. It will include or be accompanied by a statement of reasons for its issuance.

(ii) A capital directive shall become effective upon the expiration of 30 days after service upon the insured institution, unless the Office of Enforcement determines that a shorter effective period is necessary either on account of the public interest or in order to achieve the directive's purpose.

If the insured institution has consented to issuance of the directive it may become effective immediately. A capital directive shall remain in effect and enforceable unless, and then only to the extent that, it is stayed, modified, or terminated by the Board.

(6) *Change in circumstances.* Upon a change in circumstances, an insured institution may submit a request to the Office of Enforcement that the Board reconsider the terms of the capital directive or consider changes in an insured institution's capital plan issued under a directive for an insured institution to achieve its minimum capital requirement. The Office of Enforcement may refuse to consider changes that are not based on significant changes in circumstances. Pending a decision on reconsideration,

the capital directive and capital plan shall continue in full force and effect.

(b) *Relation to other administrative actions.* The Board may:

(1) Consider an insured institution's progress in adhering to any capital plan required under this section whenever such insured institution or any affiliate of such insured institution (including any company that controls such insured institution) seeks approval for any proposal that would have the effect of diverting earnings, diminishing capital, or otherwise impeding such insured institution's progress in meeting its minimum capital requirement (such as an application under § 563.13–1, or an application for approval to exceed its applicable equity risk investment threshold pursuant to § 563.9–8(g)); and

(2) Disapprove any proposal referred to in paragraph (b)(1) of this section if the Board determines that the proposal would adversely affect the ability of the insured institution on a current or *pro forma* basis to satisfy its capital requirement.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 87–23659 Filed 10–19–87; 8:45 am]

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12 CFR Parts 563 and 571

[No. 87–1046]

Troubled Debt Restructuring

Date: October 5, 1987.

AGENCY: Federal Home Loan Bank Board.

ACTION: Proposed rule.

SUMMARY: The Federal Home Loan bank Board ("Bank Board" or "Board") is proposing to amend its regulations governing institutions insured by the Federal Savings and Loan Insurance Corporation ("FSLIC") ("insured institutions") to adopt a rule and statement of policy to clarify that insured institutions have been permitted and may continue to account for troubled debt restructurings ("TDRs") in accordance with generally accepted accounting principles ("GAAP"). The proposed rule states that the Bank Board permits institutions to restructure troubled loans in compliance with Statements 5 and 15 of the Financial Accounting Standards Board ("FASB–5" and "FASE–15") and to account for the effects of such restructurings as provided in those statements. The policy statement summarizes the accounting principles applicable to TDR and sets forth reporting requirements for institutions that engage in such restructuring.

DATE: Comments must be received by November 19, 1987.

ADDRESS: Send comments to Director, Information Services Section, Office of the Secretariat, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552. Comments will be available at this address for public inspection.

FOR FURTHER INFORMATION CONTACT: Deborah Dakin, Assistant Director, (202) 377–6445, or Christina M. Gattuso, Acting Regulatory Counsel, (202) 377–6649, Regulations and Legislation Division, Office of General Counsel, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, DC 20552; or W. Barefoot Bankhead, Professional Accounting Fellow, (202) 778–2538, or Carol Larson, Professional Accounting Fellow, (202) 778–2535, Office of Regulatory Policy, Oversight and Supervision, Federal Home Loan Bank System, 900 Nineteenth Street NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION: In recent years, a number of borrowers have been unable to meet the original terms of loans they have received from thrift institutions. As a result, in order to obtain any recovery from such a borrower, a thrift may have to renegotiate the terms of the loan. In some instances, this renegotiation may result in the thrift's accepting terms it normally would not accept for similar loans with similar risks. These may include a lower interest rate or even no interest, a reduction in principal, a lengthier term to maturity, a transfer of assets from the borrower, the substitution or addition of a new borrower, or some combination of these terms. This renegotiation is known as troubled debt restructuring. FASB–15 defines TDR as a situation in which a "creditor for economic or legal reasons related to the debtor's financial difficulties grants a concession to the debtor which it would not otherwise consider."

In the past, the Bank Board has permitted institutions to use TDR. *See* Federal Home Loan Bank Board, Capital Forbearance Policy For Insured Institutions (February 26, 1987). There has been a widespread misperception, however, that thrift institutions were subjected to more stringent supervisory requirements than commercial banks because they were reportedly not permitted to use TDR to restructure their loan portfolios. This misperception, however, arises not from actions of the Board but from the more conservative generally accepted accounting principles established for thrifts than banks by the American Institute of Certified Public Accountants ("AICPA") in defining net realizable value ("NRV") for purposes of determining loan loss allowances in their respective Industry Audit Guides. The Board believes that this difference has disadvantaged thrift institutions and may have discouraged them from fully utilizing FASB–5 and FASB–15 to restructure troubled loans in their loan portfolio.

This disparate treatment has resulted because neither FASB–5 nor FASB–15 provides guidance on how to establish loan loss allowances. This guidance is contained in the AICPA Industry Audit Guides. The AICPA savings and loan industry audit guide generally requires that a loan loss allowance be based on net realizable value. This NRV is computed by estimating the sales price of a property and reducing that sales price by direct selling expenses, any costs of completion or improvement, and direct holding costs, including the cost of all debt and equity capital. This effectively requires a savings and loan to discount these estimated cash flows at its cost of funds. In contrast, the AICPA bank audit guide does not require a commercial bank to discount estimated cash flows at its cost of funds in determining NRV. As a result, a thrift would often be required to establish a specific loan loss allowance under Thrift GAAP where Bank GAAP would require such an allowance.

In the Competitive Equality Banking Act of 1987 ("CEBA"), Pub. L. 100–86, 101 Stat. 552, Congress instructed the Bank Board to allow an institution that used TDR in accordance with FASB–15 for any of its loans to account for those loans in accordance with FASB–5 and FASB–15. CEBA, secs. 402(a), (b). FASB–5 discusses loss contingencies and sets forth guidance concerning the point at which a loss must be recognized because an asset has been impaired or a liability has been incurred. FASB–15 governs the accounting treatment of a TDR. (For ease of reference FASB–5 and FASB–15 are attached as Attachments 1 and 2 to the policy statement.) Using TDR, an institution may be able to restructure its loan portfolio to minimize its losses on troubled loans.

Today, the Bank Board is publishing for public notice and comment a proposed rule on "Accounting for Troubled Debt Restructuring" to be codified as 12 CFR 563.23–4. This proposed rule would reaffirm that the Bank Board permits institutions to use TDR in order to minimize their losses on troubled loans and to account for those transactions in accordance with FASB–5

and FASB-15. The accompanying proposed statement of policy to be codified as 12 CFR 571.18 would further clarify what constitutes a TDR and when, how, and where a TDR shall be reported. The Board expects that an institution will use TDR when it reasonably expects that such a restructuring will benefit the thrift by enabling it to minimize its loss on the troubled debt. TDR should not be abused, however. Neither FASB-5 nor FASB-15 permits an institution to use TDRs to avoid reporting actual losses that have occurred on investments or to publish financial statements or reports to the Board that do not accurately reflect an institution's loan portfolio.

The CEBA explicitly provides that thrifts using TDR must comply with both FASB-5 and FASB-15 in accounting for restructured loans. Under FASB-5, an institution must accrue a loss when it is both probable that a loss has been incurred and the amount of the loss can be reasonably estimated. The statement provides that when the value of an asset, such as a loan receivable, has been impaired, the institution must adjust its books to reflect this loss. Under GAAP, a loan cannot be carried on an institution's books at an amount greater than its net realizable value. Thus, an institution may have to recognize a loss on a loan under FASB-5 before and/or after restructuring the loan under FASB-15.

Under FASB-15, a TDR may be reported as such in an institution's reports and financial statements when "consummated." The policy statement requires institutions to report TDRs that have been formally consummated by written agreement between the institution and the borrower on all counter statements and financial reports filed with the Board on the Corporation. It further requires institutions to report loans as restructured if the institution and borrower have reached an oral agreement that has been memorialized in a document in the institution's files setting forth the basic terms of the restructuring. The Board believes that such informal oral agreements may accurately reflect an actual renegotiation of a loan. They may, however, be subject to abuse and thus are not long-term substitutes for formal written agreements. The Board emphasizes, therefore, that it expects that an institution and borrower will arrive at a formal agreement within a reasonable period of time following the start of negotiations. Normally, formal written agreements for restructuring should result within six months from the start of negotiations. Negotiations that continue for a significantly longer period without a final written agreement between the thrift and the borrower may give rise to some doubt about whether the loan has actually been restructured.

When an institution accepts a transfer of property from the borrower in repayment for some or all of the original loan balance, FASB-15 requires that such transfers must be accounted for at the fair value of the property. This includes all property, however received by the institution. FASB-15 covers repossessions in substance by providing that an institution cannot avoid such fair value treatment for property under its control merely by failing to foreclose on property. The Board today adopts the standards for repossessions in substance set forth in Securities and Exchange Commission Interpretive Rule 33-6679. (Codification of Financial Reporting Policies Section 401.09(b)) ("SEC Interpretive Rule"). The SEC Interpretive Rule covers situations where the borrower has either formally transferred control of the property to the creditor institution or it is unlikely that the borrower will be able to rebuild equity in the property in the "foreseeable future." The SEC Interpretive Rule does not specify a length of time for "foreseeable future," but indicates that "any relied-upon assumptions must be expected to be attainable within a reasonably manageable future period." The Board believes that "foreseeable future" is not a term of indefinite duration. Allowing "foreseeable future" to stretch out without limit would be inconsistent with a reasonable expectation of the borrower's actual ability to rebuild equity. Determinations of whether a repossession in substance has occurred because it is unlikely that equity will be rebuilt in the foreseeable future will be made on a case-by-case basis. Some factors to be considered in determining foreseeable future include the institution's experience in previous recessionary cycles, the local market experience with real estate cycles, the borrower's financial condition and economic prospects, and the extent of the borrower's involvement in pursuing a reasonable workout agreement.

Before a TDR is implemented, losses that are probable and reasonably estimable must be recognized and an adequate allowance for loss must be provided on the loan balance written down accordingly in accordance with FASB-5. This write down or allowance must be based on NRV to determine the appropriate carrying value of the loan being restructured. Under FASB-15, TDRs involving modifications of the terms of a loan will not result in additional losses that must be recognized unless, under the modified terms, the future cash receipts do not equal or exceed the carrying value of the loan, subsequent to the FASB-5 adjustment. If total payments under the modified terms will exceed the carrying value of the loan, after any necessary FASB-5 adjustment the institution should account for the payments at a constant interest rate.

Institutions that use TDR to restructure any of their loans must accurately report such TDRs on their financial statements and reports to the Bank Board as set forth in the policy statement. These reports should contain not only line items showing the amount of restructured loans, including both loans in compliance with their modified terms and loans not in compliance with their modified terms, but also adequate disclosures of reasonably possible loss contingencies, losses that are probable but the amount of which is currently unestimable, any commitments to lend additional funds to debtors whose loans have been restructured, and other information required by FASB-5 or FASB-15.

As set forth in the proposed rule on classification of assets, published elsewhere in today's **Federal Register**, loans that have been restructured will neither be automatically classified nor automatically exempt from classification. In accordance with the practices of other finanical regulatory agencies, the credit quality of each restructured loan will be evaluated according to the criteria set forth in the classification of assets section. This may result in the classification of some restructured loans. In this regard, the Board emphasizes that its examiners will continue to monitor institutions' loan portfolios. Abuses of TDR will not be permitted.

To summarize, the policy statement is intended to clarify: (1) When an institution may account for a loan as a TDR; (2) what constitutes a TDR; (3) that the Bank Board expects thrift institutions to account for all losses that must be recongized under FASB-5 before and/or after reporting any loan balance under FASB-15; (4) that FASB-5 must be followed not only in accruing losses that have occurred but also in making adequate disclosure of loss contingencies; (5) that, in accordance with FASB-15, any property received by the thrift institution in full or partial payment of a loan, including repossessions in substance, must be accounted for at fair value, (6) that TDRs must be reported separately on a

thrift's counter statements and monthly and quarterly financial reports and in these reports and in audited financial statements, disclosures must be in accordance with FASB-15; and (7) that TDRs will neither be automatically classified, nor automatically exempt from classification, under the reproposed classification of assets regulation, but will be reviewed under the same criteria as all other loans in an institution's portfolio.

The Board solicits public comment on all aspects of the proposed rule and statement of policy. In particular, the Board requests comments on whether it should permit thrift institutions to use Bank GAAP in determining NRV for purposes of calculating loan loss allowances in unaudited monthly and quarterly reports to the Board and Corporation and in counter statements. The Board notes that the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(A), exempts general policy statements and interpretive rules from notice and comment requirements. Nevertheless, the Board believes that because the rule and policy statement are closely related, the public interest will be best served by considering comment on both. Additionally, troubled debt restructuring is an integral component of the comprehensive regulatory package required by the CEBA. Therefore, the Board believes it is in the public interest to offer this policy statement for comment so that the proposed regulatory package can be considered as a whole. Any comments should refer to Board Resolution No. 87-1046.

Initial Regulatory Flexibility Analysis

Pursuant to section 3 of the Regulatory Flexibility Act, 5 U.S.C. 603, the Board is providing the following initial regulatory flexibility analysis:

1. *Reasons, objectives, and legal basis underlying the proposed rule.* These elements are incorporated above in **SUPPLEMENTARY INFORMATION.**

2. *Small institutions to which the proposed rule applies.* The Small Business Administration defines a small financial institution as "a commercial bank or savings and loan association, the assets of which, for the preceding fiscal year, do not exceed $100 million." 13 CFP 121.13(a) (1987). Therefore, small entities to which the proposed rule applies are the 1,651 insured institutions that had assets totaling $100 million or less as of December 31, 1986.

3. *Impact of the proposed rule on small institutions.* All institutions, including small institutions, should benefit from the proposal. The proposed rule imposes no new recordkeeping requirements or other additional administrative burden on any insured institution. The Board therefore believes that the proposed rule will not have a significant economic impact on small institutions.

4. *Overlapping or conflicting federal rules.* There are no known federal rules that duplicate, overlap, or conflict with this proposed rule.

5. *Alternatives to the proposed rule.* There are no alternatives that would be less burdensome than the proposed in addressing the concerns expressed in the **SUPPLEMENTARY INFORMATION** set forth above.

List of Subjects in 12 CFR Parts 563 and 571

Accounting, Bank deposit insurance, Investments, Reporting and recordkeeping requirements, Savings and loan associations.

Accordingly, the Board hereby proposes to amend Parts 563 and 571, Subchapter D, Chapter V, Title 12, *Code of Federal Regulations,* as set forth below.

SUBCHAPTER D—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

PART 563—OPERATIONS

1. The authority citation for Part 563 continues to read as follows:

Authority: Sec. 1, 47 Stat. 725, as amended (12 U.S.C. 1421 *et. seq.*); sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 5B, 47 Stat. 727, as added by sec. 4, 80 Stat. 824, as amended (12 U.S.C. 1425b); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 2, 48 Stat. 128, as amended (12 U.S.C. 1462); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 401-407, 48 Stat. 1255-1260, as amended (12 U.S.C. 1724-1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943-1948 Comp., p. 1071.

2. Amend Part 563 by adding a new § 563.23-4 to read as follows:

§ 563.23-4 Accounting for troubled debt restructuring.

(a) If an insured institution engaged in troubled debt restructuring with respect to any loan by the insured institution and the troubled debt restructuring complies with Statement of Financial Accounting Standards Numbered 5 and Statement of Accounting Standards Numbered 15 (as issued by the Financial Accounting Standards Board) the insured institution may account for the effects of the troubled debt restructuring and its investment in the original debt instrument (or other agreement that is subject to such restructuring) in the manner provided in those statements pursuant to the guidelines set forth in § 571.18 of this subchapter.

(b) Restructured loans are to be reported on counter statements and all monthly and quarterly reports to the Board or the Corporation as either "Loans Restructured and in Compliance with Modified Terms or "Loans Restructured and Not in Compliance with Modified Terms."

PART 571—STATEMENTS OF POLICY

3. The authority citation for Parts 571 continues to read as follows:

Authority: Sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402, 403, 406, 407, 48 Stat. 1256, 1257, 1259, 1260, as amended (12 U.S.C. 1725, 1726, 1729, 1730); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR,1943-48 Comp., p. 1071.

4. Add a new § 571.18 to read as follows:

§ 571.18 Accounting for troubled debt restructuring.

(a) The purpose of this § 571.18 is to offer to the management of insured institutions the Board's views on troubled debt restructuring. This section is intended as guidance. It is not prescriptive, nor does it have the force and effect of law.

(b) All insured institutions should use the accounting treatment for troubled debt restructuring ("TDR") described in this section when preparing counter statements and all financial reports for filing with the Board or the Corporation. All insured institutions may use TDR for any loans, in compliance with Statement No. 5 and Statement No. 15 of the Financial Accounting Standards Board ("FASB-5" and "FASB-15"). If a thrift chooses to use TDR, it should account for the transaction as specified in FASB-5 and FASB-15. Allowances for losses on those loans will be determined as set forth in the AICPA Industry Audit Guide for Savings and Loan Associations. This statement of policy sets forth the policy and general criteria for determining what may be included in TDR, when an insured institution must report a TDR, treatment of any transfer of assets as part of a TDR, including treatment of repossessions in substance, and how TDRs should be reported. This statement also sets forth the criteria under FASB-5 for when a loss must be recognized because an asset has been impaired, regardless of TDR, and when loss contingencies must be disclosed.

(c) The accounting standards for TDR are set forth in FASB Statement No. 15, "Accounting by Debtors and Creditors for Troubled Debt Restructurings," which is summarized in this and

following paragraphs. Further specific information may be found by referring to FASB-15. A TDR is a restructuring in which a creditor, such as a thrift, for economic or legal reasons related to a borrower's financial difficulties, grants a concession to the borrower that it would not otherwise consider. Extending or renewing a loan with no change in principal at a stated interest rate equal to the current interest rate for new loans at a similar level of risk is not considered a restructured loan and should not be reported as such. A restructuring may involve a transfer of assets from the borrower to the thrift in full or partial satisfaction of the loan, a modification of the loan's terms, or both of the above. A restructuring may also involve the substitution or addition of a new debtor for the original borrower.

(d) FASB Statement No. 5, "Accounting for Contingencies, also plays a significant role in the reporting of TDRs. FASB-5 governs when certain losses must be recognized, because a loss contingency is both probable and estimable and an asset has therefore been impaired or a liability has been incurred. Further specific information may be found by referring to FASB-5.

(e) TDR may not be used to avoid recognizing losses that FASB-5 requires to be accrued. Estimated losses must be accrued by a charge to income if two conditions are met. First, available information indicates that it is probable that an asset had been impaired or a liability incurred at the date of the financial statements. Second, the amount of the loss must be reasonably estimable. If both of these conditions are met for a loan, the institution must, before and/or after restructuring, establish loss allowances for the difference between the carrying value of the loan and its net realizable value as determined in accordance with the AICPA Industry Audit Guide for Savings and Loan Associations. The FASB-15 criteria are then applied to the net realizable value of the loan.

(f) FASB-5 also requires adequate disclosure of loss contingencies not meeting both of the above criteria under certain circumstances. Disclosure is required, for example, where there is at least a reasonable possibility that a loss, or an additional loss, may have been incurred or where an asset has probably been impaired but the amount of loss cannot be reasonably estimated. Such disclosure should include a description of the loss or excess or additional loss contingency and either a range of possible loss or a statement that no estimate of the loss can be made.

(g) Under paragraph 6 of FASB-15, the date of consummation of the restructuring is the time of the restructuring. A TDR exists as soon as there is agreement between the institution and the borrowers (either prospective or existing) to consummate the restructuring. Thus, a TDR would clearly exist when a formal letter of intent or mutual agreement is signed. It would also be presumed to exist, however, if the senior management of both the institution and borrower reach an oral agreement memorialized in written documentation, such as a memorandum to the files, setting forth the terms of the TDR. Institutions that report such informal or incomplete restructurings assume the burden of formally completing the transaction, however. Failure to do so may result in reconsideration of any conclusions drawn as a result of the anticipated restructuring and may require refilings of financial statements. Normally a TDR should be finalized within six months from the start of negotiations. The institution's history in finalizing expected restructurings will be reviewed by the Board's examiners. If an institution's reported expected restructurings frequently do not result in formal consummation within a reasonable time, the examiner may decide to permit only formally completed TDRs to be reported as such.

(h) A restructuring may involve the transfer of assets from the borrower to the creditor institution in full or partial satisfaction of the loan. The proper treatment of assets received in partial satisfaction of the loan is set forth in paragraph (j) of this section. Assets transferred may include, but are not limited to, receivables from third parties, real estate, or an equity interest in the borrower. Pursuant to paragraph 28 of FASB-15, such assets must be accounted for at their fair value at the time of the restructuring. Paragraph 13 of FASB-15 defines the "fair value of the assets transferred" as the amount the borrower could reasonably expect to receive for them in a current sale between a willing buyer and a willing seller, *i.e.*, other than a forced or liquidation sale. Paragraph 13 provides that market value shall be used if an active market exists. If no market price is available for the asset or similar assets that could be used in estimating fair market value, a forecast of expected cash flows from the asset, discounted at a rate commensurate with any risk involved, may be used to arrive at fair value.

(1) Such fair value accounting is required by FASB-15 when collateral is repossessed by the institution. This fair value accounting treatment cannot be avoided merely by delaying formal repossession. Under paragraph 34 of FASB-15, a repossession in substance must be accounted for at fair value in accordance with paragraph 28. Paragraph 84 of FASB-15 requires such accounting "if, for example, the creditor obtains control or ownership (or substantially all of the benefits and risks incident to ownership) of one or more assets of the debtor and the debtor is wholly or partially relieved of the obligations under the debt." The Board and the Corporation will use the guidelines established by the Securities and Exchange Commission as set forth in its Interpretive Release Number 33-6679 to determine when a repossession in substance has occurred. Under these guidelines, a repossession in substance will be deemed to have occurred when:

(i) The borrower has little or no equity in the collateral, considering the current fair value of the collateral; and

(ii) The creditor can only expect proceeds for the repayment of the loan to come from the operation or sale of the collateral; and

(iii) The borrower has either

(A) Formally or effectively abandoned control of the collateral to the creditor; or

(B) Retained control of the collateral but, because of its current financial condition or economic prospects, it is unlikely that the borrower will be able to rebuild equity in the collateral or otherwise repay the loan in the foreseeable future.

These determinations will be made on a case-by-case basis. A number of factors will be considered in determining whether a repossession in substance has occurred because it is unlikely that the borrower can rebuild equity in the "foreseeable future." Among these are the institution's experience in previous recessionary cycles, the local market experience with real estate cycles, the borrower's financial condition and economic prospects, and the extent of the borrower's involvement in pursuing a reasonable workout agreement.

(2) Assets received in full satisfaction of a loan must be recorded at their fair value. The carrying value of the loan is the loan balance, adjusted for any unamortized premium or discount, less any allowance provided or any amount previously charged off, plus recorded accrued interest. Any excess of the value of the loan over the fair value of assets received in satisfaction of the loan must be recognized as a loss.

(i) TDR may involve a modification of the terms of the loan. This may include, but is not limited to, a reduction in the stated interest rate, an extension of

maturity at a favorable interest rate, a reduction in the face amount of the debt (principal) a reduction in accrued interest, or a combination of the above. The proper treatment of a TDR involving a combination of a transfer of assets from the borrower to the institution in partial satisfaction of the loan and a modification of the terms of the loan is set forth in paragraph (j) of this section. Before and/or after a TDR is implemented, an adequate allowance for loss must be provided in accordance with FASB-5. Under GAAP, this allowance must be based on net realizable value to determine the appropriate carrying value of the loan being restructured.

(1) If the total expected future cash receipts (including both principal and interest) reasonably expected to be collected under the modified repayment terms are less than the carrying value of the loan on the institution's books, after any necessary FASB-5 adjustment, then a loss on restructuring must be recognized to the extent of that deficiency. Under these circumstances, no interest income will be recognized over the life of the restructured loan.

(2) If the total expected future cash receipts are equal to or exceed the carrying value of the loan, after any necessary FASB-5 adjustment, no loss on restructuring need be reported. Interest income will be recognized over the life of the loan to the extent that future receipts exceed the carrying value of the loan. Institutions should recognize this income using an effective interest rate that will yield a constant rate of interest over the remaining life of the loan.

(3) Some restructurings may involve indeterminate future cash receipts. To the extent that the minimum future cash receipts are less than the carrying value of the loan, the institution must recognize a loss. This loss must be recognized under paragraph 32 of FASB-15, unless under the modified terms the contingent future cash receipts needed to make the total future cash receipts under the modified terms equal to the carrying value of the loan, after any necessary FASB-5 adjustment, are both probable and are reasonably estimable.

(j) Some TDRs may involve both a transfer of assets from the borrower to the institution in partial satisfaction of the loan and a modification of the terms of the remaining loan. In these circumstances, the restructuring must be accounted for by a two-stage process under paragraph 33 of FASB-15. First, the carrying value of the loan is reduced by the fair value of the property received, as calculated pursuant to paragraph 13 of FASB-15. Second, the total amount of the expected future cash receipts is compared to the remaining carrying value of the loan. Any loss recognized is limited to the excess of the remaining carrying value of the loan over such total future cash receipts. If the total expected cash receipts exceed the remaining recorded amount of the loan, no loss need be recognized and any future interest income should be recognized at a constant effective interest rate over the life of the loan.

(k) Some TDRs may involve the substitution or addition of a new debtor for the original borrower. Pursuant to paragraph 42 of FASB-15, such a restructuring should be accounted for according to its substance. If under the restructuring the substitute or additional debtor controls, is controlled by, or is under common control with the original borrower, or performs the custodial function of collecting certain of the original borrower's funds, FASB-15 provides that the restructuring should be accounted for as a modification of terms. If the substitute or additional debtor does not have such a control or custodial relationship with the original borrower, the restructuring should be accounted for as a new loan in full or partial satisfaction of the original borrower's loan. The new loan should be recorded at its fair value.

(l) As provided in § 563.23-4 of this subchapter, restructured loans are to be reported on counter statements and all monthly and quarterly reports to the Board or the Corporation as either "Loans Restructured and in Compliance with Modified Terms" or "Loans Restructured and Not in Compliance with Modified Terms." In these reports and annual audited reports filed with the Board, all disclosures and information required by FASB-5 and FASB-15 should be provided. The carrying value of an asset received in full or partial satisfaction of the loan is not reportable as a restructured loan.

(m) Examiners will continue to monitor institutions' loan portfolios, including restructured loans. Loans will not automatically be classified merely because they have been restructured. Conversely, loans will not be exempt from classification merely because they have been restructured. Where appropriate under the criteria set forth in § 561.16c, a restructured loan may be classified.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

Note.—Attachments 1 and 2 will not appear in the *Code of Federal Regulations.*

Attachment 1.—FASB Statement of Standards

FAS5

STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 5 ACCOUNTING FOR CONTINGENCIES

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Introduction

1. For the purpose of this Statement, a contingency is defined as an existing condition, situation, or set of circumstances involving uncertainty as to possible gain (hereinafter a "gain contingency") or loss [1] (hereinafter a "loss contingency") to an enterprise that will ultimately be resolved when one or more future events occur or fail to occur. Resolution of the uncertainty may confirm the acquisition of an asset or the reduction of a liability or the loss or impairment of an asset or the incurrence of a liability.

2. Not all uncertainties inherent in the accounting process give rise to contingencies as that term is used in this Statement. Estimates are required in financial statements for many on-going and recurring activities of an enterprise. The mere fact that an estimate is involved does not of itself constitute the type of uncertainty referred to in the definition in paragraph 1. For example, the fact that estimates are used to allocate the known cost of a depreciable asset over the period of use by an enterprise does not make depreciation a contingency; the eventual expiration of the utility of the asset is not uncertain. Thus, depreciation of assets is not a contingency as defined in paragraph 1, nor are such matters as recurring repairs, maintenance, and overhauls, which

[1] The term *loss* is used for convenience to include many charges against income that are commonly referred to as *expenses* and others that are commonly referred to as *losses.*

interrelate with depreciation. Also, amounts owed for services received, such as advertising and utilities, are not contingencies even though the accrued amounts may have been estimated; there is nothing uncertain about the fact that those obligations have been incurred.

3. When a loss contingency exists, the likelihood that the future event or events will confirm the loss or impairment of an asset or the incurrence of a liability can range from probable to remote. This Statement uses the terms *probable, reasonably possible,* and *remote* to identify three areas within that range, as follows:

a. *Probable.* The future event or events are likely to occur.

b. *Reasonably possible.* The chance of the future event or events occurring is more than remote but less than likely.

c. *Remote.* The chance of the future event or events occurring is slight.

4. Examples of loss contingencies include:

a. Collectibility of receivables.

b. Obligations related to product warranties and product defects.

c. Risk of loss or damage of enterprise property by fire, explosion, or other hazards.

d. Threat of expropriation of assets.

e. Pending or threatened litigation.

f. Actual or possible claims and assessments.

g. Risk of loss from catastrophes assumed by property and casualty insurance companies including reinsurance companies.

h. Guarantees of indebtedness of others.

i. Obligations of commercial banks under "standby letters of credit." [2]

j. Agreements to repurchase receivables (or to repurchase the related property) that have been sold.

5. Some enterprises now accrue estimated losses from some types of contingencies by a charge to income prior to the occurrence of the event or events that are expected to resolve the uncertainties while, under similar circumstances, other enterprises account for those losses only when the confirming event or events have occurred.

6. This Statement establishes standards of financial accounting and reporting for loss contingencies (see paragraphs 8–16) and carries forward without reconsideration the conclusions of Accounting Research Bulletin (ARB) No. 50, "Contingencies," with respect to gain contingencies (see paragraph 17) and other disclosures (see paragraphs 18–19). The basis for the Board's conclusions, as well as alternatives considered and reasons for their rejection, are discussed in Appendix C. Examples of application of this Statement are presented in Appendix A, and background information is presented in Appendix B.

7. This Statement supersedes both ARB No. 50 and Chapter 6, "Contingency Reserves," of ARB No. 43. The conditions for accrual of loss contingencies in paragraph 8 of this Statement do not amend any other present requirement in an Accounting Research Bulletin or Opinion of the Accounting Principles Board to accrue a particular type of loss or expense. Thus, for example, accounting for pension cost, deferred compensation contracts, and stock issued to employees are excluded from the scope of this Statement. Those matters are covered, respectively, in APB Opinion No. 8, "Accounting for the Cost of Pension Plans," APB Opinion No. 12, "Omnibus Opinion—1967," paragraphs 6–8, and APB Opinion No. 25, "Accounting for Stock Issued to Employees." Accounting for other employment-related costs, such as group insurance, vacation pay, workmen's compensation, and disability benefits, is also excluded from the scope of this Statement. Accounting practices for those types of costs and pension accounting practices tend to involve similar considerations.

Standards of Financial Accounting and Reporting

Accrual of Loss Contingencies

8. An estimated loss from a loss contingency (as defined in paragraph 1) shall be accrued by a charge to income [3] if both of the following conditions are met:

a. Information available prior to issuance of the financial statements indicates that it is probable that an asset had been impaired or a liability had been incurred at the date of the financial statements.[4] It is implicit in this condition that it must be probable that one or more future events will occur confirming the fact of the loss.

b. The amount of loss can be reasonably estimated.

Disclosure of Loss Contingencies

9. Disclosure of the nature of an accrual [5] made pursuant to the provisions of paragraph 8, and in some circumstances the amount accrued, may be necessary for the financial statements not to be misleading.

10. If no accrual is made for a loss contingency because one or both of the conditions in paragraph 8 are not met, or if an exposure to loss exists in excess of the amount accrued pursuant to the provisions of paragraph 8, disclosure of the contingency shall be made when there is at least a reasonable possibility that a loss or an additional loss may have been incurred.[6] The disclosure shall indicate the nature of the contingency and shall give an estimate of the possible loss or range of loss or state that such an estimate cannot be made. Disclosure is not required of a loss contingency involving an unasserted claim or assessment when there has been no manifestation by a potential claimant of an awareness of a possible claim or assessment unless it is considered probable that a claim will be asserted and there is a reasonable possibility that the outcome will be unfavorable.

11. After the date of an enterprise's financial statements but before those financial statements are issued, information may become available indicating that an asset was impaired or a liability was incurred after the date of the financial statements or that there is at least a reasonable possibility that an asset was impaired or a liability was incurred after that date. The information may relate to a loss contingency that existed at the date of the financial statements, e.g., an asset that was not insured at the date of the financial statements. On the other hand, the information may relate to a loss contingency that did not exist at the date of the financail statements, e.g., threat of expropriation of assets after the date of the financial statements or the filing for bankruptcy by an enterprise whose debt was guaranteed after the date of the financial statements. In none of the cases cited in this paragraph was an asset impaired or a liability incurred at the date of the financial statements, and the condition for accrual in paragraph 8(a) is, therefore, not met. Disclosure of those kinds of losses or loss contingencies may be necessary, however, to keep the financial statements from being misleading. If disclosure is deemed necessary, the financial statements shall indicate the nature of the loss or loss contingency and give an estimate of the amount or range of loss or possible loss or state that such an estimate cannot be made. Occasionally, in the case of a loss arising after the date of the financial statements where the amount of asset impairment or liability incurrence can be reasonably estimated, disclosure may best be made by supplementing the historical financial statements with pro forma financial data giving effect to the loss as if it had occurred at the date of the financial statements, usually a balance sheet only, in columnar form on the face of the historical financial statements.

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[2] As defined by the Federal Reserve Board, "standby letters of credit" include "every letter of credit (or similar arrangement however named or designated) which represents an obligation to the beneficiary on the part of the issuer (1) to repay money borrowed by or advanced to or for the account of the account party or (2) to make payment on account of any evidence of indebtedness undertaken by the account party or (3) to make payment on account of any default by the account party in the performance of an obligation." A note to that definition states that "as defined, 'standby letter of credit' would not include (1) commercial letters of credit and similar instruments where the issuing bank expects the beneficiary to draw upon the issuer and which do not 'guaranty' payment of a money obligation or (2) a guaranty or similar obligation issued by a foreign branch in accordance with and subject to the limitations of Regulation M [of the Federal Reserve Board]." Regulations of the Comptroller of the Currency and the Federal Deposit Insurance Corporation contain similar definitions.

[3] Paragraphs 23–24 of APB Opinion No. 9, "Reporting the Results of Operations," describe the "rare" circumstances in which a prior period adjustment is appropriate. Those paragraphs are not amended by this Statement.

[4] Date of the financial statements means the end of the most recent accounting period for which financial statements are being presented.

[5] Terminology used shall be descriptive of the nature of the accrual (see paragraphs 57–64 of Accounting Terminology Bulletin No. 1, "Review and Resume").

[6] For example, disclosure shall be made of any loss contingency that meets the condition in paragraph 8(a) but that is not accrued because the amount of loss cannot be reasonably estimated (paragraph 8(b)). Disclosure is also required of some loss contingencies that do not meet the condition in paragraph 8(a)—namely, those contingencies for which there is a reasonable possibility that a loss may have been incurred even though information may not indicate that it is probable that an asset had been impaired or a liability had been incurred at the date of the financial statements.

12. Certain loss contingencies are presently being disclosed in financial statements even though the possibility of loss may be remote. The common characteristic of those contingencies is a guarantee, normally with a right to proceed against an outside party in the event that the guarantor is called upon to satisfy the guarantee. Examples include (a) guarantees of indebtedness of others, (b) obligations of commercial banks under "standby letters of credit," and (c) guarantees to repurchase receivables (or, in some cases, to repurchase the related property) that have been sold or otherwise assigned. The Board concludes that disclosure of those loss condingencies, and others that in substance have the same characteristic, shall be continued. The disclosure shall include the nature and amount of the guarantee. Consideration should be given to disclosing, if estimable, the value of any recovery that could be expected to result, such as from the guarantor's right to proceed against an outside party.

13. This Statement applies to regulated enterprises in accordance with provisions of the Addendum to APB Opinion No. 2, "Accounting for the 'Investment Credit.'" If, in conformity with the Addendum, a regulated enterprise accrues for financial accounting and reporting purposes an estimated loss without regard to the conditions in paragraph 8, the following informaiton shall be disclosed in its financial statements:

a. The accounting policy including the nature of the accrual and the basis for estimation.

b. The amount of any related "liability" or "asset valuation" account included in each balance sheet presented.

General or Unspecified Business Risks

14. Some enterprises have in the past accrued so-called "reserves for general contingencies." General or unspecified business risks do not meet the conditions for accrual in paragraph 8, and no accrual for loss shall be made. No disclosure about them is required by this Statement.

Appropriation of Retained Earnings

15. Some enterprises have classified a portion of retained earnings as "appropriated" for loss contingencies. In some cases, the appropriation has been shown outside the stockholders' equity section of the balance sheet. Appropriation of retained earnings is not prohibited by this Statement provided that it is shown within the stockholders' equity section of the balance sheet and is clearly identified as an appropriation of retained earnings. Costs or losses shall not be charged to an appropriation of retained earnings, and no part of the appropriation shall be transferred to income.

Examples of Application of This Statement

16. Examples of application of the conditions for accrual of loss contingencies in paragraph 8 and the disclosure requirements in paragraphs 9–11 are presented in Appendix A.

Gain Contingencies

17. The Board has not reconsidered *ARB No. 50* with respect to gain contingencies. Accordingly, the following provisions of paragraphs 3 and 5 of that Bulletin shall continue in effect:

a. Contingencies that might result in gains usually are not reflected in the accounts since to do so might be to recognize revenue prior to its realization.

b. Adequate disclosure shall be made of contingencies that might result in gains, but care shall be exercised to avoid misleading implications as to the likelihood of realization.

Other Disclosures

18. Paragraph 6 of *ARB No. 50* required disclosure of a number of situations including "unused letters of credit, long-term leases, assest pledged as security for loans, pension plans, the existence of cumulative preferred stock dividends in arrears, and commitments such as those for plant acquisition or an obligation to reduce debts, maintain working capital, or restrict dividends." Subsequent Opinions issued by the Accounting Principles Board established more explicit disclosure requirements for a number of those items, i.e., leases (see *APB Opinions No. 5 and 31*), pension plans (see *APB Opinion No. 8*), and preferred stock dividend arrearages (see *APB Opinion No. 10*, paragraph 11(b)).

19. Situations of the type described in the preceding paragraph shall continue to be disclosed in financial statements, and this Statement does not alter the present disclosure requirements with respect to those items.

Effective Date and Transition

20. This Statement shall be effective for fiscal years beginning on or after July 1, 1975, although earlier application is encouraged. A change in accounting principle resulting from compliance with paragraph 8 or 14 of this Statement shall be reported in accordance with *APB Opinion No. 20*, "Accounting Changes." Accordingly, except in the special circumstances referred to in paragraphs 29–30 of *APB Opinion No. 20*, the cumulative effect of the change on retained earnings at the beginning of the year in which the change is made shall be included in net income of the year of the change, and the disclosures specified in *APB Opinion No. 20* shall be made. Reclassification of an appropriation of retained earnings to comply with paragraph 15 of this Statment shall be made in any financial statements for periods before the effective date of this Statement, or financial summaries or other data derived therefrom, that are presented after the effective date of this Statement.

The provisions of this Statement need not be applied to immaterial items.

This Statement was adopted by the unanimous vote of the seven members of the Financial Accounting Standards Board:

Marshall S. Armstrong, *Chairman*

Oscar S. Gellein

Donald J. Kirk

Arthur L. Litke

Robert E. Mays

Walter Schuetze

Robert T. Sprouse

Appendix A

EXAMPLES OF APPLICATION OF THIS STATEMENT

21. This Appendix contains examples of application of the conditions for accrual of loss contingencies in paragraph 8 and of the disclosure requirements in paragraphs 9–11. Some examples have been included in response to questions raised in letters of comment on the Exposure Draft. It should be recognized that no set of examples can encompass all possible contingencies or circumstances. Accordingly, accrual and disclosure of loss contingencies should be based on an evaluation of the facts in each particular case.

Collectibility of Receivables

22. The assets of an enterprise may include receivables that arose from credit sales, loans, or other transactions. The conditions under which receivables exist usually involve some degree of uncertainty about their collectibility, in which case a contingency exists as defined in paragraph 1. Losses from uncollectible receivables shall be accrued when both conditions in paragraph 8 are met. Those conditions may be considered in relation to individual receivables or in relation to groups of similar types of receivables. If the conditions are met, accrual shall be made even though the particular receivables that are uncollectible may not be identifiable.

23. If, based on available information, it is probable that the enterprise will be unable to collect all amounts due and, therefore, that at the date of its financial statements the net realizable value of the receivables through collection in the ordinary course of business is less than the total amount receivable, the condition in paragraph 8(a) is met because it is probable that an asset has been impaired. Whether the amount of loss can be reasonably estimated (the condition in paragraph 8(b)) will normally depend on, among other things, the experience of the enterprise, information about the ability of individual debtors to pay, and appraisal of the receivables in light of the current economic environment. In the case of an enterprise that has no experience of its own, reference to the experience of other enterprises in the same business may be appropriate. Inability to make a reasonable estimate of the amount of loss from uncollectible receivables (i.e., failure to satisfy the condition in paragraph 8(b)) precludes accrual and may, if there is significant uncertainty as to collection, suggest that the installment method, the cost recovery method, or some other method of

revenue recognition be used (see paragraph 12 of *APB Opinion No. 10*, "Omnibus Opinion—1966"); in addition, the disclosures called for by paragraph 10 of this Statement should be made.

Obligations Related to Product Warranties and Product Defects

24. A warranty is an obligation incurred in connection with the sale of goods or services that may require further performance by the seller after the sale has taken place. Because of the uncertainty surrounding claims that may be made under warranties, warranty obligations fall within the definition of a contingency in paragraph 1. Losses from warranty obligations shall be accrued when the conditions in paragraph 8 are met. Those conditions may be considered in relation to individual sales made with warranties or in relation to groups of similar types of sales made with warranties. If the conditions are met, accrual shall be made even though the particular parties that will make claims under warranties may not be identifiable.

25. If, based on available information, it is probable that customers will make claims under warranties relating to goods or services that have been sold, the condition in paragraph 8(a) is met at the date of an enterprise's financial statements because it is probable that a liability has been incurred. Satisfaction of the condition in paragraph 8(b) will normally depend on the experience of an enterprise or other information. In the case of an enterprise that has no experience of its own, reference to the experience of other enterprises in the same business may be appropriate. Inability to make a reasonable estimate of the amount of a warranty obligation at the time of sale because of significant uncertainty about possible claims (i.e., failure to satisfy the condition in paragraph 8(b)) precludes accrual and, if the range of possible loss is wide, may raise a question about whether a sale should be recorded prior to expiration of the warranty period or until sufficient experience has been gained to permit a reasonable estimate of the obligation; in addition, the disclosures called for by paragraph 10 of this Statement should be made.

26. Obligations other than warranties may arise with respect to products or services that have been sold, for example, claims resulting from injury or damage caused by product defects. If it is probable that claims will arise with respect to products or services that have been sold, accrual for losses may be appropriate.The condition in paragraph 8(a) would be met, for instance, with respect to a drug product or toys that have been sold if a health or safety hazard related to those products is discovered and as a result it is considered probable that liabilities have been incurred. The condition in paragraph 8(b) would be met if experience or other information enables the enterprise to make a reasonable estimate of the loss with respect to the drug product or the toys.

Risk of Loss or Damage of Enterprise Property

27. At the date of an enterprise's financial statements, it may not be insured against risk of future loss or damage to its property by fire, explosion, or other hazards. The absence of insurance against losses from risks of those types constitutes an existing condition involving uncertainty about the amount and timing of any losses that may occur, in which case a contingency exists as defined in paragraph 1. Uninsured risks may arise in a number of ways, including (a) non-insurance of certain risks or co-insurance or deductible clauses in an insurance contract or (b) insurance through a subsidiary or investee [7] to the extent not reinsured with an independent insurer. Some risks, for all practical purposes, may be noninsurable, and the self-assumption of those risks is mandatory.

28. The absence of insurance does not mean that an asset has been impaired or a liability has been incurred at the date of an enterprise's financial statements. Fires, explosions, and other similar events that may cause loss or damage of an enterprise's property are random in their occurrence.[8] With respect to events of that type, the condition for accrual in paragraph 8(a) is not satisified prior to the occurrence of the event because until that time there is not diminution in the value of the property. There is no relationship of those events to the activities of the enterprise prior to their occurrence, and no asset is impaired prior to their occurrence. Further, unlike an insurance company, which has a contractual obligation under policies in force to reimburse insureds for losses, an enterprise can have no such obligation to itself and, hence, no liability.

Risk of Loss from Future Injury to Others, Damage to the Property of Others, and Business Interruption

29. An enterprise may choose not to purchase insurance against risk of loss that may result from injury to others, damage to the property of others, or interruption of its business operations.[9] Exposure to risks of those types constitutes an existing condition involving uncertainty about the amount and timing of any losses that may occur, in which case a contingency exists as defined in paragraph 1.

30. Mere exposure to risks of those types, however, does not mean that an asset has been impaired or a liability has been incurred. The condition for accrual in paragraph 8(a) is not met with respect to loss that may result from injury to others, damage to the property of others, or business interruption that may occur after the date of an enterprise's financial statements. Losses of those types do not relate to the current or a prior period but rather to the *future* period in which they occur. Thus, for example, an enterprise with a fleet of vehicles should not accrue for injury to others or damage to the property of others that may be caused by those vehicles in the future even if the amount of those losses may be reasonably estimable. On the other hand, the conditions in paragraph 8 would be met with respect to uninsured losses resulting from injury to others or damage to the property of others that took place prior to the date of the financial statements, even though the enterprise may not become aware of those matters until after the date, if the experience of the enterprise or other information enables it to make a reasonable estimate of the loss that was incurred prior to the date of its financial statements.

Write-Down of Operating Assets

31. In some cases, the carrying amount of an operating asset not intended for disposal may exceed the amount expected to be recoverable through future use of that asset even though there has been no physical loss of damage of the asset or threat of such loss or damage. For example, changed economic conditions may have made recovery of the carrying amount of a productive facility doubtful. The question of whether, in those cases, it is appropriate to write down the carrying amount of the asset to an amount expected to be recoverable through future operations is not covered by this Statement.

Threat of Expropriation

32. The threat of expropriation of assets is a contingency within the definition of paragraph 1 because of the uncertainty about its outcome and effect. If information indicates that expropriation is imminent and compensation will be less than the carrying amount of the assets, the condition for accrual in paragraph 8(a) is met. Imminence may be indicated, for example, by public or private declarations of intent by a government to expropriate assets of the enterprise or actual expropriation of assets of other enterprises. Paragraph 8(b) requires that accrual be made only if the amount of loss can be reasonably estimated. If the conditions for accrual are not met, the disclosures specified in paragraph 10 would be made when there is at least a reasonable possibility that an asset has been impaired.

Litigation, Claims, and Assessments

33. The following factors, among others, must be considered in determining whether accrual and/or disclosure is required with respect to pending or threatened litigation and actual or possible claims and assessments:

a. The period in which the underlying cause (i.e., the cause for action) of the pending or threatened litigation or of the actual or possible claim or assessment occurred.

b. The degree of probability of an unfavorable outcome.

c. The ability to make a reasonable estimate of the amount of loss.

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[7] The effects of transactions between a parent or other investor and a subsidiary or investee insurance company shall be eliminated from an enterprise's financial statements (see paragraph 6 of *ARB No. 51*, "Consolidated Financial Statements," and paragraph 19(a) of *APB Opinion No. 18*, "The Equity Method of Accounting for Investments in Common Stock").

[8] The Board recognizes that, in practice, experience regarding loss or damage to depreciable assets is in some cases one of the factors considered in estimating the depreciable lives of a group of depreciable assets, along with such other factors as wear and tear, obsolescence, and maintenance and replacement policies. This Statement is not intended to alter present depreciation practices (see paragraph (2).

[9] As to injury or damage resulting from products that have been sold, see paragraph 26.

34. As a condition for accrual of a loss contingency, paragraph 8(a) requires that information available prior to the issuance of financial statements indicate that it is probable that an asset had been impaired or a liability had been incurred at the date of the financial statements. Accordingly, accrual would clearly be inappropriate for litigation, claims, or assessments whose underlying cause is an event or condition occurring after the date of financial statements but before those financial statements are issued, for example, a suit for damages alleged to have been suffered as a result of an accident that occurred after the date of the financial statements. Disclosure may be required, however, by paragraph 11.

35. On the other hand, accrual may be appropriate for litigation, claims, or assessments whose underlying cause is an event occurring on or before the date of an enterprise's financial statements even if the enterprise does not become aware of the existence or possibility of the lawsuit, claim, or assessment until after the date of the finanical statements. If those financial statements have not been issued, accrual of a loss related to the litigation, claim, or assessment would be required if the probability of loss is such that the condition in paragraph 8(a) is met and the amount of loss can be reasonably estimated.

36. If the underlying cause of the litigation, claim, or assessment is an event occurring before the date of an enterprise's financial statements, the probability of an outcome unfavorable to the enterprise must be assessed to determine whether the condition in paragraph 8(a) is met. Among the factors that should be considered are the nature of the litigation, claim, or assessment, the progress of the case (including progress after the date of the financial statements but before those statements are issued), the opinions or views of legal counsel and other advisers, the experience of the enterprise in similar cases, the experience of other enterprises, and any decision of the enterprise's management as to how the enterprise intends to respond to the lawsuit, claim, or assessment (for example, a decision to contest the case vigorously or a decision to seek an out-of-court settlement). The fact that legal counsel is unable to express an opinion that the outcome will be favorable to the enterprise should not necessarily be interpreted to mean that the condition for accrual of a loss in paragraph 8(a) is met.

37. The filing of a suit or formal assertion of a claim or assessment does not automatically indicate that accrual of a loss may be appropriate. The degree of probability of an unfavorable outcome must be assessed. The condition for accrual in paragraph 8(a) would be met if an unfavorable outcome is determined to be probable. If an unfavorable outcome is determined to be reasonably possible but not probable, or if the amount of loss cannot be reasonably estimated, accrual would be inappropriate, but disclosure would be required by paragraph 10 of this Statement.

38. With respect to unasserted claims and assessments, an enterprise must determine the degree of probability that a suit may be filed or a claim or assessment may be asserted and the possiblity of an unfavorable outcome. For example, a catastrophe, accident, or other similar physical occurrence predictably engenders claims for redress, and in such circumstances their assertion may be probable; similarly, an investigation of an enterprise by a governmental agency, if enforcement proceedings have been or are likely to be instituted, is often followed by private claims for redress, and the probability of their assertion and the possibility of loss should be considered in each case. By way of further example, an enterprise may believe there is a possibility that it has infringed on another enterprise's patent rights, but the enterprise owning the patent rights has not indicated an intention to take any action and has not even indicated an awareness of the possible infringement. In that case, a judgment must first be made as to whether the assertion of a claim is probable. If the judgment is that assertion is not probable, no accural or disclosure would be required. On the other hand, if the judgment is that assertion is probable, then a second judgment must be made as to the degree of probability of an unfavorable outcome. If an unfavorable outcome is probable and the amount of loss can be reasonably estimated, accrual of a loss is required by paragraph 8. If an unfavorable outcome is probable but the amount of loss cannot be reasonably estimated, accrual would not be appropriate, but disclosure would be required by paragraph 10. If an unfavorable outcome is reasonably possible but not probable, disclosure would be required by paragraph 10.

39. As a condition for accrual of a loss contingency, paragraph 8(b) requires that the amount of loss can be reasonably estimated. In some cases, it may be determined that a loss was incurred because an unfavorable outcome of the litigation, claim, or assessment is probable (thus satisfying the condition in paragraph 8(a)), but the range of possible loss is wide. For example, an enterprise may be litigating an income tax matter. In preparation for the trail, it may determine that, based on recent decisions involving one aspect of the litigation, it is probable that it will have to pay additional taxes of $2 million. Another aspect of the litigation may, however, be open to considerable interpretation, and depending on the interpretation by the court the enterprise may have to pay taxes of $8 million over and above the $2 million. In that case, paragraph 8 requires accrual of the $2 million if that is considered a reasonable estimate of the loss. Paragraph 10 requires disclosure of the additional exposure to loss if there is a reasonable possibility that additional taxes will be paid. Depending on the circumstances, paragraph 9 may require disclosure of the $2 million that was accrued.

Catastrophe Losses of Property and Casualty Insurance Companies

40. At the time that a property and casualty insurance company or reinsurance company issues an insurance policy covering risk of loss from catastrophes, a contingency arises. The contingency is the risk of loss *assumed* by the insurance company, that is, the risk of loss from catastrophes that may occur *during the term of the policy*. The insurance company has not assumed risk of loss for catastrophes that may occur *beyond* the term of the policy. Clearly, therefore, no asset has been impaired or liability incurred with respect to catastrophes that may occur beyond the terms of policies in force.

41. The conditions in paragraph 8 should be considered with respect to the risk of loss assumed by an insurance company for catastrophes that may occur during the terms of policies in force to determine whether accrual of a loss is appropriate. To satisfy the condition in paragraph 8(a) that it be probable that a liability has been incurred to existing policy-holders, the occurrence of catastrophes (i.e., the confirming future events) would have to be reasonably predictable within the terms of policies in force. Further, to satisfy the condition in paragraph 8(b), the amounts of losses therefrom would have to be reasonable estimable. Actuarial techniques are employed by insurance companies to predict the rate of occurrence of an amounts of losses from catastrophes over long periods of time for insurance rate-setting purposes. Predictions over relatively short periods of time, such as an individual accounting period of the terms of a large number of existing insurance policies in force, are subject to substantial deviations. Consequently, assumption of risk of loss from catastrophes by property and casualty insurance companies and reinsurance companies fails to satisfy the conditions for accrual in paragraph 8(a) and 8(b). Moreover, deferral of unearned premiums within the terms of policies in force represents the "unknown liability" for loss (including catastrophe losses) on unexpired policies, making an accrual inappropriate—see paragraphs 94–96 in Appendix C. Recognition of premium income as earned revenue within the terms of policies in force is discussed in the AICPA industry Audit Guide, "Audits of Fire and Casualty Insurance Companies."

42. Although some property and casualty insurance companies have accrued an estimated amount for catastrophe losses, other insurance companies have accomplished the same objective by deferring a portion of the premium income. Deferral of any portion of premium income *beyond the terms of policies in force* is, in substance, similar to premature accrual of catastrophe losses and, therefore, also does not meet the conditions of paragraph 8.

43. The conditions for accrual in paragraph 8 do not prohibit a property and casualty insurance company from accruing probable catastrophe losses that have been incurred on or before the date of its financial statements but that have not been reported by its policyholders as of that date. If the amount of loss can be reasonable estimated, paragraph 8 requires accrual to those incurred-but-not-reported losses.

Payments to Insurance Companies That May Not Involve Transfer of Risk

44. To the extent that an insurance contract or reinsurance contract does not, despite its form, provide for indemnification of the insured or the ceding company by the insurer

or reinsurer against loss of liability, the premium paid less the amount of the premium to be retained by the insurer or reinsurer shall be accounted for as a deposit by the insured or the ceding company. Those contracts may be structured in various ways, but if, regardless of form, their substance is that all or part of the premium paid by the insured or the ceding company is a deposit, it shall be accounted for as such.

45. Operations in certain industries may be subject to such high risks that insurance in unavailable or is available only at what is considered to be a prohibited high cost. Some enterprises in those industries have "pooled" their risks by forming a mutual insurance company in which they retain an equity interest and to which they pay insurance premiums. For example, some electric utility companies have formed such a mutual insurance company to insure risks related to nuclear power plants, and some oil companies have formed a company to insure against risk associated with petroleum exploration and production. Whether the premium paid represents a payment for the transfer of risk or whether it represents merely a deposit will depend on the circumstances surrounding each enterprise's interest in and insurance arrangement with the mutual insurance company. An analysis of the contract is required to determine whether risk has been transferred and to what extent.

Appendix B.—Background Information

46. In April 1973, the FASB placed on its technical agenda a project then entitled "Accounting for Future Losses." The project addressed accrual and disclosure of loss contingencies. The Board believes that "Accounting for Contingencies" is a more descriptive title for this Statement than "Accounting for Future Losses."

47. A task force of 16 persons from industry, public accounting, the financial community, and academe was appointed in the summer of 1973 to provide counsel to the Board in preparing a Discussion Memorandum analyzing issues related to the project.

48. The Discussion Memorandum gave examples of various types of contingencies and considered several of those at length to assist in the development of standards of financial accounting and reporting. These included (a) uninsured risks ("self-insurance"), (b) risk of losses from catastrophes assumed by property and casualty insurance companies, and (c) risk of losses from expropriations by foreign governments.

49. Research undertaken in connection with this project included (a) a search of relevant literature, (b) an examination of published financial statements in annual reports to shareholders and in filings with the SEC on Form 10-K, (c) a questionnaire survey conducted by the Financial Executives Institute to which 64 companies responded, and (d) a study of catastrophe reserve accounting methods employed by property and casualty insurance companies. Summaries of research findings are included in appendices to the Discussion Memorandum.

