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Wednesday
November 17, 1993

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WHO: The Office of the Federal Register.

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

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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

Office of the Secretary

7 CFR Part 2

Delegations of Authority

AGENCY: Department of Agriculture.

ACTION: Final rule.

SUMMARY: This document amends the delegations of authority from the Secretary of Agriculture and general officers of the Department of Agriculture to delegate the authority of the Secretary of Agriculture to implement an Emergency Wetlands Reserve Program (EWRP) to the Assistant Secretary for Natural Resources and Environment and the Chief of the Soil Conservation Service (SCS).

EFFECTIVE DATE: November 17, 1993.

FOR FURTHER INFORMATION CONTACT: Edward G. Riekert, Director Watershed Projects Division, P.O. Box 2890, Washington, DC 20013, (202) 720–2847.

SUPPLEMENTARY INFORMATION: The Wetland Reserve Program (WRP) was established under the authority of sections 1237–1237f of the Food Security Act of 1985, as amended, 16 U.S.C. 3837–3837f, and is administered by the Agricultural Stabilization and Conservation Service (ASCS) pursuant to regulations found at 7 CFR part 703. Under the WRP, persons who own croplands and other related lands that have wetland characteristics or the potential for restoration of such characteristics and who agree to the restoration and long-term maintenance of those lands as wetlands may be eligible to enroll the lands in the WRP and receive a payment for the long-term maintenance easement and some cost-sharing assistance for the restoration costs.

The Emergency Supplemental Appropriations for Relief from the Major, Widespread Flooding in the Midwest Act of 1993, Public Law 103–75, provides appropriations to SCS for the repair of "damages to the waterways and watersheds resulting from the Midwest floods and other disasters of 1993" under the Emergency Watershed Protection Program of SCS. See 107 Stat. 742. That appropriation to SCS further provides that if the Secretary of Agriculture "determines that the cost of land and levee restoration exceeds the fair market value of an affected cropland, the Secretary may use sufficient funds provided under this head to accept bids from willing sellers to enroll such cropland inundated by the Midwest floods of 1993 in any of the affected States in the Wetlands Reserve Program as authorized by subchapter C of chapter 1 of subtitle D of title XII of the Food Security Act of 1985."

This rule amends the delegations of authority of the Department of Agriculture contained in 7 CFR part 2 to delegate the authority of the Secretary of Agriculture for the EWRP to the Assistant Secretary for Natural Resources and Environment to the Chief of SCS. The EWRP will be administered by SCS as an adjunct to the WRP administered by ASCS. The delegations provided in this rule are separate from and do not affect the delegations related to the WRP that have previously been made to the Under Secretary for International Affairs and Commodity Programs and the Administrator of ASCS. The policies and procedures for implementing the EWRP will be published by the SCS.

This rule relates to internal agency management. Therefore, notice of proposed rulemaking [to provide] and an opportunity for public comment are not required pursuant to 5 U.S.C. 553, and this rule may be made effective less than 30 days after publication in the **Federal Register**. Further, since this rule relates to internal agency management, it is exempt from the provisions of Executive Orders 12778 and 12866.

This action is not a rule as defined by Public Law 96–354, the Regulatory Flexibility Act, and thus is exempt from the provisions of that Act.

List of Subjects in 7 CFR Part 2

Authority delegations (Government agencies).

Accordingly, part 2, title 7, Code of Federal Regulations is amended as follows:

PART 2—DELEGATIONS OF AUTHORITY BY THE SECRETARY OF AGRICULTURE AND GENERAL OFFICERS OF THE DEPARTMENT

1. The authority citation for part 2 contineus to read as follows:

Authority: 5 U.S.C. 301 and Reorganization Plan No. 2 of 1953.

Subpart C—Delegations of Authority to the Deputy Secretary, the Under Secretary for International Affairs and Commodity Programs, the Under Secretary for Small Community and Rural Development, and Assistant Secretaries

2. Section 2.19 is amended by revising paragraph (c)(13) to read as follows:

§ 2.19 Assistant Secretary for Natural Resources and Environment.

* * * * *

(c) * * *

(13) Carry out responsibilities for the conservation of highly erodible lands and wetlands pursuant to sections 1211–1233 of the Food Security Act of 1985, as amended (16 U.S.C. 3821–3823), provide technical assistance for soil and water conservation technology for the implementation and administration of the Conservation Reserve Program authorized by sections 1231–1244 of the Food Security Act of 1985, as amended (16 U.S.C. 3831–3844), and administer the Emergency Wetlands Reserve Program authorized by sections 1237–1237f of the Food Security Act of 1985, as amended (16 U.S.C. 3837–3837f), and the Emergency Supplemental Appropriations for Relief From the Major, Widespread Flooding in the Midwest Act of 1993, Public Law 103–75.

* * * * *

Subpart G—Delegations of Authority by the Assistant Secretary for Natural Resources and Environment

3. Section 2.62 is amended by revising paragraph (a)(13) to read as follows:

§ 2.62 Chief, Soil Conservation Service.

(a) * * *

(13) Carry out responsibilities for the conservation of highly erodible lands and wetlands pursuant to sections 1211–1233 of the Food Security Act of 1985, as amended (16 U.S.C. 3821–3823), provide technical assistance for soil and water conservation technology

for the implementation and administration of the Conservation Reserve Program authorized by sections 1231–1244 of the Food Security Act of 1985, as amended (16 U.S.C. 3831–3844), and administer the Emergency Wetlands Reserve Program authorized by sections 1237–1237f of the Food Security Act of 1985, as amended (16 U.S.C. 3837–3837f), and the Emergency Supplemental Appropriations for Relief From the Major, Widespread Flooding in the Midwest Act of 1993, Public Law 103–75, 107 Stat. 739, 742.

* * * * *

Dated: November 9, 1993.

Mike Espy,

Secretary of Agriculture.

For subpart G:

Dated: November 9, 1993

Terry D'Addio,

Acting Assistant Secretary for Natural Resources and Environment.

[FR Doc. 93–28180 Filed 11–16–93; 8:45 am]

BILLING CODE 3410–01–M

Agricultural Marketing Service

7 CFR Part 1106

[DA–93–28]

Milk in the Southwest Plains Marketing Area; Suspension of Certain Provisions of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Suspension of rule.

SUMMARY: This action suspends for the moths of October 1993 through January 1994 certain portions of the supply plant shipping requirements of the Southwest Plains Federal milk marketing order. The suspension, requested by Kraft General Foods (Kraft), would relax the requirement that supply plants ship 50 percent of their dairy farmer receipts to pool distributing plants during each of the months of October through January. Kraft contends that shipments from supply plants will not be required to meet the market's fluid requirements because there are plentiful supplies of milk available directly from producers' farms to meet the needs of the market's pool distributing plants.

EFFECTIVE DATE: October 1, 1993, through January 30, 1994.

FOR FURTHER INFORMATION CONTACT: Nicholas Memoli, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, room 2968, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 690–1932.

SUPPLEMENTARY INFORMATION: Prior document in this proceeding:

Notice of Proposed Suspension: Issued October 7, 1993; published October 15, 1993 (58 FR 53438).

This order of suspension is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674) (the Act) and the rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR, part 900).

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this proposed action would not have a significant economic impact on a substantial number of small entities. This action will lessen the regulatory impact of the order on certain milk handlers and will tend to ensure that dairy farmers will have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

This rule is being issued in conformance with Executive Order 12866, and it has been determined that it is not a "significant regulatory action."

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

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

Notice of proposed rulemaking was published in the **Federal Register** (58 FR 53438) on October 15, 1993, concerning the proposed suspension of certain portions of the pool plant definition. The public was afforded the opportunity to comment on the notice by submitting written data, views, and arguments by October 22, 1993. One comment was received and is summarized in the statement of consideration.

After consideration of all relevant material, including the proposal in the notice and other available information, it is hereby found and determined that the following provisions of the order will not tend to effectuate the declared policy of the Act during months of October 1993 through January 1994.

1. In § 1106.6, the words "during the month".

2. In § 1106.7(b)(1), beginning with the words "of February through August" and continuing to the end of that paragraph.

Statement of Consideration

This suspension was requested by Kraft General Foods (Kraft) to allow a supply plant that has been associated with the Southwest Plains order during the months of September 1992 through January 1993 to qualify as a pool plant without shipping any milk to a pool distributing plant during the months of October 1993 through January 1994. In its letter requesting the suspension, Kraft stated that there were abundant supplies of milk available to distributing plants on a direct-ship basis and that supplemental shipments of producer milk from more distant supply plants will not be needed.

Mid-America Dairymen, Inc. (Mid-America) filed a comment in support of the proposed action. Mid-America anticipates that there will be ample supplies of direct-ship producer milk in the Southwest Plains marketing order for the months of October 1993 through August 1994. Mid-America agrees with Kraft that supplemental shipments of milk from more distant supply plants, such as Kraft's plant located in Bentonville, Arkansas, are unnecessary to meet the fluid needs of the market. No comments were filed in opposition to the proposed suspension.

For the reasons discussed above, it is appropriate to suspend certain provisions of the order to permit a supply plant that has qualified as a pool plant in the Southwest Plains market to retain its pool status. In particular, it is appropriate to suspend certain portions of the provision that requires a supply plant to ship 50 percent of its producer receipts to pool distributing plants to qualify as a pool plant during the months of October through January.

It is hereby found and determined that thirty days' notice of the effective date hereof is impractical, unnecessary, and contrary to the public interest in that:

(a) The suspension is necessary to reflect current marketing conditions and to assure orderly marketing conditions in the marketing area;

(b) This suspension does not require of persons affected substantial or extensive preparation prior to the effective date; and

(c) Notice of proposed rulemaking was given interested parties, and they were afforded opportunity to file written data, views, or arguments concerning this suspension.

Therefore, good cause exists for making this order effective October 1, 1993.

List of Subjects in 7 CFR Part 1106

Milk marketing orders.

For the reasons set forth in the preamble, the following provisions in title 7 part 1106 are hereby suspended from October 1, 1993, through January 30, 1994:

PART 1106—MILK IN THE SOUTHWEST PLAINS MARKETING AREA

1. The authority citation for 7 CFR part 1106 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

§ 1106.6 [Temporarily suspended in part]

2. In § 1106.6, the words "during the month".

§ 1106.7 [Temporarily suspended in part]

3. In § 1106.7(b)(1), beginning with the words "of February through August" and continuing to the end of that paragraph.

Dated: November 8, 1993.

Patricia Jensen,

Deputy Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 93–28178 Filed 11–16–93; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Part 1220

[No. LS–92–006]

RIN 0581–AA77

Soybean Promotion and Research Program; Procedures for Conduct of Referenda

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Pursuant to the Soybean Promotion, Research, and Consumer Information Act (Act) a referendum will be conducted among eligible soybean producers to determine whether the Soybean Promotion and Research Order (Order) should be continued. The Act requires the Secretary to conduct such referendum not earlier than 18 months and no later than 36 months after the issuance of an Order. This final rule establishes the procedures for conducting the required continuance referendum. The final rule is also applicable to any subsequent referenda which may be conducted pursuant to the Act.

EFFECTIVE DATE: November 17, 1993.

FOR FURTHER INFORMATION CONTACT: Ralph L. Tapp, Chief; Marketing Programs Branch; Livestock and Seed Division; AMS, USDA, room 2624–S; P.O. Box 96456; Washington, DC 20090–6456. Telephone number 202/720–1115.

SUPPLEMENTARY INFORMATION: Prior document in this proceeding: Proposed Rule—Soybean Promotion and Research Program; Procedures for Conduct of Referendum published May 6, 1993 (58 FR 26933).

Regulatory Impact

This final rule has been reviewed by the U.S. Department of Agriculture in accordance with Departmental Regulation No. 1512–1 and the criteria contained in Executive Order No. 12291 and has been determined to be a nonmajor rule because it does not meet the criteria for a major rule as stated in the Order.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. It is not intended to have a retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 1971 of the Act, a person subject to the Order may file with the Secretary a petition stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order is not in accordance with law and requesting a modification of the Order or an exemption from the Order. The petitioner is afforded the opportunity for a hearing on the petition. After a hearing the Secretary would rule on the petition. The statute provides that the District Court of the United States in any district in which the person who is a petitioner, resides, or carries on business has jurisdiction to review a ruling on the petition if a complaint for the purpose is filed not later than 20 days after the date of the entry of the ruling.

Further, section of the Act provides, with certain exceptions, that nothing in the Act may be construed to preempt or supersede any other program relating to soybean promotion, research, consumer information, or industry information organized and operated under the laws of the United States or any State. One exemption in the Act concerns assessments collected by Qualified State Soybean Boards. The exception provides that to ensure adequate funding of the operations of Qualified State Soybean Boards under the Act, no State law or regulation may limit or have the effect of limiting the full amount of assessments that a Qualified State Soybean Board in that State may collect, and which is authorized to be credited under the Act. Another exception concerns certain referenda conducted during specified periods by a State relating to the continuation or termination of a Qualified State Soybean Board or State soybean assessment.

This action has also been reviewed under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.* This final rule establishes procedures for the conduct of referenda. It permits all eligible soybean producers to register and to vote. Participation in referenda is voluntary. The Administrator of the Agricultural Marketing Service (AMS) has determined that this rule will not have a significant economic impact on a substantial number of small business entities.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, the information collection requirements contained in this final rule have been approved by the Office of Management and Budget. They have been assigned OMB control number 0581–0093. The information collection required by this action and necessary to conduct a referendum include the following:

(a) For "in-person" voting:

(1) Each producer of soybeans voting in a referendum must complete a Ballot (Form LS–49) at the county Cooperative Extension Service (CES) office. The producer must fill out the ballot and insert it in the Ballot Envelope (Form LS–49–1).

(2) Each producer must fill out a Certification and Registration Form which is printed on the Referendum Envelope (LS–49–2). The Ballot Envelope containing the ballot is then inserted in the Referendum Envelope (Form LS–49–2). The estimated average time burden for completing the forms for in-person voting is 6 minutes per voter.

(b) For absentee voting: Each producer of soybeans requesting absentee voting in a referendum must complete a Combined Registration and Absentee Ballot (Form LS–50). The producer must fill out the form and insert the ballot portion in a Ballot Envelope (LS–49–1) (same as in-person voting) and then insert the sealed Ballot Envelope and the registration portion in the Referendum Envelope (LS–50–1) and place in the mail. The estimated average time burden for completing this procedure is 6 minutes per voter.

(c) The final rule contains a requirement that for in-person voting the producer sign the voter registration list (Form LS–49–3). For the absentee voting, the county CES agent shall enter on the Absentee Voter Request List (Form LS–50–2) the names and addresses of each person or entity requesting an absentee ballot and the date the forms were mailed or provided. This information is necessary for the Department to list the identities of each voter in the referendum and to allow voters and interested parties to see the identity of each voter in the referendum. This information can be used to validate ballots and to challenge potentially ineligible voters. Each county CES agent will fill out one or more of Form LS–50–2 per referendum. The estimated average reporting burden will vary depending on the number of absentee ballots requested.

The estimated number of producers who will vote in the referendum is 100,000, each voting once.

Background

The Act (7 U.S.C. 6301–6311) provides for the establishment of a coordinated program of promotion and research designed to strengthen the soybean industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for soybeans and soybean products. The program is financed by an assessment of 0.5 of 1 percent of the net market price of soybeans sold by producers. Pursuant to the Act, an Order was made effective July 9, 1991, and the collection of assessments began September 1, 1991.

The Act requires that a referendum be conducted not earlier than 18 months and not later than 36 months after the issuance of the Order to determine whether the Order should be continued. The initial referendum is to be conducted among persons who were producers of soybeans during a representative period specified by the Secretary for the purpose of determining whether the Order should be continued. The Secretary will establish the representative period and will announce it in an official press release and by other means as specified in § 1220.514. The Order shall be continued only if it is approved by a majority of persons voting in the referendum. If continuation of the Order is not approved by a majority of those persons voting in the referendum, the Secretary shall terminate collection of assessments under the Order within 6 months after the referendum. The Secretary shall terminate the Order in an orderly manner as soon as practicable.

If continuation of the Order is approved, the Act requires that no later than 18 months after approval, the Secretary conduct a poll of soybean producers to determine if producers support the conduct of a referendum on the continuance of the payment of refunds under the Order. If the Secretary determines, based on the poll, that the conduct of a refund referendum is supported by at least 20 percent of the producers (not in excess of one-fifth of which may be producers in any one State), a referendum will be conducted not later than 1 year after the Secretary's decision.

The Act also requires the Secretary to hold additional referenda if requested by 10 percent or more of the producers who during a representative period were engaged in the production of soybeans. No more than one-fifth may be producers in any one State, as determined by the Secretary.

The Act specifies that a referendum shall be conducted for a reasonable period of time not to exceed 3 days as determined by the Secretary and that eligible persons are to certify that they were engaged in the production of soybeans during the representative period and vote at the same time. The Secretary has determined that the referendum shall be conducted on 1 day. That date will be announced in an official Department press release and by other means as specified in § 1220.514. The Act also provides that referenda shall be conducted at county offices of the State CES and that provision shall be made for absentee mail ballots to be provided on request. The Extension Service of the U.S. Department of Agriculture will coordinate the State and county CES roles in conducting the referendum.

On May 6, 1993, AMS published in the **Federal Register** (58 FR 26933) a proposed rule which set forth procedures to be followed in conducting referenda under the Act. The proposed rule included provisions concerning definitions, supervision of the referenda, registration, voting procedures, reporting referenda results, and disposition of the ballots and records. It also proposed that the Agricultural Stabilization and Conservation Service (ASCS) of the Department, assist in the conduct of referenda by: (1) Counting ballots; (2) determining the eligibility of challenged voters; and (3) reporting referenda results.

The proposed rule was published with a request for comments to be submitted by June 7, 1993. The Department received 10 written comments. One from the United Soybean Board and nine from Qualified State Soybean Boards. The commenters generally supported the proposed procedures for the conduct of referenda with certain qualifications.

The substantive changes suggested by commenters are discussed below, together with a description of substantive changes made by the Department upon review of the proposed procedures for the conduct of referenda. The "LS" numbers identifying the forms used for absentee voting in the referenda have been changed as shown below. Also, other minor changes of a nonsubstantive nature are made by the Department for purposes of clarity and accuracy. For the reader's convenience, the discussion is organized by topic headings of the proposed rule.

LS Forms

LS forms for absentee voting referenced throughout the text are changed as follows:

	Proposed rule	Final rule
1. Voter request list	LS–44–3	LS–50–2
2. Combined absentee registration and voting form.	LS–44	LS–50
3. Ballot envelope	LS–44–2	LS–49–1
4. Referendum envelope.	LS–44–1	LS–50–1

Definitions

Section 1220.513 Producer

One commenter pointed out that the proposed rule has a comma after the word "United States" while the comma is not there in the Act or Order. The commenter feels this could introduce an element of uncertainty to the definition. In the interest of uniformity, the comma is deleted in this final rule.

Referendum

Section 1220.527 Registration Form and Ballot

One commenter suggested changes to this section; however, we believe the commenter meant to refer to § 1220.528 and have therefore responded in the section below.

Section 1220.528 Registration and Voting Procedure

Regarding § 1220.528(a)(2) and § 1220.528(b)(4) (per the preceding paragraph), one commenter suggested that in two places in this section, the reference to "his" be changed to "his/her". This is a valid suggestion. The reference to "his" is deleted in this final rule.

Regarding § 1220.528(b)(1), several commenters suggested modifying this section to allow absentee ballots to be requested at county CES offices as well as State CES offices. The commenters concern was that absentee ballots be as widely available as possible. We agree that this is a valid concern; however, we believe that the potential for requests to be lost increases when the request is handled by more than one office. Therefore, we have changed this section to permit eligible producers to request absentee ballots at the county CES office serving the county in which they reside, if individuals, or serving the county in which their main office is located, if a corporation or other entity. We have eliminated the provision that absentee ballots may be requested from the State CES office. Additionally, we have added that ballots may be requested in person as well as by mail. However, all ballots requested will be provided by mail.

The commenters went on to suggest a technical correction to § 1220.528(b)(1) to clarify that county CES offices would receive appropriate absentee voter request lists. This suggestion is not necessary due to the change in § 1220.528(b)(1) as described above. Each county CES office will maintain its own voter request list which will then be provided to the appropriate ASCS county office.

Regarding § 1220.528(b)(1), one commenter suggested that in the first sentence, the phrase "unable to vote in person" be deleted to make it consistent with the Act. Accordingly, the phrase is deleted.

Regarding § 1220.528(b)(3), several commenters were concerned that producers have maximum opportunity to identify the address of the local CES office so that the absentee ballot could be properly mailed. The commenters suggested that each absentee ballot mailed include a list of local CES office addresses and telephone numbers. This was a helpful suggestion although not adopted as presented. To preclude misaddressed ballots and to provide a means to better protect the integrity of the referendum, the county CES offices will include with each absentee ballot mailed, an envelope marked "Soybean Referendum" (Form LS–50–1) pre-addressed with the address of the appropriate county CES office.

Another commenter suggested a system of color coding for the ballot, ballot envelope and referendum envelope, as well as explicit directions on the envelope flaps to ensure ballots are correctly submitted. In the interest of limiting the cost of conducting the referendum, the Department believes that the use of color coding, which would increase cost, is not necessary. However, we concur with the commenter's intent to make the voting process as easy to understand as possible. Thus, while the commenters suggestion for color coding is not adopted, instructions are included on the forms and envelopes.

Another commenter suggested a modification to allow written requests for absentee ballots to be hand delivered by a spouse, partner, or employee. This is allowed in the rule and has been clarified. The rule specifies that the absentee ballot may be requested in person or in writing but does not specify that the written request has to be mailed; therefore, written requests may be hand delivered by a spouse, partner, or employee. However, the absentee ballot, like all absentee ballots, will be mailed to the eligible voter by the county CES office. In summary, the language has been adjusted slightly and conforms with the suggestion of the commenter.

Section 1220.533 ASCS County Office Report

One commenter viewed as inconsistent one sentence that reads: "* * * results of the referendum in each county may be made available to the public" and another sentence which reads "* * * results shall be posted for 30 days in the ASCS county office * * *." The intent of this section as proposed was that the results in each county could be released immediately after the counting of the ballots and any required review for the verification for accuracy. Additionally, such results would be posted thereafter for 30 days. This is a valid suggestion; therefore, we have revised this section to clarify the intent.

Section 1220.553; § 1220.534 ASCS State Office Report; and § 1220.535 Results of the Referendum

These sections provide for the reporting of referendum results from the county ASCS office to the State ASCS office, to the Administrator of ASCS, and to the Secretary of Agriculture. Several commenters noted that time periods had not been provided to ensure the prompt compilation and release of referendum results. The commenters proposed that State ASCS offices submit the results to the Deputy Administrator, ASCS, no later than 4 business days following the day the ballots are counted. The commenter further proposed that the Deputy Administrator, ASCS, submit to the Administrator, AMS, the results of the referendum no later than 6 business days following the day the ballots are counted. We share the commenters concerns and appreciate the importance of timely and accurate reporting of the results. We believe the deadlines suggested by the commenters are realistic, and we anticipate that they will be met. However, imposing absolute time limits could unduly restrict the Department's ability to compile, verify, and report accurate results. Therefore, this suggestion is not adopted in this final rule.

In summary, this final rule adopts the proposed rule with the substantive changes discussed herein and with other minor changes made for purposes of clarity and accuracy. One additional change was made by the Agency to clarify the challenge procedures in § 1220.530. Each challenge will be required to be separate and signed by the challenger.

Pursuant to the provisions in 5 U.S.C. 553, it is found and determined that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because postponing the final rule would unduly interfere with the anticipated scheduling of the referendum.

List of Subjects in 7 CFR Part 1220

Agricultural research, Reporting and recordkeeping requirements, Soybeans.

For the reasons set forth in the preamble, 7 CFR part 1220 is amended as follows:

PART 1220—SOYBEAN PROMOTION, RESEARCH, AND CONSUMER INFORMATION

1. The authority citation for part 1220 continues to read as follows:

Authority: Title XIX, Pub. Law 101–624, 104 Stat. 3359, 3881 (7 U.S.C. 6301–6311).

2. Subpart E, consisting of §§ 1220.501 through 1220.537, is added to read as follows:

Subpart E—Procedure for the Conduct of Referenda

Sec.

Definitions

1220.501 Act.
1220.502 Administrator.
1220.503 Agricultural Stabilization and Conservation County Committee.
1220.504 Agricultural Stabilization and Conservation Service.
1220.505 Agricultural Stabilization and Conservation Service County Executive Director.
1220.506 Cooperative Extension Service.
1220.507 Cooperative Extension Service Agent.
1220.508 Department.
1220.509 Deputy Administrator.
1220.510 Extension Service of the U.S. Department of Agriculture.
1220.511 Order.
1220.512 Person.
1220.513 Producer.
1220.514 Public notice.
1220.515 Referenda.
1220.516 Registration period.
1220.517 Representative period.
1220.518 Secretary.
1220.519 Soybeans.
1220.520 State and United States.
1220.521 Voting period.

Referendum

1220.522 General.
1220.523 Supervision of referenda.
1220.524 Eligibility.
1220.525 Time and place of registration and voting.
1220.526 Facilities for registering and voting.
1220.527 Registration form and ballot.
1220.528 Registration and voting procedure.
1220.529 List of registered producers.
1220.530 Challenge of eligibility.
1220.531 Receiving ballots.
1220.532 Canvassing ballots.
1220.533 ASCS county office report.
1220.534 ASCS State office report.
1220.535 Results of the referendum.
1220.536 Disposition of ballots and records.
1220.537 Instructions and forms.

Subpart E—Procedure for the Conduct of Referenda

Definitions

§ 1220.501 Act.

The term "Act" means the Soybean Promotion, Research, and Consumer Information Act set forth in title XIX, subtitle E of the Food, Agriculture, Conservation and Trade Act of 1990 (Pub. L. 101–624) and any amendments thereto.

§ 1220.502 Administrator.

The term "Administrator" means the Administrator of the Agricultural Marketing Service, or any officer or employee of the Department to whom there has heretofore been delegated or may hereafter be delegated the authority to act in the Administrator's stead.

§ 1220.503 Agricultural Stabilization and Conservation County Committee.

The term "Agricultural Stabilization and Conservation County Committee," also referred to as "ASC County Committee," means the group of persons within a county elected to act as the County Agricultural Stabilization and Conservation Committee.

§ 1220.504 Agricultural Stabilization and Conservation Service.

The term "Agricultural Stabilization and Conservation Service," also referred to as "ASCS," means the Agricultural Stabilization and Conservation Service of the Department.

§ 1220.505 Agricultural Stabilization and Conservation Service County Executive Director.

The term "Agricultural Stabilization and Conservation Service County Executive Director," also referred to as "ASCS Executive Director," means the person employed by the ASC County Committee to execute the policies of the ASC county committee and be responsible for the day-to-day operation of the ASCS county office or the person acting in such capacity.

§ 1220.506 Cooperative Extension Service.

The term "Cooperative Extension Service," also referred to as "CES," means the State partner in the Cooperative Extension system.

§ 1220.507 Cooperative Extension Service Agent.

The term "Cooperative Extension Service Agent," also referred to as "CES Agent," means an employee of the Cooperative Extension Service.

§ 1220.508 Department.

The term "Department" means the U.S. Department of Agriculture.

§ 1220.509 Deputy Administrator.

The term "Deputy Administrator" means the Deputy or Acting Deputy Administrator, State and County Operations, Agricultural Stabilization and Conservation Service, U.S. Department of Agriculture.

§ 1220.510 Extension Service of the U.S. Department of Agriculture.

The term "Extension Service" of the U.S. Department of Agriculture, also referred to as "ES" means the Federal partner of the Cooperative Extension System.

§ 1220.511 Order.

The term "Order" means the Soybean Promotion and Research Order.

§ 1220.512 Person.

The term "Person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity.

§ 1220.513 Producer.

The term "Producer" means any person engaged in the growing of soybeans in the United States who owns or shares the ownership and risk of loss of such soybeans.

§ 1220.514 Public Notice.

The term "Public Notice" means information regarding a referendum which shall be provided by the Secretary, without advertising expenses, through press releases and by State and county CES offices and county ASCS offices, by means of newspapers, electronic media, county newsletters, and the like. Such notice shall contain the referendum date and location, registration and voting requirements, rules regarding absentee voting, and other pertinent information.

§ 1220.515 Referenda.

The term "Referenda" means any referenda to be conducted by the Secretary pursuant to the Act whereby producers shall be given the opportunity to vote.

§ 1220.516 Registration period.

The term "Registration period" means a 1-day period to be announced by the Secretary for registration of producers desiring to vote in a referendum. The registration period shall be the same day as the voting period.

§ 1220.517 Representative period.

The term "Representative period" means the period designated by the Secretary pursuant to section 1970 of the Act.

§ 1220.518 Secretary.

The term "Secretary" means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom there has been delegated or to whom authority may hereafter be delegated the authority to act in the Secretary's stead.

§ 1220.519 Soybeans.

The term "Soybeans" means all varieties of Glycine max or Glycine soja.

§ 1220.520 State and United States.

The terms "State and United States" include the 50 States of the United States of America, the District of Columbia, and the Commonwealth of Puerto Rico.

§ 1220.521 Voting period.

The term "Voting period" means a 1-day period to be announced by the Secretary for voting in a referendum.

Referendum

§ 1220.522 General.

(a) A referendum to determine whether eligible producers favor the continuance of the Order and other referenda provided for under the Act shall be conducted in accordance with this subpart.

(b) Referendum results will be based on the Secretary's determination of approval or disapproval by a majority of the producers casting valid ballots in a referendum.

(c) Referenda shall be conducted at the county offices of the Cooperative Extension Service.

(d) The Agricultural Stabilization and Conservation Service of the Department shall assist in the conduct of referenda.

§ 1220.523 Supervision of referenda.

The Administrator, AMS, shall be responsible for conducting referenda in accordance with this subpart.

§ 1220.524 Eligibility.

(a) *Eligible producers.* Each person who was a producer during the representative period is entitled to register and vote in the referendum. Each producer entity shall be entitled to cast only one ballot in the referendum.

(b) *Proxy registration and voting.* Proxy registration and voting is not authorized except that an officer or employee of a corporate producer, or any guardian, administrator, executor, or trustee of a producer's estate, or an authorized representative of any eligible producer entity (other than an individual producer), such as a corporation or partnership, may register and cast a ballot on behalf of such entity. Any individual registering to vote in the referendum on behalf of any producer entity shall certify that he or she is authorized by such entity to take such action.

(c) *Joint and group interest.* A group of individuals, such as members of a family, joint tenants, tenants in common, a partnership, owners of community property, or a corporation engaged in the production of soybeans as a producer entity shall be entitled to only one vote; provided, however, that any member of a group may register to vote as a producer if he or she is an eligible producer separate from the group.

§ 1220.525 Time and place of registration and voting.

A referendum shall be held for 1 day on a date to be determined by the Secretary. Eligible persons shall register and vote following the procedures in § 1220.528. Except for absentee ballots, the registration and voting shall take place during business hours of each county CES office.

§ 1220.526 Facilities for registering and voting.

Each county CES office shall provide adequate facilities and space to permit producers to register and to mark their ballots in secret and a sealed box or other suitable receptacle for registration forms and ballots which shall be kept under observation during office hours and secured at all times. Copies of the Order and a summary of the Order shall be available for review.

§ 1220.527 Registration form and ballot.

A ballot (Form LS–49) and certification and registration form (Form LS–49–2) shall be used for voting in person. The information required includes name, address, and telephone number and also contains a certification statement, referenced in § 1220.528(a)(1). The ballot requires producers to check a "yes" or "no." A combined registration and voting form (Form LS–50) shall be used for absentee voting.

§ 1220.528 Registration and voting procedure.

(a) *Registering and voting in person.*

(1) Each producer desiring to vote in a referendum shall register on the day of voting at the county CES office in which the producer's residence is located or at the county CES office serving the county in which the producer's residence is located. Producer entities other than individuals shall register at the county CES office in the county in which their headquarters office or business is located or at the county CES office serving the county in which the entities headquarters office or business is located. Producers will be required to list their names on the voter registration list (Form LS–49–3) prior to receiving a registration form and ballot. To register, each producer shall complete the registration form/envelope (Form LS–49–2) and certify that:

(i) They or the entity they represent were producers during the specified representative period; and

(ii) If voting on behalf of an entity referred to in § 1220.524, they are authorized to do so.

(2) Each eligible producer who has not voted by means of an absentee ballot may cast a ballot in person at the location and time set forth in § 1220.525 and on a date to be announced by the Secretary. Eligible persons who enter their names on the voter registration list (Form LS–49–3) will receive a registration form/envelope (Form LS–49–2) and a ballot (Form LS–49). Voting shall be by secret ballot under the supervision of the local county CES agent or designee. The ballot shall be marked by the voter to indicate "yes" or "no." Voters shall place their marked ballots in an envelope marked "SOYBEAN BALLOT," seal it, and place it in the completed and signed registration form/envelope marked "SOYBEAN REFERENDUM," seal that envelope, and personally place it in a box marked "Ballot Box" or other suitable receptacle.

(b) *Absentee voting.*

(1) Eligible producers and entities may request and obtain a combined absentee registration and voting form (Form LS–50) and two envelopes—one marked "SOYBEAN BALLOT" (Form LS–49–1) and the other marked "SOYBEAN REFERENDUM" (Form LS–50–1) in writing or in person from the county CES office serving the county in which they reside if individuals, or serving the county where their main office is located, if a corporation or other entity. Only one absentee registration form and absentee ballot will be provided to each eligible producer. The forms must be requested in writing or in person during a specified time period which will be announced by the Secretary. The county CES office shall enter on the absentee voter request list (Form LS–50–2) the name and address of each person or entity requesting an absentee ballot and the date the forms were mailed. Absentee forms will be provided by mail only. A copy of the absentee voter request list (Form LS–50–2) prepared by the county CES office shall be provided to each ASCS county office for absentee voter verification.

(2) To register, eligible producers must complete and sign the registration (Form LS–50), and certify that:

(i) They or the entity they represent were producers during the specified representative period; and

(ii) If voting on behalf of an entity referred to in subsection § 1220.524, they are authorized to do so.

(3) A producer, after completing the registration form and marking the ballot, shall remove the ballot portion of Form LS–50 and seal the completed ballot in a separate envelope marked "SOYBEAN BALLOT" (Form LS–49–1) and place it in a second envelope marked "SOYBEAN REFERENDUM" (Form LS–50–1) along with the signed registration form. Voters shall print and sign their names on the envelope marked "SOYBEAN REFERENDUM" (Form LS–50–1), affix postage, and mail it in the pre-addressed envelope provided with the ballot.

(4) Absentee ballots must be received in the county CES office by the close of business, 5 business days before the date of the referendum. Absentee ballots received after that date shall be counted as invalid ballots. Upon receiving the "SOYBEAN REFERENDUM" envelope containing the registration form and ballot, the county CES agent or designee shall place it, unopened, in a secure ballot box. In addition, the county CES agent or designee shall enter on the voter request list (Form LS–50–2) beside the name of the voter the date the absentee ballot was received.

(5) A person casting an absentee ballot which is not recorded as being received or which is received after the deadline specified in this section may vote in person at the appropriate CES office on the day of the referendum.

§ 1220.529 List of registered producers.

The voter registration list (Form LS–49–3) and the absentee voter request list (Form LS–50–2) shall be available for inspection on the day of the referendum at the county CES office and subsequently at the ASCS county office. They shall be posted during regular office hours in a conspicuous public location at the ASCS county office by the second business day following the date of the referendum.

§ 1220.530 Challenge of eligibility.

(a) *Challenge period.* On the day of the referendum, the names of challenged voters may be reported to the CES county agent who will refer them to the ASCS county office. After that, the names of the challenged voters shall be referred directly to the ASCS county office. A challenge of a person's eligibility to vote may be made no later than the close of business the second business day after the date of the referendum.

(b) *Who may challenge.* A person's eligibility to vote may be challenged by any person. Any person wishing to challenge must do so in writing and must include the full name of the individual or other entity being challenged. Each challenge must be separate and must be signed by the challenger. The Secretary may issue other guidelines as the Secretary deems necessary.

(c) *Determination of challenges.* The ASC county committee or its representative shall make a determination concerning the eligibility of a producer who has been challenged and notify challenged producers as soon as practicable, but no later than 5 business days after the date of the referendum. If the ASC county committee or its representative is unable to determine whether a person was a producer during the representative period, it may require the person to submit records such as tax returns, sales documents, or other similar documents to prove that the person was a producer during the representative period.

(d) *Challenged ballot.* The registration form/envelope (Form LS–49–2) containing the ballots cast by producers voting in person whose eligibility is challenged shall be removed from the ballot box and placed in a separate box until the challenge has been resolved. Envelopes (Forms LS–50–1) containing absentee voter registration forms and absentee ballots of challenged absentee voters also shall be removed from the ballot box and placed in the box containing ballots of challenged producers. A challenged ballot shall be determined to have been resolved if the determination of the ASC county committee or its representative is not appealed within the time allowed for appeal or there has been a determination by the ASC county committee after an appeal.

(e) *Appeal.* A person declared to be ineligible to register and vote by the ASC county committee or its representative may file an appeal at the ASCS county office within 3 business days after notification of such decision. Such person may be required to provide documentation such as tax returns, sales documents, or similar documents in order to demonstrate his or her eligibility. An appeal shall be determined by the ASC county committee as soon as practicable; but, in all cases, not later than the 9th business day after the date of the referendum. The ASC county committee's determination on an appeal is final.

§ 1220.531 Receiving ballots.

A ballot shall be considered to have been received during the voting period if:

(a) It was cast in the county CES office prior to the close of business on the day of the referendum; or

(b) An absentee ballot was received in the county CES office not later than close of business 5 business days before the date of the referendum.

§ 1220.532 Canvassing ballots.

(a) *Counting the ballots.* The county CES agent or designee shall deliver the sealed ballot box, the voter registration list (Form LS–49–3), and the absentee voter request list (Form LS–50–2) to the ASCS county office by the close of business on the first business day following the date of the referendum. ASCS county employees and the county CES agent or designee shall check the registration forms of all voters against the voter registration list (Form LS–49–2) and the absentee voter request list (Form LS–50–2) to determine properly registered voters. The ballots of producers voting in person whose names are not on the voter registration list (Form LS–49–3) shall be declared invalid. Likewise, the ballots of producers voting absentee, whose names are not on the absentee voter request list (Form LS–50–2) shall be declared invalid. Ballots declared invalid and all ballots of challenged voters declared ineligible shall be kept separate from the other ballots and the envelopes containing these ballots shall not be opened. The valid ballots shall be counted on the 10th business day after the referendum date. ASCS county office employees shall remove the sealed "Soybean Ballot" envelope from the registration form/envelopes or absentee ballot envelopes of all eligible voters and all challenged voters determined to be eligible. When removing the "Soybean Ballot" envelopes, steps shall be taken to ensure that the voter's name cannot be identified. After removing all "Soybean Ballot" envelopes, ASCS county employees shall open them and count the ballots. The ballots shall be tabulated as follows:

(1) Number of eligible producers casting valid ballots;

(2) Number of producers favoring the Order;

(3) Number of producers not favoring the Order;

(4) Number of challenged ballots;

(5) Number of challenged ballots deemed ineligible;

(6) Number of invalid ballots; and

(7) Number of spoiled ballots.

(b) *Invalid ballots.* Ballots shall be declared invalid if a producer voting in person has failed to sign the voter registration list (Form LS–49–3), or an absentee voter's name is not on the absentee voter request list (Form LS–50–2), or the registration form or ballot was incomplete or incorrectly completed.

(c) *Spoiled ballots.* Ballots shall be considered as spoiled ballots when they are mutilated or marked in such a way that it cannot be determined whether it is a "yes" or "no" vote. Spoiled ballots shall not be considered as approving or disapproving the Order, or as a ballot cast in the referendum.

(d) *Confidentiality.* All ballots shall be confidential and the contents of the ballots shall not be divulged except as the Secretary may direct. The public may witness the opening of the ballot box and tabulation of the votes but may not interfere with the process.

§ 1220.533 ASCS county office report.

The ASCS county office shall notify the ASCS State office of the results of the referendum. Each ASCS county office shall transmit the results of the referendum in its county to the ASCS State office. Such report shall include the information listed in § 1220.532(a). The results of the referendum in each county may be made available to the public immediately after the ballots have been counted and any verification for accuracy has been completed. A copy of the report of those results shall be posted for 30 days in the ASCS county office in a conspicuous place accessible to the public, and a copy shall be kept on file in the ASCS county office for a period of at least 12 months.

§ 1220.534 ASCS State office report.

Each ASCS State office shall transmit to the Deputy Administrator, ASCS, a written summary of the results of the referendum received from all the ASCS county offices within the State. The summary shall include the information on the referendum results contained in the reports from all county offices within each State and be certified by the ASCS State executive director. The ASCS State office shall maintain a copy of the summary where it shall be available for public inspection for a period of not less than 12 months.

§ 1220.535 Results of the referendum.

(a) The Deputy Administrator, ASCS, shall submit to the Administrator, AMS, the results of the referendum. The Administrator, AMS, shall prepare and submit to the Secretary a report of the results of the referendum. The results of any referendum shall be issued by the Department in an official press release. State reports and related papers shall be available for public inspection in the office of the Marketing Programs Branch, Livestock and Seed Division, Agricultural Marketing Service, USDA, room 2624 South Building, 14th and Independence Avenue, SW., Washington, DC.

(b) If the Secretary deems it necessary, the report of any State or county shall be re-examined and checked by such persons that may be designated by the Deputy Administrator, ASCS, or the Secretary.

§ 1220.536 Disposition of ballots and records.

Each ASCS county executive director shall place in sealed containers marked with the identification of the referendum the voter registration list, absentee voter request list, voted ballots, challenged registration forms/envelopes, challenged absentee voter registration forms, challenged ballots found to be ineligible, invalid ballots, spoiled ballots, and county summaries. Such records shall be placed under lock in a safe place under the custody of the ASCS county executive director for a period of not less than 12 months after the date the referendum was held. If no notice to the contrary is received from the Deputy Administrator, ASCS, by the end of such time, the records shall be destroyed.

§ 1220.537 Instructions and forms.

The Administrator is hereby authorized to prescribe additional instructions and forms not inconsistent with the provisions of this subpart to govern the conduct of the referendum.

Dated: November 8, 1993.

Kenneth C. Clayton,

Deputy Administrator for Marketing Programs.

[FR Doc. 93-28182 Filed 11-16-93; 8:45 am]

BILLING CODE 3410-02-P

Commodity Credit Corporation

7 CFR Part 1485

Cooperative Agreements for the Development of Foreign Markets for Agricultural Commodities

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: The amendments made by this interim rule implement the provisions of section 1302 of the Ominbus Budget Reconciliation Act of 1993 concerning the Market Promotion Program. These changes are intended to enable the Secretary of Agriculture to achieve savings and improve the effectiveness of the Market Promotion Program.

DATES: This interim rule is effective November 17, 1993. Comments must be received in writing by January 18, 1994 to be assured of consideration.

ADDRESSES: Send comments to the Director, Marketing Operations Staff, Foreign Agricultural Service, United States Department of Agriculture, 14th and Independence Avenue, SW., Ag Box 1042, Washington, DC 20250-1042. Telephone: (202) 720-5521.

FOR FURTHER INFORMATION CONTACT: Director, Marketing Operations Staff, Foreign Agricultural Service, United States Department of Agriculture, 14th and Independence Avenue, SW., Washington, DC 20250-1042. Telephone: (202) 720-5521. The Regulatory Impact Analysis concerning the interim rule published at 56 FR 40745 (August 16, 1991) is available upon request from the Director, Planning and Evaluation Staff, Foreign Agricultural Service, United States Department of Agriculture, 14th and Independence Avenue, SW., Ag Box 1043 Washington, DC 20250-1043. Telephone: (202) 690-1198.

SUPPLEMENTARY INFORMATION: This interim rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been classified as "nonmajor". It has been determined that this interim rule will not result in an annual effect on the economy of $100 million or more; will not cause a major increase in costs to consumers, individual industries, Federal, State or local government agencies or geographic regions; and will not have an adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or foreign markets. Furthermore, the Acting Vice President, CCC, certified that this action will not have a significant economic effect on a substantial number of small entities because this action does not require any significant actions on the part of small businesses as a condition of participation in the Market Promotion Program (MPP). It is also not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials (see the Notice related to 7 CFR Part 3015, subpart V, 48 FR 29115).

This interim rule has been reviewed under the Executive Order 12778, Civil Justice Reform. The interim rule has pre-emptive effect with respect to any State or local laws, regulations, or policies which conflict with such provisions or which otherwise impede their full implementation. The interim rule does not have retroactive effect. Administrative proceedings are not required before suit may be filed.

Background

Statutory Background

MVP is authorized by section 203 of the Agricultural Trade Act of 1978, as amended by section 1531 of the Food, Agriculture, Conservation, and Trade Act of 1990, Public Law 101–624, enacted November 28, 1990, and the Omnibus Budget Reconciliation Act of 1993, Public Law 103–66. These statutes direct the CCC to carry out a program to encourage the development, maintenance and expansion of commercial export markets for agricultural commodities through cost-share assistance to eligible trade organizations.

Program Changes

Following is a listing of the changes made applicable to the MPP by this interim rule. These changes are intended to improve the effectiveness of the program and should help U.S. firms compete with foreign companies overseas. Entities that currently have MPP agreements as well as those that have participated in the Targeted Export Assistance Program should carefully review this rule.

1. Except in the case of activities conducted by small-sized entities operating through state groups, assistance will only be provided to counter or offset the adverse effects of a subsidy, import quota, or other unfair trade practice of a foreign country.

2. For brand promotions, assistance will be provided on a priority basis to small-sized entities determined on the basis of Small Business Administration criteria.

3. CCC resources will not be used to promote a specific brand product in a single market for more than five years unless CCC determines that further assistance is necessary to meet the objectives of the program. For purposes of implementing this provision, CCC will consider a "market" to be a single country. This will ease administration of the program and will conform to the strategic plan.

4. For nonbrand promotions, participants under MPP agreements will be required to provide a minimum level of contributions of no less than 10 percent of CCC resources expended. CCC may increase the required contribution level in any subsequent year that an eligible trade organization receives assistance.

5. Each participant will be required to certify that CCC resources will supplement, but not supplant, any private or third party funds or other contributions to program activities.

6. CCC may require a participant to contract for an independent evaluation or audit of program activities. CCC resources will not be used to cover the cost of such an evaluation or audit.

7. No funds made available under this program may be used for activities to develop, maintain, or expand foreign markets for tobacco.

Although comment is requested on the entire rule, public comments are specifically requested on the criteria for extending the promotion of a brand product in a market beyond the 5-year limit, defining market as a country in this context, and the use of the criteria for size determination published by the Small Business Administration.

Effective Date

Section 1302 of the Omnibus Budget Reconciliation Act of 1993 requires that regulations implementing the specified amendments to the Market Promotion Program be issued within 90 days after enactment of the Act (August 10, 1993). It is also required that these changes be made prior to implementation of the fiscal year 1994 program. Therefore, it is determined that it is impractical to give notice and obtain public comment on this rule prior to its effective date. For the same reasons, good cause is shown to make the rule effective immediately upon publication in the **Federal Register**.

These regulations will be implemented at the beginning of each participant's 1994 program and corresponding activity plan year.

Comments on the provisions of these regulations are invited and must be received within 60 days of the effective date. CCC will consider all comments received when evaluating the rule in completion of the rulemaking process. Further changes to these regulations may be made based on the comments received.

Information Collection Requirements

The information collection requirements for participating in the Market Promotion Program (MPP) were approved for use by the Office of Management and Budget (OMB) through October 31, 1994 and assigned OMB No. 0551–0027. The amendments set forth in this interim rule impose new information collection requirements to participate in the MPP, different from those previously reviewed and approved by OMB. These regulations have been submitted to the OMB for approval under the provision of 44 U.S.C. chapter 35. Due to the deadlines imposed by the Omnibus Budget Reconciliation Act of 1993 concerning the issuance of regulations, the Agency has requested emergency processing of this collection of information. Public reporting for these collections is estimated at 15 minutes per response, including time for reviewing instructions, searching existing sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Agriculture, Clearance Officer, OIRM, AG Box 7630, Washington, DC 20250–7630, and to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503.

List of Subjects in 7 CFR Part 1485

Agricultural commodities, Exports.

Accordingly, 7 CFR part 1485, subpart B is amended as follows:

PART 1485—COOPERATIVE AGREEMENTS FOR THE DEVELOPMENT OF FOREIGN MARKETS FOR AGRICULTURAL COMMODITIES

1. The authority citation for part 1485 is revised to read as follows:

Authority: 7 U.S.C. 5623, 7 U.S.C. 5662–5664 and section 1302 of the Omnibus Budget Reconciliation Act of 1993, Public Law 103–66.

Subpart B—Market Promotion Program

2. Section 1485.11, paragraph (oo) is added to read as follows:

§ 1485.11 Definitions.

* * * * *

(oo) *Small-sized entity* means any U.S. commercial entity which meets the small business size standards published by the Small Business Administration in the Standard Industrial Classification codes and Size standards in 13 CFR part 121, Small Business Size Regulations. The definitions contained in 13 CFR part 121 121.401, 121.402, 121.403, 121.404, 121.407, and 121.601 shall apply in determining size eligibility.

3. Section 1485.12, is amended by revising the first sentence of paragraph (a), by revising paragraphs (b)(2)(iv) and (b)(2)(viii), and adding paragraph (b)(2)(xi) to read as follows:

§ 1485.12 General program requirements and application procedures.

(a) *Agreements.* MPP and EIP/MPP agreements are intended, except for small-sized entities operating through state groups, to counter or offset the adverse effects of a subsidy, import quota, or other unfair trade practice of

a foreign country, through cost-share assistance, in order to permit the development, maintenance, and expansion of commercial export markets for U.S. agricultural commodities and products. * * *

(b) * * *

(2) * * *

(iv) Except for small-sized entities operating through state groups, a description of the unfair trade practice affecting export trade in the agricultural commodity or product to be addressed.

* * * * *

(viii) The total amount of CCC resources requested which includes the specific amounts requested for brand and generic promotion activities, and the anticipated percentage of CCC resources to be made available to small-sized entities for brand promotion.

* * * * *

(xi) A statement certifying that any CCC resources received will supplement, but not supplant, any private or third party funds or other contributions to program activities. These statements will be subject to audits certifying their accuracy. CCC seeks to ensure that MPP expenditures result in increased exports that otherwise would not have occurred.

* * * * *

4. Section 1485.13 is amended by revising paragraph (b)(7)(i), adding paragraph (b)(8), redesignating paragraph (c) as (c)(1), and adding paragraph (c)(2) to read as follows:

§ 1485.13 Special requirements of the Export Incentive Program.

* * * * *

(b) * * *

(7) * * *

(i) Such an agreement with a U.S. commercial entity will counter or offset the adverse effects of a subsidy, import quota, or other unfair trade practice of a foreign country so as to allow the development, maintenance, or expansion of exports of the corresponding agricultural commodity or product.

* * * * *

(8) CCC will not provide assistance to promote a specific brand product in a single country market for more than five years unless CCC determines that further assistance is necessary in order to meet the objectives of the program. This determination will be based on the continued existence of an unfair trade practice or identification of a new unfair trade practice. This five year period shall not begin prior to the 1994 program and the participant's corresponding activity plan year. In those situations where a commercial entity has been in a market already for more than 5 years, CCC will, as in the past, review the application to ensure that sufficiently strong justification exists to support continued funding.

(c) (1) * * *

(2) Applicants seeking priority consideration for assistance based on size must certify that they are a small-sized entity and demonstrate size eligibility through the submission of annual receipts or number of employees.

* * * * *

5. Section 1485.14 is amended by revising paragraphs (d)(1)(ii), (e)(2)(iv) and (e)(3)(i) and by adding paragraphs (e)(4)(vii), (e)(4)(viii), (e)(4)(ix) and (e)(8) to read as follows:

§ 1485.14 Special requirements of the Market Promotion Program.

* * * * *

(d) * * *

(1) * * *

(ii) Request approval for a reduction in the rate of contribution by submitting an APAR to CCC. A participant contribution rate below ten percent of CCC resources expended for nonbrand promotion will not be approved beginning with the participant's 1994 program and corresponding activity plan year, CCC may increase the required contribution level in any subsequent year that an eligible trade organization receives assistance for nonbrand promotion. Also, CCC will take into account the ability of the participant to increase its contribution beyond the minimum contribution level.

* * * * *

(e) * * *

(2) * * *

(iv) The applicant must describe how the program will be made available to U.S. and/or foreign commercial entities and any differences between how U.S. and/or foreign commercial entities will operate the program. It must also identify the method to be used for announcing the availability of the program, the information solicited from brand participants, the method or criteria for giving priority consideration to small-sized entities, and the provisions for evaluating brand promotions.

(3) *Distribution of CCC resources for MPP participant brand promotion.* (i) In distributing CCC resources among U.S. Commercial entities, the MPP participant must give priority consideration to those applicants that qualify as small-sized entities. Other criteria for distributing CCC resources among U.S. commercial entities must be objective and reasonably related to its worldwide promotional program goals. The distribution procedures and criteria shall be included in the strategic plan and in the announcement of the program's availability to the U.S. commercial entities.

* * * * *

(4) * * *

(vii) Describes specific documentation requirements for a brand applicant seeking priority consideration for assistance based on eligibility as a small-size entity.

(viii) Includes a requirement that all records supporting a brand participant's claim as a small-sized entity, in addition to those required to be submitted with the application, shall be available upon request to CCC, the FAS Compliance Review Staff, the USDA Office of the Inspector General, and the General Accounting Office for purposes of making audits, examinations, excerpts and transcripts.

(ix) Includes a requirement that the U.S. commercial entity submit to the participant a statement certifying that any Federal funds received will supplement, but not supplant, any private or third party funds or other contributions to program activities.

* * * * *

(8) CCC will not provide assistance to promote a specific brand product in a single country market for more than five years unless CCC determines that further assistance is necessary in order to meet the objectives of the program. This determination will be based on the continued existence of an unfair trade practice or identification of a new unfair trade practice without regard to whether the U.S. commercial entity promoting a brand product is a small-sized entity operating through a state group. This five year period shall not begin prior to the 1994 program and the participant's corresponding activity plan year. In those situations where a commercial entity has been in a market already for more than 5 years, CCC will, as in the past, review the application to ensure that sufficiently strong justification exists to support continued funding.

6. Section 1485.15 is amended by adding a sentence at the end of paragraph (a)(1), revising paragraph (a)(2) and by adding (a)(3) to read as follows:

§ 1485.15 Criteria for allocation of CCC resources.

(a) *General.* (1) * * * CCC will not enter into an EIP/MPP Agreement or MPP Agreement for the promotion of tobacco or tobacco products.

(2) Except for small-sized entities operating through state groups,

allocations will only be made to applicants who will promote commodities or products affected by a documented unfair trade practice.

(3) In providing assistance for brand promotions, priority will be given to small-sized entities.

* * * * *

7. Section 1485.27 is amended by revising paragraph (a) to read as follows:

§ 1485.27 Compliance review.

(a) *Accessibility of records.* All MPP and EIP/MPP participant records pertaining to program agreements, activity plans, reimbursement claims and contributions, and all records supporting the certifications required by these regulations that a U.S. commercial entity is a small-sized entity and that funds will supplement, but not supplant, any private or third party funds or other contributions shall be available upon request to authorized officials of the United States for purposes of making audits, examinations, excerpts and transcripts.

* * * * *

8. Section 1485.28(a) is revised to read as follows:

§ 1485.28 CCC recourse in the event of noncompliance with regulations.

(a) *General.* CCC may periodically require participants to certify compliance with the requirements of this regulation. If as a result of an evaluation or audit of activities of a participant under the program, CCC determines that further review is needed in order to ensure compliance with the requirements of the program, CCC may require the participant to contract for an independent audit of the program activities, including activities of any subcontractor. Any expenditures for such evaluation or audit will be the sole responsibility of the participant, cannot be paid with program funds, and cannot be claimed as a participant contribution.

* * * * *

Signed at Washington, DC on November 12, 1993.

Christopher E. Goldthwait,

Acting Vice President, Commodity Credit Corporation and Acting General Sales Manager, Foreign Agricultural Service.

[FR Doc. 93-28289 Filed 11-16-93; 8:45 am]

BILLING CODE 3410-10-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket Nos. 91-ANM-14, 91-ANM-16, 91-ANM-17, 93-ANM-1, 93-ANM-2, 93-ANM-3, and 93-ANM-5]

Establishment of Class E Airspace and Alteration of Class D and Class E Airspace Areas, VOR Federal Airways and Jet Routes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; delay of effective date.

SUMMARY: On September 7, 9, and 10, 1993, the Federal Aviation Administration (FAA) published final rules altering the Class D airspace area in Broomfield, CO; altering the Class D airspace and establishing Class E airspace in Aurora, CO; altering Class D and Class E airspace areas in Englewood, CO; altering the Class E airspace area in Denver, CO; altering VOR Federal airways in Colorado, Nebraska, and Wyoming; and altering jet routes in Colorado, Idaho, Kansas, Nebraska, South Dakota, Utah, and Wyoming. These actions support the new Denver International Airport airspace reconfiguration. In view of the delay in the opening date of the new Denver International Airport, this action delays the rules' effective date until March 9, 1994.

EFFECTIVE DATE: Effective November 17, 1993, the effective dates of the final rules at 58 FR 47041, 58 FR 47371, 58 FR 47372, 58 FR 47373, 58 FR 47631, 58 FR 47633, and 58 FR 47635 are delayed until 0701 UTC, March 9, 1994.

FOR FURTHER INFORMATION CONTACT: Norman W. Thomas, Airspace and Obstruction Evaluation Branch (ATP-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9230.

SUPPLEMENTARY INFORMATION: On September 7, September 9, and September 10, 1993, the Federal Aviation Administration (FAA) published final rules altering and establishing Class D and Class E airspace areas, VOR Federal airways, and jet routes to support the new Denver International Airport airspace reconfiguration. The official opening of the Denver International Airport has been delayed until March 9, 1994. Accordingly, the effective date of the related final rules should be postponed to coincide with the opening of the new airport.

Because the public needs to be made aware of this postponement immediately, notice and public procedure are impracticable and good cause exists for making the postponement effective in less than 30 days.

In consideration of the foregoing, effective November 17, 1993, the effective dates of Airspace Docket 93-ANM-1 modifying the Class D airspace area in Broomfield, CO (58 FR 47041; September 7, 1993); Airspace Docket No. 93-ANM-2 modifying the Class D airspace area and establishing a Class E airspace area in Aurora, CO (58 FR 47371; September 9, 1993); Airspace Docket No. 93-ANM-3 modifying the Class D and Class E airspace areas in Englewood, CO (58 FR 47372; September 9, 1993); Airspace Docket No. 93-ANM-5 modifying the Class E airspace areas at the Denver Centennial Airport, CO, Denver, CO, and Erie, CO, (58 FR 47373; September 9, 1993); Airspace Docket No. 91-ANM-14 altering VOR Federal airways in Colorado, Nebraska, and Wyoming (58 FR 47631; September 10, 1993); Airspace Docket No. 91-ANM-16 altering jet routes in Colorado, Idaho, Kansas, Nebraska, South Dakota, Utah, and Wyoming (58 FR 47633; September 10, 1993); and Airspace Docket No. 91-ANM-17 altering VOR Federal airways in Colorado and Wyoming (58 FR 47635; September 10, 1993) are delayed from December 19, 1993, to March 9, 1994.

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

Willis C. Nelson,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 93-28294 Filed 11-16-93; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Parts 71 and 91

[Airspace Docket No. 91-AWA-3]

RIN 2120-AE46

Alteration of the Denver Class B Airspace Area; CO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; delay of effective date.

SUMMARY: On September 17, 1993, the Federal Aviation Administration (FAA) published a final rule altering the Denver, CO, Class B airspace area. In view of the delay in the opening date of

the new Denver International Airport, this action delays the rule's effective date until March 9, 1994.

EFFECTIVE DATE: Effective November 17, 1993, the effective date of the final rule at 58 FR 48722 is delayed until 0701 UTC, March 9, 1994.

FOR FURTHER INFORMATION CONTACT: Norman W. Thomas, Airspace and Obstruction Evaluation Branch (ATP-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Rules and Procedures Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9230.

SUPPLEMENTARY INFORMATION: On September 17, 1993, the Federal Aviation Administration (FAA) published a final rule altering the Denver, CO, Class B airspace area. The official opening of the Denver International Airport has been delayed until March 9, 1994. Accordingly, the effective date of the alteration of the related Class B airspace area and revision to Special Federal Aviation Regulation No. 62, Section 2, paragraph 7, should be postponed to coincide with the opening of the new airport.

Because the public needs to be made aware of this postponement immediately, notice and public procedure are impracticable and good cause exists for making the postponement effective in less than 30 days.

In consideration of the foregoing, effective November 17, 1993, the effective date of the final rule altering the Denver, CO, Class B airspace area (58 FR 48722; September 17, 1993) is delayed from December 19, 1993, to March 9, 1994.

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

Willis C. Nelson,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 93-28293 Filed 11-16-93; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 177

[Docket No. 93F-0165]

Indirect Food Additives: Polymers; Technical Amendment

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations by correcting an error in nomenclature as identified in a notice in the **Federal Register** of June 23, 1993 (58 FR 34058). The amendment would add dipentamethylenethiuram hexasulfide for use as an accelerator in the production of rubber articles intended for repeated food-contact use, and remove the erroneous listing of dipentamethylenethiuram tetrasulfide from the regulation. This action responds to a food additive petition filed by R. T. Vanderbilt Co., Inc.

DATES: Effective November 17, 1993; written objections and requests for a hearing by December 17, 1993.

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Helen R. Thorsheim, Center for Food Safety and Applied Nutrition (HFS-216), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-254-9511.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of June 23, 1993 (58 FR 34058), FDA announced that a food additive petition (FAP 3B4370) had been filed by R. T. Vanderbilt Co., Inc., P.O. Box 5150, Norwalk CT 06856-5150. The petition proposed that the food additive regulations in § 177.2600 *Rubber articles intended for repeated use* (21 CFR 177.2600) be amended to correct an error in nomenclature. The petition proposed the addition of dipentamethylenethiuram hexasulfide for use as an accelerator in the production of rubber articles intended for repeated food-contact use, and the deletion of the erroneous listing of dipentamethylenethiuram tetrasulfide from the regulation.

A substance believed to be dipentamethylenethiuram tetrasulfide was originally regulated as an accelerator in the production of rubber articles as a result of FAP 1B0317 submitted in 1961 by the Rubber Manufacturers Association, Inc. Subsequently, in 1965, companies producing the compound determined that the regulated substance was actually composed predominantly of dipentamethylenethiuram hexasulfide. In support of the current petition, R. T. Vanderbilt has used modern analytical instrumentation that was not available in 1965 to substantiate the hexasulfide structure.

FDA has evaluated data in the petition supporting the chemical identity of the additive. The agency concludes that the petitioner has adequately shown that the regulated accelerator is actually dipentamethylenethiuram hexasulfide, not dipentamethylenethiuram tetrasulfide as currently listed, and that 21 CFR 177.2600 should be amended as set forth below. To identify the regulated additive more clearly, FDA is adding the CAS Reg. No. 971-15-3 for dipentamethylenethiuram hexasulfide to § 177.2600.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in 21 CFR 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

The agency has previously considered the environmental effects of this rule as announced in the notice of filing for FAP 3B4370 (58 FR 34058). No new information or comments have been received that would affect the agency's previous determination that there is no significant impact on the human environment and that an environmental impact statement is not required.

Any person who will be adversely affected by this regulation may at any time on or before December 17, 1993, file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be

identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 177

Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 177 is amended as follows:

PART 177—INDIRECT FOOD ADDITIVES: POLYMERS

1. The authority citation for 21 CFR part 177 continues to read as follows:

Authority: Secs. 201, 402, 409, 721 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 379e).

§ 177.2600 [Amended]

2. Section 177.2600 is amended in paragraph (c)(4)(ii)(*b*) by revising the entry for "Dipentamethylenethiuram tetrasulfide" to read as follows:

§ 177.2600 Rubber articles intended for repeated use.

* * * * *

(c) * * *
(4) * * *
(ii) * * *
(*b*) * * *

Dipentamethylenethiuram hexasulfide (CAS Reg. No. 971–15–3).

* * * * *

Dated: November 5, 1993.

Fred R. Shank,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 93–28164 Filed 11–16–93; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD07–93–086]

Drawbridge Operation Regulations; Gulf Intracoastal Waterway, Sarasota, FL

AGENCY: Coast Guard, DOT.

ACTION: Temporary rule with request for comments.

SUMMARY: The Coast Guard is temporarily changing the regulations governing the Siesta Key Drawbridge (SR758), GIWW mile 71.6, across Roberts Bay at Sarasota for 30 days to test proposed revisions to the bridge operating schedule. This test is being made because of complaints about highway traffic delays during certain hours.

DATES: Comments must be received on or before January 31, 1994. This rule is effective on January 1, 1994, and, terminates on January 30, 1994.

ADDRESSES: Comments may be mailed to Commander (oan), Seventh Coast Guard District, 909 S.E. 1st Avenue, Miami, Florida 33131–3050, or may be delivered to room 406 at the above address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is 305–536–4103.

The Commander, Seventh Coast Guard District maintains the public docket for this rulemaking. Comments will become part of this docket and will be available for inspection or copying at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. Ian MacCartney, Project Manager, Bridge Section, at (305) 536–4103.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written data, views, or arguments. Persons submitting comments should include their names and addresses, identify this rulemaking [CGD07–93–086] and the specific section of this proposal to which each comment applies, and give the reason for each comment. The Coast Guard requests that all comments and attachments be submitted in an unbound format suitable for copying. If not practical, a second copy of any bound material is requested. Persons wanting acknowledgment of receipt of comments should enclose a stamped, self-addressed postcard or envelope.

The Coast Guard will consider all comments received during the comment period. It may change this proposal in view of comments.

The Coast Guard plans no public hearing. Persons may request a public hearing by writing to Mr. Ian MacCartney at the address under **ADDRESSES.** The request should include reasons why a hearing would be beneficial. If it determines that the opportunity for oral representations will aid this rulemaking, the Coast Guard will hold a public hearing at a time and place announced by a later notice in the **Federal Register.**

Drafting Information

The principal persons involved in drafting this document are Ian MacCartney, Project Manager, and Lieutenant Commander Brad Mozee, Project Counsel.

Background and Purpose

This drawbridge presently opens on signal except that from 11 a.m. to 6 p.m., weekends and holidays, the draw opens only on the quarter hour. In response to a request for a 30-minute opening schedule from the Sarasota/Manatee Metropolitan Planning Organization (MPO) and the Florida Department of Transportation (FDOT), the bridge owner, the Coast Guard has evaluated the impact on navigation and highway traffic and determined that a 20-minute schedule may be more appropriate. This 30-day test is being made to determine whether the proposed change to the regulations would relieve highway traffic congestion while still meeting the reasonable needs of navigation.

Discussion of Proposed Amendments

The proposal, as requested by the MPO and FDOT, to open only on the hour and half hour during a 7 hour period is not justified by the available traffic and bridge opening data. However, traffic volume has increased to a level where the Coast Guard believes a change might be warranted and proposes a 30-day test of a 20-minute regulation to determine if the change would relieve traffic congestion without unreasonable impact on navigation. The test period is to begin on Saturday, January 1, 1994, and continue through Sunday, January 30, 1994.

Regulatory Evaluation

This proposal is not a significant regulatory action under Executive Order 12866 and is not significant under the Department of Transportation regulatory policies and procedures (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this proposal to be so minimal that a regulatory evaluation is unnecessary.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this proposal, if adopted, will have a significant economic impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business

concerns" under section 3 of the Small Business Act (15 U.S.C. 632).

Since tugs with tows are exempt from this proposal the economic impact is expected to be so minimal, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposal, if adopted, will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This proposal contains no collection of information requirements under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Federalism

The Coast Guard has analyzed this proposal under the principles and criteria contained in Executive Order 12612, and has determined that this proposal does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this proposal and concluded that, under section 2.B.2.g.(5) of Commandant Instruction M16475.1B, promulgation of operating requirements or procedures for drawbridges is categorically excluded from further environmental documentation. A Categorical Exclusion Determination is available in the docket for inspection or copying where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons set out in the preamble, the Coast Guard amends 33 CFR Part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05–1(g).

2. In § 117.287, paragraph (b–1) is temporarily revised to read as follows:

§ 117.287 Gulf Intracoastal Waterway.

* * * * *

(b–1) The draw of the Siesta Key bridge, mile 71.6 at Sarasota, shall open on signal, except that, from 11 a.m. to 6 p.m. daily, the draw need open only on the hour, 20 minutes past the hour, and 40 minutes past the hour.

* * * * *

Dated: October 25, 1993.

W. P. Leahy,

Admiral, U.S. Coast Guard, 7th Coast Guard District.

[FR Doc. 93–28274 Filed 11–16–93; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR Part 117

[CGD07–93–093]

Drawbridge Operation Regulations; Gulf Intracoastal Waterway, Sarasota, FL

AGENCY: Coast Guard, DOT.

ACTION: Temporary rule with request for comments.

SUMMARY: The Coast Guard is temporarily changing the regulations governing the Cortez and Anna Maria Drawbridges at Bradenton for 30 days to test staggered 30-minute openings at the request of the Mayor of Bradenton Beach. This test is being made to determine whether staggered 30-minute openings would relieve highway traffic congestion without adversely impacting the movement of vessels between these adjacent drawbridges.

DATES: Comments must be received on or before January 31, 1994. This rule is effective on January 1, 1994, and terminates on January 30, 1994.

ADDRESSES: Comments may be mailed to Commander (oan), Seventh Coast Guard District, 909 S.E. 1st Avenue, Miami, Florida 33131–3050, or may be delivered to room 406 at the above address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is 305–536–4103.

The Commander, Seventh Coast Guard District maintains the public docket for this rulemaking. Comments will become part of this docket and will be available for inspection or copying at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. Ian MacCartney, Project Manager, Bridge Section, at (305) 536–4103.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written data, views, or arguments. Persons submitting comments should include their names and addresses, identify this rulemaking [CGD07–93–093] and the specific section of this proposal to which each comment applies, and give the reason for each comment. The Coast Guard requests that all comments and attachments be submitted in an unbound format suitable for copying. If not practical, a second copy of any bound material is requested. Persons wanting acknowledgment of receipt of comments should enclose a stamped, self-addressed postcard or envelope.

The Coast Guard will consider all comments received during the comment period. It may change this proposal in view of comments.

The Coast Guard plans no public hearing. Persons may request a public hearing by writing to Mr. Ian MacCartney at the address under **ADDRESSES**. The request should include reasons why a hearing would be beneficial. If it determines that the opportunity for oral presentations will aid this rulemaking, the Coast Guard will hold a public hearing at a time and place announced by a later notice in the **Federal Register**.

Drafting Information

The principal persons involved in drafting this document are Ian MacCartney, Project Manager, and Lieutenant Commander Brad Mozee, Project Counsel.

Background and Purpose

These two drawspans are located 1.8 statute miles apart. The drawbridges now open on the hour, 20 minutes past the hour and 40 minutes past the hour, if needed. The Mayor of Bradenton Beach has requested that a test of staggered 30-minute openings be implemented. One bridge would open on the hour and half hour while the other bridge would open on the quarter hour and three-quarter hour. Traffic counts would be taken and tender logs copied. The purpose of the test is to determine whether the concept would improve highway traffic flow without adversely impacting the movement of navigation through this reach of the Gulf Intracoastal Waterway.

Discussion of Proposed Amendments

The 30-day trial period is scheduled to occur during the winter tourist season, when the beach areas experience the heaviest vehicular traffic and the greatest number of drawbridge openings. The daily staggered 30-minute operating schedules will be in effect from 7 a.m. to 6 p.m. each day. When the test is completed, the results will be compared with the existing 20-minute opening schedule to determine which operating schedule best meets the needs of navigation and helps reduce vehicular traffic delays.

Regulatory Evaluation

This proposal is not a significant regulatory action under Executive Order

12866 and is not significant under the Department of Transportation regulatory policies and procedures (44 FR 11040; February 26, 1979.) The Coast Guard expects the economic impact of this proposal to be so minimal that a regulatory evaluation is unnecessary.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this proposal, if adopted, will have a significant economic impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632.)

Since tugs with tows are exempt from this proposal the economic impact of this proposal to be so minimal, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposal, if adopted, will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This proposal contains no collection of information requirements under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Federalism

The Coast Guard has analyzed this proposal under the principles and criteria contained in Executive Order 12612, and has determined that this proposal does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this proposal and concluded that, under section 2.B.2.g.(5) of Commandant Instruction M16475.1B, promulgation of operating requirements or procedures for drawbridges is categorically excluded from further environmental documentation. A Categorical Exclusion Determination is available in the docket for inspection or copying where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons set out in the preamble, the Coast Guard amends 33 CFR Part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05–1(g).

2. In § 117.287, paragraphs (d)(1) and (d)(2) are temporarily revised to read as follows:

§ 117.287 Gulf Intracoastal Waterway.

* * * * *

(d)(1) The draw of the Cortez (SR684) bridge, mile 87.4, shall open on signal; except that, from 7 a.m. to 6 p.m., the draw need open only on the quarter hour and three-quarter hour.

(2) The draw of the Anna Maria (SR64) bridge, mile 89.2, shall open on signal; except that, from 7 a.m. to 6 p.m., the draw need open only on the hour and thirty minutes past the hour.

Dated: October 25, 1993.

W.P. Leahy,

Admiral, U.S. Coast Guard, 7th Coast Guard District.

[FR Doc. 93–28275 Filed 11–16–93; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR Part 165

[CGD13–93–035]

Security/Safety Zone Regulation; Puget Sound, WA

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a 1000 yard security and safety zone around Blake Island, Washington. This security/safety zone is needed to safeguard the President of the United States and visiting Leaders from 14 countries while attending the Asian-Pacific Economic Cooperation Conference from sabotage or other subversive acts, accidents or other causes of a similar nature. Entry into this security/safety zone is prohibited unless authorized by the Captain of the Port.

EFFECTIVE DATES: This regulation is effective on November 19, 1993 at 4 p.m. PDT. It terminates on November 20, 1993 at 7 p.m. PDT, unless sooner terminated by the Captain of the Port.

FOR FURTHER INFORMATION CONTACT: LT J. D. Gafkjen, c/o Captain of the Port Puget Sound, 1519 Alaskan Way South, Seattle, Washington 98134, (206) 286–5540.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rulemaking was not published for this regulation and good cause exists for making it effective in less than 30 days after Federal Register publication. Publishing an NPRM and delaying its effective date would be contrary to the public interest since immediate action is needed to prevent injury to the President of the United States and the visiting Leaders. Any harm to these persons would cause far-reaching negative impacts on all people of the United States. Due to the extensive and complex planning and coordination between various Federal and Washington State agencies, notice of final details were not available more than 21 days in advance of the event.

Drafting Information

The drafters of this regulation are LT J. D. Gafkjen, project officer for the Captain of the Port, and LT L. J. Argenti, project attorney, Thirteenth Coast Guard District Legal Office.

Discussion of Regulation

The event requiring this regulation will begin on November 19, 1993 at 4 p.m. PDT and will terminate on November 20, 1993 at 7 p.m. PDT or sooner if the Captain of the Port determines that the safety/security zone is no longer needed. The Coast Guard is establishing a 1000 yard safety/security zone around Blake Island, Washington. The security/safety zone is needed to safeguard the President of the United States and fourteen other Leaders of State (or their representative) while at Blake Island, Washington, This security/safety zone will be enforced by representatives of the Captain of the Port Puget Sound, Seattle, Washington. The Captain of the Port may be assisted by other Federal agencies.

Regulatory Evaluation

This rule is not a significant regulatory action under Executive Order 12866 and is not significant under the Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979). The Coast Guard expects the economic impact of this proposal to be so minimal that a regulatory evaluation is unnecessary. The entities most likely to be affected are persons on pleasure craft who are engaged in recreational activities or who wish to view the President. These individuals and vessels have ample space outside of the safety/security zone to engage in these activities and therefore they will not be subject to undue hardship. The zone may impact ferries or other commercial vessels transiting the Puget Sound region around Blake Island and Seattle, Washington, however, it is expected that the impact will not cause undue hardship on these vessels. Any hardships experienced by persons or vessels due to the zone are considered minimal compared to the national

interest in protecting the President and visiting Leaders.

Federalism Assessment

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Assessment

This final rule has been thoroughly reviewed by the Coast Guard and determined to be categorically excluded from further environmental documentation in accordance with section 2.B.2.c. of Commandant Instruction M16475.1B. A Categorical Exclusion Determination statement has been prepared and placed in the rulemaking docket.

This Regulation is issued pursuant to 50 U.S.C. 191; 33 U.S.C. 1231; 49 CFR 1.46 and 33 CFR 1.05–1(g), 6.04–1, 6.04–6 and 160.5 as set out in the authority citation for all of part 165.

List of Subjects in 33 CFR Part 165

Harbors, Marine security, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

Regulation

In consideration of the foregoing, subpart D of part 165 of title 33, Code of Federal Regulations, is amended as follows:

PART 165—[AMENDED]

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 49 CFR 1.46 and 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5.

2. A new § 165.T13030 is added to read as follows:

§ 165.T13030 Security/safety zone: COTP Puget Sound Zone.

(a) *Location.* The following areas are a security/safety zone: All waters within 1000 yards of Blake Island, Washington,

(b) *Effective date.* This section is effective on November 19, 1993 at 4 p.m. PDT. It terminates on November 20, 1993 at 7 p.m. PDT, unless sooner terminated by the Captain of the Port.

(c) *Regulations.* In accordance with the general regulations in § 165.33 of this part, entry into this zone is prohibited, unless authorized by the Captain of the Port.

Dated: November 9, 1993.

Roger D. Mowery,

Captain, U.S. Coast Guard, Captain of the Port Puget Sound.

[FR Doc. 93–28272 Filed 11–16–93; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR Part 165

[CGD13–93–034]

Security/Safety Zone Regulation; Puget Sound, WA

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a security and safety zone around U.S. Coast Guard Pier 36, Seattle, Washington and the M/V Tyee while in transit from Pier 36 to Blake Island and the return trip from Blake Island to Pier 36. This security/safety zone is needed to safeguard the President of the United States and visiting Leaders from 14 countries while attending the Asian-Pacific Economic Cooperation Conference from sabotage or other subversive acts, accidents or other causes of a similar nature. Entry into this security/safety zone is prohibited unless authorized by the Captain of the Port.

EFFECTIVE DATE: This regulation is effective on November 20,1993, at 5 a.m. PDT. It terminates on November 20, 1993, at 7 p.m. PDT, unless sooner terminated by the Captain of the Port.

FOR FURTHER INFORMATION CONTACT: LT J. D. Gafkjen, c/o Captain of the Port Puget Sound, 1519 Alaskan Way South, Seattle, Washington 98134, (206) 286–5540.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rulemaking was not published for this regulation and good cause exists for making it effective in less than 30 days after **Federal Register** publication. Publishing an NPRM and delaying its effective date would be contrary to the public interest since immediate action is needed to prevent injury to the President of the United States and the visiting Leaders. Any harm to these persons would cause far-reaching negative impacts on all people of the United States. Due to the extensive and complex planning and coordination between various Federal and Washington State agencies, notice of final details were not available more than 21 days in advance of the event.

Drafting Information

The drafters of this regulation are LT J. D. Gafkjen, project officer for the Captain of the Port, and LT L. J. Argenti, project attorney, Thirteenth Coast Guard District Legal Office.

Discussion of Regulation

The event requiring this regulation will begin on November 20, 1993 at 5 a.m. PDT and will terminate on November 20, 1993 at 7 p.m. PDT or sooner if the Captain of the Port determines that the safety/security zone is no longer needed. The Coast Guard is establishing a safety/security zone around the following areas: 500 yards around Pier 36, Seattle Washington and a 1000 yard moving zone around the M/V TYEE while in transit from Pier 36, Seattle, Washington upon U.S. navigable waters to Blake Island, Washington and while in transit from Blake Island, Washington to Pier 36, Seattle, Washington. The security/safety zone is needed to safeguard the President of the United States and fourteen other Leaders of State (or their representative) while in the Puget Sound region of the State of Washington. This security/safety zone will be enforced by representatives of the Captain of the Port Puget Sound, Seattle, Washington. The Captain of the Port may be assisted by other Federal agencies.

Regulatory Evaluation

This rule is not a significant regulatory action under Executive Order 12866 and is not significant under the Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979). The Coast Guard expects the economic impact of this proposal to be so minimal that a regulatory evaluation is unnecessary. The entities most likely to be affected are landside individuals wishing to view the President and pleasure craft engaged in recreational activities or wishing to view the President. These individuals and vessels have ample space outside of the safety/security zone to engage in these activities and therefore they will not be subject to undue hardship. The zone may impact ferries or other commercial vessels transiting the Puget Sound region around Blake Island and Seattle, Washington, however, it is expected that the impact will not cause undue hardship on these vessels. Any hardships experienced by persons or vessels due to the zone are considered minimal compared to the national interest in protecting the President and visiting Leaders.

Federalism Assessment

This action has been analyzed in accordance with the principles and

criteria contained in Executive Order 12612, and it has been determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Assessment

This final rule has been thoroughly reviewed by the Coast Guard and determined to be categorically excluded from further environmental documentation in accordance with section 2.B.2.c. of Commandant Instruction M16475.1B. A Categorical Exclusion Determination statement has been prepared and placed in the rulemaking docket.

This Regulation is issued pursuant to 50 U.S.C. 191; 33 U.S.C. 1231; 49 CFR 1.46 and 33 CFR 1.05–1(g), 6.04–1, 6.04–6 and 160.5 as set out in the authority citation for all of Part 165.

List of Subjects in 33 CFR Part 165

Harbors, Marine security, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

Regulation

In consideration of the foregoing, subpart D of part 165 of title 33, Code of Federal Regulations, is amended as follows:

PART 165—[AMENDED]

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 49 CFR 1.46 and 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5.

2. A new § 165.T13029 is added to read as follows:

§ 165.T13029 Security/Safety Zone: COTP Puget Sound Zone

(a) *Location.* The following areas are a security/safety zone: All waters within 500 yards of Pier 36, Seattle, Washington; all waters within 1000 yards of the M/V TYEE while in transit from Pier 36, Seattle, Washington to Blake Island, Washington and during the return transit from Blake Island to Pier 36.

(b) *Effective date.* This section is effective on November 20, 1993 at 5 a.m. PDT. It terminates on November 20, 1993 at 7 p.m. PDT, unless sooner terminated by the Captain of the Port.

(c) *Regulations.* In accordance with the general regulations in § 165.33 of this part, entry into this zone is prohibited, unless authorized by the Captain of the Port.

Dated: November 9, 1993.

Roger D. Mowery,

Captain, U.S. Coast Guard, Captain of the Port Puget Sound.

[FR Doc. 93–28273 Filed 11–16–93; 8:45 am]

BILLING CODE 4910–14–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300289A; FRL–4739–5]

RIN 2070–AB78

Fensulfothion; Revocation of Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule revokes all tolerances for residues of the insecticide/nematicide fensulfothion (*O,O*-diethyl *O*-[*p*-(methylsulfinyl) phenyl] phosphorothioate) in or on raw agricultural commodities. EPA has taken this action because all registered uses of products containing the pesticide fensulfothion were cancelled as of October 18, 1988.

EFFECTIVE DATE: This regulation becomes effective November 17, 1993.

ADDRESSES: Written objections and hearing requests, identified by the document control number [OPP-300289A], may be submitted to: Hearing Clerk (1900), Environmental Protection Agency, rm. M3708, 401 M St., SW., Washington, DC 20460. A copy of any objections and hearing requests filed with the Hearing Clerk should be identified by the document control number and should also be submitted to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, deliver objections and hearing requests filed with the Hearing Clerk to: rm. 1128, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. Fees accompanying objections shall be labeled "Tolerance Petition Fees" and forwarded to: EPA, Headquarters Accounting Operations Branch, OPP (tolerance fees), P.O.Box 360277M, Pittsburgh, PA 15251.

FOR FURTHER INFORMATION CONTACT: By mail: Brian Steinwand, Special Review and Reregistration Division (7508W), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Special Review Branch, Rm. WF32N4, 2800 Jefferson Davis Highway, Arlington, VA (703-308-8174).

SUPPLEMENTARY INFORMATION: This document announces the revocation of tolerances established under section 408 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 346a, for residues of the insecticide/nematicide fensulfothion (*O,O*-diethyl *O*-[*p*-(methylsulfinyl) phenyl] phosphorothioate) in or on various raw agricultural commodities.

EPA issued a proposed rule, published in the **Federal Register** of July 14, 1993 (58 FR 37893), which proposed the revocation of tolerances for residues of fensulfothion in or on various raw agricultural commodities. The Agency's decision to revoke these tolerances was based on the fact that all registered uses of fensulfothion had been cancelled as of October 18, 1988, and sale and distribution prohibited after October 18, 1989.

The Agency believes that sufficient time has passed for legally treated agricultural commodities to have gone through the channels of trade. Since it is unlikely that fensulfothion, which is not a persistent pesticide, would persist in soil more than 4 years and since the sale of fensulfothion was prohibited after October 18, 1989, there is no anticipation of a residue problem due to environmental contamination. Consequently, no action levels are being recommended to replace these revoked tolerances.

No public comments or requests for referral to an advisory committee were received in response to the notice of proposed rulemaking.

Therefore, based on the information considered by the Agency and discussed in detail in the July 14, 1993 proposal and in this final rule, the Agency is hereby revoking the tolerances listed in 40 CFR 180.234 for residues of fensulfothion (*O,O*-diethyl *O*-[*p*-(methylsulfinyl) phenyl] phosphorothioate).

Any person adversely affected by this regulation may, within 30 days after publication of this document in the **Federal Register**, file written objections and/or a request for a hearing with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issue(s) on

which a hearing is requested, the requestor's contentions on each such issue, and a summary of any evidence relied upon by the objector (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established, resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issue(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

Executive Order 12866

Under Executive Order 12866 (58 FR 51735, Oct. 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to all the requirements of the Executive Order (i.e., Regulatory Impact Analysis, review by the Office of Management and Budget (OMB)). Under section 3(f), the order defines "significant" as those actions likely to lead to a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also known as "economically significant"); (2) planned by another agency; (3) materially altering the budgetary impacts of entitlements, grants, user fees, or loan programs; or (4) raising novel legal or policy issues arising out of legal mandates, the President' priorities, or the principles set forth in this Executive Order.

Pursuant to the terms of this Executive Order, EPA has determined that this rule is not "significant" and is therefore not subject to OMB review.

Regulatory Flexibility Act

This rulemaking has been reviewed under the Regulatory Flexibility Act of 1980 (Pub. L. 96-354, 94 Stat. 1164; 5 U.S.C. 601 et seq.), and it has been determined that it will not have a significant economic impact on a substantial number of small businesses, small governments, or small organizations. The reasons for this conclusion are discussed in the July 14, 1993 proposed rule.

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 23, 1993.

Victor J. Kimm,

Acting Assistant Administrator for Prevention, Pesticides and Toxic Substances.

Therefore, 40 CFR part 180 is amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

§ 180.234 [Removed]

2. By removing § 180.234 *(O,O-diethyl O-[p-(methylsulfinyl) phenyl] phosphorothioate); tolerances for residues.*

[FR Doc. 93-28287 Filed 11-16-93; 8:45 am]
BILLING CODE 6560-50-F

Proposed Rules

Federal Register
Vol. 58, No. 220
Wednesday, November 17, 1993

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

DEPARTMENT OF AGRICULTURE

Rural Electrification Administration

7 CFR Part 1755

REA Specification for Terminating Cables

AGENCY: Rural Electrification Administration, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Electrification Administration (REA) proposes to amend its regulations on telecommunications standards and specifications for materials, equipment and construction. The revised specification will require that terminating cables comply with Article 800–50 of the 1993 National Electrical Code regarding fire retardancy of these products, include raw material requirements for insulating and jacketing compounds, update the end product requirements associated with these type cables.

DATES: Comments concerning this proposed rule must be received by REA or postmarked no later December 17, 1993.

ADDRESSES: Comments should be mailed to the Director, Telecommunications Standards Division, Rural Electrification Administration, room 2835, South Building, U.S. Department of Agriculture, Washington, DC 20250–1500. REA requests an original and three copies of all comments (7 CFR part 1700). All comments received will be made available for public inspection at room 2835, South Building, U.S. Department of Agriculture, Washington, DC 20250–1500 between 8 a.m. and 4 p.m. (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Garnett G. Adams, Chief, Outside Plant Branch, Telecommunications Standards Division, Rural Electrification Administration, room 2844, South Building, U.S. Department of Agriculture, Washington, DC 20250–1500, telephone (202) 720–0667.

SUPPLEMENTARY INFORMATION:

Executive Order 12291

This proposed rule has been issued in conformance with Executive Order 12291 and Departmental Regulation 1512–1. This action has been classified as "nonmajor" because it does not meet the criteria for a major regulation as established by the Order.

Executive Order 12778

This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. If adopted, this proposed rule will not:

(1) Preempt any State or local laws, regulations, or policies;

(2) Have any retroactive effect; and

(3) Require administrative proceeding before parties may file suit challenging the provisions of this rule.

Regulatory Flexibility Act Certification

The Administrator of REA has determined that this proposed rule 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.*). This proposed rule involves standards and specifications, which may increase the direct short term costs to REA borrowers. However, the long-term direct economic costs are reduced through greater durability and lower maintenance cost over time.

Information Collection and Recordkeeping Requirements

In compliance with the Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implements the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and section 3504 of that Act, information collection and recordkeeping requirements contained in this proposed rule have been approved by OMB under control number 0572–0077 which expires on January 31, 1994. Comments concerning these requirements should be directed to the office of Information and Regulator Affairs of OMB, Attention: Desk Officer for USDA, room 3201, New Executive Office Building, Washington, DC 20503.

National Environmental Policy Act Certification

The Administrator of REA has determined that this proposed rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Therefore, this action does not require an environmental impact statement or assessment.

Catalog of Federal Domestic Assistance

The program described by this proposed rule is listed in the Catalog of Federal Domestic Assistance programs under No. 10.851, Rural Telephone Loans and Loan Guarantees, and No. 10.852, Rural Telephone Bank Loans. This catalog is available on a subscription basis from the Superintendent of Documents, the United States Government Printing Office, Washington, DC 20402–9325.

Executive Order 12372

This proposed rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation that requires intergovernmental consultation with state and local officials. A Notice of Final rule titled Department Programs and Activities Excluded from Executive Order 12372 (50 FR 47034) exempts REA and RTB loans and loan guarantees, and RTB bank loans, to governmental and nongovernmental entities from coverage under this Order.

Background

REA issues publications titled "Bulletins" which serve to guide borrowers regarding already codified policy, procedures, and requirements needed to manage loans, loan guarantee programs, and the security instruments which provide for and secure REA financing. REA issues standards and specifications for construction of telephone facilities financed with REA loan funds. REA is proposing to rescind Bulletin 345–87, REA Specification for Terminating (TIP) Cable, PE–87, and proposing to codify the revised specification at 7 CFR 1755.870, REA Specification for Terminating Cables.

Terminating cables are used to connect the incoming outside plant cables to the vertical side of the main distributing frame in a telephone central office. Since these cables are installed inside of a building, these cables are required to be listed in accordance with Article 800–50 of the 1993 National Electrical Code (NEC). The current specification does not require these cables to be listed in accordance with Article 800–50 of the 1993 NEC.

Therefore, REA is revising the current specification to require these cables to be listed in accordance with Article 800–50 of the 1993 NEC.

The current specification does not include insulation and jacketing raw requirements, because these requirements were previously covered by REA Bulletins 345–21, 345–51, and 345–58 which have since been rescinded. Therefore, revision of the current specification is necessary to incorporate essential jacketing and insulation raw material requirements. By incorporating the raw material requirements which were formerly found in REA Bulletins 345–21, 345- 51, and 345–58 into 7 CFR 1755.870, a comprehensive document will be published for the manufacture of terminating cable products.

The current specification contains end product performance requirements that have become outdated for these type cables because of the technological advancements made in the design of terminating cables over the past ten years. Therefore, REA is revising the current specification to update the end product performance requirements associated with these cables to reflect the technological advancements made in the design of these cables.

List of Subjects in 7 CFR Part 1755

Incorporation by reference, Loan programs—communications, Reporting and recordkeeping requirements, Rural areas, Telephone.

For reasons set out in the preamble, REA proposes to amend Chapter XVII of title 7 of the Code of Federal Regulations as follows:

PART 1755—TELECOMMUNICATIONS STANDARDS AND SPECIFICATIONS FOR MATERIALS, EQUIPMENT AND CONSTRUCTION

1. The authority citation for part 1755 continues to read as follows:

Authority: 7 U.S.C. 901 *et seq.*, 1921 *et seq.*

2. Section 1755.97 is amended by removing the entry REA Bulletin 345–87 from the table.

3. Section 1755.870 is added to read as follows:

§ 1755.870 REA specification for terminating cables.

(a) *Scope.* (1) This section establishes the requirements for terminating cables used to connect incoming outside plant cables to the vertical side of the main distributing frame in a telephone central office.

(i) The conductors are solid tinned copper, individually insulated with extruded solid dual insulating compounds.

(ii) The insulated conductors are twisted into pairs which are then stranded or oscillated to form a cylindrical core.

(iii) The cable structure is completed by the application of a core wrap, a shield, and a polyvinyl chloride jacket.

(2) The number of pairs and gauge size of conductors which are used within the REA program are provided in the following table:

American Wire Gauge (AWG)	22	24
Number of Pairs	12	12
	50	50
	100	100
	200	200
	300	300
	400	400
	600	600
	800	800

Note: Cables larger in pair sizes from those shown in this table shall meet all the requirements of this section.

(3) All cables sold to REA borrowers for projects involving REA loan funds under this section must be accepted by REA Technical Standards Committee "A" (Telephone). For cables manufactured to the specification of this section, all design changes to an accepted design must be submitted for acceptance. REA will be the sole authority on what constitutes a design change.

(4) Materials, manufacturing techniques, or cable designs not specifically addressed by this section may be allowed if accepted by REA. Justification for acceptance of modified materials, manufacturing techniques, or cable designs shall be provided to substantiate product utility and long term stability and endurance.

(5) The American National Standard Institute/Electronic Industries Association (ANSI/EIA) 359–A–84, EIA Standard Colors for Color Identification and Coding, referenced in this section is incorporated by reference by REA. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of ANSI/EIA 359–A–84 are available for inspection during normal business hours at REA, room 2845, U.S. Department of Agriculture, Washington, DC 20250–1500 or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC. Copies are available from EIA, 2001 Pennsylvania Avenue, NW., suite 900, Washington, DC 20006, telephone number (202) 457–4966.

[Note: The incorporation by reference and availablity of inspection copies are pending approval by the Office of the Federal Register.]

(6) American Society for Testing and Materials Specifications (ASTM) B 33–91, Standard Specification for Tinned Soft or Annealed Copper Wire for Electrical Purposes; ASTM B 736–92a Standard Specification for Aluminum, Aluminum Alloy and Aluminum Clad Steel Cable Shielding Stock; ASTM D 1248–84(1989), Standard Specification for Polyethylene Plastics Molding and Extrusion Materials; ASTM D 1535–89, Standard Test Method for Specifying Color by the Munsell System; ASTM D 2287–81(1988), Standard Specification for Nonrigid Vinyl Chloride Polymer and Copolymer Molding and Extrusion Compounds; ASTM D 2436–85, Standard Specification for Forced-Convection Laboratory Ovens for Electrical Insulation; ASTM D 2633–82, Standard Methods of Testing Thermoplastic Insulations and Jackets for Wire and Cable; ASTM D 3349–86, Standard Test Method for Absorption Coefficient of Carbon Black Pigmented Ethylene Plastic; ASTM D 4101–82(1988), Standard Specification for Propylene Plastic Injection and Extrusion Materials; ASTM D 4565–90a, Standard Test Methods for Physical and Environmental Performance Properties of Insulations and Jackets for Telecommunications Wire and Cable; ASTM D 4566–90, Standard Test Methods for Electrical Performance Properties of Insulations and Jackets for Telecommunications Wire and Cable; and ASTM E 29–90, Standard Practice for Using Significant Digits in Test Data to Determine Conformance with Specifications, referenced in this section are incorporated by reference by REA. These incorporations by references were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the ASTM standards are available for inspection during normal business hours at REA, room 2845, U.S. Department of Agriculture, Washington, DC 20250–1500 or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC. Copies are available from ASTM, 1916 Race Street, Philadelphia, Pennsylvania 19103–1187, telephone number (215) 299–5585.

[Note: The incorporation by reference and availablity of inspection copies are pending approval by the Office of the Federal Register.]

(7) American National Standard Institute/National Fire Protection Association (ANSI/NFPA) 70, 1993 National Electrical Code referenced in this section is incorporated by reference

by REA. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. A copy of the ANSI/NFPA standard is available for inspection during normal business hours at REA, room 2845, U.S. Department of Agriculture, Washington, DC 20250–1500 or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC. Copies are available from NFPA, Batterymarch Park, Quincy, Massachusetts 02269, telephone number 1 (800) 344–3555.

[Note: The incorporation by reference and availablity of inspection copies are pending approval by the Office of the Federal Register.]

(8) Underwriters Laboratories Inc. (UL) 1666, Standard Test for Flame Propagation Height of Electrical and Optical-Fiber Cables Installed Vertically in Shafts, dated January 22, 1991, referenced in this section is incorporated by reference by REA. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. A copy of the UL standard is available for inspection during normal business hours at REA, room 2845, U.S. Department of Agriculture, Washington, DC 20250–1500 or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC. Copies are available from UL Inc., 333 Pfingsten Road, Northbrook, Illinois 60062–2096, telephone number (708) 272–8800.

[Note: The incorporation by reference and availablity of inspection copies are pending approval by the Office of the Federal Register.]

(b) *Conductors and conductor insulation.* (1) Each conductor shall be a solid round wire of commercially pure annealed tin coated copper. Conductors shall meet the requirements of the American Society for Testing and Materials (ASTM) B 33–91 except that requirements for *Dimensions and Permissible Variations* are waived.

(2) Joints made in conductors during the manufacturing process may be brazed, using a silver alloy solder and nonacid flux, or they may be welded using either an electrical or cold welding technique. In joints made in uninsulated conductors, the two conductor ends shall be butted. Splices made in insulated conductors need not be butted but may be joined in a manner acceptable to REA.

(3) (i) The tensile strength of any section of a conductor, containing a factory joint, shall not be less than 85 percent of the tensile strength of an adjacent section of the solid conductor of equal length without a joint.

(ii) Engineering Information: The sizes of wire used and their nominal diameters shall be as shown in the following table:

AWG	Nominal diameter	
	Millimeters	(Inches)
22	0.643	(0.0253)
24	.511	(0.0201)

(4) Each conductor shall be insulated with a primary layer of natural or white solid, insulating grade, high density polyethylene or crystalline propylene/ethylene copolymer and an outer skin of colored, solid, insulating grade, polyvinyl chloride (PVC) using one of the insulating materials listed in paragraphs (b)(4) (i) through (iii) of this section.