50. On January 3, 1973 (prior to the date the Board placed this subject on its agenda), the Securities and Exchange Commission issued its *Accounting Series Release No. 134*, which pointed out that a number of property and casualty insurance companies had adopted the accounting policy of making a provision from each period's income to cover a portion of major losses expected to occur in future periods. The SEC Release indicated that the Committee on Insurance Accounting and Auditing of the AICPA was working actively on the subject in cooperation with industry groups. The Release set forth certain disclosure requirements pending resolution of the question of accrual.

51. The AICPA committee's report (dated July 17, 1973) was in the form of a memorandum setting forth the views of those committee members favoring and those opposing accrual of losses from future catastrophes. In the course of its study, the AICPA committee had gathered considerable data on the subject, in part from a survey of member companies of the American Insurance Association, and this information was made available to the Board.

52. On August 2, 1973, the SEC announced in *Accounting Series Release No. 145* that property and casualty insurance companies should not change their method of accounting for catastrophe losses "until a single method has been adopted by the Financial Accounting Standards Board."

53. The Board issued the Discussion Memorandum on March 13, 1974, and held a public hearing on the subject on May 13, 1974. The Board received 87 position papers, letters of comment, and outlines of oral presentations in response to the Discussion Memorandum. Eighteen presentations were made at the public hearing.

54. An Exposure Draft of a proposed Statement on "Accounting for Contingencies" was issued on October 21, 1974. The Board received 212 letters of comment on the Exposure Draft.

Appendix C.—Basis for Conclusions

55. This Appendix discusses factors deemed significant by members of the Board in reaching the conclusions in this Statement, including various alternatives considered and reasons for accepting some and rejecting others.

Scope of This Statement

56. Some respondents to the Exposure Draft proposed that the Statement not deal with accrual and disclosure of loss contingencies in general but, rather, only with the following three specific matters: "self-insurance," risk of losses from catastrophes assumed by property and casualty insurance companies including reinsurance companies, and threat of expropriation. As the basis for that position, they noted that the Discussion Memorandum considered those three matters at length. Other respondents suggested that catastrophe losses be dealt with in a separate Statement.

57. The Board has concluded, however, that the broad issue of accrual and disclosure of loss contingencies should be dealt with in a single Statement, just as the Discussion Memorandum encompassed "the broad issue of accounting for future losses." [10] As the Discussion Memorandum stated, "future losses of all types presently known to affect enterprises and new types of future losses that may arise are conceptually included in the scope of this project." The three matters dealt with at length in the Discussion Memorandum were used "as examples to assist in the evaluation and development of criteria for accounting for future losses," and other examples were discussed. The Board has concluded that loss contingencies such as those given as examples in paragraph 4 of this Statement have common characteristics and that questions about accounting for the reporting of those contingencies should be resolved comprehensively. It is for that reason, also, that the Board believes it inappropriate to deal with catastrophe losses in a separate Statement.

58. A question has been raised whether uncollectibility of receivables and product warranties constitute contingencies within the scope of this Statement. The Board recognizes that uncertainties associated with uncollectibility of some receivables and some product warranties are likely to be, in part, inherent in making accounting estimates (described in paragraph 2) as well as, in part, the type of uncertainties that give rise to a contingency (described in paragraph 1). The Board believes that no useful purpose would be served by attempting to distinguish between those two types of uncertainties for purposes of establishing conditions for accrual of uncollectible receivables and product warranties. Consequently, those matters are deemed to be contingencies within the definition of paragraph 1 and should be accounted for pursuant to the provisions of this Statement.

Accrual of Loss Contingencies

59. Paragraph 8 requires that a loss contingency be accrued if the two specified conditions are met. The purpose of those conditions is to require accrual of losses when they are reasonably estimable and relate to the current or a prior period. The requirement that the loss be reasonably estimable is intended to prevent accrual in the financial statements of amounts so uncertain as to impair the integrity of those statements. The Board has concluded that disclosure is preferable to accrual when a reasonable estimate of loss cannot be made. Further, even losses that are reasonably estimable should not be accrued if it is not probable that an asset has been impaired or a liability has been incurred at the date of an enterprise's financial statements because those losses relate to a future period rather than the current or a prior period. Attribution of a loss to events or activities of the current or prior periods is an element of asset impairment or liability incurrence.

60. In establishing the conditions in paragraph 8, Board members considered the factors discussed in paragraphs 61-101.

[10] The Board believes that *contingencies* is a more descriptive term than *future losses*, and the Discussion Memorandum indicated that the project would necessarily involve reconsideration of both *ARB No. 50* and Chapter 6 of *ARB No. 43*.

Individual Board members gave greater weight to some factors than to others.

Accounting Accruals Do Not Provide Protection Against Losses

61. Accrual of a loss related to a contingency does not create or set aside funds to lessen the possible financial impact of a loss, although some respondents to the Discussion Memorandum and the Exposure Draft argued to the contrary. The Board believes that confusion exists between accounting accruals (sometimes referred to as "accounting reserves") and the reserving or setting aside of specific assets to be used for a particular purpose or contingency. Accounting accruals are simply a method of allocating costs among accounting periods and have no effect on an enterprise's cash flow. An enterprise may choose to maintain or have access to sufficient liquid assets to replace or repair lost or damaged property or to pay claims in case a loss occurs. Alternatively, it may transfer the risk to others by purchasing insurance. Those are financial decisions, and if enterprise management decides to do neither, the presence or absence of an accrued credit balance on the balance sheet will have no effect on the consequences of that decision. The accounting standards set forth in this Statement do not affect the fundamental business economics of that decision.

62. In that regard, some respondents to the Discussion Memorandum and the Exposure Draft contended that an accounting standard that does not permit periodic accrual of so-called "self-insurance reserves" and, in the case of insurance companies, so-called "catastrophe reserves" will force enterprises to purchase insurance or reinsurance because the "protection" afforded by the accrual would no longer exist. Those accruals, however, in no way protect the assets available to replace or repair uninsured property that may be lost or damaged, or to satisfy claims that are not covered by insurance, or, in the case of insurance companies, to satisfy the claims of insured parties. Accrual, in and of itself, provides no financial protection that is not available in the absence of accrual.

63. The sole result of accrual, for financial accounting and reporting purposes, is allocation of costs among accounting periods. Some respondents to the Discussion Memorandum and the Exposure Draft took the position that estimated losses from loss contingencies should be accrued even before available information indicates that it is probable that an asset has been impaired or a liability has been incurred to avoid reporting net income that fluctuates widely from period to period. In their view, financial statement users may be misled by those fluctuations. They believe that estimated losses should be accrued without regard to whether the loss relates to the current period if, based on experience, it is reasonable to expect losses sometime in the future.

64. Financial statement users have indicated, however, that information about earnings variability is important to them. Two elements often cited as basic to the decision models of many financial statement users are (a) expected return—the predicted amount and timing of the return on an investment—and (b) risk—the variability of that expected return. If the nature of an enterprise's operations is such that irregularities in the incurrence of losses cause variations in periodic net income, that fact should not be obscured by accruing for anticipated losses that do not relate to the current period.

65. The Board recognizes that some investors may have a preference for investments in enterprises having a stable pattern of earnings, because that indicates lesser uncertainty or risk than fluctuating earnings. That preference, in turn, is perceived by many as having a favorable effect on the market prices of those enterprises' securities. If accruals for such matters as future uninsured losses and catastrophes were prohibited, some respondents contended, enterprises would be forced to purchase insurance or reinsurance to achieve the more stable patterns of reported earnings that tend to accompany the use of an "accounting reserve." Insurance or reinsurance reduces or eliminates risks and the inherent earnings fluctuations that accompany risks. Unlike insurance and reinsurance, however, the use of "accounting reserves" does not reduce or eliminate risk. The Board rejects the contention, therefore, that the use of "accounting reserves" is an alternative to insurance and reinsurance in protecting against risk. Earnings fluctuations are inherent in risk retention and they should be reported as they occur. The Board cannot sanction the use of an accounting procedure to create the illusion of protection from risk when, in fact, protection does not exist.

66. The Board has also considered the argument that periodic accrual of losses without regard to whether an asset has been impaired or liability incurred is justified on grounds of comparability of financial statements among enterprises. Some respondents contended, for example, that accrual is necessary to make the financial statements of enterprises that do not purchase insurance comparable to those of enterprises that do purchase insurance (and report the premiums as expenses) and to make the financial statements of property and casualty insurance companies comparable regardless of the extent to which reinsurance has been purchased. In the Board's view, however, to report activity when there has been none would obscure a fundamental difference in circumstance between enterprises that transfer risks to others and those that do not.

Financial Accounting and Reporting Reflects Primarily the Effects of Past Transactions and Existing Conditions

67. Financial accounting and reporting reflects primarily the effects of past transactions and existing conditions, not future transactions or conditions. For example, paragraph 35 of *APB Statement No. 4*, "Basic Concepts and Accounting Principles Underlying Financial Statements of Business Enterprises," states:

Financial accounting and financial statements are primarily historical in that information about events that have taken place provides the basic data of financial accounting and financial statements.

68. The first condition in paragraph 8—that a loss contingency not be accrued until it is probable that an asset has been imparied or a liability has been incurred—is consistent with this concept of financial accounting and financial statements. That condition is not so past-oriented that accrual of a loss must await the occurence of the confirming future event, for example, final adjudication or settlement of a lawsuit. The condition requires only that it be probable that the confirming future event will occur. The condition is intended to prohibit the recognition of a liability when it is not probable that one has been incurred and to prohibit the accrual of an asset impairment when it is not probable that an asset of an enterprise has been impaired.

The Concept of a Liability

69. In many cases, the accrual of a loss contingency results in the recording of a liability, for example, accruals for a probable tax assessment, a warranty obligation, or a probable loss resulting from the guarantee of indebtedness of others. In the course of its deliberations, therefore, the Board found it relevant to consider the concept of a liability as expressed in accounting literature.

70. The economic obligations of an enterprise are defined in paragraph 58 of *APB Statement No. 4* as "its present responsibilities to transfer economic resources or provide services to other entities in the future." Two aspects of that definition are especially relevant to accounting for contingencies: first, that liabilities are *present* responsibilities and, second, that they are obligations to *other entities*. Those notions are supported by other definitions of liabilities in published accounting literature, for example:

Liabiliities are claims of creditors against the enterprise, arising out of past activities, that are to be satisfied by the disbursement or utilization of corporate resources.[11]

A liability is the result of a transaction of the past, not of the future.[12]

71. The condition in paragraph 8(a)—that a loss contingency shall be accrued if it is probable that a liability has been incurred—is intended to proscribe recognition of losses that relate to future periods but to require accrual of losses that relate to the current or a prior period (assuming the amount of loss can be reasonably estimated—see paragraph 8(b)).

72. Liability definitions also generally require that the amount of an economic obligation be known or susceptible of reasonable estimation before it is recorded as a liability. For example:

[Liabilities] are measured by cash received, by the established price of noncash assets or services received, or by estimates of a definitive character when the amount owing cannot be measured more precisely.[13]

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[11] American Accounting Association, *Accounting and Reporting Standards for Corporate Financial Statements and Preceding Statements and Supplements* (Sarasota, Fla.: AAA, 1957), p. 16.

[12] Maurice Moonitz, "The Changing Concept of Liabilities," *The Journal of Accountancy*, May 1960, p. 44.

[13] American Accounting Association, *Accounting and Reporting Standards for Corporate Financial Statements*, p. 16.

The amount of the liability must be the subject of calculation or of close estimation.[14]

73. The condition in paragraph 8(b)—that an estimated loss from a loss contingency not be accrued until the amount of loss can be reasonably estimated—is consistent with this feature of the liabilty concept.

Accounting for Impairment of Value of Assets

74. The accrual of some loss contingencies may result in recording the impairment of the value of an asset rather than in recording a liability, for example, accruals for expropriation of assets or uncollectible receivables. Accounting presently recognizes impariments of the value of assets such as the following:

a. Paragraph 9 of Chapter 3A, "Current Assets and Current Liabilities," of *ARB No. 43* provides that "in the case of marketable securities where market value is less than cost by a substantial amount and it is evident that the decline in market value is not due to a mere temporary condition, the amount to be included as a current asset should not exceed the market value."

b. Statement 5 of Chapter 4, "Inventory Pricing," of *ARB No. 43* states that "a departure from the cost basis of pricing the inventory is required when the utility of the goods is no longer as great as its cost. . . . A loss of utility is to be reflected as a charge against the revenues of the period in which it occurs."

c. Paragraph 19(h) of *APB Opinion No. 18*, "The Equity Method of Accounting for Investments in Common Stock," states that "a loss in value of an investment which is other than a temporary decline should be recognized the same as a loss in value of other long-term assets."

d. Paragraph 15 of *APB Opinion No. 30*, "Reporting the Results of Operations," states that "if a loss is expected from the proposed sale or abandonment of a segment, the estimated loss should be provided for at the measurement date. . . ." Paragraph 14 states that the measurement date is the date on which management "commits itself to a formal plan to dispose of a segment of the business, whether by sale or abandonment."

e. Paragraph 183 of *APB Statement No. 4* states that "when enterprise assets are damaged by others, asset amounts are written down to recoverable costs and a loss in recorded."

75. A recurring principle underlying all of these references to asset impairments in the accounting literature is that a loss should not be accrued until it is probable that an asset *has been* impaired and the amount of the loss can be reasonably estimated. As indicated by those references, impairment is recognized, for instance, when a non-temporary decline in the market price of marketable securities below cost *has taken place*, when the utility of inventory *is no longer* as great as its cost, when a commitment, in terms of a formal plan, *has been made* to abandon a segment of a business or to sell a segment at less than its carrying amount, when enterprise assets *are damaged*, and so forth. The condition in paragraph 8(a) is intended to proscribe accrual of losses that relate to future periods, and the condition in paragraph 8(b) further requires that the future requires that the amount of loss be reasonably estimable before it is accrued.

The Matching Concept

76. A number of respondents to the Discussion Memorandum and the Exposure Draft noted that losses from certain types of contingencies are likely to occur irregularly over an extended period of time encompassing a number of accounting periods. In their view, the matching process in accounting requires that estimated losses from those types of contingencies be accrued in each accounting period even if not directly related to events or activities of the period.

77. *APB Statement No. 4* explicitly avoids using the term "matching" because it has a variety of meanings in the accounting literature. In its broadest sense, matching refers to the entire process of income determination—described in paragraph 147 of *APB Statement No. 4* as "identifying, measuring, and relating revenue and expenses of an enterprise for an accounting period." Matching may also be used in a more limited sense to refer only to the process of expense recognition or in an even more limited sense to refer to the recognition of expenses by associating costs with revenue on a cause and effect basis.

78. Three pervasive principles for recognizing costs as expenses are set forth in paragraphs 156–160 of *APB Statement No. 4* as follows:

Associating Cause and Effect. . . . Some costs are recognized as expenses on the basis of a presumed direct association with specific revenue . . . recognizing them as expenses accompanies recognition of the revenue.

Systematic and Rational Allocation. . . . If an asset provides benefits for several periods its cost is allocated to the periods in a systematic and rational manner in the absence of a more direct basis for associating cause and effect.

Immediate Recognition. Some costs are associated with the current accounting period as expenses because (1) costs incurred during the period provide no discernible future benefits, (2) costs recorded as assets in prior periods no longer provide discernible benefits or (3) allocating costs either on the basis of association with revenue or among several accounting periods is considered to serve no useful purpose.

79. Some who believe that matching requires accrual of losses that are likely to occur irregularly over an extended period of time encompassing a number of accounting periods cite the systematic and rational allocation principle of expense recognition as justification for their position. That principle, however, involves the systematic and rational allocation of the cost of an asset (an asset that *has been* acquired) throughout the estimated periods that the asset provides benefits or the systematic and rational accrual of the amount of some obligations (obligations that *have been* incurred) throughout the estimated periods that the obligations are incurred. The customary depreciation of plant and equipment is an example of the former; when reasonably estimable, the accrual of vacation pay is an example of the latter. The systematic and rational allocation principle has no application to assets that are expected to be acquired in the future or to obligations that are expected to be incurred in the future.

80. Matching, in the sense of recognizing expenses by associating costs with specific revenue on a cause and effect basis, is a consideration in relation to accrual for such matters as uncollectible receivables and warranty obligations. For example, most enterprises that make credit sales or warrant their products or services regularly incur losses from uncollectible receivables and warranty obligations. Frequently, those losses can be associated with revenue on a cause and effect basis. If the amount of those losses can be reasonably estimated, paragraph 8 of this Statement requires accrual if it is probable that an asset has been impaired (estimated uncollectible receivables) or that a liability has been incurred (estimated warranty claims).

Spreading the Burden of Irregularly Occurring Cost to Successive Generations of Customers and Shareholders

81. Some respondents to the Discussion Memorandum and the Exposure Draft contended that all costs of doing business should be accrued in each accounting period so that successive generations of customers and shareholders would bear their share of all costs including those that occur irregularly. It would seem, however, that those irregularly occurring costs are usually borne by customers through pricing policy and that pricing is not necessarily dependent upon financial accounting and reporting practices. With regard to accrual on grounds that it enables successive generations of shareholders to bear their share of irregularly occuring costs, see paragraphs 63–65.

Conservatism

82. On the grounds of conservatism, some respondents supported accrual of estimated losses from loss contingencies before available information indicates that it is probable that an asset has been impaired or a liability has been incurred. Conservatism is indicated as one of the "characteristics and limitations" of financial accounting in paragraph 35 of *APB Statement No. 4* as follows:

Conservatism. The uncertainties that surround the preparation of financial statements are reflected in a general tendency toward early recognition of unfavorable events and minimization of the amount of net assets and net income.

83. Conservatism is further discussed in paragraph 171 of *APB Statement No. 4*:

Conservatism. Frequently, assets and liabilities are measured in a context of significant uncertainties. Historically, managers, investors, and accountants have generally preferred that possible errors in measurement be in the direction of understatement rather than overstatement of net income and net assets. This has led to the convention of conservatism. * * *

[14] Maurice Moonitz, "The Changing Concept of Liabilities," p. 44.

84. The conditions for accrual in paragraph 8 are not inconsistent with the accounting concept of conservatism. Those conditions are not intended to be so rigid that they require virtual certainty before a loss is accrued. They require only that it be *probable* that an asset has been impaired or a liability has been incurred and that the amount of loss be *reasonably* estimable. In the absence of that probability or estimability, however, the Board has concluded that disclosure is preferable to accruing in the financial statements amounts so uncertain as to impair the integrity of the financial statements.

Risk of Future Loss or Damage of Enterprise Property, Injury to Others, Damage to the Property of Others, and Business Interruption

85. Some persons contend that the decision not to purchase insurance against losses that can be reasonably expected some time in the future (such as risk of loss or damage of enterprise property, injury to others, damage to the property of others, and business interruption) justifies periodic accrual for those losses without regard to whether it is probable that an asset has been impaired or a liability incurred at the date of the financial statements. As a basis for their position, they frequently cite the following factors: matching of revenue and expense, spreading the burden of irregularly occurring costs to successive generations of customers, and conservatism. They also believe that accrual of estimated losses from those types of risks improves the comparability of the financial statements of enterprises that do not insure with those of enterprises that purchase insurance. Some contend that a prohibition against periodic accrual for uninsured losses will force enterprises to purchase insurance coverage that would not otherwise be purchased.

86. In the Board's judgment, however, the mere existence of risk, at the date of an enterprise's financial statements, does not mean that a loss should be accrued. Anticipation of asset impairments or liabilities or losses from business interruption that do not relate to the current or a prior period is not justified by the matching concept.

87. The Board's views regarding the contention that periodic accrual for uninsured losses is a way of providing protection against loss and improving comparability among enterprises that do and do not purchase insurance, and the contention that prohibition of accrual will force enterprises to purchase insurance, are discussed in paragraphs 61–66. The Board's position regarding periodic accrual for uninsured risks and other loss contingencies on the grounds of spreading the burden of irregularly occurring costs to successive generations of customers or on the grounds of conservatism is discussed in paragraphs 81–84.

88. Some respondents to the Exposure Draft said that prohibition against periodic accrual for uninsured losses would be detrimental to government contractors because requirements of Federal government agencies in auditing costs subject to procurement regulations currently allow reimbursement for periodic accruals for uninsured losses only if they are included in the contractor's financial statements. Contract reimbursement and financial accounting and reporting may well have different objectives. Accordingly, the provisions of this Statement may not be appropriate for contract reimbursement purposes.

Catastrophe Losses of Property and Casualty Insurance Companies

89. At the time that a property and casualty insurance company or reinsurance company issues an insurance policy covering risk of loss from catastrophes, a contingency arises. The contingency is the risk of loss *assumed* by the insurance company, that is, the risk of loss from catastrophes that may occur *during the term of the policy.*

90. Some respondents to the Discussion Memorandum and the Exposure Draft proposed that insurance companies accrue estimated losses from catastrophes including both those that may occur during the terms of insurance policies in force and those that may occur beyond the terms of policies in force. Other respondents proposed that some portion of the premium revenue of a property and casualty insurance company be deferred beyond the terms of insurance policies in force to provide what, in substance, is an estimated liability for future catastrophe losses. Some respondents proposed that accrual of estimated losses or deferral of premiums be permitted but not required. On the other hand, some respondents to the Discussion Memorandum and the Exposure Draft were opposed to any accrual for future catastrophe losses by means of an estimated liability or deferral of premium revenue. Because those estimated liabilities and revenue deferrals have come to be referred to as "catastrophe reserves," that term will be used in paragraphs 91–101 for convenience.

91. In response to the Exposure Draft, it was recommended that the FASB appoint a special committee to study further the matter of catastrophe reserve accounting and to make recommendations thereon. The Board has concluded, however, that its own research and that of others (mentioned in Appendix B to this Statement and summarized in the Discussion Memorandum), the written responses received to the Discussion Memorandum, the presentations made at the public hearing, and the letters of comment on the Exposure Draft provide the Board with sufficient information with which to reach a conclusion.

92. Proponents of catastrophe reserve accounting generally cite the following reasons for their position:

a. *Catastrophes certain to occur.* Over the long term, catastrophes are certain to occur; therefore, they are not contingencies.

b. *Predictability of catastrophe losses.* On the basis of experience and by application of appropriate statistical techniques, catastrophe losses can be predicted over the long term with reasonable accuracy.

c. *Matching.* Some portion of property and casualty insurance premiums is intended to cover losses that usually occur infrequently and at intervals longer than both the terms of the policies in force and the financial accounting and reporting period. Catastrophe losses should, therefore, be accrued when the revenue is recognized (or premiums should be deferred beyond the terms of policies in force to periods in which the catastrophes occur) to match catastrophe losses with the related revenue.

d. *Stabilization of reported income.* Catastrophe reserve accounting stabilizes reported income and avoids erratic variations caused by irregularly occurring catastrophes.

e. *Comparability.* Reinsurance premiums paid by a prime insurer are said to be similar to accrual of catastrophe losses prior to their occurrence because the reinsurance premiums paid reduce income before a catastrophe loss occurs. Accrual of catastrophe losses as an expense prior to occurrence of a catastrophe makes the financial statements of property and casualty insurance companies comparable regardless of the extent to which reinsurance has been purchased.

f. *Non-accrual would force purchase of reinsurance.* Non-accrual of catastrophe losses will force property and casualty insurance companies to purchase reinsurance.

g. *Generations of policyholders.* Periodic accrual of estimated catastrophe losses charges each generation of policyholders with its share of the loss through the premium structure.

93. The Board does not find those arguments persuasive. The fact that over the long term catastrophes are certain to occur does not justify accrual before the catastrophes occur. As stated in paragraph 59, the purpose of the conditions for accrual in pargraph 8 is to require accrual of losses if they are reasonably estimable *and relate to the current or a prior period.* An enterprise may know with certainty, for example, next year's administrative salaries, but that does not justify accrual in the current accounting period because those salaries do not relate to that period. As indicated in paragraphs 67–68, financial accounting and reporting reflects primarily the effects of past transactions and existing conditions, not future transactions or conditions; accrual for losses from catastrophes that are expected to occur *beyond the term of insurance policies in force* would amount to accrual of a liability before one has been incurred. Existing policyholders are insured only during the period covered by their insurance contracts; an insurance company is not presently obligated to policyholders for catastrophes that may occur after expiration of their policies. Accrual for those catastrophe losses would record a liability that is inconsistent with the concept of a liability discussed in paragraphs 69–73.

94. The Board recognizes that the costs of catastrophes to insurance companies are large and are incurred irregularly and that insurance companies recoup those costs in the long run through periodic adjustments in the premiums charged to policyholders. It is the view of the Board, however, that the long-run nature of pricing of premiums should not be a determinant of the time when a liability is recorded.

95. The AICPA Industry Audit Guide, "Audits of Fire and Casualty Insurance

Companies," describes accounting for premiums as follows (pp. 24–25):

As soon as a policy is issued promising to indemnify for loss, the insurance company incurs a potential liability. The company may be called upon to pay the full amount of the policy, a portion of the policy, or nothing. It would be impossible to try to measure the liability under a single policy. However, since insurance is based on the law of averages, one may estimate from experience the loss on a large number of policies.

As state supervision of insurance developed, the insurance departments set about providing a legal basis for determining the potential liability under outstanding policies in order to establish an ample reserve for the protection of policyholders and provide a uniform method of calculation. It was recognized that, since the premium is expected to pay losses and expenses, and provide a margin of profit over the term of the policy, the portion measured by the unexpired term should be adequate to pay policy liabilities (principally losses and loss expenses) and return premiums during the unexpired term on a uniform basis for all companies. Therefore the unearned premium was adopted as the basis for computing the unknown liability on unexpired policies.

96. Because unearned premiums represents the "unknown liability," the Board is of the view that it is inappropriate to accrue an additional amount as an estimate for that same unknown liability. Further, the Board's view, deferral of premiums beyond the terms of policies in force is inconsistent with the concept of revenue recognition set forth in the Audit Guide and is without any conceptual basis. Moreover, the Board believes that its conclusion regarding the time at which accruals shall be made for catastrophic losses is consistent with the Audit Guide. It should be noted that this Statement does not prohibit (and, in fact, requires) accrual of a *net* loss (that is, a loss in excess of deferred premiums) that probably will be incurred on insurance policies that are in force, provided that the loss can be reasonably estimated, just as accrual of net losses on long-term construction-type contracts is required (see *ARB No. 45,* "Long-Term Construction-Type Contracts").

97. With respect to catastrophes that may occur within the terms of policies in force, to satisfy the conditions for accrual in paragraph 8, the occurrence of catastrophes would have to be probable during the terms of those policies, and the amounts of losses therefrom would have to be reasonably estimable. The letters of comment and position papers received in response to the Discussion Memorandum and the Exposure Draft and presentations at the public hearing led the Board to conclude that neither the timing of catastrophes nor the amounts of losses therefrom are reasonably predictable within the terms of policies in force.

98. The Board is of the view that accrual of losses from catastrophes is not justified by the accounting concept of matching. Systematic and rational allocation does not apply to costs that have not been incurred. The Board recognizes that large and irregularly occurring costs must of necessity be considered in systematically and rationally determining premiums to be charged to customers but does not believe that pricing considerations should dictate the accrual of losses for financial accounting purposes. The Board also does not believe that matching in the sense of recognizing expenses by associating losses with specific revenue on a cause and effect basis is, in and of itself, a basis for accrual of catastrophe losses prior to the event causing the loss. The Board believes that, for the reasons stated in paragraphs 94–96, there can be no presumed direct association with specific revenue prior to the event causing the catastrophe loss.

99. The Board's views regarding justification of periodic accrual of catastrophe reserves on grounds of (a) stabilizing reported income, (b) improving comparability among financial statements of insurance companies, and (c) preventing the "forced" purchase of reinsurance are discussed in paragraphs 61–66.

100. The argument that accrual of catastrophe reserves enables each generation of policyholders to bear its share of the losses through the premiums that it is charged is also questionable because amounts established for premiums are not necessarily dependent on financial accounting and reporting practices.

101. The Board considered the proposal that catastrophe reserve accounting be permitted but not made mandatory. Whether it is probable that an asset has been impaired or a liability incurred is determined by the circumstances, not by choice. Accordingly, the conditions for accrual in paragraph 8 apply to all loss contingencies, including risk of loss from catastrophes assumed by property and casualty insurance companies and reinsurance companies. In the Board's view, the use of different methods to report catastrophe losses in similar circumstances cannot be justified.

Applicability to Life Insurance Companies

102. Some respondents to the Exposure Draft inquired as to whether the conditions for accrual in paragraph 8 are intended to change accounting practices of life insurance companies. This Statement does not amend the AICPA Industry Audit Guide, "Audits of Stock Life Insurance Companies."

Disclosure of Noninsurance

103. A number of respondents to the Exposure Draft inquired as to whether it is the Board's intent to require disclosure of noninsurance or underinsurance. Some recommended that the Board require disclosures with respect to uninsured risks that enterprises ordinarily insure against. Others said that they were unable to define risks that would ordinarily be insured against because the insurance practices of enterprises are so varied. Because of the problems involved in developing operational criteria for disclosure of noninsured or underinsured risks, this Statement does not require disclosure of uninsured risks. However, the Board does not discourage those disclosures in appropriate circumstances.

EFFECTIVE DATE AND TRANSITION

104. The Board considered three alternative approaches to a change in the method of accounting for contingencies: (1) prior period adjustment, (2) the "cumulative effect" method described in *APB Opinion No. 20,* "Accounting Changes," and (3) retention of amounts accrued for contingencies that do not meet the conditions for accrual in paragraph 8 until those amounts are exhausted by actual losses charged thereto. The Exposure Draft had proposed the change be effected by the prior period adjustment method. A large number of respondents to the Exposure Draft, however, opposed the prior period adjustment method for a number of reasons, including significant difficulties involved in determining the degree of probability and estimability that had existed in prior periods as would have been required if the conditions in paragraph 8 were applied retroactively. On further consideration of all the circumstances, the Board has concluded that use of the "cumulative effect" method described in *APB Opinion No. 20* represents a satisfactory solution and has concluded that the effective date in paragraph 20 is advisable.

STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 15 ACCOUNTING BY DEBTORS AND CREDITORS FOR TROUBLED DEBT RESTRUCTURINGS

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Introduction

1. This Statement establishes standards of financial accounting and reporting by the debtor and by the creditor for a troubled debt restructuring. The Statement does not cover accounting for allowances for estimated uncollectible amounts and does not prescribe or proscribe particular methods for estimating amounts of uncollectible receivables.

2. A restructuring of a debt constitutes a *troubled debt restructuring* for purposes of this Statement if the creditor for economic or legal reasons related to the debtor's financial difficulties grants a concession to the debtor that it would not otherwise consider. That concession either stems from an agreement between the creditor and the debtor or is imposed by law or a court. For example, a creditor may restructure the terms of a debt

to alleviate the burden of the debtor's near-term cash requirements, and many troubled debt restructurings involve modifying terms to reduce or defer cash payments required of the debtor in the near future to help the debtor attempt to improve its financial condition and eventually be able to pay the creditor. Or, for example, the creditor may accept cash, other assets, or an equity interest in the debtor in satisfaction of the debt though the value received is less than the amount of the debt because the creditor concludes that step will maximize recovery of its investment.[1]

3. Whatever the form of concession granted by the creditor to the debtor in a troubled debt restructuring, the creditor's objective is to make the best of a difficult situation. That is, the creditor expects to obtain more cash or other value from the debtor, or to increase the probability of receipt, by granting the concession than by not granting it.

4. In this Statement, a *receivable* or *payable* (collectively referred to as *debt*) represents a contractual right to receive money or a contractual obligation to pay money on demand or on fixed or determinable dates that is already included as an asset or liability in the creditor's or debtor's balance sheet at the time of the restructuring. Receivables or payables that may be involved in troubled debt restructurings commonly result from lending or borrowing of cash, investing in debt securities that were previously issued, or selling or purchasing goods or services on credit. Examples are accounts receivable or payable, notes, debentures and bonds (whether those receivables or payables are secured or unsecured and whether they are convertible or nonconvertible), and related accrued interest, if any. Typically, each receivable or payable is negotiated separately, but sometimes two or more receivables or payables are negotiated together. For example, a debtor may negotiate with a group of creditors but sign separate debt instruments with each creditor. For purposes of the Statement, restructuring of each receivable or payable, including those negotiated and restructured jointly, shall be accounted for individually. The substance rather than the form of the receivable or payable shall govern. For example, to a debtor, a bond constitutes one payable even though there are many bondholders.

5. A troubled debt restructuring may include, but is not necessarily limited to, one or a combination of the following:

a. Transfer from the debtor to the creditor of receivables from third parties, real estate, or other assets to satisfy fully or partially a debt (including a transfer resulting from foreclosure or repossession).

b. Issuance or other granting of an equity interest to the creditor by the debtor to satisfy fully or partially a debt unless the equity interest is granted pursuant to existing terms for converting the debt into an equity interest.

c. Modification of terms of a debt, such as one or a combination of:

1. Reduction (absolute or contingent) of the stated interest rate for the remaining original life of the debt.
2. Extension of the maturity date or dates at a stated interest rate lower than the current market rate for new debt with similar risk.
3. Reduction (absolute or contingent) of the face amount or maturity amount of the debt as stated in the instrument or other agreement.
4. Reduction (absolute or contingent) of accrued interest.

6. Troubled debt restructurings may occur before, at, or after the stated maturity of debt, and time may elapse between the agreement, court order, etc. and the transfer of assets or equity interest, the effective date of new terms, or the occurrence of another event that constitutes consummation of the restructuring. The date of consummation is the time of the restructuring in this Statement.

7. A debt restructuring is not necessarily a troubled debt restructuring for purposes of this Statement even if the debtor is experiencing some financial difficulties. For example, a troubled debt restructuring is not involved if (a) the fair value [2] of cash, other assets, or an equity interest accepted by a creditor from a debtor in full satisfaction of its receivable at least equals the creditor's recorded investment in the receivable;[3] (b) the fair value of cash, other assets, or an equity interest transferred by a debtor to a creditor in full settlement of its payable at least equals the debtor's carrying amount of the payable; (c) the creditor reduces the effective interest rate on the debt primarily to reflect a decrease in market interest rates in general or a decrease in the risk so as to maintain a relationship with a debtor that can readily obtain funds from other sources at the current market interest rate; or (d) the debtor issues in exchange for its debt new marketable debt having an effective interest rate based on its market price that is at or near the current market interest rates of debt with similar maturity dates and stated interest rates issued by nontroubled debtors. In general, a debtor that can obtain funds from sources other than the existing creditor at market interest rates at or near those for nontroubled debt is not involved in a troubled debt restructuring. A debtor in a troubled debt restructuring can obtain funds from sources other than the existing creditor in the troubled debt restructuring, if at all, only at effective interest rates (based on market prices) so high that it cannot afford to pay them. Thus, in an attempt to protect as much of its investment as possible, the creditor in a troubled debt restructuring grants a concession to the debtor that it would not otherwise consider.

8. For purposes of this Statement, troubled debt restructurings do not include changes in lease agreements (the accounting is prescribed by *FASB Statement No. 13*, "Accounting for Leases") or employment-related agreements (for example, pension plans and deferred compensation contracts). Nor do troubled debt restructurings include debtors' failures to pay trade accounts according to their terms of creditors' delays in taking legal action to collect overdue amounts of interest and principal, unless they involve an agreement between debtor and creditor to restructure.

9. The Addendum to *APB Opinion No. 2*, "Accounting for the "Investment Credit'," states that "differences may arise in the application of generally accepted accounting principles as between regulated and nonregulated business, because of the effect in regulated businesses of the rate-making process" and discusses the application of generally accepted accounting principles to regulated industries. FASB Statements and Interpretations should therefore be applied to regulated companies that are subject to the rate-making process in accordance with the provisions of the Addendum.

10. This Statement supersedes *FASB Interpretation No. 2*, "Imputing Interest on Debt Arrangements Made under the Federal Bankruptcy Act," and shall be applied to the types of situations that were covered by that Interpretation. Thus, it shall be applied to troubled debt restructurings consummated under reorganization, arrangement, or other provisions of the Federal Bankruptcy Act or other Federal statutes related thereto. [4] It also amends *APB Opinion No. 26*, "Early Extinguishment of Debt," to the extent needed to exclude from that Opinion's scope early extinguishments of debt through troubled debt restructurings.

11. Appendix A provides background information. Appendix B sets forth the basis for the Board's conclusions, including alternatives considered and reasons for accepting some and rejecting others.

STANDARDS OF FINANCIAL ACCOUNTING AND REPORTING

Accounting by Debtors

12. A debtor shall account for a troubled debt restructuring according to the type of the restructuring as prescribed in the following paragraphs.

Transfer of Assets in Full Settlement

13. A debtor that transfers its receivables from third parties, real estate, or other assets to a creditor to settle fully a payable shall recognize a gain on restructuring of payables (see paragraph 21). The gain shall be measured by the excess of (i) the carrying amount of the payable settled (the face amount increased or decreased by applicable accrued interest and applicable unamortized premium, discount, finance charges, or issue costs) over (ii) the fair value of the assets transferred to the creditor. [5] The fair value of

[1] Although troubled debt that is fully satisfied by foreclosure, repossession, or other transfer of assets or by grant of equity securities by the debtor is, in a technical sense, not restructured, that kind of event is included in the term *troubled debt restructuring* in this Statement.

[4] This Statement does not apply, however, if under provisions of those Federal statutes or in a quasi-reorganization or corporate readjustment (*ARB No. 43*, Chapter 7, Section A, "Quasi-Reorganization or Corporate Readjustment . . .") with which a troubled debt restructuring coincides, the debtor restates its liability generally.

[5] Paragraphs 13, 15, and 19 indicate that the fair value of assets tranferred or the fair value of an

Continued

the assets transferred is the amount that the debtor could reasonably expect to receive for them in a current sale between a willing buyer and a willing seller, that is, other than in a forced or liquidation sale. Fair value of assets shall be measured by their market value if an active market for them exists. If no active market exists for the assets transferred but exists for similar assets, the selling prices in that market may be helpful in estimating the fair value of the assets transferred. If no market price is available, a forecast of expected cash flows may aid in estimating the fair value of assets transferred, provided the expected cash flows are discounted at a rate commensurate with the risk involved. [6]

14. A difference between the fair value and the carrying amount of assets transferred to a creditor to settle a payable is a gain or loss on transfer of assets. [7] The debtor shall include that gain or loss in measuring net income for the period of transfer, reported as provided in *APB Opinion No. 30*, "Reporting the Results of Operations."

Grant of Equity Interest in Full Settlement

15. A debtor that issues or otherwise grants an equity interest to a creditor to settle fully a payable shall account for the equity interest at its fair value. [8] The difference between the fair value of the equity interest granted and the carrying amount of the payable settled shall be recognized as a gain on restructuring of payables (see paragarph 21).

Modification of Terms

16. A debtor in a troubled debt restructuring involving only modifications of terms of a payable—that is, not involving a transfer of assets or grant of an equity interest—shall account for the effects of the restructuring prospectively from the time of restructuring, and shall not change the carrying amount of the payable at the time of the restructuring unless the carrying amount exceeds the total future cash payments specified by the new terms. [9] That is, the effects of changes in the amounts or timing (or both) of future cash payments designated as either interest or face amount shall be reflected in future periods. [10] Interest expense shall be computed in a way that a constant effective interest rate is applied to the carrying amount of the payable at the beginning of each period between restructuring and maturity (in substance the "interest" method prescribed by paragraph 15 of *APB Opinion No. 21*). The new effective interest rate shall be the discount rate that equates the present value of the future cash payments specified by the new terms (excluding amounts contingently payable) with the carrying amount of the payable.

17. If, however, the total future cash payments specified by the new terms of a payable, including both payments designated as interest and those designated as face amount, are less than the carrying amount of the payable, the debtor shall reduce the carrying amount to an amount equal to the total future cash payments specified by the new terms and shall recognize a gain on restructuring of payables equal to the amount of the reduction (see paragraph 21). [11] Thereafter, all cash payments under the terms of the payable shall be accounted for as reductions of the carrying amount of the payable, and no interest expense shall be recognized on the payable for any period between the restructuring and maturity of the payable. [12]

18. A debtor shall not recognize a gain on a restructured payable involving indeteriminate future cash payments as long as the maximum total future cash payments may exceed the carrying amount of the payable. Amounts designated either as interest or as face amount by the new terms may be payable contingent on a specified event or circumstance (for example, the debtor may be required to pay specifed amounts if its financial condition improves to a specified degree within a specified period). To determine whether the debtor shall recognize a gain according to the provisions of paragraphs 16 and 17, those contingent amounts shall be included in the "total future cash payments specified by the new terms" to the extent necessary to prevent recognizing a gain at the time of restructuring that may be offset by future interest expense. Thus, the debtor shall apply paragraph 17 of *FASB Statement No. 5*, "Accounting for Contingencies," in which probability of occurrence of a gain contingency is not a factor, and shall assume that contingent future payments will have to be paid. The same principle applies to amounts of future cash payments that must sometimes be estimated to apply the provisions of paragraphs 16 and 17. For example, if the number of future interest payments is flexible because the face amount and accrued interest is payable on demand or becomes payable on demand, estimates of total future cash payments shall be based on the maximum number of periods possible under the restructured terms.

Combination of Types

19 A troubled debt restucturing may involve partial settlement of a payable by the debtor's transferring assets or granting an equity interest (or both) to the creditor and modification of terms, of the remaining payable. [13] A debtor shall account for a troubled debt restructuring involving a partial settlement and a modification of terms as prescribed in paragraphs 16–18 except that, first, assets transferred or an equity interest granted in that partial settlement shall be measured as prescribed in paragraphs 13 and 15, respectively, and the carrying amount of the payable shall be reduced by the total fair value of those assets or equity interest. [14] A difference between the fair value and the carrying amount of assets transferred to the creditor shall be recognized as a gain or loss on transfer of assets. No gain or restructuring of payables shall be recognized unless the remaining carrying amount of the payable exceeds the total future cash payments (including amounts contingently payable) specified by the terms of the debt remaining unsettled after the restructuring. Future interest expense, if any, shall be determined according to the provisions of paragraphs 16–18.

Related Matters

20. A troubled debt restructuring that is in substance a repossession or foreclosure by the creditor or other transfer of assets to the creditor shall be accounted for according to the provisions of paragraphs 13, 14, and 19.

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equity interest granted shall be used in accounting for a settlement of a payable in a troubled debt restructuring. That guidance is not intended to preclude using the fair value of the payable settled if more clearly evident that the fair value of the assets transferred or of the equity interest granted in a full settlement of a payable (paragraphs 13 and 15). (See paragraph 67 of *APB Opinion No. 16*, "Business Combinations.") However, a partial settlement of a payable (paragraph 19), the fair value of the assets transferred or of the equity interest granted shall be used in all cases to avoid the need to allocate the fair value of the payable between the part settled and the part still outstanding.

[6] Some factors that may be relevant in estimating the fair value of various kinds of assets are described in paragraphs 88 and 89 of *APB Opinion No. 16*, paragraphs 12–14 of *APB Opinion No. 21*, "Interest on Receivables and Payables," and paragraph 25 of *APB Opinion No. 29*, "Accounting for Nonmonetary Transactions."

[7] The carrying amount of a receivable encompasses not only unamortized premium, discount, acquisition costs, and the like but also an allowance for uncollectible amounts and other "valuation" accounts, if any. A loss on transferring receivables to creditors may therefore have been wholly or partially recognized in measuring net income before the transfer and be wholly or partly a reduction of a valuation account rather than a gain or loss in measuring net income for the period of the transfer.

[8] See footnote 5.

[9] In this Statement, *total future cash payments* includes related accrued interests, if any, at the time of the restructuring that continues to be payable under the new terms.

[10] All or a portion of the carrying amount of the payable at the time of the restructuring may need to be reclassified in the balance sheet because of changes in the terms, for example, a change in the amount of the payable due within one year after the date of the debtor's balance sheet. A troubled debt restructuring of a short-term obligation after the date of a debtor's balance sheet but before that balance sheet is issued may affect the classification of that obligation in accordance with *FASB Statement No. 6*, "Classification of Short-Term Obligations Expected to Be Refinanced."

[11] If the carrying amount of the payable comprises several accounts (for example, face amount, accrued interest, and unamortized premium, discount, finance charges, and issue costs) that are to be continued after the restructuring, some possibly being combined, the reduction in carrying amount may need to be allocated among the remaining accounts in proportion to the previous balances. However, the debtor may choose to carry the amount designated as face amount by the new terms in a separate account and adjust another account accordingly.

[12] The only exception is to recognize interest expense according to paragraph 22.

[13] Even if the stated terms of the remaining payable, for example, the stated interest rate and the maturity date or dates, are not changed in connection with the transfer of assets or grant of an equity interest, the restructuring shall be accounted for as prescribed by paragraph 19.

[14] If cash is paid in a partial settlement of a payable in a troubled debt restructuring, the carrying amount of the payable shall be reduced by the amount of cash paid.

21. Gains on restructuring of payables determined by applying the provisions of paragraphs 13–20 of this Statement shall be aggregated, included in measuring net income for the period of restructuring, and, if material, classified as an extraordinary item, net of related income tax effect, in accordance with paragraph 8 of *FASB Statement No. 4*, "Reporting Gains and Losses from Extinguishment of Debt."

22. If a troubled debt restructuring involves amounts contingently payable, those contingent amounts shall be recognized as a payable and as interest expense in future periods in accordance with paragraph 8 of *FASB Statement No. 5*. Thus, in general, interest expense for contingent payments shall be recognized in each period in which (a) it is probable that a liability has been incurred and (b) the amount of that liability can be reasonably estimated. Before recognizing a payable and interest expense for amounts contingently payable, however, accural or payment of those amounts, shall be deducted from the carrying amount of the restructured payable to the extent that contingent payments included in "total future cash payments specified by the new terms" prevented recognition of a gain at the time of restructuring (paragraph 18).

23. If amounts of future cash payments must be estimated to apply the provisions of paragraphs 16–18 because future interest payments are expected to fluctuate—for example, the restructured terms may specify the stated interest rate to be the prime interest rate increased by a specified amount or proportion—estimates of maximum total future payments shall be based on the interest rate in effect at the time of the restructuring. Fluctuations in the effective interest rate after the restructuring from changes in the prime rate or other causes shall be accounted for as changes in estimates in the periods the changes occur. However, the accounting for those fluctuations shall not result in recognizing a gain or restructuring that may be offset by future cash payments (paragraphs 18 and 22). Rather, the carrying amount of the restructured payable shall remain unchanged, and future cash payments shall reduce the carrying amount until the time that any gain recognized cannot be offset by future cash payments.

24. Legal fees and other direct costs that a debtor incurs in granting an equity interest to a creditor in a troubled debt restructuring shall reduce the amount otherwise recorded for that equity interest according to paragraphs 15 and 19. All other direct costs that a debtor incurs to effect a troubled debt restructuring shall be deducted in measuring gain on restructuring of payables or shall be included in expense for the period if no gain on restructuring is recognized.

Disclosure by Debtors

25. A debtor shall disclose, either in the body of the financial statements or in the accompanying notes, the following information about troubled debt restructurings that have occurred during a period for which financial statements are presented:

a. For each restructuring.[15] a description of the principal changes in terms, the major features of settlement, or both.
b. Aggregate gain on restructuring of payables and the related income tax effect (paragraph 21).
c. Aggregate net gain or loss on transfers of assets recognized during the period (paragraphs 14 and 19).
d. Per share amount of the aggregate gain on restructuring of payables, met of related income tax effect.

26. A debtor shall disclose in financial statements for periods after a troubled debt restructuring the extent to which amounts contingently payable are included in the carrying amount of restructured payables pursuant to the provisions of paragraph 18. If required by paragraphs 9–13 of *FASB Statement No. 5*, a debtor shall also disclose in those financial statements total amounts that are contingently payable on restructured payables and the conditions under which those amounts would become payable or would be forgiven.

Accounting by Creditors

27. A creditor shall account for a troubled debt restructuring according to the type of the restructuring as prescribed in the following paragraphs. Paragraphs 28–42 do not apply to a receivable that the creditor is accounting for at market value in accordance with the specialized industry practice (for example, a marketable debt security accounted for at market value by a mutual fund). Estimated cash expected to be received less estimated costs expected to be incurred is not market value in accordance with specialized industry practice as that term is used in this paragraph.

Receipt of Assets in Full Satisfaction

28. A creditor that receives from a debtor in full satisfaction of a receivable either (i) receivables from third parties, real estate, or other assets or (ii) shares of stock or other evidence of an equity interest in the debtor, or both, shall account for those assets (including an equity interest) at their fair value at the time of the restructuring (see paragraph 13 for how to measure fair value).[16] The excess of (i) the recorded investment in the receivable[17] satisfied over (ii) the fair value of assets received is a loss to be recognized according to paragraph 35.

29. After a troubled debt restructuring, a creditor shall account for assets received in satisfaction of a receivable the same as if the assets had been acquired for cash.

Modification of Terms

30. A creditor in a troubled debt restructuring involving only modification of terms of a receivable—that is, not involving receipt of assets (including an equity interest in the debtor)—shall account for the effects of the restructuring prospectively and shall not change the recorded investment in the receivable at the time of the restructuring unless that amount exceeds the total future cash receipts specified by the new terms.[18] That is, the effects of changes in the amounts or timing (or both) of future cash receipts designated either as interest or as face amount shall be reflected in future periods.[19] Interest income shall be computed in a way that a constant effective interest rate is applied to the recorded investment in the receivable at the beginning of each period between restructuring and maturity (in substance the "interest" method prescribed by paragraph 15 of *APB Opinion No. 21*).[20] The new effective interest rate shall be the discount rate that equates the present value of the future cash receipts specified by the new terms (excluding amounts contingently receivable) with the recorded investment in the receivable.

31. If, however, the total future cash receipts specified by the new terms of the receivable, including both receipts of designated as interest and those designated as face amount, are less than the recorded investment in the receivable before

[15] Separate restructurings within a fiscal period for the same category of payables (for example, accounts payable or subordinated debenture) may be grouped for disclosure purposes.

[16] Paragraphs 28 and 33 indicate that the fair value of assets received shall be used in accounting for satisfaction of a receivable in a troubled debt restructuring. That guidance is not intended to preclude using the fair value of the receivable satisfied if more clearly evident than the fair value of the assets received in full satisfaction of a receivable (paragraph 28). (See paragraph 67 of *APB Opinion No. 16*.) However, in a partial satisfaction of a receivable (paragraph 33), the fair value of the assets received shall be used in all cases to avoid the need to allocate the fair value of the receivable between the part satisified and the part still outstanding.

[17] *Recorded investment in the receivable* is used in paragraphs 28–41 instead of *carrying amount of the receivable* because the latter is net of an allowance for estimated uncollectible amounts or other "valuation" account, if any, while the former is not. The recorded investment in the receivable is the face amount increased or decreased by applicable accrued interest and unamortized premium, discount, finance charges, or acquisition costs and may also reflect a previous direct write-down of the investment.

[18] In this Statement, total future cash receipts includes related accrued interest, if any, at the time of the restructuring that continues to be receivable under the new terms. Uncertainty of collection of noncontingent amounts specified by the new terms (see paragraph 32 for inclusion of contingent amounts) is not a factor in applying paragraphs 30–32 but should, of course, be considered in accounting for allowances for uncollectible amounts.

[19] All or a portion of the recorded investment in the receivable at the time of restructuring may need to be reclassified in the balance sheet because of changes in the terms.

[20] Some creditors—for example, finance companies (*AICPA Industry Audit Guide*, "Audits of Finance Companies," Chapter 2)—use methods that recognize less revenue in early periods of a receivable than does the "interest" method. The accounting for restructured receivables described in this Statement is not intended to change creditors' methods of recognizing revenue to require a different method for restructured receivables from that for other receivables.

restructuring, the creditor shall reduce the recorded investment in the receivable to an amount equal to the total future cash receipts specified by the new terms. The amount of the reduction is a loss to be recognized according to paragraph 35. Thereafter, all cash receipts by the creditor under the terms of the restructured receivable, whether designated as interest or as face amount, shall be accounted for as recovery of the recorded investment in the receivable, and no interest income shall be recognized on the receivable for any period between the restructuring and maturity of the receivable.[21]

32. A creditor shall recognize a loss on a restructured receivable involving indeterminate future cash receipts unless the minimum future cash receipts specified by the new terms at least equals the recorded investment in the receivable. Amounts designated either as interest or as face amount that are receivable from the debtor may be contingent on a specified event or circumstance (for example, specified amounts may be receivable from the debtor if the debtor's financial condition improves to a specified degree within a specified period). To determine whether the creditor shall recognize a loss according to the provisions of paragraphs 30 and 31, those contingent amounts shall be included in the "total future cash receipts specified by the new terms" only if at the time of restructuring those amounts meet the conditions that would be applied under the provisions of paragraph 8 of *FASB Statement No. 5* in accruing a loss. That is, a creditor shall recognize a loss unless contingent future cash receipts needed to make total future cash receipts specified by the new terms at least equal to the recorded investment in the receivable both are probable and can be reasonably estimated. The same principle applies to amounts of future cash receipts that must sometimes be estimated to apply the provisions of paragraphs 30 and 31. For example, if the number of interest receipts is flexible because the face amount and accrued interest is collectible on demand or becomes collectible on demand after a specified period, estimates of total future cash receipts should be based on the minimum number of periods possible under the restructured terms.

Combination of Types

33. A troubled debt restructuring may involve receipt of assets (including an equity interest in the debtor) in partial satisfaction of a receivable and a modification of terms of the remaining receivable.[22] A creditor shall account for a troubled debt restructuring involving a partial satisfaction and modification of terms as prescribed in paragraphs 30–32 except that, first, the assets received shall be accounted for at their fair values as prescribed in paragraph 28 and the recorded investment in the receivable shall be reduced by the fair value of the assets received.[23] No loss on the restructuring shall be recognized unless the remaining recorded investment in the receivable exceeds the total future cash receipts specified by the terms of the receivable remaining unsatisfied after the restructuring. Future interest income, if any, shall be determined according to the provisions of paragraphs 30–32.

Related Matters

34. A troubled debt restructuring that is in substance a repossession or foreclosure by the creditor, or in which the creditor otherwise obtains one or more of the debtor's assets in place of all or part of the receivable, shall be accounted for according to the provisions of paragraphs 28 and 33 and, if appropriate, 39.

35. Losses determined by applying the provisions of paragraphs 28–34 of this Statement shall, to the extent that they are not offset against allowances for uncollectible amounts or other valuation accounts, be included in measuring net income for the period of restructuring and reported according to *APB Opinion No. 30.* Although this Statement does not address questions concerning estimating uncollectible amounts or accounting for the related valuation allowance (paragraph 1), it recognizes that creditors use allowances for uncollectible amounts. Thus, a loss from reducing the recorded investment in a receivable may have been recognized before the restructuring by deducting an estimate of uncollectible amounts in measuring net income and increasing an appropriate valuation allowance. If so, a reduction in the recorded investment in the receivable in a troubled debt restructuring is a deduction from the valuation allowance rather than a loss in measuring net income for the period of restructuring. A valuation allowance can also be used to recognize a loss determined by applying paragraphs 28–34 that has not been previously recognized in measuring net income. For example, a creditor with an allowance for uncollectible amounts pertaining to a group of receivables that includes the restructured receivable may deduct from the allowance the reduction of recorded investment in the restructured receivable and recognize the loss in measuring net income for the period of restructuring by estimating the appropriate allowance for remaining receivables, including the restructured receivable.

36. If a troubled debt restructuring involves amounts contingently receivable, those contingent amounts shall not be recognized as interest income in future periods before they become receivable—that is, they shall not be recognized as interest income before both the contingency has been removed and the interest has been earned.[24] Before recognizing those amounts as interest income, however, they shall be deducted from the recorded investment in the restructured receivable to the extent that contingent receipts included in "total future cash receipts specified by the new terms" avoided recognition of a loss at the time of restructuring (paragraph 32).

37. If amounts of future cash receipts must be estimated to apply the provisions of paragraphs 30–32 because future interest receipts are expected to fluctuate—for example, the restructured terms may specify the stated interest rate to be the prime interest rate increased by a specified amount or proportion—estimates of the minimum total future receipts shall be based on the interest rate in effect at the time of restructuring. Fluctuations in the effective interest rate after the restructuring from changes in the prime rate or other causes shall be accounted for as changes in estimates in the periods the changes occur except that a creditor shall recognize a loss and reduce the recorded investment in a restructured receivable if the interest rate decreases to an extent that the minimum total future cash receipts determined using that interest rate fall below the recorded investment in the receivable at that time.

38. Legal fees and other direct costs incurred by a creditor to effect a troubled debt restructuring shall be included in expense when incurred.

39. A receivable from the sale of assets previously obtained in a troubled debt restructuring shall be accounted for according to *APB Opinion No. 21* regardless of whether the assets were obtained in satisfaction (full or partial) of a receivable to which that Opinion was not intended to apply. A difference, if any, between the amount of the new receivable and the carrying amount of the assets sold is a gain or loss on sale of assets.

Disclosure by Creditors

40. A creditor shall disclose, either in the body of the financial statements or in the accompanying notes, the following information about troubled debt restructurings as of the date of each balance sheet presented:

a. For outstanding receivables whose terms have been modified in troubled debt restructurings, by major category:[25] (i) the

[21] The only exception is to recognize interest income according to paragraph 36.