(i) The polyethylene raw material selected to meet the requirements of this section shall be Type III, Class A, Category 4 or 5, Grade E9, in accordance with ASTM D 1248–84(1989).

(ii) The crystalline propylene/ethylene raw material selected to meet the requirements of this section shall be Class PP 200B 40003 E11 in accordance with ASTM D 4101–82(1988).

(iii) The PVC raw material selected to meet the requirements of this section shall be either Type PVC–64751E3XO, Type PVC–76751E3XO, or Type PVC–77751E3XO in accordance with ASTM D 2287–81(1988).

(iv) Raw materials intended as conductor insulation furnished to these requirements shall be free from dirt, metallic particles, and other foreign matter.

(v) All insulating raw materials shall be accepted by REA prior to their use.

(5) All conductors in any single length of cable shall be insulated with the same type of material.

(6) A permissible overall performance level of faults in conductor insulation when using the test procedures in paragraph (b)(7) of this section shall average not greater than one fault per 12,000 conductor meters (40,000 conductor feet) for each gauge of conductor.

(7) The test used to determine compliance with paragraph (b)(6) of this section shall be conducted as follows:

(i) Samples tested shall be taken from finished cables selected at random from standard production cable. The samples tested shall contain a minimum of 300 conductor meters (1,000 conductor feet) for cables sizes less than 50 pairs and 1,500 conductor meters (5,000 conductor feet) for cables sizes greater than or equal to 50 pairs. No further sample need be taken from the same cable production run within 6,000 cable meters (20,000 cable feet) of the original test sample from that run.

(ii) The cable sample shall have its jacket, shield, and core wrap removed and its core shall be immersed in tap water for a minimum period of 6 hours. In lieu of removing the jacket, shield, and core wrap from the core, the entire cable may be tested. In this case, the core shall be completely filled with tap water, under pressure; then the cable assembly shall be immersed for a minimum period of 6 hours. With the cable core still fully immersed, except for end connections, the insulation resistance (IR) of all conductors to water shall be measured using a direct current (dc) voltage of 100 volts to 550 volts.

(iii) An IR value of less than 500 megohms for any individual insulated conductor tested at or corrected to a temperature of 23 °C is considered a failure. If the cable sample is more than 7.5 meters (25 feet) long, all failing conductors shall be retested and reported in 7.5 meter (25 foot) segments.

(iv) The pair count, gauge, footage, and number of insulation faults shall be recorded. This information shall be retained on a 6 month running basis for review by REA when requested.

(v) A fault rate, in a continuous length in any one reel, in excess of one fault per 3,000 conductor meters (10,000 conductor feet) due to manufacturing defects is cause for rejection. A minimum of 6,000 conductor meters (20,000 conductor feet) is required to develop a noncompliance in a reel.

(8) Repairs to the conductor insulation during manufacturing are permissible. The method of repair shall be accepted by REA prior to its use. The repaired insulation shall be capable of meeting the relevant electrical requirements of this section.

(9) All repaired sections of insulation shall be retested in the same manner as originally tested for compliance with paragraph (b)(6) of this section.

(10) The colored composite insulating material removed from or tested on the conductor, from a finished cable, shall be capable of meeting the following performance requirements:

Property	Composite insulation
Tensile strength, minimum megapascals (MPa) (pounds per square inch (psi))	16.5 (2400)
Ultimate elongation percent, minimum	125
Cold bend failures, maximum	0/10

Property	Composite insulation
Shrinkback, maximum millimeter (mm) (inches (in.))	9.5 (3/8)
Adhesion, maximum newtons (N) (pound-force (lbf))	13.3 (3)
Compression minimum, N (lbf)	1780 (400)

(11) *Testing procedures.* The procedures for testing the composite insulation samples for compliance with paragraph (b)(10) of this section shall be as follows:

(i) *Tensile strength and ultimate elongation.* Samples of the insulation material, removed from the conductor, shall be tested in accordance with ASTM D 2633–82, except that the speed of jaw separation shall be 50 millimeters/minute (50 mm/min) (2 inches/minute (2 in./min)).

Note: Quality assurance testing at a jaw separation speed of 500 mm/min (20 in./min) is permissible. Failures at this rate shall be retested at the 50 mm/min (2 in./min) rate to determined specification compliance.

(ii) *Cold bend.* Samples of the insulation material on the conductor shall be tested in accordance with ASTM D 4565–90a at a temperature of −40 ± 1°C with a mandrel diameter of 6 mm (0.25 in.). There shall be no cracks visible to normal or corrected-to-normal vision.

(iii) *Shrinkback.* Samples of insulation shall be tested for four hours at a temperature of 115 ± 1°C in accordance with ASTM D 4565–90a.

(iv) *Adhesion.* Samples of insulation material on the conductor shall be tested in accordance with ASTM D 4565–90a with a crosshead speed of 50 mm/min (2 in./min).

(v) *Compression.* Samples of the insulation material on the conductor shall be tested in accordance with ASTM D 4565–90a with a crosshead speed of 5 mm/min (0.2 in./min).

(12) Other methods of testing may be used if acceptable to REA.

(c) *Identification of pairs and twisting of pairs.* (1) The PVC skin shall be colored to identify:

(i) The tip and ring conductor of each pair; and

(ii) Each pair in the completed cable.

(2) The colors used to provide identification of the tip and ring conductor of each pair shall be as shown in the following table:

Pair No.	Color	
	Tip	Ring
1	White	Blue.
2	White	Orange.
3	White	Green.
4	White	Brown.
5	White	Slate.
6	Red	Blue.
7	Red	Orange.
8	Red	Green.
9	Red	Brown.
10	Red	Slate.
11	Black	Blue.
12	Black	Orange.
13	Black	Green.
14	Black	Brown.
15	Black	Slate.
16	Yellow	Blue.
17	Yellow	Orange.
18	Yellow	Green.
19	Yellow	Brown.
20	Yellow	Slate.
21	Violet	Blue.
22	Violet	Orange.
23	Violet	Green.
24	Violet	Brown.
25	Violet	Slate.

(3) *Standards of color.* The colors of the insulated conductors supplied in accordance with this section are specified in terms of the Munsell Color System (ASTM D 1535–89) and shall comply with the "Table of Wire and Cable Limit Chips" as defined in ANSI/EIA–359–A–84. (Visual color standards meeting these requirements may be obtained directly from the Munsell Color Company, Inc., 2441 North Calvert Street, Baltimore, Maryland 21218).

(4) Positive identification of the tip and ring conductors of each pair by marking each conductor of a pair with the color of its mate is permissible. The method of marking shall be accepted by REA prior to its use.

(5) Other methods of providing positive identification of the tip and ring conductors of each pair may be employed if accepted by REA prior to its use.

(6) The insulated conductors shall be twisted into pairs.

(7) In order to provide sufficiently high crosstalk isolation, the pair twists shall be designed to enable the cable to meet the capacitance unbalance and the crosstalk loss requirements of paragraphs (h)(2), (h)(3), and (h)(4) of this section.

(8) The average length of pair twists in any pair in the finished cable, when measured on any 3 meter (m) (10 foot (ft)) length, shall not exceed 152 mm (6 in.).

(d) *Forming of the cable core.* (1) Twisted pairs shall be assembled in such a way as to form a substantially cylindrical group.

(2) When desired for lay-up reasons, the basic group may be divided into two or more subgroups called units.

(3) Each group, or unit in a particular group, shall be enclosed in bindings of the colors indicated for its particular pair count. The pair count, indicated by the color of insulation, shall be consecutive as indicated in paragraph (d)(5) of this section through units in a group.

(4) Threads or tapes used as binders shall be non-hygroscopic and nonwicking. The threads shall consists of a suitable number of ends of each color arranged as color bands. When tapes are used as binders, they shall be colored. Binders shall be applied with a lay of not more than 100 mm (4 in.). The colored binders shall be readily recognizable as the basic intended color and shall be distinguishable from all other colors.

(5) The colors of the bindings and their significance with respect to pair count shall be as shown in the following table:

Group No.	Color of bindings	Group pair count
1	White-Blue	1–25
2	White-Orange	26–50
3	White-Green	51–75
4	White-Brown	76–100
5	White-Slate	101–125
6	Red-Blue	126–150
7	Red-Orange	151–175
8	Red-Green	176–200
9	Red-Brown	201–225
10	Red-Slate	226–250
11	Black-Blue	251–275
12	Black-Orange	276–300
13	Black-Green	301–325
14	Black-Brown	326–350
15	Black-Slate	351–375
16	Yellow-Blue	376–400
17	Yellow-Orange	401–425
18	Yellow-Green	426–450
19	Yellow-Brown	451–475
20	Yellow-Slate	476–500
21	Violet-Blue	501–525
22	Violet-Orange	526–550
23	Violet-Green	551–575
24	Violet-Brown	576–600

(6) The use of the white unit binder in cables of 100 pair or less is optional.

(7) When desired for manufacturing reasons, two or more 25 pair groups may be bound together with nonhygroscopic and nonwicking threads or tapes into super-units. The group binders and the super-unit binders shall be colored such that the combination of the two binders shall positively identify each 25 pair group from every other 25 pair group in the cable.

(8) Super-unit binders shall be of the colors shown in the following table:

SUPER-UNIT BINDER COLORS

Pair No.	Binder color
1–600	White.
601–1200	Red.

(e) *Core wrap.* (1) The core shall be completely covered with a layer of nonhygroscopic and nonwicking dielectric material. The core wrap shall be applied with an overlap.

(2) (i) The core wrap shall provide a sufficient heat barrier to prevent visible evidence of conductor insulation deformation or adhesion between conductors, caused by adverse heat transfer during the jacketing operation.

(ii) Engineering Information: If required for manufacturing reasons, white or uncolored binders of nonhygroscopic and nonwicking material may be applied over the core and/or core wrap.

(f) *Shield.* (1) An aluminum shield, plastic coated on one side, shall be applied longitudinally over the core wrap.

(2) The shield may be applied over the core wrap with or without corrugations (smooth) and shall be bonded to the outer jacket.

(3) The shield overlap shall be a minimum of 3 mm (0.125 in.) for cables with core diameters of 15 mm (0.625 in.) or less and a minimum of 6 mm (0.25 in.) for cables with core diameters greater than 15 mm (0.625 in.). The core diameter is defined as the diameter under the core wrap and binding.

(4) General requirements for application of the shielding material shall be as follows:

(i) Successive lengths of shielding tapes may be joined during the manufacturing process by means of cold weld, electric weld, soldering with a nonacid flux, or other acceptable means;

(ii) The metal shield with the plastic coating shall have the coating removed prior to joining the metal ends together. After joining, the plastic coating shall be restored without voids using good manufacturing techniques;

(iii) The shields of each length of cable shall be tested for continuity. A one meter (3 ft) section of shield containing a factory joint shall exhibit not more than 110 percent of the resistance of a shield of equal length without a joint;

(iv) The breaking strength of any section of a shield tape containing a factory joint shall not be less than 80 percent of the breaking strength of an adjacent section of the shield of equal length without a joint;

(v) The reduction in thickness of the shielding material due to the corrugating or application process shall be kept to a minimum and shall not exceed 10 percent at any spot; and

(vi) The shielding material shall be applied in such a manner as to enable the cable to pass the bend test as specified in paragraph (i)(1) of this section.

(5) The dimensions of the uncoated aluminum tape shall be 0.2030±0.0254 mm (0.0080±0.0010 in.).

(6) The aluminum tape shall conform to either Alloy AA–1100–0, AA–1145–0, or AA–1235–0 as covered in the latest edition of Aluminum Standards and Data, issued by the Aluminum Association, except that requirements for tensile strength are waived.

(7) The single-sided plastic coated aluminum shield shall conform to the requirements of ASTM B 736–92a, Type I Coating, Class 1 or 2, or Type II Coating, Class 1. The minimum thickness of the Type I Coating shall be 0.038 mm (0.0015 in.). The minimum thickness of the Type II Coating shall be 0.008 mm (0.0003 in.).

(8) The plastic coated aluminum shield shall be tested for resistance to water migration by immersing a one meter (3 ft) length of tape under a one meter (3 ft) head of water containing a soluble dye plus 0.25 percent wetting agent.

(i) After a minimum of 5 minutes, no dye shall appear between the interface of the shield tape and the plastic coating.

(ii) The actual test method shall be acceptable to REA.

(9) The bond between the plastic coated shield and the jacket shall conform to the following requirements.

(i) Prepare test strips approximately 200 mm (8 in.) in length. Slit the jacket and shield longitudinally to produce 4 strips evenly spaced and centered in 4 quadrants on the jacket circumference. One of the strips shall be centered over the overlapped edge of the shielding tape. The strips shall be 13 mm (0.5 in.) wide. For cable diameters less than 19 mm (0.75 in.) make two strips evenly spaced.

(ii) Separate the shield and jacket for a sufficient distance to allow the shield and jacket to be fitted in the upper and lower jaws of a tensile machine. Record the maximum force required to separate the shield and jacket to the nearest newton. Repeat this action for each test strip.

(iii) The force required to separate the jacket from the shield shall not be less than 9 N (2 lbf) for any individual strip when tested in accordance with paragraph (f)(9)(ii) of this section. The average force for all strips of any cable shall not be less than 18 N (4 lbf).

(g) *Cable jacket and extraneous material.* (1) The jacket shall provide the cable with a tough, flexible, protective covering which can withstand stresses reasonably expected in normal installation and service.

(2) The jacket shall be free from holes, splits, blisters, or other imperfections and shall be as smooth and concentric as is consistent with the best commercial practice.

(3) The raw material used for the cable jacket shall be one of the following four types:

(i) Type PVC–55554EOXO in accordance with ASTM D 2287–81(1988);

(ii) Type PVC–65554EOXO in accordance with ASTM D 2287–81(1988);

(iii) Type PVC–55556EOXO in accordance with ASTM D 2287–81(1988); or

(iv) Type PVC–66554EOXO in accordance with ASTM D 2287–81(1988).

(4) The jacketing material removed from or tested on the cable shall be capable of meeting the following performance requirements:

Property	Jacket performance
Tensile Strength-Unaged Minimum, MPa (psi)	13.8 (2000)
Ultimate Elongation-Unaged Minimum, Percent (%)	200
Tensile Strength-Aged Minimum, % of original value	80
Ultimate Elongation-Aged Minimum, % of original value	50
Impact Failures, Maximum	2/10

(5) *Testing procedures.* The procedures for testing the jacket samples for compliance with paragraph (g)(4) of this section shall be as follows.

(i) *Tensile strength and ultimate elongation-unaged.* The test shall be performed in accordance with ASTM D 2633–82, using a jaw separation speed of 50 mm/min (2 in./min).

Note: Quality assurance testing at a jaw separation speed of 500 mm/min (20 in./min) is permissible. Failures at this rate shall be retested at the 50 mm/min (2 in./min) rate to determine specification compliance.

(ii) *Tensile strength and ultimate elongation-aged.* The test shall be performed in accordance with paragraph (g)(5)(i) of this section after being aged for 7 days at a temperature of 100±1°C in a circulating air oven conforming to ASTM D 2436–85.

(iii) *Impact.* The test shall be performed in accordance with ASTM D 4565–90a using an impact force of 4 newton-meter (3 pound force-foot) at a temperature of −10±1°C. The cylinder

shall strike the sample at the shield overlap. A crack or split in the jacket constitutes failure.

(6) *Jacket thickness.* The nominal jacket thickness shall be as specified in the following table. The test method used shall be either the End Sample Method (paragraph (g)(6)(i) of this section) or the Continuous Uniformity Thickness Gauge Method (paragraph (g)(6)(ii) of this section).

No. of pairs	Nominal jacket thickness mm (in.)
25 or less	1.4 (0.055)
50	1.5 (0.060)
100	1.7 (0.065)
200	1.9 (0.075)
300	2.2 (0.085)
400	2.4 (0.095)
600	2.9 (0.115)
800 and over	3.3 (0.130)

(i) *End sample method.* The jacket shall be capable of meeting the following requirements:

Minimum Average Thickness—90 % of nominal thickness.

Minimum Thickness—70 % of nominal thickness.

(ii)(A) *Continuous uniformity thickness gauge method.* The jacket shall be capable of meeting the following requirements:

Minimum Average Thickness—90 % of nominal thickness.

Minimum (Min.) Thickness—70 % of nominal thickness.

Maximum (Max.) Eccentricity—55 %.

$$\text{Eccentricity} = \frac{\text{Max. Thickness} - \text{Min. Thickness}}{\text{Average Thickeness}} \times 100$$

(B) Maximum and minimum thickness values. The maximum and minimum thickness values shall be based on the average of each axial section.

(7) The color of the jacket shall be either black or dark grey in conformance with the Munsell Color System specified in ASTM D 1535–89.

(8) There shall be no water or other contaminants in the finished cable which would have a detrimental effect on its performance or its useful life.

(h) *Electrical requirements*—(1) *Mutual capacitance and conductance.* (i) The average mutual capacitance (corrected for length) of all pairs in any reel shall not exceed the following when tested in accordance with ASTM D 4566–90 at a frequency of 1.0±0.1 kilohertz (kHz) and a temperature of 23±3° C.

No. of cable pairs	Mutual capacitance	
	Nanofarad/ kilometer	(Nanofarad/ mile)
12	52±4	(83±7)
Over 12	52±2	(83±4)

(ii) The root mean square (rms) deviation of the mutual capacitance of all pairs from the average mutual capacitance of that reel shall not exceed 3.0 % when calculated in accordance with ASTM D 4566–90.

(iii) The mutual conductance (corrected for length and gauge) of any pair shall not exceed 3.7 micromhos/ kilometer (micromhos/km) (6.0 micromhos/mile) when tested in accordance with ASTM D 4566–90 at a frequency of 1.0±0.1 kHz and a temperature of 23±3° C.

(2) *Pair-to-pair capacitance unbalance.* The capacitance unbalance as measured on the completed cable shall not exceed 45.3 picofarad/ kilometer (pF/km) (25 picofarad/1000 ft (pF/1000 ft)) rms when tested in accordance with ASTM D 4566–90 at a frequency of 1.0±0.1 kHz and a temperature of 23±3° C.

(3) *Pair-to-ground capacitance unbalance.* (i) The average capacitance unbalance as measured on the completed cable shall not exceed 574 pF/km (175 pF/1000 ft) when tested in accordance with ASTM D 4566–90 at a frequency of 1±0.1 kHz and a temperature of 23±3° C.

(ii) When measuring pair-to-ground capacitance unbalance all pairs except the pair under test are grounded to the shield except when measuring cable containing super-units in which case all other pairs in the same super-unit shall be grounded to the shield.

(iii) Pair-to-ground capacitance unbalance may vary directly with the length of the cable.

(4) *Crosstalk loss.* (i) The rms output-to-output far-end crosstalk loss (FEXT) measured on the completed cable in accordance with ASTM D 4566–90 at a test frequency of 150 kHz shall not be less than 68 decibel/kilometer (dB/km) (73 decibel/1000 ft (dB/1000 ft)). The rms calculation shall be based on the combined total of all adjacent and alternate pair combinations within the same layer and center to first layer pair combinations.

(ii) The FEXT crosstalk loss between any pair combination of a cable shall not be less than 58 dB/km (63 dB/1000 ft) at a frequency of 150 kHz. If the loss K_o at a frequency F_o for length L_o is known, then K_x can be determined for any other frequency F_x or length L_x by:

$$\text{FEXT loss } (K_X) = K_O - 20 \log 10 \frac{F_X}{F_O} - 10 \log 10 \frac{L_X}{L_O}$$

(iii) The near-end crosstalk loss (NEXT) as measured within and between units of a completed cable in accordance with ASTM D 4566–90 at a frequency of 772 kHz shall not be less than the following mean minus sigma (M-S) crosstalk requirement for any unit within the cable:

Unit size within unit	M–S decibel (dB)
12 and 13 pairs	56
18 and 25 pairs	60
Between Unit:	
Adjacent 13 pairs	65
Adjacent 25 pairs	66
Nonadjacent (all)	81

Where M–S is the Mean near-end coupling loss based on the combined total of all pair combinations, less one Standard Deviation, Sigma, of the mean value.

(5) *Insulation resistance.* Each insulated conductor in each length of completed cable, when measured with all other insulated conductors and the shield grounded, shall have an

insulation resistance of not less than 152 megohm-kilometer (500 megohm-mile) at 20±1° C. The measurement shall be made in accordance with the procedures of ASTM D 4566–90.

(6) *High voltage test.* (i) In each length of completed cable, the dielectric strength of the insulation between conductors shall be tested in accordance with ASTM D 4566–90 and shall withstand, for 3 seconds, a direct current (dc) potential whose value is not less than:

(A) 3.6 kilovolts for 22-gauge conductors; or

(B) 3.0 kilovolts for 24-gauge conductors.

(ii) In each length of completed cable, the dielectric strength between the shield and all conductors in the core shall be tested in accordance with ASTM D 4566–90 and shall withstand, for 3 seconds, a dc potential whose value is not less than 10 kilovolts.

(7) *Conductor resistance.* The dc resistance of any conductor shall be measured in the completed cable in accordance with ASTM D 4566–90 and shall not exceed the following values when measured at or corrected to a temperature of 20±1 °C.

AWG	Maximum resistance	
	ohms/kilo-meter	(ohm/1000 ft)
22	60.7	(18.5)
24	95.1	(29.0)

(8) *Resistance unbalance.* (i) The difference in dc resistance between the two conductors of a pair in the completed cable shall not exceed the values listed below when measured in accordance with the procedures of ASTM D 4566–90.

AWG	Resistance unbalance—Maximum for any reel	
	Average percent	Individual pair percent
22	1.5	4.0
24	1.5	5.0

(ii) The resistance unbalance between tip and ring conductors shall be random with respect to the direction of unbalance. That is, the resistance of the tip conductors shall not be consistently higher with respect to the ring conductors and vice versa.

(9) *Electrical variations.* (i) Pairs in each length of cable having either a ground, cross, short, or open circuit condition shall not be permitted.

(ii) The maximum number of pairs in a cable which may vary as specified in paragraph (h)(9)(iii) of this section from the electrical parameters given in this section are listed in this paragraph. These pairs may be excluded from the arithmetic calculation.

Nominal pair count	Maximum No. of pairs with allowable electrical variation
12–100	1
101–300	2
301–400	3
401–600	4
601 and above	6

(iii) *Parameter variations*—(A) *Capacitance unbalance-to-ground.* If the cable fails either the maximum individual pair or average capacitance unbalance-to-ground requirement and all individual pairs are 3280 pF/km (1000 pF/1000 ft) or less the number of pairs specified in paragraph (h)(9)(ii) of this section may be eliminated from the average and maximum individual calculations.

(B) *Resistance unbalance.* Individual pair of not more than 7 percent for all gauges.

(C) *Far end crosstalk.* Individual pair combination of not less than 52 dB/km (57 dB/1000 ft).

Note: REA recognizes that in large pair count cables (600 pair and above) a cross, short, or open circuit condition occasionally may develop in a pair which does not affect the performance of the other cable pairs. In these circumstances rejection of the entire cable may be economically unsound or repairs may be impractical. In such circumstances the manufacturer may desire to negotiate with the customer for acceptance of the cable. No more than 0.5 percent of the pairs may be involved.

(i) *Mechanical requirements*—(1) *Cable cold bend test.* The completed cable shall be capable of meeting the requirements of ASTM D 4565–90a after conditioning at −20±2 °C except the mandrel diameters shall be as specified as follows:

Cable outside diameter	Mandrel diameter
<40 mm (1.5 in.)	15x
≥40 mm (1.5 in.)	20x

(2) *Cable flame test.* The completed cable shall be capable of meeting a maximum flame height of 3.7 m (12.0 ft) when tested in accordance with Underwriters Laboratories (UL) 1666 dated January 22, 1991.

(3) *Cable listing.* All cables manufactured to the specification of this section at a minimum shall be listed as Communication Riser Cable (Type CMR) in accordance with Sections 800–50 and 800–51(b) of the 1993 National Electrical Code.

(j) *Sheath slitting cord* (optional). (1) Sheath slitting cords may be used in the cable structure at the option of the manufacturer.

(2) When a sheath slitting cord is used it shall be nonhygroscopic and nonwicking, continuous throughout a length of cable, and of sufficient strength to open the sheath without breaking the cord.

(3) Sheath slitting cords shall be capable of consistently slitting the jacket and/or shield for a continuous length of 0.6 m (2 ft) when tested in accordance with the procedure specified in Appendix B of this section.

(k) *Identification marker and length marker.* (1) Each length of cable shall be permanently identified as to manufacturer and year of manufacture.

(2) The number of conductor pairs and their gauge size shall be marked on the jacket.

(3) The marking shall be printed on the jacket at regular intervals of not more than 1.5 m (5 ft).

(4) An alternative method of marking may be used if accepted by REA prior to its use.

(5) The completed cable shall have sequentially numbered length markers in feet or meters at regular intervals of not more than 1.5 m (5 ft) along the outside of the jacket.

(6) The method of length marking shall be such that for any single length of cable, continuous sequential numbering shall be employed.

(7) The numbers shall be dimensioned and spaced to produce good legibility and shall be approximately 3 mm (0.125 in.) in height. An occasional illegible marking is permissible if there is a legible marking located not more than 1.5 m (5 ft) from it.

(8) The method of marking shall be by means of suitable surface markings producing a clear, distinguishable, contrasting marking acceptable to REA. Where direct or transverse printing is employed, the characters should be indented to produce greater durability of marking. Any other method of length marking shall be acceptable to REA as producing a marker suitable for the field. Size, shape and spacing of numbers, durability, and overall legibility of the marker shall be considered in acceptance of the method.

(9) The accuracy of the length marking shall be such that the actual length of any cable section is never less than the length indicated by the marking and never more than one

percent greater than the length indicated by the marking.

(10) The color of the initial marking for a black colored jacket shall be either white or silver. The color of the initial marking for a dark grey colored jacket shall be either red or black. If the initial marking of the black colored jacket fails to meet the requirements of the preceding paragraphs, it will be permissible to either remove the defective marking and re-mark with the white or silver color or leave the defective marking on the cable and re-mark with yellow. If the initial marking of the dark grey colored jacket fails to meet the requirements of the preceding paragraphs, it will be permissible to either remove the defective marking and re-mark with the red or black color or leave the defective marking on the cable and re-mark with yellow. No further re-marking is permitted. Any re-marking shall be on a different portion of the cable circumference than any existing marking when possible and have a numbering sequence differing from any other existing marking by at least 5,000.

(11) Any reel of cable which contains more than one set of sequential markings shall be labeled to indicate the color and sequence of marking to be used. The labeling shall be applied to the reel and also to the cable.

(l) *Preconnectorized cable* (optional). (1) At the option of the manufacturer and upon request by the purchaser, cables 100 pairs and larger may be factory terminated in 25 pair splicing modules.

(2) The splicing modules shall meet the requirements of REA Bulletin 345–54, PE–52, REA Specification for Telephone Cable Splicing Connectors (Incorporated by Reference at § 1755.97), and be accepted by REA prior to their use.

(m) *Acceptance testing and extent of testing.* (1) The tests described in Appendix A of this section are intended for acceptance of cable designs and major modifications of accepted designs. REA decides what constitutes a major modification. These tests are intended to show the inherent capability of the manufacturer to produce cable products having long life and stability.

(2) For initial acceptance, the manufacturer shall submit:

(i) An original signature certification that the product fully complies with each section of the specification;

(ii) Qualification Test Data, per Appendix A of this section;

(iii) To periodic plant inspections;

(iv) A certification that the product does or does not comply with the domestic origin manufacturing provisions of the "Buy American" requirements of the Rural Electrification Act of 1938 (7 U.S.C. 901 *et seq.*);

(v) Written user testimonials concerning performance of the product; and

(vi) Other nonproprietary data deemed necessary by the Chief, Outside Plant Branch (Telephone).

(3) For requalification acceptance, the manufacturer shall submit an original signature certification that the product fully complies with each section of the specification, excluding the Qualification Section, and a certification that the product does or does not comply with the domestic origin manufacturing provisions of the "Buy American" requirements of the Rural Electrification Act of 1938 (7 U.S.C. 901 *et seq.*) for acceptance by June 30 every three years. The required data and certification shall have been gathered within 90 days of the submission.

(4) Initial and requalification acceptance requests should be addressed to: Chairman, Technical Standards Committee "A" (Telephone), Telecommunications Standards Division, Rural Electrification Administration, Washington, DC 20250–1500.

(5) *Tests on 100 percent of completed cable.* (i) The shield of each length of cable shall be tested for continuity using the procedures of ASTM D 4566–90.

(ii) Dielectric strength between all conductors and the shield shall be tested to determine freedom from grounds in accordance with paragraph (h)(6)(ii) of this section.

(iii) Each conductor in the completed cable shall be tested for continuity using the procedures of ASTM D 4566–90.

(iv) Dielectric strength between conductors shall be tested to ensure freedom from shorts and crosses in accordance with paragraph (h)(6)(i) of this section.

(v) Each conductor in the completed preconnectorized cable shall be tested for continuity.

(vi) Each length of completed preconnectorized cable shall be tested for split pairs.

(vii) The average mutual capacitance shall be measured on all cables. If the average mutual capacitance for the first 100 pairs tested from randomly selected groups is between 50 and 53 nF/km (80 to 85 nF/mile), the remainder of the pairs need not to be tested on the 100 percent basis. (See paragraph (h)(1) of this section).

(6) *Capability tests.* Tests on a quality assurance basis shall be made as frequently as is required for each manufacturer to determine and maintain compliance with:

(i) Performance requirements for conductor insulation and jacket material;

(ii) Bonding properties of coated or laminated shielding materials;

(iii) Sequential marking and lettering;

(iv) Capacitance unbalance and crosstalk;

(v) Insulation resistance;

(vi) Conductor resistance and resistance unbalance;

(vii) Cable cold bend and cable flame tests; and

(viii) Mutual conductance.

(n) *Summary of records of electrical and physical tests.* (1) Each manufacturer shall maintain a suitable summary of records for a period of at least 3 years for all electrical and physical tests required on completed cable by this section as set forth in paragraphs (m)(5) and (m)(6) of this section. The test data for a particular reel shall be in a form that it may be readily available to the purchaser or to REA upon request.

(2) Measurements and computed values shall be rounded off to the number of places of figures specified for the requirement according to ASTM E 29–90.

(o) *Manufacturing irregularities.* (1) Repairs to the shield are not permitted in cable supplied to the end user under this section.

(2) No repairs or defects in the jacket are allowed.

(p) *Preparation for shipment.* (1) The cable shall be shipped on reels unless otherwise specified or agreed to by the purchaser. The diameter of the drum shall be large enough to prevent damage to the cable from reeling or unreeling. The reels shall be substantial and so constructed as to prevent damage to the cable during shipment and handling.

(2) A waterproof corrugated board or other means of protection acceptable to REA shall be applied to the reel and shall be suitably secured in place to prevent damage to the cable during storage and shipment.

(3) The outer end of the cable shall be securely fastened to the reel head so as to prevent the cable from becoming loose in transit. The inner end of the cable shall be securely fastened in such a way as to make it readily available if required for electrical testing. Spikes, staples, or other fastening devices which penetrate the cable jacket shall not be used. The method of fastening the cable ends shall be accepted by REA prior to it being used.

(4) Each length of cable shall be wound on a separate reel unless otherwise specified or agreed to by the purchaser.

(5) The arbor hole shall admit a spindle 63 mm (2.5 in.) in diameter

without binding. Steel arbor hole liners may be used but shall be acceptable to REA prior to their use.

(6) Each reel shall be plainly marked to indicate the direction in which it should be rolled to prevent loosening of the cable on the reel.

(7) Each reel shall be stenciled or labeled on either one or both sides with the name of the manufacturer, year of manufacture, actual shipping length, an inner and outer end sequential length marking, description of the cable, reel number and the REA cable designation:

Cable Designation

CT
Cable Construction
Pair Count
Conductor Gauge
A=Coated Aluminum Shield
P=Preconnectorized Cable

Example: CTAP 100–22

Terminating Cable, Coated Aluminum Shield, Preconnectorized, 100 pairs, 22 AWG.

(8) When preconnectorized cable is shipped, the splicing modules shall be protected to prevent damage during shipment and handling. The protection method shall be acceptable to REA prior to its use.

(The information and recordkeeping requirements of this section have been approved by the Office of Management and Budget (OMB) under the Control Number 0572–0077.)

Appendix A to 7 CFR 1755.870—Qualification Test Methods

(I) The test procedures described in this appendix are for qualification of initial designs and major modifications of accepted designs. Included in paragraph (V) of this appendix are suggested formats that may be used in submitting test results to REA.

(II) *Sample Selection and Preparation.* (1) All testing shall be performed on lengths removed sequentially from the same 25 pair, 22 gauge jacketed cable. This cable shall not have been exposed to temperatures in excess of 38° C since its initial cool down after sheathing. The lengths specified are minimum lengths and if desirable from a laboratory testing standpoint longer lengths may be used.

(a) Length A shall be 12±0.2 meters (40±0.5 feet) long. Prepare the test sample by removing the jacket, shield, and core wrap for a sufficient distance on both ends to allow the insulated conductors to be flared out. Remove sufficient conductor insulation so that appropriate electrical test connections can be made at both ends. Coil the sample with a diameter of 15 to 20 times its sheath diameter. Two lengths are required.

(b) Length B shall be 300 millimeters (1 foot) long. Three lengths are required.

(c) Length C shall be 3 meters (10 feet) long and shall be maintained at 23±3° C for the duration of the test. Two lengths are required.

(2) *Data Reference Temperature.* Unless otherwise specified, all measurements shall be made at 23±3° C.

(III) *Environmental Tests*—(1) *Heat Aging Test*—(a) *Test Samples.* Place one sample each of lengths A and B in an oven or environmental chamber. The ends of sample A shall exit from the chamber or oven for electrical tests. Securely seal the oven exit holes.

(b) *Sequence of Tests.* Sample B referenced in paragraph (III)(1)(a) of this appendix shall be subjected to the insulation compression test outlined in paragraph (III)(2) of this appendix.

(c) *Initial Measurements.* (i) For sample A, measure the open circuit capacitance and conductance for each odd pair at 1, 150, and 772 kilohertz after conditioning the sample at the data reference temperature for 24 hours. Calculate the average and standard deviation for the data of the 13 pairs on a per kilometer (per mile) basis.

(ii) Record on suggested formats in paragraph (V) of this appendix or on other easily readable formats.

(d) *Heat Conditioning.* (i) Immediately after completing the initial measurements, condition the sample for 14 days at a temperature of 65±2° C.

(ii) At the end of this period. Measure and calculate the parameters given in paragraph (III)(1)(c) of this appendix. Record on suggested formats in paragraph (V) of this appendix or on other easily readable formats.

(e) *Overall Electrical Deviation.* (i) Calculate the percent change in all average parameters between the final parameters after conditioning with the initial parameters in paragraph (III)(1)(c) of this appendix.

(ii) The stability of the electrical parameters after completion of this test shall be within the following prescribed limits:

(A) *Capacitance.* The average mutual capacitance shall be within 10 percent of its original value;

(B) The change in average mutual capacitance shall be less than 10 percent over the frequency range of 1 to 150 kilohertz and;

(C) *Conductance.* The average mutual conductance shall not exceed 3.7 micromhos/kilometer (6 micromhos/mile) at a frequency of 1 kilohertz.

(2) *Insulation Compression Test*—(a) *Test Sample B.* Remove jacket, shield, and core wrap being careful not to damage the conductor insulation. Remove one pair from the core and carefully separate and straighten the insulated conductors. Retwist the two insulated conductors together under sufficient tension to form 10 evenly spaced 360 degree twists in a length of 100 millimeters (4 inches).

(b) *Sample Testing.* Center the mid 50 millimeters (2 inches) of the twisted pair between two smooth rigid parallel metal plates measuring 50 millimeters (2 inches) in length or diameter. Apply a 1.5 volt direct current potential between the conductors, using a light or buzzer to indicate electrical contact between the conductors. Apply a constant load of 67 newtons (15 pound-force) on the sample for one minute and monitor for evidence of contact between the conductors. Record results on suggested formats in paragraph (V) of this appendix or on other easily readable formats.

(3) *Temperature Cycling.* (a) Repeat paragraphs (III)(1)(a) through (III)(1)(c)(ii) of this appendix for a separate set of samples A and B which have not been subjected to prior environmental conditioning.

(b) Immediately after completing the measurements, subject the test samples to 10 cycles of temperature between −40° C and +60° C. The test samples shall be held at each temperature extreme for a minimum of 1.5 hours during each cycle of temperature. The air within the temperature cycling chamber shall be circulated throughout the duration of the cycling.

(c) Repeat paragraphs (III)(1)(d)(ii) through (III)(2)(b) of this appendix.

(IV) *Control Sample—(1) Test Samples.* One length of sample B shall have been maintained at 23±3° C for at least 48 hours before the testing.

(2) Repeat paragraphs (III)(2) through (III)(2)(b) of is appendix.

(3) *Surge Test.* (a) One length of sample C shall be used to measure the breakdown between conductors while the other length of C shall be used to measure core to shield breakdown.

(b) The samples shall be capable of withstanding, without damage, a single surge voltage of 20 kilovolts peak between conductors, and 35 kilovolts peak between conductors and the shield as hereinafter described. The surge voltage shall be developed from a capacitor discharge through a forming resistor connected in parallel with the dielectric of the test sample. The surge generator constants shall be such as to produce a surge of 1.5×40 microseconds wave shape.

(c) The shape of the generated wave shall be determined at a reduced voltage by connecting an oscilloscope across the forming resistor with the cable sample connected in parallel with the forming resistor. The capacitor bank is charged to the test voltage and then discharged through the forming resistor and test sample. The test sample shall be considered to have passed the test if there is no distinct change in the wave shape obtained with the initial reduced voltage compared to that obtained after the application of the test voltage.

(V) The following suggested formats may be used in submitting the test results to REA:

Environmental Conditioning

FREQUENCY 1 KILOHERTZ

Pair Number	Capacitance nF/km (nF/mile)		Conductance micromhos/km (micromhos/mile)	
	Initial	Final	Initial	Final
1	____	____	____	____
3	____	____	____	____
5	____	____	____	____
7	____	____	____	____
9	____	____	____	____
11	____	____	____	____
13	____	____	____	____
15	____	____	____	____

Environmental Conditioning _____—Continued

FREQUENCY 1 KILOHERTZ

Pair Number	Capacitance nF/km (nF/mile) Initial	Capacitance nF/km (nF/mile) Final	Conductance micromhos/km (micromhos/mile) Initial	Conductance micromhos/km (micromhos/mile) Final
17	____	____	____	____
19	____	____	____	____
21	____	____	____	____
23	____	____	____	____
25	____	____	____	____
Average $\bar{x}$	____	____	____	____

Overall Percent Difference in Average $\bar{x}$ ____ ____

Environmental Conditioning _____

FREQUENCY 150 KILOHERTZ

Pair Number	Capacitance nF/km (nF/mile) Initial	Capacitance nF/km (nF/mile) Final	Conductance micromhos/km (micromhos/mile) Initial	Conductance micromhos/km (micromhos/mile) Final
1	____	____	____	____
3	____	____	____	____
5	____	____	____	____
7	____	____	____	____
9	____	____	____	____
11	____	____	____	____
13	____	____	____	____
15	____	____	____	____
17	____	____	____	____
19	____	____	____	____
21	____	____	____	____
23	____	____	____	____
25	____	____	____	____
Average x	____	____	____	____

Overall Percent Difference in Average $\bar{x}$ ____ ____

Environmental Conditioning _____

FREQUENCY 772 KILOHERTZ

Pair Number	Capacitance nF/km (nF/mile) Initial	Capacitance nF/km (nF/mile) Final	Conductance micromhos/km (micromhos/mile) Initial	Conductance micromhos/km (micromhos/mile) Final
1	____	____	____	____
3	____	____	____	____
5	____	____	____	____
7	____	____	____	____
9	____	____	____	____
11	____	____	____	____
13	____	____	____	____
15	____	____	____	____

Environmental Conditioning _____—Continued

FREQUENCY 772 KILOHERTZ

Pair Number	Capacitance nF/km (nF/mile) Initial	Capacitance nF/km (nF/mile) Final	Conductance micromhos/km (micromhos/mile) Initial	Conductance micromhos/km (micromhos/mile) Final
17	____	____	____	____
19	____	____	____	____
21	____	____	____	____
23	____	____	____	____
25	____	____	____	____
Average $\bar{x}$	____	____	____	____

Overall Percent Difference in Average $\bar{x}$ ____ ____

Insulation Compression

	Failures
Control	____
Heat Age	____
Temperature Cycling	____

Surge Test (kilovolts)

Conductor-to-Conductor	____
Shield-to-Conductors	____

Appendix B to 7 CFR 1755.870—Sheath Slitting Cord Qualification

(I) This test procedure described in this appendix is for qualification of initial and subsequent changes in sheath slitting cords.

(II) *Sample selection.* All testing shall be performed on two 1.2 m (4 ft) lengths of cable removed sequentially from the same 25 pair, 22 gauge jacketed cable. This cable shall not have been exposed to temperatures in excess of 38 °C since its initial cool down after sheathing.

(III) *Test procedure.* (1) Using a suitable tool, expose enough of the sheath slitting cord to permit grasping with needle nose pliers.

(2) The prepared test specimens shall be maintained at a temperature of 23±1 °C for at least 4 hours immediately prior to and during the test.

(3) Wrap the sheath slitting cord around the plier jaws to ensure a good grip.

(4) Grasp and hold the cable in a convenient position while gently and firmly pulling the sheath slitting cord longitudinally in the direction away from the cable end. The angle of pull may vary to any convenient and functional degree. A small starting notch is permissible.

(5) The sheath slitting cord is considered acceptable if the cord can slit the jacket and/or shield for a continuous length of 0.6 m (2 ft) without breaking the cord.

Dated: November 3, 1993.

Bob J. Nash,

Under Secretary, Small Community and Rural Development.

[FR Doc. 93-27890 Filed 11-16-93; 8:45 am]

BILLING CODE 3410-15-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 27

[Docket No. 93-ASW-5; Notice No. SC-93-5-SW]

Special Condition: Agusta Model A109C Helicopter, Electronic Flight Instrument System

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed special condition.

SUMMARY: This notice proposes a special condition for the Agusta Model A109C helicopter modified by Agusta Aerospace Corporation. This helicopter will have a novel or unusual design feature associated with the Electronic Flight Instrument System. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for the protection of these critical function systems from the effects of external high intensity radiated fields (HIRF). This notice contains the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the airworthiness standards of part 27 of the Federal Aviation Regulations.

DATES: Comments must be received on or before December 17, 1993.

ADDRESSES: Comments on this proposal may be mailed in duplicate to: Federal Aviation Administration (FAA), Office of the Assistant Chief Counsel, Attn: Rules Docket No. 93-ASW-5, Fort Worth, Texas 76193-0007, or delivered in duplicate to the Office of the Assistant Chief Counsel, Building 3B, room 158, 4400 Blue Mound Road, Forth Worth, Texas. Comments must be marked Docket No. 93-ASW-5. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 9 a.m. and 3 p.m.

FOR FURTHER INFORMATION CONTACT:

Mr. Robert McCallister, FAA, Rotorcraft Directorate, Policy and Procedures Group, Fort Worth, Texas 76193-0112; telephone (817) 624-5121.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed special condition 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 will be considered by the Administrator before taking action on this proposal. The special condition proposed in this notice may be changed in light of comments received. All comments received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Persons wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 93–ASW–5." The postcard will be date and time stamped and returned to the commenter.

Background

On July 21, 1993, Agusta Aerospace Corporation, Grand Prairie, Texas, applied for a Supplemental Type Certificate for installation of an Electronic Flight Instrument System in Agusta Aerospace Corporation Model A109C helicopter. This model is a 7 passenger, twin engine, 5,997 pound normal category helicopter

Type Certification Basis

The certification basis established for the Agusta Model A109C helicopter includes: Federal Aviation Regulation (FAR) § 21.29 and part 27 effective February 1, 1965, Amendments 29–1 through 29–8; FAR part 29 dated February 1, 1965, paragraph 2903(b), for Category "A" engine isolation; equivalent safety in lieu of compliance shown for: FAR 27.1189 (regarding shut-off means), and FAR 27.927(c) as amended by Amendment 27–12; Airworthiness Criteria for Helicopter Instrument Flight, eligible for day and night Instrument Flight Rules (IFR) operations, with one or two pilots, when Agusta Kit No. 109–0810–22, Revision E or later approved revision, is incorporated and the helicopter is operated in accordance with Model A109C Rotorcraft Flight Manual.

If the Administrator finds that the applicable airworthiness regulations do not contain adequate or appropriate safety standards for this helicopter because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16 to establish a level of safety equivalent to that established in the regulations.

Special conditions, as appropriate, are issued in accordance with FAR § 11.49 after public notice, as required by §§ 11.28 and 11.29(b), and become part of the type certification basis in accordance with § 21.101(b)(2).

Discussion

The Agusta Model A109C helicopter, at the time of the application for modification by Agusta Aerospace Corporation, was identified as having proposed modifications which will incorporate one and possibly more electrical, electronic, or combination of electrical and electronic (electrical/electronic) systems that will perform functions critical to the continued safe flight and landing of the helicopters. The electronic flight instrument system performs the attitude display function. The display of attitude, altitude, and airspeed is critical to the continued safe flight and landing of the helicopters for IFR operations in instrument meteorological conditions. After the design is finalized, Agusta Aerospace Corporation will provide the FAA with a preliminary hazard analysis that will identify any other critical functions performed by the electrical/electronic systems that are critical to the continued safe flight and landing of the helicopters.

Recent advances in technology have prompted the design of aircraft that include advanced electrical and electronic systems that perform functions required for continued safe flight and landing. However, these advanced systems respond to the transient effects of induced electrical current and voltage caused by the high intensity radiated fields (HIRF) incident on the external surface of the helicopters. These induced transient currents and voltages can degrade the performance of the electrical/electronic systems by damaging the components or by upsetting the systems' functions.

Furthermore, the electromagnetic environment has undergone a transformation not envisioned by the current application of FAR § 29.1309(a). Higher energy levels radiate from operational transmitters currently used for radar, radio, and television; the number of transmitters has increased significantly.

Existing aircraft certification requirements are inappropriate in view of these technological advances. In addition, the FAA has received reports of some significant safety incidents and accidents involving military aircraft equipped with advanced electrical/electronic systems when they were exposed to electromagnetic radiation.

The combined effects of technological advances in helicopter design and the changing environment have resulted in an increased level of vulnerability of the electrical and electronic systems required for the continued safe flight and landing of the helicopters. Effective measures to protect these helicopters against the adverse effects of exposure to HIRF will be provided by the design and installation of these systems. The following primary factors contributed to the current conditions:

(1) Increased use of sensitive electronics that perform critical functions,

(2) Reduced electromagnetic shielding afforded helicopter systems by advanced technology airframe materials,

(3) Adverse service experience of military aircraft using these technologies, and

(4) An increase in the number and power of radio frequency emitters and the expected increase in the future.

The FAA recognizes the need for aircraft certification standards to keep pace with technological developments and a changing environment and in 1986 initiated a high priority to:

(1) Determine and define electromagnetic energy levels;

(2) Develop guidance material for design, test, and analysis; and

(3) Prescribe and promulgate regulatory standards.

The FAA participated with industry and airworthiness authorities of other countries to develop internationally recognized standards for certification.

The FAA and airworthiness authorities of other countries have identified a level of HIRF environment that a helicopter could be exposed to during IFR operations. While the HIRF requirements are being finalized, the FAA is adopting a special condition for the certification of aircraft that employ electrical/electronic systems that perform critical functions. The accepted maximum energy levels that civilian helicopter system installations must withstand for safe operation are based on surveys and analysis of existing radio frequency emitters. This special condition will require the helicopters' electrical/electronic systems and associated wiring to be protected from these energy levels. These external threat levels are believed to represent

the worst-case exposure for a helicopter operating under IFR.

The HIRF environment specified in this proposed special condition is based on many critical assumptions. With the exception of takeoff and landing at an airport, one of these assumptions is the aircraft would be not less than 500 feet above ground level (AGL). Helicopters operating under visual flight rules (VFR) routinely operate at less than 500 feet AGL and perform takeoffs and landings at locations other than controlled airports. Therefore, it would be expected that the HIRF environment experienced by a helicopter operating VFR may exceed the defined environment by 100 percent or more.

This special condition will require the systems that perform critical functions, as installed in the aircraft, to meet certain standards based on either a defined HIRF environment or a fixed value using laboratory tests.

The applicant may demonstrate that the operation and operational capabilities of the installed electrical/electronic systems that perform critical functions are not adversely affected when the aircraft is exposed to the defined HIRF environment. The FAA has determined that the environment defined in table 1 is acceptable for critical functions in helicopters operating at or above 500 feet AGL. For critical functions of helicopters operating at less than 500 feet AGL, additional factors must be considered.

The applicant may also demonstrate by a laboratory test that the electrical/electronic systems that perform critical functions can withstand a peak electromagnetic field strength in a frequency range of 10 KH_z to 18 GH_z. If a laboratory test is used to show compliance with the defined HIRF environment, no credit will be given for signal attenuation due to installation. A level of 100 v/m and other considerations, such as an alternate technology backup that is immune to HIRF, are appropriate for critical functions during IFR operations. A level of 200 v/m and further considerations, such as an alternate technology backup that is immune to HIRF, are more appropriate for critical functions during VFR operations.