[22] Even if the stated terms of the remaining receivable, for example, the stated interest rate and the maturity date or dates, are not changed in connection with the receipt of assets (including an equity interest in the debtor), the restructuring shall be accounted for as prescribed in paragraph 33.

[23] If cash is received in a partial satisfaction of a receivable, the recorded investment in the receivable shall be reduced by the amount of cash received.

[24] *FASB Statement No. 5*, paragraph 17 (which continued without reconsideration certain provisions of *ARB No. 50*, "Contingencies"), states, in part: "Contingencies that might result in gains usually are not reflected in the accounts since to do so might be to recognize revenue prior to its realization."

[25] The appropriate major categories depend on various factors, including the industry or industries in which the creditor is involved. For example, for a commercial banking enterprise, at a minimum, the appropriate categories are investments in debt securities and loans. Information need not be disclosed, however, for non-interest-bearing trade receivables; loans to individuals for household, family, and other personal expenditures; and real estate loans secured by one-to-four family residential properties.

aggregate recorded investment; (ii) the gross interest income that would have been recorded in the period then ended if those receivables had been current in accordance with their original terms and had been outstanding throughout the period or since origination, if held for part of the period; and (iii) the amount of interest income on those receivables that was included in net income for the period. A receivable whose terms have been modified need not be included in that disclosure if, subsequent to restructuring, its effective interest rate (paragraph 30) has been equal to or greater than the rate that the creditor was willing to accept for a new receivable with comparable risk.

b. The amount of commitments, if any, to lend additional funds to debtors owing receivables whose terms have been modified in troubled debt restructurings.

41. A financial institution, or other creditor, may appropriately disclose the information prescribed by paragraph 40, by major category, for the aggregate of outstanding reduced-earning and nonearning receivables rather than separately for outstanding receivables whose terms have been modified in troubled debt restructurings.

Substitution or Addition of Debtors

42. A troubled debt restructuring may involve substituting debt of another business enterprise, individual, or government unit [26] for that of the troubled debtor or adding another debtor (for example, as a joint debtor). That kind of restructuring should be accounted for according to its substance. For example, a restructuring in which, after the restructuring, the substitute or additional debtor controls, is controlled by, or is under common control [27] with the original debtor is an example of one that shall be accounted for by the creditor according to the provisions of paragraphs 30–32. Those paragraphs shall also apply to a restructuring in which the substitute or additional debtor and original debtor are related after the restructuring by an agency, trust, or other relationship that in substance earmarks certain of the original debtor's funds or funds flows for the creditor although payments to the creditor may be made by the substitute or additional debtor. In contrast, a restructuring in which the substitute or additional debtor and the original debtor do not have any of the relationships described above after the restructuring shall be accounted for by the creditor according to the provisions of paragraphs 28 and 33.

Effective Date and Transition

43. The preceding paragraphs of this Statement, other than paragraphs 39–41, shall be effective for troubled debt restructurings consummated after December 31, 1977.[28] Earlier application is encouraged for those consummated on or before December 31, 1977 but during fiscal years for which annual financial statements have not previously been issued. The paragraphs shall not be applied to those consummated during fiscal years for which annual financial statements have previously been issued.

44. Paragraph 39 shall be effective for receivables resulting from sales of assets after December 31, 1977 regardless of whether the provisions of this Statement were applied to the related troubled debt restructuring. Earlier application is encouraged for receivables from sales of assets on or before December 31, 1977 but during fiscal years for which annual financial statements have not previously been issued. It shall not be applied to those from sales of assets during fiscal years for which annual financial statements have previoulsy been issued.

45. The information prescribed by paragraphs 40 and 41 shall be disclosed in financial statements for fiscal years ending after December 15, 1977. Earlier application is encouraged in financial statements for fiscal years ending before December 16, 1977. For the purpose of applying paragraph 40, "receivables whose terms have been modified in troubled debt restructurings" shall encompass not only (a) receivables whose terms have been modified in troubled debt restructurings to which the other provisions of this Statement have been applied in accordance with paragraph 43 but also (b) those whose terms have been modified in earlier restructurings that constitute troubled debt restructurings (paragraphs 2–8) but have been excluded from its other provisions because of the timing of the restructurings.

The provisions of this Statement need not be applied to immaterial items.

This Statement was adopted by the affirmative votes of five members of the Financial Accounting Standard Board. Messrs. Gellein and Kirk dissented.

Messrs. Kirk and Gellein dissent because they disagree with the conclusions in paragraphs 16 and 30 (which are also in paragraphs 19 and 33) about prospective treatment of the effect of a reduction of the face amount or maturity amount of debt. They would apply the fair value accounting required in paragraphs 13, 15, and 28 to reductions in the face amount of restructured debt. They point to the incontrovertible fact that a modification of terms that reduces the face amount or interest rate or extends the maturity date, without equivalent consideration, is a relinquishment of rights by the creditor and a corresponding benefit to the debtor, and note that debtors and creditors currently record a reduction in face amount when it occurs. They believe that this Statement takes a backward step in reversing, for the sake of consistency, the practice of current recognition, though not based on fair value. They do not accept the argument implicit in paragraphs 140–144, especially paragraph 144, that consistency in accounting for various modifications of terms should govern. They find no virtue in theoretical consistency if it means now ignoring a substantive consequence of an event—in this case relinquishment of rights—that prior to the issuance of this Statement was being recognized. Messrs. Kirk and Gellein accept prospective recognition of the relinquishment by the creditor and the contra benefit to the debtor associated with interest rate reductions and extensions of maturity dates pending further consideration of other aspects of accounting for interest.

Messrs. Kirk and Gellein believe that their proposal to apply fair value accounting (required in paragraphs 13, 15, and 28 of this Statement) to reduction in the face amount would eliminate a significant difference between the accounting required by this Statement and that required by *APB Opinion No. 26* for debt exchanges that involve changes in the face amount. They also believe that their proposal would result in a more conventional and understandable measure of gain or loss than that which results from the application of paragraphs 17, 19, 31, and 33. They believe that in situations considered to be recordable events, any gain or loss should be determined by comparing fair value, not an undiscounted amount of future cash flows, with previously recorded amounts.

Messrs. Kirk and Gellein also dissent because of disagreement with the guidelines in paragraph 42 for determining when a restructuring that involves a substitution of debtors is a recordable event. First, they believe that from the viewpoint of the creditor, there is no significant difference between a change from the original debtor to one under or to one not under the same control as the original debtor. To the creditor both are changes to a new and different credit risk that should be accounted for in the same way. Second, they believe the guideline in that paragraph concerning a substitute debtor and original debtor who are "related after the restructuring by an agency, trust, or other relationship that in substance earmarks certain of the original debtor's funds or funds flows for the creditor although payments to the creditor may be made by the substitute . . . debtor," is an unworkable criterion and is irrelevant if the right, or asset that gives rise to those funds flows, is irrevocably transferred. In the latter event, from the creditor's viewpoint, the transfer changes the risk and, in effect, results in a different asset—similar in substance to that described in paragraph 28. Further, they find insufficient guidance about the kind of relationship between the parties intended to govern. As an example, they disagree with the interpretation of that guideline in paragraph 161 where recent exchanges of bonds of the Municipal Assistance Corporation (the Corporation) for notes of the City of New York (the City) are noted as examples of debt substitutions whose substance to creditors is modification of terms of an existing

[26] Government units include, but are not limited to, states, counties, townships, municipalities, school districts, authorities, and commissions. See page 4 of *AICPA Industry Audit Guide*, "Audit of State and Local Government Units."

[27] "Control" in this paragraph has the meaning described in paragraph 3(c) of *APB Opinion No. 18*, "The Equity Method of Accounting for Investments in Common Stock": "The usual condition for control is ownership of a majority (over 50%) of the outstanding voting stock. The power to control may also exist with a lesser percentage of ownership, for example, by contract, lease, agreement with other stockholders or by court decree."

[28] For an enterprise having a fiscal year of 52 or 53 weeks ending in the last seven days in December or the first seven days in January, references to December 31, 1977 in paragraphs 43 and 44 shall mean the date in December 1977 or January 1978 on which the fiscal year ends.

receivable rather than an acquisition of a new asset. They believe the relationship in that case goes beyond that of an agency, trust, or other relationship that earmarks funds. They note that the Corporation is a corporate government agency and an instrumentality of the State of New York (the State), not the City; that bonds of the Corporation do not constitute an enforceable obligation, or a debt, of either the State or the City and neither the State nor the City shall be liable thereon; and that neither the faith and credit nor the taxing power of the State or City is pledged to the payment of principal of or interest on the bonds. They note, too, that the Corporation is empowered to issue and sell bonds and notes and to pay or lend funds received from such sale of the City and to exchange the Corporation's obligations for obligations of the City. Those characteristics in their minds establish sufficient independence of the Corporation from the City to take the exchanges out from under the guidelines of paragraph 42.

Members of the Financial Accounting Standards Board:

Marshall S. Armstrong
Chairman
Oscar S. Gellein
Donald J. Kirk
Arthur L. Litke
Robert E. Mays
Robert T. Sprouse
Ralph E. Walters

Appendix A.—Background Information

46. There has been a substantial increase in recent years in the number of debtors that are unable to meet their obligations on outstanding debt because of financial difficulties. Sometimes the debtor and the creditor have restructured the debt to enable the debtor to avoid bankruptcy proceedings or other consequences of default, and the number of troubled debt restructurings receiving publicity has also increased. Although many of the most publicized troubled debt restructurings have involved debtors that are real estate companies or real estate investment trusts, debtors in other industries have also been involved in troubled debt restructurings.

47. *APB Opinion No. 26,* "Early Extinguishment of Debt," established the accounting by a debtor for debt extinguished before its scheduled maturity. A number of commentators have observed, however, that not all troubled debt restructurings are "extinguishments" as that term is used in *APB Opinion No. 26.* Also, since many troubled debt restructurings have occurred on or after the scheduled maturity of the debt, questions have arisen about accounting for debt restructurings that are not early extinguishments. It has been suggested that troubled debt restructurings should be considered separately from restructurings, including early extinguishments, that do not involve the economic or legal pressure to restructure on the creditor that characterizes troubled debt restructurings.

48. Concern, over the lack of guidance in the authoritative literature on accounting for troubled debt restructurings, accentuated by their increasing number, led to requests that the Financial Accounting Standards Board consider the matter. The Board submitted the question to the Screening Committee on Emerging Problems and weighed its recommendations in deciding to proceed with a project limited in scope to accounting and reporting by a debtor whose debt is restructured in a troubled loan situation. The Board issued an Exposure Draft of a Proposed Statement, "Restructuring of Debt in a Troubled Loan Situation," dated November 7, 1975, and held a public hearing on December 12, 1975. The Board received 63 written responses to the Exposure Draft and heard five oral presentations at the public hearing. A number of respondents objected to the accounting prescribed by the Exposure Draft, but they held divergent views about the appropriate accounting. Major issues of concern centered on (a) whether certain kinds of troubled debt restructurings require reductions of carrying amounts of debt, (b) if they do, whether the effect of the reduction should be included in measuring current net income, be deferred, or be considered a contribution to capital, and (c) whether interest that is contingently payable on restructured debt should be recognized before it becomes payable.

49. During the same period, uncertainties arose about the abilities of some state and local government units to pay their obligations when due. Some of those obligations have also been restructured, for example, by continuing the existing obligation for a designated period at a reduced interest rate or by substituting obligations with later maturities of the same or a related issuer. Questions about accounting and reporting by creditors for those restructured securities led various individuals and organizations to urge the Board to consider that matter.

50. The Board considered (a) the lack of authoritative guidance and divergent views about accounting and reporting by debtors for troubled debt restructurings and by creditors for restructured securities of state and local government units and (b) the similarities of the issues for debtors and creditors and concluded that the accounting and reporting issues affecting both debtors and creditors should be considered in a single project. The Board therefore announced on January 7, 1976, that it had added to its agenda a project to determine accounting and reporting by both debtors and creditors. At the same time the Board announced that since the new project concerned accounting by both debtors and creditors, the Board would not issue a Statement covering the limited topic of the November 7, 1975 Exposure Draft.

51. The Securities and Exchange Commission issued, also on January 7, 1976, *Accounting Series Release No. 188,* "Interpretive Statement by the Commission on Disclosure Registrants of Holdings of Securities of New York City and Accounting for Securities Subject to Exchange Offer and Moratorium." The Commission did not require a particular accounting method because of the divergent views on accounting for the securities held and "the fact that the Financial Accounting Standards Board has agreed to undertake a study of the accounting problems . . . with the intention of developing standards which can be applied to year-end statements in 1976."

52. The Board appointed a task force in January 1976 to provide counsel in preparing a Discussion Memorandum. Its sixteen members included individuals from academe, the financial community, industry, law, and public accounting. The Board issued a Discussion Memorandum, "Accounting by Debtors and Creditors When Debt Is Restructured," dated May 11, 1976, comprehending accounting and reporting by debtors and creditors for "any change in the amount or timing of cash payments otherwise required under the terms of the debt at the date of restructuring." It received 894 written responses to the Discussion Memorandum and heard 37 oral presentations at a public hearing on July 27–30, 1976.

53. In addition, the FASB staff reviewed the accounting and reporting practices of a number of debtors and creditors involved in troubled debt restructurings and interviewed a limited number of individuals who were directly associated with some of those restructurings.

54. The Board issued an Exposure Draft of a proposed Statement on "Accounting by Debtors and Creditors for Troubled Debt Restructurings," dated December 30, 1976. It received 96 letters of comment on the Exposure Draft.

Appendix B.—Basis for Conclusions

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Basis for Conclusions

55. This Appendix discusses factors deemed significant by members of the Board in reaching the conclusions in this Statement, including various alternatives considered and reasons for accepting some of rejecting others.

Scope of This Statement

56. Paragraph 1 states that this Statement establishes standards of financial accounting and reporting by the debtor and by the creditor for a troubled debt restructing. In contrast, the Discussion Memorandum comprehended all restructurings that changed "the amount or timing of cash payments otherwise required under the terms of the debt at the date of the restructing." The broader scope of the Discussion Memorandum, which encompassed nontroubled as well as troubled debt restructurings, was due to several factors. The Board considered it necessary to obtain additional information about accounting practices and problems for both troubled and nontroubled debt restructurings. Some respondents to the November 7, 1975 Exposure Draft of a Proposed Statement, "Restructuring of Debt in a Troubled Loan Situation," expressed concern that to apply its guidelines for identifying troubled loan situations would require considerable judgment. Some Task Force members and other commentators advised the Board to comprehend all restructurings accomplished by exchanges or debt for debt or of equity securities for debt that may not be covered by *APB Opinion No. 26.*[29]

57. Most respondents to the Discussion Memorandum that commented on the matter, however, recommended that a Statement at this time should be limited to accounting for troubled debt restructurings. Numerous respondents indicated that restructurings of debt in nontroubled situations present no significant or unusual accounting problems that merit consideration or require new accounting and reporting standards. Many respondents contended that the kinds of major changes that might result from new standards on accounting for all restructurings should not be deferred pending progress on the FASB's existing projects on accounting for interest costs and the conceptual framework for financial accounting and reporting. Some respondents argued that a useful distinction between troubled and nontroubled restructurings of debt can be made and that the need to use judgment in some circumstances should not be a deterrent to making that distinction in a Statement. A number of respondents to the Exposure Draft [30] made similar comments.

58. The Board found persuasive the views described in the preceding paragraph and decided to limit the scope of this Statement to troubled debt restructurings. The Board also decided that conclusions in this Statement should not attempt to anticipate results of considering the issues in its Discussion Memorandum, "Conceptual Framework for Financial Accounting and Reporting: Elements of Financial Statements and Their Measurement," dated December 2, 1976. Rather, the Board believes that, to the extent possible, the accounting for troubled debt restructurings prescribed in this Statement should be consistent and compatible with the existing accounting framework.

59. Paragraph 1 also states that the Statement does not establish standards of financial accounting and reporting for allowances for uncollectible amounts and does not prescribe or proscribe particular methods for estimating amounts of uncollectible receivables. Several respondents to the Exposure Draft urged the Board to adopt the method of accounting for uncollectible amounts based on the net realizable value of collateral property set forth in *Statement of Position 75-2.* "Accounting Practices of Real Estate Investment Trusts," issued June 27, 1975 by the Accounting Standards Division of the American Institute of Certified Public Accountants. Others noted potential conflicts between the Exposure Draft and the AICPA publication and requested clarification. Still others urged the Board to reject the method for estimating amounts of uncollectible receivables in *Statement of Position 75-2.*

60. Since this Statement neither prescribes nor proscribes particular methods for estimating uncollectible amounts of receivables, it takes no position on whether the net realizable value of collateral is a proper basis of estimating allowances for uncollectible amounts of receivables. However, the accounting prescribed in this Statement for assets received in troubled debt restructurings differs from that in *Statement of Position 75-2,* for reasons given in paragraphs 65-105, and the accounting prescribed in this Statement governs.

61. Paragraphs 2-8 identify debt restructurings that fall within the scope of this Statement. This paragraph and the next are intended to clarify further the meaning of *troubled debt restructuring* for purposes of this Statement. The description of a troubled debt restructuring is based generally on that in the November 7, 1975 Exposure Draft, which many respondents to that Exposure Draft and the Discussion Memorandum found satisfactory. It focuses on the economic and legal considerations related to the debtor's financial difficulties that in effect compel the creditor to restructure a receivable in ways more favorable to the debtor than the creditor would otherwise consider. The creditor participates in a troubled debt restructuring because it no longer expects its investment in the receivable to earn the rate of return expected at the time of investment and may view loss of all or part of the investment to be likely unless the receivable is restructured. Thus, a troubled debt restructuring involves a receivable whose risk to the creditor has greatly increased since its acquisition, and if the creditor were not faced with the need to restructure to protect itself, it would require a much higher effective interest rate to invest in the same receivable currently. If the receivable has a market price, the effective interest rate based on that market price will have increased because of that increased risk to the creditor—that is, it will have increased more than market interest rates generally (or fallen less than market rates or increased while interest rates generally have fallen).

62. Although the broad description of a troubled debt restructuring in paragraphs 2-8 includes settlements of debt by transfers of assets and grants of equity interests in debtors, *troubled debt restructuring* refers in particular to modifications of terms intended to continue an existing debt by making the terms more favorable to the debtor to protect the creditor's investment. For purposes of this Statement, troubled debt restructurings do not include changes in terms resulting in an effective interest rate based on market price of the debt that is comparable to effective interest rates applicable to debt issued by nontroubled debtors, for example, a situation in which a debtor is able to exchange for its outstanding debt new marketable debt with an effective interest rate at or near the market interest rates for debt issued by nontroubled debtors generally. The fact that the debtor can obtain that interest rate only by including a "sweetener," such as a conversion privilege, does not make that transaction a troubled debt restructuring because (a) the debtor is sufficiently strong financially that the kind of economic compulsion on the creditor described earlier is not present, (b) the "sweetener" represents so drastic a change in the terms of the debt that the transaction is in substance the exchange of new debt for outstanding debt rather than merely a modification of terms to continue an existing debt, or (c) some combination of both factors.

63. Some respondents to the Discussion Memorandum advocated that the scope of

[29] See paragraph 47 of this Statement.

[30] References to "Exposure Draft" in this Appendix are to "Accounting by Debtors and Creditors for Troubled Debt Restructurings," dated December 30, 1976, unless the reference specifically identifies the earlier Exposure Draft, "Restructurings of Debt in a Troubled Loan Situation," dated November 7, 1975.

this Statement specifically exclude restructurings of receivables related to consumer finance activities or to all or certain residential properties. Their reasons focused primarily on the individual insignificance of those receivables in a creditor's financial position and on the cost involved to account for reductions in recorded investments in large numbers of receivables that may be restructured. The Board concluded that accounting for restructurings of those receivables in troubled situations should in general be the same as for other troubled debt restructurings. However, grouping like items or using statistical measures may be appropriate for receivables that are not individually material.

64. Some respondents to the Exposure Draft suggested that the *time of a troubled debt restructuring* be clarified because several dates or events may be involved. The time may be significant in matters relating to recognizing gains or losses from restructuring or to the effective date of the Statement. Paragarph 6 specifies the time of a restructuring to be the date of consummation, that is, the time that assets are transferred, new terms become effective, and the like. A debtor should not recognize a gain on restructuring before consummation of the restructuring; a creditor should record receipt of an asset or equity interest at that date or should formally write down a restructured receivable, but may already have recognized a loss on restructuring through estimated uncollectible amounts.

Divergent Views of Troubled Debt Restructurings

65. Respondents to the Discussion Memorandum expressed divergent views about the substance of various types of troubled debt restructurings and appropriate accounting for them within the existing accounting framework. Those views fall generally into three categories:

a. All troubled debt restructurings constitute events that are part of continuing efforts by creditors to recover amounts invested and obtain a return on investment despite debtors' financial difficulties; therefore, troubled debt restructurings may require certain disclosures, but usually do not require changes in carrying amounts of payables or recorded investments in receivables or recognition of gains or losses.

b. All debt restructurings, troubled and nontroubled, constitute transactions whose financial effect on assets or liabilities (receivables or payables) should be recognized, including recognition of gains or losses.

c. Accounting for a troubled debt restructuring depends on the characteristics of the restructuring. Some troubled debt restructurings constitute transactions requiring recognition of changes in receivables or payables and related gains or losses; other troubled debt restructurings do not.

Recognition of Changes Not Appropriate

66. Respondents who contended that troubled debt restructurings constitute events for which recognition of changes in assets or liabilities is uaually not appropriate within the existing accounting framework generally focused on accounting by creditors. They reasoned that a troubled debt restructuring commonly involves a concession granted unilaterally by the creditor to increase its prospects of recovering the amount invested. The debtor is usually a passive beneficiary of the effects of the restructuring. Troubled debt restructurings typically result from the debtor's financial difficulties that existed before restructuring, and in the existing accounting framework the creditor should have considered the debtor's financial difficulties in estimating an allowance for uncollectible amounts regardless of whether those difficulties were likely to culminate in a restructuring. According to those respondents, the restructuring event in itself has no accounting significance expcept to sometimes provide more definitive evidence of the effect of the debtor's financial difficulties on the creditor's ability to recover the recorded investment in the receivable.

67. According to that view, the creditor should record no change in a receivable restructured in a troubled debt restructuring and no gain or loss whether the restructuring involves (i) transfer of receivables, real estate, or other noncash assets from the debtor to the creditor to satisfy the receivable, (ii) grant to the creditor of an equity interest in the debtor to satisfy the receivable, (iii) modification of the terms of the receivable, or (iv) some combination of transfer of assets or grant of equity interests (or both) and modification of terms. The normal, expected course of events in a creditor's activities is to invest cash, earn interest on the cash invested, and eventually recover the cash. Although a creditor initiates or agrees to a restructuring to protect the amount invested, not to acquire noncash assets, the creditor may accept noncash assets (including an equity interest) as a necessary intermediate step. The creditor previously held a claim on the debtor's assets, either through a receivable secured by specific collateral or through an unsecured general claim against the debtor's assets. Accepting noncash assets in a restructuring represents the exercise of that claim; the assets stand in the place of the receivable. According to that view, the creditor's recorded investment in the receivable should become the recorded investment in the surrogate assets obtained. Then, since whether the creditor recovers that investment depends on the cash received for the assets that replaced the receivable, recoverability of that recorded investment as a result of obtaining the surrogate assets should be assessed. An expected failure, if any, to recover all of the recorded investment should be recognized as a loss by the creditor to the extent not previously recognized. However, transfer of the assets to the creditor should not precipitate recognition of a loss that was not inherent in the receivable before the restructuring; at most, the transfer provides evidence of the existence and amount of a loss.

Recognition of Changes Appropriate for All Debt Restructurings

68. Some respondents advocated for virtually all debt restructurings, troubled and nontroubled, the accounting normally required in the existing accounting framework for initial recognition of assets and liabilities. They reasoned that each restructuring is an exchange resulting in a new asset for the creditor or liability for the debtor in place of the old one. According to that view, the presence or absence of financial difficulties does not affect the appropriate accounting for a restructuring; at most, a debtor's financial difficulties may affect the terms of the exchange. Those respondents contended that all assets and liabilities exchanged in debt restructurings should be measured at their fair values at the time of the restructuring by both debtors and creditors. They considered continued use of recorded amounts derived from previous exchange transactions to be inappropriate for restructured receivables and payables because it ignores a current exchange transaction and may ignore gains or losses that have occurred and should be recognized.

Accounting Depends on Circumstances

69. Some respondents contended that the controlling criterion in determining appropriate accounting for a debt restructuring within the existing accounting framework is whether the restructuring involves transfer of resources, obligations, or both between debtor and creditor. According to that view, a troubled debt restructuring involving transfer of resources, obligations, or both should be accounted for the same as other transfers of resources and obligations in the existing accounting framework and may involve recognizing a gain or loss. A troubled debt restructuring involving no transfer of resources or obligations requires no accounting for changes in assets or liabilities, except to recognize losses in accordance with *FASB Statement No. 5.*

70. Some respondents distinguished debt restructurings involving transfers of resources, obligations, or both from those involving no transfers on the basis of whether the debtor transferred assets or granted an equity interest to the creditor to satisfy the debt or the restructuring involved modification of terms only. Other respondents classified modifications of terms involving reduction of face amount of the debt with transfers of assets or grants of equity interests (discussed further in paragraphs 106–155).

Board Conclusions About Recognizing Changes in Assets or Liabilities

71. *APB Statement No. 4,* "Basic Concepts and Accounting Principles Underlying Financial Statements of Business Enterprises," describes relevant parts of the existing accounting framework. That Statement defines "economic resources" as "the scarce means (limited in supply relative to desired uses) available for carrying on economic activities" and identifies "claims to receive money" as an economic resource. It defines "economic obligations" as "present responsibilities to transfer economic resources or provide services to other entities in the future" and identifies "obligations to pay money" as an economic obligation. It also states that "events that change resources, obligations, and residual interest

are the basis for the basic elements of results of operations . . . and other changes in financial position with which financial accounting is concerned." (See *APB Statement No. 4*, paragraphs 57, 58, and 61.)

72. *According to APB Statement No. 4*, almost all of the events that in the existing accounting framework normally change assets and liabilities and also affect net income for the period of change are either "exchanges" or "nonreciprocal transfers," the two classes that comprise "transfers of resources or obligations to or from other entities." The other classes of events—"external events other than transfers of resources or obligations to or from other entities" (price changes, interest rate changes, technological changes, vandalism, etc.) and "internal events" (production and casualties)—result in revenues or gains only through "exceptions" and result in expenses or losses only because some produce losses by definition or by applying the "modifying convention" of conservatism. (See *APB Statement No. 4*, paragraphs 62 and 180–187.)

73. An exchange is a reciprocal transfer between the enterprise and another entity in which "the enterprise either sacrifices resources or incurs obligations in order to obtain other resources or satisfy other obligations." "Exchanges between the enterprise and other entities (enterprises or individuals) are generally recorded in financial accounting when the transfer or resources or obligations takes place or services are provided." Nonreciprocal transfers are "transfers in one direction of resources or obligations, either from the enterprise to other entities or from other entities to the enterprise." In nonreciprocal transfers between the enterprise and entities other than owners, "one of the two entities is often passive, a mere beneficiary or victim of the other's actions." Nonreciprocal transfers between the enterprise and entities other than owners "are recorded when assets are acquired (except that some noncash assets received as gifts are not recorded), when assets are disposed of or their loss is discovered, or when liabilities come into existence or are discovered." (See *APB Statement No. 4*, paragraphs 62, 181, and 182.)

74. The Board rejected the view that virtually all troubled debt restructurings have the same substance in the existing accounting framework. It therefore rejected both the view that accouting for all troubled debt restructurings should involve recognition of changes in assets or liabilities and perhaps gains and losses and the view that no troubled debt restructurings should require recognition of changes in assets or liabilities or gains or losses.

75. The Board concluded that a troubled debt restructuring that involves transfer of resources or obligations requires accounting for the resources or obligations transferred whether that restructuring involves an exchange transaction or a nonreciprocal transfer. Both kinds of transfers are accounted for in the existing accounting framework on essentially the same basis (exchange price received or paid or fair value received or given). In this Statement, therefore, the Board found it unnecessary to decide whether the transfer of resources and obligations in various types of troubled debt restructurings is reciprocal (an exchange) or nonreciprocal as those terms are used in paragraph 62 of *APB Statement No. 4*.

76. The Board also concluded that a troubled debt restructuring that does not involve a transfer of resources or obligations is a continuation of an existing debt. It is neither an event that results in a new asset or liability for accounting purposes nor an event that requires a new measurement of an existing asset or liability.

77. The Board noted that guidance regarding the types of troubled debt restructurings that involve transfers of resources, obligations, or both is sparse in existing accounting pronouncements, and various views exist. The Board concluded that to the extent a troubled debt restructuring involves (i) transfer of receivables, real estate, or other assets from debtor to creditor to satisfy debt or (ii) grant to the creditor of an equity interest in the debtor to satisfy debt (or a combination of both), a transfer of resources or obligations has occurred that in the existing accounting framework should be accounted for at fair value. The debtor has given up assets or granted an equity interest to settle a payable, and the creditor has received the assets or equity interest in satisfaction of a receivable. In contrast, to the extent a troubled debt restructuring involves only modification of terms of continuing debt, no transfer of resources or obligations has occurred. The substance of troubled debt restructurings involving modification of continuing debt is discussed in paragraphs 106–155.

78. Several respondents to the Exposure Draft disagreed with the Board's distinction between troubled debt restructurings involving transfers of assets or grants of equity interests in debtors and those involving only modifications of terms. Some respondents wished to have fewer kinds of troubled debt restructurings accounted for as transactions between debtors and creditors and thus disagreed with the Exposure Draft's conclusions on accounting for transfers of assets; their views are noted in the next section. Others wished to account for more kinds of troubled debt restructurings as transactions between debtors and creditors and thus disagreed with the Exposure Draft's conclusions on accounting for modifications of terms; their views are noted in paragraphs 150–153.

ACCOUNTING FOR RESTRUCTURINGS INVOLVING TRANSFERS

Accounting by Debtors and Creditors for Transfer of Assets

Concept of Fair Value

79. Some respondents to the Exposure Draft continued to argue that all troubled debt restructurings should be accounted for as modifications of terms of debt and that none should be accounted for as transfers of assets (paragraphs 66 and 67). Others accepted the need to account for some troubled debt restructurings as asset transfers but held that obtaining assets through foreclosure or repossession under terms included in lending agreements should be distinguished from obtaining assets in exchange for cash or in other "asset swaps." They contended that (a) only the form of the asset is changed by foreclosure or repossession, (b) the substance of a secured loan is that the lender may choose either to postpone receipt of cash or take the asset to optimize cash receipts and recovery of its investment, and (c) foreclosure or repossession is not the completion of a lending transaction but merely a step in the transaction that begins with lending cash and ends with collecting cash.

80. The Board rejected those arguments for the reasons given in paragraphs 71–77, emphasizing that an event in which (a) an asset is transferred between debtor and creditor, (b) the creditor relinquishes all or part of its claim against the debtor, and (c) the debtor is absolved of all or part of its obligation to the creditor is the kind of event that is the basis of accounting under the existing transaction-based accounting framework. To fail to recognize an event that fits the usual description of a transaction and to recognize only the lending and collection of cash as transactions would significantly change the existing accounting framework.

81. Use of the fair value of an asset transferred to measure the debtor's gain on restructuring and gain or loss on the asset's disposal or the creditor's cost of acquisition is not adopting some kind of "current value accounting." On the contrary, that use of fair value is common practice within the existing accounting framework. Paragraph 13 of this Statement explains briefly the meaning of *fair value* and refers to *APB Opinions No. 16, No. 21*, and *No. 29*, which use *fair value* in the same way and provide guidance about determining fair values within the existing accounting framework. The term *fair value* is used in essentially the same way as *market value* was used in the Discussion Memorandum to denote a possible attribute to be measured at the time a debt is restructured. *Fair value* is defined in paragraph 181 of *APB Statement No. 4* as "the approximation of exchange price in transfers in which money or money claims are not involved." Although a "money claim" is necessarily involved in transferring assets to settle a payable in a troubled debt restructuring, the troubled circumstances in which the transfer occurs makes it obvious that the amount of the "money claim" does not establish an exchange price. Determining the fair value of the assets transferred in a troubled debt restructuring is usually necessary to approximate an exchange price for the same reasons that determining fair value is necessary to account for transfers of assets in non-monetary transactions (*APB Opinion No. 29*).

82. That point is emphasized in this Appendix because some respondents to the Exposure Draft apparently misunderstood the concept of fair value (paragraph 11 of the Exposure Draft and paragraph 13 of this Statement) and the discounting of expected cash flows specified in those paragraphs. Paragraph 13 permits discounting of expected cash flows from an asset transferred or received in a troubled debt restructuring to be used to estimate fair value only if no market prices are available either for the

asset or for similar assets. The sole purpose of discounting cash flows in that paragraph is to estimate a current market price as if the asset were being sold by the debtor to the creditor for cash. That estimated market price provides the equivalent of a sale price on which the debtor can base measurement of a gain on restructuring and a gain or loss on disposal of the asset and the equivalent of a purchase price on which the creditor can measure the acquisition cost of the asset. To approximate a market price, the estimate of fair value should use cash flows and discounting in the same way the marketplace does to set prices—in essence, the marketplace discounts expected future cash flows from a particular asset "at a rate commensurate with the risk involved" in holding the asset. An individual assessment of expected cash flows and risk may differ from what the marketplace's assessment would be, but the procedure is the same.

83. In contrast to the purpose of paragraph 13, *AICPA Statement of Position No. 75-2* [31] is concerned with different measures—net realizable value to a creditor of a receivable secured by real property and net realizable value of repossessed or foreclosed property. Its method of accounting for assets obtained by foreclosure or repossession thus differs from the method specified in this Statement. It proposes discounting expected cash flows at a rate based on the creditor's "cost of money" to measure the "holding cost" of the asset until its realizable value is collected in cash. The concept of fair value in paragraph 13 does not involve questions of whether interest is a "holding cost" or "period cost" because it is concerned with estimating market price, not net realizable value, however defined. Accounting for transfers of assets in troubled debt restructurings and for the assets after transfer is, of course, governed by this Statement.

84. Several respondents to the Exposure Draft suggested that the Statement should explicitly state that troubled debt restructurings that are in substance transfers of assets should be accounted for according to that substance. The Board agreed that a restructuring may be in substance a foreclosure, repossession, or other transfer of assets even though formal foreclosure or repossession proceedings are not involved. Thus, the Statement requires accounting for a transfer of assets if, for example, the creditor obtains control or ownership (or substantially all of the benefits and risks incident to ownership) of one or more assets of the debtor and the debtor is wholly or partially relieved of the obligations under the debt, or if both the debt and one or more assets of the debtor are transferred to another debtor that is controlled by the creditor.

Debtor's Recognition of Gain or Loss

85. Responses to the November 7, 1975 Exposure Draft, the May 11, 1976 Discussion Memorandum, and the Exposure Draft included two general procedures for a debtor to account for a gain or loss from a troubled debt restructuring involving a transfer of assets to settle a payable:

a. The debtor recognizes a difference, if any, between the carrying amount of assets transferred and the carrying amount of the payable settled as a gain on restructuring of a payable.

b. The debtor (1) recognizes a difference, if any, between the fair value and carrying amount of assets transferred as a gain or loss transfer of assets and (2) recognizes a difference, if any, between the fair value of assets transferred and the carrying amount of the payable settled, as a gain on restructuring of a payable.

86. Some respondents contended that debtors should not recognize the difference between the carrying amount and fair value of assets transferred to settle a payable as a gain or loss on assets. Instead, the net difference, if any, between the carrying amount of assets transferred and the carrying amount of a payable settled should be recognized as a gain or loss on restructuring of a payable. They argued that to measure the fair value of assets transferred would be costly and subjective in certain circumstances and that distinctions in the debtor's income statement between a gain or loss on disposition of assets and a gain on settlement of payables in the same troubled debt restructuring would probably not be helpful and might be arbitrary.

87. Other respondents who addressed the question emphasized the desirability of being able to assess separately the debtor's performance with respect to the transferred assets. They suggested that measuring the fair values of the transferred assets is essential to that assessment and conveys significant information that is obscured if fair values are not measured. For example, the fair values of some assets transferred (such as real estate) may often exceed their carrying amounts, while the fair values of other assets transferred (such as receivables) may sometimes be less than their face amounts. In the existing accounting framework, the first kind of difference is not recognized before disposal of the asset, but the second kind of difference is likely to have been recognized before restructuring by some debtors but not recognized by others for various reasons. Failure to include a gain or loss for the difference between the fair values and carrying amounts of assets transferred in troubled debt restructurings is likely to obscure differences and similarities between restructurings, according to that view, and respondents who advocated separate recognition of a debtor's gains or losses on assets transferred and gains on restructuring argued that separate recognition is required to provide consistent information about a single debtor for different periods and comparable information about different debtors for the same periods. The need for separate recognition is accentuated if gains and losses on transfer of assets are classed differently from gains on restructuring in the debtor's income statement (that is, if the latter are classified as extraordinary items).

88. The Board concluded that the fair value of the assets transferred in a troubled debt restructuring constitutes the best measure of the debtor's sacrifice to settle the payable and therefore that the fair value of assets transferred should be used to measure the gain on restructuring of the payable. In the existing accounting framework, gains, and losses on certain kinds of noncurrent assets, are usually recognized on assets only when the assets are sold or otherwise disposed of. For many assets, that gain or loss on sale or disposal is the only indication of whether the enterprise did well or poorly by having the asset. That indication is lost if the gain or loss on disposition is buried in a gain on restructuring of troubled debt, and the effect of the restructuring itself is also obscured. Further, unless fair value of the asset transferred is used to account for the transaction, the proportion of a payable settled by the transfer can usually be determined only by arbitrary and complicated allocations if the transfer settles only part of the payable and the terms are modified on the remainder (paragraph 19).

89. Since a gain or loss recognized by a debtor on the assets transferred to settle a payable in a troubled debt restructuring is closely related to a gain recognized by a debtor on restructuring of a payable, the Board concluded that the aggregate amount of each should be disclosed for restructurings that have occurred during a period for which financial statements are presented (paragraph 25).

Creditor's Subsequent Accounting

90. The Board considered two proposals for a creditor's accounting for assets received in full satisfaction of a receivable in a troubled debt restructuring: (a) the creditor accounts for the assets received at their fair value and recognizes as a loss a difference, if any, between the total fair value of assets received and the recorded investment in the receivable satisfied or (b) the creditor accounts for the assets received at the recorded investment in the receivable satisfied and recognizes no loss. Those alternatives are described in paragraphs 65–70, and the Board's reasons for adopting the first proposal are given in paragraphs 71–78.

91. Several respondents to the Exposure Draft requested guidance on a creditor's accounting after a troubled debt restructuring for assets received in the restructuring. Some asked the Board to require or permit creditors to accrue interest on all assets acquired through repossession or foreclosure. In response, paragraph 29 states that "after a troubled debt restructuring, a creditor shall account for assets received in satisfaction of a receivable the same as if the assets had been acquired for cash." The fair value at the time of transfer of an asset transferred to a creditor in a troubled debt restructuring is a measure of its cost to the creditor and generally remains its carrying amount (except for depreciation or amortization) until sale or other disposition if the asset is inventory, land, building, equipment, or other nonmonetary asset. That is, under the present accounting framework, interest is accrued only on some receivables and other monetary assets. Except for the effects of a few specialized rules that permit interest cost to be added to the cost of some assets under construction, etc., interest is not accrued on nonmonetary assets. That framework governs accounting for assets acquired in a troubled debt restructuring. The method of accounting for assets received through foreclosure,

[31] See paragraphs 59 and 60 of this Statement.

repossession, or other asset transfer to satisfy a receivable proposed by *Statement of Position 75-2* is not compatible with the accounting specified in this Statement.

Debtor's Accounting for Grant of Equity Interest

92. The Board considered three proposals for a debtor's accounting for an equity interest granted to a creditor to settle a payable in a troubled debt restructuring:

a. The debtor directly increases its owners' equity by the fair value of the equity interest granted [32] and recognizes the difference between that fair value and the carrying amount of the payable settled as a gain included in measuring net income.
b. Same as (a) except that the resulting gain is included directly in the owners' equity of the debtor.
c. The debtor directly increases its owners' equity by the carrying amount of the payable settled, recognizing no gain.

93. Respondents favoring use of fair value to record a grant of an equity interest contended that the increase in the owners' equity of the debtor as a result of a troubled debt restructuring should be measured by the consideration received for the equity interest granted, not by the carrying amount of the payable settled because that carrying amount has no current economic significance. They also contended that a separate measure of a gain on restructuring of payables provides useful information.

94. Among those who advocated use of fair value to record an equity interest granted to settle debt in a troubled debt restructuring and recognition of a resulting gain on restructuring, some advocated including that gain in measuring net income and others advocated including it directly in the debtor's equity accounts. Those favoring inclusion in net income argued that all gains from troubled debt restructurings are components of net income whether they arise from transfer of assets or grant of equity interests. Those favoring direct inclusion in owners' equity argued that, to the extent an equity interest is involved, the restructuring is a capital transaction and gains resulting from capital transactions should be recognized as direct increases in paid-in or contributed owners' equity rather than as components of net income.

95. Those who advocated that the debtor's increase in equity for an equity interest granted should be the carrying amount of the debt settled also argued that granting an equity interest is essentially a capital transaction to which the notion of a gain does not apply. That solution was proposed in the November 7, 1975 Exposure Draft. Advocates of that view noted that paragraph 187 of *APB Statement No. 4* states that, among other sources, increases in owners' equity arise from investments in an enterprise by its owners. According to that view, a creditor that accepts an equity interest in the debtor in satisfaction of a receivable becomes an owner; the debtor's measure of the owners' investment is the carrying amount of the payable settled.

96. After considering the comments received in response to the November 7, 1975 Exposure Draft, the May 11, 1976 Discussion Memorandum, and the Exposure Draft, the Board concluded that a debtor should record an equity interest in the debtor granted to a creditor to settle a payable in a troubled debt restructuring at its fair value, and the difference between that fair value and the carrying amount of the payable settled should be recognized as a gain in measuring net income. The Board recognizes that, for some debtors involved in troubled debt restructurings, estimating either fair value of the equity interest granted or the fair value of the payable settled may be difficult. That estimate is necessary, however, to measure separately the consideration received for the equity interest and the gain on restructuring. To include the gain on restructuring in contributed equity would violate a clear principle for accounting for issues of stock—capital stock issued is recorded at the fair value of the consideration received (*APB Statement No. 4*, paragraph 182). The consideration received for the stock issued in that kind of troubled debt restructuring is cancellation of the payable (or part of it), but the fair value of the consideration received is not measured by the carrying amount of the payable. Whether the consideration received is measured by the fair value of the stock issued or the fair value of the payable cancelled, the consideration is less than the carrying amount of the payable. To record the stock issued at the carrying amount of the payable thus results in recording the stock at an amount in excess of the consideration received; to include the gain in restructuring in contributed equity instead of net income gives the same result.

97. To recognize a gain on restructuring acknowledges that the creditor accepted something less than the carrying amount of the payable to settle it. Since that is the essential result whether the restructuring is in the form of a transfer of assets from debtor to creditor or the form of a grant to the creditor of an equity interest in the debtor, the Board believes that essentially the same accounting applies in the existing accounting framework to both kinds of restructurings. Although the creditor becomes an owner of the debtor to the extent that the creditor accepts an equity interest in the debtor, that is a consequence of the kind of consideration used to settle a payable in a restructuring. The restructuring itself is an agreement between a debtor and a creditor, and the gain to the debtor results because the creditor accepted less consideration than the carrying amount of the debt.

Classification of Debtor's Gain on Restructuring

98. Alternatives considered by the Board for classifying gain on a troubled debt restructuring in the debtor's financial statements were that the gain is: (a) always included in measuring net income in accordance with *APB Opinion No. 30*, (b) always included in measuring net income as an extraordinary item, and (c) always included as a direct addition to paid-in capital. Most respondents addressing the question recommended classifying a gain on restructuring debt as an extraordinary item, primarily because they perceived it to be similar to gains or losses on extinguishment of debt that, according to *FASB Statement No. 4*, shall be aggregated and, if material, classified as an extraordinary item, net of related income tax effect. Some respondents recommended classifying the gain as a direct increase in paid-in capital, contending that since the gain results from a unilateral action by the creditor, the debtor has in effect received a contribution to equity from the creditor.

99. The Board concluded that a gain on restructuring (net of related income tax effect), if material, should always be classified as an extraordinary item in measuring the debtor's net income. The Board recognized that to apply the criteria in *APB Opinion No. 30* to a particular debtor's gain on restructuring would not necessarily result in its classification as an extraordinary item. The Board concluded, however, that a gain on restructuring of a payable in a troubled debt restructuring is indistinguishable from a gain or loss on other extinguishments of debt, and the same classification in financial statements is appropriate. Since *FASB Statement No. 4* classifies a gain or loss on extinguishment of debt as an extraordinary item, the classification is appropriate for a gain on restructuring of a payable.

100. Some respondents suggested that "legal fees and other direct costs that a debtor incurs in granting an equity interest to a creditor in a troubled debt restructuring" (paragraph 24) always be included as extraordinary items whether or not the debtor recognizes a gain on restructuring. Issuing equity interests is not an extraordinary event for a business enterprise, however, and related costs are not extraordinary items under any existing authoritative literature. Deducting those costs from the proceeds of issue has been customary practice, and this Statement does not change that custom. But only costs of issuing the equity interest may be accounted for that way. All other direct costs of a troubled debt restructuring are expenses of the period of restructuring but shall be deducted from a gain, if any, on restructuring.

Creditor's Accounting for Loss on Restructuring

101. Some respondents to the Discussion Memorandum, especially financial institutions, indicated that they hold and manage broad groups of earning assets (primarily loans and investments) as portfolios rather than as individual assets. According to them, their primary consideration in making a new loan or investment is to recover the amount invested, and the rate of return on the amount invested is a secondary consideration. Although one objective is to obtain an appropriate rate of return for the particular credit risk, changes in market conditions and general economic conditions as well as changes affecting the individual asset or debtor may cause the actual return from a loan or investment to

[32] "Fair value" in this context normally means the fair value of the liability satisfied or the fair value of the equity interest granted, whichever is the more clearly evident (*APB Opinion No. 16*, paragraph 67 and *APB Statement No. 4*, paragraph 182).

vary from that originally anticipated. Therefore, the objective is to maintain a portfolio with an average yield that provides an adequate margin over the cost of funds and that has risk, maturity, marketability, and liquidity characteristics that are appropriate for the particular institution. To achieve that objective, the contractual rate of return required on individual loans and investments must include a factor to offset the probability that some of them will become nonearning assets, some will ultimately recover amounts invested only with difficulty, and some will involve loss of at least a portion of the amounts invested.

102. The financial difficulties of a debtor that lead to a troubled debt restructuring usually require the creditor to consider those difficulties carefully in determining whether to recognize a loss on the existing receivable. Typically, before restructuring occurs, the creditor has determined the need for a related allowance for uncollectible amounts in light of those difficulties. An allowance for uncollectible amounts may have been based on individual receivables, on groups of similar receivables without necessarily attempting to identify particular receivables that may prove uncollectible, or both. The creditor typically has numerous lending transactions and expects loan losses to recur as a consequence of customary and continuing business activities. Almost all respondents who commented on the classification of a creditor's loss on restructuring recommended that the loss be accounted for in a manner consistent with the enterprise's method of accounting for other losses related to its receivables. Usually that involves recognizing specific losses as they are identified and periodically adjusting the allowance for uncollectible amounts based on an assessment of its adequacy for losses not yet specifically identified. Respondents recommended that the net effect of recognizing specific losses and adjusting the valuation allowance be included in measuring net income in accordance with the provisions of *APB Opinion No. 30.*

103. The Board considered the varied frequency and significance for creditors of troubled debt restructurings in the light of the discussion in *APB Opinion No. 30,* and agreed that (a) a creditor should account for a loss from a troubled debt restructuring in the same manner as a creditor's other losses on receivables (that is, as deductions in measuring net income or as reductions of an allowance for uncollectible amounts), and (b) *APB Opinion No. 30* should apply to losses on restructuring that are included in measuring net income.

Creditor's Sale of Assets Received in Restructuring

104. A creditor whose customary business activities include lending may sell an assert that was previously acquired in a troubled debt restructuring. The consideration received in that sale may be represented, in whole or in part, by a receivable. The Board considered whether a receivable received in that way is exempt from the provisions of *APB Opinion No. 21* because paragraph 3(d) of that Opinion states that, except for one paragraph, the Opinion does not apply to several kinds of receivables or payables or activities, including "the customary cash lending activities and demand or savings deposit activities of financial institutions whose primary business is lending money." Some respondents to the Exposure Draft held that acquiring and disposing of those assets is part of "the customary cash lending activities" of certain financial institutions.

105. The "lending activities" referred to in paragraph 3(d) of *APB Opinion No. 21* are modified by the words "customary" and "cash," and the Board concluded that the sale of an asset, such as real estate, by a financial institution is distinguishable from its customary cash lending activities. The view that the customary cash lending activities of a financial institution include repossession or foreclosure and resale of assets is part of the argument that repossessions and foreclosures are not transactions to be accounted for but merely changes in the form of the asset (paragraphs 66, 67, and 79–84). The Board rejected that contention and also rejected this part of it. *APB Opinion No. 21* focuses primarily on the possible misstatement of the exchange price (sale price or purchase price) in an exchange of a noncash asset for a receivable or payable, with consequent misstatement in the period of the transaction of gain or loss on sale or acquisition cost and misstatement in later periods of interest income or interest expense. The resale of repossessed or foreclosed assets is that kind of transaction and involves the same questions. Accordingly, the Board concluded that a receivable resulting from sale of an asset received in a troubled debt restructuring is covered by that Opinion, including paragraph 12, which prescribes the measurement of a note (receivable) exchanged "for property, goods, or service in a bargained transaction entered into an arm's length."

ACCOUNTING FOR RESTRUCTURINGS INVOLVING MODIFICATION OF TERMS

Background Information

106. A creditor holds a receivable with the expectation that the future cash receipts, both those designated as interest and those designated as face amount, specified by the terms of the agreement will provide a return of the creditor's investment in that receivable and a return on the investment (interest income).[33] That essential nature of a creditor's investment in a receivable is the same whether the creditor invested cash (for example, a cash loan to a debtor or a cash purchase of debt securities) or exchanged assets or services (for example, a sale of the creditor's services, product, or other assets) for the receivable.

107. Similarly, a debtor expects the future cash payments specified by the terms of a payable to include a cost (interest expense) for the privilege of deferring repayment of funds borrowed or deferring payment for goods or services acquired. The essential nature of a debtor's payable is the same whether the debtor received cash in exchange for the payable (for example, a cash loan or the issue of debt securities for cash) or received other assets or services (for example, a purchase of services, materials, or other assets from the creditor).

108. The difference between the amount a creditor invests in a receivable and the amount it receives from the debtor's payments of interest and face amount is the return on the investment (interest income) for the entire period the receivable is held. Similarly, the difference between the amount a debtor receives and the amount it pays for interest and face amount is the cost of deferring payment (interest expense) for the entire period the payable is outstanding. The question that must be answered to account for a debt (a receivable or payable) and related interest is how that total interest income or expense is to be allocated to the accounting periods comprising the entire period that the receivable is held or the payable is outstanding.

109. That allocation of interest income or expense to periods is normally accomplished in present accounting practices by the interest method, which measures the interest income or expense of each period by applying the effective interest rate implicit in the debt to the amount of the debt at the beginning of the period, assuming that all cash receipts or payments will occur as specified in the agreement. The effective interest rate implicit in the debt may be the same as or different from the interest rate stated in the agreement (the stated interest rate). The effective and stated rates are the same if the amount invested or borrowed equals the face amount; the rates differ if the amount invested or borrowed is greater or less than the face amount.

110. Thus, the recorded investment in a receivable or the carrying amount of a payable, both at the time of the originating transaction and at the beginning of each period comprising the entire period a receivable is held or a payable is outstanding, is the sum of the present values of (a) the amounts of periodic future cash receipts or payments that are designated as interest and (b) the face amount of cash due at maturity, both discounted at the effective interest rate implicit in the debt. If the effective interest rate differs from the stated interest rate, the recorded investment in the receivable or carrying amount of the payable in financial statements is the face amount plus unamortized premium or less unamortized discount, and that amount is used to measure the interest income or expense, as described in the preceding paragraph.

111. Numerous references to and descriptions of the concepts and procedures referred to in paragraphs 108–110 are found in the pronouncements of the Accounting Principles Board and the Financial Accounting Standards Board, for example, on accounting for leases *(FASB Statement No. 13);* accounting for the cost of pension plans *(APB Opinion No. 8);* accounting for interest on receivables and payables *(APB Opinions*

[33] The terms of some short-term receivables and payables (for example, trade accounts receivable or payable) may not be expected to result in interest income or interest expense to the creditor or debtor except as it may be implicit in the transaction (for example, implicit in the price of a product sold or purchased on account).

No. 12 and *No. 21);* accounting for early extinguishment of debt *(APB Opinion No. 26);* recording receivables and payables of a company acquired in a business combination (*APB Opinion No. 16,* paragraphs 87–89); and translating receivables and payables denominated in a foreign currency (*FASB Statement No. 8,* paragraph 39).

112. Pronouncements of the Accounting Principles Board also include several specific statements of broad principle. They include: "The general principles to apply the historical-cost basis of accounting to an acquisition of an asset depend on the nature of the transaction: . . . b. An asset acquired by incurring liabilities is recorded at cost—that is, at the present value of the amounts to be paid" (*APB Opinion No. 16,* paragraph 67); "Conceptually, a liability is measured as the amount of cash to be paid discounted to the time the liability is incurred" (*APB Statement No. 4,* paragraph 181 [M–1C]; and ". . . upon issuance, a bond is valued at (1) the present value of the future coupon interest payments plus (2) the present value of the future principal payments (face amount) . . . discounted at the prevailing market rate of interest . . . at the date of issuance of the debt" and ". . . the difference between the present value and the face amount should be treated as discount or premium and amortized as interest expense or income over the life of the note in such a way as to result in a constant rate of interest when applied to the amount outstanding at the beginning of any given period. This is the 'interest' method described in and supported by paragraphs 16 and 17 of *APB Opinion No. 12*" (*APB Opinion No. 21,* paragraphs 18 [Appendix] and 15).

Kinds of Modifications and Accounting Issues

113. Agreements between a creditor and a debtor that modify the terms of an existing debt may affect (i) only the *timing* of future cash receipts or payments specified by the agreement—the timing of periodic interest, the maturity date, or both, (ii) only the *amounts* of cash to be received or paid—the amounts of interest, face amount, or both, or (iii) *both* timing and amounts of cash to be received or paid.

114. Two major issues arise in accounting for an existing debt whose terms are modified in a troubled debt restructuring. One issue involves whether to: (a) continue the same recorded investment for the receivable or carrying amount for the payable and recognize the effects of the new terms prospectively as reduced interest income or expense or (b) recognize a loss or gain by changing the recorded amount. The interest method (paragraph 109) is used in both (a) and (b) to allocate interest income or expense to periods between restructuring and maturity, but in general, the implicit annual interest rate will be higher, and the resulting interest income or expense will be larger in each of the remaining periods, if a loss (creditor) or gain (debtor) is recognized at the time of a troubled debt restructuring, as in (b), than if the effects of the new terms are recognized prospectively, as in (a).

115. The other issue involves two related questions: Should the same accounting (either (a) or (b) in paragraph 114) apply both to modifications of *timing* and to modifications of *amounts* to be received or paid under the agreement? And should the same accounting apply both to modifications of *interest* and to modifications of *face amount?* The following paragraphs explain and illustrate those issues and summarize the arguments advanced for various proposed solutions.

116. Modifications of terms that affect only the *timing* of amounts to be received or paid do not change the total amount to be received or paid. However, changes in timing of the amounts to be received or paid on a debt change its present value determined by discounting at the prerestructuring effective interest rate or a current market interest rate or change the effective interest rate needed to discount the amounts to the prerestructuring present value (recorded investment in receivable or carrying amount of payable) or market value. Modifications that affect only the *amount* of interest or face amount (or both unless they are exactly offsetting) to be received or paid change total amounts as well as present values, effective interest rates, or both. Modifications of *both timing and amount* to be received or paid combine those effects. A hypothetical case illustrates those kinds of modifications and their effects.

117. A creditor holds a receivable calling for receipt of $100 at the end of each year for five more years and receipt of the $1,000 face amount at the end of those five years. The stated interest rate is 10 percent, compounded annually. The recorded investment in the receivable is $1,000, and the effective annual interest rate implicit in the investment is also 10 percent. If all amounts are received as agreed, the creditor will receive total interest income of $500—the difference between the total amount to be received ($1,500) and the recorded investment in the receivable ($1,000)—and the effective interest rate on the $1,000 investment will be 10 percent. However, the terms of the receivable are to be modified in a troubled debt restructuring. The four modifications that follow are examples of the three kinds of modifications described in paragraphs 113 and 116 (change in amount of interest and change in face amount are both illustrated; change in timing of face amount raises no issues different from change in timing of interest and is not illustrated):

1. *Timing of interest only*—Terms modified to defer collection of interest until the receivable matures (a single collection of $500 at the end of five years is substituted for five annual collections at $100).
2. *Amount of interest only*—Terms modified to leave unchanged the timing of interest and the timing and amount of the face amount but reduce the annual interest from $100 to $60.
3. *Amount of face amount only*—Terms modified to leave unchanged the amounts and timing of interest but reduced the face amount to $800 due at the end of five years.
4. *Both timing of interest and amount of face amount*—Terms modified to defer collection of interest until the receivable matures and reduce the face amount to $800 (modifications 1 and 3 combined).

118. The following chart lists several factual observations that can be made about the effects on the creditor's receivable of each of those restructurings. In general, the same observations apply to the debtor's payable.

	Before modification	Modification 1 (Timing only)	Modification 2 (Amount of interest only)	Modification 3 (Amount of face amount only)	Modification 4 (Timing and amount)
Observation:					
a. Amount by which total cash receipts specified by the terms exceed recorded investment in the receivable:					
Interest	$500	$500	$300	$500	$500
Face amount	1,000	1,000	1,000	800	800
Total cash receipts	$1,500	$1,500	$1,300	$1,300	$1.300
Recorded investment	1,000	1,000	1,000	1,000	1,000
Excess of specified cash receipts over recorded investment	$500	$500	$300	$300	$300
b. Effective interest rate on the recorded investment ($1,000)	10.0%	8.5%	6.0%	6.5%	5.4%
c. Present value of the total cash receipts discounted at the prerestructuring effective interest rate (10%)	$1,000	$931	$848	$876	$807
d. Present value of the total cash receipts discounted at the current market interest rate (assumed to be 12%)	$928	$851	$784	$814	$738
e. Face amount specified by the terms	$1,000	$1,000	$1,000	$800	$800

Alternatives Considered

119. Proposals for accounting for troubled debt restructurings tend to focus on the various observations (paragraph 118) about the effects of modifying the terms of a debt.

a. Some respondents focused on the effect of a troubled debt restructuring on the effective interest rate (observation (b)). They would not reduce the recorded investment in a receivable or carrying amount of a payable and recognize a loss (creditor) or gain

(debtor) as long as the new terms did not result in a negative effective interest rate on the recorded investment or carrying amount—that is, as long as the total future cash receipts or payments specified by the new terms (including both amounts designated as interest and the amount designated as face amount) at least equaled the recorded investment or carrying amount (observation (a)). Thus, they would recognize no loss or gain for any of the four modifications in the illustration in paragraphs 117 and 118.

b. Some respondents focused on the effect of a troubled debt restructuring on the face amount of the debt (observation (e)). They would not reduce the recorded investment in a receivable or carrying amount of a payable as long as the restructuring modified only the timing or amount of designated interest or the timing of the designated face amount, but would recognize a loss (creditor) or gain (debtor) if restructuring reduced the face amount of the debt. Thus, they would recognize a loss or gain for modifications 3 and 4 in the illustration.

c. Some respondents focused on the effect of a troubled debt restructuring on the present value of the debt discounted at the effective interest rate before restructuring (observation (c)). They would reduce the recorded investment in a receivable or carrying amount of a payable to the present value of the total future cash receipts or payments under the new terms discounted at the prerestructuring effective interest rate and recognize a loss (creditor) or gain (debtor) equal to the reduction. Thus, they would recognize a loss or gain for each of the modifications in the illustration.

d. Some respondents focused on the fair market value of the debt after a troubled debt restructuring. They would account for each restructuring as an exchange of debt, recording a new receivable or payable as its fair or market value and recognizing a loss (creditor) or gain (debtor) for the difference between that fair or market value and the recorded investment or carrying amount of the receivable or payable replaced. Thus, they would recognize a loss or gain for each of the modifications in the illustration.

The following paragraphs summarize those four views and their variations.

Change in Effective Rate View

120. Some respondents emphasized that, in the absence of a transfer of resources or obligations, the existing accounting framework does not require losses to be recognized or permit gains to be recognized because of events that affect only future profitability of an investment but do not affect the recoverability of the investment itself. They contended that applying that principle to troubled debt restructuring means that no loss or gain should be recognized on a debt because of modification of terms of debt unless part of the recorded investment in a receivable is not recoverable or part of the carrying amount of a payable will not be paid under the new terms. In their view, a creditor should recognize a loss to the extent that the total future cash receipts specified by the new terms is less than the recorded investment in the receivable, and a debtor should recognize a gain to the extent that the total future cash payments specified by the new terms is less than the carrying amount of the payable.

121. According to that view, if the recorded investment in a receivable is recoverable or the carrying amount of a payable is to be paid under the new terms,[34] interest income or expense is allocated to the periods between restructuring and maturity of the debt by using the reduced effective interest rate that is implicit in the difference between the recorded investment or carrying amount before (and after) restructuring and the future cash receipts or payments specified by the new terms. If a loss or gain is recognized at the time of restructuring, the recorded investment or carrying amount equals the total future cash receipts or payments, and no interest income or expense is allocated to the remaining periods between restructuring and maturity.

122. Some of those respondents contended that the amount invested by a creditor in a receivable has some of the characteristics of, and is analogous to, an investment in plant, property, intangibles, and similar assets sometimes called "capital assets." According to that analogy, modifying the terms of receivables in troubled debt restructurings is similar to modifying selling prices of products produced by those capital assets; the modifications affect the profitability of those assets but are not recorded in the existing accounting framework unless they result in an inability to recover the investment in the assets. That capital asset analogy leads its proponents to accounting for troubled debt restructurings that is essentially the same as that described in paragraphs 120 and 121.

123. Certain respondents who supported the views described in paragraphs 120–122 argued that the resulting accounting not only is required by the existing accounting framework but also accurately describes a troubled debt restructuring involving only modification of terms. They held that, unless the effective interest rate on a debt becomes negative in a troubled debt restructuring, the essential effect of modifying terms is to reduce the effective interest rate on the debt—that is, to decrease the effective rate of return to the creditor and to decrease the effective cost to the debtor of deferring payment. For example, some responding financial analysts argued that to disclose the creditor's new effective interest rate on restructured receivables would be more useful for their purposes than for the creditor to report a loss on restructuring and then show those receivables to be earning the prerestructuring interest rate, the current market interest rate, or some other rate higher than the effective rate on the recorded investment in a receivable before restructuring.

124. According to respondents who emphasized the effect of a troubled debt restructuring on the effective interest rate, there is no economic basis for distinguishing modifications of future cash receipts or payments designated as interest from modifications of future cash receipts or payments designated as face amount. They argued that a creditor in a troubled debt restructuring attempts first to assure recovery of its investment (which is represented in its financial statements by the recorded investment in the receivable) and then to obtain the highest interest income commensurate with the situation. Whether the amounts to be received under the new terms are designated as receipts of interest or receipt of face amount is a minor consideration; the significant question is whether the new terms allow the creditor to recover its investment.

125. According to that view, since numerous combinations of receipts or payments designated as interest and face amount can be structured to produce a particular present value or effective interest rate, to base accounting on that distinction is likely to result in questionable, if not indefensible, financial reporting. The creditor in a troubled debt restructuring may have considerable flexibility in designating a proportion of the future receipts or payments under the new terms as interest and designating another proportion as face amount. If those designations were to dictate the accounting, a creditor desiring to recognize a loss or restructuring and to recognize higher interest income for later periods could restructure terms in one way, while creditor desiring to avoid recognizing a loss on restructuring and to recognize lower interest income for later periods could restructure the terms in another way, even though the underlying cash receipts specified by the new terms were the same, both in timing and amount, for both creditors. A creditor desiring to recognize a gain or restructuring could conceivably increase the amount designated as face amount to an amount higher than the present recorded investment and reduce the amounts designated as receipt of interest; a debtor might agree to that arrangement if it were financially troubled at the time of restsructuring but expected to be able to pay the higher face amount later.

Change in Fact Amount View

126. Some respondents distinguished modifications of face amounts from modifications affecting only amounts or timing of receipts or payments designated as interest or timing of the maturity date. They would neither reduce recorded investment in a receivable or carrying amount of a payable nor recognize loss or gain in a troubled debt restructuring if a modification of terms of a debt changed only the *amounts or timing* of receipts or payments designated as interest or changed the *timing* of receipts or payment designated as face amount. They held, however, that if a troubled debt restructuring *reduces the face amount* of a debt, the creditor should recognize a loss, and the debtor should recognize a gain.[35]

[34] The likelihood of collection of the amounts specified by the new terms of a receivable should, of course, be assessed in determining allowances for estimated uncollectible amounts.

[35] Some proponents of this view opposed recognizing gains from trouble debt restructurings not involving transfers of assets or grants of equity interests.

127. To record a modification of terms involving reduction of face amount of a debt, proponents of that view would reduce the recorded investment in the receivable or carrying amount of the payable by the same proportion as the reduction of the face amount and recognize a loss (creditor) or gain (debtor) for that amount. If the restructuring changed the effective interest rate on the remaining recorded investment or carrying amount, they would allocate interest income or expense to the remaining periods between restructuring and maturity using that new effective interest rate. That rate would be implicity in the difference between the new recorded investment in the receivable or carrying amount of the payable and the future cash receipts or payments specified by the new terms. That rate would be higher for a debt whose face amount had been reduced, and would therefore result therefore result in more interest income or expense for those periods, than the rate described in paragraph 121.

128. Respondents who distinguished between modifications of terms that change the face amount of a debt and other kinds of modifications generally agreed with the view expressed in paragraphs 120 and 122 that the existing accounting framework does not recognize losses or gains from events that change the profitability of existing assets but requires a loss to be recognized if the event causes part or all of an investment in an asset to become unrecoverable. Those respondents gave several reasons for concluding that reduction of face amount of a debt in a troubled debt restructuring requires proportionate reduction of the recorded investment in the receivable or carrying amount of the payable and recognition of a resulting loss or gain.

129. Some respondents who favored accounting based on a distinction between modifications of face amount and other modifications argued that to the extent that the face amount of a debt is reduced, the debtor-creditor relationship has been terminated, and the accounting should recognize that termination. In other words, the face amount adjusted by a premium or discount, if any, measured in the market at the time a receivable or payable was created is recognized in the existing accounting framework as an asset for the creditor or liability for the debtor; reducing that face amount therefore reduces an asset or liability proportionately, and the reduction must be recognized. In their view, to the extent the face amount is reduced, a transfer of resources or obligations occurs.

130. Some respondents described the analogy between a creditor's investment in a receivable and an investment in "capital assets" that is noted in paragraph 122 and contended that reductions of face amounts of receivables in troubled debt restructurings are analogous to events that reduce the amount, rather than the future profitability, of capital assets. Both they and the respondents whose view is described in the preceding paragaph held that the act of reducing the face amount showed that the creditor and debtor agreed that the receivable and payable had been decreased.

131. Some respondents contended in effect that accounting for receivables and payables in the existing accounting framework is based on the face amount of a receivable or payable, or perhaps on the face amount plus a premium or minus a discount at the date of acquisition or issue, and a change in the face amount is a change in an asset (receivable) or liability (payable). They implicitly assumed or concluded that the present value concepts described in the pronouncements noted in paragraphs 111 and 112 did not apply to receivables or payables involved in troubled debt restructurings. Thus, they contended that the distinction between the face amount due at maturity and the amounts designated as interest to be received or paid periodically until maturity is vital in determining proper accounting for a troubled debt restructuring. According to that view, the face amount due at maturity (sometimes referred to as the "principal") is the basis of the recorded investment in a receivable or carrying amount of a payable; that investment or carrying does not include the present value of future receipts or payments designated as interest. That is, a creditor or debtor records the face amount (perhaps increased by premium or decreased by discount) when a receivable is obtained or a payable is incurred, and no value is ascribed in the accounts to rights to receive or obligations to pay amounts designated as interest; rather, cash receipts or payments designated as interest are recognized in the accounts only as they become receivable or payable in future periods. Some respondents holding that view added that to record a loss (creditor) or gain (debtor) because future cash receipts or payments designated as interest are modified in a trouble debt restructuring would represent abandonment of the existing historical cost framework and constitute piecemeal implementation of current value accounting.

132. Several respondents who supported the views described in paragraphs 126–131 held that the accounting required by those views is presently used, at least by some financial institutions. Some banker respondents indicated that troubled debt restructurings involving reductions in face amount or "principal" are exceedingly rare, but that most bankers would probably recognize a loss of "principal" in recording one in which their institution was the creditor.

133. Differences between the view that focuses on the effect of a troubled debt restructuring on face amount (paragraphs 126–132) and the view that focuses on its effect on the effective interest rate (paragraphs 120–125) pertain wholly to troubled debt restructurings that reduce the amount designated as face amount. Both views lead to the same accounting for troubled debt restructurings involving other kinds of modification of terms.

Present Value at Prerestructuring Rate View

134. Some respondents contended that accounting for troubled debt restructurings should recognize the revised pattern of cash receipts or payments under the new terms of the restructured debt. That is, they would continue to use the effective interest rate established when the receivable was acquired or payable was incurred and would reduce the recorded investment or carrying amount to the present value of the future cash receipts or payments specified by the new terms.

135. Those respondents in effect supported the accounting proposed in the FASB Exposure Draft, "Restructuring of Debt in a Troubled Loan Situation" (November 7, 1975): a debtor should account for a troubled debt restructuring that involves modification of terms of debt by adjusting the carrying amount of the payable to the present value of the cash payments (both those designated as interest and those designated as face amount) required of the debtor after restructuring, discounted at the prerestructuring effective interest rate, and recognizing a gain on restructuring of the payable equal to the difference, if any, between that present value and the carrying amount of the payable before restructuring (paragraph 6 of that Exposure Draft). Since a troubled debt restructuring almost invariably involves stretching out or deferring the debtor's payments, and may involve reducing amounts due as well, the present value of a restructured payable is almost invariably less than its carrying amount (both are determined by discounting at the same interest rate); a debtor would thus normally recognize a gain on the restructuring. The November 7, 1975 Exposure Draft dealt only with accounting by debtors, but if the counterpart accounting were adopted by creditors, the creditor would normally recognize a loss equal to the difference between its recorded investment in the receivable before restructuring and the present value at the prerestructuring effective interest rate. Interest expense or income in future periods would continue to be based on the prerestructuring interest rate.

136. Some respondents who held the view described in paragraphs 134 and 135 agreed with the view in paragraphs 124 and 125 that no economic basis exists for distinguishing between modifications of face amounts and other kinds of modifications. The major difference between the two views is that the accounting for one view (paragraphs 134 and 135) retains the same effective interest rate as before restructuring and changes the present value of the future cash receipts or payments specified by the new terms, while the other view (paragraphs 124 and 125) retains the same present value as before restructuring (the recorded investment in a receiveable or carrying amount of a payable)[36] and changes the effective interest rate for the periods remaining between restructuring and maturity.

Fair Value View

137. Some respondents contended that modifying terms in a troubled debt restructuring results in an exchange of new debt for the previous debt. The new debt should be recorded at its fair value—usually the present value of the future cash receipts or payments specified by the new terms (whether designated as interest or face amount) discounted at the current market

[36] Unless the restructuring causes the effective interest rate to fall below zero.

rate of interest for receivables or payables with similar terms and risk characteristics. Those respondents contended that every debt restructuring is an exchange transaction (paragraph 68), and they would recognize a loss (creditor) and gain (debtor) to the extent of the difference between the recorded investment in the receivable or carrying amount of the payable before restructuring and the fair value of the receivable or payable after restructuring. Interest income and expense in future periods would be based on the market rate of interest at the time of restructuring.

138. Respondents who supported the view just described agreed that designations of amounts as face amount or interest should not determine whether a loss or gain should be recognized (paragraphs 124 and 125) because only the amounts and timing of cash receipts or payments, and not their names, affect the present value of a receivable or payable. They disagreed with other respondents by contending that the current market interest rate—which gives the fair value of a receivable or payable—should be used because an exchange transaction had occurred.[37]

139. Some of the responding financial analysts indicated a preference for accounting that does not use a current interest rate to determine whether a creditor should recognize a loss in a troubled debt restructuring involving modification of terms. According to them, to use a current interest rate to discount future cash receipts only for receivables that have been restructured would not result in meaningful information about the earning potential of a creditor's entire loan or investment portfolio and might be confusing because receivables that were not restructured would continue to reflect the various historical interest rates at the time of each investment.

Conclusions on Modification of Terms

140. After considering the information received in connection with (i) the Exposure Draft, "Restructuring of Debt in a Troubled Loan Situation" (November 7, 1975), and the public hearing based on it (paragraph 48), (ii) the Discussion Memorandum, "Accounting by Debtors and Creditors When Debt Is Restructured" (May 11, 1976), and the public hearing based on it (paragraph 52), and (iii) the Exposure Draft, the Board concluded that the substance of all modifications of a debt in a troubled debt restructuring is essentially the same whether they are modifications of timing, modifications of amounts designated as interest, or modifications of amounts designated as face amounts. All of those kinds of modifications affect future cash receipts or payments and therefore affect (a) the creditor's total return on the receivable, its effective interest rate, or both and (b) the debtor's total cost on the payable, its effective interest rate, or both. The Board believes that accounting for restructured debt should be based on the substance of the modifications—the effect on cash flows—not on the labels chosen to describe those cash flows.

141. The Board thus rejected views that modifications involving changes in face amounts should be distinguished from and accounted for differently from modifications involving amounts of future cash receipts or payments designated as interest and modifications involving timing of future cash receipts or payments. The major reason for that rejection is given in the preceding paragraph: the substance of a troubled debt restructuring lies in its effect on the *timing and amounts* of cash receipts or payments due in the future. Whether an amount due at a particular time is described as face amount or interest is of no consequence to either the present value of the receivable or payable or its effective interest rate.

142. The Board considered the views described in paragraphs 129–132 and rejected them to the extent they conflict with the Board's conclusions. In the Board's view, a debtor-creditor relationship is described by the entire agreement between the debtor and creditor and not merely by the face amount of the debt. Changes in that relationship therefore encompass changes in timing and changes in amounts designated as interest as well as changes in an amount designated as face amount. The same reasoning applies to the analogy between debt and investment in "capital assets." A reduction in a troubled debt restructuring of an amount designated as face amount is not, in the Board's view, analogous to the loss or destruction of a portion of a capital asset. Indeed, the economic impact of reducing an amount designated as face amount is essentially the same as that of reducing by the same amount an amount designated as interest that is due at the same time. Thus, although an analogy between investment in a receivable and investment in a capital asset may have merit, an analogy between an amount designated as the face amount of a receivable and the physical entirety of a capital asset does not.

143. The Board also rejected the view that accounting is based on the face amount or "principal" in the existing accounting framework. That view is not consistent with the weight of the pronouncements noted in paragraphs 111 and 112 to the effect that the recorded investment in a receivable or carrying amount of a payable is the present value of the future cash receipts or payments specified by the terms of the debt discounted at the effective interest rate that is implicit in the debt at its inception. That accounting explicitly excludes from the recorded investment in a receivable or carrying amount of a payable the interest income or expense to be recognized in future periods. The interest method recognizes that interest income or expense as a constant percent (the effective interest rate) of the recorded investment or carrying amount at the beginning of each future period as the interest income or expense becomes receivable or payable. The method is not a "current value method" as that term is generally used in the accounting literature, unless the effective interest rate used to determine present value and interest income or expense each period is the current market interest rate for the period.

144. The Board noted the argument that current practice in some financial institutions is to record losses based on reductions in troubled debt restructurings of amounts designated as face amount. The Board also noted that several respondents indicated that modifications of terms of that kind almost never occur. Presumably, a creditor would generally prefer to alleviate the debtor's cash difficulties by deferring payment of the amount designated as face amount rather than by reducing it because deferring payment preserves a creditor's maximum claim in the event of the debtor's bankruptcy. The Board decided that accounting for reductions in troubled debt restructurings of amounts designated as face amounts, although occurring only rarely, should be made consistent with accounting for other modifications of future cash receipts or payments in troubled debt restructurings and with the accounting pronouncements referred to in paragraphs 111 and 112.

145. The Board also considered the views described in paragraphs 134–139 and rejected them to the extent they conflict with the Board's conclusions. The Board concluded that since a troubled debt restructuring involving modifications of terms of debt does not involve transfers of resources or obligations (paragraph 77), restructured debt should continue to be accounted for in the existing accounting framework, on the basis of the recorded investment in the receivable or carrying amount of the payable before the restructuring. The effective interest rate on that debt should be determined by the relation of the recorded investment in the receivable of carrying amount of the payable and the future cash receipts or payments specified by the new terms of the debt.

146. To introduce the current market interest rate to provide a new measure of the recorded investment in a restructured receivable or carrying amount of a restructured payable is inappropriate in the existing accounting framework in the absence of a transfer of resources or obligations, that is, if only the terms of a debt are modified in a troubled debt restructuring. Moreover, since the new terms are not negotiated on the basis of the current market rates of interest, there is little or no reason to believe that a current market rate of interest applied to the restructured debt reflects the effective return to the creditor or the effective cost to the debtor. On the contrary, the circumstances of a troubled debt restructuring give every reason to believe that, except by coincidence, it does not. Similarly, there is little or no reason to believe that a restructured debt continues to earn or cost the same effective interest rate as before the restructuring. The restructuring reflected the creditor's recognition that its investment in the receivable no longer could earn that rate and that a lower effective rate was inevitable. In other words, the effect of the restructuring was to decrease the effective interest rate on a continuing debt, and the accounting should show that result.

147. The Board found persuasive the arguments that a creditor in a troubled debt restructuring is interested in protecting its unrecovered investment (represented in the

[37] Some respondents contended that the fair value of the receivable or payable after restructuring should be measured by discounting the future cash flows specified by the new terms at the cost of capital to the creditor or debtor, as appropriate.

accounts by the recorded investment in the receivable) and, if possible, obtaining a return. To the creditor, therefore, the effect of a restructuring that provides for recovery of the investment is to reduce the rate of return (the effective interest rate) between the restructuring and maturity. Similarly, the effect of that kind of restructuring to the debtor is to reduce the cost of credit (the effective interest rate) between the restructuring and maturity.

148. Thus, the Board concluded that no loss (creditor) or gain (debtor) should be recognized in a troubled debt restructuring if the total future cash receipts or payments (whether designated as interest or face amount) specified by the new terms at least equals the recorded investment or carrying amount of the debt before the restructuring. The creditor should reduce the recorded investment in the receivable and recognize a loss and the debtor should reduce the carrying amount of the payable and recognize a gain to the extent that the recorded investment or carrying amount exceeds the total cash receipts or payments specified by the new terms. Some responsdents to the Exposure Draft apparently misunderstood the reason for using *total* future cash receipts or payments to compare with the recorded investment in a receivable or the carrying amount of a payable to determine whether to recognize a loss or gain on restructuring. Some wondered if the failure to discount the future cash flows implied changes in pronouncements that require discounting or de-emphasis or abandonment by the Board of discounting methods. On the contrary, the Statement is based solidly on the need to consider the effect of interest. Indeed, the Board's conclusion is that a troubled debt restructuring affects primarily the effective interest rate and results in no loss or gain as long as the effective rate does not fall below zero. It requires recognition of a loss to prevent the effective rate from falling below zero. The effective interest rate inherent in the unrecovered receivable or unpaid payable and the cash flows specified by the modified terms is then used to recognize interest income or interest expense between restructuring and maturity.

149. The Board also concluded that the fair values of assets transferred or equity interest granted in partial settlement of debt in a troubled debt restructuring should be accounted for the same as a partial cash payment. The recorded investment in the receivable or carrying amount of the payable should be reduced by the amount of cash or fair value transferred, and the remaining receivable or payable should be accounted for the same as a modification of terms. That accounting avoids basing losses or gains on restructuring on arbitrary allocations otherwise required to determine the amount of a receivable satisfied or payable settled by transfer of assets or grant of an equity interest.

150. Several respondents to the Exposure Draft disagreed with its proposed conclusions on accounting for modifications of terms in troubled debt restructurings. One group, which favored accounting for all troubled debt restructurings at fair value as exchanges of debt, criticized the Exposure Draft for failing to recognize losses and gains from decreases in present values of receivables and payables, for being inconsistent with *APB Opinions No. 21* and *No. 26*, and for elevating form over substance. Another group, which agreed with the Exposure Draft except for restructurings in which face amounts of receivables are reduced, criticized it for failing to recognize losses and gans from decreases in face amounts, for changing existing practice, and for elevating form over substance. Both views are discussed individually in earlier paragraphs (126–139) and are there shown to be virtually opposite views to each other, but they have some similarities when compared to the accounting in the Exposure Draft and this Statement.

151. For example, both criticisms of the Exposure Draft noted in the preceding paragraph result from rejection of fundamental conclusions in the Exposure Draft. Thus, respondents who favor accounting for all troubled debt restructurings as exchanges of debt disagreed with the conclusions that "a troubled debt restructuring that does not involve a transfer of resources or obligations is a continuation of an existing debt" and "to the extent that a troubled debt restructuring involves only a modification of terms of continuing debt, no transfer of resources or obligations has occurred" (paragraphs 76 and 77). Respondents with that view presumably saw troubled debt restructurings as of the same essence as exchanges covered by *APB Opinions No. 21* and *No. 26* and found the Exposure Draft inconsistent with those Opinions. If, however, the conclusions quoted earlier in this paragraph are accepted, modifications of terms of continuing debt are different in substance from exchanges of resources or obligations, and the Exposure Draft is consistent with the Opinions.

152. Similarly, some respondents who favor recognizing losses and gains from reducing face amounts in troubled debt restructurings disagreed with the conclusion that "the substance of all modifications of a debt in a troubled debt restructuring is essentially the same whether they are modifications of timing, modifications of amounts designated as interest, or modifications of amounts designated as face amounts" (paragraph 140). That is, they think that financial institutions' customary distinctions between principal and interest have more substance than the effects of modifications on future cash flows, although they admit that changes in practice would be minimal because few troubled debt restructurings involve changes in face amounts (paragraph 144).

153. The fact that elevating form over substance is a criticism common to the arguments of respondents who fundamentally disagreed with the Exposure Draft emphasizes that various views on proper accounting depend in varying perceptions of the substance of modification of terms in a troubled debt restructuring. The preceding paragraphs note three different views of that substance: the view on which the Exposure Draft and this Statement are based and two other views that differ significantly not only from the view adopted but from each other. The Board carefully analyzed all three views before issuing the Exposure Draft and decided on one of them for the reasons stated in paragraphs 106–152.

154. Some respondents who agreed generally with the accounting for modification of terms specified in the Exposure Draft and some who preferred to recognized debtors' gains and creditors' losses from decreases in face amounts expressed concern that a debtor's prepayment may result in recognizing a creditor's loss in the wrong period (they are silent about a debtor's gain). That is, if a debtor may prepay a reduced face amount without penalty, total future cash receipts may actually be less than the recorded investment in the receivable even though the total future amounts specified by the restructured terms are at least equal to the recorded investment, and no loss is recognized by the creditor at the time of restructuring under paragraph 16. The loss would be recorded in the period of prepayment rather than the period of restructuring. They propose that a creditor be required to recognize a loss on restructuring in the period of restructuring to the extent that a reduction of face amount is not protected by a prepayment penalty.

155. This Statement does not include that kind of test based on prepayment penalties. The proposed test rests on the assumption that a loss resulting from prepayment necessarily is a loss on restructuring, and that presumption is questionable. At the time of restructuring, the most probable estimate of future cash receipts is usually that the debtor will not prepay, even if there is no prepayment penalty, because (a) prepayment of a debt with a relatively low effective interest rate is to the creditor's advantage, not the debtor's, (b) initiative for prepayment lies wholly with the debtor, and (c) the debtor is clearly unable to prepay at the time of a troubled debt restructuring and may never be able to prepay. If that most probable estimate later proves incorrect, and the debtor does prepay, a change of estimate should be recorded in the period of prepayment.

CREDITOR'S ACCOUNTING FOR SUBSTITUTION OR ADDITION OF DEBTORS

156. A change between the Exposure Draft and this Statement is that Exposure Draft dealt with substitutions of debtors only if the debtors were government units. Several respondents to the Exposure Draft suggested that the principles developed there applied to substitutions or additions of nongovernment debtors as well.

157. The general principle developed in earlier paragraphs is that the accounting for a troubled debt restructuring depends on its substance. The issues raised if a creditor in a troubled debt restructuring accepts, or is required to accept, a new receivable from a different debtor to replace an existing receivable from a debtor experiencing financial difficulties pertains to the circumstances, if any, in which the substitution or addition is in substance similar to a transfer of assets to satisfy a receivable and the circumstances, if any, in which that kind of restructuring is in

substance similar to a modification of terms only.

158. One view expressed by respondents was that the substitution of a receivable from a different debtor for an existing receivable or the addition of another debtor is always a transaction requiring accounting by the creditor for a new asset at its fair value, recognizing gain or loss to the extent that the fair value of the new asset differs from the recorded investment in the receivable it replaces. To some proponents, that view holds regardless of the relationship between the original debtor and the new debtor.

159. Another view expressed was that the kind of substitution involved in each restructuring must be considered, and the accounting depends on the relationship between the original and new debtors and between the original and new terms.

160. The Board rejected the view that the substitution or addition of a new debtor is always a transaction requiring recognition of a new asset by the creditor. In some troubled debt restructurings, the substitution or addition may be primarily a matter of form while the underlying debtor-creditor relationship, though modified, essentially continues. For example, to enhance the likelihood that the modified terms of a troubled debt restructuring will be fulfilled, a new legal entity may be created to serve as a custodian or trustee to collect designated revenues and disburse the cash received in accordance with the new debt agreement. The role of that new unit may be similar to that of a sinking fund trustee in an untroubled debt situation. The source of the funds required to fulfill the agreement may be the same, but some or all of those funds may be earmarked to meet specific obligations under the agreement. Similarly, if the new debtor controls, is controlled by, or is under common control with the original debtor, the substance of the relationship is not changed. Each troubled debt restructuring involving a substitution or addition of a debtor should be carefully examined to determine whether the substitution or addition is primarily a matter of form to facilitate compliance with modified terms or primarily a matter of substance.

161. The Board considers the exchanges of bonds of the Municipal Assistance Corporation (Corporation) for notes of the City of New York (City) described in recent exchange offers [38] to be examples of troubled debt restructurings whose substance to creditors for accounting purposes is a modification of the terms of an existing receivable rather than an acquisition of a new asset (receivable). According to those exchange offers:

The Corporation * * * was created in June 1975 * * * for the purposes of assisting the City in providing essential services to its inhabitants without interruption and increating investor confidence in the soundness of the obligations of the City. To carry out such purposes, the Corporation is empowered, among other things, to issue and sell bonds and notes and to pay or lend funds received from such sale to the City and to exchange the Corporation's obligations for obligations of the City.[39]

The Board's understanding is that: (a) the Corporation receives its funds to meet debt service requirements and operating expenses from tax allocations from New York State's collections of Sales Taxes imposed by the State within the City, Stock Transfer Taxes, and Per Capita Aid (revenue sources previously available to the City); (b) Tax and Per Capita Aid amounts not allocated to the Corporation for its requirements are available to the City under the terms of the applicable statutes; and (c) the primary purpose in creating the Corporation was to enhance the likelihood that the City's debt will be paid, not to introduce new economic resources and activities.

RELATED MATTERS

162. Several respondents commenting on accounting for contingent future cash payments or receipts indicated a need for some clarification of the accounting described in the Exposure Draft. Accounting for contingent payments or receipts is complicated because it involves four separate situations—(1) accounting by the debtor at the time of restructuring, (2) accounting by the debtor after the time of restructuring, (3) accounting by the creditor at the time of restructuring, and (4) accounting by the creditor after the time of restructuring. It is further complicated because the view of both debtor and creditor shifts between "gain" contingencies and "loss" contingencies as the accounting shifts from the time of restructuring to after the time of restructuring. The accounting in the Exposure Draft and this Statement is governed by the following general principles:

a. Paragraph 17 (gain contingencies) of *FASB Statement No. 5* governs a debtor's accounting for contingent cash payments at the time of restructuring (paragraph 18) and a creditor's accounting for contingent cash receipts after the time of restructuring (paragraph 36). Since gain contingencies are not recognized until a gain is realized, (1) a *debtor* should not recognize a gain at the time of restructuring that may be offset by future contingent payments, which is equivalent to assuming that contingent future payments will be paid, and (2) a *creditor* should not recognize contingent cash receipts as interest income until they become unconditionally receivable, that is, until both the contingency has been removed and the interest has been earned.

b. Paragraph 8 (loss contingencies) of *FASB Statement No. 5* governs a debtor's accounting for contingent cash payments after the time of restructuring (paragraph 22) and a creditor's accounting for contingent cash receipts at the time of restructuring (paragraph 32). Since two conditions must be met to recognize an estimated loss, (1) a *debtor* should recognize an interest expense and payable for contingent payments when it is probable that a liability has been incurred and the amount can be reasonably estimated, and (2) a *creditor* should recognize a loss unless offsetting contingent cash receipts are probable and the amount can be reasonably estimated. Contingent cash receipts are unlikely to be probable at the time of restructuring.

163. The principles described in the preceding paragraph also apply to other situations in which future cash payments or receipts must be estimated to apply the provisions of the Statement, for example, future interest payments or receipts that are expected to fluctuate because they are based on the prime interest rate or indeterminate total interest payments or receipts because the debt is payable or collectible on demand or becomes payable or collectible on demand after a specified period (paragraphs 18 and 32).

DISCLOSURE

Disclosure by Debtors

164. Most respondents to the Discussion Memorandum commenting on disclosure by debtors for restructurings advocated essentially the disclosure prescribed for gains or losses from extinguishment of debt in *FASB Statement No. 4*. Paragraph 99 gives the Board's reasons for adopting for gains on troubled debt restructurings the guidelines for income statement classification prescribed in that Statement for gains from extinguishment of debt. Since troubled debt restructurings for which gains are recognized and extinguishments of debts thus use the same guidelines for income statement classification and are similar for disclosure purposes, the Board concluded that the kind of information prescribed in paragraph 9 of *FASB Statement No. 4* is generally appropriate for disclosing troubled debt restructurings involving recognition of gains. Since some of those restructurings involve transfers of assets to creditors to settle payables, the Board believes that it is appropriate also to disclose the aggregate net gain or loss recognized on transfers of assets. However, since several respondents to the Exposure Draft indicated that problems would arise in attempting to determine when a debtor's current difficulties began and perhaps in obtaining amounts of earlier losses, this Statement omits a requirement in the Exposure Draft to disclose also "the aggregate loss, if any, recognized on those assets in earlier periods in connection with the debtor's current financial difficulties."

165. Restructurings not involving recognition of gain or loss at the time of restructuring usually modify the timing, amounts, or both, of interest or face amount the debtor is to pay under the debt's terms (paragraphs 16–18). In the Board's view, the principal changes in terms should be disclosed to permit an understanding of the financial effects of those modifications.

166. Paragraph 26, specifying disclosure of the extent to which inclusion of contingent future cash receipts prevented recognizing a gain on restructuring was added in response to suggestions by respondents to the Exposure Draft. The Board agreed that information would be useful in assessing the

[38] Municipal Assistance Corporation for the City of New York, "Exchange Offer[s] to Holders of Certain Short-Term Notes of the City of New York," November 26, 1975, May 21, 1976, and March 22, 1977.

[39] Municipal Assistance Corporation for the City of New York, "Exchange Offer to Holders of Certain Short-Term Notes of the City of New York," November 26, 1975, p. 15.

relation between future cash payments and future interest expenses of the debtor.

Disclosure by Creditors

167. Most banking and other financial institutions responding to the Discussion Memorandum that commented on disclosure by creditors argued against separate disclosures about restructured receivables. They emphasized that to be the most meaningful to financial statement users information about receivables should disclose the interest rate characteristics of each broad group of earning assets (primarily loan or investment portfolios), by major category. They argued that information limited to receivables that have been restructured would not only be less meaningful than information about entire portfolios of receivables but also could be confusing because the same information is also needed about other receivables, particularly those that are earning no return but have not been restructuring (nonearning receivables). Several of those institutions referred to the requirements of the Securities and Exchange Commission and of the banking regulatory agencies, which recently became effective, both concerning disclosure about categories of loan and investment portfolios—including their maturities, interest rates, and nonearning loans and investments—and the allowance for uncollectible amounts. They indicated that those requirements provide adequate information about the financial effects of restructurings, troubled or nontroubled. Financial analysts responding also recommended disclosure focusing on the characteristics of each broad group of earning assets. They expressed a desire for information about past and expected yields of entire portfolios, by major category, to enable them to make informed judgments about recent and prospective earnings performance.

168. Some respondents to the Discussion Memorandum that are not financial institutions recommended that the Board require information to be disclosed about each significant troubled debt restructuring in the period that it occurs, primarily the terms of the restructuring, gain or loss recognized, if any, and the related income tax effect. Most of those respondents focused on individual receivables rather than on groups of receivables and proposed that debtors and creditors disclose similar information.

169. The Board concluded that the information prescribed by paragraph 40 should be disclosed, by major category, for outstanding receivables whose terms have been modified in troubled debt restructurings. The information may be disclosed either separately for those receivables or as part of the disclosure about reduced-earning and nonearning receivables. The Board believes that the appropriate format for that disclosure depends primarily on the characteristics and number of receivables, including the proportion of those receivables that have reduced earning potential. It believes the argument has merit that the most meaningful disclosure about earnings potential for a financial institution typically should focus on entire portfolios of receivables, by major category, rather than only on receiveables that have been restructured in troubled situations, but the Board acknowledges that determing appropriate disclosure for receivables in general is beyond the scope of this Statement. Accordingly, paragraphs 40 and 41 specify types of information that shall be disclosed and permit that information to be provided by major category for the aggregate of outstanding reduced-earning and nonearning receivables, by major category for outstanding receivables whose terms have been modified in troubled debt restructurings, or for each significant outstanding receivable that has been so restructured, depending on the circumstances.

170. This Statement contains three changes from the Exposure Draft concerning disclosure by creditors, all made in response to comments or suggestions from respondents to the Exposure Draft and all in paragraph 40, which was paragraph 34 of the exposure Draft: (1) disclosure of information more in conformity with SEC Guides 61 and 3 [40] replaces disclosure of the weighted average effective interest rate and the range of maturities, (2) disclosure of the allowance for uncollectible amounts or other valuation allowance applicable to restructured receivables is deleted, and (3) disclosure of a commitment to lend additional funds to debtors owning restructured receivables is added.

171. Disclosure of commitments to lend additional funds was chosen instead of a penalty suggested by some respondents to the Exposure Draft. They expressed concern that a creditor might avoid recognizing a loss under paragraphs 30–32 by restructuring a troubled receivable in a way that the specified future cash receipts exceed the recorded investment in the receivable and then agree to lend funds to the debtor to meet those terms. They proposed that irrevocable commitments to lend to the debtor be included in the creditor's recorded investment to determine whether the creditor should recognize a loss at the time of restructuring. Since that test is equivalent to saying that a creditor must recognize a loss unless the restructured terms provide not only for recovery of the outstanding receivable but also for recovery of future loans to the same debtor (because future cash receipts from future loans are ignored), the test is excessively punitive. The Board decided that disclosure of those commitments is adequate. That disclosure may already be required by paragraphs 18 and 19 of *FASB Statement No. 5*, but paragraph 40(b) makes the disclosure explicit.

172. Some respondents who advocated that the scope of this Statement exclude restructurings of receivables related to consumer financing activities or to all or certain residential properties (paragraph 63) also argued that, if those restructurings were embraced by this Statement, applicable requirements for disclosure would likely be burdensome and not very meaningful to financial statement users. They put out that the accounting, including information normally disclosed in financial statements or in other reports, for those types of receivables has been tailored to fit special characteristics of the receivables, such as large numbers of relatively small balances, interest rates fixed by state law rather than in a fluctuating market, and numerous accounts on which collections are past due. The Board noted the special characteristics of those types of receivables and, since the scope of this Statement does not encompass appropriate disclosure for receivables generally, concluded that paragraphs 40 and 41 should not necessarily apply to those types of receivables that have been restructured.

ACCOUNTING SYMMETRY BETWEEN DEBTORS AND CREDITORS

173. The Discussion Memorandum contained several questions on whether particular accounting by debtors and creditors should be symmetrical. Most respondents considered a criterion of symmetry between debtors and creditors an insignificant factor in accounting for troubled debt restructurings. Many noted that existing accounting principles of accounting by creditors for receivables after their initial recording and for recognizing losses already differ from those for accounting by debtors for payables and for recognizing gains. Some respondents also noted that differences usually exist between the debtor and creditor in a particular restructuring (for example, differences in the industry or industries in which they are involved, in their financial viability, and in the significance and frequency of that kind of event for them). The accounting for troubled debt restructurings prescribed in this Statement is symmetrical between debtors and creditors in most matters. However, the Board considered the types of differences described above, among other factors, in concluding that different accounting is appropriate for debtors and creditors in matters such as classifying gains or losses recognized at the time of troubled debt restructurings, accounting for contingent interest, and disclosing information about troubled debt restructurings.

EFFECTIVE DATE AND TRANSITION

174. The Board concluded that prospective application of this Statement is appropriate and that the effective dates in paragraphs 43–45 are advisable. In the Board's view, comparability of financial statements would not be greatly enhanced by restating past, nonrecurring troubled debt restructurings. Further, difficulties in retroactive application of the provisions of this Statement included identifying restructurings for which fair values would need to be determined and determining those fair values. A number of enterprises that in recent years have had several restructurings of those types would be unlikely to have information available to restate retroactively.

[FR Doc. 87-23662 Filed 10-19-87; 8:45 am]
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[40] SEC, Securities Exchange Act of 1934 Release No. 12748, "Guides for Statistical Disclosure by Bank Holding Companies," August 31, 1976.

12 CFR Parts 561, 563, and 563c

[No. 87-1047]

Uniform Accounting Standards

Date: October 5, 1987.

AGENCY: Federal Home Loan Bank Board.

ACTION: Proposed rule.

SUMMARY: The Federal Home Loan Bank Board ("Board"), as the operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC" or "Corporation") is proposing to amend its regulations applicable to all institutions the accounts of which are insured by the FSLIC ("insured institutions") pertaining to the definition of regulatory capital. First, a companion rule document (87-1047A), published elsewhere in this issue of the **Federal Register** delays the effective date of the Definition of Regulatory Capital Regulation, Board Res. No. 87-259, 52 FR 18340 (May 5, 1987) ("DRC Regulation"), from January 1, 1988 to January 1, 1989 in order to implement a phase-in of uniform accounting standards. This effective date could be modified further as explained in greater detail in the preamble to this proposed rule. Second, this proposal would revise the DRC regulation by eliminating treatment of certain items under risk analysis reporting ("RAR") and substituting in place thereof treatment under generally accepted accounting principles ("GAAP"). The DRC regulation, as amended by this proposal, would begin the phase-in to GAAP on January 1, 1989; such phase-in would end on December 31, 1993, at which time insured institutions would be required to report virtually all components of regulatory capital in accordance with GAAP or the regulatory accounting practices employed by commercial banks.

This proposal is part of the revision of the Board's regulations required by the Competitive Equality Banking Act of 1987, ("CEBA"), Pub. L. No. 100-86, 101 Stat. 552. The Board today also is proposing a rule and a policy statement on the accounting treatment of troubled debt restructurings. *See* Board Res. No. 87-1046, published elsewhere in this issue of the **Federal Register.** Additionally, on October 2, 1987, the Board adopted proposed revisions to its regulations pertaining to the classification of assets and appraisal standards of insured institutions. *See* Board Res. Nos. 87-1042, 87-1040, published elsewhere in this issue of the **Federal Register.**

DATE: Comments must be received on or before November 19, 1987.

ADDRESS: Send comments to: Director, Information Services Section, Office of the Secretariat, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552. Comments will be available for public inspection at this address.

FOR FURTHER INFORMATION CONTACT: Christina M. Gattuso, Acting Regulatory Counsel, (202) 377-6649, Deborah Dakin, Assistant Director, (202) 377-6445, Regulations and Legislation Division, Office of General Counsel, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552; or W. Barefoot Bankhead, Professional Accounting Fellow, (202) 778-2538, Carol Larson, Professional Accounting Fellow, (202) 778-2535, Office of Regulatory Policy, Oversight and Supervision, Federal Home Loan Bank System, 900 Nineteenth Street NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION:

I. Introduction

The CEBA requires the Board and the FSLIC to issue regulations prescribing "uniformly applicable accounting standards to be used by all insured institutions for the purpose of measuring compliance with any rule or regulation" promulgated by the FSLIC or the Board "to the same degree that generally accepted accounting principles are used to determine compliance with rules and regulations of the Federal banking agencies." [1] CEBA, tit. IV, sec. 402(b), section 415(b)(1).[2] Before the enactment of the CEBA, the Board issued a final regulation that was intended to achieve an objective similar to that set forth by the Congress in the CEBA. This rule, the Definition of Regulatory Capital regulation, was to have taken effect on January 1, 1988. Board Res. No. 87-529, 52 FR 18340 (May 15, 1987) ("DRC Regulation"). In view of the CEBA's enactment, however, the Board believes it should delay the effective date of the DRC Regulation for two reasons. First, as discussed more fully below, the Board has determined that new amendments to the DRC Regulation are necessary to implement the CEBA's accounting provisions. The Board is aware that changing its accounting regulations twice within a fairly short period of time may unduly burden insured institutions, which would then be required twice to alter both the manner in which they report to the Board and the calculation of their regulatory capital. The Board believes that it will be far less burdensome to propose the amendments to the DRC Regulation that the CEBA mandates and provide in this proposal that those changes and the DRC Regulation will take effect on the same date.

Moreover, the Board concludes that Congress intended that a gradual phase-in application of accounting standards in accordance with GAAP or the regulatory accounting practices employed by the Federal banking agencies ("Bank RAP"), over a five-year period, in assessing an institution's compliance with Board regulations. The Board further believes that Congress intended this to be accomplished in a manner that minimizes, to the extent feasible, the impact of the requirements on insured institutions' regulatory capital.

To ensure compliance with the requirements of the CEBA and, at the same time, avoid undue burden on insured institutions the Board intends to retain the DRC Regulation, but to delay its effective date. Further, the Board proposes to amend the DRC Regulation in the manner set forth in this resolution. The Board is proposing a single date on which the DRC Regulation, as amended by this proposal, would become effective.

Set forth below are, first, a summary of the DRC Regulation; then, a discussion of the CEBA's requirements; and, finally, a description of the amendments to the DRC Regulation that the Board proposes today in order to implement the aspects of the CEBA not implemented by the DRC Regulation.

II. Definition of Regulatory Capital Regulation

On May 5, 1987, the Board adopted the DRC Regulation which was to be effective January 1, 1988, and which set forth a new definition of regulatory capital and new reporting requirements for insured institutions. First, the rule requires that all financial statements issued by insured institutions, including statements of condition required pursuant to 12 CFR 545.115, and all financial reports filed with the Board

[1] For purposes of section 402 of the CEBA, the term "Federal banking agency" is defined to mean the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation. *See id.* sec. 402(b), section 415(f).

[2] Section 402(a) of the CEBA amended the Home Owners' Loan Act of 1933, 12 U.S.C. 1461 *et seq.*, which governs federally chartered and insured thrifts. Section 402(b) amended the National Housing Act, 12 U.S.C. 1724 *et seq.*, by which the FSLIC regulates state-chartered, federally insured thrifts. Today's proposal amends the Board's regulations governing all insured institutions. Thus, these uniform accounting standards will apply to both federally and state chartered insured institutions.

shall be prepared in accordance with GAAP. Second, the term "regulatory capital" is defined to mean the sum of equity capital as determined in accordance with GAAP plus certain other items based on risk analysis reporting ("RAR"). Third, the rule eliminates prospectively certain regulatory accounting practices previously permitted by the Board.

A. Reporting in Accordance With GAAP

The DRC Regulation requires that all financial statements and reports issued by insured institutions or filed with the Board for all periods beginning on or after January 1, 1988, be prepared in accordance with GAAP and include a footnote reconciliation of GAAP equity capital to regulatory capital. *See* 52 FR at 18351, *to be codified at* 12 CFR 563.23–3. This includes all financial statements issued by insured institutions, all audited financial statements and reports filed pursuant to Bulletin PA–7a, all financial reports that must be filed with the Board, and all counter statements issued by insured institutions.

B. The Components of Regulatory Capital

The DRC Regulation defines regulatory capital as the sum of (1) equity capital as determined in accordance with GAAP ("equity capital"), (2) items that serve as the functional equivalents of capital for the FSLIC by providing a buffer against loss, as well as specific capital instruments created by Congressional action and Board authority ("definitional capital"), (3) certain other components of capital that the Board determines to be consistent with risk analysis reporting, and (4) accounting forbearances.

1. Equity Capital

Equity capital is determined in accordance with GAAP. Equity capital represents the difference between the recorded values of an institution's assets and its liabilities, as determined under GAAP. *See* FASB *Statement of Financial Accounting Concepts No. 6* (Dec. 1985). Goodwill is accounted for as equity capital under GAAP.[3]

2. Definitional Capital

Definitional capital includes qualified subordinated debt, qualified redeemable preferred stock, income capital certificates ("ICCs"), mutual capital certificates ("MCCs"), net worth certificates ("NWCs"), annual income payments on capital certificates ("AIPs"), pledged certificates of deposit, allowances for loan losses except specific allowances (including those established pursuant to §§ 561.16c, 563.17–2, and 571.la of this subchapter), and other nonwithdrawable accounts (excluding any treasury shares held by the insured institution) to the extent such nonwithdrawable accounts are not included in equity capital.

3. RAR Components of Capital

a. Pre-January 1, 1988, RAR. This category of regulatory capital includes only the components of RAR permitted prior to January 1, 1988 for which RAR is eliminated. It includes appraised equity capital (12 CFR 563.13(c)); the deferral of certain losses and gains (12 CFR 563c.14); and the cumulative RAR/GAAP differential for the sale of real estate by the institution or its subsidiary; (12 CFR 563.23–1(f)), futures transactions (12 CFR 563.17–4(g)); and the accretion of discounts on securities and the amortization of premiums on securities (12 CFR 563.23–1 (a), (b)).

b. Post-January 1, 1988 Rule, RAR. Insured institutions also may continue to include in their regulatory capital an amount that represents the difference between the treatment of certain items under GAAP and the treatment of those same items under RAR after January 1, 1988. An insured institution may compute the items in this category under both RAR and GAAP for purposes of regulatory capital. The amount that represents the RAR/GAAP differential for a particular item would be added to or subtracted from equity capital to arrive at regulatory capital.

First, this category includes amounts reflecting the RAR/GAAP differential treatment of loan origination and commitment fees pursuant to newly redesignated 12 CFR 563.23–4(f)(3). The second item in this category is the amount of the RAR/GAAP differential in the treatment of options transactions pursuant to 12 CFR 563.17–5(g). Third, institutions are to continue to use RAR with respect to allowances for loan losses pursuant to the Board's classification of assets rules, 12 CFR 561.16c, reevaluation of assets, adjustment charges, 12 CFR 563.17–2, and accounting for uncollectible interest with respect to 1–4 family residential mortgage loans pursuant to 12 CFR 563c.11.

4. RAR Accounting Forbearances

Insured institutions also may include in their regulatory capital additional items reflecting accounting forbearances previously authorized, or which may be authorized in the future, by the Corporation, the Board, or the Principal Supervisory Agents. Most of the forbearances included in this category result from FSLIC merger transactions.

C. Elimination of Certain RAR Requirements

The final rule eliminates altogether, effective January 1, 1988, prospective authority for insured institutions to rely on five accounting procedures heretofore permitted by the Board that represent departures from GAAP. First, the Board's accounting regulation, 12 CFR 563.23–1(f) (1987), is eliminated, and insured institutions and their service corporations must account for the sales of real estate by the institution or its service corporation in accordance with GAAP. *See* FASB *Statement of Financial Accounting Standards No. 66.* Second, insured institutions must record marketable equity securities in accordance with GAAP. *See* FASB *Statement of Financial Accounting Standards No. 12.* Third, the final rule amends 12 CFR 563.17–4(g) to require institutions to determine gains or losses arising from futures transactions in accordance with GAAP. *See* FASB *Statement of Financial Accounting Standards No. 80.* Fourth, 12 CFR 563.23–1 was amended to require that premiums on securities be amortized and that discounts on securities be accredited in accordance with GAAP. *See* FASB *Statements of Financial Accounting Standards No. 65 and No. 91.* Fifth, the final rule removed obsolete accounting procedures set forth in 12 CFR 563.23–2, which provides for the deferral and amortization of gains and losses on the disposition of securities made for purposes of meeting the Board's liquidity requirements during the period beginning on December 11, 1969, and ending December 31, 1971.

III. Statutory Requirements and Legislative History

As discussed above, sections 402 (a) and (b) of the CEBA require the Board to prescribe, by regulation, uniformly applicable accounting standards to be used by all insured institutions for the purpose of determining compliance with Board rules and regulations to the same degree that GAAP is used to determine compliance with the rules and regulations of the Federal banking agencies. CEBA, tit. IV, secs. 402 (a), (b). The Board may suspend the application of any such standard with respect to any insured institution or transaction if it would result in an institution or its

[3] The Board notes that the DRC regulation permits institutions to continue to use the Board's accounting procedures for wash sale transactions as set forth in Office of Regulatory Policy, Oversight and Supervision ("ORPOS") Memorandum No. T–59–8 (June 22, 1982) for purposes of computing equity capital.

parent being treated differently than a bank and its parent on a consolidated basis and the transaction was consistent with GAAP when completed. *Id.* The CEBA requires that these regulations "shall take effect on December 31, 1987." *Id.* sec. 402(d). An insured institution that demonstrates to the satisfaction of the Board or the FSLIC that it is not feasible for it to comply with those accounting regulations by that date may submit a plan for compliance at a later date to the Board for its approval. That date would be the earlier of the date the Board determined it would be feasible for the institution to comply with the regulation or December 31, 1993. *Id* sec. 402(d)(2)(B).

The legislative history of the CEBA indicates Congress' belief that GAAP was the appropriate basis for uniform thrift accounting requirements. The only permitted deviations from GAAP are Bank RAP. *See* H.R. Rep. No. 261, 100th Cong., 1st Sess. 164 (1987); S. Rep. No. 19, 100th Cong., 1st Sess. 20, 54–55 (1987). The legislative history also reflects additional congressional concerns. First, Congress intended that all financial institutions eventually achieve uniform, GAAP-based reporting. *See* S. Rep. No. 19 at 55. Second, Congress also intended that the Board allow thrift institutions, whose compliance with Board and FSLIC regulations had previously been measured by more liberal thrift regulatory accounting practices, a phase-in period, not to exceed five years, before measuring their regulatory compliance by the stricter GAAP requirements. *See* S. Rep. No. 19 at 20; 133 Cong. Rec. H3156 (daily ed. May 5, 1987) (remarks of Representative Parris).

The Conference Report recognized that the Federal banking agencies' accounting standards are not themselves uniform. H.R. Rep. No. 261 at 164. The Senate Report accompanying S. 790, which contained the uniform accounting standards provision that was adopted without substantive amendment in the CEBA, explicitly states that, to the extent the banking regulatory agencies deviate from GAAP in their accounting and reporting regulations, the Board may "choose whether to adopt the same deviations or adopt GAAP." S. Rep. No. 19 at 55.

The Senate Report further explained the interaction of the CEBA with the Board's regulatory capital requirements: "It is not the intent of this section to require the federal thrift and banking agencies to adopt identical regulatory frameworks such as might apply to capital adequacy. It is expected that the FHLBB will retain its own authority to determine, for example, the components and levels of capital to be required of FSLIC-insured institutions." S. Rep. No. 19 at 55.

As the plain language and legislative history of the CEBA show, Congress determined that the thrift regulatory accounting practices adopted in the early 1980's do not serve the best interest of the thrift industry or the public. The legislative history also shows, however, Congress' concern that institutions have an opportunity to adjust to having their compliance with Board and FSLIC regulations measured by stricter, GAAP-based accounting standards. The Conference Report states that section 402 requires the Board "to formulate regulations for the eventual application of GAAP to all thrift institutions." H.R. Rep. No. 261 at 164. In this regard, numerous members of Congress noted that the legislation was designed to move the thrift industry toward GAAP over a period of time. *See, e.g.*, 133 Cong. Rec. H6949 (daily ed. Aug. 3, 1987) (remarks of Representative Parris) ("This section would require that thrift institutions begin to abide by generally accepted accounting principles [GAAP] within a period of five years."); 133 Cong. Rec. at H6951 (remarks of Representative Cooper) ("S&L's will have to begin operating under the accounting rules that every other business in America is ruled by, GAAP accounting, when the $10.8 billion bailout fund is exhausted"); 133 Cong. Rec. at H6954 (remarks of Representative Hubbard) ("[T]his legislation takes an important step forward in the section 402 provisions directing the Federal Home Loan Bank Board to move toward generally accepted accounting principles.").