Applicants must perform a preliminary hazard analysis to identify electrical/electronic systems that perform critical functions. The term "critical" means those functions whose failure would contribute to or cause a failure condition that would prevent the continued safe flight and landing of the helicopters. The systems identified by the hazard analysis as performing critical functions are required to have HIRF protection.

A system may perform both critical and noncritical functions. Primary electronic flight display systems and their associated components perform critical functions such as attitude, altitude, and airspeed indications. HIRF requirements would apply only to the systems that perform critical functions.

Compliance with HIRF requirements will be demonstrated by tests, analysis, models, similarity with existing systems, or a combination of these methods. The two basic options of either testing the rotorcraft to the defined environment or laboratory testing may not be combined. The laboratory test allows some frequency areas to be under tested and requires other areas to have some safety margin when compared to the defined environment. The areas required to have some safety margin are those shown, by past testing, to exhibit greater susceptibility to adverse effects from HIRF; and laboratory tests, in general, do not accurately represent the aircraft installation. Service experience alone will not be acceptable since such experience in normal flight operations may not include an exposure to HIRF. Reliance on a system with similar design features for redundancy, as a means of protection against the effects of external HIRF, is generally insufficient because all elements of a redundant system are likely to be concurrently exposed to the radiated fields.

The modulation that represents the signal most likely to disrupt the operation of the system under test, based on its design characteristics, should be selected. For example, flight control systems may be susceptible to 3 H_z square wave modulation while the video signals for electronic display systems may be susceptible to 400 H_z sinusoidal modulation. If the worst-case modulation is unknown or cannot be determined, default modulations may be used. Suggested default values are a 1 KH_z sine wave with 80 percent depth of modulation in the frequency range from 10 KH_z to 400 MH_z and 1 KH_z square wave with greater than 90 percent depth of modulation from 400 MH_z to 18 GH_z. For frequencies where the unmodulated signal would cause deviations from normal operation, several different modulating signals with various waveforms and frequencies should be applied.

Acceptable system performance would be attained by demonstrating that the critical function components of the system under consideration continue to perform their intended function during and after exposure to required electromagnetic fields. Deviations from system specifications may be acceptable but must be independently assessed by the FAA on a case-by-case basis.

TABLE 1.—FIELD STRENGTH VOLTS/METER

Frequency	Peak	Average
10–100 KH_z	50	50
100–500	60	60
500–2000	70	70
2–30 MH_z	200	200
30–100	30	30
100–200	150	33
200–400	70	70
400–700	4020	935
700–1000	1700	170
1–2 GH_z	5000	990
2–4	6680	840
4–6	6850	310
6–8	3600	670
8–12	3500	1270
12–18	3500	360
18–40	2100	750

Conclusion

This action affects only certain unusual or novel design features on one model of helicopter. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the affected helicopters.

List of Subjects in 14 CFR Part 27

Aircraft, Air transportation, Aviation safety, Rotorcraft, Safety

The authority citations for this special condition are 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. 1875f–10, 4321 et seq.; E.O. 11514; 49 U.S.C. 106(g).

The Proposed Special Condition

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration (FAA) proposes the following special condition as a part of the type certification basis for the Agusta Model A109C helicopter.

Protection for Electrical and Electronic Systems From High Intensity Radiated Fields

Each system that performs critical functions must be designed and installed to ensure that the operation and operational capabilities of these critical functions are not adversely affected when the helicopters are exposed to high intensity radiated fields external to the helicopters.

Issued in Fort Worth, Texas, on November 4, 1993.

Larry M. Kelly,

Acting Manager, Rotorcraft Directorate Aircraft Certification Service.

[FR Doc. 93-28271 Filed 11-16-93; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 284

[Docket No. RM93-4-000]

Standards for Electronic Bulletin Boards Required Under Part 284 of the Commission's Regulations

November 10, 1993.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of filing.

SUMMARY: The Federal Energy Regulatory Commission (Commission) received a filing on November 3, 1993, from industry working groups containing revisions in the capacity release data sets from those proposed in the Notice of Proposed Rulemaking (58 FR 41647, August 5, 1993) in this docket. The Commission will be considering these issues at an informal conference and is permitting interested persons an opportunity to file comments on this filing.

DATES: Informal conference to be held on November 17, 1993, at 10 a.m.

Comments are due by November 19, 1993.

ADDRESSES: The conference will be held at: Federal Energy Regulatory Commission, Hearing Room 1, 810 First Street NE., Washington, DC 20426.

All filings should refer to Docket No. RM93-4-000 and should be filed at: Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT:

Michael Goldenberg, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 208-2294.

Marvin Rosenberg, Office of Economic Policy, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 208-1283.

Brooks Carter, Office of Pipeline and Producer Regulation, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 208-0666.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in room 3104, 941 North Capitol Street NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208-1397. To access CIPS, set your communications software to use 300, 1200, or 2400 bps, full duplex, no parity, 8 data bits, and 1 stop bit. CIPS can also be accessed at 9600 bps by dialing (202) 208-1781. The full text of this notice will be available on CIPS for 30 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in room 3104, 941 North Capitol Street NE., Washington, DC 20426.

Take notice that Industry Working Groups 1 and 2 made a filing on November 3, 1993, detailing revisions in the capacity release data sets from those proposed in the Notice of Proposed Rulemaking in this docket.

These revisions will be discussed at an informal Commission conference being held on November 17, 1993, beginning at 10 a.m., at the Federal Energy Regulatory Commission, Hearing Room 1, 810 First Street NE., Washington, DC 20426. Any person desiring to submit comments on this filing should file an original and 14 copies of such comments with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426 on or before November 19, 1993.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28257 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Chapter I

[FRL-4802-9]

Open Meeting of the Architectural and Industrial (AIM) Maintenance Coatings Negotiated Rulemaking Advisory Committee

AGENCY: Environmental Protection Agency.

ACTION: Meeting.

SUMMARY: The AIM Negotiated Rulemaking Advisory Committee will meet in Washington, DC to attempt to reach consensus that can be used as the basis of a proposed rule.

DATES: The meeting will take place on December 9 and 10. On December 9, we'll start at 9 a.m. and run until completion. On December 10, we'll start at 8:30 a.m. and end by 4 p.m.

ADDRESSES: The meeting will be held at the Georgetown Conference Center, 3800 Reservoir Road, Washington, DC, (202) 687-3232.

FOR FURTHER INFORMATION CONTACT: Persons needing further information on substantive aspects of the rule should call Bruce Madariaga of EPA's Office of Air Quality Planning and Standards at 919-541-5290. Persons needing further information on meeting logistics should call Barbara Stinson the Committee Co-chair at 303-468-5822.

Dated: November 12, 1993.

Chris Kirtz,

Director, Consensus and Dispute Resolution Program.

[FR Doc. 93-28264 Filed 11-16-93; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Ch. I

[FRL-4803-5]

Public Meeting of the Hazardous Waste Manifest Rulemaking Committee

AGENCY: Environmental Protection Agency.

ACTION: Public meeting.

SUMMARY: As required by the Federal Advisory Committee Act, we are giving notice of the final public meeting of the Hazardous Waste Manifest Rulemaking Committee. The meeting is open to the public without advance registration.

The purpose of the meeting is to complete work on revising the uniform national hazardous waste manifest form and rule. The committee reached consensus on most of the outstanding issues at its September, 1993 meeting.

Among the issues the committee will address at this meeting are: Whether or not to have continuation pages and waste handling codes. The Committee will also discuss the preamble to the rule and the final committee agreement document.

DATES: The Committee meeting will be held on December 2, from 10 a.m. to 6 p.m., and on December 3, 1993 from 8:30 a.m. to 4 p.m.

ADDRESSES: The meeting will be held at Resolve-World Wildlife, 1250 Twenty-fourth Street, NW., Fifth Floor, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Persons needing further information on the substantive matters of the rule should contact Rick Westlund, Regulatory Management Division, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 260–2745. Persons needing further information on procedural or logistical matters should call the Committee's facilitator, Suzanne Orenstein, Resolve, 1250 24th Street, NW., suite 500, Washington, DC 20037, (202) 778–9533.

Dated: November 15, 1993.

Deborah S. Dalton,

Deputy Director, EPA Consensus and Dispute Resolution Program, Office of Regulatory Management and Evaluation.

[FR Doc. 93–28448 Filed 11–16–93; 8:45 am]

BILLING CODE 6560–50–M

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40 CFR Part 180

[OPP–300310; FRL–4159–9]

RIN 2070–AB78

Ronnel; Revocation of Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document proposes to revoke the tolerances for residues of the pesticide ronnel (*O,O*-dimethyl *O*-(2,4,5-trichlorophenyl) phosphorothioate), including its 2,4,5-trichlorophenyl-containing metabolites, in or on all raw agricultural commodities. EPA is proposing this action because all registered uses of ronnel on these commodities have been canceled. Therefore, there is no need to maintain these tolerances.

DATES: Written comments, identified by the document control number [OPP-300310], must be received on or before December 17, 1993.

ADDRESSES: By mail, submit comments to Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, 401 M St., SW., Washington, DC 20460. In person, deliver comments to rm. 1128, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

Information submitted as a comment concerning this document may be claimed confidential by marking any or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

FOR FURTHER INFORMATION CONTACT: By mail: Jeff Morris, Special Review and Reregistration Division (7508W), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Special Review Branch, Crystal Station #1, 3rd Floor, 2800 Jefferson Davis Hwy., Arlington, VA 22202, (703)-308-8029.

SUPPLEMENTARY INFORMATION: Ronnel is an insecticide developed to control a variety of pest species. Before its cancellation, over 100 hundred companies had registered products containing ronnel as the active ingredient, principally for the control of insects on livestock.

The Federal Food, Drug, and Cosmetic Act (FFDCA, 21 U.S.C. 301 et seq.) authorized the establishment of tolerances (maximum legal residue levels) and exemptions from the requirement of a tolerance for residues of pesticide chemicals in or on raw agricultural commodities pursuant to section 408 (21 U.S.C. 346(a)). Without such tolerances or exemptions, a food containing pesticide residues is considered to be "adulterated" under section 402 of the FFDCA and hence may not legally be moved in interstate commerce (21 U.S.C. 342). To establish a tolerance or an exemption under section 408 of the FFDCA, EPA must make a finding that the promulgation of the rule would "protect the public health" (21 U.S.C. 346a(b)). For a pesticide to be sold and used in the production of a food crop or food animal, the pesticide must not only have appropriate tolerances under the FFDCA, but must be registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, 7 U.S.C. 136 et seq.). FIFRA requires the registration of pesticides that are sold and distributed in the United States.

Dow Chemical Co., the sole manufacturer of ronnel, ceased all production of ronnel in 1979 and in 1986 voluntarily canceled its ronnel technical registration. Notice of this cancellation was published in the **Federal Register** of January 22, 1986 (51 FR 2953), and took effect on February 21, 1986. EPA allowed existing stocks of ronnel to be distributed, sold, and used for 1 year following the effective date of the cancellation, or until the stocks were exhausted. Between the 1986 cancellation and January 22, 1991 (56 FR 4992), EPA canceled the registrations held by registrants other than Dow for all products containing ronnel as the active ingredient. There are currently no EPA-registered ronnel products, and EPA does not believe that there are any existing stocks of ronnel.

Because ronnel is no longer registered in the United States for use on any food or animal feed crops, and a tolerance is generally not necessary for a pesticide chemical that is not registered for a particular food use, this document proposes the revocation of tolerances established under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, for residues of the insecticide ronnel (*O,O*-dimethyl *O*-(2,4,5-trichlorophenyl) phosphorothioate), including its 2,4,5-trichlorophenyl-containing metabolites, in or on the commodities listed in 40 CFR 180.177. These tolerances are as follows: 10 parts per million (ppm) in fat of cattle, goats, and sheep; 4 ppm in meat and meat byproducts of cattle, goats, and sheep; 3 ppm in fat of hogs; 2 ppm in meat and meat byproducts of hogs; 1.25 ppm in milk fat (reflecting negligible residues in whole milk); 0.5 ppm on bananas (of which residue, zero shall be in the pulp after the peel is removed and discarded); 0.03 ppm on eggs; and 0.01 ppm in meat, fat, and meat byproducts of poultry. There is no anticipation of a residue problem due to environmental contamination. Consequently, no action levels will be recommended to replace the tolerances upon their revocation.

Interested persons are invited to submit written comments, information, or data in response to this proposed rule. Comments must be received by EPA on or before December 17, 1993. Comments must bear a notation indicating the document control number. Three copies of the comments should be submitted to either location listed under ADDRESSES above in this document. Documents considered and relied upon by EPA in reaching its decision and all written comments filed pursuant to this document will be available for public inspection in rm. 1128, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202.

between 8 a.m. and 4 p.m., Monday through Friday, except public holidays. Any person who has registered, or who has submitted an application for registration of ronnel under FIFRA, may request that this proposal be referred to an advisory committee. Such a request must be made within 30 days of the publication of this proposal. To satisfy requirements for analysis specified by Executive Order 12866 and the Regulatory Flexibility Act, EPA has analyzed the impacts of this proposal. This analysis is available for public inspection in rm. 1128 at the Virginia address given above.

Executive Order 12866

Under Executive Order 12866 (58 FR 51735, Oct. 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to all the requirements of the Executive Order (i.e., Regulatory Impact Analysis, review by the Office of Managment and Budget (OMB)). Under section 3(f), the order defines "significant" as those actions likely to lead to a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also known as "economy significant"); (2) creating serious inconsistenty or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlements, grants, user fees, or loan programs; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Pursuant to the terms of this Executive Order, EPA has determined that this proposed rule is not "significant" and is therefore not subject to OMB review.

Regulatory Flexibility Act

This proposed rule has been reviewed under the Regulatory Flexibility Act of 1980 (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 et seq.), and EPA has determined that it will not have a significant economic impact on a substantial number of small businesses, small governments, or small organizations. Accordingly, I certify that this proposed rule does not require a separate regulatory flexibility analysis under the Regulatory Flexibility Act.

Paperwork Reduction Act

This proposed regulatory action does not contain any information collection requirements subject to review by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 23, 1993.

Victor J. Kimm,

Acting Assistant Administrator for Pesticides and Toxic Substances.

Therefore, 40 CFR part 180 is amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

§ 180.177 [Removed]

2. Section 180.177 *Ronnel; tolerances for residues* is removed.

[FR Doc. 93-28285 Filed 11-16-93; 8:45 am]

BILLING CODE 6560-50-F

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40 CFR Part 372

[OPPTS-400073A; FRL-4643-8]

Glycol Ethers Category; Toxic Chemical Release Reporting; Community Right-to-Know; Notice of Availability, Technical Amendment, Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of availability, technical amendment, and extension of public comment period.

SUMMARY: In the **Federal Register** of July 6, 1993, EPA issued a proposed rule to redefine the glycol ethers category on the list of toxic chemicals subject to reporting under section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). In this document, EPA is announcing the availability of two additional references included in the public docket for this proposal. EPA is also announcing at this time a change in the original proposed rule language. To assure that the public and other interested parties have sufficient time to review the documents added to the public docket (Docket Number OPPTS-400073) and the revision to the rule language, the comment period has been extended. The original comment period ended September 7, 1993.

DATES: Comments must be received by December 2, 1993.

ADDRESSES: Written comments should be submitted in triplicate to: OPPT Document Control Officer, TSCA Nonconfidential Information Center (NCIC), also known as TSCA Public Docket Office, 7407, Environmental Protection Agency, E-G99, 401 M St., SW., Washington, DC 20460, Attn: Docket Number OPPTS-400073. Nonconfidenital comments and the references are available for viewing and photocopying in TSCA NCIC from 8 a.m. to 12 noon and 1 p.m. to 4 p.m., Monday through Friday, excluding legal holidays. TSCA NCIC is located at EPA Headquarters, Rm. E-G102, 401 M St., SW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Maria J. Doa, Petitions Coordinator, Emergency Planning and Community Right-to-Know Information Hotline, Environmental Protection Agency, Mail Stop OS-120, 401 M St., SW., Washington, DC 20460, Toll free: 800-535-0202, Toll free TDD: 800-553-7672.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 6, 1993 (58 FR 36180), EPA issued a proposed rule to redefine the glycol ethers category on the list of toxic chemicals subject to reporting under section 313 of (EPCRA).

This proposed redefinition will change the current definition of the glycol ethers category to exclude the high molecular weight glycol ethers that do not, in EPA's judgement, meet the criteria set out in EPCRA section 313(d). The proposed definition would retain in the category all glycol ethers that are known to or may be reasonably anticipated to cause adverse human health and/or environmental effects, and those for which there is insufficient evidence to establish any of the section 313(d) criteria. The proposed redefinition of the glycol ethers category is based on EPA's review of available human health data on low molecular weight glycol ethers. EPA believes that the category can be redefined to exclude the high molecular weight glycol ethers. The Agency also believes it may be appropriate to further narrow the definition beyond this exclusion of surfactants. However, based on current data EPA is not able to establish a molecular "size" or weight below which there are no concerns for adverse effects on human health.

In the proposed rule, the proposed definition of the glycol ethers category was incorrectly defined in the preamble at page 36181, third column, and in the table to § 372.65 as follows:

In the preamble:

$R - (OCH_2CH_2)_n - OR'$
Where:
n = 1, 2, or 3
R = alkyl C_7 or less or R = phenyl or alkyl substituted phenyl
R' = H or alkyl C_7 or less
or carboxylic acid ester (for example, acetate),
sulfate,
phosphate,
nitrate, or
sulfonate.

In the regulatory text:
Glycol Ethers
$R - (OCH_2CH_2)_n - OR'$
Where:
n = 1, 2, or 3
R = alkyl C_7 or less or R = phenyl or alkyl substituted phenyl
R' = H or alkyl C_7 or less
or carboxylic acid ester
sulfate
phosphate
nitrate
sulfonate.

The correct definition is:
Glycol Ethers
$R - (OCH_2CH_2)_n - OR'$
Where:
n = 1, 2, or 3
R = alkyl C_7 or less or R = phenyl or alkyl substituted phenyl
R' = H or alkyl C_7 or less
or OR' = carboxylic acid ester,
sulfate,
phosphate,
nitrate, or
sulfonate.

Additionally, EPA inadvertently omitted from the public docket two documents that were used in support of the proposed rule. Therefore, the following references have been added to public docket [OPPTS–400073]:

(1) Baker and Hostetler, February 13, 1991. Letter to Maria Doa concerning additional information on the glycol ethers category.

(2) Foster, et al, Toxicology, 43 (1987) 17–30. Comparison of the *in vivo* and *in vitro* testicular effects produced by methoxy-, ethoxy-, and *n*-butoxy acetic acids in the rat.

Accordingly, EPA is amending the proposed rule of July 6, 1993 (58 FR 36180), to revise the definition of the glycol ethers category.

List of Subjects in 40 CFR Part 372

Environmental protection, Community right-to-know, Reporting and recordkeeping requirements, Toxic chemicals.

Dated: November 9, 1993.

Lynn R. Goldman,

Assistant Administrator for Prevention, Pesticides and Toxic Substances.

Therefore, the proposed amendment to 40 CFR 372.65(c), published at 58 FR 36180, July 6, 1993, is amended as follows:

PART 372—[AMENDED]

1. The authority citation for part 372 would continue to read as follows:

Authority: 42 U.S.C. 11013 and 11028.

2. In § 372.65(c), the proposed definition for the glycol ethers category, published at page 36183, is correctly revised to read as follows:

§ 372.65 Chemicals and chemical categories to which the part applies.

* * * * *

(c) * * *

Category Name	Effective Date
* * *	*
Glycol Ethers ..... $R - (OCH_2CH_2)_n - OR'$ Where: n = 1, 2, or 3 R = alkyl C_7 or less or R = phenyl or alkyl substituted phenyl R' = H or alkyl C_7 or less or OR' = carboxylic acid ester, sulfate, phosphate, nitrate, or sulfonate	1/1/94
* * *	*

[FR Doc. 93–28284 Filed 11–16–93; 8:45 am]

BILLING CODE 6560-50-F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 611 and 672

[Docket No. 931199–3299; I.D. 110193B]

Foreign Fishing; Groundfish of the Gulf of Alaska

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

ACTION: Proposed 1994 initial specifications of groundfish and associated management measures; request for comments.

SUMMARY: NMFS proposes initial harvest specifications of groundfish and associated management measures in the Gulf of Alaska (GOA) for the 1994 fishing year. This action is necessary to carry out management objectives contained in the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP).

DATES: Comments must be received by December 10, 1993.

ADDRESSES: Comments should be sent to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802–1668. The preliminary Stock Assessment and Fishery Evaluation Report, dated September 1993, is available from the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510.

FOR FURTHER INFORMATION CONTACT: Jessica A. Gharrett, Fishery Management Biologist, NMFS, (907) 586–7230.

SUPPLEMENTARY INFORMATION:

Background

The domestic and foreign groundfish fisheries in the Exclusive Economic Zone of the GOA are managed by the Secretary of Commerce (Secretary) according to the FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act). The FMP is implemented by regulations for the foreign fishery at 50 CFR part 611 and for the U.S. fisheries at 50 CFR part 672. General regulations that also pertain to the U.S. fisheries appear at 50 CFR part 620.

This action is published under authority of those regulations. It proposes for the 1994 fishing year: (1) Specifications of total allowable catch (TAC) for each groundfish target species category in the GOA and apportionments thereof among domestic annual processing (DAP), joint venture processing (JVP), total allowable level of foreign fishing (TALFF), and reserves; (2) apportionments of reserves to DAP; (3) apportionments of the sablefish TAC to users of hook-and-line trawl gear; (4) apportionments of pollock TAC; (5) apportionments of Pacific cod TAC; (6) apportionments of Atka mackerel and "other species" TAC; (7) halibut PSC limits; and, (8) seasonal allocations of the halibut PSC limits. NMFS also announces interim groundfish specifications that are in effect January 1, 1994, until superseded, the opening date of the directed fishery for sablefish for hook-and-line gear, and closures to directed fishing. A discussion of each of these measures follows.

1. Proposed Establishment of TACs and Apportionments Thereof Among DAP, JVP, TALFF, and Reserves

Under § 672.20(c)(1)(ii), NMFS, after consultation with the Council, publishes in the **Federal Register** proposed specifications of annual TACs and interim harvest limits. These proposed specifications indicate apportionments of TACs among DAP, JVP, reserves, and TALFF for each target species and the "other species" category. The sum of the TACs for all species must fall within the combined optimum yield (OY) range, of 116,000–800,000 metric tons (mt), established for these species. Comments on the proposed 1994 specifications are invited from the public through December 10, 1993. After again consulting with the Council, NMFS will publish final TACs and apportionments for the 1994 fishing year in the **Federal Register.**

Species TACs are apportioned initially among DAP, JVP, TALFF, and reserves under § 611.92(c)(1) and § 672.20(a)(2). DAP amounts are intended for harvest by U.S. fishermen for delivery and sale to U.S. processors. JVP amounts are intended for joint ventures in which U.S. fishermen deliver their catches to foreign processors at sea. TALFF amounts are intended for harvest by foreign fishermen. Existing harvesting and processing capacity of the U.S. industry is capable of utilizing the entire 1994 TAC specification for GOA groundfish. Therefore, the Council recommended that DAP equal TAC for each species category, resulting in no proposed amounts of TALFF or JVP for the 1994 fishing year.

The reserves for the GOA are 20 percent of the TACs for pollock, Pacific cod, flatfish target species categories, and "other species." If necessary, these reserve amounts may be set aside for possible apportionment to DAP and/or to JVP if the initial apportionments prove inadequate. Reserves that are not apportioned to DAP or JVP may be reapportioned to TALFF. Given that the GOA groundfish TACs have been fully utilized by DAP since 1987, NMFS has reapportioned all the reserves to DAP effective on January 1 for the preceding 6 years, including 1993.

The Council met during September 21–26, 1993, to review scientific information concerning groundfish stocks. The preliminary Stock Assessment and Fishery Evaluation Report (SAFE), dated September 1993, prepared and presented to the Council by the GOA Plan Team (Plan Team), summarizes the best available scientific information. At this time, the September 1993 SAFE report information is largely unchanged from that used to manage the groundfish fisheries in the GOA during 1993, except for a decrease in pollock and Pacific cod biomass, and new biomass estimates for Atka mackerel and for three species in the demersal shelf rockfish (DSR) complex. Additional information from the 1993 triennial trawl survey is anticipated to be incorporated in the final 1993 SAFE report, to be released in November 1993 for review by the Council, Scientific and Statistical Committee (SSC), and Advisory Panel (AP) in December. Except for pollock, Pacific ocean perch (POP), DSR, and Atka mackerel, changes in information concerning stock abundance and trends relative to the 1993 fishing year result from new analyses of existing data as updated with recent commercial catch information.

For pollock, updated information about exploitable biomass and the acceptable biological catch (ABC) in the combined Western and Central GOA (W/C GOA) are derived from the 1993 spring hydroacoustic survey in Shelikof Strait, new egg production estimates of spawning biomass, estimates of catch-at-age from the 1992 fishery, length frequency data from the 1992–1993 hydroacoustic surveys and from the commercial fishery, and updated catch and discard estimates. Following a discussion of stock synthesis model and risk assessment, the Plan Team recommended a W/C GOA ABC of 172,000 mt but recommended that the 1994 pollock TAC should be lower than the ABC to address the following concerns: (1) Although the 1994 projected pollock biomass is considered healthy, stock biomass is in a declining trend, which began in 1983; (2) the optimal fishing mortality rate derived from the current model spawning pollock biomass is projected to approach historic lows by 1995; and, (3) the current biomass is supported by a single strong year class (1988) with no signs of more recent strong year classes. In consideration of these factors and overall concerns for the GOA ecosystem, the SSC could not support an increase to the ABC above the value obtained from using the fishing exploitation rate used during the past several years, 78,000 mt. The SSC concurred in the Plan Team's estimated biomass increase projected for the Eastern GOA, but recommended reducing the Plan Team's recommended ABC (12,250 mt) to 5,550 mt, consistent with proportionate decreases recommended by the SSC for the W/C GOA. The Council adopted the SSC's recommendation of an ABC.

For Pacific cod, the status of stocks analysis presented in the SAFE report was updated with catch and discard data. The analysis results in a 1994 biomass estimate of 294,000 mt, lower than the 324,000 mt established for 1993. The Council adopted the Plan Team's and SSC's recommendation of 52,700 mt for the 1994 Pacific cod ABC, which is a 4,000 mt decrease from the 1993 ABC level (56,700 mt).

No new analyses were presented for flatfishes. However, the Plan Team recommended that rex sole be removed from deep water flatfish and established as a separate target species to provide flexibility in managing rockfish bycatch. With the exception of subtracting the ABC for rex sole from the 1993 ABC specified for the deep water flatfish complex, ABCs for flatfish groups did not change from those in the November 1992 SAFE.

For POP, the preliminary biomass assessment for 1994 had only minor differences from that used to manage POP in 1993. The 1994 assessment uses spawn-recruit data generated by a stock synthesis model to derive an optimal fishing mortality rate (0.08) and target female spawner biomass (150,000 mt), estimates of F_{MSY} and B_{MSY}, respectively. The optimal fishing mortality rate was then adjusted by the ratio of current spawner biomass/target spawner biomass and the resultant exploitation rate was used to arrive at an ABC for POP of 3,378 mt (rounded to 3,380 mt). At its September 1993 meeting, the Council also recommended that overfishing levels for POP be established by regulatory area as a means to control POP mortality in the Central Regulatory Area, where bycatch needs in existing fisheries exceed available POP ABC.

For 1994, the Plan Team did not recommend separation of the black rockfish from the pelagic shelf rockfish complex as in 1993. In addition to a lack of information on which to base biomass and ABC estimates, the 1993 black rockfish catch appears to have fallen dramatically from that of recent years, alleviating the need to provide immediate additional protection for this species.

For DSR, new biomass estimates were presented for quillback, rosethorn, and tiger rockfish. In past years, the ABC for DSR was based on the natural mortality and biomass of yelloweye rockfish, but for 1994 the basis for determining DSR ABC was expanded to account for the proportion of catch of other species in the complex. The overfishing level for DSR remains based solely on yelloweye rockfish.

Atka mackerel occurs primarily in the Western Regulatory Area and is currently part of the "other species" complex. A recently-developed target fishery or Atka mackerel in the Western Regulatory Area preempted fishing activities for this category in other GOA areas and prompted separate TAC specifications for "other species" for the three regulatory areas for 1993. Amendment 31, approved on October 18, 1993, establishes a separate target category for Atka mackerel beginning with the 1994 fishing year. In anticipation of such approval, the SSC, AP, and Council made preliminary 1994 recommendations of overfishing and ABC for Atka mackerel. These recommendations are based on a new biomass assessment for Atka mackerel presented in the Amendment 31 Environmental Assessment and to the Plan Team, SSC, AP, and Council in September 1993. This assessment is based on the 1990 trawl survey and a ratio of ABC/biomass similar to that recommended for the Aleutian Islands subarea (0.15). Because Atka mackerel is established as a separate target species, it is no longer necessary to establish separate TACs for "other species" for the three regulatory areas. Therefore, NMFS proposes applying a GOA-wide TAC for "other species" in 1994.

The Council considered information in the SAFE report, recommendations from its SSC and its AP, as well as public testimony. The Council then proposed the ABCs as recommended by the SSC and the TACs as recommended by the AP. Each of these TAC specifications is shown in Table 1.

TABLE 1.—PRELIMINARY 1994 ABCS, PROPOSED TACS, ONE-FOURTH TACS AND DAPS OF GROUNDFISH (METRIC TONS) FOR THE WESTERN/CENTRAL (W/C), WESTERN (W), CENTRAL (C), AND EASTERN (E) REGULATORY AREAS AND IN THE WEST YAKUTAT (WYK), SOUTHEAST OUTSIDE (SEO), AND GULF-WIDE (GW) DISTRICTS OF THE GULF OF ALASKA. AMOUNTS SPECIFIED AS JOINT VENTURE PROCESSING (JVP) AND TOTAL ALLOWABLE LEVEL OF FOREIGN FISHING (TALFF) ARE PROPOSED TO BE ZERO AND ARE NOT SHOWN IN THIS TABLE. RESERVES ARE PROPOSED TO BE APPORTIONED TO DAP

Species	Area[1]	ABC	TAC=DAP	1/4 TAC=DAP
Pollock:[2]				
Shumagin	(61)	16,930	16,930	4,232
Chirikof	(62)	18,250	18,250	4,563
Kodiak	(63)	42,820	42,820	10,705
Subtotal	W/C	78,000	78,000	19,500
Subtotal	E	5,550	5,550	1,387
Total		83,550	83,550	20,887
Pacific cod:[3]				
Inshore	W	.....	15,660	3,915
Offshore	W	.....	1,740	435
Inshore	C	.....	29,430	7,357
Offshore	C	.....	3,270	818
Inshore	E	.....	2,340	585
Offshore	E	.....	260	65
Subtotal	W	17,400	17,400	4,350
Subtotal	C	32,700	32,700	8,175
Subtotal	E	2,600	2,600	650
Total		52,700	52,700	13,175
Flatfish[4] (deepwater)	W	740	500	125
	C	20,680	8,000	2,000
	E	4,990	500	125
Total		26,410	9,000	2,250
Rex sole[4]	W	1,280	500	125
	C	14,900	7,000	1,750
	E	2,940	500	125
Total		19,120	8,000	2,000
Flathead sole	W	12,580	2,000	500
	C	31,830	5,000	1,250
	E	5,040	3,000	750
Total		49,450	10,000	2,500
Flatfish[5] (shallow water)	W	27,480	4,500	1,125
	C	21,260	10,000	2,500
	E	1,740	1,740	435
Total		50,480	16,240	4,060
Arrowtooth flounder	W	38,880	5,000	1,250
	C	253,330	20,000	5,000
	E	29,080	5,000	1,250

TABLE 1.—PRELIMINARY 1994 ABCS, PROPOSED TACS, ONE-FOURTH TACS AND DAPS OF GROUNDFISH (METRIC TONS) FOR THE WESTERN/CENTRAL (W/C), WESTERN (W), CENTRAL (C), AND EASTERN (E) REGULATORY AREAS AND IN THE WEST YAKUTAT (WYK), SOUTHEAST OUTSIDE (SEO), AND GULF-WIDE (GW) DISTRICTS OF THE GULF OF ALASKA. AMOUNTS SPECIFIED AS JOINT VENTURE PROCESSING (JVP) AND TOTAL ALLOWABLE LEVEL OF FOREIGN FISHING (TALFF) ARE PROPOSED TO BE ZERO AND ARE NOT SHOWN IN THIS TABLE. RESERVES ARE PROPOSED TO BE APPORTIONED TO DAP—Continued

Species	Area[1]	ABC	TAC=DAP	1/4 TAC=DAP
Total		321,290	30,000	7,500
Sablefish[6]	W	2,030	2,030	508
	C	9,610	9,610	2,402
	WYK	3,830	3,830	958
	SEO	5,430	5,430	1,357
Total		20,900	20,900	5,225
Pacific ocean perch[7]	W	760	341	85
	C	950	949	238
	E	1,670	1,270	317
Total		3,380	2,560	640
Short raker/rougheye[8]	W	100	90	23
	C	1,290	1,161	290
	E	570	513	128
Total		1,960	1,764	441
Other rockfish Helvetica[9 10 11]	W	330	214	54
	C	1,640	1,064	266
	E	6,330	4,105	1,026
Total		8,300	5,383	1,346
Northern rockfish[12]	W	1,000	1,000	250
	C	4,720	4,720	1,180
	E	40	40	10
Total		5,760	5,760	1,440
Pelagic shelf rockfish[13]	W	1,010	1,010	253
	C	4,450	4,450	1,112
	E	1,280	1,280	320
Total		6,740	6,740	1,685
Demersal shelf rockfish[11]	SEO	943	800	200
Thornyhead rockfish	GW	1,180	1,062	265
Atka mackerel[14]	GW	4,800	4,800	1,200
Other species[14]	GW	*N/A	12,963	3,241
Grand total[15]		656,963	272,222	68,055

*Not available.

[1] See § 672.2 for definitions of regulatory area, regulatory district, and statistical area.

[2] Pollock is apportioned to three statistical areas in the combined Western/Central Regulatory Area (Table 3), each of which is further divided into equal quarterly allowances. The first quarterly allowances are in effect on an interim basis. In the Eastern Regulatory Area, pollock is not divided into quarterly allowances, and one-fourth of the TAC is available on an interim basis.

[3] Pacific cod is allocated 90 percent to the inshore, and 10 percent to the offshore component. One-fourth of the inshore and offshore allocations will be available on an interim basis. Component allowances are shown in Table 4.

[4] "Deep water flatfish" means Dover sole and Greenland turbot. Rex sole is a separate target species beginning with the 1994 fishing year.

[5] "Shallow water flatfish" means flatfish not including "deep water flatfish," flathead sole, rex sole, or arrowtooth flounder.

[6] Sablefish is allocated to trawl and hook-and-line gears (Table 2).

[7] "Pacific ocean perch" means *Sebastes alutus*.

[8] "Shortraker/rougheye rockfish" includes *Sebastes borealis* (shortraker) and *S. aleutianus* (rougheye).

[9] "Other rockfish" in the Western and Central Regulatory Areas and in the West Yakutat District includes slope rockfish and demersal shelf rockfish. The category "other rockfish" in the Southeast Outside District includes Slope rockfish.

[10] "Slope rockfish" includes *Sebastes aurora* (aurora), *S. melanostomus* (blackgill), *S. paucispinis* (bocaccio), *S. goodei* (chilipepper), *S. crameri* (darkblotch), *S. elongatus* (greenstriped), *S. variegates* (harlequin), *S. wilsoni* (pygmy), *S. proriger* (redstripe), *S. zacentrus* (sharpchin), *S. jordani* (shortbelly), *S. brevispinis* (silvergrey), *S. diploproa* (splitnose) *S. saxicola* (stripetail) *S. miniatus* (vermilion), and *S. reedi* (yellowmouth).

[11] "Demersal shelf rockfish" includes *Sebastes pinniger* (canary), *S. nebulosus* (china), *S. caurinus* (copper), *S. maliger* (quillback), *S. babcocki* (redbanded), *S. helvomaculatus* (rosethorn), *S. nigrocinctus* (tiger), and *S. ruberrimus* (yelloweye).

[12] "Northern rockfish" means *Sebastes polyspinis*.

[13] "Pelagic shelf rockfish" includes *Sebastes malanops* (black), *S. mystinus* (blue), *S. ciliatus* (dusky), *S. entomelas* (widow), and *S. flavidus* (yellowtail).

[14] Atka mackerel is a separate target species beginning in 1994. "Other species" includes sculpins, sharks, skates, eulachon, smelts, capelin, squid, and octopus. The TAC for "other species" equals 5 percent of the TACs of target species.
[15] The total ABC reflects the sum of the ABCs for target species.

The sum of the TACs proposed by the Council, including a separate TAC for Atka mackerel and resultant adjustments to the "other species" category, is 272,222 mt, which is 89 percent of the sum of TACs for 1993 and which falls within the OY range specified by the FMP. In many cases, the proposed 1994 TAC specification for a target species category is the same as the final 1993 initial TAC specification. Target species with proposed TACs equal to those in 1993 are flathead sole, shallow water flatfish, arrowtooth flounder, sablefish, and all rockfishes including thornyhead rockfish. Target species for which recommended TACs are lower than in previous years are pollock, Pacific cod, and deep water flatfish, including rex sole. For pollock, 1994 recommended TACs for the W/C GOA are substantially lower than those adopted in 1993. A decrease in pollock biomass and ABC estimates prompted recommendation of 1994 TACs equalling 70 percent of 1993 TACs. Only the TAC for pollock in the Eastern Regulatory Area was recommended to be higher than in 1993. In the Eastern Regulatory Area, analysis of trawl survey data resulted in an increased biomass estimate and a greater than 60 percent increase over the 1993 TAC.

Proposed TAC amounts for other species remain unchanged from 1993 levels except for Pacific cod, deep water flatfish, and Atka mackerel. Continued decline in Pacific cod stock abundance resulted in a recommended decrease in the 1994 TACs; the total proposed 1994 GOA TAC is lower than the 1993 ABC, TAC, and catch. Flatfish TACs adopted in recent years have been substantially lower than ABCs due both to limited demand and because harvests have been controlled by halibut bycatch mortality restrictions. For 1994, the Council recommended that rex sole be established as a separate target species, because the principal target species, rex and Dover sole, experience different bycatch rates of POP, which could then be more effectively managed. The sum of the rex sole and remaining deep water flatfish TACs is 17,000 mt, slightly lower than the 19,740 mt specified for 1993. For POP, the Council recommended a preliminary 1994 TAC, of 2,560 mt, the same as that specified by the Secretary for 1993 after the April 1993 Council meeting. In a separate but related action, the Council adopted a rebuilding policy for POP under proposed Amendment 32 to the FMP. If approved, that amendment would establish the method for calculating the annual POP TAC in the FMP. Although the amendment would not be effective until some time during the 1994 fishing year, the TAC implicit in the Council's preferred alternative would presumably be reflected in the December Council TAC recommendation. A recommendation to apply the overfishing definition for POP by regulatory area is anticipated to promote uniform rebuilding rates and limit POP mortality by curtailing fishing activities in the Central Regulatory Area in 1994.

For Atka mackerel, the Council recommended a preliminary 1994 TAC equal to the recommended ABC of 4,800 mt. Creation of this new target species also results in an increase of the TAC for "other species" category, which is designated as 5 percent of the TACs of target species. At the December 1993 Council meeting, the Council will make final recommendations for 1994 initial groundfish TACs.

NMFS has reviewed the Council's recommendations for TAC specifications and apportionments and hereby proposes these specifications under § 672.20(c)(1)(ii)(A). Public comment and new information may be forthcoming that could cause the Council to change its recommendations at its December 1993 meeting.

2. Proposed Apportionment of Reserves to DAP

Regulations implementing the FMP require 20 percent of each TAC for pollock, Pacific cod, flatfish species, and the "other species" category be set aside in reserves for possible apportionment at a later date (§ 672.20(a)(2)(ii)). Consistent with (§ 672.20(a)(2)(iii), NMFS is proposing to apportion the 1994 reserves for each of the four species categories to DAP, anticipating that domestic harvesters and processors have established markets for these species and should be provided the opportunity to realize revenues from the harvest of the full DAP amounts so specified. Specifications of DAP shown in Table 1 reflect apportioned reserves.

3. Proposed Apportionment of the Sablefish TACs to Users of Hook-and-Line and Trawl Gear

Under § 672.24(c), sablefish TACs for each of the regulatory areas and districts are assigned to hook-and-line and trawl gear. In the Central and Western Regulatory Areas, hook-and-line gear is assigned 80 percent of the TACs and 20 percent is assigned to trawl gear. In the Eastern Regulatory Area, 95 percent of the TAC is assigned to hook-and-line gear and 5 percent is assigned to trawl gear. The trawl gear allocation in the Eastern Regulatory Area may only be used as bycatch to support directed fisheries for other target species. Sablefish caught in the GOA with gear other than hook-and-line or trawl must be treated as prohibited species and may not be retained. Table 2 shows the assignments of the proposed 1994 sablefish TACs between hook-and-line and trawl gears.

TABLE 2.—PROPOSED 1994 SABLEFISH TAC SPECIFICATIONS IN THE GULF OF ALASKA AND ASSIGNMENTS THEREOF TO HOOK-AND-LINE AND TRAWL GEAR. VALUES ARE IN METRIC TONS.

Area/District	TAC	Hook-and-line share	Trawl share
Western	2,030	1,624	406
Central	9,610	7,688	1,922
Eastern:			
West Yakutat	3,830	3,638	192
Southeast Outside	5,430	5,158	272
Total	20,900	18,108	2,792

4. Proposed Apportionments of Pollock TAC

In the GOA, pollock is apportioned by area and season. These amounts are further apportioned between inshore and offshore components. Regulations at § 672.20(a)(2)(iv) require that the TAC for pollock in the combined W/C GOA be apportioned among statistical areas Shumagin (61), Chirikof (62), and Kodiak (63) in proportion to known distribution of the pollock biomass. This measure was intended to provide spatial distribution of the pollock harvest as a sea lion protection measure. Each statistical area apportionment is further divided equally into the four calendar quarters. Within any fishing year, any unharvested amount of any quarterly allowance of pollock TAC is added in equal proportions to the quarterly allowances of following quarters, resulting in a sum for each quarter not to exceed 150 percent of the initial quarterly allowance. Similarly, harvests in excess of a quarterly allowance of TAC are deducted in equal proportions

from the remaining quarterly allowances of that fishing year. The Eastern Regulatory Area proposed TAC of 5,550 mt is not allocated among smaller areas, or quarterly.

Regulations at § 672.20(a)(2)(v)(A) require that the DAP apportionment for pollock in all regulatory areas and all quarterly allowances thereof be divided into inshore and offshore components. The inshore component is apportioned 100 percent of the pollock DAP in each regulatory area after subtraction of amounts that are determined by the Regional Director to be necessary to support the bycatch needs of the offshore component in directed fisheries for other groundfish species. At this time, these bycatch amounts are unknown, and will be determined during the fishing year. The proposed distribution of pollock within the combined W/C GOA is shown in Table 3, except that inshore and offshore component apportionments of pollock are not shown.

TABLE 3.—PROPOSED DISTRIBUTION OF POLLOCK IN THE WESTERN AND CENTRAL REGULATORY AREAS OF THE GULF OF ALASKA (W/C GOA); BIOMASS DISTRIBUTION, AREA APPORTIONMENTS, AND QUARTERLY ALLOWANCES. ABC FOR THE W/C GOA IS PROPOSED TO BE 78,000 METRIC TONS (mt.). BIOMASS DISTRIBUTION IS BASED ON 1990 SURVEY DATA. TACS ARE EQUAL TO ABC. INSHORE AND OFFSHORE ALLOCATIONS OF POLLOCK ARE NOT SHOWN. ABCS AND TACS ARE ROUNDED TO THE NEAREST 10 MT.

Statistical area	Biomass percent	1994 ABC=TAC	Quarterly allowance
Shumagin (61)	21.7	16,930	4,232
Chirikof (62)	23.4	18,250	4,563
Kodiak (63)	54.9	42,820	10,705
Total	100.0	78,000	19,500

5. Proposed Apportionments of Pacific Cod TAC

Regulations at § 672.20(a)(2)(v)(B) require that the DAP apportionment of Pacific cod in all regulatory areas be divided into inshore and offshore components. The inshore component is equal to 90 percent of the Pacific cod TAC in each regulatory area. Inshore and offshore component allocations of the proposed 52,700 mt TAC for each regulatory area are shown in Table 4.

TABLE 4.—PROPOSED 1994 ALLOCATION (METRIC TONS) OF PACIFIC COD IN THE GULF OF ALASKA; ALLOCATIONS TO INSHORE AND OFFSHORE COMPONENTS

Regulatory area	TAC	Component allocation	
		Inshore (90%)	Offshore (10%)
Western	17,400	15,660	1,740
Central	32,700	29,430	3,270
Eastern	2,600	2,340	260
Total	52,700	47,430	5,270

6. Proposed Apportionments of Atka Mackerel and "Other Species" TAC

The FMP specifies that amounts for the "other species" category are calculated as 5 percent of the combined TACs for target species. For 1993, the Council recommended that "other species" be made available separately in each of the three regulatory areas to avoid preemption of fishing activities in the remainder of the GOA by a target fishery for Atka mackerel that developed in the Western Regulatory Area. Approval of Amendment 31, which established Atka mackerel as a separate target species, rather than a species component of "other species," removed the necessity to apportion "other species" among regulatory areas in 1994. In anticipation of approval of Amendment 31, the Council at the September 1993 meeting recommended GOA-wide TACs for Atka mackerel and "other species". The preliminary 1994 Atka mackerel TAC is equal to the ABC of 4,800 mt. The "other species" TAC is calculated as 12,963 mt, which is 5 percent of the sum of combined TACs for the target species.

7. Proposed Halibut Prohibited Species Catch (PSC) Mortality Limits

Under § 672.20(f), annual Pacific halibut PSC mortality limits are established for trawl and hook-and-line gear and may be established for pot gear. For 1993, NMFS, after consulting with the Council, established halibut PSC mortality limits of 2,000 mt and 750 mt for trawl and hook-and-line gear, respectively. The hook-and-line halibut PSC limit is further apportioned between the DSR fishery (10 mt halibut mortality) and all other hook-and-line fisheries (740 mt).

At its September 1993 meeting, the Council recommended that for 1994, the Secretary re-establish 1993 PSC limits of 2,000 mt and 750 mt to trawl and hook-and-line gear, respectively, with 10 mt of the hook-and-line limit allocated to the DSR fishery and the remainder to other hook-and-line gear fisheries. As in 1993, the Council proposes to exempt pot gear from halibut limits for 1994. The Council proposed this exemption after considering that the groundfish catch and associated halibut bycatch and mortality rates for pot gear are low (5 percent).

At the September 1993 meeting, the Council recommended that NMFS prepare a proposed rule for Secretarial review that, if approved, would authorize separate apportionments of the trawl halibut bycatch mortality limit between trawl fisheries for deep water and shallow water species. These apportionments could be seasonally divided to avoid seasonally high halibut bycatch rates. The proposed and final rule for that action would include proposed and final 1994 PSC halibut specifications for trawl fisheries.

NMFS preliminary concurs in the Council's 1994 recommendations. In doing so, NMFS has considered the following types of information as presented by, and summarized from, the preliminary 1993 SAFE report, or from public comment and testimony:

(A) *Estimated Halibut Bycatch in Prior Years*

The best available information on estimated halibut bycatch is available from 1993 observations of the groundfish fisheries as a result of the NMFS Observer Program. The calculated halibut bycatch mortality by trawl, hook-and-line, and pot gear through September 25, 1993, is 1,658 mt, 1,328 mt, and 2.4 mt, respectively, for a total of 2,988 mt. Halibut bycatch restrictions seasonally constrained trawl gear fisheries during the first, second, and third quarters of the fishing year. Trawling, with the exception of trawling for pollock with pelagic trawl gear, was

closed in 1993 from March 24 to March 29 (58 FR 16372, March 26, 1993), from April 19 to June 28 (58 FR 21545, April 22, 1993); and from August 3 to October 4 (58 FR 41640, August 5, 1993) as a result of halibut PSC seasonal allowances. NMFS projects that the GOA trawl fishery will reach the fourth quarter seasonal allowance by early November 1993. Hook-and-line gear was closed to directed fishing for all but DSR on June 4 to December 31, 1993 (58 FR 32064, June 8, 1993; 58 FR 46095, September 1, 1993).

The amount of groundfish that trawl or hook-and-line gear might have harvested if halibut had not been seasonally limiting in 1993 is unknown. For trawl gear, some remaining groundfish will be harvested during the fourth quarter of 1993 pending the availability of halibut PSC bycatch. However, lacking market incentives, some amounts of groundfish will not be harvested, regardless of halibut PSC bycatch availability. Sablefish and Pacific cod are of the most interest to fishermen using hook-and-line gear. Over 900 mt of sablefish in the Western Regulatory Area, and 1,000 mt of Pacific cod in the Eastern Regulatory Area remain unharvested. An unknown portion of these amounts likely would have been harvested had 1993 halibut restrictions not been limiting.

(B) *Expected Changes in Groundfish Stocks.*

At its September 1993 meeting, the Council adopted lower ABCs for W/C GOA pollock, GOA-wide Pacific cod, and a higher ABC for pollock in the Eastern Regulatory Area than ABCs adopted for these species for 1993. Other ABCs are essentially unchanged from 1993 levels. More information on these proposed changes is included in the preliminary SAFE report, dated September 1993, and in the Council minutes.

(C) *Expected Changes in Groundfish Catch*

The total of the proposed 1994 specified TACs for the GOA is 272,222 mt, which represents 89 percent of the sum of TACs for 1993 (306,651 mt). Significant changes in TACs for pollock and Pacific cod are proposed.

TACs for W/C GOA pollock and GOA-wide Pacific cod are proposed to decrease from 111,000 mt to 78,000 mt, and from 56,700 mt to 52,700 mt, respectively. Reduced Pacific cod TACs could result in reduced halibut mortality associated with these fisheries, and in more halibut bycatch becoming available to support other trawl fisheries, especially those for flatfishes. Proposed 1994 TACs for flatfishes are the same as those for 1993, except for the separation of rex sole from the deep water complex and a slight decrease in the total TAC available for the two target groups. The changes in pollock TACs are not expected to affect halibut bycatches, because most of the pollock harvest in the GOA is accomplished with pelagic trawls that experience low bycatch rates of halibut.

(D) *Current Estimates of Halibut Biomass and Stock Condition*

The stock assessment for 1992 conducted by the International Pacific Halibut Commission (IPHC) indicates that the total exploitable biomass of Pacific halibut was 265.8 million pounds. This represents a decline in biomass of 11 percent from the previous stock assessment, a rate similar to declines observed in previous years. The IPHC is preparing a 1993 stock assessment for the 1993 fishing year, which is expected to be available in the final SAFE dated November 1993.

(E) *Potential Impacts of Expected Fishing for Groundfish on Halibut Stocks and U.S. Halibut Fisheries*

Halibut fisheries will be adjusted to account for the overall halibut PSC mortality limit established for groundfish fisheries. The 1994 groundfish fisheries are expected to use the entire proposed halibut PSC limit of 2,750 mt. The allowable directed commercial catch is determined by accounting for the recreational catch, waste, and bycatch mortality, and then providing the remainder to the directed fishery. Therefore, although the amount of halibut available for directed halibut fisheries will be reduced, halibut bycatch in groundfish fisheries is not expected to have any effect on halibut stocks.

(F) *Methods Available For, and Costs of, Reducing Halibut Bycatches in Groundfish Fisheries*

Methods available for reducing halibut bycatch include (1) reducing amounts of groundfish TACs, (2) reducing halibut bycatch rates through a Vessel Incentive Program, (3) modifications to gear and fish handling procedures, and (4) changes in groundfish fishing seasons.

Reductions in groundfish TACs provide no incentives for fishermen to reduce bycatch rates. Costs that would be imposed on fishermen as a result of reducing TACs depend on species and amounts of groundfish foregone.

Trawl vessels carrying observers for purposes of complying with the Observer Plan are subject to the Vessel Incentive Program. The program encourages trawl fishermen to avoid high halibut bycatch rates while conducting groundfish fisheries by specifying bycatch rate standards for various target fisheries.

Current regulations require groundfish pots to have halibut exclusion devices to reduce halibut bycatches. Resulting low bycatch and mortality rates of halibut in pot fisheries have justified exempting pot gear from PSC limits. Because halibut bycatch mortality in the pot fisheries is so low, and not expected to increase during 1994, the Council has proposed to continue to exempt these fisheries from halibut bycatch restrictions in 1994. A recent change in the definition of pelagic trawl gear is intended to reduce bycatch of halibut by displacing fishing effort off the bottom of the sea floor when certain halibut bycatch levels are reached during the fishing year. The definition provides standards for physical conformation and also for performance of the trawl gear in terms of crab bycatch (58 FR 39680, July 26, 1993). A recent regulatory change required all hook-and-line vessel operators to employ careful release measures when handling halibut bycatch (58 FR 28799, May 17, 1993). This measure is intended to reduce handling mortality, increase the amount of groundfish harvested under the available halibut mortality bycatch limits, and possibly lower overall halibut bycatch mortality in groundfish fisheries.

Halibut bycatch has been reduced by changes in some groundfish fishing seasons. The sablefish hook-and-line season starts around May 15, and the rockfish trawl fishery is delayed until the third quarter, around July 1. These delays postpone the start of the sablefish and rockfish fisheries to times when seasonal halibut bycatch rates are lower.

Methods available for reducing halibut bycatch listed above will be reviewed by NMFS and the Council to determine their effectiveness. Changes will be initiated as necessary in response to this review or to public testimony and comment, either through regulatory or FMP amendments.

Consistent with the goals and objectives of the FMP to reduce halibut bycatches while providing an opportunity to harvest the groundfish OY, NMFS proposes the assignments of 2,000 mt and 750 mt of halibut PSC mortality limits to trawl and hook-and-line gear, respectively. While these limits would reduce the harvest quota for commercial halibut fishermen, NMFS has determined that they would

not result in unfair allocation to any particular user group. NMFS recognizes that some halibut bycatch will occur in the groundfish fishery, but expansion of the Vessel Incentive Program, required modifications to gear and handling procedures, and delays to the start of the sablefish hook-and-line gear and rockfish trawl gear fisheries are intended to reduce adverse impacts on halibut fishermen while promoting the opportunity to achieve the OY from the groundfish fishery.

8. Proposed Seasonal Allocations of the Halibut PSC Limits

Under § 672.20(f)(2)(iii), NMFS proposes to allocate seasonally the halibut PSC limits based on recommendations from the Council. The FMP requires that the following information be considered by the Council in recommending seasonal allocations of halibut: (1) Seasonal distribution of halibut; (2) seasonal distribution of target groundfish species relative to halibut distribution; (3) expected halibut bycatch needs on a seasonal basis relevant to changes in halibut biomass and expected catches of target groundfish species; (4) expected bycatch rates on a seasonal basis; (5) expected changes in directed groundfish fishing seasons; (6) expected actual start of fishing effort; and, (7) economic effects of establishing seasonal halibut allocations on segments of the target groundfish industry.

The Council recommended the same seasonal allocation of PSC limits for the 1994 fishing year as those in effect during the 1993 fishing year (58 FR 16787, March 31, 1993). The publication of the final 1993 initial groundfish and PSC specifications (58 FR 16787, March 31, 1993) summarizes Council findings with respect to each of the FMP considerations set forth above. At this time, the Council's findings are unchanged from those set forth for 1993.

Slight adjustments from the 1993 seasonal allocations are proposed to accommodate dates of anticipated fishing effort and the opening date of the hook-and-line directed fishery for sablefish (May 18, 1994). Pacific halibut PSC catch limits, and apportionments thereof, are presented in Table 5. Regulations specify that any overages or shortfalls in PSC catches will be accounted for within the 1994 season.

TABLE 5.—PROPOSED 1993 PACIFIC HALIBUT PSC LIMITS, ALLOWANCES, AND APPORTIONMENTS. THE PACIFIC HALIBUT PSC LIMIT FOR HOOK-AND-LINE GEAR IS ALLOCATED TO THE DEMERSAL SHELF ROCKFISH (DSR) FISHERY AND FISHERIES OTHER THAN DSR. VALUES ARE IN METRIC TONS. ALL ALLOWANCES AND APPORTIONMENTS OTHER THAN THOSE ON JANUARY 1 AND DECEMBER 31 BEGIN AND END AT 12 NOON, ALASKA LOCAL TIME

Trawl gear		Hook-and-line gear			
		Other than DSR		DSR	
Dates	Amounts	Dates	Amounts	Dates	Amounts
January 1–April 1	600 (30%)	January 1–May 18	200 (27%)	January 1–December 31	10 (100%)
April 1–July 1	400 (20%)	May 18–August 31	500 (68%)		
July 1–October 1	600 (30%)	September 1–December 31	40 (5%)		
October 1–December 31	400 (20%)				
Total	2,000 (100%)		740 (100%)		10 (100%)

Assumed halibut mortality rates for halibut PSC bycatch in 1993 are based on an average of bycatch rates seen by NMFS observers in 1990 and 1991. These rates are listed in Table 6, and reflect mandatory careful release measures implemented during 1993 (58 FR 28799, May 17, 1993).

TABLE 6.—1993 ASSUMED PACIFIC HALIBUT MORTALITY RATES FOR VESSELS FISHING IN THE GULF OF ALASKA WITH MANDATORY CAREFUL RELEASE MEASURES. TABLE VALUES ARE PERCENT OF HALIBUT BYCATCH ASSUMED TO BE DEAD

Gear and target	Observed vessels	Unobserved vessels
Hook-and-line:		
Sablefish	14.0	17.0
Other targets	11.5	14.0
Trawl:		
Pelagic pollock	75.0	75.0
Rockfish, shallow water flatfish, "other spp."	60.0	60.0

TABLE 6.—1993 ASSUMED PACIFIC HALIBUT MORTALITY RATES FOR VESSELS FISHING IN THE GULF OF ALASKA WITH MANDATORY CAREFUL RELEASE MEASURES. TABLE VALUES ARE PERCENT OF HALIBUT BYCATCH ASSUMED TO BE DEAD—Continued

Gear and target	Observed vessels	Unobserved vessels
Pacific cod, non-pelagic pollock, deep water flats	55.0	55.0
Pot:		
All targets	5.0	5.0

The IPHC analyzed data collected inseason from NMFS observers during the 1993 fishing year. The results of this analysis are presented as an appendix to the preliminary SAFE report (September 1993) and suggest that halibut mortality rates for trawl and pot vessels are unchanged from those assumed during 1993. However, halibut bycatch mortality rates for hook-and-line vessels appear to have changed from those established preseason for 1993. Rates based on inseason observer data suggest that halibut mortality experienced in 1993 hook-and-line fisheries under regulations requiring careful release procedures were as follows: For vessels targeting sablefish, 18 percent (observed vessels) and 20.5 percent (unobserved); and for Pacific cod, 8 percent for all vessels. The IPHC is anticipated to provide additional data for the final 1993 SAFE report in November which will reflect a thorough analysis of debriefed observer data from 1992 fisheries. After the December 1993 Council meeting, NMFS will consider all available data and will publish preseason assumed halibut mortality rates in the **Federal Register** publication announcing the final 1994 initial specifications of groundfish TACs.

Interim Groundfish Harvest Specifications

Current regulations at § 672.20(c)(1)(ii)(A) require that one-fourth of the preliminary specifications (not including the reserves and the first quarterly allowance of pollock), one-fourth of the inshore and offshore

allocations of Pacific cod in each regulatory area, and one-fourth of the halibut PSC amounts, take effect on January 1 on an interim basis and remain in effect until superseded by the final 1994 initial specifications published in the **Federal Register**. Seasonal apportionments of TACs or PSC limits under provisions of other regulations may supersede this interim specification. Table 1 shows amounts of preliminary specifications of target species and the "other species" categories in effect on an interim basis beginning January 1, 1994.

Opening Date of the Directed Fishery for Sablefish for Hook-and-Line Gear

Under regulations at § 672.23(c), the opening date for the directed fishing season for sablefish with hook-and-line gear is the calendar day from May 9 through May 22 upon which the tide with the smallest tidal range occurs. According to annual tide tables published by NOAA for 1994, this date is May 18, 1994. Therefore, in accordance with § 672.23 (b) and (c), the season will commence at 12:00 noon, Alaska local time, May 18, 1994.

Closures to Directed Fishing

Under § 672.20(c)(2)(ii), if the Regional Director determines that the amount of a target species or "other species" category apportioned to a fishery, or with respect to Pacific cod, to an allocation to the inshore or offshore component, is likely to be reached, the Regional Director may establish a directed fishing allowance for that species or species group. In establishing a directed fishing allowance, the Regional Director shall consider the amount of that species group or allocation of Pacific cod to the inshore or offshore component that will be taken as incidental catch in directed fishing for other species in the same regulatory area or district. If the Regional Director establishes a directed fishing allowance and that allowance is or will be reached before the end of the fishing year, NMFS will prohibit directed fishing for that species or species group in the specified regulatory area or district. The Regional Director has determined that interim amounts of groundfish specified by this proposed specification (Table 1) for species or species groups identified in Table 7 will be necessary as incidental catch to support anticipated groundfish fisheries prior to the time that final specifications of groundfish are in effect for the 1994 fishing year. Therefore, NMFS is prohibiting directed fishing for those target species, gears, and components listed in Table 7 to prevent exceeding the interim amounts of groundfish TACs specified. These closures will be in effect during the period that the appropriate interim specifications of groundfish TACs are in effect. During these closures, applicable directed fishing standards may be found at § 672.20(g). Additional closures and restrictions may be found in existing regulations at 50 CFR part 672.

TABLE 7.—CLOSURES TO DIRECTED FISHING FOR INTERIM TOTAL ALLOWABLE CATCHES IMPLEMENTED BY THIS NOTICE.[1] OFFSHORE=THE OFFSHORE COMPONENT; TRW=TRAWL; ALL=ALL GEARS; WG=WESTERN REGULATORY AREA; CG=CENTRAL REGULATORY AREA; EG=EASTERN REGULATORY AREA; GOA=ENTIRE GULF OF ALASKA

Fishery	Component	Gear	Closed areas
Atka mackerel		ALL	GOA.
Northern rockfish		ALL	EG.
Other rockfish[2]		ALL	WG, CG.
Pacific cod	Offshore	ALL	WG, CG, EG.
Pacific ocean perch		ALL	WG, CG, EG.
Rex sole		ALL	WG.
Sablefish		TRW	WG, CG.
Shortraker/rougheye rockfish		ALL	WG, CG, EG.
Thornyhead rockfish		ALL	GOA.

[1] These closures to directed fishing are in addition to closures and prohibitions found in regulations at 50 CFR Part 672.
[2] Other rockfish includes slope and demersal shelf rockfish in the WG and CG.

After consideration of public comments and additional scientific information presented at its December 1993 meeting, the Council may recommend other closures to directed fishing. Additionally, NMFS may implement other closures at the time the final 1994 initial specifications of groundfish TACs are promulgated or during the 1994 fishing year as necessary for effective management.

Under § 672.20(b)(1), when NMFS determines after consultation with the Council that the TAC for any species or species group will be fully harvested in the DAP fishery, NMFS may specify for each calendar year the PSC limit applicable to any JVP or TALFF fisheries for that species or species group. Any PSC limit specified shall be for bycatch only and cannot be retained. Under § 672.20(c)(6), if the Regional Director determines that a PSC limit applicable to a directed JVP or TALFF fishery has been or will be reached, NMFS will publish a closure in the **Federal Register** prohibiting all further JVP or TALFF fishing in all or part of the regulatory area concerned.

The Council did not propose any PSC limits for fully utilized groundfish species at its September meeting, and it is not expected to make such recommendations at its December meeting. Groundfish PSC limits only would have been relevant if the Council had recommended groundfish apportionments to JVP or TALFF. The Council is not expected to recommend JVP or TALFF apportionments for the 1994 fishing year.

Other Matters

This action is authorized under 50 CFR 611.92 and 672.20 and is covered by the regulatory flexibility analysis prepared for the implementing regulations.

A draft environmental assessment (EA) on the allowable harvest levels set forth in the final 1993 SAFE report will be available for public review at the December 6–10, 1993, Council meeting. After the December meeting, a final EA will be prepared on the final 1994 TAC amounts recommended by the Council.

Consultation pursuant to section 7 of the Endangered Species Act has been initiated for the 1994 GOA initial specifications.

List of Subjects

50 CFR Part 611

Fisheries, Foreign relations.

50 CFR Part 672

Fisheries, Reporting and recordkeeping requirements.

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

Dated: November 10, 1993.

Gary Matlock,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

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50 CFR Parts 611 and 675

[Docket No. 93110-3300; I.D. 110193D]

Foreign Fishing; Groundfish of the Bering Sea and Aleutian Islands

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

ACTION: Proposed 1994 initial specifications of groundfish and associated management measures; closures; and request for comments.

SUMMARY: NMFS proposes 1994 initial total allowable catches (TACs) for each category of groundfish and specifications for prohibited species bycatch allowances for the groundfish fishery of the Bering Sea and Aleutian Islands management area (BSAI). MNFS also is closing specified fisheries consistent with the interim 1994 groundfish specifications. This action is necessary to inform the public about proposed 1994 harvest specifications and associated management measures. The intended effect is to conserve and manage the groundfish resources in the BSAI and to provide an opportunity for public participation in this decision-making process.

DATES: Comments will be received through December 10, 1993, 12:00 noon, Alaska local time.

ADDRESSES: Comments should be sent to Ronald J. Berg, Chief, Fisheries Management Division, Alaska Region, NMFS, P.O. Box 21668, Juneau, Alaska 99802-1668. The preliminary 1994 Stock Assessment and Fishery Evaluation (SAFE) report may be requested from the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510. Telephone (907) 271-2809.

FOR FURTHER INFORMATION CONTACT: Ellen R. Varosi, Fishery Management Biologist, NMFS, 907-586-7228.

SUPPLEMENTARY INFORMATION: Groundfish fisheries in the BSAI are governed by Federal regulations (50 CFR parts 611.93 and 675) that implement the Fishery Management Plan for the Groundfish Fishery of the BSAI (FMP). The FMP was prepared by the North Pacific Fishery Management Council (Council) and approved by the Secretary of Commerce (Secretary) under the Magnuson Fishery Conservation and Management Act (Magnuson Act).

The FMP and implementing regulations require the Secretary, after consultation with the Council, to specify for each calendar year the TAC for each target species and the "other species" category, the sum of which must be within the optimum yield range of 1.4 million to 2.0 million metric tons (mt) (§ 675.20(a)(2)). Regulations under § 675.20(a)(7)(i) further require NMFS to annually publish and solicit public comment on amounts of proposed annual TACs, apportionments of each TAC, prohibited species catch allowances, and seasonal allowances of pollock. The specifications set forth in Tables 1-6 of this action satisfy these requirements. For 1994, the proposed sum of TACs is 1,998,620 mt. Under § 675.20(a)(7)(ii), NFMS will publish the final annual TACs for 1994 and initial apportionments thereof, after considering: (1) Comments received within the comment period (see DATE); and, (2) consultations with the Council at its December 1993 meeting.

The specified TACs for each species are based on the best available biological and socioeconomic information. At its September and December meetings, the Council, its Advisory Panel (AP), and its Scientific and Statistical Committee (SSC), annually review biological information about the condition of groundfish stocks in the BSAI. This information is compiled by the Council's BSAI Groundfish Plan Team and is presented in the SAFE report. The Plan Team annually produces such a report as the first step in the process of specifying TACs. The SAFE report contains a review of the latest scientific analyses and estimates of each species' biomass, maximum sustainable yield (MSY), acceptable biological catch (ABC) and other biological parameters, as well as summaries of the economic condition of groundfish fisheries off Alaska. A preliminary 1994 SAFE report dated September 1993 provides an update on status of stocks. These preliminary assessments will be updated based on biological survey work done during the summer of 1993. Assessments will be made available by the Council in November, 1993, in the final edition of the 1994 SAFE report. Final ABCs for the 1994 fishing year will be based on the most recent stock assessments. The proposed ABCs adopted by the Council for the 1994 fishing year will be based on the best available scientific information, including projected biomass trends, information on assumed distribution of stock biomass, and revised technical methods used to calculate stock biomass.

Procedure for Estimating ABC

The Council bases its definition of ABC on the definition contained in 50 CFR part 602—Guidelines For Fishery Management Plans. These guidelines (§ 602.11(e)(1)) state, "ABC is a preliminary description of the acceptable harvest (or range of harvests) for a given stock or stock complex. Its derivation focuses on the status and dynamics of the stock, environmental conditions, other ecological factors, and prevailing technological characteristics of the fishery."

Under these guidelines, the Council is provided with the flexibility needed to develop a definition of overfishing appropriate to the individual stock or species characteristics, as long as it is defined in a way that allows the Council and the Secretary to evaluate the condition of the stock relative to the definition. Application of the overfishing definition requires some flexibility because the amount of data for different stocks varies. The calculations used to derive preliminary overfishing levels for a given stock or stock complex are described in the preliminary 1994 SAFE report dated September 1993.

Calculation of ABC varies among species depending on the quality of available data and prior knowledge of a species' stock status. The Plan Team has adopted three steps for estimating ABCs. First, the exploitable biomass of a stock is estimated. Second, the ABC for a stock is calculated by multiplying an exploitation rate times the estimated exploitable biomass. Various exploitation rates or fishing mortality (F) rates may be used in this calculation. For example, the exploitation rate that would produce MSY (F_{MSY}) may be used when the stock is known to be in good condition, high in abundance and not in danger of drastic declines. When more conservative stock management is indicated, a $F_{0.1}$ harvest strategy is used to determine an exploitation rate. This strategy determines a level of F at which the marginal increase in yield-per-

recruit due to an increase in F is 10 percent of the marginal yield-per-recruit in a newly exploited fishery. Recruitment refers to the growth of juvenile fish into the adult or exploitable population. Generally, the $F_{0.1}$ harvest strategy produces a more conservative exploitation rate than F_{MSY}. Another alternative is to use historical exploitation rates when historical fishery data indicate that a stock is not adversely affected by such rates. A switch in harvest strategy from F_{35} to F=natural mortality (M) can be used when current maturity parameter estimates are unreliable. Finally, an empirical estimation of ABC based on historical catch levels may be used when information is insufficient to estimate the biomass of a stock. Details of overfishing, ABC, and other calculation procedures are discussed in the preliminary 1994 SAFE report dated September 1993. This report is available from the Council (see ADDRESSES).

The Plan Team's recommendations for preliminary ABCs for each species for 1994 and other biological data are provided in the preliminary 1994 SAFE report. At its September 20–26, 1993, meeting, the Council's SSC reviewed the Plan Team's preliminary recommendations for 1994 ABCs. The SSC recommended revisions from the Plan team's recommended ABCs for Aleutian Basin (Bogoslof) pollock, Atka mackerel, and Greenland turbot. The Council adopted the ABCs recommended by the SSC (Table 1).

TABLE 1.—PROPOSED 1994 ACCEPTABLE BIOLOGICAL CATCH (ABC), TOTAL ALLOWABLE CATCH (TAC), INITIAL TAC (ITAC) AND ITAC APPORTIONMENTS, OF GROUNDFISH IN THE BERING SEA AND ALEUTIAN ISLANDS AREA.(1) (2)

[The 1994 Interim ITACs Are Established as 25 Percent of the Proposed ITAC.]

Species	ABC	TAC	Initial TAC (ITAC) = DAP(3)x(4)	Over fishing level
Pollock:				
Bering Sea (BS)	1,340,000	1,300,000	1,105,000	1,340,000
Aleutian Islands (AL)	58,700	51,600	43,860	62,600
Bogoslof District	32,000	1,000	850	180,000
Pacific cod	183,000	183,000	155,550	267,000
Sablefish:				
BS	1,500	1,500	1,275	2,000
AL	2,600	2,600	2,210	3,400
Atka mackerel(9) Total	122,500	40,425	34,362	484,000
	W 53,900	13,475	11,454	.....
	C 55,125	13,475	11,454	.....
	E 13,475	13,475	11,454	.....
Yellowfin sole	238,000	193,075	164,114	275,000
Rock sole	185,000	75,000	63,750	270,000
Greenland turbot	7,000	7,000	5,950	26,100
Arrowtooth flounder	72,000	10,000	8,500	96,000
Other flatfish(5)	191,000	79,000	67,150	228,000
Pacific Ocean perch:				
BS	3,330	3,330	2,830	3,750
AL	13,900	13,900	11,815	16,800
Other red rockfish(6):				
BS	1,400	1,200	1,020	1,400
Sharpchin/Northern:				
AL	5,670	5,100	4,335	5,670
Shortraker/Rougheye:				
AL	1,220	1,100	935	1,220
Other rockfish(7)				
BS	400	360	306	400
AL	925	830	705	925
Squid	3,400	2,000	1,700	3,400
Other Species(8)	26,600	26,600	22,610	156,000
Totals	2,490,145	1,998,620	1,698,827	3,423,665

(1) Amounts are in metric tons. These amounts apply to the entire Bering Sea (BS) and Aleutian Islands (AI) area unless otherwise specified. With the exception of pollock and for the purpose of these specifications, the BS includes the Bogoslof district.

(2) Zero amounts of groundfish are specified for Joint Venture Processing (JVP) and Total Allowable Level of Foreign Fishing (TALFF).

(3) Initial TAC (ITAC) = 0.85 of TAC; initial reserve = TAC − ITAC = 299,793 mt.

(4) DAP = domestic annual processing = ITAC.

(5) "Other flatfish" include all flatfish species except for Pacific halibut (a prohibited species) and all other flatfish species that have a separate specified TAC amount.

(6) "Other red rockfish" include shortraker, rougheye, sharpchin, and northern.

(7) "Other rockfish" include *Sebastes* and *Sebastolobus* species except for Pacific ocean perch, sharpchin, northern, shortraker, and rougheye.

(8) "Other species" includes sculpins, sharks, skates, eulachon, smelts, capelin, and octopus.

(9) W is the western AI district; C is the central AI district; and E is the eastern AI/Bering Sea subarea.

A brief discussion of the SSC's revisions to the ABCs recommended by the Plan Team for Aleutian Basin pollock, Atka mackerel, and Greenland turbot follows:

Aleutian Basin pollock. The SSC concurred in the Plan Team's concept that the Aleutian Basin (Bogoslof District) pollock stock should continue to be managed separately from the Bering Sea and Aleutian Islands pollock stocks. Accordingly, separate ABCs and TACs are specified for each stock.

Although the SSC concurred in the Plan Team's preliminary biomass and ABC recommendations for the Bering

Sea and Aleutian Islands pollock stocks, the SSC did not concur in the Plan Team's projected estimate of 1994 biomass for Bogoslof District pollock. The Plan Team used new survey information to estimate a 1993 biomass of 600,000 mt. The SSC assumed that no recruitment will occur in 1993 or 1994, and calculated a projected biomass for 1994 of 491,000 mt using M = .02. The SSC then calculated the $F_{0.35}$ exploitation rate of 0.26 and adjusted this rate downward by 25 percent to select a ratio of current biomass to optimal biomass. Multiplying this result (0.065) by 491,000 yields an ABC of 32,000. Due to lack of recruitment predicted for 1993 and 1994 stocks, the Council recommended a proposed TAC of 1,000 mt to provide for bycatch in other groundfish operations.

Atka Mackerel. The SSC accepted the Plan Team's 1994 estimate of ABC (245,000 mt), although it expressed concern that the time series of trawl surveys is short and inconsistent in the extent of coverage. The SSC also was apprehensive about the possible ecosystem ramifications of an increased catch of the magnitude proposed by the Plan Team's estimate of 1994 ABC. In particular, Atka mackerel is a prey species of northern fur seals, a species listed as depleted under the Marine Mammal Protection Act, and Steller sea lions, a species listed as threatened under the Endangered Species Act. The effect of a large increase in the Atka mackerel fishery on these species is presently unclear. Given these concerns, the SSC recommended to continue its 1992 and 1993 policy to phase in the Plan Team's estimate of ABC over a 6-year period by adopting the 1993 biomass estimate (816,000 mt) and raising the exploitation rate incrementally during this period. According to this policy, the recommended ABC for 1994 is 122,500 mt. The main purpose of this approach is to postpone a large ABC increase until new survey estimates are available to validate exploitable biomass estimates.

Amendment 28 to the BSAI FMP became effective August 11, 1993 (58 FR 37660, July 13, 1993). This amendment establishes three new management districts in the Aleutian Islands (AI) subarea (western, central, and eastern AI districts) for the purpose of apportioning TAC of groundfish. To allow for improved TAC management, disperse fishing effort, and minimize the potential for undesirable effects of concentrated fishing effort on Atka mackerel stocks and marine mammal predators, the Council recommended the proposed TAC for Atka mackerel be divided equally among the western AI district, central AI district, and the eastern AI district/Bering Sea subarea. This results in a total proposed TAC for Atka mackerel in the BSAI of 40,425 mt, or 13,475 mt each for the western district, central district, and eastern district/Bering Sea subarea.

Greenland Turbot. The Plan Team used a new stock synthesis model to estimate an ABC of 18,800 mt. The SSC agreed with the use of this model. However, the SSC recommended that ABC be set at 7,000 mt due to continued poor recruitment and stock abundance levels. The Council concurred with this ABC recommendation and set the TAC at 7,000 mt for this species.

Proposed TAC Specifications

In general, the Council recommended TACs for individual groundfish species or species groups be set at either the 1993 TAC level or the 1994 proposed ABC amount. The Council adopted the 1993 TAC levels for all species except Atka mackerel, yellowfin sole, and Pacific cod. For Atka mackerel and Pacific cod, the Council adopted TACs at the proposed 1994 ABC level. For yellowfin sole, the Council recommended that the TAC be reduced from the ABC (238,000 mt) to allow for increases in the Atka mackerel and Pacific cod TACs, while maintaining the sum of the total TAC within the optimum yield range of 1.4 million to 2.0 million mt (§ 675.20(a)(2)).

The Council has expressed concern about localized depletion of sablefish in the AI and has requested that the Plan Team provide, at the Council's December 1993 meeting, information on apportioning the AI sablefish TAC among the three AI districts established under Amendment 28.

Apportionment of TAC

As required by §§ 675.20(a)(3) and 675.20(a)(7)(i), each species' TAC initially is reduced by 15 percent. The sum of these 15 percent amounts is the reserve. The reserve is not designated by species or species group, and any amount of the reserve may be reapportioned to a target species or the "other species" category during the year, providing that such reapportionments do not result in overfishing.

The initial TAC (ITAC) for each target species and the "other species" category at the beginning of the year, which is equal to 85 percent of TAC, is then apportioned between the domestic annual harvest (DAH) category and the total allowable level of foreign fishing (TALFF). Each DAH amount is further apportioned between two categories of U.S. fishing vessels. The domestic annual processing (DAP) category includes U.S. vessels that process catch on board or deliver it to U.S. fish processors. The joint venture processing (JVP) category includes U.S. fishing vessels working in joint ventures with foreign processing vessels authorized to receive catches in the exclusive economic zone.

In consultation with the Council, the initial amounts of DAP and JVP are determined by the Director, Alaska Region, NMFS (Regional Director). Consistent with the final 1991–1993 initial specifications, the Council recommended that 1994 DAP specifications be set equal to ITAC and that zero amounts of groundfish be allocated to JVP and TALFF. In making this recommendation, the Council considered the capacity of DAP harvesting and processing operations and anticipates that 1994 DAP operations will harvest the full ITAC specified for each BSAI groundfish species category.

The proposed ABCs, TACs, ITACs, overfishing levels and initial apportionments of groundfish in the BSAI area for 1994 are given in Table 1. These proposed specifications are subject to change as a result of public comment, analysis of the current biological condition of the groundfish stocks, and consultation with the Council at its meeting scheduled for December 6–10, 1993.

Regulations at § 675.20(a)(7)(i) require that one fourth of each proposed ITAC and apportionment thereof, one fourth of each prohibited species catch allowance, and the first seasonal allowance of pollock be in effect on January 1 on an interim basis and remain in effect until superseded by a **Federal Register** publication of final specifications. Proposed seasonal allowances of pollock and prohibited species bycatch allowances are discussed below. The interim ITAC specifications for the 1994 fishing year are 25 percent of the ITACs listed in Table 1.

Apportionment of the Pollock TAC to the Inshore and Offshore Components and to the Western Alaska Community Development Quota

Regulations at § 675.20(a)(2)(iii) require that the proposed 1994 pollock ITAC specified for the BSAI be allocated 35 percent to vessels catching pollock for processing by the inshore component and 65 percent to vessels catching pollock for processing by the offshore component (table 2). Definitions of these components are found at § 675.2.

TABLE 2.—SEASONAL ALLOWANCES OF THE INSHORE AND OFFSHORE COMPONENT ALLOCATIONS OF POLLOCK TACS [1] [2]

Subarea	TAC	ITAC [3]	Roe season [4]	Non-roe season [5]
Bering Sea:				
Inshore		386,750	174,038	212,712.
Offshore		718,250	323,212	395,038.
	1,300,000	1,105,000	497,250	607,750.
Aleutian Islands:				
Inshore		15,351	15,351	remainder.
Offshore		28,509	28,509	remainder.
	51,600	43,860	43,860	remainder.
Bogoslof:				
Inshore		298	298	remainder.
Offshore		552	552	remainder.
	1,000	850	850	remainder.

[1] TAC = total allowable catch.
[2] Based on an allocation of 0.65 (TAC) to vessels catching pollock for processing by the offshore component and an allocation of 0.35 (TAC) to vessels catching pollock for processing by the inshore component.
[3] ITAC = initial TAC = 0.85 of TAC;
[4] January 1 through April 15.
[5] August 15 through December 31.

Regulations at § 675.20(a)(3)(ii) require one-half of the pollock TAC placed in the reserve for each subarea or district, or 7.5 percent of each TAC, be assigned to a Community Development Quota (CDQ) reserve for each subarea or district. Given the proposed 1994 pollock TACs recommended by the Council, the 1994 CDQ reserve amounts for each subarea would be as follows:

BSAI subarea	Pollock CDQ
Bering Sea	97,500 mt
Aleutian Islands	3,870 mt
Bogoslof	74 mt

Under § 675.27 NMFS may allocate portions of the 1994 CDQ reserve established for each subarea or district to eligible Western Alaska communities or groups of communities that have an approved community development plan (CDP). The State of Alaska received six CDP applications pursuant to § 675.27 and State of Alaska regulations at 6 AAC 93. All six applications were submitted in conformance with both sets of regulations and have been fully reviewed by the State. Pending approval by NMFS, 1994 allocations of the CDQ reserve to the successful CDP recipients will be published in the **Federal Register** prior to the 1994 fishing year.

Seasonal Allowances of Pollock TAC

Under § 675.20(a)(2)(ii), the ITAC of pollock for each subarea or district of the BSAI area is divided, after subtraction of reserves (§ 675.20(a)(3)), into two allowances. The first allowance will be available for directed fishing from January 1 to April 15 (roe season). The second allowance will be available from August 15 through the end of the fishing year (non-roe season).

The Council recommended that the 1994 seasonal allowances of pollock be set at the same relative levels as in 1993, or 45 percent of the pollock ITAC specified for each management subarea or district during the roe season and 55 percent during the non-roe season. Seasonal allowances for the 1994 CDQ pollock fishery were not discussed but are anticipated to be set at the same relative levels as 1993.

When specifying seasonal allowances of the pollock TAC, the Council and the Secretary consider the following nine factors as listed in section 14.4.10 of the FMP:

1. Estimated monthly pollock catch and effort in prior years;
2. Expected changes in harvesting and processing capacity and associated pollock catch;
3. Current estimates of, and expected changes in, pollock biomass and stock conditions; conditions of marine mammal stocks, and biomass and stock conditions of species taken as bycatch in directed pollock fisheries;
4. Potential impacts of expected seasonal fishing for pollock on pollock stocks, marine mammals, and stocks and species taken as bycatch in directed pollock fisheries;
5. The need to obtain fishery data during all or part of the fishing year;
6. Effects on operating costs and gross revenues;
7. The need to spread fishing effort over the year, minimize gear conflicts, and allow participation by various elements of the groundfish fleet and other fisheries;
8. Potential allocative effects among users and indirect effects on coastal communities; and
9. Other biological and socioeconomic information that affects the consistency of seasonal pollock harvests with the goals and objectives of the FMP.

The Council seeks pubic comment on the effects of the recommended seasonal allowances with respect to these nine factors.

Apportionment of Pollock TAC to the Non-pelagic Trawl Gear Fishery

Regulations under § 675.24(c)(2) authorize the Secretary, in consultation with the Council, to limit the amount of pollock TAC that may be taken in the directed fishery for pollock using non-pelagic trawl gear. This authority is intended to reduce the amount of halibut and crab bycatch that occurs in non-pelagic trawl operations.

The Council did not propose to limit the amount of pollock TAC that may be taken in the 1994 directed fishery for pollock by vessels using non-pelagic trawl gear. At its December 1993 meeting, the Council has the option of restricting the amount of pollock that may be taken with non-pelagic trawl gear.

Proposed Allocation of the Pacific Cod TAC

At its June 1993 meeting, the Council adopted Amendment 24 to the FMP. This amendment would authorize fixed allocations of the Pacific cod TAC among vessels using trawl gear, hook-and-line gear or pot gear, and jig gear. NMFS has submitted the proposed amendment and implementing regulations to the Secretary for review and approval. The proposed rule was published in the **Federal Register** on October 27, 1993 (FR 58 57803), and includes for public comment and review, proposed 1994 initial specifications for Pacific cod authorized under Amendment 24. If the

amendment and its implementing regulations are approved, final specifications for Pacific cod would be published with the final rule implementing Amendment 24 that would supersede those in effect under the current specification process.

Allocation of Prohibited Species Catch (PSC) Limits Crab, Halibut, and Herring

PSC limits of red king crab and C. bairdi Tanner crab in Bycatch Limitation Zones (50 CFR 675.2) of the Bering Sea subarea, and for Pacific halibut throughout the BSAI area are specified under § 675.21(a). At this time the 1994 PSC limits are:

—200,000 red king crabs applicable to Zone 1;
—one million C. bairdi Tanner crabs applicable to Zone 1;
—three million C. bairdi Tanner crabs applicable to Zone 2;
—3,775 mt mortality of Pacific halibut applicable to the BSAI trawl fisheries; and
—900 mt mortality of Pacific halibut to non-trawl fisheries in the BSAI.

The PSC limit of Pacific herring caught while conducting any trawl operation for groundfish in the BSAI is 1 percent of the annual eastern Bering Sea herring biomass. At this time, the best estimate of 1994 herring biomass is 212,187 mt. This amount was derived using 1992 survey data and an aged structured biomass projection model developed by the Alaska Department of Fish and Game (ADF&G). Complete analysis of the 1993 spawning data by the ADF&G will be presented during the Council's December 1993 meeting. The proposed herring PSC limit for 1994 is 2,122 mt. This value is subject to change pending an updated forecast analysis of 1993 herring biomass that will be presented to the Council by the ADF&G during the Council's December 1993 meeting.

Regulations under § 675.21(b) authorize the apportionment of each PSC limit into PSC allowances that are assigned to specified fishery categories. Regulations at § 675.21(b)(1)(iii) authorize the apportionment of PSC limits established for trawl gear fisheries to seven fishery categories (midwater pollock, Greenland turbot/arrowtooth flounder/sablefish, rock sole/other flatfish, yellowfin sole, rockfish, Pacific cod, and bottom pollock/Atka mackerel/ "other species"). Regulations at § 675.21(b)(2)(ii) authorize the apportionment of the non-trawl halibut PSC limit among three fishery categories (Pacific cod hook-and-line gear fishery, groundfish pot gear fishery, and other non-trawl fisheries). The proposed PSC allowances are listed in Table 3.

In 1993, the Council recommended to exempt groundfish pot gear fisheries from halibut bycatch restrictions because of the low halibut bycatch mortality rates associated with these fisheries. During 1992, the halibut mortality associated with this groundfish catch was only 5 mt, based on an assumed halibut mortality rate of 5 percent. Given this small amount of bycatch mortality and the Council's desire to encourage fishing operations that experience low halibut mortality rates, the Council recommended to continue to exempt groundfish pot gear fisheries from halibut bycatch restrictions during 1994.

Regulations at § 675.20(a)(7)(i) require that one-fourth of each proposed PSC allowance be made available on an interim basis for harvest at the beginning of the fishing year until superseded by the final initial specifications. These interm PSC bycatch allowances are 25 percent of the annual allowances listed in Table 3.

TABLE 3.—PROPOSED 1994 PROHIBITED SPECIES BYCATCH ALLOWANCES FOR THE BSAI TRAWL AND NON-TRAWL FISHERIES

[25 Percent of the Allowances Listed Below Will Be Made Available on an Interim Basis January 1, 1994, Until Superseded by the Final 1994 Initial Specifications]

Trawl fisheries	Zone 1	Zone 2	BSAI-wide
Red king crab, number of animals:			
Yellowfin sole	40,000		
Rcksol/othflat [1]	110,000		
Turb/arrow/sabl [2]			
Rockfish	0		
Pacific cod	10,000		
Plck/Atka/othr [3]	40,000		
Total	200,000		
C. bairdi Tanner crab, number of animals:			
Yellowfin sole	175,000	1,225,000	
Rcksol/oth.flat	475,000	200,000	
Turb/arrow/sabl	0	0	
Rockfish	0	0	
Pacific cod	175,000	400,000	
Plck/Atka/othr	175,000	1,150,000	
Total	1,000,000	3,000,000	
Pacific halibut, mortality (mt):			
Yellowfin sole			592
Rcksol/oth.flat			588
Turb/arrow/sabl			137
Rockfish			201
Pacific cod			1,000
Plck/Atka/othr			1,257
Total			3,775
Pacific herring, (mt):			
Midwater pollock			1,534
Yellowfin sole			359
Rcksol/oth.flat			0
Turb/arrow/sabl			0
Rockfish			9
Pacific cod			27
Plck/Atka/othr [4]			193

TABLE 3.—PROPOSED 1994 PROHIBITED SPECIES BYCATCH ALLOWANCES FOR THE BSAI TRAWL AND NON-TRAWL FISHERIES—Continued

[25 Percent of the Allowances Listed Below Will Be Made Available on an Interim Basis January 1, 1994, Until Superseded by the Final 1994 Initial Specifications]

Trawl fisheries	Zone 1	Zone 2	BSAI-wide
Total			2,122
Non-trawl fisheries:			
Pacific halibut, mortality (mt):			
Pacific Cod hook-and-line			825
Other non-trawl			75
Groundfish Pot Gear			Exempt
Total			900

[1] Rock sole and other flatfish fishery category.
[2] Greenland turbot, arrowtooth flounder, and sablefish fishery category.
[3] Pollock, Atka mackerel, and "other species" fishery category.
[4] Pollock other than midwater pollock, Atka mackerel, and "other species" fishery category.

Proposed seasonal apportionments of the 1994 Pacific halibut bycatch allowances are shown in Table 4. At this time the Council recommended, with the exception of the rockfish fishery, not to apportion halibut by season for trawl gear. The AP recommended that the seasonal apportionment of halibut for the directed rockfish fishing during the period January 1 through April 1 be set at zero. Prohibiting directed fishing on these species is necessary to avoid potentially high bycatch rates of halibut and address overfishing concerns for certain species of rockfish. The AP's recommendation is intended to delay the start of the rockfish fishery to provide a greater opportunity for participants in this fishery to more fully harvest TAC amounts of all rockfish species under existing halibut bycatch limitations. The Council also recommended that the halibut bycatch mortality allowance specified for the Pacific cod hook-and-line gear fishery be seasonally apportioned. The recommended apportionment (Table 4) is based on: (1) The council's anticipation that the proposed allocation of Pacific cod TAC among gear groups under Amendment 24 will be approved; (2) most of the hook-and-line gear effort for Pacific cod will occur during the first half of 1994; and, (3) the Council's desire to limit a hook-and-line fishery for Pacific cod during summer months when halibut bycatch rates are high.

Prohibited species bycatch allowances and the seasonal apportionment of those allowances will be subject to change at the December 1993 Council meeting, pending public comment, year-to-date information on bycatch performance, and updated information on anticipated fishing patterns in 1994.

TABLE 4.—PROPOSED SEASONAL APPORTIONMENTS OF THE 1994 PACIFIC HALIBUT BYCATCH ALLOWANCES FOR THE BSAI TRAWL AND NON-TRAWL FISHERIES

[All Allowances and Apportionments Other Than Those on January 1 and December 31 Begin and End at 12 Noon, Alaska Local Time]

Fishery	Seasonal bycatch allowance (mt halibut)
Trawl Gear:	
Yellowfin sole	592
Rock sole/"other flatfish"	588
Turbot/arrowtooth flounder/sablefish	137
Rockfish:	
Jan. 01–Apr. 01	0
Apr. 01–Jul. 01	81
Jul. 01–Dec. 31	120
Total	201
Pacific cod 1,000.	
Pollock/Atka mackerel/"other species"	1,257
Total Trawl Halibut Mortality	3,775
Non-Trawl Gear:	
Pacific cod [1]:	
Jan. 01–Apr. 01	685
Apr. 01–Jul. 01	40
Jul. 01–Dec. 31	Remainder
Total	725
Other Non-trawl	175
Total Non-trawl Halibut Mortality	900

[1] Pending approval of Amendment 24, a seasonal allocation of Pacific cod also could be implemented for 1994.

For purposes of monitoring the halibut bycatch mortality allowances specified in Table 4, the Regional Director will use observed halibut bycatch rates and reported and observed groundfish catch to project when a fishery's halibut bycatch mortality allowance is reached. The Regional Director will monitor the fishery bycatch mortality allowances using assumed mortality rates that are based on the best information available, including that contained in the final annual SAFE report.

The best information available on assumed halibut mortality rates is based on 1990–1993 observer data and summarized in Table 5. Assumed halibut mortality rates for halibut PSC bycatch in 1993 were based on NMFS observer data from 1990–1991. A discussion on the derivation of these assumed rates is presented in the preamble to the final rule implementing Amendment 21 to the FMP (58 FR 14524, March 18, 1993). The International Pacific Halibut Commission (IPHC) analyzed preliminary 1993 data on Pacific halibut condition factors collected by NMFS certified observers. Results of this analysis suggest that halibut mortality rates for trawl and pot gear fisheries are unchanged from those assumed for 1993 (Table 5). Except for the hook-and-line Pacific cod fishery, analysis of the 1993 observer data also suggests that mortality rates for the hook-and-line gear fisheries generally reflect 1993 assumed rates (15 percent for observed vessels; 12.5 percent for unobserved vessels). The 1993 observer data suggest that the mortality rate assumed for observed vessels participating in the 1993 Pacific cod fishery (12.5 percent) was too low, and should be increased to 15 percent during 1994 (Table 5).

The IPHC is anticipated to provide additional data for the final 1993 SAFE report, which will reflect a thorough analysis of debriefed observer data from the 1992 fisheries to further assess mortality rate assumptions for 1994. These final determinations will be published in the **Federal Register** with the final 1994 initial specifications of groundfish TACs.

TABLE 5.—ASSUMED PACIFIC HALIBUT MORTALITY RATES PROPOSED FOR THE BSAI FISHERIES DURING 1994

	Unobserved vessels (percent)	Observed vessels (percent)
Hook-and-Line Gear Fisheries:		
BSAI Pacific cod	15.0	15.0
BSAI Greenland turbot	12.5	15.0
BSAI sablefish	12.5	15.0

	Percent
Trawl Gear Fisheries (Proposed Mortality rates are unchanged from 1993):	
Midwater pollock	80.0
Atka mackerel	.....
Rock sole	.....
Yellowfin sole	.....
Other flatfish	70.0
Pacific cod	.....
Bottom pollock	.....
Rockfish	60.0
Arrowtooth flounder	.....
Greenland turbot	.....
"Other species" and sablefish	40.0
Pot Gear Fisheries	5.0

Groundfish PSC Limits

At this time, no groundfish are proposed to be allocated to either JVP or TALFF and specifications of groundfish PSC limits are unnecessary. No PSC limits for groundfish species that would be applicable to JVP and TALFF fisheries, as authorized by § 675.20(a)(6), are proposed to be specified for 1994.

Sablefish Gear Allocation

Regulations under § 675.24(c)(1) allocate sablefish TACs for the BSAI subareas between gear types. In the Bering Sea subarea, hook-and-line and pot gear may be used to take up to 50 percent of the TAC for sablefish, and trawl gear may be used to take up to 50 percent of the TAC for sablefish. In the Aleutian Islands subarea, hook-and-line and pot gear may be used to take up to 75 percent of the TAC for sablefish, and trawl gear may be used to take up to 25 percent of the TAC for sablefish.

If the initial specifications are adopted for the 1994 fishing year, gear allocations of sablefish will be apportioned according to the percentage shares listed in Table 6 for the TAC and ITACs listed in Table 1.

TABLE 6.—PROPOSED 1994 GEAR SHARES OF BSAI SABLEFISH TAC

Subarea	Gear	Percent of TAC	Share of TAC (mt)	Share of ITAC (mt) [1]
Bering Sea [2]	Trawl	50	750	637
	Hook-and-line/pot gear	50	750	638
Aleutian Islands	Trawl	25	650	553
	Hook-and-line/pot gear	75	1,950	1,657

[1] Initial TAC (ITAC) = 0.85 of TAC, rounded to the nearest whole mt; 0.15 of TAC is apportioned to reserve. The sum of both ITAC gear shares in a subarea is equal to the ITAC for that subarea in Table 1.
[2] Includes Bogoslof district.

Closures to Directed Fishing

If the Regional Director establishes a directed fishing allowance and that allowance is or will be reached before the end of the fishing year or, with respect to pollock, before the end of the fishing season, NMFS will prohibit directed fishing for that species or species group in the specified subarea or district under § 675.20(a)(8). The Regional Director has determined that interim TAC amounts of groundfish specified by this announcement for species or species groups identified in Table 7 will be necessary as incidental catch to support other anticipated groundfish fisheries prior to the time that final specifications of groundfish are in effect for the 1994 fishing year. Therefore, NMFS is prohibiting directed fishing for those target species, gears, and components, to prevent exceeding the interim amounts of groundfish TACs specified. These closures will be implemented for the period that the interim specifications of groundfish TACs are effective (from January 1 until the effective date of the final 1994 groundfish specifications).

TABLE 7.—CLOSURES TO DIRECTED FISHING UNDER 1994 INTERIM TACS [1]

Fishery (All Gear) Closed Areas:	
Pollock	518.
Pacific Ocean Perch	ALL BSAI.
Sharpchin/Northern rockfish	AI Subarea.
Shortraker/rougheye rockfish	AI Subarea.
Other rockfish [2]	All BSAI.
Other Red rockfish [3]	Bering Sea.
Subarea.	

[1] These closures to directed fishing are in addition to closures and prohibitions found in regulations at 50 CFR part 675.
[2] "Other rockfish" include *Sebastes* and *Sebastolobus* species except for Pacific ocean perch and the "other red rockfish" species.