The House Report accompanying H.R. 27 (which as reported from the House Banking Committee did not include the uniform accounting standards subsequently added to H.R. 27 during the floor debate) stated: "The Committee approves the long-term goal of having institutions report their financial stateaents in accordance with GAAP. However . . . it is impossible for an industry so dependent on regulatory accounting principles to comply, without a significant transition period, with generally accepted accounting standards." H.R. Rep. No. 62, 100th Cong., 1st Sess. 37 (1987). The House markup of H.R. 27 contains a lengthy discussion about the need for a gradual move to GAAP. Transcript of markup of H.R. 27 at 55–62. In the floor debate on H.R. 27, during which the uniform accounting standards provision was added, Representative Parris, the amendment's sponsor, stated that his amendment, which was similar to S. 790's provisions, "would have the Bank Board by the end of this year promulgate regulations that would, over a 5-year period, have S&L's use accounting principles consistent with GAAP." 133 Cong. Rec. at H3156.

In the Senate Banking Committee markup of S. 790, which contained the uniform accounting provisions, Senator Garn cautioned that, while there was a clear consensus that the Board move to GAAP accounting for thrifts, "[u]sually the argument was not whether it should be done. It was whether it should be implemented in five years or seven or ten, and usually the testimony was, well, let's get it started." Transcript of Senate Banking Committee markup of S. 790 at 77–78.

The Board believes that the legislative history of the CEBA shows a clear congressional intent that the Board act by December 31, 1987, to promulgate regulations establishing a timetable that will move the thrift industry to uniform, GAAP-based, accounting standards by December 31, 1993. Pursuant to this congressional mandate, the Board today is proposing to take several steps. First, it is proposing to delay the effective date of the DRC regulation from January 1, 1988 to January 1, 1989.[4] This includes not only the modification to the definition of regulatory capital contained therein, but also the reporting requirements and expiration of certain RAR components. The Board believes that this is necessary in order to phase-in uniform accounting standards based on GAAP or Bank RAP as required by the CEBA. While it believes that the DRC regulation was a first step in this congressionally mandated direction, to implement the DRC Regulation at this time would, in the Board's estimation, lead to needless confusion in the industry about the accounting and public reporting requirements.

Second, it is proposing to modify the DRC regulation to comport with the CEBA-mandated treatment of certain items of regulatory capital. Third, it is proposing to grandfather certain provisions of RAR not specifically discussed in the CEBA to phase-in the effects of GAAP on thrifts. As proposed,

[4] The Board is not proposing to withdraw the DRC, but to delay implementation of the provisions that were to have gone into effect on January 1, 1988. The provisions that went into effect on May 5, 1987 remain effective. Thus, thrifts' authority to defer loan losses still expires on January 1, 1988, consistent with the CEBA provision that loan losses may be deferred "consistent with regulations in effect before the passage of the Thrift Industry Recovery Act" on August 10, 1987. *See* CEBA, tit. IV, sec. 402(b), § 415(e).

this grandfathering treatment will expire on or before December 31, 1993. Fourth, it is proposing a timetable whereby over the next several years, thrift institutions will begin filing reports in accordance with GAAP and will include progressively fewer elements of RAR in regulatory capital. Finally, it is proposing procedures whereby an institution that believes it cannot meet the proposed timetable may file a plan for Board approval of its delayed compliance to a date no later than December 31, 1993.

The grandfathering and phase-in proposed today should, in the Board's estimation, make it feasible for most thrift institutions to comply with both the reporting requirements as well as those regulations that measure compliance with Board regulations on an institution's regulatory capital. Therefore, the Board anticipates that plans requesting delayed compliance will be the rare exception, rather than the rule. The Board notes that the statute sets a feasibility standard for delayed compliance. Institutions that file plans seeking delayed compliance not because of an inability to meet the Board requirements but because of an unwillingness to report capital components as required by Board regulations should be aware that such plans will not be approved by the Board or the FSLIC. The Board continues to believe that achieving uniform accounting based on GAAP at the earliest possible date is in the best interest of the thrift industry and the public.

As noted above, in the Board's view, the DRC regulation accomplishes Congress' mandate to a certain degree. In reviewing that regulation in light of the CEBA, however, the Board has determined that further amendments are necessary to achieve the goal of Congress. Accordingly, the Board today is proposing to amend its DRC regulation to define regulatory capital in a manner that brings the thrift industry closer to GAAP by 1993 for purposes of assessing compliance with Board regulations.

IV. Description of the Proposed Rule

A. Reporting in Accordance With GAAP

As discussed in greater detail above, the legislative history of section 402 of the CEBA makes clear that, to the extent the banking agencies deviate from GAAP in their regulatory requirements, it was Congress' intent to allow the Board discretion to choose whether to adopt the same deviations or to adopt GAAP. The Board's reporting requirements under the DRC regulation deviate from Bank RAP or GAAP in certain areas.

First, bank call reports are prepared primarily on a GAAP basis; however, the accounting treatment for certain line items deviates from GAAP and, in fact, tends to be more conservative than GAAP. *See* Federal Financial Institutions Examination Council ("FFIEC") *Consolidated Reports of Condition and Income*, p. 9. The DRC regulation requires insured institutions to prepare their monthly and quarterly reports ("call reports") in accordance with GAAP. Second, bank call reports do not contain a computation of the bank's primary and total capital, which is analogous to regulatory capital for thrifts. Under the DRC regulation, thrifts are required to include on all financial statements and reports a reconciliation of GAAP equity capital to regulatory capital. Third, the Federal banking agencies, consistent with GAAP, require that bank call reports be prepared on a consolidated basis. Insured institutions' call reports are prepared on a unconsolidated basis.

After carefully reviewing the reporting requirements of the DRC regulation in light of the CEBA, the Board has determined to continue to require insured institutions to prepare their call reports in accordance with GAAP with a reconciliation on the report to regulatory capital effective for all periods ending after January 1, 1989. While the Board recognizes that its call reports are primarily supervisory and regulatory documents, not primarily accounting documents, it continues to believe that its supervisory, regulatory, and economic policies are best served by a GAAP call report that includes a reconciliation to regulatory capital. More specifically, the Board believes that requiring GAAP call reports for all insured institutions will provide it with a more consistent, comprehensive basis for analyzing and comparing financial statements issued by insured institutions and that this method of reporting also will assist the Board in monitoring the performance and soundness of the thrift industry. Moreover, in light of the proposed effective date of these requirements, the Board does not believe that such reporting requirements will adversely affect insured institutions. Although regulatory reports filed with the Board are, until January 1, 1989, filed on a RAR basis, such reports are available to the public under the Freedom of Information Act. Because items such as definitional capital, deferred loan losses, and appraised equity capital are segmented by the reporting system, an approximation of the GAAP equity capital can be derived from such reports. Thus, in effect, approximations of the GAAP equity position of the individual institutions and the industry are already available to the public.

The Board emphasizes, however, that it will continue to rely primarily on regulatory capital in assessing an insured institution's compliance with Board regulations. Further, the Board will continue to use regulatory capital to determine an institution's compliance with the Board's minimum regulatory capital requirements under 12 CFR 563.13 (1987).[5] The Board notes that, as discussed *infra*, it is proposing certain amendments to its definition of regulatory capital. While these amendments will eventually bring regulatory capital closer to GAAP/Bank RAP, the amendments would not cause an immediate reduction in the regulatory capital of the thrift industry. For these reasons, it is the Board's view that this proposal is consistent with the intent of section 402.

The Board also is proposing to require insured institutions to file their monthly and quarterly reports with the Board on a consolidated basis, consistent with GAAP and Bank RAP, effective January 1, 1989. This means that institutions would be required to consolidate all their majority-owned subsidiaries, including, but not limited to, service corporations, finance subsidiaries and operating subsidiaries for purposes of reporting to the Board. *See* FASB Accounting Research Bulletin No. 51, *Consolidated Financial Statements*. In the Board's view, consolidated reporting will enable the Board more effectively to monitor the financial conditions of insured institutions and their subsidiaries and, consequently, aid in its supervisory efforts.

The Board wishes to emphasize, however, that an institution's minimum capital requirement pursuant to sections 563.13 or newly proposed section 563.14 and its liability growth calculation pursuant to section 563.13–1 would continue to be calculated on an unconsolidated basis. This decision is based, in part, on the potential substantial impact that consolidated reporting could have on the regulatory capital requirement of some institutions. Specifically, consolidated reporting would increase the value of the assets

[5] The Board also is adopting today proposed amendments to its minimum capital requirement regulation to implement the authority granted by section 406 of the CEBA to set capital requirements on a case-by-case basis. *See* Board Res. No. 87–1045, published elsewhere in this issue of the Federal Register.

and liabilities of an institution, and in cases where subsidiaries are more highly leveraged than the parent, the regulatory capital of the institution as a percentage of total liabilities will decline. In such a situation, an institution that had, prior to consolidation, met its regulatory capital requirement, would need to raise additional capital to remain in compliance with its requirement.

In light of the statutory authority granted to the Board in section 406 of the CEBA with respect to minimum capital requirements, the Board intends to revisit its current minimum capital regulation, 12 CFR 563.13 (1987), in the near future. At such time the Board will consider whether minimum capital requirements should be calculated on a consolidated basis. Any such requirement would be implemented in conjunction with any proposed changes to the Board's minimum capital regulation.

B. Components of Regulatory Capital

Today's proposal further restructures the various components of regulatory capital in accordance with the CEBA mandate for uniform accounting standards for thrifts. These provisions would become effective on January 1, 1989, and would apply to all reports filed with the Board for periods ending after that date. The Board wishes to emphasize that the intent of the DRC regulation and the amendments thereto proposed today is to implement a phase-in of GAAP in such a manner as not to cause an immediate reduction of an institution's regulatory capital. In the Board's view, since institutions would not be required to comply with the DRC regulations. as amended by today's proposal, until January 1, 1989, such a phase-in is accomplished. As discussed *infra*, the Board is proposing to grandfather through December 31, 1993, those components of regulatory capital that were eliminated in the DRC regulation or by today's amendments. Thus, the Board is confident that institutions will not be adversely affected by today's proposal.

1. Equity Capital

Under today's proposal, an institution's equity capital would continue to be determined in accordance with GAAP. Goodwill is therefore included in a thrift's equity capital. The Board has determined to follow GAAP, rather than Bank RAP, which does not include goodwill, because the CEBA's language and its legislative history clearly indicate that the Board may include goodwill in regulatory capital. *See* CEBA, tit. IV, sec. 402(b), § 415(d). The thrift industry has historically included goodwill in capital, and the Board believes that no change in this policy is warranted given the clear language of the CEBA.

Under the DRC regulation, institutions are permitted, for purposes of calculating equity capital, to account for wash sales transactions pursuant to ORPOS Memorandum No. T-59-8 (June 22, 1982). Today's proposal would eliminate RAR for wash sales transactions and would require such transactions to be accounted for in accordance with GAAP and Bank RAP. Pursuant to T-59-8 gains and losses from wash sales should be recognized currently. Under GAAP and Bank RAP, when a bank sells a security and concurrently reinvests the proceeds from the sale in the purchase of substantially the same security, no sale should be recognized, since the effect of the sale and repurchase transaction leaves the bank in essentially the same position as before, notwithstanding the fact that the bank has incurred brokerage fees and taxes. *See* AICPA Industry Audit Guide—Audit of Banks, "Investment Securities." The Board believes that GAAP more accurately reflects the economic substance of the transaction and thus better serves to protect institutions from loss. Thus, effective January 1, 1989, institutions would be required to account for wash sales transactions in accordance with GAAP in computing their equity capital.

2. Definitional Capital

Today's proposal would continue to allow institutions to include as definitional capital most of the items included in the DRC regulation. First, section 402 of the CEBA specifically authorizes the Board to permit institutions to continue to include subordinated debt as regulatory capital. CEBA, tit. IV, sec. 402(b), section 415(d). Thus, the proposal would continue to allow institutions to include subordinated debt as a component of capital pursuant to the amortization schedule included in the DRC Regulation.

Second, the CEBA authorizes institutions to treat general loss allowances as regulatory capital to the extent such treatment is consistent with the procedures established by the Federal banking agencies. *Id.* section 415(a)(5). Both the DRC regulation and the Federal banking agencies permit the inclusion of general loss allowances as a component of capital. The Board notes, however, that the Federal banking agencies are currently reconsidering whether general loss allowances should be included as capital.[6] Consequently, the Board may revisit this issue at a later date.[7] For the present, however, the Board is proposing to continue to allow such loss allowances to be included as regulatory capital.

Third, the Board is proposing to continue to allow institutions to include as regulatory capital, net worth certificates, mutual capital certificates, income capital certificates, and annual income payments on capital certificates not due and payable. In the Board's experience, these items have had a beneficial effect on insured institutions. Moreover, Congress, by statute, has explicitly mandated that two of these forms of FSLIC assistance, mutual capital certificates and net worth certificates, constitute capital infusions and are to be included in the regulatory capital of insured institutions. 12 U.S.C. 1464(b)(5) (A), (B), 1726(b) (1982 & Supp. III 1985). While income capital certificates are not statutorily created instruments, they serve a similar function and, thus, in the Board's view, should continue to be included as regulatory capital. Similarly, annual income payments which represent income payments on capital certificates are also, in the Board's view, properly includable in capital.

Fourth, after reviewing the other items currently included in capital, the Board has preliminarily determined to amend definitional capital to modify the extent to which nonpermanent preferred stock is included. Consistent with Bank RAP,[8] the Board is proposing to allow limited life preferred stock that has an original maturity of more than 25 years to be included as a component of definitional capital. The Board believes, however, that it would be appropriate to adjust for the amount of limited life preferred

[6] *See* 52 FR 5119 (Feb. 19, 1987) (Federal Reserve Board ("FRB")); 52 FR 23045 (June 17, 1987) (Comptroller of the Currency ("OCC"); 52 FR 11476 (Apr. 9, 1987) (Federal Deposit Insurance Corporation ("FDIC")).

[7] The Board notes that the authority to include general loss allowances as capital sunsets when the Financing Corporation issues the last obligations under its $10.825 billion borrowing authority. CEBA, tit. IV, sec. 416(a). The sunset provision does not, however, limit the Board's authority to continue to allow institutions to include such loss allowances as regulatory capital after that date, if it so desires. *See id.* sec. 416(c).

[8] The federal banking agencies recently issued proposals regarding capital adequacy and maintenance. As part of those proposals, the federal banking agencies have proposed to include limited life preferred stock as capital in substantially the same manner as the Board is proposing to include such stock. *See* 52 FR 5119 (Feb. 19, 1987) (FRB); 52 FR 23045 (June 17, 1987) (OCC); 52 FR 11476 (Apr. 9, 1987) (FDIC). The Board notes that the comment period on the FRB proposal ended on June 1, 1987; FDIC on June 9, 1987; and OCC on August 17, 1987.

stock included in definitional capital by discounting such stock as it approaches maturity. In the Board's view, this discounting process is necessary because as limited life preferred stock approaches maturity it must either be redeemable or refunded; it then resembles a current liability more than a component of capital. Accordingly, the Board is proposing to reduce the original issue amount by 20 percent in each of the last five years before maturity. Thus, 80 percent of the issue amount would be included in definitional capital if the remaining life was between four and five years, 60 percent would be included if the remaining life was between three and four years, and so on. None would be included if the remaining maturity was one year or less. The Board specifically solicits comment on whether it should retain its current treatment of nonpermanent preferred stock as set forth in § 561.13(d) or adopt the approach of the Federal banking agencies, as outlined above.

The Board proposes that nonpermanent preferred stock that meets the current requirements of section 561.13(d) would be "grandfathered." The Board notes, however, that only the amount of such redeemable preferred stock that was included in capital under the current requirements prior to January 1, 1989 would be grandfathered. In this regard, the Board also today is requesting comment on whether, and to what degree, mandatorily convertible securities should be included as a component of definitional capital. Generally, there are two types of mandatory convertible securities: (1) "Equity contract notes" securities that obligate the holder to take common or perpetual preferred stock of the issuer in lieu of cash for repayment of principal, and (2) "equity commitment notes" securities that are redeemable only with the proceeds from the sale of common or preferred perpetual stock. The Board notes that mandatory convertible securities are not considered GAAP equity capital but are included, subject to certain limitations, in bank capital.

Finally, the Board also is proposing that certain components of definitional capital would be eliminated as of January 1, 1989. These include pledged certificates of deposit and other nonwithdrawable accounts that are not included in GAAP equity capital. Since these items are not included in capital either under GAAP or Bank RAP, the Board believes that they should no longer be included in thrift regulatory capital. While the Board recognizes that these items may provide a buffer from loss both to insured institutions and the FSLIC, it has determined that consistent with the intent of the CEBA that such items should no longer be included as regulatory capital. However, to the extent an institution included such items in regulatory capital prior to January 1, 1989, such items will be afforded grandfathering treatment. The Board specifically requests comment on whether these items should be eliminated as a component of regulatory capital.

3. RAR Components of Capital

In the DRC regulation, this component of capital is broken into two categories: Pre-January 1, 1988, RAR and Post-January 1, 1988, RAR. The items included in these categories are balance sheet and income statement line items, *i.e.*, assets, liabilities, income or expenses. The manner in which these items are accounted for, *i.e.*, GAAP or RAR, affects both the amount of equity capital and the amount of regulatory capital an institution reports. Because the DRC regulation requires that all financial statements be prepared on a GAAP basis, each line item on a thrift's balance sheet and income statement must be accounted for in accordance with GAAP as of January 1, 1989.

The Board's purpose in establishing the Pre-January 1, 1988, RAR category was to "grandfather" those specific accounting transactions that previously had been accounted for under RAR before the effective date of the DRC regulation, so as not to cause immediate reductions in institutions' regulatory capital as a result of the new GAAP reporting requirements. With respect to appraised equity capital and deferred loan losses, this result was accomplished by permitting institutions that had accounted for these items under RAR prior to the effective date of the DRC regulation to include them as a regulatory capital adjustment. With respect to other items for which RAR was eliminated, the Board permitted institutions to treat the cumulative RAR/GAAP differential for those items as an adjustment to regulatory capital. Again, the purpose for this section was to phase out RAR and phase in GAAP in a manner that would not immediately affect an insured institution's regulatory capital in an adverse way.

The Board's purpose in establishing the Post-January 1, 1988 RAR category was somewhat different. At the time the Board adopted the DRC regulation, it believed that its accounting treatment for the items included in this category provided a more effective tool for analyzing risk of loss to the FSLIC and therefore determined to continue to require institutions to account for these items in accordance with RAR for purposes of calculating regulatory capital. The accounting treatment for two of the items in this category, valuation allowances and uncollectible interest, generally is more conserative than GAAP. Consequently, it tends to result in a reduction in regulatory capital. On the other hand, RAR treatment for loan fees and options is generally more liberal than GAAP and therefore would result in an increase in regulatory capital. As with the items in the Pre-January 1, 1988 RAR category, this adjustment to regulatory capital was made by calculating the cumulative RAR/GAAP differential for these items and adjusting regulatory capital accordingly.

In light of the CEBA, the Board has revisited the Pre-and Post-January 1, 1988 categories and has determined that further amendments are necessary consistent with the intent of section 402. As discussed *infra.*, the Board today is proposing to eliminate prospectively RAR for all items listed in the post-January 1, 1988 category and to afford grandfathering treatment for purposes of computing regulatory capital for certain of those Post-January 1, 1988 RAR items. Consequently, this component of regulatory capital will no longer consist of the Pre-and Post-January 1, 1988 RAR categories. Instead, this component will represent only grandfathered items and will be referred to as "RAR components of regulatory capital." What follows is a discussion of those items that are affected by today's proposal.

a. Deferred Loan Losses and Gains. The Board notes that loan losses and gains that were deferred pursuant to section 563c.14 would continue to be included in this category provided that the institution has excluded such gains and included such losses in computing its regulatory capital prior to January 1, 1988. The CEBA specifically authorizes institutions to continue, "for purposes of determining regulatory net worth and capital," to defer loan gains and losses "pursuant to regulations of the Board in effect before [August 10, 1987]." CEBA, tit. IV, sec. 402(b), section 415(e). As discussed above, although the Board is proposing to delay the effective date of the DRC regulation, that action does not affect the sunset provision set forth in § 563c.14(f). In the Board's view, the sunset provision became effective on May 5, 1987, when the Board adopted the DRC regulation. Thus, consistent with the CEBA, institutions may only include in regulatory capital those loan losses and gains that are deferred pursuant to § 563c.14 prior to January 1,

1988. The Board does not believe that it was Congress' intent to reinstate the ability of institutions to use § 563c.14 particularly because the provision was not added to the CEBA until July 6, 1987, over two months after the Board adopted the DRC regulation.

b. Loan origination and commitment fees. Today's proposal would eliminate the Board's accounting regulations at 12 CFR 563.23–1(f)(3) and require insured institutions to account for loan origination and commitment fees in accordance with GAAP as of January 1, 1989. Before the Board adopted the DRC regulation, the FASB issued Statement of Financial Accounting Standards No. 91, *Accounting for Nonrefundable Fees and Costs Associated with Originating or Acquiring Loans and Initial Direct Costs of Leases* (Dec. 1986) ("SFAS No. 91"). SFAS No. 91 generally requires an institution to defer all loan origination and commitment fees and recognize them by the interest method over the contractual life of the related loan as an adjustment to yield. Incremental direct costs (narrowly defined) of originating a loan are capitalized and recognized by the interest method as a reduction of the loan's yield.

After carefully reviewing SFAS No. 91, and 12 CFR 563.23–1(f), the Board's current regulation governing accounting for such fees, it has determined that its regulation on loan origination and commitment fees does not result in as conservative a measure of capital as produced under GAAP. Moreover, the Board believes that this approach is consistent with the other banking agencies which currently require banks to account for loan fees under Pre-SFAS No. 91 GAAP, but who have indicated, based on informal discussions, that they intend to follow SFAS No. 91.

Consistent with the grandfathering treatment in the DRC regulation afforded to those items for which RAR is eliminated, under the proposal institutions would be allowed to include in regulatory capital the amount representing the RAR/GAAP differential for those loan origination and commitment fees calculated under RAR prior to [the effective date of final rule]. However, institutions would not be permitted to use RAR in calculating loan fees incurred after January 1, 1989.

c. Options transactions. The proposal would eliminate the Board's accounting regulation set forth in 12 CFR 563.17–5(g) (1987) for options transactions and require insured institutions to account for such transactions in accordance with GAAP. Under the proposal, institutions would be allowed to include in regulatory capital the amount representing the RAR/GAAP differential for those options transactions calculated under RAR prior to January 1, 1989. Institutions would not, however, be permitted to use RAR in accounting for options transactions entered into after January 1, 1989. The Board recognizes that GAAP is still evolving in this area and thus has not yet been defined by a specific FASB Statement of Financial Accounting Standards. Consequently, the Board specifically requests comment on whether RAR should be eliminated for options transactions or whether the Board should continue to provide guidance in this area until such time as the FASB or the AICPA issue an authoritative pronouncement in this regard.

d. Valuation allowances. The Board also is proposing to delete from this category the RAR/GAAP differential for valuation allowances. As part of its comprehensive revision of its regulations in accordance with the CEBA, the Board, on October 2, 1987, adopted proposed rules concerning asset classification and appraisal standards. Board Res. Nos. 87–1042, 87–1040 published elsewhere in this issue of the **Federal Register.** The CEBA requires the Board to implement a new classification system and new appraisal standards consistent with the practices of the other federal banking agencies. *See* CEBA, tit. IV, sec. 402(b), sections 415(a) (1), (2). Those proposals implement those requirements. As described in those proposals, there should not be significant RAR/GAAP differentials for establishing loss allowances. Thus, this component is no longer appropriately included in regulatory capital. The Board notes that, in effect, this will benefit insured institutions because the RAR/GAAP differential for valuation allowances under the Board's current classification of assets regulation usually would result in a deduction from capital.

e. Uncollectible interest. The Board is proposing to eliminate its accounting treatment for uncollectible interest with respect to 1–4 family mortgage loans pursuant to 12 CFR 563c.11 (1987) as of January 1, 1989. Section 563c.11 provides that any uncollected interest on certain loans that have any portion due but uncollected for a period in excess of 90 days shall be classified as uncollectible and, therefore, not included in an institution's net income or regulatory capital. Under GAAP, the accrual of interest on delinquent loans is discontinued when it is probable that the interest will not be received, pursuant to FASB, Statement of Financial Accounting Standards No. 5, *Accounting for Contingencies.* In the Board's view, requiring GAAP for uncollectible interest is consistent with Bank RAP and the intent of the CEBA. Consequently, under the proposal the RAR/GAAP differential for that item will no longer be includable as a component of capital. In the Board's view, this amendment would not adversely affect an institution's regulatory capital since RAR is generally more restrictive than GAAP in this area and consequently would result in a subtraction from regulatory capital and not an addition. Thus, the Board is not proposing grandfathering treatment for uncollectible interest.

4. Accounting Forbearances

The proposal would have no effect on the ability of insured institutions to include accounting forbearances as a component of regulatory capital. However, the Board wishes to take this opportunity to emphasize that this category only includes *accounting* forbearances, *i.e.*, deviations from GAAP or RAR for specific accounting transactions which were previously authorized, or which may be authorized in the future, by the Corporation, the Board, or the Principal Supervisory Agents. This category does *not* include forbearances granted by the Board or its designee with respect to institutions' minimum regulatory capital requirements.

5. Sunset Date

Consistent with the CEBA, the Board is proposing that the ability of insured institutions to include certain items as components of regulatory capital shall sunset on December 31, 1993. The sunset provision will apply to appraised equity capital, grandfathered nonpermanent preferred stock, grandfathered pledged certificates of deposit and other nonwithdrawable accounts, and all other grandfathered items except deferred loan losses. In the Board's view, this will effectively implement the phase-in for thrift institutions to GAAP/Bank RAP by December 31, 1993, the mandatory time deadline set forth in the CEBA. Moreover, the Board believes that this 5-year period gives institutions adequate time to access new capital in the capital markets and thereby improve their capital positions. The Board, however, specifically solicits comment on whether, instead of eliminating these items entirely on December 31, 1993, the Board should instead gradually phase-out these items, *i.e.*, permit 100 percent to be counted in the first year, 80 percent in the second year, and so on to 0 percent in the fifth year, with such a phase-out beginning on January 1, 1989 and ending on December 31, 1993.

C. Plans for Delayed Compliance

In accordance with section 402(d)(2)(B) of the CEBA, the Board is today proposing to add a new paragraph (d) to 12 CFR 563.23–3 (1987). As proposed, the new section will (1) permit institutions to file plans for delayed compliance with the proposed uniform accounting standards with their Principal Supervisory Agent ("PSA") and (2) establish the criteria by which such plans will be evaluated. An institution that believes it will not be feasible for it to comply with the uniform accounting standards proposed today may file a plan for delayed compliance with its PSA. The plan should explain why it will not be feasible for the institution to comply fully with the standards. Each plan must contain, at a minimum, the following information: (1) The specific aspects of the uniform accounting standards the institution will be unable to meet by the timetable set forth in today's proposal; (2) the specific reasons why it cannot meet each element by that timetable; and (3) a timetable by which the institution will be able to comply with the uniform accounting standards. In evaluating an institution's plan, the PSA will consider at least the following factors: (1) The number of components with which the institution will be unable to comply; (2) the soundness of the reasons for delayed compliance, considering (a) the institution's history, (b) other institutions in the region, and (c) whether compliance with the uniform accounting standards would make an institution unable to comply with other Board regulations; (3) the length of time needed for the institution to achieve compliance with each component and (4) the extent to which the grandfathering of certain RAR components and phase-in of certain GAAP-based components will alleviate the institution's difficulties.

The Board intends that delayed compliance be allowed only where it is not feasible for an institution to comply with the timetable proposed today. Such delayed compliance should further be authorized only to the degree and for the amount of time necessary to enable an insured institution to comply. Thus, the Board expects, under today's proposal, that blanket waivers until December 31, 1993 will be extraordinarily rare, but that a year's delayed compliance with one or two aspects of the new requirements will be slightly more common. The PSAs will act on such delayed compliance plans pursuant to the procedures set forth at 12 CFR 571.12. *See* Board Res. No. 87–1038, published elsewhere in this issue of the **Federal Register.**

D. Solicitation of Comment

The Board hereby solicits comments on all aspects of this proposal. The Board requests that any comments on this proposal clearly reference on their face Board Resolution No. 87–1047.

Pursuant to the rulemaking policies and procedures of 12 CFR 508.13, as supplemented by Board Res. No. 80–584, 45 FR 73135 (1980), the Board is providing for a 30-day rather than a 60-day public comment period because section 402(d)(2)(A) of the CEBA requires the Board to implement this regulation by December 31, 1987.

Initial Regulatory Flexibility Analysis

Pursuant to section 3 of the Regulatory Flexibility Act, 5 U.S.C. 603, the Board is providing the following regulatory flexibility analysis:

1. Reasons, objectives, and legal basis underlying the proposed rule. These elements are incorporated above in the above **SUPPLEMENTARY INFORMATION.**

2. Small entities to which the proposed rule would apply. The proposed rule would apply to all insured institutions without regard to size.

3. Impact of the proposed rule on small entities. The Board believes that the proposed revision of its definition of regulatory capital would not have a significant or disproportionate impact on small institutions.

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

5. Alternatives to the proposed rule. In the above **SUPPLEMENTARY INFORMATION** the Board is soliciting comment on the rule as proposed.

List of Subjects in 12 CFR Parts 561, 563, and 563c

Bank deposit insurance, Investments, Reporting and recordkeeping requirements, Savings and loan associations.

Accordingly, the Board hereby proposes to amend Parts 561, 563 and 563c, Subchapter D, Chapter V, Title 12, *Code of Federal Regulations,* as set forth below.

SUBCHAPTER D—FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

PART 561—DEFINITIONS

1. The authority citation for 12 CFR Part 561 continues to read as follows:

Authority: Sec. 1, 47 Stat. 725, as amended (12 U.S.C. 1421 *et seq.*); sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 5B, 47 Stat. 727, as added by sec. 4, 80 Stat. 824, as amended (12 U.S.C. 1425b); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 2, 48 Stat. 128, as amended (12 U.S.C. 1462); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 401–407, 48 Stat. 1255–1260, as amended (12 U.S.C. 1724–1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., p. 1071.

2. Section 561.13 is revised to read as follows:

§ 561.13 Regulatory capital.

Regulatory Capital is the sum of:

(a) Equity capital, as determined in accordance with generally accepted accounting principles ("equity capital");

(b) Definitional capital, which is the sum of:

(1) Income capital certificates, mutual capital certificates (issued pursuant to § 563.7–4 of this subchapter), outstanding net worth certificates issued in accordance with Part 572 of this subchapter or that the Corporation is committed to purchase by virtue of § 572.1(c), accumulated annual income payments on capital certificates not due and payable; allowances for losses except specific allowances (including those specific allowances established pursuant to §§ 561.16c, 563.17–2, and 571.1a of this subchapter), *Provided,* that for any nonpermanent instrument qualifying as regulatory capital under paragraph (b)(1) of this § 561.13, either (i) the remaining period to maturity or required redemption (or time of any required sinking fund or other prepayment or reserve allocation with respect to the amount of such prepayment or reserve) is not less than one year, or (ii) the redemption or prepayment is only at the option of the issuing insured institution and such payments would not cause the insured institution to fail or continue to fail to meet its regulatory capital requirement under § 563.13 of this subchapter;

Provided further, that capital stock may be included as regulatory capital without limitation if it would otherwise qualify but for a provision permitting redemption in the event of a merger, consolidation, or reorganization approved by the Corporation when the issuing institution is not the survivor, or a provision permitting a redemption when the funds for redemption are raised by the issuance of permanent stock;

(2) Subordinated debt securities issued pursuant to § 563.8–1 of this subchapter: *Provided,* that an institution whose application to include subordinated debt in net worth pursuant to § 563.8–1 was approved prior to December 5, 1984, shall be permitted to

continue to include 100 percent of the principal amount of such subordinated debt as regulatory capital until the remaining period to maturity (or time of any required sinking fund or other prepayment or reserve allocation with respect to the amount of such prepayment or reserve) is less than one year: *Provided further*, that an institution that had filed a substantially complete application pursuant to § 563.8–1 prior to December 5, 1984, shall be permitted to include 100 percent of the subordinated debt issued pursuant to such application as regulatory capital until the remaining period to maturity (or time of any required sinking fund or other prepayment or reserve allocation with respect to the amount of such prepayment or reserve allocation with respect to the amount of such prepayment or reserve) is less than one year if such subordinated debt otherwise is in compliance with the requirements of § 563.8–1 and if such application is not amended in any material respect subsequent to December 5, 1984: *Provided further*, that, except as otherwise provided in paragraph (b)(2) of this § 561.13 and unless otherwise approved by the Corporation in writing, subordinated debt securities issued pursuant to § 563.8–1 after December 5, 1984, may be included as regulatory capital only in accordance with the following schedule:

Years to maturity of outstanding subordinated debt	Percent included in regulatory capital
Greater than or equal to 7	100
Less than 7 but greater than or equal to 6	86
Less than 6 but greater than or equal to 5	71
Less than 5 but greater than or equal to 4	57
Less than 4 but greater than or equal to 3	43
Less than 3 but greater than or equal to 2	29
Less than 2 but greater than or equal to 1	14
Less than 1	0

For purposes of determining the principal amount outstanding of an obligation issued at a discount that exceeds 10 percent of the face amount, the issuing institution shall treat as principal only the gross consideration actually received upon issuance plus the accrued interest not payable until maturity, as of the date of the computation. In the case of an instrument sold at a discount that exceeds 10 percent and that bears no stated rate of interest, the amount that can be added to principal each period is an amount equal to the accrued interest payable computed on the "level-yield" or "interest" method. For purposes of computing the amount of subordinated debt includable as regulatory capital pursuant to paragraph (b)(2) of this § 561.13, the issuing institution must determine the effective maturity of each portion of the principal amount outstanding of the subordinated debt that is subject to required sinking fund payments, other required prepayments, and required reserve allocations and calculate the percentage amount of each portion of the principal amount outstanding that may be included pursuant to the schedule set forth in paragraph (b)(2) of this § 561.13; and

(3) Preferred stock that has an original maturity of at least 25 years, *Provided that:* such limited life preferred stock may be includable as regulatory capital only in accordance with the following schedule:

Years to maturity	Percent included in regulatory capital
Greater than or equal to 5	100
Between 4 and 5	80
Between 3 and 4	60
Between 2 and 3	40
Between 1 and 2	20
Less than 1	0

(c) The sum of the following items determined in accordance with risk analysis reporting in effect prior to January 1, 1989 that an insured institution has included in computing and reporting its regulatory capital to the Corporation prior to January 1, 1989:

(1) Appraised equity capital (as defined in § 563.13(c) of this subchapter);

(2) The amount of unamortized loan gains and losses the exclusion or inclusion of which were deferred pursuant to § 563c.14 of this subchapter;

(3) The amount of the following items computed by an insured institution in accordance with risk analysis reporting in effect prior to January 1, 1989, and included in its financial statements prior to January 1, 1989. An institution may include an amount that represents the sum of the differences between the treatment of the following items under generally accepted accounting principles and the treatment under risk analysis reporting prior to January 1, 1989:

(i) Sales of real estate developed by the institution or its subsidiary;

(ii) Futures transactions;

(iii) Accretion of discounts and amortization of premiums on securities;

(iv) Loan origination and commitment fees; and

(v) Options transactions;

(4) Qualifying redeemable preferred stock that was included as regulatory capital prior to January 1, 1989; and

(5) Qualifying pledged certificates of deposit and other nonwithdrawable accounts that were included as regulatory capital prior to January 1, 1989.

(d) Accounting forbearances permitted under risk analysis reporting, which shall include all forbearances and other practices authorized by the Corporation, the Board, or its Principal Supervisory Agents.

(e) Notwithstanding paragraphs (a), (b), (c), and (d) of this § 561.13, the term "regulatory capital" does not include any capital instrument or security that may be included as regulatory capital pursuant to any of those paragraphs of § 561.13 if such capital instrument or security is held by a service corporation or other subsidiary, regardless of the organizational form of that entity, in which the insured institution directly or indirectly (1) owns, controls, or holds with power to vote, or holds proxies representing 10 percent or more of the voting shares or rights in such entity, or (2) invested in or contributed to such entity more than 10 percent of such entity's capital, unless inclusion of regulatory capital is specifically approved by the Corporation in writing.

(f) "Sunset" Provisions. Authority to include items listed in paragraphs (c)(1), (3) through (5), of this § 561.13 as a component of regulatory capital will cease as of December 31, 1993.

PART 563—OPERATIONS

3. The authority citation for 12 CFR Part 563 continues to read as follows:

Authority: Sec. 1, 47 Stat. 725, as amended (12 U.S.C. 1421 *et seq.*); sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 256, as amended (12 U.S.C. 1425a); sec. 5B, 47 Stat. 727, as added by sec. 4, 80 Stat. 824, as amended (12 U.S.C. 1425b); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 2, 48 Stat. 128, as amended (12 U.S.C. 1462); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 401–407, 48 Stat. 1255–1260, as amended (12 U.S.C. 1724–1730); sec. 408, 82 Stat. 5, as amended (12 U.S.C. 1730a); Reorg. Plan. No. 3 of 1947, 12 FR 4981, 3 CFR, 1943–1948 Comp., p. 1071.

§ 563.17-5 [Amended]

4. Section 563.17–5 is amended by removing paragraph (g).

§ 563.23-1 [Amended]

5. Section 563.23–1 is amended by removing paragraph (f).

6. Section 563.23–3 is amended by adding new paragraph (d) to read as follows:

§ 563.23-3 Accounting principles and procedures.

* * * * *

(d) *Delayed compliance with uniform accounting standards.*

(1) An insured institution seeking to delay its compliance with the uniform accounting standards set forth in this § 563.23-3 or § 561.13 of this subchapter shall file a plan with its Principal Supervisory Agent ("PSA").

(2) The plan shall set forth the following:

(i) The specific components of the uniform accounting standards with which the insured institution is unable to comply ("excepted components");

(ii) A timetable setting forth the date, in no event later than December 31, 1993, by which the insured institution proposes to comply with each excepted component; and

(iii) Any other information that the insured institution believes is relevant to its determination that it is not feasible for the institution to comply with each excepted component.

(3)(i) The Principal Supervisory Agent shall act on such plans in accordance with the guidelines set forth at § 571.12 of this subchapter.

(ii) In reviewing a plan, the PSA shall consider all relevant information, including, but not limited to,

(A) The institution's plan submitted pursuant to this section;

(B) Other information available to the PSA regarding the insured institution;

(C) The ability of other institutions in the region to comply with the uniform accounting standards; and

(D) The extent to which any relevant grandfathering or phase-in of the uniform accounting standards affects any excepted component in the institution's plan.

(4) In the event that the PSA disapproves a plan for delayed compliance in whole or in part, the institution may appeal the disapproval to the Corporation within thirty days of the disapproval. The Corporation shall act on such appeal in accordance with the guidelines set forth at section 571.12 of this subchapter. The Corporation, in reviewing the disapproval, shall take into consideration all relevant factors, including those listed above.

PART 563c—ACCOUNTING REQUIREMENTS

6. The authority citation for Part 563c continues to read as follows:

Authority: Sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402-403, 407, 48 Stat. 1256-1257, 1260, as amended (12 U.S.C. 1725-1726, 1730); secs. 3(b), 12-14, 23, 48 Stat. 882, 892, 894-895, 901, as amended (15 U.S.C. 78c(b), m,n,w); Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943-48 Comp., p. 1071.

§ 563c.11 [Removed and Reserved]

7. Part 563c is amended by removing § 563c.11 and by reserving the section designation for future use.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 87-23657 Filed 10-19-87; 8:45 am]

BILLING CODE 6720-01-M

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12 CFR Ch. V

[No. 87-1048]

Regulations Required by the Competitive Equality Banking Act of 1987

Date: October 5, 1987.

AGENCY: Federal Home Loan Bank Board.

ACTION: Notice of public hearing.

SUMMARY: This notice announces a public hearing on proposed regulations adopted by the Federal Home Loan Bank Board ("Board") pursuant to the Competitive Equality Banking Act of 1987 with respect to a policy statement on guidelines concerning the notice and disapproval procedures for applications; qualitified thrift lender test; classification of assets; appraisals; uniform accounting standards; capital forbearance; minimum capital requirements; and a proposed regulation and policy statement on troubled debt restructuring.

DATES: The public hearing will be held Tuesday, November 3, and Wednesday, November 4, 1987, 9:30 a.m.-5:00 p.m.

ADDRESSES: Written requests to participate in the public hearing must be mailed to the Secretary, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552, or hand delivered to the same address between the hours of 9:00 a.m. and 5:00 p.m. Monday, through Friday, and received no later than 5:00 p.m. on Monday October 26, 1987.

Hearing Location: The Federal Home Loan Bank Board's Amphitheater, 2nd Floor, 1700 G Street NW, Washington, DC 20552.

Copies of the Notice of Proposed Rulemaking and any comments or other material relating to those rulemakings will be made available in the Federal Home Loan Bank Board's reading room at the above address.

FOR FURTHER INFORMATION CONTACT: Ruth R. Amberg, Special Assistant to the Executive Director, (202) 377-6412, or Signe Allen, Staff Assistant, (202) 377-6626, Federal Home Loan Bank at the above address.

SUPPLEMENTARY INFORMATION: The Competitive Equality Banking Act of 1987 ("CEBA" or the "Act") Pub. L. No. 100-86, 101 Stat. 552 was signed into law on August 10, 1987. The CEBA requires the Board to implement certain regulations or guidelines with specified deadlines ranging from 60 days to 6 months from August 10, 1987, the date of enactment of the Act. Additionally, the CEBA requires the Board to submit to Congress no later than November 8, 1987, proposed regulations implementing certain CEBA provisions.

On August 28, 1987, the Board adopted an advance notice of proposed rulemaking to inform the public of its intention to promulgate regulations required by the CEBA. Board Res. No. 87-941, 52 FR 33595 (Sept. 4, 1987).

On October 2, and October 5, 1987, the Board adopted proposed regulations in the following areas: qualified thrift lender test, Board Res. No. 87-1041; classification of assets, Board Res. No. 87-1042; appraisals, Board Res. Nos. 87-1039 and 1040; uniform accounting standards, Board Res. No. 87-1047; capital forbearance, Board Res. No. 87-1044; minimum capital requirements, Board Res. No. 87-1045; a proposed regulation and policy statement on troubled debt restructuring, Board Res. No. 87-1046; and a policy statement on guidelines concerning notice and disapproval procedures for applications, Board Res. No. 87-1038. The Board prescribed a 30-day comment period for all of the proposals. At the October 5, 1987 Board meeting, the Board voted to hold a two-day public hearing on November 3 and November 4, 1987, at which it would receive oral comments on all of the above-mentioned proposals

Participants in the hearing are invited to address all of the aspects of the proposals. In addition, the Board specifically invites oral comments, as well as supplementary or independent written submissions, studies, or analyses with regard to the following issues:

(1) The interrelationship among the proposed regulations; and

(2) The extent to which the proposals achieve conformity with the rules or policies of the Federal banking agencies consistent with the letter and spirit of the CEBA.

Persons wishing to participate in the hearing should send a written request to participate in the hearings to the Secretary, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552, to be received no later than the close of business Monday, October 26, 1987. This requirement is necessary in order to provide sufficient time to

acknowledge receipt of the notices and inform participants of the schedule of the hearings. It will also enable alternative arrangements to be made for the hearings if more persons are expected to attend than the Amphitheater can accommodate. Requests may be hand delivered between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday.

The request to participate in the hearings must include the following:

(1) The name of the witness; (2) the entity that the witness is representing; (3) which proposals the witness wishes to address in testimony; (4) a brief summary of the witness' remarks; and (5) the preference, if any, for the date and time on which the witness wishes to testify. While the Board will attempt to accommodate the witnesses as to time and date of appearance, it cannot guarantee that it will be able to honor all such preferences. Moreover, the Board intends to allocate the available time according to the subject matter of the proposals. Witnesses should therefore be selective in identifying the topics they wish to address.

Depending on the number of requests received, participants may be limited to a ten-minute oral presentation; they will be advised in writing of the time scheduled for their presentation.

The Board reserves the right to limit the number of participants and to select in its discretion those persons who may make oral presentations, if it receives more requests for participation than can be accommodated in the time available. Additionally, the Board also reserves the right to establish panels of participants for the presentations. If it is necessary to impose such limitations, the Board will take steps to ensure that the designated witnesses or panels constitute a representative sample of the types of participants and of the views of those who wish to participate.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 87-23654 Filed 10-19-87; 8:45 am]

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federal register

Tuesday
October 20, 1987

Part IV

Department of Agriculture

Food and Nutrition Service

7 CFR Part 253

Food Distribution Program on Indian Reservations; Proposed Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 253

Food Distribution Program on Indian Reservations

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Food and Nutrition Service is proposing to revise the regulations for the Food Distribution Program on Indian Reservations to: (1) Increase program accountability; (2) reduce administrative burdens placed upon State agencies; and (3) reconstruct and better organize subject areas.

DATE: To be assured of consideration, comments must be received on or before January 19, 1988.

ADDRESS: Comments should be sent to: Susan Proden, Chief Program Administration Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Alexandria, Virginia 22302, (703) 756-3660. Comments in response to this proposed rule may be inspected at 3101 Park Center Drive, Room 506, Alexandria, Virginia during normal business hours (8:30 a.m. to 5:00 p.m., Mondays through Fridays).

FOR FURTHER INFORMATION CONTACT: Susan Proden, Chief, Program Administration Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Alexandria, Virginia 22302, (703) 756-3660.

SUPPLEMENTARY INFORMATION: This action has been reviewed under Executive Order No. 12291 and has not been classified major because it does not meet any of the three criteria identified under the Executive Order. Compliance with the provisions in the rule will not have an annual effect on the economy of $100 million or more, nor will it cause a major increase in costs or prices for consumers, individual industries, Federal, State or local governments, or geographical regions. This action would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This action has also been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612). Mrs. Anna Kondratas, Administrator, Food and Nutrition Service, has certified that this action will not have a significant economic impact on a substantial number of small entities.

The reporting and recordkeeping requirements contained in this regulation are subject to review by the Office of Management and Budget (OMB). The OMB approved control number is 0584-0071.

The program is listed in the Catalog of Federal Domestic Assistance under No. 10.567 and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. (Cite 7 CFR Part 3015, Subpart V and 49 FR 22675, May 1, 1984).

The regulations governing the Food Distribution Program on Indian Reservations establish the responsibilities of the Food and Nutrition Service (FNS) and State agencies for the distribution of federally acquired food to eligible households living on or near Indian reservations. FNS donates foods to help meet the nutritional needs of low-income households on Indian reservations. U.S. Department of Agriculture (USDA) commodities are distributed to eligible households on a monthly basis from distribution sites. Participating agencies are either Indian tribal organizations (ITO) or agencies of State government. The distributing agencies order food items from the list of approved USDA commodities, taking into account local Indian household food preferences.

FNS regional offices and State agencies have recommended the inclusion of certain program matters in this rulemaking. These are: (1) Procedures for assessing and handling claims against households; (2) procedures for audit resolution; (3) procedures for dealing with the misuse of program funds, assets or property; and (4) procedures for administrative disqualification hearings. Furthermore, FNS is proposing procedures for disqualification from participation in the Food Distribution Program on Indian Reservations. Although these new sections will place some additional requirements upon State agencies and ITOs, they will improve program accountability. The resulting improvement in program operations should outweigh any additional paperwork generated by these new requirements.

Many sections of the current regulations (published June 19, 1979) are very closely patterned after Food Stamp Program regulations. Because the two programs differ in the manner in which they deliver benefits, this has led to some administrative difficulties. The proposed revisions remove unnecessary requirements currently imposed upon State agencies and ITOs and place program requirements in a more logical order. The proposed changes should improve administration and operation of the Food Distribution Program on Indian Reservations.

Definitions

The current definition of "Indian tribal household" specifies that one *adult* member must be recognized by *the* ITO. FNS is proposing that this definition be expanded to allow State agencies to serve tribal members of another tribe. It has been common practice in the Food Distribution Program on Indian Reservations to permit such arrangements, especially in cases where the participating household resides closer to an ITO other than its own. FNS has implemented such policies in a few cases where the State agencies involved have demonstrated that sufficient precautions against dual participation are in place. Although not included in this proposed rule, FNS has also been asked to include households where the only Indian household members are minors, as eligible FDPIR households. This is important for those families where the only adult member has died or is no longer living with the family. Under the current definition, these households who previously receive Food Distribution Program on Indian Reservations benefits can no longer participate in this program. These households may, however, be eligible to receive food assistance under the Food Stamp Program. FNS is soliciting comments to determine how extensive this problem is and whether others believe that a change in the definition is necessary.

Authority for Distribution of Commodities

Section 253.3(a) of the June 19, 1979, regulations is taken directly from the Food Stamp Act of 1977, as amended, which authorizes the distribution of commodities under certain conditions where the Food Stamp Program is in operation. Included in this section is the distribution of commodities for the purpose of disaster relief and for the Commodity Supplemental Food Program. FNS believes that this passage is inappropriate for inclusion in the Food Distribution Program on Indian Reservations regulations and therefore proposes its removal.

FNS proposes to remove the comparison of the Food Distribution Program on Indian Reservations food package to Food Stamp Program

benefits as stated in § 253.3(d). Although the food package is indeed a nutritional alternative to Food Stamp Program benefits, there is no purpose to making such comparisons in regulations.

Application Procedures and Program Implementation

In the current rules, the procedures for filing an application by an ITO wishing to participate in the Food Distribution Program on Indian Reservations are contained in § 253.4(d) and the requirements for program implementation in § 253.5(m). The proposed rules consolidate these two subject matters into one section. Additionally, FNS proposes that the current § 253.4(c), Qualification as a Reservation, be incorporated as one facet of the application process.

Current regulations allow for a waiver of the urban place provision. This provision excludes tribal households living in urban areas outside the reservation from participating in the Food Distribution Program on Indian Reservations. It was the intent of the June 19, 1979 rules to provide Food Distribution Program services to Indian tribal households living near the reservation. This is consistent with other Federal provisions that allow for the delivery of services beyond reservation boundaries. In addition, the urban place ruling is applicable in Oklahoma despite the fact that Indian land areas there do not conform to the regular reservation patterns observed in other States. However, authority for granting new waivers for tribes in Oklahoma (7 CFR Part 254) expired September 30, 1985. Although the proposed rule does not change FNS' current policy on urban place participation, FNS is re-evaluating this policy.

FNS is considering several possible options which would allow urban places to participate in the Food Distribution Program on Indian Reservations while maintaining program accountability and controlling dual participation in urban places. Options being considered include: (1) Allowing any urban place to participate provided that the State agency can meet certain requirements to insure program accountability and adequate controls for dual participation; and (2) keeping the current 10,000 population limit, but relaxing the criteria used for granting waivers to the limitation. Comments on whether the current urban place participation provision should be changed are hereby solicited. Comments should include a rationale and possible requirements which could be implemented to ensure program accountability and dual participation controls. Comments on whether to reinstate the waiver authority (currently expired) for Oklahoma are hereby solicited as well.

Tribal Capability

FNS' determination of an ITO's capability to administer the Food Distribution Program on Indian Reservations is a critical function. Under the June 19, 1979 rules, this subject is within the body of section 253.4 entitled "Administration". These proposed revisions separate the tribal capability provisions to provide greater clarity. In addition, another factor for determining ITO capability has been included. This new evaluation factor will allow FNS to consider an ITO's ability to operate the program within budgetary limitations. This review of the ITO's previous financial management record would become part of the approval process.

Program Administration

The June 19, 1979, regulations outline three conditions that govern which agency will administer the Food Distribution Program on Indian Reservations: (1) An ITO will administer the program if determined by FNS to be capable of effective and efficient program administration; (2) an agency of State government must administer the program if FNS determines the ITO incapable; and (3) an agency of State government may administer the program on behalf of any tribe whether or not the tribe is determined capable, if agreed to in writing by the tribe. However, the June 19, 1979 regulations overlooked one aspect of program administration which is a very common practice. An ITO that has been determined capable by FNS may administer the program for another tribe. However, this arrangement must be agreed to in writing by both tribes, and can be done regardless of whether the tribe that wishes to have another ITO operate the program has undergone a capability determination. Therefore, FNS proposes to include this practice as another alternative for program administration.

Under § 253.4, Administration, the current regulations give specific examples regarding the contracting of certain program functions. It is proposed that these examples be eliminated, as they appear to be a source of confusion for program administrators. However, the regulations will still retain the provision that the State agency shall not contract responsibility for certification activities such as interviews or eligibility determinations with an ITO that has not been determined capable.

Plan of Operation

Section 253.5, State agency requirements, is a very lengthy section addressing those items to be included in the State agency's plan of operation. The structure of this section has made it difficult for State agencies to clearly understand what items they need to address in their plans. To correct this situation, FNS is proposing that State agency requirements, except for plans of operation, be included as part of a revised § 253.6, Program administration. FNS is also proposing a new section, plan of operation, and is further separating the plan requirements into two main categories: (1) Submission and approval; and (2) Contents of the plan of operation. The required items under the contents of the plan of operation will cross-reference where those items appear in the regulations. In revising this section, a number of substantive changes are proposed.

Under Submission and approval, FNS proposes to revise § 253.5(a) by requiring State agencies to submit their program plans of operation at the time the budgets are submitted. This is necessary since funds cannot be disbursed to State agencies until both documents are approved. Additionally, FNS is proposing to combine paragraphs § 253.5(a)(1) (i) and (iii). State agency requirements on consultation will be addressed under the new § 253.6(b)(6) of this section. In addition, FNS is proposing that consultation by the State agency with the ITO be removed as one of the plan of operation components.

Changes being proposed under the Contents of the plan of operation section are described in detail in the following paragraphs:

As the result of restructuring the regulations, three program areas have been moved to the redesignated § 253.17, "Commodity control, storage and distribution". These areas are: (1) The value of commodities; (2) the prohibition of distribution of commodities to further political interest; and (3) the prohibition against payments in return for the receipt of commodities.

Section 253.5(c) requires that State agencies follow the Office of Personnel Management's (OPM) Merit System when hiring certification staff. FNS has determined that this requirement should be removed from the regulations. ITOs currently develop their own personnel standards for hiring staff. Additionally, the agencies of State government which administer the program are required to follow the State personnel standards. FNS believes that such standards are satisfactory and they should be used

rather than OPM standards. FNS proposes the State agencies be required to employ sufficient personnel to carry out the various duties in administering the Food Distribution Program on Indian Reservations. In addition, State agencies must develop a training program for Food Distribution Program on Indian Reservations staff to keep employees up-to-date on program policies.

Through discussions with FNS regional offices, State agencies and ITOs, FNS has become aware that the majority of the bilingual requirements in § 253.5(d) may be unnecessary. The majority of people living on or near most Indian reservations speak English. One exception may be elderly persons. FNS has learned that when bilingual services are needed, other tribal members who speak English usually are available to act as interpreters. Because of this situation, § 253.11 of the proposed rules would require only that the State agency or ITO arrange for a bilingual speaker or an interpreter when an applicant does not speak English.

These regulations propose that all outreach and referral activities required under § 253.5(e) be deleted. The availability of this program is now widely known by Indians, social workers, State personnel and tribal officials. Furthermore, from analysis of the tribes eligible for the Food Distribution Program on Indian Reservations, it appears that this program is reaching the vast majority of persons who can qualify. Therefore, it would appear that outreach activities are no longer necessary.

FNS is proposing to remove § 253.5(f)(1), 253.5(f)(2) and 253.5(f)(3) from the regulations for the following reasons: (1) Paragraph 253.5(f)(1) gives specific examples of subject areas for training programs. These examples are being removed because FNS believes that specific training needs can now be determined based on program deficiencies and new policy changes. Thus, examples are no longer needed. State agency training requirements are now addressed in § 253.6(b)(2); (2) paragraph 253.5(f)(2) addresses public attendance at formal certification training sessions. FNS believes that this requirement is not useful; and (3) training effectiveness currently addressed in paragraph § 253.5(f)(3) is now addressed in the proposed § 253.6(b)(3).

Under the proposed regulations, a description of planned nutrition education efforts will become one of the components of the plan of operation. The specific requirement that the State agency must ensure that nutrition information is conveyed to households is addressed under § 253.6(b)(4).

Section 253.5(h), Records and reports, is being moved to § 253.6(b)(9) under these proposed regulations.

One of the requirements in the plan of operation is for State agencies to describe the system used to determine the food preferences of households. Food preferences reflect not only individual choices but also cultural preferences. In order to plan these needs, as well as to maintain the nutritional integrity of the program, it is necessary to collect this data. The manner in which the data is now collected is not uniform among State agencies and is often collected and reported sporadically. Additionally, this information is not always conveyed to the FNS Headquarters staff who can update the food package based on the preferences of households. FNS proposes that food preference data be submitted to FNS. Furthermore, FNS would especially like to receive comments or suggestions on the collection format and use of food preference data for future program improvements.

Program Monitoring

Section 253.5(i), Program monitoring, is proposed as a separate section (§ 253.8).

Audits and Investigations

FNS is proposing that § 253.5(j), Investigations and complaints, become a separate section. This section has been expanded to require each State agency to provide for an independent audit of Food Distribution Program on Indian Reservations financial operations. These audits will be conducted in accordance with the auditing provisions set forth under the Uniform Federal Assistance Regulations (Title 7 CFR Part 3015, Subpart I) which implement OMB Circular A-128. The proposed rules also spell out the requirements that State agencies and ITOs make records available to USDA's Office of the Inspector General for auditing purposes. These proposed revisions are now addressed under § 253.9.