[3] "Other red rockfish" include shortraker, rougheye, sharpchin, and northern.

After consideration of public comments and additional scientific information presented at its December 1993 meeting, the Council may recommend other closures to directed fishing. Additionally, NMFS may implement other closures at the time the final specifications of groundfish TACs for 1994 are promulgated or during the 1994 fishing year as necessary for effective management.

Other Matters

This action is authorized under 50 CFR 611.93(b) and 675.20, complies with E.O. 12866, and is covered by the regulatory flexibility analysis prepared for the implementing regulations.

A draft environmental assessment (EA) on the allowable harvest levels set forth in the final 1993 SAFE report will be available for public review at the December 6–10, 1993, Council meeting. After the December meeting, a final EA will be prepared on the final 1994 TAC amounts recommended by the Council.

Consultation pursuant to section 7 of the Endangered Species Act has been initiated for the 1994 BSAI initial specifications.

List of Subjects

50 CFR Part 611

Fisheries, Foreign relations, Reporting and recordkeeping requirements.

50 CFR Part 675

Fisheries, Reporting and recordkeeping requirements.

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

Dated: November 10, 1993.

Gary Matlock,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 93–28170 Filed 11–10–93; 4:34 pm]

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Notices

Federal Register
Vol. 58, No. 220
Wednesday, November 17, 1993

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 93-083-1]

General Conference Committee of the National Poultry Improvement Plan; Renewal

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of renewal.

SUMMARY: We are giving notice that the Secretary of Agriculture has renewed the General Conference Committee of the National Poultry Improvement Plan (Committee) for a 2-year period. The Secretary has determined that the Committee is necessary and in the public interest.

FOR FURTHER INFORMATION CONTACT: Mr. Andrew Rhorer, Senior Coordinator, National Poultry Improvement Plan, VS, APHIS, USDA, room 205, Federal Building, 6525 Belcrest Road, Hyattsville, MD 20782 (301) 436-7768.

SUPPLEMENTARY INFORMATION: We are giving notice that the Secretary of Agriculture has renewed the General Conference Committee of the National Poultry Improvement Plan (Committee) for a 2-year period. The purpose of this Committee is to maintain and ensure industry involvement in Federal administration of matters pertaining to poultry health.

The Committee Chairperson and the Vice Chairperson shall be elected by the Committee from among its members. There are seven members on the Committee with 4-year staggered terms. This Committee differs somewhat from other advisory committees in the selection process and composition of its membership. The poultry industry elects the members to the Committee. The members represent six geographic areas with one member-at-large. The membership is not subject to the U.S. Department of Agriculture's review, and a formal request for nominations for membership is not published in the **Federal Register**.

Done in Washington, DC, this 4 day of November, 1993.

Wardell C. Townsend, Jr.,

Assistant Secretary for Administration.

[FR Doc. 93-28268 Filed 11-16-93; 8:45 am]

BILLING CODE 3410-34-M

Rural Electrification Administration

Seminole Electric Cooperative, Inc., Intent To Prepare a Supplemental Environmental Impact Statement

AGENCY: Rurarl Electrification Administration, USDA.

ACTION: Notice of intent to prepare a supplemental Environmental Impact Statement.

SUMMARY: Notice is hereby given that the Rural Electrification Administration (REA), pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality Regulations for Implementing NEPA (40 CFR parts 1550-1508), and REA Environmental Policies and Procedures (7 CFR part 1794) intends to prepare a supplemental environmental impact statement for its Federal action related to a proposal by Seminole Electric Cooperative, Inc. (SECI), to own and operate a new 440-megawatt (MW) combined cycle power plant. REA may provide financing assistance to Seminole for project construction costs or take other approval actions that would be necessary for the project to be constructed. The Environmental Protection Agency (EPA) will be a cooperating agency in the preparation of the supplemental environmental impact statement because of its action related to the modification of the National Pollution Discharge Elimination System Permit for the Hardee Power Station. The proposed impact statement will be a supplement to the final environmental impact statement prepared for the Hardee Power Station by REA, EPA, and the Federal Energy Regulatory Commission completed in January of 1991. The supplemental environmental impact statement will be made available for public review in draft and final version. The public will have an opportunity to comment on both versions. It is anticipated that a draft document will be available sometime during the third quarter of 1994.

FOR FURTHER INFORMATION CONTACT: Lawrence R. Wolfe, Chief, Environmental Compliance Branch, Electric Staff Division, room 1246, South Agriculture Building, Rural Electrification Administration, Washington, DC 20250, telephone (202) 720-1784.

SUPPLEMENTARY INFORMATION: Seminole is planning to own and operate a new 440-megawatt (MW) combined cycle power plant to be known as the Hardee Power Station Unit 3. This project would be constructed on the site of the existing 295 MW Hardee Power Station. The Hardee Unit 3 project would be constructed under a turnkey agreement with Westinghouse Electric Corporation and Black & Veatch Construction, Inc., at a cost of $315 million. The Hardee Unit 3 project would consist of a highly efficient combined cycle unit made up of two 150 MW Westinghouse Model 501F combustion turbines. Exhaust heat from the CTs is proposed to be captured and "recycled" through heat recovery steam generators which would produce steam to power a single steam turbine and generate an additional 140 MW of electricity.

The Hardee Unit 3 project is proposed to be built on the 1,300 acre Hardee Power Station site, which straddles the Hardee and Polk County lines, approximately 9 miles northwest of Wauchula and 16 miles south-southwest of Bartow. This site has been extensively mined for phosphate and has been previously certified pursuant to the Florida Electric Power Plant Siting Act for the construction of a 660 MW power plant. This site is owned by a Seminole subsidiary and is the location of an existing 295 MW combined cycle power plant. Locating the Hardee Unit 3 project on the same site as the existing 295 MW plant would allow SECI to utilize on-site facilities as the existing 570 acre cooling reservoir, substation, and transmission lines.

The primary fuel for the Hardee Unit 3 project is proposed to be natural gas, with low-sulfur distillate fuel oil as a backup. Through the use of natural gas as the primary fuel and the installation of dry low nitrogen oxide combustors, the Hardee Unit 3 project would represent the state of the art in air

emissions control for the electric power industry.

Alternatives to the proposed construction such as purchase power, conservation (demand side management), other generation technologies, size, and timing options will be discussed in an Alternative Analysis to be prepared by SECI and submitted to REA. The draft and final supplemental environmental impact statements will include a section on alternatives.

Comments and questions regarding the scope of the proposed project should be submitted in writing to REA at the address provided herein or to Mr. Michael P. Opalinski, Manager of Environmental Affairs, Seminole Electric Cooperative, Inc., P.O. Box 272000, Tampa, Florida 33688–2000.

Any final action by REA related to the proposed project will be subject to, and contingent upon, compliance with all relevant Federal environmental laws and regulations and completion of Environmental procedures as prescribed by Council on Environmental Quality and REA environmental policies and procedures as applicable.

Dated: November 9, 1993.

Robert Peters,

Action Administrator.

[FR Doc. 93–28181 Filed 11–16–93; 8:45 am]

BILLING CODE 3410–15–M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

[Docket Nos. 1101–01 and 1102–01]

The Sound You Company, Ltd. and Yuzo Oshima; Administrative Review and Order

Summary

Pursuant to the July 30, 1993 Decision and Order on Remand of the Administrative Law Judge (ALJ) (which is attached hereto), the Sound You Company, Ltd., and its president, Yuzo Oshima (individually, and doing business as the Sound You Company, Ltd.) are hereby denied all export privileges in the United States for a period of twenty (20) years, based on three violations of the Export Administration Regulations.

Discussion

This case concerns four charges of violating the Export Administration Regulations (EAR). The first and second charges allege that Respondents violated §§ 787.2 and 787.3(a) of the EAR, which provide, respectively, that

> No person may cause, or aid, abet, counsel, command, induce, procure or permit the doing of any act [prohibited by the EAR].

and

> No person may do any act that solicits the commission of, or that constitutes an attempt to bring about [a violation of the EAR].

The third charge was based on § 787.4, which provides that

> No person may order, buy, receive, conceal, store, use, sell, loan, dispose of, transfer, transport, finance, forward, or otherwise service, in whole or in part, any commodity or technical data exported or to be exported from the United States or which is otherwise subject to the Export Administration Regulations, with a knowledge or reason to know that a violation of the [EAR] has occurred, is about to occur, or is intended to occur with respect to any transaction.

The fourth charge was based on § 787.5(b), which provides that

> No person may engage in any transaction or take any other action, either independently or through any other person, with intent to evade the provisions of the [EAR].

The ALJ's initial (February 12, 1992) Decision and Order found that the Respondents had violated the EAR as alleged in all four charges. He commended that the Respondents be denied export privileges for a period of 20 years. However, the Acting Under Secretary remanded the decision to the ALJ for further consideration. In his July 30, 1993 Decision and Order on Remand, the ALJ addressed the most substantantive arguments set forth in the Acting Under Secretary's decision, and upheld his earlier decision as to the first three charges. However, he reversed his earlier decision on the fourth charge, finding that the record provided insufficient evidence to support his earlier determination that the Respondents had violated § 787.5(b) as alleged.

The ALJ's Decision and Order on Remand is hereby affirmed.

Order

On July 30, 1993, the ALJ entered his Decision and Order on Remand in the above-referenced matter. Having examined the record, and based on the facts in these cases, I hereby affirm the ALJ's recommended Order that:

I. For a period of 20 years from the date of this Order, Respondents, The Sound You Company, Ltd., and its president, Yuzo Oshima, with addresses at: Tatsuno-Nishitenma Building, 3–1–6, Nishitenma; Kita-ku, Osaka, Japan, and all successors, assignees, officers, partners, representatives, agents, and employees hereby are denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction involving commodities or technical data exported from the United States in whole or in part, or to be exported, or that are otherwise subject to the Export Administration Regulations.

II. Participation prohibited in any such transaction, either in the United States or abroad, shall include, but not be limited to, participation:

(i) As a party or as a representative of a party to a validated or general export license application;

(ii) In preparing or filing any export license application or request for reexport authorization, or any document to be submitted therewith;

(iii) In obtaining or using any validated or general export licensee or export control document;

(iv) In carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported from the United States, or to be exported; and

(v) In the financing, forwarding, transporting, or other servicing of such commodities or technical data.

Such denial of export privileges shall extend to those commodities and technical data which are subject to the Export Administration Act and implementing Export Administration Regulations.

III. After notice and opportunity for comment, such denial of export privileges may be made applicable to any person, firm, corporation, or business organization with which the Respondent is now or hereafter may be related by affiliation, ownership, control, position of responsibility, or other connection in the conduct of trade or related services.

IV. All outstanding individual validated export licenses in which Respondent(s) appear or participate, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Respondent(s)' privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

V. No person, firm, corporation, partnership, or other business organization, whether in the United States or elsewhere, without prior disclosure to and specific authorization from the Office of Export Licensing, shall, with respect to commodities and technical data, do any of the following acts, directly or indirectly, or carry on

negotiations with respect thereto, in any manner or capacity, on behalf of or in any association with any respondent or any related person, or whereby any Respondent or any related person may obtain any benefit therefrom or have any interest or participation therein, directly or indirectly:

(i) Apply for, obtain, transfer, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to any export, reexport, transshipment, or diversion of any commodity or technical data exported in whole or in part, or to be exported by, to, or for any Respondent or related person denied export privileges, or

(ii) Order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance or otherwise service or participate in any export, reexport, transshipment or diversion of any commodity or technical data exported or to be exported from the United States.

Dated: November 4, 1993.

Barry E. Carter,

Acting Under Secretary for Export Administration.

Decision and Order on Remand

Appearance for Respondents: Yuzo Oshima, President, Pro Se, The Sound You Company, Ltd., Tatsuno-Nishitenma Building, 3–1–6, Nishitenma, Kita-ku, Osaka, Japan.

Appearance for Agency: Anthony Hicks, Esq., Office of Chief Counsel for Export Administration, U.S. Department of Commerce, Suite H–3839, 14th & Constitution Ave., NW., Washington, DC 20230.

Preliminary Statement

By separate charging letters issued February 6, 1991 the Office of Export Enforcement, Bureau of Export Administration, United States Department of Commerce, initiated administrative proceedings against Yuzo Oshima (Oshima) and The Sound You Company, Ltd. (Sound You) pursuant to the Export Administration Act of 1979, as amended (currently codified at 50 U.S.C. app. 2401–2420 (supp. 1991) (the Act), and the Export Administration Regulations.[1] Respondent Yuzo Oshima and Respondent Sound You Company, Ltd. responded to their respective charging letters by filing a document entitled "Statement of Defense" with this Tribunal on March 12, 1991. On May 16, this Tribunal issued a scheduling order pursuant to 15 CFR 788.14. The Respondents requested this adjudication be made without a hearing, pursuant to that section of the Regulations. The Agency did not request a hearing. This matter was therefore presented for determination upon the submissions of the parties. Following a number of postponements, exchanges of records and submissions were completed. The record closed on October 3, 1991 for determination on the submissions of all parties. Because the allegations in the charging letters are the same as to both of the Respondents, the cases were consolidated for disposition.

The charging letters allege that between February 20, 1990 and June 19, 1990, the Respondents committed four violations of the Regulations. Charges One and Two allege in the time specified that:

Respondents requested the Intel Corporation to export, dispose of, direct or ship U.S.-origin Intel 80386 microprocessors (CPU–386 microprocessors) to Oshima's and Sound You's client in North Korea without the validated license required by § 772.1(b). Sound You, through Oshima, did an act that solicited Intel to commit a violation of the Regulations, thereby violating § 787.3(a) of the Regulations; and did an act that counseled, commanded, or induced the doing of an act prohibited by § 787.2 of the Regulations.

Charge Three alleges that:

Respondents ordered the above-mentioned 80386–25 microprocessors with knowledge or reason to know that a validated license was required by § 772.1(b) for the export from the United States to North Korea and that Respondents intended to export the CPU–386 without obtaining such validated license. The Respondents knew or had reason to know that a violation was about to occur or was intended to occur, and thereby committed one violation of § 787.4 of the Regulations.

Charge Four alleges that:

With knowledge that such action was prohibited, Respondents hired lawyers and/or other persons to establish entities as intermediate destinations in other countries from which Respondents intended to ship the CPU–386s to North Korea without the required validated license. In so doing, Respondents engaged in transactions or took action, through other persons, with the intent to evade the Regulations, and thereby committed one violation of Section 787.5(b) of the Regulations.

A Decision and Order by the Administrative Law Judge issued on February 12, 1992. It was vacated and remanded by the Acting Under Secretary for Export Administration on March 13, 1991. The concerns expressed in the Remand and the substance of the February 12, 1992, Decision are addressed herein.

Facts

By telefacsimile letter dated February 20, 1990, with the return address of "Sound You Co., Ltd.", Yuzo Oshima, president of Sound You Company, Ltd., asked the Intel Corporation to export for him 800,000 units of "CPU–386"[2] to North Korea (Agency Ex. 2). The CPU–386 is a high-performance microprocessor, which at the time of the request by Sound You, was a scarce commodity, and part of the Commodity Control List under ECCN 1564A[3] for reasons of national security (Agency Ex. 3 at 2, 4). Office of Export Enforcement documents regarding licensing determinations for the microprocessors indicate a presumption that exports to North Korea would be denied. A direct request for licensing determination made on March 13, 1990 reflects that the control of the product was for national security reasons (Agency Ex. 4 at 1). Another request for licensing determination for export to North Korea for the time period of January 1, 1990 to December 31, 1990, also reflects a presumption of denial (Agency Ex. 4 at 2).[4]

In his letter to Intel, Respondent Oshima stated that his client was in North Korea and that he knew "COCOM regulations" prohibited export of such shipments to a Communist country (Agency Ex. 2). Respondent Oshima, aware of and concerned with restrictions on the export of the microprocessor from Japan and suggested alternatives to his taking delivery in Japan (*Id.*). Moreover, Respondent wrote that he "would like to see the business transaction in any way possible" (*Id.*). At this early stage, it is not articulated whether Respondents were aware of the U.S. laws governing the exportation of this product.

On February 22, a special agent with the Office of Export Enforcement (OEE) commenced an investigation into the

[1] The Act expired on September 30, 1990. Under 1 U.S.C. § 109, violations committed while the Act was in effect remain litigable. Executive Order 12730 (55 FR 40373, October 2, 1990) continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C.A. §§ 1701–1706 (Supp. 1990)). The Act was reauthorized by Pub. L. 103–34, dated May 31, 1993.

[2] The CPU–386 is variously referred to as the 386 microprocessor, the 8086 microprocessor and the 80386 microprocessor. The CPU–386 is also referred to as the CPU–386–25. The suffix refers to the speed of the microprocessor.

[3] "ECCN" refers to export commodity control number.

[4] The signature of the engineer on this request is dated what appears to be 7–18–91.

activities of Sound You and Oshima. Intel assigned one of its employees to assume the role of a fictitious marketing executive, "Leonard Garcia," during the investigation (Agency Ex. 3).

On March 13, 1990, Intel, through its Director of Strategic Marketing, responded by facsimile letter to Oshima (Agency Ex. 6). In that letter, Intel clearly informed Respondent that the CPU–386 is regulated by "the United States and COCOM" and could "only be exported from the United States under a Department of Commerce Export License" (*Id.*). The letter further requested particulars of the Respondents' U.S. agents as a suggested means of expediting delivery and advised Oshima that Leonard Garcia, a fictitious name for the investigator in this matter, would be handling his account (*Id.*). On March 16, 1990, Oshima responded on Sound You Company, Ltd. letterhead. He clarified the requested amount of units as 800,000 and suggested a delivery schedule of 80,000 per month for 10 months. Oshima again made reference to the ultimate user in Pyongyoung, North Korea, noting that the units were to be used in the manufacture of telephone switchboards (Agency Ex. 7). No mention was made regarding export licensing requirements; however, Respondents requested that Intel deal directly with the North Korea corporation through the intermediation of Sound You (*Id.*).

On April 2, 1990, Intel responded through its named employee, Leonard Garcia, and reiterated that the Export Administration Regulations prohibited the export of the CPU–386s to North Korea (Agency Ex. 8). Garcia submitted that he would work with Sound You "and a representative of DPRK to fill this order and move these units to a delivery point mutually acceptable between the three of us, whereby you [Oshima] can arrange for reexport to Pyongyoung, North Korea" (*Id.*). In the same letter, Garcia told Oshima that his services and those of the freight forwarder would require a "cash inducement" of $5.00 per unit.[5] He also informed Oshima that no one else at Intel knew that the order was destined for North Korea and he requested that "all incoming correspondence" with regard to Oshima's account be sent "only" to him (*Id.*).

On April 5, 1990, Garcia placed an overseas telephone call to Oshima, who provided his own interpreter.[6] The Intel account representative, Garcia, did not speak Japanese. Respondent Oshima apparently had a very limited command of English (Agency Ex. 3 at 3). Much of the evidence in the record is composed of, or derives from, the taped telephone conversations between Garcia and Respondent Oshima. During the April 5 conversation, Oshima stated that he knew that the export of the CPU–386s to North Korea was prohibited under COCOM "regulations" and asked if there was any way that the CPU–386s could be shipped directly, or indirectly through Moscow, Peking, Bulgaria or Czechoslovakia to North Korea (Agency Ex. 9 at 2, 3, 4). Oshima made it clear that he did not want the CPU–386s to enter Japan and that none of the meetings in connection with his acquisition of the CPU–386s should take place in Japan because the COCOM regulations were strictly enforced there.

On May 1, 1190, Oshima stated that Sound You had hired some attorneys to establish North Korea representatives in countries to which the CPU–386s could be shipped, at which point the Sound You would be doing business with North Korea in foreign territory beyond COCOM jurisdiction. Oshima noted that a final determination regarding the legality of this scheme had not been made (Agency Ex. 10 at 3, 4, 5). In response, Intel informed Oshima that Intel could not lawfully ship the CPU–386s to North Korea through other countries (Agency Ex. 10 at 5). Oshima responded saying that he wanted to proceed with the purchase of the CPU–386s even through he knew that it was unlawful to export those microprocessors to North Korea under U.S. law (*Id.*). Oshima's primary concern seemed to be his liability under the law of Japan; he apparently discounted his liability under U.S. law and did not concern himself with Intel's liability (Agency Ex. 10 at 4, 5). At Garcia's suggestion, Oshima expressed a preference for obtaining a U.S. export license to give "the appearance that everything was legal," but again asserted that any such action must conform with Japanese law (Agency Ex. 10 at 5; Respondents' Statement of Defense, march 12, 1991, at 8).

Conservations and correspondence during the remainder of May addressed currency problems and delivery schedules. During a conversation taped May 7, 1990, Garcia informed Oshima that Intel could not ship directly to Peking, Bulgaria, or Moscow due to COCOM regulations. In response to Garcia's query of where Intel should deliver the product, Oshima advised that he would study the question (Agency Audiotape dated 5/7/90).

On June 6, 1990, Oshima informed Intel by facsimile letter that he would pay for the CPU–386s in cash and that he would travel to the United States to accept the first delivery of 1,000 units (Agency Ex. 11). In a telephone conversation held June 13, 1990, Garcia acknowledged receipt of the fax and objected to the quantity requested; an accord was reached that Oshima would take delivery of 10,000 units in the United States and that the price would be reduced to $190 (plus Garcia's $5 "commission") to pay for two "go-betweens" between Oshima and North Korea who also required "commissions" (Agency Audiotape dated 6/13/90). The presence of a "go-between" was also mentioned in a telephone conversation the next day (Agency Audiotape dated 6/14/90).

On June 15, 1990, Garcia communicated with Oshima by facsimile letter stating that he would be able to sell him the CPU–386s but that it would be very risky for him because the transaction was unlawful. Garcia recommended that "you and your business associates be discreet while visiting Intel in San Francisco and not mention North Korea to anyone else at Intel other than myself" (Agency Ex. 12).

On or about June 18, 1990, Oshima submitted a letter and facsimile purchase order to Intel for 120,000 CPU–386s, with a total purchase price of $23,400,000 (Agency Ex. 13]. The purchases were to span a seven-month period and the first delivery of 36,000 units was to occur on June 28, 1990 (*Id.*). In that letter of transmittal, Oshima stated, "As for your concern in the previous fax, we have decided to suspend that trade until conditions could be arranged to legally carry out the trade. So our now-undertaking does not include any risk that you are concerned about." (Agency Ex. 13; Respondent Ex. 5). Oshima did not indicate any new destination or identify new customers in the purchase order or correspondence. Oshima also reiterated his earlier assertion that he would pay cash for the first shipment of CPU–386s and to come to the United States to take possession of them, despite the fact that the quantity ordered would be "at least three full pallets, each four to five feet

[5] With the cost per unit quoted at $290, the total cost for 800,000 units, without fees, was in the order of $232,000,000. The "cash inducement" of $5 per unit amounted to $4,000,000 for 800,000 units!

[6] Several different interpreters were used in the series of telephone conversations; at times the interpreters were provided by Intel and at other times by Sound You.

high" (Agency Ex. 14).[7] In a telephone conversation held after the fax was sent, Oshima also told Garcia that he would bring the $180,000 "inducement" for Garcia and give it to him in "cash" (Agency Ex. 14 at 5).[8] This conversation is also the first time companies in Singapore and Taiwan are mentioned (Agency Ex. 14 at 3).

On June 20, 1990, Oshima stated that the would not be sending the CPU-386s to North Korea, but rather intended to ship them to customers in Taiwan and Singapore (Agency Ex. 15). Oshima still agreed to pay Garcia the solicited $180,000 cash inducement (36,000 times the $5.00 per unit commission), even though the CPU-386s could be shipped to Singapore and Taiwan legally; Oshima did request a reduction in the "fee" given the reduction in risk, but Garcia insisted that the inducement should be paid to compensate his having held back 50,000 units from other customers and his being "uncomfortable [sic] because he [Oshima] was talking about dealing with North Korea * * * (Agency Ex. 15 at 12). Oshima stated that payment for the CPU-386s would still be in cash (Agency Ex. 15, 16, 17). Intel requested details of the new customers during this telephone conversation in order to arrange shipment and to prepare shipping and licensing documentation (Agency Ex. 15 at 2). By facsimile letter dated June 22, 1990, Oshima provided the names, addresses, and allocation of shipment, information for customers in Singapore and Taiwan (Respondent Ex. 10). On June 28, Oshima again sent the same information by fax, adding that the "intended end use of all of these three customers is to manufacture personal computers" (Respondent Ex. 13). Pre-licensing inquiry checks into these companies revealed that they had no direct dealings with or knowledge of Oshima and The Sound You Company (Agency Ex. 3 at 4).[9] Thereafter followed letters from Respondent Oshima to Intel suggesting delivery dates and asking for information on how the efforts to get the license is proceeding. Oshima also asked Garcia to reserve a room at the Wells Fargo bank wherein the "cash" transaction could be carried out during a meeting that was scheduled to take place on June 26, 1990, but later postponed. On July 4, Respondent Oshima proposed a delivery schedule. (Respondent Ex. 15). On July 13, Oshima stated by fax that he hoped the transaction can be carried out. (Respondent Ex. 16). Then on July 17, in a letter to Intel, Respondent Oshima stated that three weeks had now passed, that he was "in big trouble", and that he hopes the transaction works out as was arranged on June 25. (Respondent Ex. 17). On July 20, Intel informed Oshima that it had received an unfavorable pre-license check from the Department of Commerce.

By July 20, 1990, the Agency has also learned that two of the end users named by Oshima had not ordered the CPU-386s or any other equipment from him or Sound You and informed Intel of this fact (Agency Ex. 18).[10] Therefore, Intel informed Oshima that it could not do business with him (*Id.*). On September 7, 1990, Intel broke off all further negotiations with the Respondents due to the unfavorable pre-license check from the Department of Commerce. (Respondent Ex. 22). On September 19, 1991, Oshima wrote to Intel saying he had received a letter from Intel advising him to contact the Department of Commerce (Agency Ex. 20). In that letter, Oshima writes, "However, it is impossible for me to gain any information without your cooperation. If your advise were not what pulls my leg, please cooperate me for the purpose of making unfavorable matters favorable." (*Id.*) Oshima also requests that Intel "please let me know your promotive suggestion concerning how to carry out our transaction even without an export license, which you had promised me." (*Id.*) There were two contacts from Respondents to Intel referenced in two letters dated October 25 and November 2 enclosing letters purportedly from Respondents' customers regarding their intended use of the microprocessors (Agency Ex. 21). The intended use statements were from WIN Technologies and Hsing Tech Enterprise Company, Ltd., two end users who had previously denied any contact with Sound You or Oshima (Agency Ex. 3 at 4, 6; Resp. Ex. 22, 23). The final contact was a letter dated February 5, 1991, in which Oshima stated that he had already sent documents to the Department of Commerce to clear the problems raised by Intel during a November 18th telephone conference and further stated," I believe we will be able to carry out the transaction without a license as Intel had promised in the early stages of their negotiations." (Agency Ex. 19). A search of U.S. Department of Commerce, Bureau of Export Administration licensing files covering the period of October 1, 1989 to July 18, 1991 uncovered no records relating to Oshima or Sound You (Agency Ex. 22).

On February 6, 1991, the charging letters were filed.

Law and Regulations

In the charging letter, the Agency cited sections 787.1(b), 787.2, 787.3(a), 787.4, and 787.5(b) of the Export Administration Regulations (currently codified at 15 CFR parts 768–799) (1990).

Section 787.1(b) provides:

No commodity or technical data subject to the Export Administration Regulations may be exported to any destination without a validated license issued by the Office of Export Licensing, except where the export is authorized by a general license or other authorization by the Office of Export Licensing.

Section 787.2 provides:

No person may cause, or aid, abet, counsel, command, induce, procure, or permit the doing of any act prohibited, or the omission of any act required, by the Export Administration Act or any regulation order, or license issued under the Act.

Section 787.3(a) provides in relevant part:

No person may do any act that solicits the commission of, or that constitutes an attempt to bring about, a violation of the Export Administration Act or any regulation, order, or license issued under the Act.

Section 787.4 of the Regulations provides:

(a) No person may order, buy, receive, conceal, store, use, sell, loan, dispose of, transfer, transport, finance, forward, or otherwise service, in whole or in part, any commodity or technical data exported or to be exported from the United States or which is otherwise subject to the Export Administration Regulations, with knowledge or reason to know that a violation of the Export Administration Act or any regulation, order, or license has occurred, is about to occur, or is intended to occur with respect to any transaction.

(b) No person may possess any commodities or technical data, controlled for

[7] Subsequent shipments were to be paid for by Letter of Credit.

[8] Because the violations are alleged to have occurred between February 20 and June 19, 1990, the evidence of acts and comments after the latter date is not received or considered as evidence of violations but rather shows the Respondents' frame of mind during the charged period.

[9] At the request of the Office of Export Enforcement, the Foreign Commercial Offices in Singapore and Taipei contacted the named consignees. Both Mr. Lee, President of WIN Technologies and Mr. Chiang, President of Hsing Tech Enterprises, told the commercial officers that they had not placed orders with Sound You and that they did not know Oshima. There was no response from the Foreign Commercial Post in Singapore as the World Wide Integrated Agencies. No evidence was submitted regarding the substance or direction of these inquiries or the general practice adopted for making prelicensing inquiries.

[10] The Agency acknowledges that it never learned whether the third end user was legitimate and Oshima did not allude to that entity again (Agency Ex. 3). The names and locations of the two Taiwanese firms that deny placing such orders, or even knowing Respondents are set forth in the record. No purpose would be served by specific identification here.

national security or foreign policy reasons under section 5 or 6 of the Act:

(1) With the intent to export such commodities or technical data in violation of the Export Administration Act or any regulation, order, license, or other authorization under the Act, or

(2) Knowing or having reason to believe that the commodities or technical data would be so exported.

Finally, the Regulations provide in part at § 787.5(b):

No person may engage in any transaction or take any other action, either independently or through any other person, with intent to evade the provisions of the Act, or any regulation, order, license, or other authorization issued under the Act.

Discussion

The Under Secretary's Decision to Vacate and Remand the Decision and Order of February 12, 1992 directed the undersigned to consider the evidence contained in the twenty-eight (28) documents submitted by Respondents and to reconsider the remaining evidence on the record in light of Respondents' submissions. Those submissions, in substantial part, relate to activities that occurred after the time period during which the alleged violations happened. The concerns raised more specifically in the body of the Under Secretary's Decision to Vacate and Remand will be addressed first.

The "language issue" expressed in the Decision and Order previously issued remains unchanged. There is concededly some variance between the spoken work and that which is set forth in the transcribed report (*e.g.* Agency Ex. 9, 10, 14, 15). With the exception of the June 18, 1990 telephone conference, the interpreters were provided by the Respondents. The assertion that the "skill and objectivity of the interpreters involved in this matter [may] have been less than adequate for a proceeding of this magnitude" by the Under Secretary is not borne out by any significant questioning of what was communicated. In addition, a company negotiating a $200 million deal hires inadequate translators at its own peril. Such concerns affect the weight of the evidence, but they do not eliminate it. Respondents cannot rely on a language barrier to shield them from civil liability in this context. The contact with Intel was made with the knowledge that a language difference existed; it was in Respondents' own interest to arrange for an able translator to assist in the negotiations. The record reflects that he did so.

Charge One alleges that the Respondents did an act that solicited the commission of a violation of the Export Administration Regulations. Solicitation is defined as "asking another person to commit an offense." W. LaFave and A. Scott, *Criminal Law*, section 58 at 418 (1972). For the offense of solicitation to be completed, the actor must entice, advise, incite, order or otherwise encourage another person to commit an offense. It is not necessary that the crime actually be completed. Based on the same events set forth *supra*, Charge Two alleges that the Respondents counseled, commanded or induced the doing of an act prohibited by the Regulations.

The evidence establishes that between February 20, 1990 and June 18, 1990, Oshima solicited Intel to obtain 800,000 CPU–386 microprocessors for a client in North Korea. Respondent Oshima was aware that "COCOM" regulations prohibited such shipments from Japan and his inquiry to Intel was made with the intent of evading Japanese law. Given the controls in place in Japan at the time of these events, Oshima could reasonably be considered to be on "inquiry notice" regarding United States controls of exports to communist countries. However, Oshima left his "inquiry" to Intel, asking the manufacturer to suggest a way to sell microprocessors in such a way that he might profit without violating Japanese law. Respondents' defenses generally reveal an exaggerated reliance on Intel for legal and transactional advice.[11] Such reliance may be characterized as either extraordinarily naive or duplicitous. This Tribunal concludes that given the facts and circumstances of this case, most notably the magnitude of the deal and the requests to a seller for advice (when that seller stands to sell $232 million of product!), Respondents acted duplicitously. Subsequent proclamations that "Our interests were strictly limited to legal transaction [sic]" were self-serving and contradictory of the Respondents' total actions (Resp. Ex. 3A, Statement of Defense at 9).

Oshima solicited Intel to obtain 800,000 CPU–386 microprocessors and export them to North Korea without a validated license. Intel's 80386 microprocessors are controlled under ECCN1566A and require a validated license for export to North Korea. During the earliest stages of his correspondence with Intel, Oshima was advised that Intel's 80386 [TM] microprocessors were regulated by the Export Regulations of the United States and that exports to North Korea were prohibited. Intel, in its March 13, 1990 letter and its April 2, 1990 letter expressed a willingness to conduct trade within the U.S. or to move the units to a delivery point mutually acceptable to Intel, Oshima, and the North Korean client. Oshima, on being advised that a direct shipment from Intel to North Korea would be illegal, suggested that Intel ship the units indirectly, via Moscow, Peking, Bulgaria, or Czechoslovakia. Oshima was also advised that such indirect shipments were illegal; yet, in the telephone conversation between Garcia and himself, he reiterated that the shipment would have to be made to Moscow, Peking or Hong Kong. Oshima clearly wanted to avoid involvement with Japanese applications of "COCOM regulations," but was will to let Intel run a risk regarding U.S. export regulations in exchange for a huge sale and a $5.00 per unit "commission." The on-going negotiations between Intel and Oshima, with the inducement and enticement of an expressed willingness to buy large quantities at a high price and with an additional commission constituted solicitation under § 787.3(a) of the Regulations. The repeated suggestion and instruction that delivery be made by a circuitous route constituted counseling and commanding the doing of an act prohibited by the Regulations, in violation of § 787.2 of the Regulations.

Charge Three alleges that Sound You and Oshima ordered 80386 microprocessors with knowledge or reason to know that a validated license was required by the United States for export. From the time Oshima first solicited Intel to sell him the CPU–386s, he knew that shipments to North Korea of those microprocessors were controlled. In fact, it was due to his experience with and knowledge of Japanese controls that he asked Intel to ship to North Korea directly. Respondents contend that a number of newspaper articles predicting the easing of these controls encouraged them to pursue the trade with North Korea (Resp. Ex. 1, 2, 3). The only interpretation to be given to those articles is that the controls were still in effect but they might be relaxed. Just as Respondents were encouraged to trade, they likewise should have remained wary of precisely which regulations would change. Respondents were not new to trade with North Korea (Agency Ex. 5). They were familiar with international shipments and the controls affecting communist states. Moreover, Oshima was repeatedly told by Garcia that the Regulations

[11] It is worth noting that at no time did Respondents request Intel's technical advice; indeed, when such advice was gratuitously offered, Respondents rejected it even though it was their first time trading with this type of technology. (Agency Ex. 9 at 5)

prohibited such exports. Nevertheless, Oshima was intent on obtaining the CPU-386s, offering cash incentives to Garcia if he would help him to do so, suggesting that he had lawyers working on a scheme whereby the CPU-386s could be shipped through other countries to North Korea.

Respondents argue that at no time did they ask that the microprocessors be shipped without a validated license. Indeed, nowhere in the record can Respondent Oshima be found to say (even through translation), "Ship the CPU without a validated license" or some similar statement. In fact, the purchase order specified that delivery was to be made in the United States. Respondents asked that delivery be made in the United States after informing Intel that the products were to go to North Korea and after having been informed that both direct and indirect shipments from Intel to North Korea were prohibited by U.S. Export Regulations. Respondent further argues that on June 18, 1990, when the purchase order was sent, the "customer" was no longer North Korea, but rather some companies in Taiwan and Singapore—countries to which the CPU could be shipped under general license instead of a validated license. In Support of the claim, Respondents note that Intel was given the names, addresses and intended use of the product for each new customer.

Respondents' version of events may be the way they would have me believe that the Export Regulations and related laws are supposed to work: an exporter of controlled U.S. products, after determining his liability under U.S. law, changes his plans to export a product illegally and instead finds new customers in other countries. Perhaps, in such a context, Respondents' initial illegal proposal should not taint subsequent legal proposals if all events were as Respondents represent. There are, however, a number of inconsistencies in Repondents' chronology of events that must be noted. After providing Intel with the new customer list following the June 18 purchase order, investigating inquiries by U.S. officials revealed that none of these companies was familiar with or had done business with Sound You or Oshima. Moreover, Sound You had never listed Singapore or Taiwan as one of its areas of trade. Respondent explained both these discrepancies by insisting that (1) in an effort to protect Intel, with whom negotiations had been time-consuming, and to be "fair" to Garcia, Respondents had struggled to find new clients after discovering that trade with North Korea would be illegal and (2) the reason given respecting why none of the companies named by Sound You and Oshima had heard of the Respondents was because they had dealt through a middleman—the mysterious J.K. Pen. Respondents' valiant efforts were only half-hearted. Despite assertedly finding clients in countries for which no validated license was required, no application was made by Respondents for any export license for these new clients (Agency Ex. 22). The introduction to the record of the existence of a middleman by the Respondents, which I find to be a false representation, was made after the Agency introduced evidence of its investigation of the clients. The letters which Oshima submitted as proof of business relationship with the "new clients" did not constitute valid orders; do not mention any such agency with Pen; and were untimely (Agency Ex. 22; Resp. Ex. 22, 23). Even Respondents' own evidence regarding this issue, tapes and transcripts of conversations between Sound You and the companies listed in the purchase order to Intel well after Respondents had been charged, shows only that some of the companies had tried to order microprocessors in 1990. Those contacted showed no familiarity or acquaintance with Respondents Oshima or Sound You (Resp. Ex. 26, 27).

The totality of the circumstances supports the conclusion that Respondents ordered 80386 microprocessors with knowledge or reason to know that a validated license was required by § 772.1(b) for the export from the United States to North Korea and that Respondents intended to export the CPU-386 without obtaining such validated license. Respondents planned to take delivery from Intel in the United States. Despite this, they did not attempt to obtain a license and instead presented evidence showing reliance on Intel to work with the Department of Commerce on their behalf. Viewed in the light most favorable to Respondents, the contention that they did not know the mechanisms for exporting goods from the U.S. and that they relied on Intel to provide this information is no defense. Ignorance of the law is no excuse. Respondents, like all others who export goods from the U.S., have a responsibility to plunge the byzantine depths of export regulations before claiming complete and total confusion. Had they taken delivery in the United States, they would have been the one to obtain an export license. The entire set of actions following the placement of the order on June 18, 1990 was but an attempt to purse the same illegal venture, dressing it as a silk purse.

Section 787.4 of the Regulations, provides that no person may order any commodity to be exported from the United States or which is subject to the Regulations with knowledge or reason to know that a violation of the Export Administration Regulations is about to occur or is intended to occur with respect to any transaction.

Charge four alleges that "with knowledge that such action was prohibited, Respondents hired lawyers and/or other persons to establish entities as intermediate destinations in other countries from which Respondents intended to ship the CPU-386s to North Korea without the required validated license" in an attempt to evade the Regulations, which is a violation of Section 787.5(b) of the Regulations. The evidence reflects that, on May 1, 1990, Oshima stated to Garcia during a telephone conversation that he had hired some attorneys to look into the possibility of setting up entities in countries to which the CPU-386s could be shipped under U.S. law, noting that they could then be reexported from those countries to North Korea. Respondent Oshima noted that no final determination had been made regarding the legality of such a scheme. The evidence also establishes that, in response, Garcia informed Oshima that Intel could not lawfully ship the CPU-386s to North Korea through other countries without an export license. Oshima responded by saying that he wanted the CPU-386s regardless of U.S. law. The Agency's position is that once Oshima realized that the Regulations would present an obstacle to his obtaining the CPU-386s he wanted for shipment to North Korea and acknowledged that he could not export through Japan because of the strict enforcement of COCOM controls, he represented that he consulted with counsel to devise a scheme to evade those Regulations by involving "dummy companies" in various countries and shipping the CPU-386s through those companies to North Korea.

The evidence in the record does not support the alleged violation of § 787.5(b) of the Regulations. Consultation with counsel regarding possibilities is not implementation. The only evidence in the record that directly support Agency's allegation is Respondent Oshima's remark that his lawyers were investigating the possibility. Agency presented no evidence to support the claim that the plan was implemented. No connection was drawn between Respondents and any company in the original proposed

shipping destinations of Moscow, Bulgaria, or Peking. The later companies introduced by Respondents in Singapore and Taiwan had not even heard of the Respondents; all indications suggests that these companies were independent of Oshima and Sound You.

Liability of Sound You Corporation

The liability of an agent acting within the scope of his employment is imputed to his employer, *Gleason* v. *Seaboard Airline Railway Co.*, 278 U.S. 349 (1929). It is also well-established that corporations act only through individuals and that the acts of an officer of a corporation may be imputed to the corporation when his conduct was in the course of his employment and for the benefit of the corporation. See, *e.g.*, *PTF Enterprises* v. *United States*, 558 F. Supp. 1317 (W.D. Mo. 1983), aff'd 716 F.2d 908 (8th Cir. 1983).

Oshima was the president of Sound You. He signed his name as president on the numerous pieces of correspondence generated in connection with this matter. Oshima's conduct was clearly within the course of his employment because, as the president of a firm involved in the export of items to North Korea, Oshima would certainly be authorized to negotiate a transaction like the one at issue here.

Moreover, Oshima's actions were also thought to be clearly for the benefit of the corporation, because any profit derived as a result would be profit for the corporation of which he was president. In its answer, Sound You did not allege that Oshima was not authorized to take the actions he took in this matter and that those actions did not benefit the corporation. Oshima's acts are fully imputable to Sound You.

The Remand

The Remand is based on the assertion that the decision is unsupported by substantial evidence on the record in that it: (1) Mischaracterizes certain evidence, (2) fails to address other evidence potentially favorable to Respondents, and (3) it effectively deprives Respondents of a full and fair opportunity to be heard. A number of other assertions in the Remand also deserve comment. These include: (a) Respondent Oshima's lack of fluency in English, (b) lack of skill and objectivity of interpreters, (c) failure to address evidence favorable to Respondent and mischaracterizing evidence, and (d) failure to cite, or respond to Respondents' 28 exhibits or arguments.

Persons who seek to violate the export and other laws do not broadcast their intentions in clear and explicit language. Here Intel officials perceived that inquiry was being made to effect an impermissible transfer of protected technology to North Korea. That responsible domestic company then gave appropriate notice to the Department of Commerce. Contacts were then monitored and it was concluded that a significant diversion of controlled items to North Korea was being attempted by Respondents. The story told in this record admits of no other conclusion.

A. The inquiry from Oshima to Intel clearly reflected his knowledge that export of CPU–386s to Communist countries was prohibited and that Respondents nevertheless sought to find a way to effect such export. Since Oshima alluded to COCOM it may be inferred that he knew what that term meant. Neither the Department nor a vendor has the burden of educating a prospective purchaser when no questions or inquiry are posed.

B. Respondent stated his understanding that CPU–386 could not be exported to Communist countries. The restatement of that conclusion by Intel constituted a clear and unequivocal reiteration of the fact.

C. The discussions respecting shipment through another country with subsequent transfer to North Korea was identified as an illegal diversion and clearly so understood by Mr. Oshima. The probability of reshipment to Russia was suggested by Mr. Oshima. The facts and understandings were neither misunderstood nor mischaracterized. The subsequent proposed to changes of consignees to three companies in the far east outside of North Korea rather than reflecting legitimate sales, warranted inference that a diversion through third parties and countries was in the offing. This was confirmed when two of the companies that were identified advised that no such orders had been placed.

The payment of a "cash inducement" of $5.00 per unit for ultimately 800,000 units was not found to be a "Commission" or "inducement". It was, and was found to be, an offer of a bribe for illegal acts. Plain and simple.

Conclusion

From the evidence presented by the Agency, I conclude that Respondent Yuzo Oshima and Respondent Sound You Company, Ltd., acting through individuals under its control, did commit three violations of the Export Administration Act and the Regulations promulgated thereunder, as set forth in Charges One, Two and Three of the charging letter. Evidence presented by the Agency regarding Charge Four, alleging the establishment of entities as intermediate destinations in other countries with the intent to evade the Regulations, as discussed above, does not support a finding of a violation on that charge.

Sanctions

I concur with Agency Counsel's proposal that the appropriate sanction in this matter for both Oshima and Sound You is denial of their U.S. export privileges for a period of 20 years.

The actions here involve microprocessor units that were controlled for reasons of national security and which were intended for North Korea, a country against which the United States has a virtual embargo. Oshima was told repeatedly that a validated export license was required to export the CPU–386s to North Korea. Even so, he systematically attempted to find a way to export those microprocessors without first obtaining such a license. Oshima first tried to get Intel to export the CPU–386s directly to North Korea, expressing his willingness to pay his point of contact with Intel a "cash" inducement to see that the export took place. That was not a bonus, bounty, or premium nor was it a kumshaw, baksheesh or dashee except in an American G.I. sense. To offer or agree to pay 5% of a $232 million gross price, as occurred here, was plainly and simply an agreement to bribe. Next, Oshima proposed to have Intel to export the CPU–386s to North Korea through other countries, going so far as to explore the possibility of setting up "dummy" companies to make the transaction look legitimate. Oshima also suggested, during later negotiations with Intel, that the CPU–386s were going to be exported to end users in Taiwan and Singapore. However, this was not true as is established by the fact that the companies his identified to Intel as end users in Taiwan denied any affiliation with Oshima or Sound You. The fact that Oshima was willing to pay an enormous amount in cash for the CPU–386s and his insistence on taking personal delivery of several large pallets of the CPU–386s also indicates that this was not a legitimate business transaction but rather was proposed to set up a blind trail to an impermissible destination to which the microprocessors could not be traced.

Order

I. For a period of 20 years from the date of the final Agency action, Respondent The Sound You Company, Ltd. and Yuzo Oshima with addresses at Tatsuno-Nishitenma Building 3–1–6, Nishitenma Kita-ku, Osaka, Japan and

all successors, assignees, officers, partners, representatives, agents, and employees hereby are denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction involving commodities or technical data exported from the United States in whole or in part, or to be exported, or that are otherwise subject to the Regulations.

II. Participation prohibited in any such transaction, either in the United States or abroad, shall include, but not be limited to, participation:

(i) As a party or as a representative of a party to a validated or general export license application;

(ii) In preparing or filing an export license application or request for reexport authorization, or any document to be submitted therewith;

(iii) In obtaining or using any validated or general export license or other export control document;

(iv) In carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported from the United States, or to be exported; and

(v) In the financing, forwarding, transporting, or other servicing of such commodities or technical data.

Such denial of export privileges shall extend to those commodities and technical data which are subject to the Act and the Regulations.

III. After notice and opportunity for comment, such denial of export privileges may be made applicable to any person, firm, corporation, or business organization with which the Respondent is now or hereafter may be related by affiliation, ownership, control, position of responsibility, or other connection in the conduct of trade or related services.

(IV) All outstanding individual validated export licenses in which Respondent(s) appears or participates, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Respondent(s)'s privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

V. No person, firm, corporation, partnership, or other business organization, whether in the United States or elsewhere, without prior disclosure to and specific authorization from the Office of Export Licensing, shall, with respect to commodities and technical data, do any of the following acts, directly or indirectly, or carry on negotiations with respect thereto, in any manner or capacity, on behalf of or in any association with any Respondent or any related person, or whereby any Respondent or any related person may obtain any benefit therefrom or have any interest or participation therein, directly or indirectly:

(i) Apply for, obtain, transfer, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to any export, reexport, transshipment, or diversion of any commodity or technical data exported in whole or in part, or to be exported by, to, or for any Respondent or related person denied export privileges, or

(ii) Order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance of otherwise service or participate in any export, reexport, transshipment or diversion of any commodity or technical data exported or to be exported from the United States.

This Order as affirmed or modified shall become effective upon entry of the Secretary's final action in this proceeding pursuant to the Act (50 U.S.C.A. app. § 2412(c)(1)).

Dated: July 30, 1993.

Hugh J. Dolan,

Administrative Law Judge.

To be considered in the 30 day statutory review process which is mandated by Section 13(c) of the Act, submissions must be received in the Office of the Under Secretary for Export Administration, Bureau of Export Administration, U.S. Department of Commerce, room H-3898B, 14th & Constitution Ave., N.W., Washington, DC, 20230, within 12 days. Replies to the other party's submission are to be made within the following 8 days. 15 CFR 788.23(b), 50 FR 53134 (1985). Pursuant to Section 13(c)(3) of the Act, the order of the final order of the Under Secretary may be appealed to the U.S. Court of Appeals for the District of Columbia within 15 days of its issuance. 15 CFR 788.23(e).

Certificate of Mailing

I certify that I have sent the attached document by courier Federal Express (International Shipment) to:

Yuzo Oshima, President, Pro Se The Sound You Company, Ltd., Tatsuno-Nishitenma Building 3-1-6, Nishitenma Kita-ku, Osaka, 530 Japan (Airbill No. 400-94226510)

I also certify that the attached document was delivered to:

Anthony Hicks, Esq., Office of Chief Counsel for Export Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Suite 3839, Washington, DC 20230.