Sanctions (§ 253.5(k)) and Appeals, (§ 253.5(l)) are being moved to Sanctions and liabilities, (§ 253.18) under these proposed rules.

Civil Rights

The nondiscrimination clause (§ 253.5(a)(2)(iv)) is addressed under a new section entitled, Civil Rights, (§ 253.10). The nondiscrimination requirements are those required by Departmental regulations for programs receiving Federal financial assistance.

Eligibility of Households

FNS is proposing two important changes in the eligibility section. These changes would ensure consistency with other FNS food programs. First, it is proposed that the Food Distribution Program on Indian Reservations adopt a maximum gross income limit of 130 percent of the Federal poverty guideline. The second change, to revise the resource standards, is discussed in detail later in this preamble.

Current procedures employ a net income basis for determining income. The purpose of the new 130 percent gross income limit is to bring about consistency with other FNS programs including the Food Stamp Program.

Table 1, *Food Distribution Program on Indian Reservations—Monthly Income Standards*, shows a comparison between the current net monthly income standards and the 130 percent gross monthly income standards.

It is not anticipated that this change in the income eligibility standards would have a substantial effect on households participating in the program. Although there are little data on characteristics of housholds that receive commodities, FNS believes the proposed revision in the income eligibility standards is not likely to result in any significant change in the number of participants in the Food Distribution Program on Indian Reservations. This is because the number of eligible households under either income test is virtually the same.

Table 1.—FOOD DISTRIBUTION PROGRAM ON INDIAN RESERVATIONS—MONTHLY INCOME STANDARDS

[Effective October 1, 1987]

Household size	Net income limit	Gross income limit
1	$561	$596
2	719	802
3	877	1,008
4	1,036	1,214
5	1,194	1,420
6	1,352	1,625
7	1,511	1,831
8	1,699	2,037
Each additional member	+$159	+$206

The second proposed change in eligibility is to remove the actual dollar amount citation of the maximum resource standard for households. These rules will continue to state that the Food Stamp Program resource limits will be used as the resource limits for the Food Distribution Program on Indian Reservations. Currently, the maximum resource linit cannot exceed $1,750 for

the household; except that, for households of two or more members which include a member age 60 or over, resources cannot exceed $3,000. The purpose of this proposal is not to reduce program benefits. Rather, this proposed revision will make certification less complex, less error prone and consistent with the Food Stamp Program. This provision will ensure that most households are treated similarly in the two programs. This is useful to facilitate switching from the Food Stamp Program to the Food Distribution Program on Indian Reservations. Both the resource standards and income standards for the Food Distribution Program on Indian Reservations would be automatically revised as the Food Stamp Program's standards are revised.

The proposed rules also eliminate the deductions for 20 percent earned income and the cost of child care or dependent care in § 253.6(f). These deductions were allowed in the past so that a household's income (gross income minus allowable deductions) could be compared to the net income eligibility standards. Because FNS is proposing to use a gross income eligibility standard these deductions are no longer applicable.

Certification of Households

Section 253.7 of the current regulations gives State agencies a series of requirements and procedures to follow to determine household eligibility. In many cases, the requirements have proved to be too rigid and add to the burden placed on local eligibility workers.

Rather than prescribe all the details of the certification procedures, FNS is proposing a simplified eligibility determination by removing all requirements which are no longer applicable under the proposed gross income eligibility standards, (e.g. net income deductions). The application for assistance would contain questions about the household members, work status and how much income and resources the household has available. The State agency would verify the income information, and if the household is below the maximum income limit (proposed to be 130 percent of the Federal poverty guidelines), the household would be certified for six months. However, the State agency has the responsibility to verify questionable information. Shorter certification periods continue to be required for househods with unstable income.

FNS proposes to eliminate some burdensome requirements in § 253.7, Certification of households. Instead, FNS is requiring only that: (1) The State agency develop an application form acceptable to FNS; (2) the household must file and sign an application and be interviewed; and (3) gross non-exempt income must be verified. State agencies would also verify any information that is questionable. In addition, the time limit for action on an application would be increased from 7 days to 14 days. For expedited service, households may be served immediately, but the State agencies would not be required to serve such households in one calendar day. The State agency would have two working days to provide commodities to households in immediate need. These time limits enable State agencies to provide service to the entire caseload while also allowing fast service for those in special need.

In § 253.7(a), paragraphs (a)(1) through (a)(10) are substantially revised in the proposed regulations. Although the basic requirements of certification are retained, numerous constraining details are removed. The next few paragraphs explain these proposed changes in more detail. Use of examples in the section is also eliminated because examples of situations are not necessary. In some cases, the examples may have added more confusion than clarification. The proposed regulations should allow the State agencies greater ease in making an eligibility determination. Households should also benefit from the simpler determination of eligibility.

In § 253.7(b), two important changes are proposed. First, the example of what is considered anticipated income is removed. The income definition remains but is moved to § 253.11, Eligibility of households.

Commenters have advised FNS that the concept of counting only income which is "reasonably anticipated" is difficult to apply. However, few other concepts of available income are flexible enough to be fair to households and also simultaneously capture all income the household has. Therefore, we are proposing to retain the current policy on determining income. FNS invites commenters to suggest other feasible, simple approaches. Retrospective accounting using only past income to determine eligibility such as annual income tax statements, is another option being considered.

Second, the determination of what is considered income from self-employment is simplified. Self-employment income is unique. In each case, the goal of the certifier is to determine the amount of income earned after the cost of doing business is subtracted from gross receipts. The proposed regulations eliminate details about determining self-employment income since each case is different. Eligibility workers must exercise professional judgment within the scope of the regulations and State agency procedures to decide the amount of income a self-employed person earns. These proposed regulations give State agencies the flexibility in developing their own procedures for determining self-employment income. However, each State agency must use the basic regulations for determining self-employment income. This requirement will ensure equity among individual cases.

Overissuance of Commodities

FNS Headquarters has received many requests from regional offices and State agencies to provide regulatory procedures for establishing and handling claims against households. FNS is considering three options to recover the value of the USDA commodities improperly received by households: (1) Automatic reduction of program benefits; (2) demand letters requesting payment from the head of the household; and (3) demand letters requesting payment with *voluntary* benefit reductions for those households who wish to repay a claim with their commodity package. The Department believes that all of these options would tighten accountability and minimize program losses. FNS is soliciting comment concerning these options as well as suggestions for their implementation. FNS is also interested in comments concerning other available options for collecting claims against households.

First, FNS is considering an automatic reduction of program benefits similar to the one currently used in the Food Stamp Program. Under this option, program benefits would be reduced by the amount of USDA commodities normally distributed to a one person household. One exception would be that the one-or two-person households, who receive smaller commodity packages, would not be subject to automatic benefit reduction. However, one- and two-person households would be expected to pay for excess benefits. Threat of reductions, or actual reductions, would increase program integrity, reduce overissuance of commodities and encourage households to accurately report household information. FNS is particularly interested in comments which carefully analyze these important issues.

A second option, and the one where specific procedures have been written into the proposed regulation, is to establish a "demand letter' system for repayment of claims. FNS is proposing

to establish claims against households that have received more USDA commodities than they were entitled to receive, except for claims resulting from procedural errors. FNS is proposing that housholds be required to pay for the USDA commodities in full or with scheduled payments or be disqualified from program participation. State agencies may, however, postpone or readjust payment schedules for housholds that have no income or resources or where the houshold would otherwise experience a hardship. Also, no claims would be established for a household that is otherwise eligible, that forgets to sign the application form.

The proposed rule also limits the period of mandatory claims collection to one year. Since program participation is small, as compared to other FNS programs, we believe this timeframe is adequate and will prevent the collection of old claims. However, if a State law authorizes the legal pursuit of these types of claims beyond the one year limit set in the regulations. ITOs can seek appropriate judicial relief in State or local courts and pursue these claims for up to six years. Therefore, State agencies may suspend collection after one demand letter is written in cases where the household cannot be located or the cost of pursuing the claim would likely exceed the amount to be recovered.

In order to ensure that collection of household claims proceeds properly when the household can pay but does not, FNS proposes to disqualify the individual household member responsible for the claim action.

FNS also proposes that in cases where claims result from State agency certification or issuance errors, individuals will not be subject to disqualification. Under the proposed rule, State agencies would be required to regularly and actively review casefiles for errors and any losses sustained due to these errors must be paid by the State agency. For example, if a State erroneously issues commodities at twice the allowed distribution rate, the Department would expect restitution for this overissuance. Any systematic errors found as a result of any Federal, State or local review will also be paid by the State agency. Although State agencies will be required to pay these claims to FNS, State agencies have the option of attempting collection of these claims from the household. However, since the errors were made without the knowledge of the household, individuals could not be disqualified for nonpayment of such claims.

The third option which FNS is considering is a combination of options one and two, previously described. This option would use the "established" demand letter system for repayment of claims according to the procedures specified in these proposed regulations. However, this option would allow participating households to *voluntarily* repay an overissuance claim by having its benefits reduced. The benefit reduction procedures would be the same as those described under the automatic benefit reduction system explained in option two above.

Any of these claims collection procedures, using demand letters and disqualification with or without voluntary benefit reduction, or using automatic benefit reduction, may be implemented in the final rules. The Department, therefore, would like commenters to state which system they believe is better and provide their rationale.

Agency Conferences and Fair Hearings

These two topics have been removed from § 253.7, Certification of households, and combined to form one § 253.14. The limitations on the types of disagreements covered by agency conferences have been removed to allow any agency conferences to be used for any State agency action which has adversely affected any household. Currently agency conferences are used solely for immediate resolution for eligibility denials. Additionally, FNS believes that the listing of persons who may attend an agency conference is unnecessary. Therefore, this list has been removed. The proposed changes should simplify agency conference procedures and hopefully encourage their use to settle any problems.

The timeframe required to complete the fair hearing process has been retained at 60 days. However, the proposed rules eliminate the intermediate timeframes established by current rules. This provision will allow more State agency flexibility in carrying out fair hearing.

Disqualification Hearings

FNS proposes a new section entitled, Disqualification for misrepresentation or failure to pay an established claim (§ 253.15). Under these proposed rules, household members may be disqualified from six to twelve months if the household willfully or recklessly misrepresents its household circumstances in order to receive more benefits or simply fails to pay an established claim against the household. This may be done by administrative action or by referral to a court of appropriate jurisdiction. The Department believes that individuals being subjected to possible administrative disqualifications should have a means for presenting the households circumstances through a formal administrative disqualification hearing. The proposed procedures are basically those procedures currently used in the Food Stamp Program for "intentional program violations" (§ 273.16). References to "intentional program violations" have been replaced with "misrepresentation or failure to pay a claim" to conform to the Food Distribution Program on Indian Reservations definitions.

Administrative Funds for State Agencies

Section 253.9(a) of the current regulations states that FNS will make available up to 75 percent of approved State agency administrative costs and that payment of funds in excess of 75 percent will be based on compelling justification that such additional amounts are necessary for the effective operation of the Food Distribution Program on Indian Reservations. Compelling justification may include, but not be limited to, such factors as the need for a larger Federal contribution during a State agency's first year of program operation. FNS is proposing that compelling justification include more than just a statement that no other funds are available to operate the program. Justification for increased funding must document to the satisfaction of FNS why the Federal share of funding must be more than 75 percent of approved costs. FNS regional offices shall assess waiver requests. Tribes must demonstrate that all funds that could be used to meet the required 25 percent share of administrative costs are dedicated to *necessary* tribal expenditures. The proposed rules also include examples of financial documentation that have been accepted by FNS in the past.

FNS is also proposing to strengthen the regulations by adding that FNS will disapprove any budget, or portion thereof, in which operating expenses exceed 30 percent of the value of food to be distributed to participants.

The establishment of the 30 percent guideline is based on FNS' review of the budgetary guidelines that other FNS programs used to determine administrative costs. FNS also considered that most reservations are located in rural settings, which often results in increased program operation and transportation costs. With very few exceptions, the budgets submitted by State agencies over last three years have fallen below the 30 percent guideline. FNS believes that these

reasons provide sufficient justification for setting the operating expense guideline at 30 percent rather than at a lower level.

The priority for approving applications for financial assistance (§ 253.9(d)(2)) of the current regulations submitted by State agencies for administrative funds has been simplified under this proposal. The proposed language provides that FNS will make payments of funds to ongoing programs first, and then to all other applicants, in the order the applications are received and approved by FNS (§ 253.16).

Commodity Control, Storage and Distribution

The commodity control, storage and distribution requirements have been reorganized and shifted to § 253.17. Several program requirements which pertain to the distribution of commodities that were listed under § 253.8(c), Storage facilities and practices, have been more appropriately placed under Distribution, now § 253.17(d). Also under new § 253.17(c), the requirement that posters be displayed is removed. The posters advised program participants to accept only those commodities in such quantities as will be consumed by them. While the display of such posters may be beneficial, FNS does not believe it is necessary to regulate such a requirement.

Sanctions and Liabilities

FNS is proposing that a new section be created, entitled, Sanctions and liabilities, which will contain the following program areas: (1) Sanctions; (2) Appeals, and (3) Embezzlement, misuse, theft or obtainment by fraud of commodities and commodity-related funds, assets, or property in the Food Distribution Program on Indian Reservations. Of these program areas to be included under § 253.18, only the paragraphs which address embezzlement, misuse, theft or obtainment by fraud of commodities are new to the regulations. FNS believes that it is necessary to strengthen the regulations by including penalties that can be taken against any individual who commits fraud, as authorized by section 1334 of Pub. L. 97–98.

List of Subjects in 7 CFR Part 253

Administrative practice and procedure, Food assistance programs, Grant programs, Social programs, Indians, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, Part 253 is proposed to be revised to read as follows:

PART 253—ADMINISTRATION OF THE FOOD DISTRIBUTION PROGRAM ON INDIAN RESERVATIONS

Sec.
253.1 General purpose and scope.
253.2 Definitions.
253.3 Authority for distribution of commodities.
253.4 Application procedures and program implementation.
253.5 Tribal capability.
253.6 Program administration.
253.7 Plan of operation.
253.8 Program monitoring.
253.9 Audits and investigations.
253.10 Civil rights.
253.11 Eligibility of households.
253.12 Certification of households.
253.13 Overissuance claims.
253.14 Agency conferences and fair hearings.
253.15 Disqualification hearings.
253.16 Administrative funds for State agencies.
253.17 Commodity control, storage and distribution.
253.18 Sanctions and liabilities.

Authority: 91 Stat. 980 (7 U.S.C. 2011–2027); Pub. L. 97–98, section 1336.

§ 253.1 General purpose and scope.

This part discribes the terms and conditions under which: Commodities (available under Part 250 of this chapter) may be distributed to eligible households on or near all or any part of any Indian reservation; the program may be administered by capable Indian tribal organizations or agencies of State government; and funds may be obtained from the Department for the costs incurred in administering the program. This part also provides for the concurrent operation of the Food Distribution Program on Indian Reservations and the Food Stamp Program when such concurrent operation is requested by an ITO.

§ 253.2 Definitions.

(a) "Department" means the U.S. Department of Agriculture.

(b) "Exercises governmental jurisdiction" means the active exercise of the legislative, executive or judicial powers of government by an ITO.

(c) "Food Distribution Program on Indian Reservations" means a food distribution program for households on Indian reservations operated under authority of section 4(b) of the Food Stamp Act of 1977 (7 U.S.C. 2013(a)) and section 1304(a) of Pub. L. 95–113, as amended.

(d) "FNS" means the Food and Nutrition Service, U.S. Department of Agriculture.

(e) "Indian tribal household" means any household in which at least one adult member is recognized by an ITO as a tribal member.

(f) "Indian tribal organization (ITO)" means:

(1) The recognized governing body of any Indian tribe on a reservation; or

(2) The tribally recognized intertribal organization which the recognized governing bodies of two or more Indian tribes on a reservation authorized to operate the Food Stamp Program or Food Distribution Program on Indian Reservations on their behalf.

(g) "Indian tribe" means:

(1) Any Indian tribe, band, or other organized Indian group (for example, a Rancheria, Pueblo, or colony) and including any Alaska Native village or regional or village corporation (established according to the Alaska Native Claims Settlement Act (85 Stat. 688), which is on a reservation and recognized as eligible for Federal programs and services provided to Indians because of their status as Indians; or

(2) Any Indian tribe or band on a reservation holding a treaty with a State government.

(h) "Reservation" means the geographically defined area of areas over which an ITO exercises governmental jurisdiction so long as such area or areas are legally recognized by the Federal or State government as being set aside for the use of Indians.

(i) "State" means any one of the fifty States, the District of Columbia, and the reservation of an Indian tribe whose ITO meets the requirements of the Food Stamp Act of 1977 for participation as a State agency.

(j) "State agency" means:

(1) The agency of State government, including the local offices thereof, which enters into an agreement with FNS for the distribution of commodities on all or part of an Indian reservation; and

(2) The ITO of any Indian tribe, determined by the Department to be capable of effectively administering a Food Distribution Program on Indian Reservations, which enters into an agreement with FNS for the distribution of commodities on all or part of an Indian reservation.

(k) "Urban place" means those towns or cities with a population of 10,000 or more.

§ 253.3 Authority for distribution of commodities.

(a) *Availability of commodities.* Commodities acquired for donation under authority of section 416 of the Agricultural Act of 1949, Pub. L. 81–439, 63 Stat. 1058 (7 U.S.C. 1431), as

amended; section 32 of Pub. L. 74-320, 49 Stat. 744 (7 U.S.C. 612(c)), as amended; section 709 of the Food and Agricultural Act of 1963, Pub. L. 89-321, 79 Stat. 1212 (7 U.S.C. 1446 a-1), as amended; and section 4(a) of the Agriculture and Consumer Protection Act of 1973 as amended by section 1304 of the Food and Agriculture Act of 1977, Pub. L. 95-113, 91 Stat. 980 (7 U.S.C. 612 note) may be made available under Part 250 of this chapter for distribution to households in accordance with the provisions of that part and the additional provisions and requirements of this part.

(b) *Concurrent or separate food program operation.* Distribution of commodities under this part, whether or not the Food Stamp Program is in operation, cannot be made unless an ITO has submitted a completed application for the Food Distribution Program on Indian Reservations on all or part of a reservation to FNS.

(1) Except as provided in paragraph (b)(2) of this section, when the Food Distribution Program on Indian Reservations is operating on all or part of a reservation, all eligible households within those boundaries may participate in the Food Distribution Program on Indian Reservations or, if the ITO has elected concurrent operation of the Food Stamp Program, those eligible households may elect to participate in either program, without regard to whether the household is an Indian tribal household.

(2) FNS may determine, based on the number of non-Indian tribal households located on all or part of a reservation, that concurrent operation is necessary. When such a determination has been made, all households residing in such areas may apply to participate in either the Food Stamp Program or the Food Distribution Program on Indian Reservations.

(c) *Food package.* Households eligible under this part shall receive a monthly food package based on the number of household members. The food package offered to each household shall consist of a quantity and variety of commodities made available by the Department to provide eligible households with an opportunity to obtain a more nutritious diet. The food package shall be offered to eligible households by the State agency and shall contain a variety of foods from the four food groups: Meat, vegetable-fruit, milk and bread-cereal. FNS shall periodically notify State agencies of the kinds of commodities it proposes to make available based, insofar as practicable, on the preferences of eligible households as determined by the State agency. In the event one or more of the proposed commodities cannot be delivered, the Department shall arrange for delivery of a similar commodity within the same food group, whenever possible.

§ 253.4 Application procedures and program implementation.

(a) *Filing the application and qualifying to participate.* Any ITO which desires to participate in the Food Distribution Program on Indian Reservations shall file an application with the FNS regional office serving the State or States in which the reservation is located. The ITO of a traditionally established Indian reservation will qualify for participation under the provisions of this part, when that ITO files an application which demonstrates to FNS the status of an area as a traditionally established reservation, and shows that it is capable of program administration to the satisfaction of FNS. *Provided that* sufficient funds have been appropriated to fully carry out the provisions of this part for each new applicant ITO not currently participating in the program. Should it appear that sufficient funds have not been appropriated, FNS shall not establish new food distribution programs if it is expected to interfere with maintenance of assistance already provided to participating ITOs. For purposes of this Part, traditionally established reservation means the geographically defined area(s) currently recognized and established by Federal or State treaty or by Federal statute whereby such geographically defined area(s) is set aside for the use of Indians. Where such established area(s) exist, the appropriate ITO is presumed to exercise governmental jurisdiction, unless otherwise determined by FNS.

(b) For any area which does not qualify as a traditionally established reservation, the applicant ITO must prove reservation status and sufficient funds, as explained in paragraph (a) of this section, must be available for newly applying ITOs. Reservation status shall be granted only when there is:

(1) A geographically defined area(s) which has received legal recognition from the Federal or a State government as an Indian area;

(2) A tribal organization as that term is defined in § 253.2, operating within its boundaries; and

(3) The tribal organization must exercise governmental jurisdiction within the defined geographic boundaries.

(c) *Geographic reservation boundaries and near areas.* The ITO shall specify whether it wants the program on all or part of the reservation, and if on part, shall describe the geographic boundaries of the relevant part(s). Additionally, if the ITO wishes to serve areas near the reservation, the ITO shall describe the geographic boundaries of the near area(s) for FNS review and approval. Any urban place inside a reservation can be served by the Food Distribution Program on Indian Reservations. Any urban place outside reservation boundaries may not be served. However, an ITO or State agency can request an exception to the limitations on urban places based on justification of need provided by the ITO or State agency as determined appropriate by FNS. In making its decision, FNS shall rely on relevant factors including any anticipated budgetary constraints and FNS' determination of whether the Food Stamp Program is available to serve participants in the area in question.

(d) *Additional information.* FNS shall promptly advise the State agency of the need for additional information if an incomplete application is received. The State agency shall also provide any other information requested by FNS.

(e) *FNS acknowledgment.* Properly addressed applications shall be acknowledged by the FNS regional office in writing within five working days of receipt.

(f) *Program implementation.* FNS shall determine tribal eligibility and capability to administer the Food Distribution Program on Indian Reservations within 60 days of the receipt of a completed application. Such determination reviews shall be conducted only if funds are available to FNS to implement new programs and cover the costs to conduct the reviews. FNS shall advise the applicant ITO of the review determination within the 60-day timeframe.

(1) The ITO shall have 120 days from FNS' determination of capability to submit and have approved a budget and a plan of operation, and to commence program operations.

(2) If FNS determines that an ITO is not capable of administering the Food Distribution Program on Indian Reservations:

(i) FNS shall direct an agency of State government to begin or continue program operations, to submit a new plan of operation and budget, and to commence program operations within 120 days of the final FNS determination of ITO capability;

(ii) The ITO may, if so desired, elect to have another capable ITO administer the program and carry out the responsibilities of the State agency. Such arrangements must be agreed upon

by the capable ITO and must be committed to in writing.

(3) Extensions to the above 120-day timeframe may be granted by FNS to State agencies with justification.

(4) In those cases where an ITO does not wish to administer the program, but does wish to receive program benefits, the ITO may enter into an agreement with an agency of State government or with an ITO determined capable by FNS to administer the program on its behalf. Where such written agreements have been made, no capability determination of the applicant ITO need be conducted by FNS.

(The information collection requirements contained in paragraphs (a), (c) and (d) were approved by the Office of Management and Budget under control number 0584-0071)

253.5 Tribal capability.

(a) *Evaluation factors.* In determining whether the ITO on a given reservation is capable of effectively and efficiently administering the Food Distribution Program on Indian Reservations, FNS shall consult with other sources, such as the Bureau of Indian Affairs, and shall consider the ITO's experience, if any, in operating other government programs and its management and fiscal capabilities. Fiscal capabilities include whether the ITO has outstanding, unpaid claims. Other factors for evaluation include, but are not limited to, the ITO's ability to:

(1) Order and properly store commodities;

(2) Certify eligible households;

(3) Arrange for physical issuance of commodities;

(4) Keep appropriate records and submit required reports;

(5) Budget and account for administrative funds;

(6) Determine the food preferences of households;

(7) Conduct on-site reviews of certification and distribution procedures and practices;

(8) Operate the program within budgetary limitations; and

(9) Critically monitor its own operations, design effective corrective action plans and take appropriate corrective action.

(b) *Training and technical assistance.* FNS shall, if requested by a State agency, provide the State agency's designees with appropriate training and technical assistance to prepare the State agency to commence program administration.

§ 253.6 Program administration.

(a) *FNS responsibilities.* (1) Within the Department of Agriculture, FNS shall be responsible for the Food Distribution Program on Indian Reservations.

(2) FNS shall determine whether an applicant ITO is capable of effective and efficient administration of the Food Distribution Program on Indian Reservations on or near the reservation in question.

(3) FNS shall be responsible for approving a joint request made by an ITO and a State agency that a single State agency administer the program on all or part of the Indian reservation in those cases where the Indian reservation boundaries cross State lines.

(b) *State agency responsibilities.* (1) The State agency may contract program functions, but in all cases, the State agency remains responsible for program administration, for proper use of commodities and program administrative funds, and is liable for improper use or distribution of commodities and for misuse of funds. The State agency may wish to contract program functions to a local ITO which is not responsible for program administration. However, the State agency may not contract certification activities of eligibility determinations to an ITO that has been determined incapable of program administration by FNS.

(2) The State agency shall employ sufficient personnel to carry out the various duties involved in administering the Food Distribution Program on Indian Reservations. These duties and responsibilities shall include clerical, certification, issuance, managerial and monitoring activities.

(3) The State agency shall institute a training program for Food Distribution Program on Indian Reservations employees to cover all aspects of the program. The content of the training material shall be reviewed and revised periodically to correct deficiencies in program operations or reflect changes in policy and procedures.

(4) The State agency shall publicize to participants how commodities may be used to contribute to a nutritious diet and explain proper storage procedures for commodities. The State agency shall encourage the dissemination of food and nutrition information designed to improve the nutritional level of households on Indian reservations.

(5) The State agency shall develop a method of determining the food preferences of households. Preference information shall be collected and submitted to FNS at least annually. Such information shall be used periodically by FNS to analyze the components of the food package for acceptability, nutritional adequacy, responsiveness to special needs of participating households and such information may be used in ordering the commodities included in the food package.

(6) The State agency shall maintain ongoing consultation with ITOs in developing the written internal policies, instructions, and forms which are necessary to carry out the Food Distribution Program on Indian Reservations. The State agency shall file any comments offered by an ITO, for review by FNS.

(7) State agencies shall submit all printed materials, including forms used to administer and operate the Food Distribution Program on Indian Reservations, to FNS for approval prior to their use.

(8) State agencies shall restrict disclosure of information obtained from Food Distribution Program on Indian Reservations applicant households, exclusively for Food Distribution Program on Indian Reservations to persons directly connected with the administration or enforcement of the provisions of the Food Distribution Program on Indian Reservations, the Food Stamp Act or regulations, or with other Federal or Federally-aided, means-tested assistance programs such as Titles IV-A (AFDC), XIX (Medicaid), or XVI (SSI), or with general assistance programs that are subject to the joint processing requirements specified in § 253.12(d).

(9) Records and reports. State agencies shall:

(i) Keep accounts and records as may be necessary to enable FNS to determine whether there has been compliance with this part;

(ii) Submit reports and other information as required by FNS;

(iii) Submit household food preference data annually to FNS;

(iv) Submit quarterly reports to FNS on form SF-269, "Financial Status Report," by the 30th day after the close of the reporting quarter and a close-out SF-269 report 90 days after the end of each fiscal year; and

(v) Retain records, reports and audits for a period of three years from the date of the submission of the annual financial status report, SF-269, except that if any litigation, claim or audit is started before the expiration of the three-year period, the records shall be retained until all litigation, claim or audit findings involving the records have been resolved.

(The information collection requirements contained in paragraph (b)(9) were approved by the Office of Management and Budget under control number 0584-0071)

§ 253.7 Plan of operation.

(a) *Submission and approval.* (1) Plans of operation and budgets shall be submitted to FNS for approval no later than July 1 of each year. FNS shall consider the budgets for administrative costs submitted by State agencies to determine whether such administrative costs are reasonable and do not exceed 30 percent of the value of the commodities being donated, as established by FNS. FNS may disapprove the plan of operation and budget if the costs of operation are not reasonable in comparison to the amount of benefits provided to households. Approval of the plan and budget by FNS shall be a prerequisite to the donation of commodities available for use by households under Part 250 of this chapter and to the payment of administrative funds under § 253.16 of this part. No amendment to the plan of operation shall be effective without prior approval of FNS and FNS may require the amendment of any plan as a condition of continuing approval.

(2) A State agency which is not an ITO shall submit its plan of operation, budget and any substantive subsequent amendments to the ITO for comment at least 45 days prior to submission of the plan, budget or amendment to FNS. Comments by the ITO shall be attached to the plan, budget or amendment which is submitted to FNS. This paragraph does not apply to amendments required by FNS under paragraph (a)(1) of this section.

(b) *Contents of the plan.* As a minimum, the plan of operation shall include the following information:

(1) A description of the geographic boundaries including, tribal reservation land, near area(s) and urban place(s) previously approved by FNS, as required in § 253.4;

(2) The manner in which commodities will be distributed, including but not limited to, the storage and distribution facilities to be used, as required in § 253.17;

(3) The procedures for preventing simultaneous participation of households in both the Food Stamp Program and Food Distribution Program on Indian Reservations, as required in § 253.12;

(4) The system the State agency will use to determine food preferences of households, as required in § 253.6;

(5) A description of the procedures for complying with the nondiscrimination requirements, as required in § 253.10 and any applicable nondiscrimination requirements specified by the Department;

(6) A description of the procedures for monitoring the program to ensure compliance with these regulations and guidance provided by FNS, as required in § 253.8;

(7) A description the procedures for training for State agency and ITO personnel involved in the Food Distribution Program on Indian Reservations activities, as required in § 253.6;

(8) A list of all employees, by job title, working on the Food Distribution Program on Indian Reservations; and

(9) A description of the procedures for making food and nutrition education information and materials available to participating households, as required in § 253.6.

(The information collection requirements contained in paragraphs (a) and (b) were approved by the Office of Management and Budget under control number 0584-0071)

§ 253.8 Program monitoring.

(a) *Evaluation and review procedures.* The State agency shall monitor and review its operations to ensure compliance with the provisions of this part and with any applicable instructions of FNS.

(b) The State agency shall review program operations at least annually, document program deficiencies, and establish and implement specific plans of corrective action for deficiencies noted.

(c) Reviews of program operations shall include, but not be limited to: Certification of households; determination of food preferences; distribution of commodities; agency conferences, fair hearing and administrative disqualification hearing procedures; commodity inventories; and timeliness and accuracy of reports to FNS.

(d) Program reviews and corrective action plans shall be documented and made available to FNS upon request. The adequacy of program monitoring and sufficiency of corrective action will be assessed by FNS in its approval of the annual plan of operation.

(The information collection requirements contained in paragraph (a) and (c) were approved by the Office of Management and Budget under control number 0584-0071)

§ 253.9 Audits and investigations.

(a) *Office of Management and Budget (OMB) Circular A-128 audit requirements.* (1) State agencies that participate in the program shall arrange for independent audits of financial operations to ensure compliance with laws and regulations affecting the expenditure of Federal funds, financial transactions and accounts, and financial statements and reports of State agencies and ITOs.

(2) Audits shall be made annually unless exempted in accordance with A-128, however, not less frequently than every two years. Audits shall be performed by independent State or local government auditors or independent public accountants who meet the independence standards in the *Standards for Audit of Government Organizations, Programs, Activities, and Functions.* Such audits shall be conducted on an organization basis, rather than on a grant-by-grant basis.

(3) Audits shall be made in accordance with the auditing provisions set forth under the Uniform Federal Assistance Regulations (Title 7 CFR, Part 3015, Subpart I) implementing OMB Circular A-128.

(b) *Office of the Inspector General (OIG) or audits.* (1) Each State agency shall provide OIG with full opportunity to conduct audits (including visits to Indian reservations) of all operations of the State agency under this program.

(2) Each State agency shall make available its records, including records of the receipt and expenditure of funds and any audit reports and related working papers of audits performed by or for State agencies upon request by OIG for the purpose of conducting audits. State agencies shall retain such records in accordance with § 253.6(b)(9).

(c) *Investigations.* (1) The State agency shall promptly investigate complaints of irregularities relating to the handling, distribution, receipt, or use of commodities by eligible households, as well as complaints of irregularities relating to certification procedures or the delivery of services.

(2) The State agency shall take appropriate action to correct any irregularities or noncompliance with the provisions of this part and shall document each investigation and action in sufficient detail to allow for OIG or FNS review of all State agency actions and information.

(The information collection requirements contained in paragraph (c) were approved by the Office of Management and Budget under control number 0548-0071)

§ 253.10 Civil rights.

Nondiscrimination. State agencies are subject to the Department's regulations putting into effect Title VI of the Civil Rights Act of 1964 (7 CFR Part 15); Title IX of the Education Amendments of 1972, section 504 of the rehabilitation Act of 1973; and the Age Discrimination Act of 1975. No person in the United States shall, on the grounds of race, color, national origin, age, sex or handicap, be excluded from participation, be denied the benefits of,

or be otherwise subjected to discrimination under this program. State agencies shall also be subject to any applicable Departmental provisions and any instructions or guidance issued by FNS with regard to nondiscrimination.

§ 253.11 Eligibility of households.

(a) *Household concept.* (1) The State agency shall determine eligibility for the Food Distribution Program on Indian Reservations on a household basis. Household means an individual living alone or a group of related or non-related individuals living together who purchase and prepare food together for home consumption. Such individuals cannot be boarders or residents of an institution. Separate household status shall not be granted to dependent children of an adult household member or to spouses of household members living together even if they purchase or prepare food separately.

(2) The following persons residing with the household shall not be considered household members:

(i) *Roomers.* Individuals to whom a household furnishes lodging, but not meals for compensation.

(ii) *SSI recipients in "cash-out" States.* Recipients of Supplemental Security Income (SSI) benefits who reside in a State designated by the Secretary of the Department of Health and Human Services to have specifically included the value of the food stamp coupon allotment in their State supplemental payment. These persons are not eligible to receive Food Distribution Program on Indian Reservations benefits.

(iii) *Disqualified individuals.* Individuals disqualified from the Food Stamp Program or Food Distribution Program on Indian Reservations.

(iv) *Illegal residents.* Individuals who are not legal residents of the United States. While U.S. citizenship is not required for participation in the Food Distribution Program on Indian Reservations, persons receiving food distribution benefits must be lawful residents of the United States.

(b) *Residency or citizenship.* A non-Indian household must be living on the reservation when it files an application for participation; Indian tribal households may be living on or near the reservation. The State agency may not impose any requirement as to the length of residency. No household may participate in the Food Distribution Program on Indian Reservations in more than one geographical area at the same time.

(c) *Income and resource eligibility for assistance households.* (1) Households in which all members are included in a federally aided public assistance or SSI grant, except as provided for in paragraph (a)(2)(ii) of this section shall, if otherwise eligible under this part, be determined eligible to participate in the Food Distribution Program on Indian Reservations while receiving such grants without regard to the income and resources of the household members.

(2) If FNS determines that a State or local general assistance program applies criteria of need the same as or similar to those applied under any of the federally aided public assistance programs, households in which all members are included in such a general assistance grant, shall, if otherwise eligible under this part, be determined to be eligible to participate in the Food Distribution Program on Indian Reservations while receiving such grants without regard to the income and resources of household members.

(d) *Resource eligibility standard.* (1) The State agency shall apply uniform national resource standards of eligibility to all applicant households, except those in which all members are recipients of Federally aided public assistance, SSI, or certain general assistance program benefits as provided in paragraph (c)(2) of this section. The maximum allowable resources for households shall be equal to maximum allowable resources limit established for the Food Stamp Program.

(2) *Resources.* In determining the resources of household, only cash on hand, money in checking or savings accounts, savings certificates, stocks and bonds shall be counted; except that the following resources shall be entirely excluded:

(i) The cash value of life insurance policies and pension funds, including funds in pension plans with interest penalties for early withdrawals, such as a Keogh plan or an Individual Retirement Account (IRA), as long as the funds remain in the pension plans.

(ii) Any governmental payments which are designated for the restoration of a home damaged in a disaster, if the household is subject to a legal sanction if the funds are not used as intended, for example, payments made by the Department of Housing and Urban Development through the individual and family grant program of disaster loans or grants made by the Small Business Administration.

(iii) Resources, such as those of students or self-employed persons, which have been prorated as income.

(iv) Resources which are excluded by express provision of Federal statute. The following is the current listing of resources excluded by Federal statute:

(A) Payments received under the Alaska Native Claims Settlement Act (Pub. L. 92-203, or the Sac and Fox Indian claims agreement Pub. L. 94-189);

(B) Payments received by certain Indian tribal members under Pub. L. 94-114, section 6, regarding submarginal land held in trust by the United States;

(C) Payments received by certain Indian tribal members under Pub. L. 94-540, regarding the Grand River Band of Ottawa Indians;

(D) Reimbursements from the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970 (Pub. L. 91-646, section 216);

(E) Earned income tax credits received before January 1, 1980, as result of Pub. L. 95-600, the Revenue Act of 1978;

(F) Payments received from the youth incentive entitlement pilot projects, the youth community conservation and improvement projects and the youth employment and training programs under Title IV of the Comprehensive Employment and Training Act Amendments of 1978 (Pub. L. 95-524);

(G) Education assistance payments received from a program funded in whole or inpart under Title IV of the Higher Education Act (as amended by Pub. L. 99-498), used for tuition, mandatory fees, transportation, books, supplies and miscellaneous personal expenses, as defined by the State agency; and

(H) Benefits received from the special supplemental food program for woman, infants and children (WIC) (Pub. L. 92-443, section 9);

(I) Payments received by the Confederated Tribes and Bands of the Yakima Indian Nation and the Apache Tribe of the Mescalero Reservation from the Indian Claims Commission as designated under Pub. L. 95-433, section 2;

(J) Payments to the Passamaquoddy Tribe and the Penobscot Nation or any of their members received pursuant to the Maine Indian Claims Settlement Act of 1980 (Pub. L. 96-420, section 5); and

(K) Payments of relocation assistance to members of the Navajo and Hopi Tribes under Pub. L. 93-531.

(3) *Jointly owned resources.* Resources owns jointly by separate households shall be prorated between or among those households unless the applicant can demonstrate that such resources are inaccessible to it because access to the value of the resource is dependent upon the agreement of a joint owner who refuses to comply.

(4) *Resources of disqualified members.* Resources of individuals disqualified from participation in the Food Stamp Program or the Food Distribution Program on Indian

Reservations shall continue to count in their entirely to the remaining household members when determining the household's eligibility for the Food Distribution Program on Indian Reservations.

(e)(1) *Income eligibility standards for nonassistance households.* The income eligibility standards shall be equal to the Food Stamp Program's gross monthly income eligibility standards, which is the amount equal to 130 percent of the Federal proverty guidelines. These income eligibility standards shall not be applied to households in which all members, are recipients of public assistance, SSI (except as provided for in paragraph (a)(2)(ii) of this section, or certain general assistance program payments as provided in paragraph (c) of this section). FNS shall provide State agencies with adjusted income eligibility standards, as necessary.

(2) *Income.* Household income shall mean all income from whatever source already received by the household during the certification period and any anticipated income the household and the State agency are reasonably certain will be received during the remainder of the certification period. The total monthly income shall be compared to the income eligibility standard for the appropriate household size to determine the household's eligibility. Except that the following income shall be excluded from household income and no other income shall be disregarded:

(i) Monies withheld from an assistance payment earned income or other services, or monies received from any income source with are voluntarily or involuntarily returned to repay a prior overpayment received from that income service.

(ii) Child support payments received by AFDC recipient which must be transferred to the agency administering Title IV–D of the Social Security Act of 1935, as amended, to maintain AFDC eligibility.

(iii) Any gain or benefit which is not in the form of money payable directly to the household including:

(A) *In-kind income.* Nonmonetary or in-kind benefits, such as meals, clothing, public housing or produce from a garden.

(B) *Vendor payments.* A payment made in money on behalf of a household shall be considered a vendor payment whenever a person or organization outside of the household uses its own funds to make a direct payment to either the household's creditors or a person or organization providing a service to the household. Also, specific payments directed to a third party from a court ordered support or alimony payment or other written supporting alimony agreement, rather than the designated recipient household are excluded as vendor payments. However, money received by a household whether from court ordered alimony or by voluntary payment shall not be excluded as a vendor payment. Wages garnished or diverted by employers, or money deducted or otherwise diverted from a household's public assistance or certain general assistance, as provided in paragraph (c)(2) of this section, grant by a State for purposes such as managing the household's expenses, shall not be considered a vendor payment, since the person or organization making the payment is using money payable to the household rather than its own funds.

(iv) Any income in the certification period which is received too infrequently or irregularly to be reasonably anticipated, but not in excess of $30 in a quarter.

(v) Education loans on which payment is deferred, grants, scholarships, fellowships, veterans' educational benefits, and the like to the extent that they are used for tuition and mandatory school fees. Mandatory fees are those charged to all students or those charged to all students within a certain curriculum. For example, uniforms, lab fees, or equipment charged to all students to enroll in a chemistry course would be excluded. However, transportation, supplies, and textbook expenses are not uniformly charged to all students and therefore, would not be excluded as mandatory fees, except as excluded in paragraph (e)(2)(x) of this section.

(vi) All loans, including loans from private individuals as well as commercial institutions, other than education loans on which repayment is deferred.

(vii) Reimbursement for past or future expenses to the extent they do not exceed actual expenses. For example, reimbursements of flat allowances for job or training related expenses such as travel per diem, uniforms, and transportation to and from the job or training site are excluded as income.

(viii) Monies received and used for care and maintenance of a third party beneficiary who is not a household member.

(ix) The earned income (as defined in paragraph (e)(2)(i) of this section) of children who are members of the household, who are students at least half time and who have not attained their eighteenth birthday. The exclusion shall continue to apply during temporary interruptions in school attendance due to semester or vacation breaks, provided the child's enrollment will resume following the break. Individuals are considered children for purposes of this provision if they are under the parental control of another household member.

(x) Money received in the form of a nonrecurring lump sum payment, including but not limited to, income tax refunds, rebates, or credit retroactive lump-sum social security, SSI, public assistance, railroad retirement benefits or other payments, or retroactive lump-sum insurance settlements; refunds of security deposits on rental properties or utilities or lump-sum payments arising from loan interests held in trust for, or by, a tribe.

(xi) The cost of producing self-employment income. The procedures for computing the cost of producing self-employment income are described in § 253.12(a)(11).

(xii) Any income that is specifically excluded by any other Federal statute from consideration as income. The following Federal statutes provide such an exclusion:

(A) Reimbursement from the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970 (Pub. L. 91–646, section 216);

(B) Payments received under the Alaska Native Claims Settlement Act (Pub. L. 92–203);

(C) Any payment to volunteers under Title II (RSVP, foster grandparents, and others) and Title III (SCORE and ACE) of the Domestic Volunteer Services Act of 1973 (Pub. L. 93–113), as amended. Payments under Title I (VISTA) to volunteers shall be excluded for those individuals receiving federally donated commodities, food stamps, or public assistance at the time they joined the Title I program, except that households which are receiving an income exclusion for a VISTA or other Title I subsistence allowance at the time of implementation of these rules shall continue to receive an income exclusion for VISTA for the length of their volunteer contract in effect at the time of implementation of these rules. Temporary interruptions in food distribution shall not alter the exclusion once an initial determination has been made. New applicants who are not receiving Federally donated commodities, food stamps or public assistance at the time they joined VISTA shall have these volunteer payments included as earned income;

(D) Income derived from certain submarginal land of the United States which is held in trust for certain Indian tribes (Pub. L. 94–114, section 6);

(E) Payments received by certain Indian tribal members under Pub. L. 94–540 regarding the Grand River Band of Ottawa Indians;

(F) Payments received from the youth incentive entitlement pilot projects, the youth community conservation and improvement projects and the youth employment and training programs under Title IV of the Comprehensive Employment and Training Act Amendments of 1978 (Pub. L. 95–524);

(G) Educational assistance payments received from a program funded in whole or in part under Title IV of the Higher Education Act (as amended by Pub. L. 99–498), used for tuition, mandatory fees, transportation, books, supplies and miscellaneous personal expenses, as defined by the State agency;

(H) Payments by the Indian Claims Commission to the Confederated Tribes and Bands of the Yakima Indian Nation or the Apache Tribe of the Mescarlero Reservation (Pub. L. 95–433).

(I) Payments to the Passamaquoddy Tribe and the Penobscott Nation or any of their members received pursuant to the Maine Indian Claims Settlement Act of 1980 (Pub. L. 96–420, section 5); and

(J) Payments of relocation assist once to members of the Navajo and Hopi Tribes under Pub. L. 93–531.

§ 253.12 Certification of households.

(a) *Certification procedures.* (1) The State agency shall determine eligibility of households for the Food Distribution Program on Indian Reservations based on the eligibility requirements of these regulations.

(2) The State agency shall use an application form acceptable to FNS.

(3) *Filing an application.* Households must file an application for the Food Distribution Program on Indian Reservations by submitting the form to a certification office in person, through an authorized representative or by mail. The State agency shall document the date the application was received.

(4) *Interview.* All applicant households shall have an interview with an eligibility worker prior to certification. The interview shall be an official and confidential discussion of household circumstances. The State agency shall provide facilities adequate to preserve the privacy of the interview.

(5) *Verification.* Gross nonexempt income shall be verified for all households prior to certification. State agencies shall also verify residency of all non-Indian households living on the reservation. The State agency shall verify other eligibility criteria if the information provided by the household is questionable. The household shall provide needed verification, including names of collateral contacts. The State agency shall assist the household if the household cannot supply needed verification.

(6) *Documentation.* The State agency shall document the decision of eligibility or ineligibility in sufficient detail for reviewers to determine the accuracy of the decisions.

(7) *Recertification.* The State agency shall recertify households under the same criteria used for initial certification, except that the State agency may elect not to verify information which has not changed since the last certification and is not questionable.

(8) *Processing standards.* The State agency shall provide eligible households an opportunity to obtain commodities not later than 14 working days from initial application. The State agency shall also provide an opportunity to obtain commodities as soon as possible, but no later than 2 working days from application for households with no income after exclusions. If the State agency cannot determine a household's eligibility within 14 working days due to lack of verification, the State agency shall authorize commodities for one month pending verification. The State agency shall not issue commodities beyond one month without verification.

(9) *Authorized representative.* The head of the household, spouse or other responsible adult household member may designate in writing an authorized representative to apply for or pick up commodities on the household's behalf.

(10) *Bilingual requirement.* State agencies shall make the necessary or appropriate arrangements to provide for a bilingual speaker or an interpreter when an applicant is not fluent in English.

(11) *Self-employment income.* (i) The State agency shall determine the amount of income available to households that are self-employed. Self-employment income is determined by adding all gross self-employment income, subtracting the cost of producing the income, and dividing the net self-employment income prorated over the number of months the income is intended to cover. The allowable costs of producing self-employment income include, but are not limited to, the identifiable costs of labor, stock, raw materials, seed and fertilizer, interest paid to purchase income producing property, insurance premiums and taxes paid on income producing property.

(ii) In determining net self-employment income, payment on the principal of the purchase price of income-producing real estate and capital assets, equipment, machinery, and other durable goods, net losses from previous periods, Federal, State, and local income taxes, money set aside for retirement purposes, and other work-related personal expenses (such as transportation to and from work) will not be allowable costs of doing business.

(12) *Certification periods.* Households with relatively stable income shall be assigned a certification period of six months, unless the State agency determines that the certification period should be a shorter or longer timeframe. Households with fixed incomes or other predictable income may be certified for up to one year. Households with fluctuating income shall be assigned a certification period of one to three months depending upon the household's circumstances, (i.e., likelihood of change in income). In no event shall the certification period exceed one year.

(13) *Notice of denial.* If the application is denied, the State agency shall provide the household with written notice, explaining the basis for the denial. The State agency shall advise households of their right to request a fair hearing and the telephone number and address of a person to contact for additional information.

(14) *Notice of adverse action.* (i) State agencies shall advise households of any proposed action to reduce or terminate household benefits ten days prior to the effective date of the action. The notice of adverse action shall not be used when households voluntarily switch program participation from the Food Distribution Program on Indian Reservations to the Food Stamp Program.

(ii) The notice of adverse action shall explain the reason for the proposed action and the household's right to request a fair hearing. This notice shall also advise the household of the effective date of the proposed action, the telephone and address of a person to contact for additional information, and the availability of continued benefits. In addition, the notice should inform the household that any continued benefits received which result in an overissuance of commodities, based on the fair hearing decision, will be subject to the claims procedures described in § 253.13.

(iii) If the household requests a fair hearing during the adverse notice period, the State agency shall continue distribution of commodities to the household at the same level which was distributed prior to the fair hearing request. The State agency shall continue the distribution of commodities to the household through the duration of the fair hearing procedure.

(15) *Reporting changes.* Certified households are required to report

changes in household composition, change in income of over $100 per month, and income changes which would cause the household to exceed the maximum income limit for their household size. To facilitate reporting changes in income each certified household shall be advised at the time of certification what the maximum monthly income limit, as defined in § 253.11(e), is for its size household, and shall be required to report any change in income that goes above that limit to the certification office within ten days after the change becomes known to the household.

(16) *Recertification notice.* (i) The State agency shall develop a procedure for notifying the household prior to or shortly after the end of its certification period that the household must reapply and be recertified for continued participation. Household shall also be notified of the date upon which termination from participation will be effective should the household fail to reapply before the expiration of the certification period.

(ii) The State agency shall approve or deny a household's application for recertification and notify the household of the determination prior to the expiration of the household's current certification period. Households applying for recertification period must be provided an opportunity to obtain commodity distribution on an uninterrupted basis.

(b) *Controls for dual participation.* (1) No household shall be allowed to participate simultaneously in the Food Stamp Program and the Food Distribution Program on Indian Reservations. The State agency shall inform each applicant household of this prohibition and shall develop a method to detect dual participation. The method developed by the State agency shall, at a minimum, employ lists of currently certified household members provided by and provided to the appropriate food stamp agency on a monthly basis. The State agency may also employ computer checks, address checks and telephone calls to prevent dual participation. The State agency shall coordinate with the appropriate food stamp agency in developing controls for dual participation.

(2) *Choice of programs.* Households eligible for either the Food Stamp Program or the Food Distribution Program on Indian Reservations where both programs are available may elect to participate in either program. Such households may elect to participate in one program, and subsequently elect the other at the end of the certification period. Households may also elect to switch from one program to the other program within a certification period only by terminating their participation, and notifying the State agency of their intention to switch programs. Households certified in either the Food Distribution Program on Indian Reservations or Food Stamp Program on the first day of the month can only receive benefits in the program for which they are currently certified during that month. At the point the household elects to change programs, the household should notify the State agency of its intent to switch programs, and should file an application for the program in which it wishes to participate. Households that wish to switch programs shall have the eligibility terminated for the program in which they are currently certified on the last day of the month by notifying the State agency of their intent to change programs.

(3) *Disqualification.* (i) No individual disqualified from participation in the Food Stamp Program may participate in the Food Distribution Program on Indian Reservations until the period of disqualification expires. The State agency, in cooperation with the appropriate food stamp agency must develop a procedure to identify those individuals who have been disqualified for participation by the food stamp agency or by courts exercising jurisdiction within that State.

(ii) During the time a household member is disqualified, the eligibility and food distribution benefits of the remaining household members are not affected. The resources of the disqualified member shall continue to count in their entirety to the remaining household members. A pro rata share of the income of the disqualified member after exclusions are taken as provided in § 253.11(e)(2) shall be counted as income to the remaining household members.

(c) *Eligibility and benefits.* The disqualified member shall not be counted as a household member to determine Food Distribution Program on Indian Reservation benefits or for comparing gross monthly income with the income eligibility standards.

(d) *Joint processing for Public and General Assistance Programs.* (1) State agencies which administer both the Food Distribution Program on Indian Reservations and public assistance (PA) or general assistance (GA) programs may allow households to apply for both Food Distribution Program on Indian Reservations and PA or GA benefits at the same time. GA households shall have their eligibility for commodities based solely on Food Distribution Program on Indian Reservations eligibility criteria, except as provided in § 253.11(c)(2) for those GA programs whose criteria of need is the same or similar to PA program criteria.

(2) The State agency shall process all applications for PA or GA as applications for the Food Distribution Program on Indian Reservations, unless the household clearly indicates that the household does not want commodities. A single interview shall be conducted for joint processing, unless the State agency is unable to do so within the Food Distribution Program on Indian Reservations processing standards prescribed in paragraph (a)(8) of this section. In such cases, the State agency shall provide separate certification for PA or GA and Food Distribution Program on Indian Reservations eligibility.

(3) The State agency must follow all Food Distribution Program on Indian Reservations timeliness rules for certification of households for the Food Distribution Program on Indian Reservations.

§ 253.13 Overissuance claims.

(a) *Establishing claims.* (1) State agencies shall establish a claim against any household that has received more USDA commodities than it is entitled to receive, unless specifically exempted in paragraph (b)(1) or (b)(2) of this section.

(2) State agencies must submit their procedures for establishing claims against households to the appropriate FNS regional office for approval.

(b) *Claim exemptions.* (1) No claim shall be established against a household if the cumulative value of the overissuances occurring within the one-year limit, specified in paragraph (c) of this section, equals less than a one-person household's issuance for one month.

(2) No claim shall be established in cases where a State agency failed to ensure that the household signed its application or the household continued to receive commodities after its certification period expired without benefit of a reapplication determination. If errors other than procedural errors are noted, claim collection shall be initiated in accordance with paragraph (d) of this section.

(c) *One-year limit.* Any overissuance occurring within a one-year period before discovery of an error by the State agency shall be included in the claim determination.

(d) *Calculating the claim.* The claim value shall be based on the cost of the extra food issued to the household for the period of the overissuance except as limited in paragraphs (c) and (f) of this

section. FNS will provide information to State agencies for the costs of each commodity.

(e) *Claims collection action.* (1) At a minimum, the State agency shall initiate collection action for household errors by sending the household a written demand letter which informs the household of the amount owed, the reason for the claim, the right to a fair hearing, and information about how to pay the claim. In cases where disqualification actions apply, the State agency shall include notification that no response to the claim letter from a participating household within 30 days may result in the disqualification from program participation. State agencies may also use these procedures for initiating collection actions for State agency errors.

(2) Claims collection action shall be initiated against the head of the household. If the head of the household is no longer living or cannot be located, the State agency shall pursue collection against the remaining adult household members. If a change in household membership occurs, the State agency shall initiate collection action against the household containing a majority of the individuals who were household members at the time the overissuance of USDA commodities occurred.

(3) Monies collected in repayment of claims shall be forwarded to the appropriate FNS regional office.

(4) In cases of nonpayment, State agencies shall do one of the following:

(i) Renegotiate the payment schedule for one- or two-person households or households which have no income (after exclusion) or resources available to pay the claim or would otherwise experience a hardship by:

(A) Postponing and/or adjusting the payment schedule to a longer timeframe enabling the household to make additional payments until the claim is paid; and/or

(B) Adjusting the payments to no more than 10 percent of the value of the household's monthly food package or $5 per month, whichever is less, until the claim is paid.

(ii) For overissuances caused by household errors, the household shall be warned that failure to pay the claim or to make scheduled monthly payments shall result in the head of the household's disqualification from program participation. The State agency shall disqualify the head of the household from program participation in accordance with the timeframes described in § 253.15.

(iii) For overissuances caused by State agency errors, the State agency shall pay the amount of the claim to FNS. This includes any claims resulting from a Federal, State or local review. The State agency may at its option continue its attempt to collect the amount of the claim from the household, however, no household members shall be disqualified for failure to pay such claims.

(f) *Suspension of collection.* (1) The State agency shall send the household one demand letter, in accordance with paragraph (e)(1) of this section. The State agency may suspend further claim action against the household if one of the following conditions apply:

(i) Household cannot be located; or

(ii) Cost of additional collection procedures would likely exceed the amount to be recovered.

(2) Unless one of the criteria described in paragraph (f)(1) of this section applies, the State agency shall send the household additional demand letters in no more than 30 day intervals for maximum of three letters. In cases of continued nonpayment, the head of the household shall be disqualified from program participation in accordance with paragraph (h) of this section. However, suspension of a claim shall not relieve the State agency of its requirement for paying claims caused by State agency errors, in accordance with paragraph (e)(4)(iii) of this section.

§ 253.14 Agency conferences and fair hearings.

(a) *Availability and conduct of agency conferences.* The State agency shall offer agency conferences to households which request immediate resolution of any action which has adversely affected them regarding any aspect of the Food Distribution Program on Indian Reservations. Requested agency conferences shall be scheduled within four working days of the request unless the household requests that it be scheduled at a later date. The State agency shall advise households that the use of an agency conference is optional and that such use shall in no way delay or replace the fair hearing process.

(b) *Availability and conduct of fair hearings.* (1) The State agency shall provide a fair hearing to any household requesting one, which is aggrieved by any action of the State agency that affects the participation of the household in the Food Distribution Program on Indian Reservations.

(2) Within 60 days of receipt of a request for a fair hearing, the State agency shall conduct the hearing and arrive at a decision.