Dated: July 30, 1993.

Lynn Clemons.

[FR Doc. 93-27873 Filed 11-16-93; 8:45 am]

BILLING CODE 3510-DT-M

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

AGENCY: International Trade Administration/Import Administration, Department of 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, findings and suspension agreements with October anniversary dates. In accordance with the Commerce Regulations, we are initiating those administrative reviews.

EFFECTIVE DATE: November 17, 1993.

FOR FURTHER INFORMATION CONTACT: Holly A. Kuga, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230, telephone: (202) 482-2104.

SUPPLEMENTARY INFORMATION:

Background

The Department of Commerce (the Department) has received timely requests, in accordance with §§ 353.22(a) and 355.22(a) of the Department's regulations, for administrative reviews of various antidumping and countervailing duty orders, findings, and suspension agreements with October anniversary dates.

Initiation of Reviews

In accordance with §§ 353.22(c) and 355.22(c) of the Department's regulations, we are initiating administrative reviews of the following antidumping and countervailing duty orders, findings, and suspension agreements. We intend to issue the final results of these reviews not later than October 31, 1994.

Antidumping duty proceedings	Period to be Previewed
Italy:	
Pressure Sensitive Plastic Tape	
A-475-059	
N.A.R. S.p.A	10/1/92-9/30/93
Japan:	
Tapered Roller Bearings and Parts Thereof, Finished and Unfinished; Tapered Roller Bearings and Certain Components Thereof	
A-588-604	
A-588-054	
NTN Corporation, Koyo Seiko Co., Ltd., NSK Ltd., Nachi-Fujikoshi, Fuji Heavy Ind., C. Itoh, Kawasaki Heavy Ind., Maekawa Bearings, MC International, Niigata Convertor Co., Ltd., Sumitomo Shoji, Suzuki Motor Co., Ltd., Honda Motor Co., Toyosha Co., Ltd., Yamaha Motor Co., Ltd., Daido Steel, Kawada Tekkosho, Asakawa Seisakusho, Fuserashi, Gotoh Nut Seisakusho, Hamanaka Nut, Ichiyanagi Tekko, Isshi Nut Ind., Kawada Tekko, Kinki Marusei Nut Kogyo Kumiai, Kitazawa Valve Co., Nittetsu Bolten, Shiga Bolt, Shinko Bolt, Sugira Seisakusho, Sumikin Seiatsu, Toyo Valve Co., Unytite Kogyo	10/1/92-9/30/93
Malaysia:	
Extruded Rubber Thread	
A-557-805	
Rubberflex SDN BHD	4/2/92-9/30/93
Suspension Agreements	
Kazakhstan:	
Uranium	
A-834-802	10/16/92-9/30/93
Kyrgyzstan:	
Uranium	
A-835-802	10/16/92-9/30/93
Russian Federation:	
Uranium	
A-821-802	10/16/92-9/30/93
Uzbekistan:	
Uranium	
A-844-802	10/16/92-9/30/93
Venezuela:	
Gray Portland Cement and Clinker	
A-307-803	
Corporation Venezolana de Cementos, S.A.C.A. Cementos Caribe, C.A.	2/1/92-1/31/93
Countervailing Duty Proceedings	
India:	
Certain Iron-Metal Castings	
C-533-063	1/1/92-12/31/92

Interested parties must submit applications for administrative protective orders in accordance with §§ 353.34(b) and 355.34(b) of the Department's regulations.

These initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1675(a)) and 19 CFR 353.22(c)(1) and 355.22(c)(1) (1993).

Dated: November 12, 1993.

Joseph A. Spetrini,

Deputy Assistant Secretary for Compliance.

[FR Doc. 93-28265 Filed 11-16-93; 8:45 am]

BILLING CODE 3510-DS-M

United States-Canada Free-Trade Agreement, Article 1904 Binational Panel Reviews; Corrected Notice of Opportunity To Apply to Serve on Binational Review Panels and Extraordinary Challenge Committees

AGENCY: United States-Canada Free-Trade Agreement, Binational Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Correction to Notice of opportunity to apply for inclusion on lists of candidates eligible to serve on binational panels and Extraordinary Challenge Committees convened pursuant to Chapter 19 of the United States—Canada Free-Trade Agreement (CFTA or Agreement) published in 58 FR 59705 on Wednesday, November 10, 1993. The notice omitted Annex A, the U.S. Article 1904 Roster List and Annex B, Final List of Candidates for Article 1904.13 Extraordinary Challenge Committees, both of which are published in this corrected notice. The text of the notice is otherwise unchanged.

SUMMARY: The CFTA provides for the establishment of binational panels to review final determinations in U.S. and Canadian antidumping and countervailing duty proceedings involving merchandise from Canada or the United States. The CFTA also provides for review of binational panel decisions, in limited circumstances, by Extraordinary Challenge Committees. Pursuant to the CFTA and its implementing legislation, USTR maintains lists of candidates eligible to serve on Chapter 19 panels and Extraordinary Challenge Committees. USTR and the interagency group established pursuant to section 405 of the United States—Canada Free-Trade Agreement Implementation Act of 1988, Public Law 100-449 (the Act), invite eligible citizens of the United States to apply for inclusion on these candidate lists.

DATES: Eligible citizens are encouraged to supply a resume to the office indicated below by November 24, 1993 in order to be considered for the 1994 candidate lists.

ADDRESSES: Section 405 Group, room 223, Office of the United States Trade

Representative, 600 17th Street NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Dorothy Balaban, Legal Assistant, Office of the General Counsel, Office of the United States Trade Representative, (202) 395-3432.

SUPPLEMENTARY INFORMATION: Chapter 19 of the CFTA substituted binational panel review for judicial review by national courts of final determinations in antidumping and countervailing duty proceedings. Chapter 19 panels review determinations to decide whether the competent investigating authority complied with the relevant national laws, applying the standard of review that would otherwise have been applied by a national court in comparable circumstances.

Since the implementation of the CFTA, 46 binational panel proceedings have been convened pursuant to Chapter 19. 30 of these panel proceedings have involved determinations by U.S. investigating authorities; 16 have involved Canadian determinations. Six of these panels have reviewed countervailing duty determinations; 23 proceedings have involved antidumping duty determinations; 14 have involved injury determinations; and three have involved scope determinations. 21 panel proceedings are currently pending.

Binational panels convened pursuant to Chapter 19 consist of five independent experts. A separate panel is formed for each challenged determination. The panelists are nominated by the United States and Canada from lists of eligible candidates developed in advance pursuant to the requirements of the CFTA and the Act. The majority of individuals on each panel must be attorneys.

Panel decisions are not subject to appeal, but may be reviewed in limited circumstances by a binational Extraordinary Challenge Committee. Extraordinary Challenge Committees are composed of current and former Federal judges. To date, two panel decisions has been considered by Extraordinary Challenge Committees.

Section 405 of the Act establishes an interagency group, chaired by USTR, to propose lists of candidates eligible to serve on Chapter 19 panels and Extraordinary Challenge Committees. After consulting with the Senate Committee on Finance and the House Committee on Ways and Means, USTR approves a final candidate list. Pursuant to section 405, the candidate list may be modified twice each year.

The current U.S. list of candidates eligible to serve on chapter 19 binational panels is set forth in Annex A to this notice. The current U.S. list of candidates eligible to serve on Extraordinary Challenge Committees is set forth in Annex B.

Criteria for Eligibility

Chapter 19 establishes specific criteria for panel selection. First, candidates must be U.S. or Canadian citizens and not affiliated with either government. They also must be of good character, high standing and repute, and must be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law. Although the Act precludes active judges from serving on Chapter 19 panels, former judges are encouraged to apply.

Section 405 of the Act establishes further requirements for the selection of eligible U.S. candidates to serve on Chapter 19 binational panels. Candidates are to be selected without regard to political affiliation. Individuals who would be prevented by conflicts of interest from serving on many panels convened pursuant to Chapter 19 may be excluded from the final candidate list. Not all individuals included on the final candidate list necessarily will be selected for panels.

Remuneration

The two governments share equally in compensating panel members. The amount of remuneration varies according to the exchange rate and is currently $320 per day, plus reasonable expenses. Although panelists will receive remuneration from the United States, section 405(b) of the Act specifies that panelists are not considered employees of the Government.

Procedures for Application

Interested parties are encouraged to supply one copy of their resumes to Section 405 Group, room 223, Office of the United States Trade Representative, 600 17th Street NW., Washington, DC 20506. Upon receipt of resumes, the Section 405 Group may send a letter requesting further information in order to allow a thorough evaluation of the application.

The applicant's resume and any supplementary information provided by an applicant will be used by USTR for the purpose of selecting candidates for the final lists and for nominating candidates for particular panels or committees. Further information concerning potential conflicts may be requested, on an as needed basis, from individuals prior to final selection or appointment to particular panels or committees. This information will be provided to the Government of Canada upon the nomination of candidates to particular panels or committees.

Current Members

Current members of the candidate lists need not reapply in response to this notice. Current members who are no longer interested in serving on panels or committees should notify USTR so that they can be removed from the list. In the absence of such notice, USTR will assume that the individual wishes to remain on the list. Individuals who have previously applied but have not been selected for a final candidate list may reapply.

False Statements

Pursuant to section 405(a)(2)(C) of the Act, false statements by an applicant to USTR regarding the applicant's personal or professional qualifications, or financial or other relevant interests, that bear upon the applicant's suitability for placement on a list of eligible candidates or appointment to panels or committees are subject to criminal sanctions under 18 U.S.C. 10901.

Dated: November 12, 1993.

James R. Holbein,

United States Secretary, FTA Binational Secretariat.

Annex A—United States Article 1904 Roster List

Bruce Aitken
Bill Alberger
William P. Alford
Steven W. Baker
John H. Barton
David E. Birenbaum
Lawrence J. Bogard
James R. Cannon
Michael J. Coursey
Gail T. Cumins
Joel Davidow
Joseph F. Dennin
Harry B. Endsley
Howard N. Fenton, III
Harry First
Peter J. Gartland
Timothy A. Harr
David Hartquist
C. Michael Hathaway
Mark D. Herlach
F. Lynn Holec
O. Thomas Johnson, Jr.
Alan G. Kashdan
Harold H. Koh
Daniel M. Kolkey
Jane C. Luxton
Robert E. Lutz, II
Michael P. Mabile
W. Clark McFadden, II
Brian E. McGill
John J. Miller, CPA
Carol A. Mitchell
Philip D. O'Neill, Jr.
Daniel G. Partan
Kathleen F. Patterson

John M. Peterson
Morton Pomeranz
Lauren D. Rachlin
John A. Ragosta
Kenneth B. Reisenfeld
W. Michael Reisman
Robert E. Ruggeri
Francis J. Sailer
Michael Sandler
Leonard E. Santos
Tom M. Schaumberg
Thomas J. Schoenbaum
Melvin S. Schwechter
Saul L. Sherman
Mary T. Staley
Eugene L. Stewart
Terence P. Stewart
The Honorable Paula Stern
Steven S. Weiser
Gary M. Welsh

Annex B—Final List of Candidates for Article 1904.13 Extraordinary Challenge Committees

Honorable Arlin M. Adams
Honorable Patricia J. Boyle
Honorable Susan Getzendanner
Honorable Lynn C. Higby
Honorable Frederick B. Lacey
Honorable Miles W. Lord
Honorable Frank J. McGarr
Honorable Thomas R. McMillen
Honorable James R. Miller, Jr.
Honorable Robert J. O'Connor
Honorable John A. Reed
Honorable Charles B. Renfrew
Honorable Philip W. Tone
Honorable Harold R. Tyler, Jr.
Honorable Malcolm R. Wilkey

[FR Doc. 93–28266 Filed 11–16–93; 8:45 am]
BILLING CODE 3510–GT–M

Lehigh University, et al.; Consolidated Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision consolidated pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instruments described below, for such purposes as each is intended to be used, is being manufactured in the United States.

Docket Number: 93–095. *Applicant:* Lehigh University, Bethlehem, PA 18015. *Instrument:* Gas Source Isotope Ratio Mass Spectrometer, Model MAT 252. *Manufacturer:* Finnigan MAT, Germany. *Intended Use:* See notice at 58 FR 47887, September 13, 1993. *Reasons:* The foreign instrument provides internal precisions of 0.1 per mil for 1.0 x 10^7 to 1.0 x 10^4 mole samples of both N_2 and CO_2 in dual-inlet continuous viscous flow mode.

Docket Number: 93–097. *Applicant:* University of Oklahoma, Norman, OK 73019. *Instrument:* Gas Chromatograph Isotope Ratio Mass Spectrometer, Model MAT 252. *Manufacturer:* Finnigan MAT, Germany. *Intended Use:* See notice at 58 FR 47887, September 13, 1993. *Reasons:* The foreign instrument provides: (1) An internal precision of 0.005 per mil for 3 bar µl samples of CO_2, (2) two ion multicollector systems and (3) an all metal inlet with gold seals.

Docket Numbers: 93–100 and 93–101. *Applicant:* University of Michigan, Ann Arbor, MI 48109–1063. *Instruments:* (2) Used Rare Gas Mass Spectrometers and Accessories, Models VG 1200S and VG 3000. *Manufacturer:* Fisons, United Kingdom. *Intended Use:* See notice at 58 FR 49023, September 21, 1993. *Reasons:* The Model VG 1200S instrument provides a sensitivity of 1 x 10^{-3} amps/Torr for Ar and low background (partial pressure at mass 36 is less than 3 x 10^{-13} cm^3 STP). The Model VG 3000 instrument provides detection and measurement of ion beams of 6 x 10^{-16} amps with a 3:1 signal/noise ratio and measurement of helium isotopic compositions ($^3He/^4He$) to 5.0%.

The capability of each of the foreign instruments described above is pertinent to each applicant's intended purposes. We know of no instrument or apparatus being manufactured in the United States which is of equivalent scientific value to any of the foreign instruments.

Frank W. Creel,
Director, Statutory Import Programs Staff.
[FR Doc. 93–28300 Filed 11–16–93; 8:45 am]
BILLING CODE 3510–DS–F

University of Arkansas et al.; Consolidated Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision consolidated pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instruments described below, for such purposes as each is intended to be used, is being manufactured in the United States.

Docket Number: 93–096. *Applicant:* University of Arkansas, Fayetteville, AR 72701.

Docket Number: 93–098. *Applicant:* Oklahoma State University, Stillwater, OK 74078.

Instrument: Tandem Fabry-Perot Interferometers and Accessories.

Manufacturer: J.R. Sandercock, Switzerland.

Intended Use: See notices at 58 FR 47887, September 13, 1993 and 58 FR 49023, September 21, 1993. *Reasons:* The foreign instrument provides a 3-pass dynamically isolated tandem system with contrast in the range 10^9 to 10^{11} and optimal dynamic range with minimal draft. *Advice Received From:* National Institute of Standards and Technology, October 15, 1993.

The National Institute of Standards and Technology advises that (1) the capabilities of each of the foreign instruments described above are pertinent to each applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value for the intended use of each instrument.

We know of no other instrument or apparatus being manufactured in the United States which is of equivalent scientific value to the foreign instruments.

Frank W. Creel,
Director, Statutory Import Programs Staff.
[FR Doc. 93–28302 Filed 11–16–93; 8:45 am]
BILLING CODE 3510–DS–F

University of California; Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States.

Docket Number: 92–169R. *Applicant:* University of California, Los Alamos, NM 87545. *Instrument:* UHV Scanning Tunneling Microscope. *Manufacturer:* Omicron Associates, Germany. *Intended Use:* See notice at 58 FR 4978, January 19, 1993. *Reasons:* The foreign

instrument provides: (1) In-situ tip exchange, (2) guaranteed atomic resolution on gold and (3) an additional substrate electrode and preamp for ballistic electron emission microscopy capability.

The capabilities of the foreign instrument described above are pertinent to the applicant's intended purpose and we know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Frank W. Creel,

Director, Statutory Import Programs Staff.

[FR Doc. 93-28301 Filed 11-16-93; 8:45 am]

BILLING CODE 3510-DS-F

Minority Business Development Agency

[I.D. No. 06-10-94004-01]

Business Development Center Applications: Little Rock MBDC

AGENCY: Minority Business Development Agency, DOC.

ACTION: Notice.

SUMMARY: In accordance with Executive Order 11625, the Minority Business Development Agency (MBDA) is soliciting competitive applications under its Minority Business Development Center (MBDC) program. The total cost of performance for the first budget period (12 months) from April 1, 1994 to March 31, 1995 is estimated at $169,125. The application must include a minimum cost-share of 15% of the total project cost through non-Federal contributions. Cost-sharing contributions may be in the form of cash contributions, client fees, in-kind contributions or combinations thereof. The MBDC will operate in the Little Rock, Arkansas MSA geographic service area.

The funding instrument for this project will be a cooperative agreement. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The MBDC program provides business development services to the minority business community to help establish and maintain viable minority businesses. To this end, MBDA funds organizations to identify and coordinate public and private sector resources on behalf of minority individuals and firms; offer a full range of management and technical assistance to minority entrepreneurs; and to serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated on the following criteria: the experience and capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodologies) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to any one evaluation criteria category to be considered programmatically acceptable and responsive. Those applications determined to be acceptable and responsive will then be evaluated by the Director of MBDA. Final award selections shall be based on the number of points received, the demonstrated responsibility of the applicant, and the determination of those most likely to further the purpose of the MBDA program. Negative audit findings and recommendations and unsatisfactory performance under prior Federal awards may result in an application not being considered for award. The applicant with the highest point score will not necessarily receive the award.

MBDCs shall be required to contribute at least 15% of the total project costs through non-Federal contributions. To assist in this effort, the MBDCs may charge client fees for management and technical assistance (M&TA) rendered. Based on a standard rate of $50 per hour, the MBDC will charge client fees at 20% of the total cost for firms with gross sales of $500,000 or less, and 35% of the total cost for firms with gross sales of over $500,000.

Quarterly reviews culminating in year-to-date evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the total discretion of MBDA based on such factors as the MBDC's performance, the availability of funds and Agency priorities.

DATES: The closing date for applications is December 28, 1993. Applications must be postmarked on or before December 28, 1993.

ADDRESSES: Dallas Regional Office, 1100 Commerce St., room 7B23, Dallas, Texas 75242, (214) 767-8001.

FOR FURTHER INFORMATION CONTACT: Melda Cabrera, Regional Director, Dallas Regional Office, telephone (214) 767-8001.

A pre-bid conference will be held on December 10, 1993 in the Earl Cabell Federal Building, room 7B23, on 1100 Commerce Street, Dallas, Texas at 10 a.m.

SUPPLEMENTARY INFORMATION: Anticipated processing time of this award is 120 days. Executive order 12372, "Intergovernmental Review of Federal Programs," is not applicable to this program. The collection of information requirements for this project have been approved by the Office of Management and Budget (OMB) and assigned OMB control number 0640-0006. Questions concerning the preceding information can be answered by the contact person indicated above, and copies of application kits and applicable regulations can be obtained at the above address.

Pre-Award Costs—Applicants are hereby notified that if they incur any costs to an award being made, they do solely at their own risk of not being reimbursed by the Government. Notwithstanding any verbal assurance that an applicant may have received, there is no obligation on obligation on the part of the Department of Commerce to cover pre-award costs. Awards under this program shall be subject to all Federal laws, and Federal and Departmental regulations, policies, and procedures applicable to Federal financial assistance awards.

Outstanding Account Receivable—No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either the delinquent account is paid in full, repayment schedule is established and at least one payment is received, or other arrangements satisfactory to the Department of Commerce are made.

Name Check Policy—All non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing criminal charges such as fraud, theft, perjury or other matters which significantly reflect on the applicant's management honesty or financial integrity.

Award Termination—The Departmental Grants Office may terminate any grant/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the award recipient has failed to comply with the conditions of the grant/

cooperative agreement. Examples of some of the conditions which can cause termination are failure to meet cost-sharing requirements; unsatisfactory performance of the MBDC work requirements; and reporting inaccurate or inflated claims of client assistance. Such inaccurate or inflated claims may be deemed illegal and punishable by law.

False Statements—A false statement on an application for Federal financial assistance is grounds for denial or termination of funds, and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001.

Primary Applicant Certifications—All primary applicants must submit a completed Form CD-511, "Certification Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying."

Nonprocurement Debarment and Suspension—Prospective participants (as defined at 15 CFR part 26, section 105) are subject to 15 CFR part 26, "Nonprocurement Debarment and Suspension" and the related section of the certification form prescribed above applies.

Drug Free Workplace—Grantees (as defined at 15 CFR part 26, section 605) are subject to 15 CFR part 26, subpart F, "Governmentwide Requirements for Drug-Free Workplace (Grants)" and the related section of the certification form prescribed above applies.

Anti-Lobbying—Persons (as defined at 15 CFR part 28, section 105) are subject to the lobbying provisions of 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions," and the lobbying section of the certification from prescribed above applies to applications/bids for grants, cooperative agreements, and contacts for more than $100,000.

Anti-Lobbying Disclosures—Any applicant that has paid or will pay for lobbying using any funds must submit an SF-LLL, "Disclosure of Lobbying Activities," as required under 15 CFR part 28, appendix B.

Lower Tier Certifications—Recipients shall require applications/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD-512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying" and disclosure form, SF-LLL, "Disclosure of Lobbying Activities." Form CD-512 is intended for the use of recipients and should not be transmitted to DOC. SF-LLL submitted by any tier recipient or subrecipient should be submitted to DOC in accordance with the instructions contained in the award document.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

Dated: November 8, 1993.

Melda Cabrera,

Regional Director, Dallas Regional Office.

[FR Doc. 93-28188 Filed 11-16-93; 8:45 am]

BILLING CODE 3510-21-M

[I.D. No. 06-10-94001-01]

Business Development Center Applications: Shreveport MBDC

AGENCY: Minority Business Development Agency, DOC.

ACTION: Notice.

SUMMARY: In accordance with Executive Order 11625, the Minority Business Development Agency (MBDA) is soliciting competitive applications under its Minority Business Development Center (MBDC) program. The total cost of performance for the first budget period (12 months) from April 1, 1994 to March 31, 1995 is estimated at $169,125. The application must include a minimum cost-share of 15% of the total project cost through non-Federal contributions. Cost-sharing contributions may be in the form of cash contributions, client fees, in-kind contributions or combinations thereof. The MBDC will operate in the Shreveport, Louisiana MSA geographic service area.

The funding instrument for this project will be a cooperative agreement. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The MBDC program provides business development services to the minority business community to help establish and maintain viable minority businesses. To this end, MBDA funds organizations to identify and coordinate public and private sector resources on behalf of minority individuals and firms; offer a full range of management and technical assistance to minority entrepreneurs; and to serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated on the following criteria: The experience and capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodologies) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to any one evaluation criteria category to be considered programmatically acceptable and responsive. Those applications determined to be acceptable and responsive will then be evaluated by the Director of MBDA. Final award selections shall be based on the number of points received, the demonstrated responsibility of the applicant, and the determination of those most likely to further the purpose of the MBDA program. Negative audit findings and recommendations and unsatisfactory performance under prior Federal awards may result in an application not being considered for award. The applicant with the highest point score will not necessarily receive the award.

MBDCs shall be required to contribute at least 15% of the total project costs through non-Federal contributions. To assist in this effort, the MBDCs may charge client fees for management and technical assistance (M&TA) rendered. Based on a standard rate of $50 per hour, the MBDC will charge client fees at 20% of the total cost for firms with gross sales of $500,000 or less, and 35% of the total cost for firms with gross sales over $500,000.

Quarterly reviews culminating in year-to-date evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the total discretion of MBDA based on such factors as the MBDC's performance, the availability of funds and Agency priorities.

DATES: The closing date for applications is December 28, 1993. Applications must be postmarked on or before December 28, 1993.

ADDRESSES: Dallas Regional Office, 1100 Commerce St., room 7B23, Dallas, Texas 75242, (214) 767-8001.

FOR FURTHER INFORMATION CONTACT: Melda Cabrera, Regional Director, Dallas Regional Office, telephone (214) 767-8001.

A pre-bid conference will be held on December 10, 1993 in the Earl Cabell Federal Building, room 7B23, on 1100 Commerce Street, Dallas, Texas at 10 a.m.

SUPPLEMENTARY INFORMATION: Anticipated processing time of this

award is 120 days. Executive Order 12372, "Intergovernmental Review of Federal Programs," is not applicable to this program. The collection of information requirements for this project have been approved by the Office of Management and Budget (OMB) and assigned OMB control number 0640–0006. Questions concerning the preceding information can be answered by the contact person indicated above, and copies of application kits and applicable regulations can be obtained at the above address.

Pre-Award Costs—Applicants are hereby notified that if they incur any costs to an award being made, they do solely at their own risk of not being reimbursed by the Government. Notwithstanding any verbal assurance that an applicant may have received, there is no obligation on the part of the Department of Commerce to cover pre-award costs. Awards under this program shall be subject to all Federal laws, and Federal and Departmental regulations, policies, and procedures applicable to Federal financial assistance awards.

Outstanding Account Receivable—No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either the delinquent account is paid in full, repayment schedule is established and at least one payment is received, or other arrangements satisfactory to the Department of Commerce are made.

Name Check Policy—All non-profit and for-profit applicants are subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing criminal charges such as fraud, theft, perjury or other matters which significantly reflect on the applicant's management honesty or financial integrity.

Award Termination—The Department Grants Office may terminate any grant/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the award recipient has failed to comply with the conditions of the grant/cooperative agreement. Examples of some of the conditions which can cause termination are failure to meet cost-sharing requirements; unsatisfactory performance of the MBDC work requirements; and reporting inaccurate or inflated claims of client assistance. Such inaccurate or inflated claims may be deemed illegal and punishable by law.

False Statements—A false statement on an application for Federal financial assistance is grounds for denial or termination of funds, and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001.

Primary Applicant Certifications—All primary applicants must submit a completed Form CD–511, "Certification Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying."

Nonprocurement Debarment and Suspension—Prospective participants (as defined at 15 CFR part 26, section 105) are subject to 15 CFR Part 26, "Nonprocurement Debarment and Suspension" and the related section of the certification form prescribed above applies.

Drug Free Workplace—Grantees (as defined at 15 CFR part 26, Section 605) are subject to 15 CFR part 26, subpart F, "Governmentwide Requirements for Drug-Free Workplace (Grants)" and the related section of the certification form prescribed above applies.

Anti-Lobbying—Persons (as defined at 15 CFR part 28, section 105) are subject to the lobbying provisions of 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions," and the lobbying section of the certification form prescribed above applies to applications/bids for grants, cooperative agreements, and contacts for more than $100,000.

Anti-Lobbying Disclosures—Any applicant that has paid or will pay for lobbying using any funds must submit an SF–LLL, "Disclosure of Lobbying Activities," as required under 15 CFR part 28, appendix B.

Lower Tier Certifications—Recipients shall require applications/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD–512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying" and disclosure form, SF–LLL, "Disclosure of Lobbying Activities." Form CD–512 is intended for the use of recipients and should not be transmitted to DOC. SF–LLL submitted by any tier recipient or subrecipient should be submitted to DOC in accordance with the instructions contained in the award document.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

Dated: November 8, 1993.

Melda Cabrera,

Regional Director, Dallas Regional Office.

[FR Doc. 93–28189 Filed 11–16–93; 8:45 am]

BILLING CODE 3510–21–M

National Oceanic and Atmospheric Administration

Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Public Hearing

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

ACTION: Notice of a public hearing.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene a public hearing on draft Amendment 7 to the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic. Amendment 7 proposes to: (1) Suballocate the Eastern zone commercial quota for Gulf group king mackerel equally between the east and west coasts of Florida (the North area and the South/West area are separated at the boundary between Florida's Dade and Monroe counties); and (2) further suballocate the South/West area quota between net and troll fishermen.

DATES: Written comments on the proposed action must be received by January 3, 1994. The hearing is scheduled for Tuesday, December 7, 1993, from 7 p.m., to 10 p.m.

ADDRESSES: Comments should be addressed to Terrance R. Leary, Gulf of Mexico Fishery Management Council, 5401 West Kennedy Boulevard, suite 331, Tampa, FL, 33609. The hearing will be held in the Conference Room at the NMFS Panama City Laboratory, 3500 Delwood Beach Road, Panama City, Florida (904–234–6541).

FOR FURTHER INFORMATION CONTACT: Terrance R. Leary, 813–228–2815.

SUPPLEMENTARY INFORMATION: The hearing is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aides should be directed to Beverly Badillo at the above Council address by November 30, 1993.

Dated: November 10, 1993.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 93–28177 Filed 11–16–93; 8:45 am]

BILLING CODE 3510–22–M

National Technical Information Service

Prospective Grant of Exclusive Patent License

This is notice in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i) that the National Technical Information Service (NTIS), U.S. Department of Commerce, is contemplating the grant of an exclusive license in the United States to practice the invention embodied in U.S. Patent No. 4,973,194 (Serial No. 7-229,935), titled "Method for Burial and Isolation of Waste Sludge," to Del Mar Environmental Technologies, Inc., a company in the process of incorporating and organizing operations in the State of Virginia. The patent rights in this invention have been assigned to the United States of America.

The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within sixty days from the date of this published Notice, NTIS receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

The invention describes a method of disposal of waste solid material in an underwater geologic formation on the continental margins which comprises the steps of: Drilling a large diameter hole into the geologic formation to a depth of several hundred feet in a single stroke operation; depositing a slug of a paste of waste material into the bottom of the hole thereby burying the slug; and permitting the geologic formation adjacent to the hole above the buried slug to fill the hole above the slug, thereby sealing the buried slug in the geologic formation. A continuous slug of waste material can be used, or the waste material can be formed into discrete charges of material.

The availability of Patent No. 4,973,194 for licensing was published in the **Federal Register**, Vol. 56, No. 21, p. 3822 (January 31, 1991). A copy of the above-identified patent may be purchased from the Commissioner of Patents and Trademarks, Box 9, Washington, DC 20231 for $3.00 (payable by check or money order).

Inquires, comments and other materials relating to the contemplated license must be submitted to Neil L. Mark, Office of Federal Patent Licensing, NTIS, Box 1423, Springfield, VA 22151. Properly filed competing applications received by the NTIS in response to this Notice will be considered as objections to the grant of the contemplated license.

Douglas J. Campion,

Acting Director, Office of Federal Patent Licensing.

[FR Doc. 93-28161 Filed 11-16-93; 8:45 am]

BILLING CODE 3510-04-M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Bangladesh

November 10, 1993.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs increasing limits.

EFFECTIVE DATE: November 17, 1993.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927-5850. For information on embargoes and quota re-openings, call (202) 482-3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limits for Categories 334 and 634 are being increased for carryforward.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 57 FR 54976, published on November 23, 1992). Also see 57 FR 60174, published on December 18, 1992.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 10, 1993.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on December 11, 1992, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in Bangladesh and exported during the twelve-month period which began on February 1, 1993 and extends through January 31, 1994.

Effective on November 17, 1993, you are directed to amend further the directive dated December 11, 1992 to increase the limits for the following categories, as provided under the terms of the current bilateral agreement between the Governments of the United States and the People's Republic of Bangladesh:

Category	Adjusted twelve-month limit [1]
334	112,321 dozen.
634	392,958 dozen.

[1] The limits have not been adjusted to account for any imports exported after January 31, 1993.

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,

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 93-28296 Filed 11-16-93; 8:45 am]

BILLING CODE 3510-DR-F

Adjustment of Import Limits for Certain Man-Made Fiber Textile Products Produced or Manufactured in India

November 10, 1993.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: November 17, 1993.

FOR FURTHER INFORMATION CONTACT: Jennifer Tallarico, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4212. For information on the

quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–6705. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limit for Category 641 is being increased by application of swing, reducing the limit for Categories 647/648 to account for the increase.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 57 FR 54976, published on November 23, 1992). Also see 57 FR 56328, published on November 27, 1992.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 10, 1993.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on November 20, 1992, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, man-made fiber, silk blend and other vegetable fiber textile products, produced or manufactured in India and exported during the twelve-month period which began on January 1, 1993 and extends through December 31, 1993.

Effective on November 17, 1993, you are directed to amend further the directive dated November 20, 1992 to adjust the limits for the following categories, as provided under the terms of the current bilateral agreement between the Governments of the United States and India:

Category	Adjusted twelve-month limit [1]
Levels in Group I:	
641	895,965 dozen.
647/648	282,444 dozen.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1992.

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,

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 93–28299 Filed 11–16–93; 8:45 am]

BILLING CODE 3510–DR–F

Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in the Philippines

November 10, 1993.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: November 17, 1993.

FOR FURTHER INFORMATION CONTACT: Jennifer Aldrich, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–6713. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limits for certain categories are being adjusted for special shift.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 57 FR 54976, published on November 23, 1992). Also see 57 FR 53473, published on November 10, 1992.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 10, 1993.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on November 4, 1992, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool and man-made fiber textile products and silk blend and other vegetable fiber apparel, produced or manufactured in the Philippines and exported during the twelve-month period which began on January 1, 1993 and extends through December 31, 1993.

Effective on November 17, 1993, you are directed to amend further the directive dated November 4, 1992 to adjust the limits for the following categories, as provided under the terms of the current bilateral agreement between the Governments of the United States and the Philippines:

Category	Adjusted twelve-month limit [1]
Levels in Group I:	
335	148,220 dozen.
634	364,952 dozen.
635	290,385 dozen.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1992.

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,

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 93–28298 Filed 11–16–93; 8:45 am]

BILLING CODE 3510–DR–F

Adjustment of an Import Limit for Certain Wool Textile Products Produced or Manufactured in Poland

November 10, 1993.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs increasing a limit.

EFFECTIVE DATE: November 17, 1993.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce,

(202) 482–4212. For information on the quota status of this limit, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–5850. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limit for Category 443 is being increased for carryforward.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 57 FR 54976, published on November 23, 1992). Also see 57 FR 48022, published on October 21, 1992.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 10, 1993.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on October 15, 1992, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool and man-made fiber textile products, produced or manufactured in Poland and exported during the twelve-month period which began on January 1, 1993 and extends through December 31, 1993.

Effective on November 17, 1993, you are directed to amend the directive dated October 15, 1992 to increase the limit for Category 443 to 239,673 numbers [1], as provided under the terms of the current bilateral agreement between the Governments of the United States and the Republic of Poland.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

[1] The limit has not been adjusted to account for any imports exported after December 31, 1992.

Sincerely,

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 93–28297 Filed 11–16–93; 8:45 am]

BILLING CODE 3510–DR–F

Request for Public Comments on Bilateral Textile Consultations With the Government of the People's Republic of China on Certain Silk Blend and Other Vegetable Fiber Textile Products

November 12, 1993.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing a limit.

EFFECTIVE DATE: November 19, 1993.

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of this limit, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–6703. For information on embargoes and quota re-openings, call (202) 482–3715. For information on categories on which consultations have been requested, call (202) 482–3740.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

On October 29, 1993, under the terms of the Bilateral Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textile Agreement of February 2, 1988, as amended, between the Governments of the United States and the People's Republic of China, the United States Government requested consultations with the Government of the People's Republic of China with respect to silk blend and other vegetable fiber luggage in Category 870.

The U.S. Government has decided to implement a limit for the prorated period beginning on October 29, 1993 and extending through December 31, 1993.

A summary market statement concerning Category 870 follows this notice.

Anyone wishing to comment or provide data or information regarding the treatment of Category 870, under the agreement with the the Government of the People's Republic of China, or to comment on domestic production or availability of products included in Category 870, is invited to submit 10 copies of such comments or information to Rita D. Hayes, Chairman, Committee for the Implementation of Textile Agreements, U.S. Department of Commerce, Washington, DC 20230; ATTN: Helen L. LeGrande. The comments received will be considered in the context of the consultations with the Government of the People's Republic of China.

Comments or information submitted in response to this notice will be available for public inspection in the Office of Textiles and Apparel, room H3100, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Further comments may be invited regarding particular comments or information received from the public which the Committee for the Implementation of Textile Agreements considers appropriate for further consideration.

The solicitation of comments regarding any aspect of the agreement or the implementation thereof is not a waiver in any respect of the exemption contained in 5 U.S.C. 553(a)(1) relating to matters which constitute "a foreign affairs function of the United States."

The United States remains committed to finding a solution concerning Category 870. Should such a solution be reached in consultations with the Government of the People's Republic of China, further notice will be published in the **Federal Register.**

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 57 FR 54976, published on November 23, 1992).

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

Market Statement—China

Category 870—Luggage of Silk-Blend and Non-Cotton Vegetable Fiber

October 1993

Import Situation and Conclusion

U.S. imports of Category 870 luggage—silk-blend and non-cotton vegetable fiber—from China reached 26.1 million kilograms in the year ending in August 1993, 63 percent above the 16.0 million kilograms imported a year earlier. During the first eight months of 1993, China shipped 17.7 million kilograms, 55 percent above their January-August 1992 level and 89 percent of their total calendar year 1992 level. China is the largest uncontrolled supplier accounting for 84

percent of total Category 870 imports during the year ending August 1993.

Imports of silk-blend and non-cotton vegetable fiber luggage compete directly with domestically produced man-made fiber luggage, Category 670 Part. The sharp and substantial increase in Category 870 imports from China is causing a real risk of market disruption in the U.S. market for man-made fiber luggage.

U.S. Production, Import Penetration, and Market Share

U.S. production of man-made fiber luggage, Category 670 Part, measured in kilograms of fabric consumed in the production of luggage, declined seven percent between 1989 and 1992. In contrast, Category 670 Part luggage imports, measured in kilograms of fabric content, increased by nine percent between 1989 and 1992. The ratio of imports to domestic production in Category 670 Part luggage increased to 229 percent in 1992 from 195 percent in 1989. The domestic manufacturers' share of this market fell from 34 percent in 1989 to 30 percent in 1992, a decline of 4 percentage points.

U.S. imports of silk-blend and non-cotton vegetable fiber luggage, Category 870, surged in 1992 reaching 25,599,000 kilograms (actual weight of luggage) in 1992, 41 percent above the 1991 level. Imports continued to surge in 1993 increasing 37 percent in the first eight months of 1993 over the January-August 1992 level.

When imports of the directly competitive Category 870 luggage, adjusted for fabric content, are included in the market analysis, the import to domestic production ratio increases by 81 percentage points to 310 percent in 1992 and the domestic manufacturers' share of the market declines six percentage points to 24 percent in 1992.

Duty-Paid Value and U.S. Producers' Price

Nearly all of Category 870 luggage imports from China during 1993 entered the U.S. under HTSUSA numbers 4202.12.6000—suitcases and similar containers of non-cotton vegetable fibers, not of pile or tufted construction, and 4202.92.2000—travel bags and similar bags of non-cotton vegetable fiber, not of pile or tufted construction. The prices of these imports of luggage from China are lower than the prices of comparable U.S. produced luggage.

Committee for the Implementation of Textile Agreements

November 12, 1993.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on December 23, 1992, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in the People's Republic of China and exported during the period which began on January 1, 1993 and extends through December 31, 1993.

Effective on November 19, 1993, you are directed to establish a limit for silk blend and other vegetable fiber textile products in Category 870, produced or manufactured in China and exported during the period beginning on October 29, 1993 and extending through December 31, 1993 at a level of 5,058,892 kilograms[1].

Textile products in Category 870 which have been exported to the United States prior to October 29, 1993 shall not be subject to the limit established in this directive.

Textile products in Category 870 which have been released from the custody of the U.S. Customs Service under the provisions of 19 U.S.C. 1448(b) or 1484(a)(1) prior to the effective date of this directive shall not be denied entry under this directive.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 93-28295 Filed 11-16-93; 8:45 am]

BILLING CODE 3510-DR-F

[1] The limit has not been adjusted to account for any imports exported after October 28, 1993.

COPYRIGHT ROYALTY TRIBUNAL

[CRT Docket No. 93-1-92DRD]

1992 Audio Home Recording Act Distribution Proceeding

AGENCY: Copyright Royalty Tribunal.

ACTION: Notice.

SUMMARY: On November 4, 1993, the American Society of Composers, Authors and Publishers, Broadcast Music Inc., Copyright Management, Inc., Gospel Music Coalition, The Harry Fox Agency, Inc., SESAC, Inc. and The Songwriters Guild of America ("Parties") filed a joint motion to consolidate the 1992 and 1993 Dart Distribution Proceedings in the Musical Works Fund. The Tribunal invites comments from interested parties.

DATES: Comments are due by November 23, 1993. Reply comments will not be accepted.

ADDRESSES: An original and five copies of the comments shall be addressed to Chairman, Copyright Royalty Tribunal, 1825 Connecticut Avenue, NW., suite 918, Washington, DC 20009.

FOR FURTHER INFORMATION CONTACT: Cindy Daub, Chairman, Copyright Royalty Tribunal, 1825 Connecticut Avenue, NW., suite 918, Washington, DC 20009, (202) 606-4400.

SUPPLEMENTARY INFORMATION: On June 30, the parties in Joint Comments advised the Tribunal that they had reached agreement among themselves and with certain individual claimants within the Musical Works Fund who had filed claims in the Writers Subfund, the Publishers Fund, or both Subfunds for 1992. By that agreement, the parties advised the Tribunal that claims to 1992 Musical Works Fund royalties were "rolled over" into the 1993 Distribution Proceedings and claims of settling parties to shares of the respective Subfunds of the 1992 Musical Works Fund are to be settled based on the shares each receives of the respective 1993 Subfunds. In Supplementary Comments dated September 8, 1993, the parties advised the Tribunal that they had reached agreement with other individual claimants who filed claims within the Musical Work Fund and that no controversy existed as among these additional individual claimants. Further, Mr. James Cannings was the only claimant in the Musical Work Fund to file a Notice of Intent to Participate in the 1992 DART Distribution Proceedings and had not agreed to "roll over" his 1992 claims into the 1993 Distribution Proceeding.

The parties express that because of the unique circumstances presented and in the interest of justice and efficient administration they request the Tribunal to consolidate the 1992 and 1993 DART Distribution Proceedings in the Musical Works Fund. The parties note the following several reasons why consolidation is the fairest and most prudent course:

1. The size of the 1992 DART royalty fund does not justify a proceeding, for the costs of a proceeding will leave nothing to distribute;

2. The first DART Distribution Proceeding will have precedential effect, and should not be held in these circumstances; precisely, that if the Tribunal were to conduct a special Distribution Proceeding at this time to determine Mr. Canning's 1992 entitlement, those claimants not appearing will be denied the opportunity to be heard on the important matters of the procedure and substance of Music Works Fund

Distribution Proceedings. The parties further note that significant prejudice would be avoided if the Tribunal were to consolidate the 1992 and 1993 DART Distribution Proceedings.

3. Because of the pendency of H.R. 2840 and S. 1346, bills introduced to abolish by the Tribunal, to conduct a 1992 DART Distribution Proceeding at this time may truncate the proceeding and needlessly expend effort and resources. Additionally, the parties note that in view of this legislation, the Tribunal has already suspended conduct of the 1990 Cable Royalty Distribution Proceeding. Also, the Tribunal's procedural schedule calls for submission of written direct cases by December 1, 1993, and commencement of hearings on January 10, 1994. If parties acted on this schedule, and the legislation is enacted, the parties would have gone to the expense of preparing direct cases for nought.

4. Consolidation would improve the quality of any evidence to be adduced and enhance the prospects for settlement; and finally,

5. Consolidation of the 1992 and 1993 DART Distribution Proceedings will not prejudice Mr. Cannings since the parties do not seek to impose on Mr. Cannings the settlement for 1992 that all other parties in the Musical Works Fund have found acceptable. Mr. Cannings would have a full and fair opportunity to present his evidence of entitlement during one consolidated Distribution Proceeding. The parties assert that the only conceivable detriment Mr. Cannings may suffer from consolidation of the two proceedings is that he will have to wait slightly longer to receive the 1992 award.

Cindy Daub,

Chairman.

[FR Doc. 93-28422 Filed 11-16-93; 8:45 am]

BILLING CODE 1410-09-M

DEPARTMENT OF DEFENSE

Department of the Army

Army Science Board, Open Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92-463), announcement is made of the following Committee Meeting:

Name of Committee: Army Science Board (ASB).

Date of Meeting: 9 December 1993.

Time of Meeting: 1400-1600 hours.

Place: Pentagon, Washington.

Agenda: The Army Science Board's C3I Issue Group will commence their Director of Information Systems for Command, Control, Communication, and Computers (DISC4) initiated Issue Group study on Moving Army Tactical Command and Control System (ATCCS) from a Character-Oriented Message System to a Data-Oriented Message System. this meeting will be open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. The ASB Administrative Officer, Sally Warner, may be contacted for further information (703) 695-0781.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 93-28162 Filed 11-16-93; 8:45 am]

BILLING CODE 3710-08-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. QF93-131-000]

UNIGAS Corp.; Motion to Revoke Self-Certification

November 10, 1993.

Take notice that on November 4, 1993, Advanced Extraction Technologies, Inc., (AET) filed a motion with the Federal Energy Regulatory Commission (Commission) requesting the Commission to revoke the qualifying small power production facility status of the UNIGAS Corporation (Unigas), pursuant to § 292.207(d) of the Commission's regulations. Unigas' notice of self-certification was filed with the Commission on June 12, 1993, in the above-captioned docket.

AET maintains that certification should be revoked by the Commission on the ground that the natural gas that Unigas proposes to burn in the small power production facility is not waste. According to AET, Unigas will be burning valuable gas and not "waste" in contravention of the Commission's regulations.

Any person desiring to be heard or objecting to the revocation of the qualifying small power production facility status 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. All such motions or protests should be filed on or before November 23, 1993. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to this proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28256 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Project Nos. 3574-004, et al.]

Hydroelectric Applications; Continental Hydro Corp., et al.; Applications

Take notice that the following hydroelectric applications have been filed with the Commission and are available for public inspection:

1 a. Type of Application: Major License (Notice of Tendering).

b. Project No.: 3574-004.

c. Date filed: October 18, 1993.

d. Applicant: Continental Hydro Corporation.

e. Name of Project: Tiber Dam Hydroelectric Project.

f. Location: At the U.S. Department of the Interior, Bureau of Reclamation's Tiber Dam, on the Marias River in Liberty County, Montana. Township 30 North, Range 5 East, Sections 28, 29, 32, and 33.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. Applicant Contact: Mr. Robert L. Winship, Vice President, Continental Hydro Corporation, 745 Atlantic Avenue, 10th Floor, Boston, MS 02111-2735, (617) 357-9029.i. FERC Contact: James Hunter at (202) 219-2839.

i. FERC Contact: James Hunter at (202) 219-2839.

j. Brief Description of Project: The proposed project will consist of a penstock connecting to the existing outlet, a powerhouse with an installed capacity of 7.5 megawatts, and a transmission line connecting to an existing Western Area Power Administration substation.

k. With this notice, we are initiating consultation with the State Historic Preservation Officer (SHPO), as required by § 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36 CFR at § 800.4.

l. In accordance with § 4.32(b)(7) of the Commission's regulations, if any resource agency, SHPO, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate, factual basis for a complete analysis of this application on its merits, they must file a request for the study with the Commission, together with justification for such request, not later than 60 days from the filing date and serve a copy of the request on the Applicant.

2 a. Type of Application: Exemption of Small Conduit Hydroelectric Facility.

b. Project No.: 11178–001.

c. Date filed: July 12, 1993.

d. Applicant: City of Tucson, Arizona.

e. Name of Project: City of Tucson Hydroelectric Project.

f. Location: At eleven locations within the city of Tucson's water distribution system, which gets its water from an existing U.S. Bureau of Reclamation aqueduct located west of the city, in Pima County, Arizona.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. Applicant Contact: Mr. Thomas Mundinger, Tucson Water, City of Tucson, Arizona, P.O. Box 27210, Tucson, Arizona 85726–7210.

i. FERC Contact: Mr. Michael Strzelecki, (202) 219–2827.

j. Status of Environmental Analysis: This application is ready for environmental analysis at this time—see attached paragraph D–4.

k. Comment Deadline: Sixty days from the issuance date of this notice. (January 4, 1994).

l. Description of Project: The project would be located on the city of Tucson's water distribution system which includes the enclosed Clearwell Reservoir and approximately 28 miles of water distribution pipeline. The project itself would consist of 11 powerhouses whose generating units have installed capacities ranging from 49 Kw to 1,275 Kw, for a cumulative capacity of 4,246 Kw. The project excludes the existing conduits on which the powerhouses are located.

m. This notice also consists of the following standard paragraphs: A2, A9, B1, and D4.

n. Available Locations of Application: A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 941 North Capitol Street, NE., room 3104, Washington, DC 20426, or by calling (202) 208–1371. A copy is also available for inspection and reproduction at the offices of Tucson Water, in Tucson Arizona.

3 a. Type of Application: Preliminary Permit.

b. Project No.: 11435–000.

c. Date Filed: September 22, 1993.

d. Applicant: Hildebrand Hydro Associates.

e. Name of Project: Hildebrand.

f. Location: On the Monongahela River in Monongalia County, West Virginia.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. Applicant Contact: Mr. V. James Dunlevy, 185 Genesee Street, suite 1518 Utica, NY 13501.

i. FERC Contact: Charles T. Raabe (dt) (202) 219–2811.

j. Comment Date: December 29, 1993.

k. Description of Project: The proposed project would utilize the existing U.S. Army Corps of Engineers' Hildebrand Dam and Reservoir and would consist of: (1) A powerhouse containing one 5 MW horizontal pit turbine-generator; (2) 4.16 kV generator leads; (3) a 4.16/25–kV, 7/13 MVA transformer; (4) a 528-foot-long transmission line; and appurtenant facilities. Applicant estimates that the average annual generation would be 17,100 MWh and that the cost of the studies under the permit would be $75,000.

l. This notice also consists of the following standard paragraphs: A5, A7, A9, A10, B, C & D2.