(3) At the time of application for program benefits, the State agency shall inform households of their right to a fair hearing, the procedures which are to be followed in requesting a fair hearing, the manner in which fair hearings are conducted, that the rendering of decisions by the State agency will be based on the hearing record and their right to pursue judicial review if unsatisfied with the hearing official's decision. In addition, the household should be informed of its right to an agency conference when a household requests an immediate resolution of a denial of eligibility for food distribution benefits.

(4) Denial or dismissal of request for hearing. The State agency shall not deny or dismiss a request for a hearing unless:

(i) The request is withdrawn in writing by the household or its representative; or

(ii) The household or its representative fails, without good cause, to appear at the scheduled hearing.

(5) Notification of time and place of hearing. The time, date and place of the hearing shall be convenient to the household. Prompt, advance written notice shall be provided to all parties involved to permit adequate preparation of the case. The notice shall:

(i) Advise the household or its representative of the name, address, and telephone number of the person to notify in the event it is not possible for the household to attend the scheduled hearing.

(ii) Specify that the State agency will dismiss the hearing request if the household or its representative fails to appear for the hearing without good cause.

(iii) Explain that the household or its representative may examine the casefile prior to the hearing.

(6) The household or its representatives shall be given adequate opportunity to:

(i) Examine all documents and records to be used at the hearing. The State agency shall provide a free copy of the relevant portions of the casefile, if requested. Confidential information that is protected from release and other documents or records which the household will not otherwise have an opportunity to contest or challenge shall not be introduced at the hearing or affect the hearing official's decision;

(ii) Present the case;

(iii) Bring witnesses;

(iv) Advance arguments without undue interference;

(v) Question or refute any testimony or evidence, including an opportunity to confront and cross-examine adverse witnesses; and

(vi) Submit evidence to establish all pertinent facts and circumstances in the case.

(7) *Hearing official.* Hearing shall be conducted by an impartial official(s), designated by the State agency, who does not have any personal interest or involvement in the case and who was not directly involved in the initial determination of the action which is being contested. The hearing official shall:

(i) Administer oaths or affirmations if required by the State;

(ii) Ensure that all relevant issues are considered;

(iii) Request, receive and make part of the record all evidence determined necessary to decide the issues being raised;

(iv) Regulate the conduct and course of the hearing consistent with due process to ensure an orderly hearing; and

(v) Render a hearing decision in the name of the State agency in accordance with paragraph (b) of this section.

(8) *Hearing decisions.* (i) Decisions of the hearing official shall comply with Federal law or regulations and shall be based on the hearing records. The verbatim transcript or recording of testimony and exhibits or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for a final decision by the hearing official.

(ii) A decision by the hearing official shall be binding on the State agency and shall summarize the facts of the case, specify the reasons for the decision and identify the supporting evidence and pertinent FNS regulations. The decision shall become part of the record.

(iii) The household shall be advised of the decision of the hearing official and of the right to pursue judicial review.

(The information collection requirements contained in paragraph (b)(6) were approved by the Office of Management and Budget under control number 0584-0071)

§ 253.15 Disqualification hearings.

(a) *Administrative responsibility.* (1) The State agency shall be responsible for investigating any case of alleged misrepresentation or failure to pay an established claim, and ensuring that appropriate cases are acted upon either through administrative disqualification hearings or referral to appropriate State or local legal authorities for civil or criminal action in a court of law. Administrative disqualification procedures or referral for prosecution action should be initiated by the State agency in cases in which the State agency has sufficient documentary evidence to substantiate that an individual has intentionally misrepresented the household's circumstances as defined in paragraph (c) of this section or failed to pay an established claim. If the State agency does not initiate administrative disqualification procedures or refer for prosecution a case involving an overissuance caused by a suspected act of misrepresentation, the State agency shall take action to collect the overissuance by establishing a claim against the household in accordance with the procedures in § 253.13. The State agency should conduct administrative disqualification hearings in cases in which the State agency believes the facts of the individual case do not warrant civil or criminal prosecution through the appropriate court system, in cases previously referred for prosecution that were not accepted by the appropriate legal authority, and in previously referred cases where no action was taken within a reasonable period of time and the referral was formally withdrawn by the State agency. The State agency shall not initiate administrative disqualification procedures against an individual whose case is currently being referred for prosecution or subsequent to any action taken against the individual by the prosecutor or court of appropriate jurisdiction, if the factual issues of the case arise out of the same, or related, circumstances. The State agency may initiate administrative disqualification procedures or refer a case for prosecution, regardless of the current eligibility of the individual. The disqualification period for nonparticipants at the time of the administrative disqualification or court decision shall be deferred until the individual applies for and is determined eligible for Food Distribution Program on Indian Reservations benefits.

(2) Each State agency shall establish a system for conducting administrative disqualification hearings for household members who misrepresent the household's circumstances or who simply fails to pay an established claim which conforms with the procedures outlined in paragraph (f) of this section. FNS shall exempt any State agency from the requirement to establish an administrative disqualification system if the State agency has already entered into an agreement, pursuant to paragraph (h)(1) of this section, with the State's Attorney General's Office or, where necessary, with appropriate level prosecutors under which prosecution of cases will be pursued. FNS shall also exempt any State agency from the requirement to establish an administrative disqualification system if there is a State law that requires the referral of such cases for prosecution and if the State agency demonstrates to FNS that it is clearly referring cases for prosecution and that prosecutors are following up on the State agency's referrals. FNS may require a State agency to establish an administrative disqualification system if it determines that the State agency is not promptly or actively pursuing cases of suspected misrepresentation or failure to pay claims through the courts.

(3) The State agency shall base administrative disqualification on the determinations of hearing authorities arrived at through administrative disqualification hearings in accordance with paragraph (e) of this section or on determinations reached by courts of appropriate jurisdiction in accordance with paragraph (h) of this section. However, any State agency has the option of allowing the individuals either to waive their rights to administrative disqualification hearings in accordance with paragraph (f) of this section. Any State agency which chooses either of these options may base administrative disqualifications on the waived right to an administrative disqualification hearing.

(b) *Disqualification penalties.* Individuals found to have willfully misrepresented household circumstances or to have failed to pay an established claim, either through an administrative disqualification hearing or by a court of appropriate jurisdiction, or who have signed either a waiver of right to an administrative disqualification hearing shall be ineligible to participate in the program for six months for the first violation and twelve months for the second and subsequent violations. However, one or more disqualifications which occurred prior to the implementation of these penalties shall be considered as only one previous disqualification when determining the appropriate penalty to impose in a case under consideration. If a court fails to impose a disqualification period, the State agency shall impose the disqualification penalties specified in this section unless it is contrary to the court order. State agencies shall disqualify only the individual found to have misrepresented household circumstances or the head of the household who fails to pay an established claim, or who signed the waiver of right to an administrative disqualification hearing not the entire household. The remaining household members shall agree to make restitution within 30 days of the date the State agency's written demand letter is mailed. The remaining household

members, if any, shall begin restitution during the period of disqualification imposed by the State agency or a court of law. All restitutions shall be made in accordance with established procedures for cash repayment.

(c) *Misrepresentation.* Any individual household member that willfully misrepresents information or submits information with reckless disregard for accuracy of information, or provides information which is known by the individual to be incorrect regarding household size, income, resources or other eligibility factors which results in the household receiving more benefits than it would otherwise be entitled to receive, shall be disqualified from participation in accordance with the timeframes set forth in paragraph (b) of this section.

(d) *Notification to applicant households.* The State agency shall inform all households in writing of the disqualification penalties prescribed in paragraph (b) of this section at the time of application for Food Distribution Program on Indian Reservations benefits. The notice shall be in clear, prominent, and boldface lettering on the application form.

(e) *Consolidation of administrative disqualification hearing with fair hearing.* The State agency may combine a fair hearing and an administrative disqualification hearing into a single hearing if the factual issues arise out of the same, or related, circumstances and the household receives prior notice that the hearings will be combined. If the disqualification hearing and fair hearing are combined, the State agency shall follow the timeframes for conducting disqualification hearings. If the combined hearings determine the amount of the claim as well as whether or not the household circumstances were willfully misrepresented, the household shall not be entitled to a subsequent fair hearing on the amount of the claim.

(f) *Hearings procedures.* (1) The State agency shall conduct administrative disqualification hearings in accordance with the requirements outlined in this section.

(i) State agencies have the option of using the same hearing officials for disqualification hearings and fair hearings or designating hearing officials to conduct only administrative disqualification hearings.

(ii) At the administrative disqualification hearing, the hearing official shall advise the household member or representative that they may refuse to answer questions during the hearing.

(iii) Within 90 days of the date the household member is notified in writing that a State or local hearing has been scheduled, the State agency shall conduct the hearing, arrive at a decision and notify the household member and local agency of the decision. The household member or representative is entitled to a postponement of the scheduled hearing, provided that the request for postponement is made at least 10 days in advance of the date of the scheduled hearing. However, the hearing shall not be postponed for more than a total of 30 days and the State agency may limit the number of postponements to one. If the hearing is postponed, the above time limits shall be extended for as many days as the hearing is postponed.

(iv) The State agency shall publish clearly written rules of procedure for disqualification hearings, and shall make these procedures available to any interested party.

(2) *Advance notice of hearing.* (i) The State agency shall provide written notice to the household member suspected of misrepresentation or failing to pay an established claim at least 30 days in advance of the date a disqualification hearing has been scheduled. However, the State agency shall, upon household request, allow the household to waive the 30-day advance timeframe. The notice shall be mailed certified mail-return receipt requested or provided by any other method as long as proof of receipt is obtained, and shall contain at a minimum:

(A) The date, time, and place of the hearing;

(B) The charge(s) against the household member;

(C) A summary of the evidence, and how and where the evidence can be examined;

(D) A warning that the decision will be based solely on information provided by the food distribution office if the household member fails to appear at the hearing;

(E) A statement that the household member or representative will have 10 days from the date of the scheduled hearing to present good cause for failure to appear in order to receive a new hearing;

(F) A warning that a determination of misrepresentation or failure to pay an established claim will result in a six-month disqualification for the first violation and 12-month disqualification for the second and subsequent violations, and a statement of which penalty the State agency believes is applicable to the case scheduled for a hearing; and

(G) A statement that the hearing does not preclude the State or Federal Government from prosecuting the household member in a civil or criminal court action, or from collecting the overissuances.

(ii) A copy of the State agency's published hearing procedures shall be attached to the 30-day advance notice or the advance notice shall inform the household of its right to obtain a copy of the State agency's published hearing procedures upon request.

(iii) Each State agency shall develop an advance notice form which contains the information required by this action.

(3) *Scheduling of hearing.* The time and place of the hearing shall be arranged so that the hearing is accessible to the household member. If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if misrepresentation or failure to pay an established claim was committed based on clear and convincing evidence. If household member is found to have misrepresented the household's circumstances or failed to pay an established claim but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct the new hearing. The household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.

(4) *Participation while awaiting a hearing.* A pending disqualification hearing shall not affect the individual's or the household's right to be certified and participate in the Food Distribution Program on Indian Reservations. Since the State agency cannot disqualify a household member until the hearing official finds that the individual has misrepresented the household's circumstances or failed to pay an established claim, the State agency shall determine the eligibility and benefit level of the household in the same manner it would be determined for any other household. However, the household's benefits shall be terminated if the certification period has expired

and the household, after receiving its notice of expiration, fails to reapply. The State agency shall also reduce or terminate the household's benefits if the State agency has documentation which substantiates that the household is ineligible for benefits and the household fails to request a fair hearing and continuation of benefits pending the hearing.

(5) *Criteria for determining misrepresentation.* The hearing authority shall base the determination on clear and convincing evidence which demonstrates that the household member(s) misrepresented, and intended to commit, a misrepresentation of the household's circumstances, as defined in paragraph (c) of this section.

(6) *Decision format.* The hearing authority's decision shall specify the reasons for the decision, identify the supporting evidence, identify the pertinent FNS regulation, and respond to reasoned arguments made by the household member or representative.

(7) *Imposition of disqualification penalties.* (i) If the hearing authority rules that the household member has misrepresented the household's circumstances or failed to pay an established claim, the household member shall be disqualified in accordance with the disqualification periods specified in paragraph (b) of this section beginning with the first month which follows the date the household member receives written notification of the hearing decision. The same act repeated over a period of time shall not be separated so that separate penalties can be imposed.

(ii) No further administrative appeal procedure exists after an adverse State level hearing. The determination made by a disqualification hearing official cannot be reversed by a subsequent fair hearing decision. the household member, however, is entitled to seek relief in a court having appropriate jurisdiction. The period of disqualification may be subject to stay by a court of appropriate jurisdiction or other injunctive remedy.

(iii) If the individual is not eligible for the Food Distribution Program on Indian Reservations at the time the disqualification period is to begin, the period shall be postponed until the individual applies and is determined eligible for benefits.

(iv) Once a disqualification penalty has been imposed against a currently participating household member, the period of disqualification shall continue uninterrupted until completed regardless of the eligibility of the disqualified member's household. However, the disqualified member's household shall continue to be responsible for repayment of the overissuance.

(8) *Notification of hearing decision.* (i) If the hearing official finds that the household member did not misrepresent the household's circumstances or the household has paid the established claim, the State agency shall provide a written notice which informs the household member of the decision.

(ii) If the hearing official finds that the household member misrepresented the household's circumstances or failed to pay an established claim, the State agency shall provide written notice to the household member prior to disqualification. The notice shall inform the household member of the decision and the reason for the decision. In addition, the notice shall inform the household member of the date the disqualification will take effect. If the individual is no longer participating, the notice shall inform the individual that the period of disqualification will be deferred until such time as the individual again applies for and is determined eligible for Food Distribution Program on Indian Reservations benefits. The State agency shall also provide written notice to the remaining household members, if any, of either the allotment they will receive during the period of disqualification or that they must reapply because the certification period has expired. The procedures for handling the income and resources of the disqualified member are described in § 253.12(b). A written demand letter for restitution, as described in § 253.13, shall also be provided.

(iii) Each State agency shall develop a form for notifying individuals that they have been found by an administrative disqualification hearing to have misrepresented the household's circumstances or failed to pay an established claim. The form shall contain the information required by this section. A model form for notifying individuals of an adverse hearing decision is available from FNS for adaptation by any State agency.

(g) *Waived hearings.* Each State agency shall have the option of establishing procedures to allow accused individual to waive their rights to an administrative disqualification hearing. For State agencies which choose the option of allowing individuals to waive their rights to an administrative disqualification hearing, the procedures shall conform with the requirements outlined in this section.

(1) *Advance notification.* (i) The State agency shall provide written notification to the household member that the member can waive his/her right to an administrative disqualification hearing. Prior to providing this written notification to the household member, the State agency shall ensure that the evidence against the household member is reviewed by someone other than the eligibility worker assigned to the accused individual's household and a decision is obtained that such evidence warrants scheduling a disqualification hearing.

(ii) The written notification provided to the household member which informs him/her of the possibility of waiving the administrative disqualification hearing shall include, at a minimum:

(A) The date that the signed waiver must be received by the State agency to avoid the holding of a hearing and a signature block for the accused individual, along with a statement that the head of household must also sign the waiver if the accused individual is not the head of household, with an appropriately designated signature block;

(B) A statement of the accused individual's right to remain silent concerning the charge(s), and that anything concerning the charge(s) can be used against him/her in a court of law;

(C) The fact that a waiver of the disqualification hearing will result in disqualification and a reduction in benefits for the period of disqualification, even if the accused individual does not admit to the facts as presented by the State agency;

(D) An opportunity for the accused individual to specify whether or not he/she admits to the facts as presented by the State agency. This opportunity shall consist of the following statements, or statements developed by the State agency which have the same effect, and a method for the individual to designate his/her choice:

(*1*) I admit to the facts as presented, and understand that a disqualification penalty will be imposed if I sign this waiver; and

(*2*) I do not admit that the facts as presented are correct. However, I have chosen to sign this waiver and understand that a disqualification penalty will result;

(E) The telephone number and, if possible, the name of the person to contact for additional information; and

(F) The fact that the remaining household members, if any, will be held responsible for repayment of the resulting claim.

(iii) The State agency shall develop a waiver of right to an administrative disqualification hearing form which contains the information required by this section as well as the information

described in paragraph (f)(3) of this section for advance notice of a hearing. However, if the household member is notified of the possibility of waiving his/her right to an administrative disqualification hearing before the State agency has scheduled a hearing, the State agency is not required to notify the household member of the date, time and place of the hearing at that point as required by paragraph (f)(3)(i)(A) of this section.

(2) *Imposition of disqualification penalties.* (i) If the household member signs the waiver of right to an administrative disqualification hearing and the signed waiver is received within the timeframes specified by the State agency, the household member shall be disqualified in accordance with the disqualification periods specified in paragraph (b) of this section. The period of disqualification shall begin with the first month which follows the date the household member receives written notification of the disqualification. However, if the act which led to the disqualification occurred prior to the disqualification periods specified in paragraph (b) of this section, the household member shall be disqualified in accordance with the disqualification penalties in effect at the time of the offense.

(ii) No further administrative appeal procedure exists after an individual waives his/her right to an administrative disqualification hearing and a disqualification penalty has been imposed. The disqualification penalty cannnot be changed by a subsequent fair hearing decision. The household member, however, is entitled to seek relief in a court having appropriate jurisdiction. The period of disqualification may be subject to stay by a court of appropriate jurisdiction or other injunctive remedy.

(iii) If the individual is not eligible for the Food Distribution Program on Indian Reservations at the time the disqualification period is to begin, the period shall be postponed until the individual applies for and is determined eligible for benefits.

(iv) Once a disqualification penalty has been imposed against a currently participating household member, the period of disqualification shall continue uninterrupted until completed regardless of the eligibility of the disqualified member's household. However, the disqualified member's household shall continue to be responsible for repayment of the overissuance.

(3) *Notification of disqualification.* The State agency shall provide written notice to the household member prior to disqualification. The State agency shall also provide written notice to any remaining household members of the amount of USDA commodities they will receive during the period of disqualification or that they must reapply because the certification period has expired. The notice(s) shall conform to the requirements for notification of a hearing decision specified in paragraph (f)(9) of this section. A written demand letter for restitution, as described in § 253.13, shall be provided.

(h) *Court referrals.* Any State agency exempted from the requirement to establish an administrative disqualification system in accordance with paragraph (a) of this section shall refer appropriate cases for prosecution by a court of appropriate jurisdiction in accordance with the requirements outlined in this section.

(1) *Appropriate cases.* (i) The State agency shall refer cases of alleged misrepresentation or failure to pay an established claim for prosecution in accordance with an agreement with prosecutors or appropriate law. The agreement shall provide for prosecution of cases and include the understanding that prosecution will be pursued in cases where appropriate. This agreement shall also include information on how, and under what circumstances, cases will be accepted for possible prosecution and any other criteria set by the prosecutor for accepting cases for prosecution, such as a minimum amount of overissuance which resulted from the Act.

(ii) State agencies are encouraged to refer for prosecution under State or local statutes those individuals suspected of misrepresenting the household's circumstances or failed to pay an established claim, particularly if large amounts of USDA commodities are suspected of having been obtained or the individual is suspected of committing more than one violation. The State agency shall confer with its legal representative to determine the types of cases which will be accepted for possible prosecution. State agencies shall also encourage State and local prosecutors to recommend to the courts that a disqualification penalty as described in paragraph (b) of this section be imposed in addition to any other civil or criminal penalties for such violations.

(2) *Imposition of disqualification penalties.* (i) State agencies shall disqualify an individual found guilty for the length of time specified by the court. If the court fails to impose a disqualification period, the State agency shall impose a disqualification period in accordance with the provisions in paragraph (b) of this section, unless contrary to the court order. If disqualification is ordered but a date for initiating the disqualification period is not specified, the State agency shall initiate the disqualification period for currently eligible individuals within 45 days of the date the disqualification was ordered. Any other court-imposed disqualification shall begin within 45 days of the date the court found a currently eligible individual guilty of civil or criminal misrepresentation or fraud.

(ii) If the individual is not eligible for the Food Distribution Program on Indian Reservations at the time the disqualification period is to begin, the period shall be postponed until the individual applies for and is determined eligible for benefits.

(iii) Once a disqualification penalty has been imposed against a currently participating household member, the period of disqualification shall continue uninterrupted until completed regardless of the eligibility of the disqualified member's household. However, the disqualified member's household shall continue to be responsible for repayment of the overissuance, regardless of its eligibility for Food Distribution Program on Indian Reservations benefits.

(3) *Notification of disqualification.* If the court finds that the household member has misrepresented the household's circumstances or failed to pay an established claim, the State agency shall provide written notice to the household member. The notice shall be provided prior to disqualification, whenever possible. The notice shall inform the household member of the disqualification and the date the disqualification will take effect. The State agency shall also provide written notice to the remaining household members, if any, of the amount of USDA commodities they will receive during the period of disqualification or that they must reapply because the certification period has expired. The procedures for handling the income and resources of the disqualified member are described in § 253.12(b). In addition, the State agency shall provide the written demand letter for restitution described in § 253.13.

(i) *Reporting requirements.* (1) Each State agency shall report to FNS information concerning individuals disqualified from program participation, including those individuals disqualified based on the determination of an administrative disqualification hearing official or a court of appropriate jurisdiction and those individuals disqualified as a result of signing either

a waiver of right to a disqualification hearing. The information shall be submitted to FNS so that it is received no later than 30 days after the date the disqualification took effect, or would have taken effect for a currently ineligible individual whose disqualification is pending future eligibility.

(2) Each State agency shall report information concerning each individual disqualified in a format designed by FNS. This format shall include the individual's date of birth, and full name, the number of the disqualification (1st, 2nd, etc.), the State and reservation in which the disqualification took place, the date on which the disqualification took effect, and the length of the disqualification period imposed.

(3) Each State agency shall submit the required information on each individual disqualified through a reporting system in accordance with procedures specified by FNS.

(i) State agencies shall, at a minimum, use the data for the following:

(A) To determine the eligibility of applicants prior to certification in cases where the State agency has reason to believe a household member is subject to disqualification in another political jurisdiction, and

(B) To ascertain the appropriate penalty to impose, based on past disqualifications, in a case under consideration.

(ii) State agencies may also use the data in other ways, such as the following:

(A) To screen all program applicants prior to certification, and

(B) To periodically match the entire list of disqualified individuals against their current caseloads.

(4) The disqualification of an individual in one political jurisdiction shall be valid in another. However, one or more disqualifications which occurred prior to the implementation of the penalties contained in these regulations shall be considered as only one previous disqualification when determining the appropriate penalty to impose in a case under consideration, regardless of where the disqualification(s) took place. State agencies are required to identify any individuals disqualified prior to implementation of this rule and to submit the information required by this section on such individuals.

(5) In cases where the imposition of a disqualification penalty is being held pending the future eligibility of a household member, the State agency shall submit a report revising the original disqualification report once the individual begins the period of disqualification in accordance with instructions provided by FNS.

(6) In cases where the disqualification is reversed by a court of appropriate jurisdiction, the State agency shall submit a report to purge the file of the information relating to the disqualification which was reversed in accordance with instructions provided by FNS.

(j) *Reverse disqualifications.* In cases where the determination is reversed by a court of appropriate jurisdiction, the State agency shall reinstate the individual in the program if the household is otherwise eligible.

§ 253.16 Administrative funds for State agencies.

(a) *Application for funds.* (1) Any State agency administering an ongoing Food Distribution Program on Indian Reservations which desires to receive administrative funds under this section shall submit a Form AD-623, "Application for Federal Assistance", to the appropriate FNS regional office at least three months prior to the beginning of each Federal fiscal year. The budget information required in Part III of the application shall reflect by category of expenditures, the State agency's best estimate of the total amount to be expended in the administration of the Food Distribution Program on Indian Reservations during a Federal fiscal year. FNS may require that detailed information be submitted by the State agency to support or explain the total estimated amounts shown for each cost budget category.

(2) FNS will disapprove any application for funds, or portion thereof, in which the ongoing operating costs (excludes building rennovation and capital equipment) exceed 30 percent of the value of the food to be distributed to participants, except where compelling justification has been approved by FNS.

(3) Approval of the application by FNS shall be a prerequisite to the payment of funds to State agencies.

(b) *Payments.* (1) Within the limitation of funds available to carry out the provisions of this part, FNS shall make available up to 75 percent of approved administrative costs. Administrative costs must be included in annual or revised budget information submitted by the State agency to FNS for approval prior to the contribution of Federal funds. Administrative costs must be allowable under paragraph (d) of this section. In accordance with 7 CFR Part 3015, the value of services rendered by volunteers shall be allowable to meet the matching administrative costs requirement for the Food Distribution Program on Indian Reservations.

(2) Any approval for payment of funds in excess of 75 percent shall be based on compelling justification that such additional amounts are necessary for the effective operation of the Food Distribution Program on Indian Reservations. FNS regional offices shall assess waiver requests. Tribes must demonstrate that all funds that could be used to meet the required 25 percent share of administrative costs are dedicated to *necessary* tribal expenditures. A statement that no other funds are available to administer the program is not sufficient. Justification for the FNS share of funding to exceed 75 percent of approved costs must be demonstrated to the satisfaction of FNS. Financial sources that will be accepted to show compelling justification for a waiver include, but are not limited to:

(i) Tribal financial statements;

(ii) Certified Public Accountant (CPA) organization-wide audit;

(iii) Tribe's published financial report to its members; or

(iv) Detailed letter from a CPA, including specific dollar figures, explaining tribal financial circumstances.

(c) *Availability of funds.* (1) FNS shall review and evaluate the budget information submitted by the State agency in relationship to the State agency's plan of operation and any other factors which may be relevant to FNS' determination as to whether the estimated expenditures itemized by budget category are reasonable and justified. FNS shall give written notification to the State agency of the following:

(i) Its approval or disapproval of any or all the itemized expenditures; and

(ii) The amount of funds which will be made available. FNS may disapprove any budget or portion of a budget in which ongoing administrative costs exceed 30 percent of the value of the food to be distributed to participants.

(2) FNS shall review and evaluate applications submitted by State agencies for administrative funds. FNS shall fund, at the approved level, on-going programs first. All other programs will be funded, in the order applications are received and approved by FNS to the extent it is anticipated that each can be fully funded (up to 75 percent or higher level, where compelling justification has been approved).

(d) *Program costs.* (1) Costs which are allowable are those necessary and proper for administration of the Food Distribution Program on Indian Reservations, in accordance with OMB Circular A-87 and Departmental regulations 7 CFR Part 3015. OMB

Circular No. A-87 and 7 CFR Part 3015 shall be used to determine specific allowable costs, except that the following costs are allowable only with FNS approval:

(i) Automated data processing;
(ii) Building space and related facilities;
(iii) Capital expenditures; and
(iv) Insurance.

(2) Unallowable costs. The following costs are unallowable:
(i) Bad debts;
(ii) Contingencies;
(iii) Contributions and donations;
(iv) Entertainment;
(v) Fines and penalties;
(vi) Governor's expenses;
(vii) Interest and other financial costs;
(viii) Legislative expenses; and
(ix) Underrecovery of costs under grant agreements, except that for a federally recognized Indian tribe, the portion of salaries and expenses of a chief executive directly attributable to managing or operating the food distribution Program on Indian Reservations is allowable.

(3) Capital equipment and building renovation. State agencies shall use the procurement and disposition procedures, as described in OMB Circulars A-87 and A-102 and 7 CFR Part 3015, for the purchase, rental or barter of supplies, equipment and services (including construction) to be used for the Food Distribution Program on Indian Reservations; and the disposition of such supplies, equipment and services which are no longer used for purposes of this program.

(e) *Method of payment to State agencies.* (1) FNS shall determine according to Treasury Circular No. 1075 the method of payment to State agencies, whether through a Letter of Credit system or an advance by Treasury Check.

(2) The Letter of Credit funding method shall be done in conjunction with Treasury Department procedures, Treasury Circular No. 1075 and through an appropriate Treasury Disbursing Office. The appropriate form shall be correctly prepared and certified by a duly appointed official of the State for requesting payment from the Treasury Disbursing Office.

(3) State agencies shall request Treasury check advances through the use of the Standard Form 270, "Request for Advance or Reimbursement", and procedures associated with its use. State agencies receiving payments under this method shall request payments before cash outlays are made.

(4) Any State agency receiving payment under the Letter of Credit method or by the Treasury Check method shall have in place and in operation, a financial management system which meets the standards for fund control and accountability in paragraph (f) of this section.

(f) *Standards for financial management-system.* State agencies shall maintain financial management systems which provide for:

(1) Accurate, current and complete disclosure of financial results of program activities in accordance with Federal reporting requirements;

(2) Records which identify the source and application of funds for FNS or State agency activities supporting the administration of the program. These records shall show authorization, obligation, unobligated balances, assets, liabilities, outlays and income of the State agency and its agents;

(3) Accounting controls must be in effect to prevent the State agency from claiming unallowable costs;

(4) Effective control and accountability by the State agency for all program funds, property and other assets. The State agency shall adequately safeguard all such assets and shall assure they are used solely for authorized program purposes unless the property is disposed of properly;

(5) Controls which minimize the time between the receipt of Federal funds and their disbursement for program costs. In the Letter of Credit system, the State agency shall make drawdowns as closely as possible to the time disbursements are made;

(6) Procedures to determine the reasonableness and allowability of costs in accordance with the requirements of OMB Circular No. A-87 and this part.

(g) *Return, reduction, and reallocation of funds.* (1) FNS may require State agencies to return prior to the end of the fiscal year, any or all unobligated funds received under this section, and may reduce the amount it has apportioned or argeed to pay to any State agency if FNS determines that:

(i) The State agency is not administering the Food Distribution Program on Indian Reservations in accordance with these regulations or the State agency's plan of operation approved by FNS and the provisions of this part;

(ii) The amount of funds which the State agency requested from FNS is in excess of actual need, based on reports of expenditures and current projections of program needs; or

(iii) The approved facilities, equipment, other capital assets, or repairs are:

(A) No longer available for Food Distribution Program on Indian Reservations use; or

(B) Used for purposes not authorized by FNS.

In each case, FNS' equity in the asset shall be refunded.

(iv) Circumstances or conditions justify the return, reallocation or transfer of funds to accomplish the purpose of this part.

(2) The State agency shall return to FNS within 90 days following the close of each Federal fiscal year, any funds received under this section which are unobligated at that time.

(h) *Audits costs.* The cost of organization-wide audits, allowed under OMB Circular No. A-87, shall be equally divided among the activities being audited. State agencies shall recover the cost of conducting the audit through the indirect cost method of recovery.

Note to § 253.16: The OMB and Treasury Department circulars referenced in this part are available at the Food and Nutrition Service, U.S. Department of Agriculture, Alexandria, Virginia 22302. (The information collection requirements contained in paragraph (e), (f) and (h) were approved by the Office of Management and Budget under control number 0584-0071)

§ 253.17 Commodity control, storage and distribution.

(a) *Control and accountability.* The State agency shall be responsible for the issuance of commodities to households and the control of and accountability for the commodities upon its acceptance of the commodities at time and place of delivery.

(b) *Commodity inventories.* The State agency shall, in cooperation with the FNS Regional Office, develop an appropriate procedure for determining and monitoring the level of commodity inventories at central commodity storage facilities and at each local distribution point. The State agency shall maintain the inventories at proper level, taking into consideration, among other factors, households preferences and the historical and projected volume of distribution at each site. The procedures shall provide that commodity inventories at each central storage facility and each local distribution point are not in excess, but are adequate for, an uninterrupted distribution of commodities.

(c) *Storage facilities and practices.* The State agency shall as a minimum ensure that:

(1) Adequate and appropriate storage facilities are maintained. The facilities shall be clean and neat and safeguarded against theft, damage, insects, rodents and other pests;

(2) Department recommended securing cases, stacking and ventilation methods are followed;

(3) Commodities are stocked in a manner which facilitates an accurate inventory;

(4) Commodities held in storage for over six months are reinspected prior to issuance;

(5) Out-of-condition commodities are disposed of in accordance with methods approved by the Department, as specified in paragraph (f) of this section;

(6) An adequate supply of commodities which are available from the Department is on hand at all distribution sites;

(7) Days and hours of distribution are sufficient for caseload size and convenience;

(8) Complete and current records are kept of all commodities received, issued, transferred, and on hand. Such records must also reflect any inventory overages, shortages and losses;

(9) A list of commodities offered by the Department is displayed at distribution sites so that households may indicate preferences for future orders.

(d) *Distribution.* (1) The State agency shall distribute commodities only to households eligible to receive them under this part. If the State agency uses any other agency, administration, bureau, service or similar organization, to effect or assist in the certification of households or distribution of commodities, the State agency shall impose upon such organization responsibility for determining that households to whom commodities are distributed are eligible under this part. The State agency shall not delegate to any such organization its responsibilities to the Department for overall management and control of the Food Distribution Program on Indian Reservations.

(2) The State agency shall assure that:

(i) Commodities are issued on a first-in, first-out basis;

(ii) Notification is provided to certified households of the location of distribution sites and days and hours of distribution;

(iii) Households are advised that they may refuse any commodity not desired, even if the commodities are prepackaged by household size;

(iv) Emergency issuance of commodities will be made to households certified for expedited service in accordance with § 253.12(a)(8) of this part;

(v) Eligible households or authorized representatives are identified prior to the issuance of commodities;

(vi) Authorized signatures are obtained for commodities issued and the issue date recorded;

(vii) The value of the commodities provided to any eligible household shall not be considered income or resources for any purpose. Furthermore, no State agency shall decrease any assistance otherwise provided to a household because of the receipt of commodities;

(viii) The distribution of commodities shall not be used as a means of furthering the political interest of any individual or party. This prohibition includes printed information on bags, boxes or other containers in which commodities are distributed. Materials which may not be distributed include, but are not limited to materials about State or tribal referenda or constitutional amendments, political candidates, political or social causes, or religious doctrines. Materials which may be distributed include recipes, information about commodities, distribution schedules or other programs or services for the needy and similar information.

(ix) Households shall not be required to make any payments in money, materials or service for, or in connection with, the receipt of commodities; and they shall not be solicited in connection with the receipt of commodities for voluntary cash contributions for any purpose.

(e) *Improper distribution or loss of or damage to commodities.* State agencies shall take action to obtain restitution in connection with claims arising in their favor for improper distribution, use or loss, or damage of commodities in accordance with the State agency's agreement with the Department under § 250.6(b) of Part 250 of this chapter and the requirements of § 250.6(m) of this same chapter, except as specifically modified in § 253.13 "overissuance claims".

(f) *Damaged or out-of-condition commodities.* The State agency shall immediately notify the appropriate FNS Regional Office if any commodities are found to be damaged or out-of-condition at the time of arrival, or at any subsequent time, whether due to latent defects or any other reason. FNS Regional Offices shall advise the State agency of appropriate action to be taken with regard to such commodities. If the commodities are declared unfit for human consumption in accordance with § 250.7 of Part 250 of this chapter, they shall be disposed of as provided for under that section.

When out-of-condition commodities do not create a hazard to other food at the same location, they shall not be disposed of until the FNS Regional Office or the responsible commodity contractor approves. When circumstances require prior disposal of a commodity, the quantity and manner of disposal shall be reported to the appropriate FNS Regional Office. If any damaged or out-of-condition commodities are inadvertently issued to a household and are rejected or returned by the household because the commodities were unsound at the time of issuance and not because the household failed to provide proper storage, care of handling, the State agency shall replace the damaged or out-of-condition commodities with the same or similar kind of commodities which are sound and in good condition. The State agency shall account for such replacements on its monthly inventory report.

(The information collection requirements contained in paragraph (a) and (f) were approved by the Office of Management and Budget under control number 0584-0071)

§ 253.18 Sanctions and liabilities.

(a) *Sanctions.* (1) If the State agency fails to comply with the provisions of this part or with its plan of operation, FNS may:

(i) Take action in accordance with § 253.16(g) of this part with respect to administrative funds available from FNS for use by the State agency; or

(ii) Withhold future shipments of USDA commodities from the State agency; or

(iii) Disqualify the State agency from further distribution of commodities to households. Disqualification of the State agency shall not prevent FNS or the Department from taking other actions, including prosecution under applicable Federal statutes, when deemed necessary. Reinstatement shall be contingent upon approval by FNS of the State agency's plan for corrective action or determination by FNS that the State agency has complied with any other requirements for reinstatement which FNS may set forth.

(2) These provisions apply to all State agencies, regardless of whether the program is administered by an agency of the State government or an ITO. If the ITO is disqualified as a State agency, an appropriate agency of State government, or if agreed to in writing, another ITO determined capable, shall administer the Food Distribution Program on Indian Reservations. If an agency of State government is disqualified as the State agency for the Food Distribution Program on Indian Reservations, the ITO may request in writing a capability determination for program administration.

(b) *Appeals.* (1) The agency of the State government or an ITO may appeal an initial determination by FNS on:

(i) Whether or not the definition of reservation is met;

(ii) The capability of an ITO to administer the Food Distribution Program on Indian Reservations;

(iii) Sanctions taken under paragraph (a) of this section or § 253.16(g); or

(iv) The administrative funding provided by FNS.

(2) At the time FNS advises the State agency or ITO of its determination, FNS shall also advise the State agency or ITO of its right to appeal and, except for appeals of funding determinations, shall advise the State agency or ITO of its right to request either a meeting to present its position in person or a review of the record. On appeals of funding determinations, FNS shall advise the State agency or ITO that it may indicate if it wishes a meeting. However, FNS need schedule a meeting only if FNS determines a meeting is warranted to reach a proper adjudication of the matter. Otherwise, FNS shall review supportive information submitted by the State agency or ITO in paragraph (b)(3)(iii) of this section.

(3) *Procedure*—(i) *Time limit.* Any State agency or ITO that wishes to appeal an initial FNS determination under paragraph (b)(1) of this section, must notify the Administrator of FNS in writing, within 15 days from the date of receipt of the determination. If the appeal concerns either paragraphs (b)(1)(i) or (ii) of this section, the implementation timeframes as specified in § 253.4(h) of this part are suspended from the date the appeal is requested to the date of the final determination.

(ii) *Acknowledgment.* Within five days of receipt by the Administrator, FNS, or a request for review, FNS shall provide the State agency or ITO with a written acknowledgment of the request by certified mail, return receipt requested. The acknowledgment shall include the name and address of the official designed by the Administrator, FNS, to review the appeal. The acknowledgment shall also notify the State agency or ITO that within ten days of receipt of the acknowledgment, the State agency or ITO shall submit written information in support of its position.

(4) *Scheduling a meeting.* If the Administrator, FNS, grants a meeting, FNS shall advise the State agency or ITO of the time, date and location of the meeting by certified mail, return receipt requested, at least ten days in advance of the meeting. FNS shall schedule and conduct the meeting and make a decision within 60 days of the receipt of the information submitted in response to paragraph (b)(3)(ii) of this section.

(5) *Review.* If no meeting is conducted, the official designated by the Administrator, FNS, shall review the information presented by a State agency or an ITO which requests a review and shall make a final determination in writing within 45 days of the receipt of the State agency's or ITO's information submitted in response to paragraph (b)(3)(ii) of this section, setting forth in full the reasons for the determination.

(6) *Final decision.* The official's decision after a meeting or a review shall be final.

(c) *Embezzlement, misuse, theft, or obtainment by fraud of commodities and commodity-related funds, assets, or property.* Whoever embezzles, willfully misapplies, steals or obtains by fraud, commodities donated for use in the Food Distribution Program on Indian Reservations, or any funds, assets, or property deriving from such donations, or whoever receives, conceals, or retains such commodities, funds, assets, or property for his own use or gain, knowing such commodity, funds, assets, or property have been embezzled, willfully misapplied, stolen or obtained by fraud, shall be subject to Federal criminal prosecution under section 4 of the Agriculture and Consumer Protection Act of 1973, as amended. State agencies shall immediately notify FNS of any suspected violation to allow the Department, in conjunction with the U.S. Department of Justice, to determine whether Federal criminal prosecution under section 4 of the Agriculture and Consumer Protection Act of 1983, as amended, is warranted. Prosecution violations under section 4 by the Federal Government shall not relieve any State agency of its obligations to obtain recovery for improperly distributed or lost commodities as required by § 253.18 of this part. Individuals convicted of any of the above crimes in relation to the Food Distribution Program on Indian Reservations shall be disqualified from participation in the Food Distribution Program on Indian Reservation in accordance with § 253.15. Unless the court determines a different time period. Unless otherwise ordered by a court of appropriate jurisdiction, the eligibility and food distribution benefits of the remaining household members are not affected during the period of disqualification. The resources of the disqualified member shall continue to fully count to the remaining household members. However, a prorata share of the income of the disqualified member shall be counted as income to the remaining household members.

Date: October 9, 1987.

Anna Kondratas,

Administrator, Food and Nutrition Service.

[FR Doc. 87-24006 Filed 10-19-87; 8:45 am]

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Part V

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 785

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Requirements for Permits for Special Categories of Mining; Mountaintop Removal Mining; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 785

Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Requirements for Permits for Special Categories of Mining; Mountaintop Removal Mining

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

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is amending its regulations in 30 CFR 785.14 applicable to mountaintop removal mining. This action is taken in compliance with the District Court for the District of Columbia's July 15, 1985, ruling in *In re: Permanent Surface Mining Regulation Litigation II* No. 79-1144 (D.D.C. 1985). The revised regulation corrects an inadvertent error made during previous rulemaking which omitted certain statutorily required provisions concerning mountaintop removal mining. The omitted provisions included a requirement that the applicant present specific plans for the proposed postmining land use and assurances that such use will meet certain conditions for a variance prior to a regulatory authority's granting of a permit to mine.

EFFECTIVE DATE: November 19, 1987.

FOR FURTHER INFORMATION CONTACT: H. Leonard Richeson, Office of Surface Mining, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240, telephone (202) 343-5150.

SUPPLEMENTARY INFORMATION:

I. Background
II. Discussion of Comments Received and Rule Adopted
III. Procedural Matters

I. Background

The Surface Mining Control and Reclamation Act of 1977 (the Act) 30 U.S.C. 1201 *et seq.* sets forth the statutory requirements governing surface coal mining operations and the surface impacts of underground coal mining. OSMRE has by regulations at 30 CFR Chapter VII implemented or clarified many of these requirements and established corresponding performance standards.

Section 515(c) of the Act permits an exception to the approximate original contour restoration requirement of section 515(b)(3) for mountaintop removal operations which, after reclamation, would be capable of supporting specific postmining land uses. In such operations, instead of restoring the approximate original contour, the operator is permitted to remove all of the overburden and to create a level plateau or a gently rolling contour with no highwall remaining. The regulatory authority may grant a permit of this type if a number of specific conditions are satisfied. Section 515(c)(3)(B) requires the applicant to present specific plans and assurances that the postmining land use will meet these conditions prior to the granting of a permit.

In 1979, OSMRE promulgated regulations implementing section 515(c)(3)(B) at 30 CFR 785.14(c)(l)(iii). That section required any person who intended to conduct mountaintop removal mining to demonstrate in the permit application compliance with the conditions by cross-referencing the requirements for alternative postmining land use in 30 CFR 816.133.

On September 1, 1983 (48 FR 39892) OSMRE promulgated final rules amending portions of its permanent regulatory program concerning postmining land uses and variances from approximate original contour. The rules amended include 30 CFR 785.14 and 816.133.

When OSMRE amended these sections, it inadvertently omitted the following requirements of section 515(c)(3)(B) of the Act, which an applicant must satisfy to qualify for a variance:

(B) The applicant presents specific plans for the proposed postmining land use and appropriate assurances that such use will be—

(i) Compatible with adjacent land uses;

(ii) Obtainable according to data regarding expected need and market;

(iii) Assured of investment in necessary public facilities;

(iv) Supported by commitments from public agencies where appropriate;

(v) Practicable with respect to private financial capability for completion of the proposed use;

(vi) Planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use; and

(vii) Designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site * * *.

The omission of these requirements was challenged in *In re: Permanent Surface Mining Regulation Litigation II,* No. 79-1144 (D.D.C. 1985). As a result, the Secretary reviewed the rule and determined it was necessary to amend it to correct this inadvertent error, and so informed the court. *In re: Permanent Surface Mining Regulation Litigation II* (Round III, Secretary's brief at page 142, No. 90 (Dec. 17, 1984)). The court noted the Secretary's decision not to oppose the challenge and his determination to reinstate these provisions through a new rulemaking (July 15, 1985 Memorandum Opinion at p. 132).

OSMRE published a proposed rule on March 25, 1987 (52 FR 9640). The proposed rule was open to public comment until June 3, 1987. The final rule, except for minor editorial changes, is the same as the proposed rule. Three comments were received from environmental groups. One actually made comments and the other two wrote a joint letter endorsing the comment made by the one commenter. These comments are addressed below.

III. Discussion of Comments Received and Rules Adopted

A. Amendment to Permit Requirements for Mountaintop Removal Mining

This final rule amends 30 CFR 785.14 concerning permit requirements for mountaintop removal mining by adding a new paragraph (c)(1)(iii). The new paragraph implements the provisions of section 515(c)(3)(B) of the Act.

The added provisions require an applicant to present specific plans for the proposed postmining land use and to make appropriate assurances concerning this use to the regulatory authority.

Existing paragraphs (c)(1)(iii) and (c)(1)(iv) are redesignated as paragraphs (c)(1)(iv) and (c)(1)(v) respectively. The newly redesignated paragraph (c)(1)(iv), which implements section 515 (c)(3)(c) of the Act, is revised to change the existing term "compatible" to "consistent" to conform with the exact language of section 515 (c)(3)(C). This provision requires the regulatory authority to find that the proposed land use is consistent with adjacent land use plans and programs. No substantive change is intended.

The new rule ensures full implementation of the statutory provisions of section 515 (c)(3)(B) and (C) as they pertain to mountaintop removal mining.

Three commenters objected to OSMRE's proposed insertion of the word "made" to the introductory phrase of 30 CFR 785.14 (c)(1)(iii) which stated that "the applicant has presented specific plans for the proposed

postmining land use and *made* appropriate assurances that such use will be * * *." They pointed out that the Act provides that the applicant "present specific plans for the proposed postmining land use and appropriate assurances that such use will be consistent with statutory requirements". In response to the commenters, OSMRE has deleted the word "made" in the final rule so that final 30 CFR 785.14(c)(1)(iii) of the final rule tracks the statutory language.

B. Effect in Federal Program States and on Indian Lands

The rules apply through cross-referencing to the following Federal program States: Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. The Federal programs for these States appear at 30 CFR Parts 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. There were no comments as to whether unique conditions exist in any of these states relating to this rule. This rule also applies through cross-referencing to Indian lands under the Federal program for Indian lands as provided in 30 CFR Part 750.

III. Procedural Matters

Federal Paperwork Reduction Act

The information collection requirements of this rule have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned approval number 1029-0040. The information is needed to meet the requirements of section 515(c)(3) of Pub. L. 95-87, and will be used by regulatory authorities when issuing permits for mountaintop removal operations.

Executive Order 12291

The Department of the Interior has examined the final rule according to the criteria of Executive order 12291 (February 17, 1981) and has determined that it is not major and does not require a regulatory impact analysis.

Regulatory Flexibility Act

The DOI also has determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that the final rule will not have a significant economic impact on a substantial number of small entities.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA) on the impacts on the human environment of the final rule. Based on this EA, OSMRE has made a finding that this rule will not have any significant adverse affect on the quality of the human environment. This EA is on file in the OSMRE Administrative Record at the address listed in the "Addresses" section of the preamble.

List of Subjects in 30 CFR Part 785

Coal mining, Reporting requirements, Surface mining.

For the reasons set out in this preamble, Title 30, Chapter VII, Subchapter G of the Code of Federal Regulations, is amended as set forth below.

Date: September 2, 1987.

James E. Cason,

Acting Assistant Secretary for Land and Mineral Management.

PART 785—REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

1. The authority citation for Part 985 is revised to read as follows:

Authority: Pub. L. 95-87 (30 U.S.C. 1201 *et seq.*). and Pub. L. 100-34 unless otherwise noted.

2. Section 785.14 is amended by redesignating paragraphs (c)(1)(iii) and (c)(1)(iv) as paragraphs (c)(1)(iv) and (c)(1)(v), respectively.

3. Section 785.14 is amended by adding a new paragraph (c)(1)(iii) and revising paragraphs (c)(1)(iv) to read as follows:

§ 785.14 Mountaintop removal mining.

* * * * *

(c) * * *

(1) * * *

(iii) The applicant has presented specific plans for the proposed postmining land use and appropriate assurances that such use will be—

(A) Compatible with adjacent land uses;

(B) Obtainable according to data regarding expected need and market;

(C) Assured of investment in necessary public facilities;

(D) Supported by commitments from public agencies where appropriate;

(E) Practicable with respect to private financial capability for completion of the proposed use;

(F) Planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use; and

(G) Designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuation necessary for the intended use of the site.

(iv) The proposed use would be consistent with adjacent land use and existing State and local land use plans and programs;

* * * * *

[FR Doc. 87-24221 Filed 10-19-87; 8:45 am]

BILLING CODE 4310-05-M

federal register

Tuesday
October 20, 1987

Part VI

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 762

Surface Coal Mining and Reclamation Operations; Unsuitability Criteria; Substantial Legal and Financial Commitments; Proposed Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 762

Surface Coal Mining and Reclamation Operations; Unsuitability Criteria; Substantial Legal and Financial Commitments

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

ACTION: Proposed rule.

SUMMARY: The Surface Mining Control and Reclamation Act of 1977 (the Act) provides that the regulatory authority shall establish a planning process to enable it to make an objective decision as to which, if any, lands are unsuitable for all or certain types of surface coal mining operations. That process does not apply to lands where substantial legal and financial commitments in surface coal mining operations were in existence prior to January 4, 1977. The proposed rule would revise the definition of "substantial legal and financial commitments in a surface coal mining operation" (SLFC) at 30 CFR 762.5 to clarify that an existing mine is not necessary for SLFC.

DATES:

Written comments: OSMRE will accept written comments on the proposed rule until 5 p.m. Eastern time on December 29, 1987.

Public hearings: Upon request, OSMRE will hold a public hearing on the proposed rule in Washington, DC at 9:30 a.m. local time on December 22, 1987. Upon request, OSMRE will also hold public hearings in the States of Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington at times and on dates to be announced prior to the hearings. OSMRE will accept requests for public hearings until 5 p.m. Eastern time on November 19, 1987. Individuals wishing to attend, but not testify at any hearing should contact the person identified under **"FOR FURTHER INFORMATION CONTACT"** beforehand to verify that the hearing will be held.

ADDRESSES:

Written comments: Hand-deliver to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131, 1100 L St. NW., Washington, DC; or mail to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131-L, 1951 Constitution Avenue NW., Washington, DC 20240.

Public hearings: Department of the Interior Auditorium, 18th and C Streets NW., Washington, DC. The addresses for any hearings scheduled in the States of Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington will be announced prior to the hearings.

Request for public hearings: Submit orally or in writing to the person and address specified under **"FOR FURTHER INFORMATION CONTACT."**

FOR FURTHER INFORMATION CONTACT: James M. Kress, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202-343-5145 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures
II. Background and Discussion of Proposed Rule
III. Procedural Matters

I. Public Comment Procedures

Written Comments

Written comments submitted on the proposed rule should be specific, should be confined to issues pertinent to the proposed rule, and should explain the reason for any recommended change. Where practicable, commenters should submit three copies of their comments (see **"ADDRESSES"**). Comments received after the close of the comment period or delivered to addresses other than those listed above (see **"DATES"**) may not be considered or included in the Administrative Record for the final rule.

Public Hearings

OSMRE will hold public hearings on the proposed rule on request only. The time, date and address scheduled for the hearing in Washington, DC are previously specified in this notice (see **"DATES"** and **"ADDRESSES"**). The times, dates and addresses for the hearings in other locations have not yet been scheduled, but will be announced in the **Federal Register** at least 7 days prior to any hearings which are held at these locations.

Any person interested in participating at a hearing at a particular location should inform Mr. Kress (see **"FOR FURTHER INFORMATION CONTACT"**) either orally or in writing of the desired hearing location by 5 p.m. Eastern time November 19, 1987. If no one has contacted Mr. Kress to express an interest in participating in a hearing at a given location by that date, the hearing will not be held. If only one person expresses an interest, a public meeting rather than a hearing may be held and the results included in the Administrative Record.

If a hearing is held, it will continue until all persons wishing to testify have been heard. To assist the transcriber and ensure an accurate record, OSMRE requests that persons who testify at a hearing give the transcriber a copy of their testimony. To assist OSMRE in preparing appropriate questions, OSMRE also requests that persons who plan to testify submit to OSMRE at the address previously specified for the submission of written comments (see **"ADDRESSES"**) an advance copy of their testimony.

II. Background and Discussion of Proposed Rule

The Act provides that each State regulatory authority must establish a "planning process enabling objective decisions based upon competent and scientifically sound data and information as to which, if any, land areas of a State are unsuitable for all or certain types of surface coal mining operations * * *." (unsuitability process). 30 U.S.C. 1272(a)(1). The same requirements apply in a State with a Federal program where the Office of Surface Mining Reclamation and Enforcement (OSMRE) is the regulatory authority, and also to Federal land. 30 U.S.C. 1272(b). The unsuitability process may be used to prohibit or limit surface coal mining operations which (1) would be incompatible with existing State or local land use plans or programs; or (2) would affect fragile or historic lands and could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems; or (3) affect renewable resource lands and could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, which lands include aquifers and aquifer recharge areas; or (4) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology. 30 U.S.C. 1272(a)(3)(A)-(D). It is also mandatory to designate an area as unsuitable for all or certain types of surface coal mining operations if the State regulatory authority determines that reclamation pursuant to the requirements of the Act is not technologically and economically feasible. 30 U.S.C. 1272(a)(2).

However, the Act provides that the unsuitability process does not apply (1) to lands on which surface coal mining operations were conducted on the date of its enactment; (2) under a permit issued pursuant to the Act; or (3) where

SLFC were in existence prior to January 4, 1977. 30 U.S.C. 1272(a)(6). OSMRE first defined SLFC in its regulations on March 13, 1979. 44 FR 15344. The 1979 definition provided in part that "(A)n example (of SLFC) would be an existing mine, not actually producing coal, but in a substantial stage of development prior to production. Costs of acquiring coal in place or the right to mine it without an existing mine, * * * alone are not sufficient to constitute substantial legal and financial commitments." *Id.* OSMRE retained the 1979 definition in its 1983 revision of Part 762. 48 FR 41351, September 14, 1983.

The coal industry challenged the 1983 revisions, asserting, among other arguments, that the regulation ignored significant legislative history. *In re: Permanent Surface Mining Regulation Litigation II,* Civil Action No. 79-1144 (D.D.C., July 15, 1985) (hereafter *In re II*). It claimed that the language in the House of Representatives committee report, on which the Secretary relied for his definition, did not mandate the definition chosen, but was merely intended to be illustrative, and therefore should not have set the outer bounds of the definition. The committee report declared:

> The phrase "substantial legal and financial commitments" in the designation section and other provisions of the act is intended to apply to situations where, on the basis of a long-term coal contract, investments have been made in power plants, railroads, coal handling and storage facilities and other capital-intensive activities. The Committee does not intend that mere ownership or acquisition costs of the coal itself or the right to mine it should constitute "substantial legal and financial commitments." H.R. Rep. No. 218, 95th Cong., 1st Sess. 95 (1977).

The court upheld the regulation, but not entirely. At oral argument, counsel for the government explained that the use of the term, "an existing mine," in the rule language is simply an example of where SLFC will be found. The court concluded that the language of the rule suggested otherwise. Therefore it remanded the rule to the Secretary for the narrow purpose of clarifying his position that an existing mine is not necessary for SLFC. *In re II* at 55. Pursuant to the court's remand, OSMRE is undertaking this rulemaking effort.

The proposed rule would clarify that an existing mine is not necessary to meet the definition of SLFC. It would remove the following language from the present definition which could be interpreted to suggest that an existing mine is necessary to meet the requirements for a finding of SLFC. The present definition gives the following example of SLFC:

> * * * an existing mine, not actually producing coal, but in a substantial stage of development prior to production.

For the same reasons, the proposed rule would also delete the reference to "an existing mine" and the example to which it refers, in the next sentence of the rule which presently reads as follows:

> Costs of acquiring the coal in place or the right to mine it *without an existing mine, as described in the above example,* alone are not sufficient to constitute substantial legal and financial commitments. (Emphasis added.)

The proposed rule still retains ample flexibility in its definition of SLFC through the usage of the phrase "other capital-intensive activities."

III. Procedural Matters

Effect in Federal Program States

The proposed rule applies through cross-referencing in those States with Federal programs. The States with Federal programs are Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR Parts 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. Comments are specifically solicited as to whether unique conditions exist in any of these States relating to this proposal which should be reflected as changes to the national rules or as specific amendments to any or all of the Federal programs.

Federal Paperwork Reduction Act

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

Executive Order 12291 and Regulatory Flexibility Act

The DOI has determined that this document is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and certifies that it 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.* The rule does not distinguish between small and large entities. These determinations are based on the findings that the regulatory additions proposed by the rule will not change costs to industry or to the Federal, State, or local governments. Furthermore, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

National Environmental Policy Act

OSMRE has prepared a draft environmental assessment (EA), and has made a tentative finding that the proposed rule would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). The EA is on file in the OSMRE Administrative Record at the address specified previously (see "**ADDRESSES**"). An EA will be completed on the final rule and a finding made on the significance of any resulting impacts prior to promulgation of the final rule.

Author

The principal authors of this rule are James Kress and Hugo Fleischman, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202-343-5145 (Commercial of FTS).

List of Subjects in 30 CFR Part 762

Historic preservation, Wildlife refuges, Surface mining, Underground mining.

Accordingly it is proposed to amend 30 CFR Part 762 as follows:

Dated: September 2, 1987.

James E. Cason,

Acting Assistant Secretary for Land and Minerals Management.

PART 762—CRITERIA FOR DESIGNATING AREAS AS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS

1. The authority citation for Part 762 is revised to read as follows:

Authority: Pub. L. 95-87, 30 U.S.C. 1201 *et seq.*, and Pub. L. 100-34.

2. Section 762.5 is amended by revising the following definition to read as follows:

§ 762.5 Definitions.

* * * * *

Substantial legal and financial commitments in a surface coal mining operation means significant investments that have been made on the basis of a long-term coal contract in power plants, railroads, coal-handling, preparation, extraction or storage facilities, and other capital-intensive activities. Costs of acquiring the coal in place, or the right to mine it alone without other significant investments, as described above, are not sufficient to constitute substantial legal and financial commitments.

[FR Doc. 87-24220 Filed 10-19-87; 8:45 am]
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federal register

Tuesday
October 20, 1987

Part VII

Department of Transportation

Federal Aviation Administration

14 CFR Parts 21, 25, and 121

Location of Passenger Emergency Exits in Transport Category Airplanes; Notice of Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 21, 25, and 121

[Docket No. 25419; Notice No. 87-10]

Location of Passenger Emergency Exits in Transport Category Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: This notice proposes to limit increases in passenger emergency escape path distance by establishing a new standard limiting the distance any passenger seat may be from the nearest emergency exit and the distance any exit may be from an adjacent exit. The proposal would make the standard applicable to type certification of new transport category airplane models, regardless of the date of original application for type certificate, and to airplanes operating under Part 121, except those already in operation. The standard would be applicable for issuance of standard airworthiness certificates for airplanes manufactured after (the date of this notice). The proposal is a result of the recent public Emergency Evacuation Task Force and is intended to improve the likelihood of passengers safely escaping an airplane during an emergency evacuation.

DATE: Comments must be received on or before December 21, 1987.

ADRESS: Comments on this proposal may be mailed in duplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-204), Docket No. 25419, 800 Independence Avenue SW., Washington, DC 20591, or delivered in duplicate to FAA Rules Docket, Room 915-G, 800 Independence Avenue, SW., Washington 20591. Comments delivered must be marked: Docket No. 25419. Comments may be examined in Room 915-G weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Arthur Hayes, Technical Analysis Branch (AWS-120), Aircraft Engineering Division, Office of Airworthiness, Federal Aviation Administration, 800 Indenpendence Avenue SW., Wasington, DC 20591; Telephone (202) 267-9937.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments relating to the environmental, energy, or economic impact that might result from adopting the proposals contained in this notice are invited. Substantive comments should be accompanied by cost estimates. Commenters should identify the regulatory docket or notice number and submit comments, in duplicate, to the Rules Docket address specified above. All comments received on or before the closing date for comments will be considered by the Administrator before taking action on this proposed rulemaking. The proposal contained in this notice may be changed in light of comments received. All comments will be available in the Rules Docket, both before and after the closing date for comments, for examination by interested persons. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing this FAA to acknowledge receipt of their comments must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 25419." The postcard will be date/time stamped and returned to the commenter.

Availability of NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-230, 800 Independence Avenue SW., Washington, DC 20591; or by calling (202) 267-3484. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future rulemaking documents should also request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

Background

This proposal concerns passenger emergency escape path distance within the airplane cabin. This is the distance the passenger must traverse to reach an exit during an emergency evacuation. Escape path distance can have a major effect on the outcome of the evacation. Escape path distance is determined by the distance along the aisle between the passenger seat and the nearest passenger emergency exit and the distance between one emergency exit and the adjacent emergency exit. This proposal is one of several actions being taken by the FAA as a result of the Emergency Evacuation Task Force Program to improve aircraft emergency evacuation.

Emergency Evacuation Task Force

The Emergency Evacuation Task Force was formed in September 1985 by the FAA in response to concerns expressed by the public over passenger safety in the event of an aircraft emergency evacuation. Its primary objective was the review of safety issues raised by the public and the reassessment of existing regulations and practices pertaining to emergency evacuation of air carrier transport airplanes. A major issue of concern of the task force was passenger emergency escape path distance. The task force consisted of members of the interested public and was chaired by the FAA. The notice announcing the initial conference and inviting public participation was published in the **Federal Register** on August 8, 1985. The task force program included the meetings of three specialized working groups to study Design and Certification, Training and Operations, and Maintenance and Reliability. The task force received strong public support and participation of world experts in aircraft design, manufacture, operations, maintenance, and passenger safety.

The task force reviewed recent design and operational experience of the new generation narrow and wide body transports. It examined the full range of emergency evacuation topics including emergency exits, cabin configuration, emergency evacuation demonstrations, evacuation slides, crewmember duties and training, and passenger safety information. Public support and FAA's commitment to subsequent action have made the task force an important step forward in passenger safety.

The task force program is the subject of a two-volume report entitled Task Force Report on Emergency Evacuation of Transport Airplanes, dated July 1986. Volume I, Summary Report, Report No. DOT/FAA/VS-86/1, I, and Volume II, Supporting Documentation, Report No. DOT/FAA/VS-86/1, II, are available from the National Technical Information Service, Springfield, Virginia 22161. Copies of public submittals and correspondence are maintained in a file open to the public. The file can be reviewed in Room 915-G at the FAA Headquarters, 800 Independence Avenue, SW., Washington, DC 20591.

Justification for the Proposal

This proposal addresses passenger emergency escape path distance, as

determined by seat-to-exit and exit-to-exit distances measured longitudinally. Airworthiness regulations have taken passenger escape path distance into account for some time. Current § 25.807(c) requires that exits be distributed as uniformly as practicable taking in account passenger distribution. This requirement was established in 1967 by Amendment 25–15 to address escape path distance as a factor affecting passenger cabin evacuation. Notice 66–26, on which the amendment was based, cited as a reason for the requirement, the direct relationship between a passenger's proximity to an exit and that passenger's chances for escape. The amendment did not establish a limit on seat-to-exit or exit-to-exit distance because in airplanes envisaged at that time it was assumed that a uniform distribution of exits, as required by § 25.807(c), would result in reasonable passenger seat-to-exit and exit-to-exit distances. Recent certification experience has not borne out that assumption. Of the new wide body transports being designed when Amendment 25–15 was adopted, the Boeing Model 747 had a maximum distance between exits of 44 feet, the McDonnell Douglas Model DC–10, 47 feet, and the Lockheed Model L–1011, 50 feet. Basic narrow body transport models typically had shorter distances. Much larger distances were not considered in establishing that regulation.

Recent exit configurations have shown a trend toward exit distances considerably greater than those envisaged when the exit distribution requirement in § 25.807(c) was written. In one model, exit-to-exit distance, originally about 50 feet in the basic model, increased to nearly 70 feet in a later derivative model. In another model, this distance increased from 44 feet to 70 feet in a derivative configuration. A recent certification request proposed a derivative configuration with a distance substantially greater than 80 feet. These recent cases of exit configuration design indicate that the exit distribution requirement of § 25.807(c) has become ineffective in preventing excessive escape path distances and that limits on the distance must be established for reasons of safety.

Passenger escape path distance was a major issue considered by the Design and Certification Working Group of the task force and is the subject of recent public correspondence received by the FAA. Parties opposed to setting limits on escape path distance contend the distance has no effect on the time required for a passenger to leave the airplane in an emergency evacuation. They contend emergency evacuation demonstrations conducted under § 25.803 for aircraft type certification have shown that passengers waiting to leave the airplane queue up at exits and that evacuee flow rates through the exits determine the speed of cabin evacuation. They contend that in this situation the time required for a passenger to leave the airplane is determined by the number of preceding passengers in the exit queue, not the passenger's initial distance from the exit.

With an opposing viewpoint, others contend that in an actual emergency evacuation, as contrasted with an evacuation demonstration, exit distance can be crtitical to the evacuation process. They point out that in an actual emergency, the airplane may be structurally damaged and the cabin floor may not be level. The aisle may be obstructed with debris and carry-on articles, and the cabin may be filled with smoke. Passengers may be confused or panicked and some may be physicially impaired. In a cabin with few passengers, there would be no queues, as there are in an evacuation demonstration, and exit flow rate would not determine the speed of cabin evacuation. They contend that under such actual emergency conditions, the distance a passenger must traverse to reach an exit could determine that passenger's survival and that distance becomes increased and even more critical if the nearest pair of exits has been rendered unusable as a result of the emergency landing.

The FAA agrees that escape path distance can be a critical factor in actual emergency evacuations and believes that regulations should be proposed which address, to the greatest extent practicable, actual emergency conditions. The evacuation demonstration required by § 25.803, cited as adequate by parties opposed to new limits on emergency exit layout, does not establish a maximum escape path distance or demonstrate that escape path distance is not a major factor in actual emergencies. That demonstration is conducted to provide a benchmark against which the FAA can consistently evaluate emergency exit performance of various internal seating and emergency exit configurations. It does not simulate a real evacuation, nor could it reasonably do so. It is inappropriate to contend that successful compliance with requirements of § 25.803 or any other certification test conclusively and irrevocably demonstrates that an aircraft is safe. Tests are designed in advance of the aircraft, by definition. From time to time, an aircraft design may evolve which technically meets the letter, but not the spirit of a regulation. In such cases, the question arises whether a regulation may have become outdated and need modification to account for such evolution in design, in order to maintain the high level of safety demanded by the public. Such is the case in this rule proposal.

When the evacuation demonstration required by § 25.803 is conducted, the cabin is filled to maximum passenger capacity, and the airplane is in a level attitude with all gears extended. One exit in each pair of exits is used, with the other exit rendered inoperable to simulate actual blockage which might occur in an accident. This demonstration is required by regulations to determine maximum passenger capacity and emergency exit configuration for a transport category design. It does not represent the more severe conditions of cabin smoke, cabin floor incline, and passenger confusion and potential impaired mobility in panic, which singly or in combination can make escape path distance critical in actual emergency evacuations. The Design and Certification Working Group gave major consideration to the adequacy of the emergency conditions simulated in the evacuation demonstration. Although the group provided information which will enable the FAA to propose means to upgrade the demonstration criteria, the group concluded that actual simulation of the more severe emergency conditions in the evacuation demonstration is impractical. The FAA believes exposure to evacuation hazards posed by the more severe conditions prevalent in actual emergency situations must be reduced, in part, by limiting escape path distance.

Excessive escape path distance can be a major impediment to evacuation in a number of situations which service experience has shown might occur during an actual emergency. The typical passenger cabin with a single aisle feeds evacuees to pairs of exits, one exit on each side of the cabin (or dual aisles to dual lane exits in typical wide body cabins). In an actual emergency evacuation, exits at one end of the cabin might be made unusable by fire, smoke, structural damage, water submersion, landing gear collapse, or other causes, leaving one or more pairs of usable exits in the remainder of the cabin. This is commonly the case in a "pool fire" accident, where escape time differences of only a few seconds can be critical. In

this situation, the aisle cannot feed evacuees to a pair of typical floor level exits fast enough to utilize the full evacuation capability of the exit pair. The flow rate of the aisle is less than that of the exit pair, making the aisle itself the critical impediment which determines the time required for passengers to escape the airplane. (Similarly, dual aisles inadequately feed pairs of exits equipped with dual-lane evacuation slides.)

In the situation where one exit in a pair of exits is unusable, as in an evacuation demonstration, the aisle is not the critical impediment to evacuation. In this case the aisle can feed more evacuees to the remaining single exit than that exit can handle. This results in passenger queues at exits. The limited flow rate of the single exit is the impediment which determines evacuation time. This is the situation which some parties contend demonstrates that aisle length has no effect on evacuation time. The FAA does not agree with this contention because it applies primarily to those types of situations represented in the emergency evacuation demonstrations.

The FAA is increasingly concerned that while the existing emergency evacuation regulations are intended to require the aircraft's type design to include demonstratably acceptable minimum evacuability characteristics, they may overlook actual cabin evacuation factors which may have a direct effect upon the likely success of an actual emergency evacuation. Actual accidents have shown that small differences in evacuation time, which would arise if exit distances were allowed to increase without constraint, can be life threatening.

Based upon tests conducted in the emergency evacuation simulator at the FAA Civil Aeromedical Institute (CAMI) the FAA believes that excessive passenger aisle length is a major impediment to evacuation when the cabin floor becomes inclined due to landing gear collapse or other circumstances which are known to occur in an actual emergency. The simulator is a passenger cabin mock-up which can be tilted to simulate aircraft attitudes typical in emergency conditions. The CAMI tests demonstrate the difficulty passengers have in traversing an aisle located between passenger seats, in a cabin inclined because of landing gear collapse. The typical passenger has great difficultly negotiating an inclined aisle without the coordinated and forceful use of hands for support against seat backs to maintain balance. Without hand support, the passenger tends to lose balance and fall sideward into the seating area. Movement along an inclined aisle becomes more difficult when visibility is poor because of smoke, evacuees are partially incapacitated, obstructions are in the aisle, or there are no handholds because seat backs are in the breakdown position because of crash landing impact. These conditions not only impede the orderly flow of evacuees along the aisle, but also substantially increase the probability that evacuees might stumble and fall, blocking the aisle and stopping the flow of evacuees altogether. The CAMI tests are reported in Report No. FAA-AM-78-3, Passenger Flow Rates Between Compartments: Straight-Segmented Stairways, Spiral Stairways, and Passageways with Restricted Vision and Changes in Attitude, dated January 1978. The report is available through the National Technical Information Service, Springfield, Virginia 22161.

From the foregoing discussions the FAA concludes that passenger emergency escape path distances are factors in an emergency evacuation which may not be adequately addressed in current regulations. The FAA believes that this proposal may be necessary to prevent excessive escape path distances in future airplanes and the increased hazard exposures they pose for emergency evacuation of an airplane cabin.

Discussion of Proposal

This proposal would amend Part 21, Certification Procedures for Products and Parts, by adding a requirement to § 21.183 that for issuance of a standard airworthiness certificate for a transport category airplane manufactured after (the date of this notice), the airplane must be shown to meet the new exit distance requirements proposed for § 25.807(c). Under proposed § 121.310(m), airplanes manufactured after (the date of this notice) and operated by U.S. air carriers would be required to meet the proposed exit distance requirements.

The proposal would amend Part 25, Airworthiness Standards: Transport Category Airplanes, by adding a requirement in § 25.807(c) that each passenger seat be not more than 30 feet from the nearest exit (seat-to-exit distance) and that each exit not be more than 60 feet from an adjacent exit (exit-to-exit distance). Distances are measured from the exit edges and the front floor attach points of seats.

These proposed distances are nominal design limits for evacuation conditions in general, which would provide a margin of about 20 percent above those exit distances envisaged in the exit distribution requirement of current § 25.807(c), based on designs completed or in process at the time of its adoption. The FAA considers that this margin would provide appropriate flexibility for continued design development. Certification experience has shown that the proposed requirements would permit a wide range of economic cabin configurations. Accident experience has shown that small differences in evacuation time can be critical to survival. This proposal would prevent an expansion of seat-to-exit distance beyond a reasonable limit which has been shown to be satisfactory by service experience. The use of nominal design limits has been shown through experience to be an effective and practical means of defining a required level of safety in airworthiness regulations. Comments are specifically sought on whether or not, as an alternative to the proposed limits, an effective and practical performance standard would be developed to accomplish the intent of the proposal.

The proposed limits address an aspect of emergency evacuation conditions which are not adequately accounted for in the evacuation demonstration under § 25.803 or in other regulations. The FAA believes that the proposed limits on escape path distance are reasonable and justified from a safety standpoint, as indicated below.

To confirm the appropriateness of these limits, the FAA has analyzed the evacuation of an area of a typical high seating density cabin served by an aisle the length of the proposed 30-foot seat-to-exit distance. Such an area would seat in the neighborhood of 60 passengers per aisle, or 60 passengers in a single-aisle narrow body cabin and 120 passengers in a dual-aisle wide body cabin. The CAMI tests mentioned earlier indicate that a reduction in aisle flow by about one-third could be reasonably expected when the floor is inclined because of, for example, gear collapse. For a typical aisle, with an evacuee flow capacity of 72 passengers per minute when the floor is level, a one-third reduction would result in an aisle flow of 48 passengers per minute per aisle when the floor is inclined. This yields an evacuation flow time of 75 seconds for the area of the cabin served by the aisle, or aisles. With an additional 15-second delay for passenger response, exit readiness, and evacuation start-up, the total evacuation time for the area would be 90 seconds. This example indicates that the proposed exist distance limits are necessary from a safety standpoint

because the limits tend to establish a balance between the seating capacity of the cabin and the evacuation capacity of the aisle serving the cabin under certain emergency evacuation conditions. This example accounts for a hypothetical seating arrangement representative of air carrier service and evacuation conditions which experience has shown occur in an actual emergency evacuation. Different seating arrangements and emergency conditions could lead to somewhat higher or lower evacuation times. In the above example, the important point to recognize is that the factor which can have the greatest influence on evacuation time in an actual accident situation is the aisle flow, not the door flow rate. Seat-to-exit distance can be a critical survival factor. Conditions such as partially incapacitated passengers, heavy cabin smoke, aisle obstructions, and seat backs in the breakover position could not only reduce aisle flow by an amount greater than the one-third used in the above example, but also could substantially increase the probability of persons falling and blocking the aisle and stopping the flow of evacuees altogether because of passenger panic. The FAA believes that further limiting escape path distance, beyond that in common use today, to account for evacuation conditions is unnecessary, based on satisfactory service experience of the past two decades. (This proposal is drafted with the intent of avoiding problems which would be expected if exit distances were allowed to increase without constraint, not to reduce distances which in service have been shown to be acceptable.)

This proposal would incorporate the new exit distance requirements into § 25.2 to be retroactively applicable for type certification of new airplane models regardless of date of the original application for type certificate. Section 25.2 was established by amendment 25-15 as a means of assuring, when practicable, that significant advancements directly affecting the safety of passengers can be implemented in airplane type certification without delay.

The proposal would amend Part 121, Certification and Operations: Domestic, Flag, and Supplemental Air Carriers and Commercial Operators of Large Aircraft, by adding a requirement in § 121.310(m) that, except for airplanes which have already received airworthiness approval, airplanes must meet the exit distance requirements proposed for § 25.807(c). Airplanes already in U.S. airline operation have been excluded from the requirement because the excessive cost required to retrofit or remanufacture these airplanes so as either to relocate exits or install additional exits to achieve the objective of this proposal makes such action impractical.

This proposal, therefore, would not directly affect any airplane in the United States air carrier fleet. It would indirectly affect a model in the fleet by preventing incorporation in that model of a previously approved modification which would deactivate a pair of emergency exits. That modification is being used by several foreign carriers, and those airplanes could conceivably be sold or leased to U.S. airlines. This proposal would require modification of them before use in U.S. airline operation under this part, consistent with the Administrator's letter to U.S. airlines dated June 12, 1985. Such modification can be done at the same time customer specific interior reconfiguration is being accomplished, however, and such minimal additional cost as could theoretically be ascribed to this proposal are not further addressed herein.

Regulatory Evaluation

The regulatory evaluation examines the benefits and costs of this Notice of Proposed Rulemaking to amend Parts 21, 25, and 121.

This proposal would limit passenger emergency escape path distance by establishing a new standard limiting the distance any passenger seat may be from the nearest emergency exit (no more than 30 feet) and the distance any exit may be from an adjacent exit (no more than 60 feet). The proposed rule is a result of findings of the recent public Emergency Evacuation Task Force, and it is intended to improve the likelihood of passengers safely escaping an airplane during an emergency evacuation.

In assessing the need for this rulemaking and fashioning a proposal which adequately addresses the safety concerns identified, the FAA has proposed to limit the distance any passenger seat may be from the nearest emergency exit to no more than 30 feet, and the distance any exit may be from an adjacent exit to no more than 60 feet. The specific distance limits proposed in this notice represent the FAA's best safety judgment to address this problem. This regulatory evaluation focuses on the costs and benefits anticipated from implementation of the distance limits specified in this proposal.

Since the specific distance limits adopted by regulation could vary considerably, with corresponding variations in the rule's range of effectiveness, the FAA recognizes that views may differ regarding the distance limits proposed and the attendant costs and benefits of alternate distance limits. For this reason, we specifically invite comment regarding other cost-effective distance limits capable of providing an adequate level of cabin evacuation safety.

This proposal would potentially primarily impact U.S. airline operators of Boeing Model 747 airplanes. Although B-747 airplanes currently in use by U.S. air carriers do not have adjacent passenger emergency exit doors that are greater than 60 feet apart, the B-747 type certificate has been amended to permit deletion or deactivation of a pair of emergency exists. This proposal would prohibit the deletion, deactivation, or respacing of airplane emergency exists only if such action would increase the passenger seat-to-exit and exit-to-exit distances beyond 30 feet and 60 feet, respectively. As a result of the potential for this exit deletion, the regulatory evaluation focuses entirely on B-747 airplanes.

The costs of the proposed rule are the foregone savings an airline operator could obtain by deleting the two exits. The cost elements are the weight reduction resulting from the elimination of the ramp/slide assembly and the reduction in the maintenance costs of the exit door and the ramp/slide assembly.

The FAA estimates that deletion of the two doors would reduce the airplane weight by 600 pounds. This weight reduction is a result of the removal of evacuation ramps and slides and door mechanisms. Some weight must be added to make the affected interior of the airplane presentable. In the future it is expected that the weight of slides will be reduced because of improved technology, but for this evaluation the 600 pound figure will be used. Airline estimates indicate that about 18 gallons of fuel are used per year for each pound of added weight. Since the cost of fuel is about 63 center per gallon the cost savings as a result of the weight reduction is about $6,800 per year ($0.63 per gallon × 18 gallons per pound × 600 pounds).

The ramp/slide assemblies and exit doors require periodic maintenance as well as maintenance associated with malfunctions. Periodic maintenance is done every 3 years and requires about 40 person-hours. The FAA estimates that the yearly maintenance cost including the periodic maintenance is about $1,500 per year representing 25 hours of labor at $40 per hour including overhead and $500 in parts. Therefore,

the total yearly cost is about $8,300 ($6,800 fuel + $1,500 maintenance).

The FAA believes it has identified the only costs associated with this proposal. However, if there are any costs we have not accounted for, we urge commenters to let us know what they are with as much specificity as possible. We will review such comments and revise our cost estimates in connection with any final rule subsequently developed if commenters identify any significant cost which we have not adequately considered.

The benefits of the proposed rule represent the avoidance of an increased likelihood that fatalities would occur if two passenger emergency exits were deleted from U.S. registered B-747 airplanes.

The benefits are as a result of the reduced escape path distance the two additional emergency exit doors would allow for evacuating an airplane. As indicated by tests conducted in the emergency evacuation simulator at CAMI, excessive passenger aisle length is a major impediment to evacuation when the cabin floors become inclined due to landing gear collapse or other circumstances likely in an actual emergency. It is for this reason that the proposed rule would potentially save lives during an emergency evacuation of a transport category airplane.

The National Bureau of Standards (NBS) recently did a study for the FAA ralating to passenger airplane fire safety with application to fire blocking of seats. NBS analyzed historical fire incidents involving fire fatalities for the 1965 to 1982 period and estimated how many lives could be saved if the passengers had additional time to escape an airplane.

NBS estimated that if fire-blocking of seats could provide an additional margin (20 seconds) for emergency escape, about 8.8 lives could have been saved for the 1982 U.S. fleet. In some of the accidents analyzed, fire-blocking of seats would not have added any escape time, whereas additional emergency exits may have significantly lessened the escape time and thus increased the margin for survival. Extrapolating for 1985, the number of lives saved is estimated to be 11.2. Since the B-747 fleet represents about 12.6 percent of the total seats in the 1985 fleet, the number of lives saved in the B-747 fleet would be 1.4 or 0.009 lives saved per year per B-747 airplane based on a fleet of 156 airplanes. Valued in monetary terms, these lives would amount to an estimated $9,000 ($1 million × 0.009) per aircraft per year. This figure of $1 million is consistent with the widely accepted minimum value assigned to human life for use in regulatory evaluations/analyses of government regulations. Therefore, this proposal would be cost-beneficial, if adopted. The draft Regulatory Evaluation that has been placed in the docket contains additional detail relating to costs and benefits.

International Trade Impact Assessment

This proposal is not expected to have any measurable impact on international trade. Although some foreign airline operators could modify their aircraft by deleting exit doors, such an action would not result in any serious competitive disadvantages for U.S. airline operators doing business abroad. This assessment is based on the fact that some foreign airline operators have already deleted exit doors and this practice is not expected to continue to any great extent because virtually all of the world fleet airline operators are flying below their maximum seating capacity. Thus, this proposal, if adopted is expected to have no measurable impact on the trade opportunities for U.S. airline operators doing business abroad or for foreign airline operators doing business in the U.S.

Regulatory Flexibility

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 agencies to review rules which may have a "significant economic impact on a substantial number of small entities."

The proposal would directly impact two types of entities, the manufacturer of B-747 airplanes and airline operators whose fleets contain B-747 airplanes.

The FAA size threshold for a determination of a small entity for aircraft manufacturers is 75 employees; that is, any aircraft manufacturer with more than 75 employees is considered not to be a small entity. It is clear that the Boeing Company, manufacturer of the B-747 airplanes, is not a small manufacturer.

The FAA size threshold for a determination of a small entity for aircraft operators is 9 owned aircraft; that is, any operator with more than 9 owned aircraft is considered not to be a small entity. The FAA threshold for a substantial number of small entities is one third and at least eleven of the small entities must be impacted. There are less than eleven small entities that own B-747 airplanes.

Conclusion

For the reasons given earlier in the preamble, the FAA has determined that this proposal is not a major regulation as defined in Executive Order 12291. The FAA has determined that this action is significant as defined in Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). In addition, it has been determined under the criteria of the Regulatory Flexibility Act that this regulation, at promulgation, will not have a significant economic impact on a substantial number of small entities.

List of Subjects

14 CFR Part 21

Air transportation, Aircraft, Aviation safety, Safety.

14 CFR Part 25

Air transportation, Aircraft, Aviation safety, Safety.

14 CFR Part 121

Aviation safety, Safety, Air carriers, Air transportation, Aircraft, Airplanes, Airworthiness directives and standards, Transportation, Common carriers, Crashworthiness, Emergency evacuation.

The Proposed Amendments

Accordingly, the FAA proposes to amend Parts 21, 25, and 121 of the Federal Aviation Regulations, 14 CFR Parts 21, 25, and 121, as follows:

PART 21—CERTIFICATION PROCEDURES FOR PRODUCTS AND PARTS

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

Authority: 49 U.S.C. 1344, 1348(c), 1352, 1354(a), 1355, 1421 through 1431, 1502, 1651(b)(2); 42 U.S.C. 1857f-10, 4321 et seq., E.O. 11514; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983).

2. By amending § 21.183 by adding a new paragraph (f) to read as follows:

§ 21.183 Issue of standard airworthiness certificates for normal, utility, acrobatic, commuter and transport category aircraft; manned free balloons; and special classes of aircraft.

* * * * *

(f) *Passenger emergency exit requirements.* Notwithstanding all other provisions of this section, each applicant for issuance of a standard airworthiness certificate for a transport category airplane manufactured after October 16, 1987 must show that the airplane concerned meets the requirements of § 25.807(c) (7) and (8) in effect on (the

effective date of this amendment). For the purposes of this paragraph, the date of manufacture of an airplane is the date the inspection acceptance records reflect that the airplane is complete and meets the FAA Approved Type Design Data.

PART 25—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES

3. The authority citation for Part 25 continues to read as follows:

Authority: 49 U.S.C. 1344, 1354(a), 1355, 1421, 1423, 1424, 1425, 1428, 1429, 1430; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 49 CFR 1.47(a).

4. By amending § 25.2 by redesignating the introductory text as paragraph (a), redesignating paragraphs (a), (b), (c) and (d) as paragraphs (a)(1),(a)(2),(a)(3) and (a)(4), respectively, and adding a new paragraph (b) to read as follows:

§ 25.2 Special retroactive requirements.

* * * * *

(b) Irrespective of the date of application, each applicant for a supplemental type certificate (or an amendment to a type certificate) involving an increase in distance between any adjacent passenger emergency exits must show that the airplane concerned meets the requirements of § 25.807(c) (7) and (8) in effect on (the effective date of this amendment).

5. By amending § 25.807 by adding new paragraphs (c) (7) and (8) to read as follows:

§ 25.807 Passenger emergency exits.

* * * * *

(c) * * *

(7) No passenger seat shall be located more than 30 feet from the nearest passenger emergency exit on each side of the fuselage, as measured in the longitudinal plane from the front floor attachment point of the seat to the nearest edge of the emergency exit.

(8) For an airplane that is required to have more than one passenger emergency exit for each side of the fuselage, no passenger emergency exit shall be more than 60 feet from any adjacent passenger emergency exit, as measured between the nearest exit edges.

* * * * *

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

6. The authority citation for Part 121 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1356, 1357, 1401, 1421 through 1430, 1472, 1485, and 1502; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 49 CFR 1.47(a).

7. By amending § 121.310 by adding a new paragraph (m) to read as follows:

§ 121.310 Additional emergency equipment.

* * * * *

(m) Except as provided by § 121.627(c) and except for airplanes used in operations under this part on October 16, 1987 and having emergency exit configurations installed and authorized for operation prior to October 16, 1987—

(1) No passenger seat shall be located more than 30 feet from the nearest passenger emergency exit on each side of the fuselage, as measured in the longitudinal plane from the front floor attachment point of the seat to the nearest edge of the emergency exit.

(2) For an airplane that is required to have more than one passenger emergency exit for each side of the fuselage, no passenger emergency exit shall be more than 60 feet from any adjacent passenger emergency exit, as measured between the nearest exit edges.

Issued in Washington, DC, on October 16, 1987.

Sandy DeLucia,

Acting Director of Airworthiness.

[FR Doc. 87–24289 Filed 10–16–87; 12:26 pm]

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federal register

Tuesday
October 20, 1987

Part VIII

Environmental Protection Agency

40 CFR Part 32

Debarment and Suspension Under EPA Assistance, Loan and Benefit Programs; Notice of Proposed Rulemaking

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 32

[OA-FRL-3265-1]

Debarment and Suspension Under EPA Assistance, Loan and Benefit Programs

AGENCY: Environmental Protection Agency.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This proposed rule would revise EPA's regulation governing suspension and debarment under its assistance programs (40 CFR Part 32) to conform to OMB government-wide guidelines issued on May 26, 1987 (52 FR 20360-69).[1]

DATES: To be assured of consideration, comments on the proposed rule must be received on or before December 21, 1987. Comments should refer to specific sections of the regulation.

ADDRESS: Comments should be sent to: Robert Meunier, Chief, Compliance Branch (PM-216F), United States Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. (202) 475-8025 (This is not a toll free number.)

FOR FURTHER INFORMATION CONTACT: Robert Meunier or Carlene Foushee on (202) 475-8025.

SUPPLEMENTARY INFORMATION: Executive Order 12549, "Debarment and Suspension," was signed by President Reagan on February 18, 1986 and was published February 21, 1986 (51 FR 6370-71).

As part of the Administration's initiatives to curb fraud, waste, and abuse, the President's Council on Integrity and Efficiency created an interagency task force to study the feasibility and desirability of a comprehensive suspension and debarment system encompassing the full range of Federal activities. The task force concluded, in its November 1982 report, that such a system was desirable and feasible.

As a result, the Office of Management and Budget (OMB) established an interagency Task Force on Nonprocurement Suspension and Debarment. This Task Force recommended in its November 1984 report that a government-wide nonprocurement suspension and debarment system, similar to that currently in effect for procurement, be established. This could be the first step toward a comprehensive system, including both procurement and nonprocurement.

The Task Force on Nonprocurement Suspension and Debarment considered many issues in developing the proposed guidelines. It concluded that the system should be as compatible as possible with the procurement debarment and suspension system included in the Federal Acquisition Regulations (FAR), while fully addressing the needs and concerns of nonprocurement programs. As a result, the guidelines generally used the due process procedural structure of the FAR. Also, the proposed grounds for debarment and suspension were substantially similar to those in the FAR. The proposal combined the criteria common to the existing agency nonprocurement regulations with the criteria in the FAR.

On February 21, 1986, OMB published proposed guidelines covering the subjects indicated in section 6 of E.O. 12549, including: coverage, government-wide criteria, and minimum due process procedures (51 FR 6372-79).

OMB received 60 comments on the proposed guidelines. All comments were provided to the Task Force on Nonprocurement Suspension and Debarment for consideration in preparing the final guidelines which were issued on May 26, 1987, and published May 29, 1987 (52 FR 20360-69).

This proposed rule follows closely the language and format contained in the OMB guidelines. However, in order to reflect specific EPA organizational responsibilities, specific references have replaced the general language used in the guidelines wherever appropriate.

Under the guidelines, "§ ____.310 Procedures" reflects a decisionmaking process which is employed by several agencies and used in Subpart 9.4 of the FAR. Under that procedure, a hearing need be employed only where material facts are in dispute (i.e., actions not based upon a criminal conviction).

This proposed rule, varies slightly in that it reflects EPA's preference for allowing a respondent to appear in person or through a representative (hearing), or to waive the appearance in favor of entering a written submission. This election is available at EPA regardless of whether there are "material facts" in dispute.

Also, § 32.313(d) permits a party to seek reconsideration by the Director (debarring official) for legal or factual errors if requested within 10 days of the party's receipt of the determination. § 32.314 is added to reflect EPA's internal procedure for appealing a suspension or debarment determination. There is no corresponding provision contained in the OMB guidelines.

Subpart D of this proposed rule is tailored to reflect the above applicable procedures where a suspension has been imposed. EPA's internal investigation and referral procedures are reflected in § 32.410, and the decisionmaking process in § 32.412 cross-references the debarment procedures in an effort to economize in the cost of publication, and for ease of reading.

The final OMB guidelines allowed agency discretion to determine when agencies would require certification by nonprocurement participants. This proposed rule would permit certification in lieu of an obligation to check the GSA Consolidated List by all participants making awards of $25,000 or less. The Agency invites comments on whether it should expand or narrow the range for optional certification, or establish a mandatory certification system at all tiers of participation.

Impact Analyses

Executive Order 12291 requires that a regulatory impact analysis be prepared for "major" rules which are defined in the Order as any rule that has an annual effect on the national economy of $100 million or more, or certain other specified effects.

We do not believe that this proposed regulation will have an annual economic impact of $100 million or more or the other effects listed in the Order. For this reason, we have determined that this proposed regulation is not a major rule within the meaning of the Order.

Regulatory Flexibility Act of 1980

The Regulatory Flexibility Act, 5 U.S.C. 605(b), requires that, for each rule with a "significant economic impact on a substantial number of small entities," an analysis be prepared describing the rule's impact on small entities and identifying any significant alternatives to the rule that would minimize the economic impact on small entities.

We certify that this proposed regulation will not have a significant economic impact on a substantial number of small entities.

Dated: October 19, 1987.

Lee M. Thomas,

Administrator.

List of Subjects in 40 CFR Part 32

Administrative practice and procedure, Assistance programs—environmental protection, Technical assistance.

[1] For other documents concerning debarment and suspension see Part II of this issue of the Federal Register.

40 CFR Part 32 is revised to read as follows:

PART 32—DEBARMENT AND SUSPENSION UNDER EPA ASSISTANCE, LOAN AND BENEFIT PROGRAMS

Subpart A—General

Sec.
32.100 Purpose.
32.105 Authority.
32.110 Coverage.
32.115 Policy.
32.120 Definitions.

Subpart B—Effect of Action

32.200 Debarment or suspension.
32.205 Voluntary exclusion.
32.210 Ineligible persons.
32.215 Exception provision.
32.220 Continuation of current awards.
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Subpart C—Debarment

32.300 General.
32.305 Causes for debarment.
32.310 Investigation and referral.
32.311 Notice of proposed debarment.
32.312 Hearing.
32.313 Decisionmaking process.
32.314 Review.
32.315 Effect of proposed debarment.
32.320 Settlement and voluntary exclusion.
32.325 Period of debarment.
32.330 Scope of debarment.
32.331 Imputed conduct.

Subpart D—Suspension

32.400 General.
32.405 Causes for suspension.
32.410 Investigation and referral.
32.411 Notice of suspension.
32.412 Decisionmaking process.
32.415 Period of suspension.
32.420 Scope of suspension.

Subpart E—Agency Responsibilities; Consolidated List

32.500 GSA responsibility.
32.505 Responsibilities of EPA.
32.510 Responsibilities of participants.

Authority: 7 U.S.C. 136 et seq.; 15 U.S.C. 2601 et seq.; 20 U.S.C. 4011 et seq.; 33 U.S.C. 1251 et seq.; 42 U.S.C. 300f et seq., 4901 et seq., 6901 et seq., 7401 et seq., 9601 et seq.; Executive Order 12549.

Subpart A—General

§ 32.100 Purpose.

(a) Executive Order 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a system for debarment and suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits. Debarment or suspension of a participant in a program by one agency shall have government-wide effect. Section 3 of the Order directs agencies to issue implementing regulations and section 6 of the Order authorizes the Office of Management and Budget (OMB) to issue guidelines concerning the Order.

(b) These regulations implement sections 3 and 6 of Executive Order 12549 by:

(1) Prescribing the programs and activities that are covered by the Order;

(2) Prescribing the government-wide criteria and government-wide minimum due process procedures that EPA shall use in implementing the Order;

(3) Providing for the listing of debarred and suspended participants, participants who voluntarily exclude themselves from participation in covered transactions, and participants declared ineligible (see the definition of "ineligible" in § 32.120);

(4) Setting forth the consequences of the actions under paragraph (b)(3) of this section;

(5) Offering such other guidance as necessary for the effective implementation and administration of the Order.

(c) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

§ 32.105 Authority.

These regulations are issued pursuant to Executive Order 12549 of February 18, 1986.

§ 32.110 Coverage.

(a) *Covered transactions.* These regulations apply to Executive branch domestic assistance transactions described below:

(1) *General.* Covered transactions (whether by a Federal agency, recipient, subrecipient, or intermediary) include, except as noted in paragraph (a)(3) of this section: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements; subawards, subcontracts and transactions at any tier that are charged as direct costs, regardless of type (including subtier awards under awards which are statutory entitlement or mandatory awards); and specially covered activities identified in paragraph (a)(2) of this section.

(2) *Specially covered activities.* In addition to those transactions identified in paragraph (a)(1) of this section, participants in the loan, loan guarantee, and insurance programs of the Departments of Agriculture and Housing and Urban Development and of the Veterans Administration, and in the interstate land sales and manufactured housing programs of the Department of Housing and Urban Development are subject to these regulations. Also, those in business relationships with such participants with respect to such programs are subject to these regulations, whether or not their participation involves the actual receipt of Federal funds.

(3) *Exceptions.* The following transactions are not covered: statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory); benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted); incidental benefits derived from ordinary governmental operations; and other transactions where the application of Executive Order 12549 and these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section, § 32.110, describes the types of activities and transactions to which a debarment or suspension under these regulations will apply. Subpart B, Effect of Action, § 32.200, sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants in the covered transactions and activities described in § 32.110. Sections 32.330, Scope of debarment, and § 32.420, Scope of suspension, govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which additional affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal acquisition activities.* Executive Order 12549 and these regulations do not apply to direct Federal acquisition activities. Debarment and suspension of Federal contractors and subcontractors are covered by the Federal Acquisition Regulation (FAR), 48 CFR Subpart 9.4.

§ 32.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to effectuate this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal

Government's protection and not for purposes of punishment. EPA may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

§ 32.120 Definitions.

Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliate. Persons are affiliates of one another if, directly or indirectly, one owns, controls, or has the power to control the other, or a third person owns, controls, or has the power to control both.

Agency. Any executive department, military department or defense agency, or other agency of the executive branch, excluding the independent regulatory agencies.

Consolidated List. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about participants who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and those who have been determined to be ineligible.

Control. The power to exercise, directly or indirectly, a controlling influence over the management, policies, or activities of a person, whether through the ownership of voting securities, through one or more intermediary persons, or otherwise. For purposes of actions under these regulations, a person who owns or has the power to vote more than 25 percent of the outstanding voting securities of another person, or more than 25 percent of total equity if the other person has no voting securities, is presumed to control. Such presumption may be rebutted by evidence. Other indicia of control include, but are not limited to: interlocking management or ownership; identity of interests among family members; shared facilities and equipment; common use of employees; and, establishment, following the debarment, suspension, or other exclusion of a participant, of an organization or entity which is to operate in the same business or activity and to have substantially the same management, ownership, or principal employees as the debarred, suspended or excluded participant.

Conviction. A judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

Debarment. An action taken by a debarring official in accordance with agency regulations implementing Executive Order 12549 to exclude a person from participating in covered transactions. A person so excluded is "debarred."

Debarring official. An agency head or a designee authorized by the agency head to impose debarment. In EPA, the debarring official is the Director, Grants Administration Division.

Director. The Director, Grants Administration Division, who is EPA's debarring and suspending official.

Indictment. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible. Excluded from participation in covered transactions, programs or agreements pursuant to statutory, Executive order, or regulatory authority other than Executive Order 12549 and its agency implementing and supplementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the equal employment opportunity acts and Executive orders, or the environmental protection acts and Executive orders.

Legal proceedings. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

Notice. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

Participant. Any person who submits proposals for, receives an award or subaward or performs services in connection with, or reasonably may be expected to be awarded or to perform services in connection with, a covered transaction. This term also includes any person who conducts business with a Federal agency as an agent or representative of another participant.

Person. Any individual, corporation, partnership, association, unit of government or legal entity however organized, including any subsidiary of any of the foregoing.

Preponderance of the evidence. Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Proposal. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking a benefit, directly or indirectly, under a covered transaction.

Respondent. A person against whom a debarment or suspension action has been initiated.

Subsidiary. Any corporation, partnership, association or legal entity however organized, owned or controlled by another person.

Suspending official. An agency head or a designee authorized by the agency head to impose suspension. In EPA the suspending official is the Director, Grants Administration Division.

Suspension. An action taken by a suspending official in accordance with agency regulations implementing Executive Order 12549 to immediately exclude a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal or debarment proceedings as may ensue. A person so excluded is "suspended."

Voluntary exclusion. A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

Subpart B—Effect of Action

§ 32.200 Debarment or suspension.

(a) Except to the extent prohibited by law, a person's debarment or suspension shall be effective throughout the Executive branch of the Federal Government. Except as provided in § 32.215, persons who are debarred or suspended under these provisions are excluded from participation in all covered transactions of all agencies for the period of their debarment or suspension. Accordingly, agencies and participants shall not make awards to or agree to participation by such debarred or suspended persons during such period.

(b) In addition, persons who are debarred or suspended are excluded from participation in or under any covered transaction in any of the following capacities: as an owner or partner holding a controlling interest, director, or officer of the participant; as a principal investigator, project director, or other position involved in management of the covered transaction; as a provider of federally-required audit services; in any other position to the extent that the incumbent is responsible for the administration of Federal funds; on in any other position charged as a

direct cost under the covered transaction.

§ 32.205 Voluntary exclusion.

Participants who accept voluntary exclusions under § 32.320 are excluded in accordance with the terms of their settlements; their listing, pursuant to Subpart E, is for informational purposes. Awarding agencies and participants must contact the original action agency to ascertain the extent of the exclusion.

§ 32.210 Ineligible persons.

Persons who are ineligible are excluded in accordance with the applicable statutory, Executive order, or regulatory authority.

§ 32.215 Exception provision.

EPA may grant an exception permitting a debarred, suspended, or excluded person to particpate in a particular transaction upon a written determination by the Director stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549. However, the Order states that it is the President's intention that exceptions to this policy should be granted only infrequently. Exceptions should be reported in accordance with § 32.505.

§ 32.220 Continuation of current awards.

(a) Notwithstanding the debarment, suspension, voluntary exclusion or ineligible status of any person, EPA and participants may continue agreements in existence at the time the person was debarred, suspended, declared ineligible or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) EPA and participants shall not renew or extend the duration of current agreements with any person who is debarred, suspended, declared ineligible or under a voluntary exclusion, except as provided in § 32.215.

§ 32.225 Failure to adhere to restrictions.

Doing business with a debarred, suspended or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended or otherwise excluded from participation in such transaction, except as permitted under these regulations, may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

Subpart C—Debarment

§ 32.300 General.

The Director may debar a participant for any of the causes in § 32.305, using procedures in §§ 32.310 through 32.314. The existence of a cause for debarment, however, does not necessarily require that the participant be debarred; the seriousness of the participant's acts or omissions and any mitigating factors should be considered in making any debarment decision.

§ 32.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 32.300 and 32.310 through 32.314 for:

(a) Conviction of or civil judgment for any offense indicating a lack of business integrity or honesty which affects the present responsibility of a participant, including but not limited to:

(1) Fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement;

(2) Bribery, embezzlement, false claims, false statements, falsification or destruction of records, forgery, obstruction of justice, receiving stolen property, or theft; or

(3) Unlawful price fixing between competitors, allocation of customers between competitors, bidrigging, or any other violation of Federal or State antitrust laws that relates to the submission of bids or proposals.

(b) Violation of the terms of a public agreement so serious as to affect the present responsibility of a participant, including but not limited to:

(1) A willful or material failure to perform under one or more public agreements;

(2) A history of substantial noncompliance with the terms of one or more public agreements; or

(3) A willful or material violation of a statutory or regulatory provision or requirement applicable to a public agreement.

(c) Any of the following causes:

(1) Debarment or equivalent exclusionary action by any public agency or instrumentality for causes substantially the same as provided for by § 32.305;

(2) Doing business with a debarred, suspended or otherwise excluded person, in connection with a covered transaction, where it is known or reasonably should have been known that the person is debarred, suspended or otherwise excluded from participation in such transactions;

(3) Conduct indicating a lack of business integrity or honesty which affects the present responsibility of a participant;

(4) Loss or denial of the right to do business or practice a profession under circumstances indicating a lack of business integrity or honesty or otherwise affecting the present responsibility of a participant;

(5) Failure to pay a debt (including disallowed costs and overpayments) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted; or

(6) Violation of a material provision of a voluntary exclusion or of any settlement of a debarment or suspension action.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a participant.

§ 32.310 Investigation and referral.

Anyone may contact the Chief, Compliance Branch, Grants Administration Division, or the Regional Counsel concerning the existence of a cause for debarment. The Chief or Counsel may refer the matter to EPA's Inspector General or other appropriate office for further investigation. If, after review or investigation, the Chief or Counsel reasonably believes that a cause for debarment exists, he or she may request that debarment be proposed.

§ 32.311 Notice of proposed debarment.

When the Director decides to propose debarment, he or she shall provide notice to the respondent. The notice shall state:

(a) That debarment is being proposed;

(b) The reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) the cause(s) relied upon under § 32.305 for proposing debarment;

(d) The provisions of §§ 32.311 through 32.314;

(e) The effect of the proposed debarment pending a final debarment decision;

(f) The potential effect of a debarment; and

(g) That the party being served will be afforded an opportunity for a hearing or to enter a written submission if the person so requests and the request is made in writing within 30 calendar days after receipt of the notice; and that failure to timely request a hearing or enter a written submission will result in debarment as proposed.

§ 32.312 Hearings.

(a) The Respondent shall be provided an opportunity for a hearing if he or she so requests in accordance with § 32.311(g)

(b) If the Respondent requests a hearing in accordance with this part, the Director shall act as a hearing officer or appoint a hearing officer or panel to conduct the hearing.

(c) The hearing officer or panel shall arrange for a hearing and notify the parties, in writing, of the time and place of the hearing.

(d) The hearing shall be conducted in an informal manner without formal rules of evidence or procedure, consistent with principles of fundamental fairness. The Respondent shall be afforded an opportunity to appear with counsel, submit documentary evidence, present witnesses and confront any person EPA presents.

(e) A transcribed record of the hearing shall be made available at cost to the respondent, unless the respondent and EPA, by mutual agreement, waive the requirement for a transcript.

§ 32.313 Decisionmaking process.

(a) *Written determination.* The Director shall issue a written determination on the evidence presented within 45 days of the final submissions or arguments by the parties, unless the Director extends this period for a good cause. If the Director appoints a hearing officer or panel under § 32.312(b), the Director may reject any findings of fact by the hearing officer or panel, in whole or part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(b) *Standard of evidence.* The existence of the causes(s) for debarment shall be proved by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, this standard is met upon production of the court's judgment, decree, order or similiar evidence of its findings.

(c) *Notice of Director's determination.* (1) If the Director decides to impose debarment, the respondent shall be given pompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the Executive branch of the Federal Government unless an agency head or a designee authorized by an agency head makes the determination referred to in § 32.215.

(2) If the Director decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

(d) *Reconsideration.* Any party to the action may petition the Director to reconsider a determination for alleged errors of fact or law. The petition for reconsideration must be in writing and filed with the Director within 10 calendar days from the date of the party's receipt of the determination.

§ 32.314 Review.

(a) The determination under § 32.313 shall be final. However, any party to the action may request the Director, Office of Administration (OA Director), to review the findings of the Director by filing a request with the OA Director within 30 calendar days of the party's receipt of the determination. The request must be in writing and set forth the specific reasons why relief should be granted.

(b) A review under this section shall be at the discretion of the OA Director. If a review is granted, the OA Director may stay the effective date of a debarment or suspension order pending his or her determination. If a debarment or suspension is stayed, the stay shall be automatically lifted if the OA Director affirms the determination.

(c) The review shall be based solely upon the record. The OA Director may set aside a determination only if it is found to be arbitrary, capricious, an abuse of discretion, or based upon a clear error of law.

(d) The OA Directror's subsequent determination shall be in writing and mailed to all parties.

(e) A determination under § 32.313 or a review under this section shall not be subject to a dispute or a bid protest under Part 30 or Part 33 of this subchapter.

§ 32.315 Effect of proposed debarment.

Upon issuance of a notice of proposed debarment and until the final debarment decision is rendered, EPA and its participants shall not make any new awards to the respondent. EPA may waive this exclusion pending a debarment decision upon a written determination by the Director identifying the reasons for doing so. In the absence of such a waiver, the provisions of § 32.215 allowing exceptions for particular transactions may be applied.

§ 32.320 Settlement and voluntary exclusion.

(a) When in the best interest of EPA, the Director may, at any time prior to the determination, settle a debarment or suspension action.

(b) If a participant and EPA enter into a settlement providing for the exclusion of the participant, such exclusion shall be entered on the Consolidated List (see Subpart E).

§ 32.325 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, a debarment should not exceed three years. Where circumstances warrant, a longer or indefinite period of debarment may be imposed. If a suspension precedes a debarment, the suspension period may be considered in determining the debarment period.

(b) The Director may extend an existing debarment for an additional period, if he or she determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If the debarment for an additional period is determined to be necessary, the procedures of §§ 32.310 through 32.314 shall be followed to extend the debarment.

(c) The Director may reduce the period or scope of debarment, upon the respondent's request, supported by documentation, for reasons such as:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the Director deems appropriate.

§ 32.330 Scope of debarment.

(a) Debarment of a person or affiliate under Executive Order 12549 constitutes debarment of all its subsidiaries, divisions, and other organizational elements unless the debarment decision is limited by its terms to one or more specifically identified individuals or organizational elements or to specific types of transactions.

(b) The debarment action may include any other affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see § 32.311).

§ 32.331 Imputed conduct.

For purposes of determining the scope of debarment, conduct may be imputed as follows:

(a) *Conduct imputed to participant.* The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be presumptive evidence of such knowledge, approval, or acquiescence.

(b) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(c) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be presumptive evidence of such knowledge, approval or acquiescence.

Subpart D—Suspension

§ 32.400 General.

(a) The Director may suspend a participant for any of the causes in § 32.405 using procedures in §§ 32.410 through 32.412.

(b) Suspension is a serious action to be imposed on the basis of adequate evidence of one or more of the causes set out in § 32.405 when it has been determined that immediate action is necessary to protect the public interest.

§ 32.405 Causes of suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 32.400 and 32.410 through 32.412 upon adequate evidence:

(1) To suspect the commission of an offense listed in § 32.305(a); or

(2) That a cause for debarment under § 32.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 32.410 Investigation and referral.

If during review or investigation of any matter referred to him or her or as part of a recommendation to debar, the Chief, Compliance Branch, Grants Administration Division, or Regional Counsel believes that immediate action is required to protect the public interest, he or she may request the Director to suspend a person upon presenting adequate evidence that a cause for suspension exists, and providing a narrative statement describing the public interest which is jeopardized by awaiting completion of debarment or legal proceedings.

§ 32.411 Notice of suspension.

When the Director decides to impose a suspension, he or she shall immediately provide notice to respondent. The notice shall state:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) The irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) The cause(s) relied upon under § 32.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation and such legal or debarment proceedings as may ensue;

(f) Of the provisions of §§ 32.411 and 32.412;

(g) Of the effect of the suspension; and

(h) That the party being served will be afforded an opportunity for a hearing or to enter a written submission if the person so requests and the request is made in writing within 30 calendar days after receipt of the notice, except as otherwise provided in § 32.412.

§ 32.412 Decisionmaking process.

(a) If the Respondent requests a suspension hearing in accordance with § 32.411(h), the procedure under §§ 32.312, 32.313 (a), (c) and (d) and 32.314 shall apply in providing for a suspension hearing, determination, and opportunity for review. However, no hearing shall be provided if a decision is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(b) The Director may modify or terminate the suspension (for example, see § 32.325(c) for the reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency.

§ 32.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of investigation and any ensuing legal or debarment proceedings, unless terminated sooner by the Director or as provided in paragraph (b) of this section.

(b) If legal or debarment proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The Director shall notify the Department of Justice of an impending termination of a suspension at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§ 32.420 Scope of suspension.

The scope of a suspension shall be the same as the scope of debarment (see §§ 32.330 and 32.331) except that the procedures of §§ 32.410 through 32.412 shall be used in imposing a suspension.

Subpart E—Agency responsibilities; Consolidated List

§ 32.500 GSA responsibility.

(a) The General Services Administration (GSA) shall compile, maintain, and distribute a list of all participants who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, voluntarily excluded, and ineligible participants in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§ 32.505 Responsibilities of EPA.

(a) EPA shall provide GSA with current information concerning debarments, suspensions, voluntary exclusions and ineligibilities taken by EPA. Until February 18, 1989, EPA shall also provide GSA and OMB with information concerning all transactions in which the EPA has granted exceptions under § 32.215 permitting participation by debarred, suspended, or excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, EPA shall advise GSA of the information set forth in § 32.500(b) and of the exceptions granted under § 32.215 within five working days after taking such actions.

(c) EPA shall provide for the effective dissemination and use of the list, in order to ensure that listed persons do not participate in any covered transaction in a manner inconsistent with that person's listed status, except as otherwise provided in these regulations. Anyone may contact the Chief, Compliance Branch, Grants Administration Division, or the cognizant Regional or Headquarters grants administration office for information about the Consolidated List.

(d) EPA shall direct inquiries concerning listed persons to the agency that took the action.

(e) EPA Assistance Award Officials shall consult the most current issue of the Consolidated List before making any award under EPA assistance, loan, and benefit programs and shall, if necessary, consult the Federal agency contact person for a particular listing, to assure that no award is made to a listed person in violation of Executive Order 12549.

§ 32.510 Responsibilities of participants.

(a) Before awarding any subaward or subcontract, participants in EPA assistance, loan or benefit programs must consult the Consolidated List or contact the agency officials listed in § 32.505(c) who will consult the Consolidated List for them.

(b) Where any participant will award a subaward or subcontract in an amount of $25,000 or less, the participant may elect to obtain a certification in lieu of action under paragraph (a) of this section. In such case, the participant shall require the prospective awardee to certify whether the prospective awardee or any person acting in a capacity listed in § 32.200(b) with respect to the prospect awardee or the particular covered transaction is currently or within the preceding three years has been:

(1) Debarred, suspended, or declared ineligible;

(2) Formally proposed for debarment, with a final determination still pending;

(3) Voluntarily excluded from participation; or

(4) Indicted, convicted or had a civil judgment rendered against them for any of the offenses listed in § 32.305(a). Adverse information on the certification need not necessarily result in denial of participation. However, the information provided by the certification and any additional information requested by the awarding participant shall be considered in the administration of covered transactions.

(c) Participants shall direct inquiries regarding compliance with this section to the agency officials listed in § 32.505(c).

(d) Participants shall retain documentation of their compliance with paragraphs (a) and (b) of this section for the same period of time required for financial records related to the covered transaction.

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H.R. 242/Pub. L. 100-130

To provide for the conveyance of certain public lands in Oconto and Marinette Counties, Wisconsin. (Oct. 15, 1987; 101 Stat. 804; 2 pages) Price: $1.00

H.J. Res. 338/Pub. L. 100-131

Designating October 15, 1987, as "National Safety Belt Use Day." (Oct. 15, 1987; 101 Stat. 806; 1 page) Price: $1.00