4 a. Type of Application: Minor License.

b. Project No.: 10822–000.

c. Date filed: September 19, 1989.

d. Applicant: Summit Hydropower.

e. Name of Project: Upper Collinsville.

f. Location: On the Farmington River in Hartford County Connecticut.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. Applicant Contact: Duncan Broatch, 92 Rocky Hill Rd., Woodstock, CT 06281, (203) 974–1620.

i. FERC Contact: Ms. Julie Bernt, (202) 219–2814.

j. Deadline Date: See paragraph D9. (January 3, 1994).

k. Status of Environmental Analysis: This application is ready for environmental analysis at this time—see attached paragraph D9.

l. Description of Project: The proposed project would consist of: (1) An existing 18-foot-high stone masonry dam owned by Connecticut Department of Environmental Protection (2) a reservoir with a surface area of 55 acres and a total volume of 350-acre-feet at elevation 289.2 feet msl; (3) an existing set of eight 4-foot by 8-foot cast iron slide gates; (4) an existing 140-foot-long power canal; (5) an existing sluice gate located along the power canal; (6) an existing powerhouse containing one generating unit with a rated capacity of 1,400 Kw; (7) an existing 70-foot-long tailrace; (8) a proposed 150-foot-long transmission line; and, (9) appurtenant facilities. The energy generation is estimated to be 5,165,000 Kwh.

m. Purpose of Project: Power produced would be sold to a local power company.

n. This notice also consists of the following standard paragraphs: A4 and D9.

o. Available Locations of Application: A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 941 North Capitol Street, NE, room 3104, Washington, DC 20426, or by calling (202) 208–1371. A copy is also available for inspection and reproduction at the offices of Summit Hydropower, 92 Rocky Hill Rd., Woodstock, CT 06281, or by calling (203) 974–1620.

5 a. Type of Application: Minor License.

b. Project No.: 10823–000.

c. Date filed: September 19, 1989.

d. Applicant: Summit Hydropower.

e. Name of Project: Lower Collinsville.

f. Location: On the Farmington River in Hartford County, Connecticut.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. Applicant Contact: Duncan Broatch, 92 Rocky Hill Rd., Woodstock, CT 06281, (203) 974–1620.

i. FERC Contact: Ms. Julie Bernt, (202) 219–2814.

j. Deadline Date: See paragraph D9. (January 3, 1994).

k. Status of Environmental Analysis: This application is ready for environmental analysis at this time—see attached paragraph D9.

l. Description of Project: The proposed project would consist of: (1) An existing 20-foot-high concrete gravity dam owned by Connecticut Department of Environmental Protection (2) a reservoir with a surface area of 32 acres and a total volume of 270-acre-feet at elevation 269.7 feet msl; (3) an existing set of low-level slide gates; (4) an existing gatehouse; (5) an existing 650-foot-long power canal; (6) an existing powerhouse containing one generating unit with a rated capacity of 1,150 kW; (7) an existing 100-foot-long tailrace; (8) a proposed 150-foot-long transmission line; and, (9) appurtenant facilities. The energy generation is estimated to be 4,560,000 kWh.

m. Purpose of Project: Power produced would be sold to a local power company.

n. This notice also consists of the following standard paragraphs: A4 and D9.

o. Available Locations of Application: A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 941 North Capitol Street, NE., room 3104, Washington, DC 20426, or by calling (202) 208–1371. A copy is also available for inspection and reproduction at the offices of Summit Hydropower, 92 Rocky Hill Rd., Woodstock, CT 06281, or by calling (203) 974–1620.

6 a. Type of Application: Conduit Exemption.

b. Project No.: 11441-000.

c. Date filed: October 13, 1993.

d. Applicant: Metropolitan Water District of Southern California.

e. Name of Project: Etiwanda Small Conduit Hydroelectric Power Plant.

f. Location: On the existing Etiwanda Pipeline in the City of Rancho Cucamonga, San Bernardino County, California; T1S, R6W, in Section 8.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. Applicant Contact: Mr. Richard Balcerzak, Assistant General Manager, The Metropolitan Water District, of Southern California, P.O. Box 54153, Terminal Annex, Los Angels, CA 90054, (213) 217-6686.

i. FERC Contact: Mr. Surender M. Yepuri, P.E., (202) 219-2847.

j. Brief Description of Project: The proposed project consists a masonry powerhouse containing a turbine with an installed capacity of 23.9 Megawatts (project excludes the existing conduit on which the powerhouse is proposed).

k. With this notice, we are initiating consultation with the State Historic Preservation Officer (SHPO), as required by section 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36 CFR, at § 800.4.

l. In accordance with § 4.32 (b)(7) of the Commission's regulations, if any resource agency, SHPO, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate, factual basis for a complete analysis of this application on its merits, they must file a request for the study with the Commission, together with justification for such request, no later than December 13, 1993, and must serve a copy of the request on the applicant.

7a. Type of Application: Approval of a Revised Recreation Plan.

b. Project No.: 487-009.

c. Date Filed: September 20, 1993.

d. Applicant: Pennsylvania Power and Light Company.

e. Name of Project: Wallenpaupack Project.

f. Location: Lake Wallenpaupack, Wayne and Pike Counties, Pennsylvania.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. Applicant Contact: Mr. David J. Dulick, Senior Counsel, Pennsylvania Power and Light Company,Two North Ninth Street, Allentown, PA 18101-1179, (215) 774-4107.

i. FERC Contact: Heather Campbell, (202) 219-3097.

j. Comment Date: December 27, 1993.

k. Description of Project: Pennsylvania Power and Light Company filed a revised recreation plan. The revisions to the plan include not developing Shumans Point Recreation Area and allowing the Wallenpaupack Creek Recreation Area to revert to a natural area for conservation and passive recreation. This plan will define recreational development for the length of the license period.

l. This notice also consists of the following standard paragraphs: B, C1, and D2.

8 a. Type of Application: Major License.

b. Project No.: 10756-001.

c. Date filed: May 28, 1992.

d. Applicant: Blue Diamond South Pumped Storage Power Company, Inc.

e. Name of Project: Blue Diamond South Pumped Storage.

f. Location: Mostly on U.S. lands administered by the Bureau of Land Management, on two man-made reservoirs—on and near the Blue Diamond Hill, about 5 miles west of Las Vegas in Clark County, Nevada.

g. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. Applicant Contact: Mr. David K. Iverson, Synergics, Inc., 191 Main Street, Annapolis, MD 21401, (410) 268-8820.

i. FERC Contact: Mr. Surender M. Yepuri, P.E. (202) 219-2847

j. Deadline Date: Sixty days from the issuance date of this notice (January 4, 1994).

k. Status of Environmental Analysis: This application has been accepted for filing and is ready for environmental analysis at this time—see attached standard paragraph D9.

l. Description of Project: The proposed project consists of: (1) A forebay—a lined earthen embankment reservoir with a capacity of 1,200 acre-feet, a surface area of 30.87 acres, and a maximum water elevation of 4,825 feet (msl); (2) a afterbay—a lined earthen embankment reservoir with a capacity of 1,200 acre-feet, a surface area of 31.43 acres, and a maximum water elevation of 3,317 feet (msl); (3) a five-section water conduit system connecting the forebay to the afterbay; (4) a underground, circular concrete powerhouse containing 2 pump-turbine and generator-motor units with a combined rated capacity of 200 MW; (5) a control building, 80 feet long and 60 feet wide, that is contiguous to the powerhouse; (6) a booster substation, about 300 feet square, with two transformers; (7) a 138-kV transmission line, 17,000 feet long, connecting the project substation to the Nevada Power Company's proposed substation; (8) a water line, 6 inches in diameter, to initially fill the system; and (9) appurtenant facilities.

m. This notice also consists of the following standard paragraph: D9.

n. Available Locations of Applications: A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 941 North Capitol Street NE., room 3104, Washington, DC 20426, or by calling (202) 208-1371. A copy is also available for inspection and reproduction at the applicant's office (see item (h) above).

Standard Paragraphs

A2. Development Application—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

A4. Development Application—Public notice of the filing of the initial development application, which has already been given, established the due date for filing competing applications or notices of intent. Under the Commission's regulations, any competing development application must be filed in response to and in compliance with public notice of the initial development application. No competing applications or notices of intent may be filed in response to this notice.

A5. Preliminary Permit—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b)(1) and (9) and 4.36.

A7. Preliminary Permit—Any qualified development applicant desiring to file a competing

development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b)(1) and (9) and 4.36.

A9. Notice of intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

A10. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit with be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

B. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of the Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

B1. Protests or Motions to Intervene—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

C. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC. 20426. An additional copy must be sent to Director, Division of Project Review, Federal Energy Regulatory Commission, Room 1027, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

C1. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtain by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

D4. Filing and Service of Responsive Documents—The application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

The Commission directs, pursuant to § 4.34(b) of the regulations (see Order No. 533 issued May 8, 1991, 56 FR 23108, May 20, 1991) that all comments, recommendations, terms and conditions and prescriptions concerning the application be filed with the Commission within 60 days from the issuance date of this notice (January 4, 1994 for Project No. 11178–01). All reply comments must be filed with the Commission within 105 days from the date of this notice (February 15, 1994 for Project No. 11178–001).

Anyone may obtain an extension of time for these deadlines from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with 18 CFR 385.2008.

All filings must (1) bear in all capital letters the title "PROTEST", "MOTION TO INTERVENE", "NOTICE OF INTENT TO FILE COMPETING APPLICATION," "COMPETING APPLICATION," "COMMENTS," "REPLY COMMENTS," "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, room 1027, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

D9. Filing and Service of Responsive Documents—The application is ready

for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

The Commission directs, pursuant to section 4.34(b) of the regulations (see Order No. 533 issued May 8, 1991, 56 FR 23108, May 20, 1991) that all comments, recommendations, terms and conditions and prescriptions concerning the application be filed with the Commission within 60 days from the issuance date of this notice. (January 3, 1994 for Project Nos. 10822-000 and 10823-000; January 4, 1994 for Project No. 10756-001). All reply comments must be filed with the Commission within 105 days from the date of this notice. (February 17, 1994 for Project Nos. 10822-000 and 10823-000; February 18, 1994 for Project No. 10756-001).

Anyone may obtain an extension of time for these deadlines from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with 18 CFR 385.2008.

All filings must (1) bear in all capital letters the title "COMMENTS", "REPLY COMMENTS", "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, Room 1027, at the above address. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

Dated: November 12, 1993, Washington, DC.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28235 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-P

[Docket No. JD94-00621T Texas—152]

Texas; NGPA Notice of Determination by Jurisdictional Agency Designating Tight Formation

November 10, 1993.

Take notice that on November 1, 1993, the Railroad Commission of Texas (Texas) submitted the above-referenced notice of determination pursuant to § 271.703(c)(3) of the Commission's regulations, that the Travis Peak Formation, Bear Grass (Travis Peak), underlying certain portions of Leon County, Texas, qualifies as a tight formation under section 107(b) of the Natural Gas Policy Act of 1978. The designated area is in Railroad Commission District No. 5 and consists of the portions of the following surveys:

William F. Gray Survey, Abstract 296
J.M. Mead Survey, Abstract 629
Thomas B. Hearn Survey, Abstract 351

The notice of determination also contains Texas' findings that the referenced portion of the Travis Peak meets the requirements of the Commission's regulations set forth in 18 CFR part 271.

The application for determination is available for inspection, except for material which is confidential under 18 CFR 275.206, at the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington DC 20426. Persons objecting to the determination may file a protest, in accordance with 18 CFR 275.203 and 275.204, within 20 days after the date this notice is issued by the Commission.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28254 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Project No. 10987-001 Washington]

Ohop Mutual Light Co., Inc.; Surrender of Preliminary Permit

November 10, 1993.

Take notice the Ohop Mutual Light Company, Inc. Permittee for the Little Mashel Project No. 10987, has requested that its preliminary permit be terminated. The preliminary permit for Project No. 10987 was issued March 14, 1991, and would have expired February 28, 1994. The project would have been located on Little Mashel River, in Pierce County, Washington.

The Permittee filed the request on November 1, 1993, and the preliminary permit for Project No. 10987 shall remain in effect through the thirtieth day after issuance of this notice unless that day is a Saturday, Sunday or holiday as described in 18 CFR 385.2007, in which case the permit shall remain in effect through the first business day following that day. New applications involving this project site, to the extent provided for under 18 CFR Part 4, may be filed on the next business day.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28255 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP94-49-000]

Proposed Changes in FERC Gas Tariff; Algonquin Gas Transmission Co.

November 10, 1993.

Take notice that on November 5, 1993, Algonquin Gas Transmission Company (Algonquin) tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1, the following tariff sheets, with a proposed effective date of December 1, 1993:

Third Revised Sheet No. 20A
Original Sheet No. 95B

Algonquin states that the purpose of this filing is to provide for the recovery of transition costs to be paid by Algonquin to Texas Eastern Transmission Corporation (Texas Eastern) pursuant to Texas Eastern's third direct bill of Account No. 191 purchased gas costs filed on October 29, 1993.

Algonquin requests that the Commission waive Section 154.22 of the Commission's regulations to the extent necessary in order to permit this application to take effect as requested.

Algonquin states that copies of this tariff filing were mailed to all customers of Algonquin and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before November 18, 1993. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to

the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28260 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP94-50-000]

Arkla Energy Resources Co.; Request Under Blanket Authorization

November 10, 1993.

Take notice that on October 29, 1993, Arkla Energy Resources Company (AER), 525 Milam Street, P.O. Box 21734, Shreveport, Louisiana 71151 filed in Docket No. CP94-40-000 a request pursuant §§ 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act for authorization to abandon certain facilities in Louisiana, under its blanket certificate issued in Docket No. CP82-384-000 and CP82-384-001, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

AER specifically proposed to abandon a 1-inch diameter domestic sales tap served by Arkansas Louisiana Gas Company on AER's AM-165 line in Howard County, Arkansas. AER indicates that the customer will no longer be located at the tap's delivery point.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the date after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7(c) of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28243 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP91-161-017; RP91-160-014]

Columbia Gas Transmission Corp., Columbia Gulf Transmission Co.; Proposed Changes in FERC Gas Tariff

November 10, 1993.

Take notice that on November 5, 1993, Columbia Gas Transmission Corporation (Columbia) and Columbia Gulf Transmission Company (Columbia Gulf) (collectively Columbia) tendered for filing the following proposed changes to their respective FERC Gas Tariff, Second Revised Volumes No. 1, as set forth on Attachment A to the filing, to become effective January 1, 1994.

Columbia states that the instant filing is being made to implement the last sentence of Article I.A.(2)(c)(v) of the Settlement in Docket Nos. RP91-160-000 et al., and RP91-161-000 et al., which states: "If the Commission permits the OPEB accrual in rates but requires a ratemaking methodology other than that reflected in the settlement rates, Columbia Transmission and Columbia Gulf will file within 30 days after a final order to adjust their rates accordingly on a prospective basis." The Commission issued its statement of policy concerning OPEB on December 17, 1992, (Docket No. PL93-1-000) and an order on rehearing on the statement of policy on October 6, 1993. The October 6, 1993, order in Docket No. PL93-1-001 is a "final order" requiring a prospective rate change as contemplated by the above mentioned Settlement. The instant filing removes from Columbia's costs of service the taxes related to OPEB expenses used in the Settlement consistent with the statement of policy.

Columbia states that copies of the filing were served upon Columbia's jurisdictional customers, interested state commission and the official service list in the aforementioned dockets.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's rules of Practice and Procedure. All such protests should be filed on or before November 18, 1993. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of Columbia's filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28258 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TX94-2-000]

El Paso Electric Co., and Central and South West Services, Inc., as Agent for Public Service Co. of Oklahoma, West Texas Utilities Co., Southwestern Electric Power Co. and Central Power & Light Co.

November 10, 1993.

Take notice that on November 4, 1993, El Paso Electric Company (El Paso) and Central and Southwest Services, Inc. (CSWS), as agent for Public Service Company of Oklahoma (PSO), West Texas Utilities Company (WTU), Southwestern Electric Power Company (SWEPCO), and Central Power and Light Company (CPL) (collectively "the Applicants"), filed with the Federal Energy Regulatory Commission an application requesting that the Commission issue an order pursuant to section 211 of the Federal Power Act requiring Southwestern Public Service Company (Southwestern) to provide certain transmission services and grant the Applicants certain other relief.

Specifically, the Applicants have requested that the Commission order Southwestern to provide up to 133 MW of firm and non-firm transmission service to the Applicants to assist them in the coordinated operation of their electric systems following the merger of El Paso and a subsidiary of Central and South West Corporation. The Applicants expect to require non-firm service beginning on or about January 1, 1995, and firm service beginning on or about January 1, 1999. The Applicants require such services for transfers of power and energy between the control areas of El Paso and PSO, both of whose transmission system are directly interconnected with Southwestern's transmission system.

Pursuant to the Commission's Order No. 560, the Applicants have served a copy of the application on Southwestern, the Southwestern Power Administration, the Public Utility Commission of Texas, the Public Service Commission of New Mexico, the Oklahoma Corporation Commission, the Arkansas Public Service Commission and the Louisiana Public Service Commission.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal

Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before December 1, 1993. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28262 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP94-67-000]

El Paso Natural Gas Co.; Request Under Blanket Authorization

November 10, 1993.

Take notice that on November 8, 1993, El Paso Natural Gas Company (El Paso), Post Office Box 1492, El Paso, Texas 79978, filed in Docket No. CP94-67-000 a request pursuant to §§ 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.212) for authorization to construct and operate delivery tap facilities, referred to as the Afton Meter Station, to enable El Paso to provide a new delivery point in Dona Ana County, New Mexico to City of Las Cruces, New Mexico (Las Cruces), under the blanket certificate issued in Docket No. CP82-435-000, pursuant to section 7(c) of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

El Paso asserts that effective November 1, 1991, Las Cruces elected to convert its firm sales entitlement under its existing service agreement to firm transportation service pursuant to the provisions of El Paso's Global Settlement at Docket No. CP88-44-000, *et al.* It is stated that this firm transportation service is being rendered pursuant to the terms of a transportation service agreement dated August 15, 1991, which provides for the firm transportation of Las Cruces' full requirements of natural gas to consumers situated within the City of Las Cruces, New Mexico and its surrounding areas.

El Paso also states that Las Cruces seeks to deliver natural gas for its customers from a point on El Paso's existing El Paso-Douglas and California Lines in Dona Ana County, New Mexico. To meet that request, El Paso proposes to construct and operate the Afton Metering Station, consisting of dual 6⅝-inch senior orifice-type meter runs including tap and valve assemblies. El Paso estimates the cost of the metering facilities at $151,600, which would be reimbursed by Las Cruces.

El Paso states that construction of the proposed delivery point is not prohibited by El Paso's existing tariff. El Paso further states that it has sufficient capacity to accomplish the deliveries of the requested gas volumes without detriment or disadvantage to its other customers.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary,

[FR Doc. 93-28249 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. EG94-4-000]

EPZ 93-1 Trust, Acting Through its Trustee, State Street Bank and Trust Co. of Connecticut, National Assoc.; Filing

November 10, 1993.

On October 29, 1993, EPZ 93-1 Trust (the "Trust"), acting through its trustee, State Street Bank and Trust Company of Connecticut, National Association, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations. The Trust will own an undivided interest in a 600 MW electric generating facility located in Geertruidenberg, The Netherlands.

The Trust states that it is exclusively in the business of being the owner of the eligible facility and of selling energy at wholesale from the eligible facility.

Any person desiring to be heard concerning the application for exempt wholesale generator status should file a motion to intervene or comments 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. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application. All such motions or protests must be filed on or before November 30, 1993, and must be served on the applicant. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28250 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP85-221-025]

Frontier Gas Storage Co.; Sale Pursuant to Settlement Agreement

November 10, 1993.

Take notice that on October 21, 1993, Frontier Gas Storage Company (Frontier), % Reid & Priest, Market Square, 701 Pennsylvania Ave., NW., Washington, DC 20004, in compliance with the provisions of the Commission's February 13, 1985 Order in Docket No. CP82-487-000 et, al., submitted an executed Service Agreement under Rate Schedule LVS-1 providing for the possible sale of up to 5 Bcf of Frontier's gas storage inventory on an "as metered" basis to Prairielands Energy Marketing, Inc. (Prairielands). The Service Agreement, dated October 20, 1993, contemplates the possible sale to commence November 4, 1993.

Under subpart (b) of Ordering Paragraph (F) of the Commission's February 13, 1985 Order, Frontier is "authorized to commence this sale of its inventory under such an executed service agreement fourteen days after the filing of the agreement with the Commission and may continue making such sale unless the Commission issues an order either requiring Frontier to stop selling and setting the matter for hearing or permitting the sale to continue and establishing other procedures for resolving the matter."

Any person desiring to be heard or to make a protest with reference to said tariff sheet filing should, on or before December 1, 1993, file with the Federal Energy Regulatory Commission (825 North Capitol Street, NE., Washington,

DC 20426) a motion to intervene or protest in accordance with the requirements of the Commission's Rules of Practice and Procedures, 18 CFR 385.214 or 385.211. 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. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28241 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP94-65-000]

Koch Gateway Pipeline Co.; Request Under Blanket Authorization

November 10, 1993.

Take notice that on November 8, 1993, Koch Gateway Pipeline Company (Gateway), P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP94-65-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to construct and operate a delivery tap to Endevco Oil and Gas Company (Endevco) under Gateway's blanket certificate issued in Docket No. CP82-430-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Specifically, Gateway proposes to construct and operate a tap on its Index 370, Clarence to Olla 30-inch pipeline in LaSalle Parish, Louisiana, to deliver gas, transported by Gateway, to Endevco. Gateway states that it would deliver, on an interruptible basis, up to 2,000 Mcf per day of natural gas to Endevco. The gas would ultimately be deliverd to a Louisiana Pacific Corporation paper mill in LaSalle Parish, Lousiana, it is stated.

Gateway states that the proposed facilities will not have an impact on its curtailment plan, that it has sufficient capacity to provide the proposed service without detriment or disadvantage to its other existing customers, and that its tariff does not prohibit the proposed construction of facilities.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28248 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. FA91-53-000]

New England Power Co.; Order Establishing Hearing Procedures

November 12, 1993.

On September 21, 1993 the Chief Accountant issued a letter under delegated authority noting New England Power Company's (NEP) disagreement with the recommendations of the Division of Audits regarding the accounting and fuel adjustment clause treatment for certain payments made to Central Maine Power Company as discussed in Part I of the audit report. NEP was requested to advise whether it would agree to the disposition of the contested issue under the shortened procedures provided for by part 41 of the Commission's Regulations. 18 CFR part 41.

By letter dated October 18, 1993, NEP responded that it did not consent to the shortened procedures. Section 41.7 of the Commission's Regulations provides that in case consent to the shortened procedures is not given, the proceeding will be assigned for hearing. Accordingly, the Secretary, under authority delegated by the Commission, will set the issue [1] for hearing.

Any interested person seeking to participate in this docket shall file a protest or motion to intervene pursuant to Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) no later than 15 days after the date of publication of this order in the **Federal Register.**

It is ordered:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act, the provisions of the Federal Power Act, particularly sections 205, 206, and 301 thereof, and pursuant to the Commission's Rules of Practice and Procedures (18 CFR Chapter I), a public hearing shall be held concerning the appropriateness of NEP's practices as discussed above.

(B) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding, to be held within 45 days of the date of this order, in a hearing room of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC 20426. The Presiding Judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(C) This order shall be published in the **Federal Register.**

Lois D. Cashell,

Secretary.

[FR Doc. 93-28234 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[1] Tariff Exception No. 1 Accounting and Billing for Certain Reimbursements Made to Another Utility described in Part I of the audit report.

[Docket No. ER94-69-000]

New England Power Co.; Filing

November 10, 1993.

Take notice that New England Power Company on November 2, 1993, tendered for filing an amendment to its filing in this docket.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before November 24, 1993. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28252 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM94-3-59-000]

Proposed Changes in FERC Gas Tariff, Northern Natural Gas Co.

November 10, 1993.

Take notice that on November 5, 1993, Northern Natural Gas Company (Northern), tendered for filing changes in its FERC Gas Tariff, Fifth Revised Volume No. 1.

On November 5, 1993, Northern filed revised Sheet No. 1 Revised 2 Revised No. 53 to establish the October 1993 Index Price for determining the dollar/volume equivalent for any transportation imbalances that may exist on contracts between Northern and its Shippers. Since the Index Price is applied to any imbalances generated during a given production month, Northern utilized the Index Price methodology set forth in its Fourth Revised Volume No. 1 to maintain consistency for the time period during which the provisions of Northern's Fourth Revised Volume No. 1 Tariff were in effect.

Northern states that copies of the filing were served upon Northern's customers and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests should be filed on or before November 18, 1993. Protests will be considered by the Commission in determining the appropriate proceeding, but will not serve to make protestant parties to the proceedings. Copies of this filing are on file with the Commission and are available for inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28261 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER93-645-000]

Southern California Edison Co.; Filing

November 10, 1993.

Take notice that on October 22, 1993, Southern California Edison Company (Edison) tendered for filing additional information which was requested by the Commission Staff in Docket No. ER93-645-000, an agreement between Edison and the Metropolitan Water District (District) which contains the terms and conditions for the interconnection of District's Etwisanda Power Plant with the Edison System.

Copies of this filing were served upon the Public Utilities Commission on the State of California and all interested 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 285.211 and 18 CFR 285.214). All such motions or protests should be filed on or before November 24, 1993. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28251 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP94-33-001]

Texas Eastern Transmission Corp.; Proposed Changes in FERC Gas Tariff

November 10, 1993.

Take notice that on November 8, 1993, Texas Eastern Transmission Corporation (Texas Eastern) tendered for filing as part of its FERC Gas Tariff, Sixth Revised Volume No. 1, Third Revised Sheet No. 627, with a proposed effective date of November 28, 1993.

Texas Eastern states that on October 29, 1993, it filed in Docket No. RP94-33 tariff sheets to incorporate proposed revisions to Sections 15.2(C) and 15.2(D) of Texas Eastern's General Terms and Conditions to be effective November 28, 1993, (October 29 Filing). Texas Eastern states that such revisions reflect the same method of allocating GSR Costs and stranded costs between system wide customers and incremental customers as were originally proposed in Docket No. CP92-184-000 ("October 1 Filing"). However, the Commission's October 28, 1993, order accepting the October 1 Filing rejected, without prejudice to Texas Eastern's rights to refile, the tariff sheets which would have revised Section 15.2(C) and Section 15.2(D) on the ground that such revisions were inappropriate to include in a compliance filing.

Texas Eastern states that on October 14, 1993, Long Island Lighting Company (LILCO) filed with the Commission in Docket No. CP92-184-000 a "Motion to Intervene and Comments of LILCO" (Comments). LILCO stated therein that, while it did not take issue with the proposed allocation methodology proposed in the October 1 Filing, Texas Eastern should revise the refund methodology for GSR Costs contained in Section 15.2(C)(2)(c) to be consistent with the proposed new allocation methodology for collecting the GSR Costs.

After further consideration of LILCO's Comments, Texas Eastern states that it agrees with LILCO's proposed revision to Section 15.2(C)(2(c). Accordingly, Texas Eastern herewith supplements its October 29 Filing with the submission of Third Revised Sheet No. 627 to reflect LILCO's concern about the refunds of GSR Costs. Such tariff sheet provides that Texas Eastern will refund any GSR Costs actually incurred and recovered on the same basis as such costs were allocated in Section 15.2(C)(2)(a) for the time period during which the GSR Costs were allocated.

Texas Eastern states that copies of the filing were served on firm customers of Texas Eastern and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure. All such protests should be filed on or before November 18, 1993. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28259 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP88-391-013]

Transcontinental Gas Pipe Line Corp.; Refund Report

November 10, 1993.

Take notice that on September 30, 1993, Transcontinental Gas Pipe Line Corporation (TGPL) filed a report of cash-out refunds totaling $6,281,332.92 made to its jurisdictional firm and interruptible transportation customers on September 29, 1993. TGPL reports that the refunds cover the annual period August 1, 1992, through July 31, 1993, and are made pursuant to Section 15 of the General Terms and Conditions of its

FERC Gas Tariff, Third Revised Volume No. 1.

In support of its refund report, TGPL submitted a report of cash-out purchases and a report comparing cash-out revenues received with costs incurred for the annual period ending July 31, 1993. TGPL also submitted a copy of the refund letter sent each customer which states that the refund amount reflects the carry forward of TGPL's net underrecovery for the prior cash-out annual period—August 1991 through July 1992.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure, 18 CFR 385.211. All such protests should be filed on or before December 1, 1993. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28242 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

Docket No. CP94-55-000

Transwestern Pipeline Co.; Application

November 10, 1993.

Take notice that on November 2, 1993, Transwestern Pipeline Company (Transwestern), 1400 Smith Street, P.O. Box 1188, Houston, Texas 77251-1188, filed in Docket No. CP94-55-000 an application pursuant to section 7(b) of the Natural Gas Act for authorization to abandon the transportation and exchange of natural gas services between it and Caprock Pipeline Company (Caprock) with was authorized in Docket Nos. CP72-254-000 and CP75-218-000, all as more fully set forth in the application on file with the Commission and open to public inspection.

Transwestern indicates that the exchange with Caprock as set forth under an exchange agreement designated as Rate Schedule X-9 in Transwestern's FERC Gas Tariff, continued until recently, when Transwestern, by cancellation notice dated June 16, 1993, requested that Caprock terminate the exchange service, effective September 1, 1993.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 1, 1993, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission on its designee on this application if not motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Transwestern to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28244 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER94-125-000]

Western Resources, Inc.; Filing

November 10, 1993.

Take notice that on November 4, 1993, Western Resources, Inc. (WRI) tendered for filing an Electrical Interconnection Agreement between the Kansas City, Kansas, Board of Public Utilities (BPU) and WRI. WRI states that the Agreement is a fifteen year contract that will allow both parties to realize additional operating benefits from the interconnected operation of their respective electric utility systems and from the purchase, sale and exchange of electric power and energy between their respective systems under the terms of the Agreement. Service under the Agreement is expected to commence November 8, 1993.

Copies of this filing have been served upon BPU and the Kansas Corporation Commission.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before November 24, 1993. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28253 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP94-64-000]

Williams Natural Gas Co., Natural Gas Pipeline Co., of America; Application

November 10, 1993.

Take notice that on November 5, 1993, Williams Natural Gas Company (Williams), P.O. Box 3288, Tulsa, Oklahoma 74102, and Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, jointly referred to Applicants, filed in Docket No. CP94-64-000 an application pursuant to section 7(b) of the Natural Gas Act for authorization to abandon two certificated exchange services, all as more fully set forth in the joint application which is on file with the Commission and open to public inspection.

Applicants state that they were authorized, inter alia, to exchange gas by order issued October 30, 1953, in Docket No. G-1988, (12 FPC 1338) and have been implementing the exchange agreement under each company's Rate Schedule X-5. Applicants now indicate that they have executed an agreement dated October 15, 1993, terminating the exchange agreement.

Applicants also state that they were authorized to exchange gas by order issued January 2, 1964, in Docket No. CP64-89 (31 FPC 3) and have been implementing the exchange, as

subsequently amended, under Williams' Rate Schedule X-6 and Natural's Rate Schedule X-11. Applicants now indicate that Williams has submitted a letter to Natural dated April 30, 1990, providing a one-year notice that it wished to terminate the exchange agreement. It is also indicated that the imbalance in deliveries between the parties under the agreement reached zero in January of 1993.

Applicants state that in each instance no abandonment of facilities is requested.

Any person desiring to be heard or to make any protest with reference to said application should on or before December 1, 1993, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Williams or Natural to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28247 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP94-60-000]

Williston Basin Interstate Pipeline Co.; Request Under Blanket Authorization

November 10, 1993.

Take notice that on November 4, 1993, Williston Basin Interstate Pipeline Company (Williston Basin), Suite 300, 200 North Third Street, Bismarck, North Dakota 58501, filed in Docket No. CP94-60-000 a request pursuant to §§ 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.216) for authorization to abandon 24,120 feet of 6-inch pipeline and a field meter station under Williston Basin's blanket certificate issued in Docket Nos. CP83-1-000 and CP82-487-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Williston Basin indicates that the services for which the facilities served have either expired or have terminated. As a result, Williston Basin would sever and cap both ends and abandon the pipeline in place. Williston Basin indicates that it would remove all above ground facilities.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 93-28246 Filed 11-16-93; 8:45 am]

BILLING CODE 6717-01-M

The Office of Hearings and Appeals

Issuance of Decisions and Orders During the Week of August 23 Through August 27, 1993

During the week of August 23 Through August 27, 1993, the decisions and orders summarized below were issued with respect to appeals and applications for other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Appeals

Colorado River Commission, 8/26/93, LFA-0311

The Colorado River Commission of Nevada filed an Appeal from a denial by the Western Area Power Administration of the Department of Energy (DOE/WAPA) for documents describing the environmental hazards or risks associated with ownership, operation and maintenance of the Hoover-Basic Transmission Line. In considering the Appeal, the DOE found that DOE/WAPA had properly withheld certain draft documents under Exemption 5. The Appeal was remanded to DOE/WAPA for preparation of a descriptive index and release of maps contained in one or more documents.

Government Accountability Project, 8/27/93, LFA-0312

The Government Accountability Project (GAP) filed an Appeal from a determination issued by the Department of Energy Field Office, Oak Ridge (DOE/OR), in response to a request for information submitted under the Freedom of Information Act (FOIA). GAP had requested documents related to various activities of Oak Ridge National Laboratory (ORNL) and DOE Contractor Martin Marietta Energy Systems (MMES). DOE/OR denied GAP's request for FOIA requests filed with the DOE by or on behalf of MMES, stating that the request failed to reasonably describe the records it was seeking. DOE/OR also denied GAP's request for a waiver of fees in connection with three other items of the request. In considering the Appeal, the DOE found that: (1) DOE/OR should conduct a search of its FOIA database for requests filed by MMES, but was not required to conduct a manual search through requests filed before the database came into existence, as these requests were not indexed by the name of the requester; (2) DOE/OR should issue a determination on GAP's fee waiver request only after it has had the opportunity to review the information to be released to consider whether its disclosure is likely to contribute significantly to public understanding of the operation or activities of government. Accordingly, the matter was remanded to DOE/OR with instructions to conduct the search described above and to issue a new determination on GAP's fee waiver request. To the extent that the Appeal requested a decision by the OHA where

no appealable determination had been issued, the matter was dismissed. In all other respects, the Appeal was denied.

Motion for Discovery

Chevron U.S.A. Inc., 8/24/93, LRD-0007 LRH-0003

Chevron U.S.A. Inc. (Chevron) filed a Motion for Discovery and Motion for Evidentiary Hearing, relating to a Proposed Remedial Order (PRO) issued to Chevron by the Economic Regulatory Administration (ERA) on March 26, 1992. In the PRO, the ERA alleges that as a result of its participation in the DOE Tertiary Incentive Program (TIP), Chevron received excess tertiary incentive revenue attributable to its first sales of domestically produced crude oil during the period January 1980 through January 27, 1981, in violation of 10 CFR. 212.78, 212.73, 212.74, and 205.202. In considering Chevron's Motion for Discovery, the DOE determined that Chevron's request to depose certain ERA personnel was without proper basis, but that the ERA should be deemed to admit certain factual matters specified in firm's request for admissions. Further, in considering Chevron's Motion for Evidentiary Hearing, the DOE determined that an evidentiary hearing should be convened regarding the factual issue of the amount of revenue actually received by Chevron under the TIP. Accordingly, both Chevron's Motion for Discovery and Motion for Evidentiary Hearing were granted in part.

Implementation Of Special Refund Procedures

Kaiser International Corporation, Century Resources Development, Inc., Entex Petroleum, Inc., 8/26/93, KEF-0125, KEF-0126, KEF-0127

The Department of Energy (DOE) issued a final Decision and Order implementing special refund procedures to distribute a total of $5,048,242.96, plus accrued interest, remitted to the DOE, as part of either a settlement agreement or a DOE consent order, by three companies, Kaiser International Corporation, Century Resources Development, Inc., and Entex Petroleum, Inc. in settlement of alleged violations of the crude oil portions of the Mandatory Petroleum Price and Allocation Regulations. The DOE determined that the monies would be added to the crude oil refund pool to be disbursed to the Federal Government, the States, and eligible claimants in accordance with the DOE's Statement of Modified Restitutionary Policy in Crude Oil Cases. Accordingly, eighty percent of the funds in these cases will be divided equally between the Federal Government and the States. Twenty percent of the funds are to be initially reserved for direct restitution to injured parties submitting claims to the Office of Hearings and Appeals under 10 CFR Part 205, subpart V. In making this determination, the DOE rejected the comments filed by Philip P. Kalodner concerning the sufficiency of the twenty percent set-aside for injured claimants. The specific information to be included in the Applications for Refund, and the standards by which Subpart V crude oil refund claims will be evaluated, are included in the Decision. The Decision also includes a discussion of the presumption of injury for end-users. All Applications for Refund must be submitted by June 30, 1994. However, applications should not be filed by applicants who have previously filed refund claims in the Crude Oil Subpart V Special Refund Proceeding.

Lunday-Thagard Oil Co., Lotus Petroleum, Inc., and William T. Tootle, 08/26/93, LEF-0050, LEF-0051

The DOE issued a Decision and Order implementing procedures for the distribution of $31,199.66 plus accrued interest, in alleged overcharges obtained from Lunday-Thagard Oil Co. (Lunday-Thagard) and William T. Tootle, (Tootle) president of Lotus Petroleum, Inc. These funds were remitted by Lunday-Thagard and Tootle to settle possible pricing violations with respect to the sale of crude oil. The DOE determined that these funds will be distributed in accordance with the DOE's Modified Statement of Restitutionary Policy Concerning Crude Oil Overcharges. Under the Modified Policy, crude oil overcharge monies are divided among the states (40%), federal government (40%), and injured purchasers of refined products (20%). Accordingly, Applications for Refund will be accepted from any party who purchased refined petroleum during the period of price controls. The specific information to be included in applications for crude oil refunds, which must be submitted by June 30, 1994, is included in the Decision. Any party who has previously filed an Application for Refund in the crude oil proceedings will be deemed to have filed an application in these proceedings.

Refund Applications

Flatiron Paving Company of Greeley, Flatiron Paving Company of Boulder, 8/24/93, RF272-25573, RD272-25573, RF272-78408

The DOE issued a Decision and Order granting Applications for Refund filed by Flatiron Paving Company of Greeley (Flatiron Greeley) and Flatiron Paving Company of Boulder (Flatiron Boulder) in the subpart V crude oil refund proceeding. A group of States and Territories (States) objected to Flatiron Greeley's application on the grounds that the applicant was able to pass through increased petroleum costs to its customers. In support of their objection, the States submitted an affidavit of an economist stating that, in general, the construction industry was able to pass through increased petroleum costs. The DOE determined that the evidence offered by the States was insufficient to rebut the presumption of end-user injury and that the applicant should receive a refund. The DOE also denied the States' Motion for Discovery, finding that discovery was not warranted where the States had not presented evidence sufficient to rebut the applicant's presumption of injury. The refund granted to Flatiron Greeley in this Decision was $65,212, and the refund granted to Flatiron Boulder was $24,395.

Texaco Inc./Steve's Texaco, 8/23/93, RF321-7708

The DOE issued a Decision and Order concerning an Application for Refund filed in the Texaco Inc. special refund proceeding. Steven R. Bon (Bon) applied for a refund based upon purchases from Texaco made by his outlet, Steve's Texaco. Bon stated, in his Application, that for part of the consent order period he operated the outlet as a partnership. Bon argued that he should be entitled to the entire refund because he had purchased his partner's interest in the firm. The DOE determined that the mere fact that Bon purchased his partner's interest did not operate as a transfer of his partner's right to a refund. Because Bon was unable to provide the DOE with any evidence that his partner's right to a refund was transferred to him, the DOE determined that Bon was entitled to only one-half of the refund for the purchases made by the outlet while it was operated as a partnership. In this Decision, the applicant was granted a refund totaling $1,133, representing $829 principal plus $304 interest.

Refund Applications

The Office of Hearings and Appeals issued the following Decisions and Orders concerning refund applications, which are not summarized. Copies of the full texts of the Decisions and Orders are available in the Public Reference Room of the Office of Hearings and Appeals.

Ashmore Bros., Inc	RF272–67016	08/26/93
Ashmore Bros., Inc	RD272–67016	
Atlantic Richfield Company/Jake's Arco et al	RF304–14031	08/26/93
Atlantic Richfield Company/Mansfield Oil Company, Inc	RF304–13895	08/26/93
Atlantic Richfield Company/Murray's Arco Service et al	RF304–14078	08/26/93
City of Corvallis, Oregon et al	RF272–88312	08/24/93
Compania Sud-Americana De Vapores	RF272–69666	08/27/93
Compania Sud-Americana Devapores	RF272–69666	
Davis Oil Co., Inc. et al	RF272–90000	08/24/93
Drum Services, Inc. et al	RF272–90357	08/27/93
East Palestine City SD et al	RF272–80232	08/26/93
Eastern Shore Hospital Center et al	RF272–86005	08/23/93
Farmers Union Oil Co. (MN)	RF272–89022	08/27/93
Farmers Union Oil Co. (ND)	RF272–89036	
Gulf Oil Corporation/Hopkins County et al	RF300–21100	08/24/93
Gulf Oil Corporation/Oglethorpe County Bd. of Comm. et al	RF300–20413	08/24/93
New Reigel Local Schools et al	RF272–87124	08/27/93
NVF Company	RF272–21104	08/27/93
NVF Company	RD272–21104	
Polk County Highway Depart. et al	RF272–85221	08/26/93
Shell Oil Company/Green Acres Shell	RF315–8413	08/27/93
Texaco Inc./Lakewood Texaco et al	RF321–577	08/26/93
Texaco Inc./Pecan Shoppe of Camden, Inc. et al	RF321–13113	08/24/93
Texaco Inc./Southern California Rapid Transit District et al	RF321–6653	08/24/93
Town of Sutton et al	RF272–83750	08/27/93

Dismissals

The following submissions were dismissed:

Name	Case No.
Alaska Village Elec. Coop	RF272–92740
Anniston City School District.	RF272–85182
Aratex-Services	RF272–86042
Big Horn County School District No. 3.	RF272–83440
Bland County Public Schools.	RF272–83326
Bolton School District	RF272–83563
Carroll Oil, Inc	RF321–8214
Del Paso Heights Elementary.	RF272–79488
ERB Lumber Co	RF272–92608
Fred M. Luth & Sons, Inc	RF272–92074
Gomick's Texaco Service	RF321–17768
James River Corporation	RF321–19626
Kulaga's Garage & Service Station.	RF321–17762
LaFourche Parish Council	RF272–87798
Mexia ISD	RF272–83486
Mit Transportation, Inc	RF272–92492
Moniteau County C–1	RF272–79573
Palmyra-Eagle Area School District.	RF272–83576
Pecan Shoppe of Lottie	RF321–16447
Perry Community High School District 172.	RF272–83367
Perry School District 57	RF272–83366
Riverside Co. of Office of Education.	RF272–92625
Roy Smith Texaco Service Center.	RF321–17761
School District of the Chathams.	RF272–83477
Shiocton School District	RF272–83530
Southern Concrete	RF300–13588
Standard Marine Ltd	RF321–17796
Sublette County School District No. 9.	RF272–83323
The Firestone Tire & Rubber Company.	RF272–92324
Washburn Public Schools	RF272–83363
Waverly Central School	RF272–87335
Weinbach Texaco	RF321–8575
West Frankfort C.U. District 168.	RF272–79230

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, Room 1E–234, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, Monday through Friday, between the hours of 1 p.m. and 5 p.m., except federal holidays. They are also available in Energy Management: Federal Energy Guidelines, a commercially published loose leaf reporter system.

Dated: November 10, 1993.

Georges B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 93–28277 Filed 11–16–93; 8:45 am]

BILLING CODE 6450–01–P

Issuance of Decisions and Orders During the Week of September 20 through September 24, 1993

During the week of September 20 through September 24, 1993 the decisions and orders summarized below were issued with respect to appeals and applications for other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Appeals

Hanford Education Action League, 9/24/93, LFA–0315

Hanford Education Action League filed an Appeal from a partial denial by the DOE's Richland Field Office (Richland) of a Request for Information

that it had submitted under the Freedom of Information Act (the FOIA). In considering the Appeal, the DOE found that the internal audit reports that Richland had contended were not "agency records" under the FOIA were in fact agency records. The DOE also found that the internal audit reports were not properly withheld under either FOIA exemptions 4 or 5. Accordingly, the matter was remanded to Richland with instructions to release the documents.

James L. Schwab, 9/24/93, LFA-0316

James L. Schwab filed an Appeal from a denial by the Office of the Inspector General of the Department of Energy (OIG). In considering the Appeal, the DOE found that the OIG had improperly applied Exemptions 2, 5, 6 and 7(C) to certain documents requested by Mr. Schwab. The matter was remanded to the OIG for release of those documents or preparation of an explanation as to why it would not be appropriate to do so.

Refund Applications

Texaco Inc./B-OK Super Service, 9/23/93, RF321-16254

The DOE issued a Decision and Order granting a refund to Dave Dickerson, owner of B-OK Super Service, a retail outlet located in Kennewick, WA, for 2,776,551 gallons of Texaco petroleum products purchased indirectly. Mr. Dickerson was previously granted a full volumetric refund of $9,679 for 8,798,766 gallons purchased directly from Texaco under Case No. RF321-4744. The OHA combined the purchase volumes of Mr. Dickerson's two claims to calculate one allocable share of $10,137. Since Mr. Dickerson is limited to the larger of $10,000 or 50% of his allocable share by the medium-range presumption, his principal refund in this instance was limited to $321 ($10,000 − $9,769=$321). The total refund granted to Mr. Dickerson in this Decision was $440 ($321 principal plus $119 interest).

Texaco Inc./Broadway Texaco, 9/22/93, RF321-892

The DOE denied an Application for Refund filed by Broadway Texaco (Broadway) an indirect purchaser and reseller of products covered by the consent order the DOE entered into with Texaco Inc. Broadway purchased Texaco motor gasoline through Oakwood Oil Company (Oakwood). In a previous Decision, the DOE had granted Oakwood a refund based on a finding that Oakwood had absorbed costs associated with Texaco's alleged overcharges. Therefore the DOE determined that Broadway, as a customer of Oakwood, could not have incurred any injury as a result of Texaco's alleged overcharges. Accordingly, Broadway's Application for Refund was denied.

Refund Applications

The Office of Hearings and Appeals issued the following Decisions and Orders concerning refund applications, which are not summarized. Copies of the full texts of the Decisions and Orders are available in the Public Reference Room of the Office of Hearings and Appeals.

Atlantic Richfield Company/Fred Wright et al	RF304-14217	09/21/93
Atlantic Richfield Company/Gasco Gasoline, Inc. et al	RF304-14004	09/24/93
Atlantic Richfield Company/Shultz's Arco et al	RF304-13949	09/21/93
Banks Construction Co. et al	RF272-66087	09/23/93
Banks Construction Co.	RD272-66087	.....
C. J. Langenfelder & Son, Inc	RD272-67566	.....
Beardstown C.U. School Dist. 15 et al	RF272-79189	09/22/93
City of Bedford et al	RF272-83001	09/21/93
Copperas Cove Independent School District et al	RF272-81252	09/22/93
East Valley School District et al	RF272-81974	09/23/93
Gulf Oil Corporation/Anderson-Gilyard	RR300-203	09/21/93
Lincoln Land Oil Co	RR300-205	.....
Saunders Oil Co	RR300-214	.....
Glenn Smith Oil Co	RR300-215	.....
Bestrom Oil Co	RR300-217	.....
Mount Vernon Mills, Inc	RC272-215	09/24/93
Shell Oil Company/Miller Shell Service	RF315-5656	09/21/93
St. Croix Petrochemical Corp	RF272-58649	09/24/93
St. Croix Petrochemical Corp	RD272-58649	.....
Texaco Inc./Gay Meadows Texaco	RR321-121	09/21/93
Texaco Inc./Ray Gessner Texaco #1 et al	RF321-4789	09/21/93

Dismissals

The following submissions were dismissed:

Name	Case No.	Name	Case No.	Name	Case No.
Alma Public Schools	RF272-82477	City of South Pasadena	RF272-82791	Sak's Texaco Service Station.	RF321-2467
Andres Martinez Solis	RF315-9319	Courthouse Texaco	RF321-16591	Slagle Texaco	RF321-14713
Animal By-Products	RF272-90544	Days Inn	RF300-14140	Sterling High School District.	RF272-82819
Art's Airport Texaco	RF321-14745	E. Quiett, Jr	RF321-14759	Terry McGovern Services, Inc.	RF315-9643
Auburn Car Clean	RF321-14748	Forbes Texaco	RF321-14719	Terry McGovern Services, Inc.	RF315-9433
Bellaire Texaco	RF321-803	Fred's Texaco	RF321-14720	Tex-Fan, Inc	RF300-15640
Bernie's Automotive	RF272-80322	Grizzly Bear Trading Post	RF321-14712	Triple Clean Texaco	RF321-14747
Bluford Comm. Cons. Dist. No. 114.	RF272-79490	Haleakala Dairy	RF272-90592		
Bob & Bobbie's Texaco	RF321-11715	Pete's Texaco	RF321-18840		
Branson Texaco	RF321-884	Rakes Texaco	RF321-14741		
Brown & Son Texaco	RF321-14798	Rob's Fair Park	RF321-9745		
		Robert L. Frederick	RF321-14600		

Name	Case No.
Triple Clean Texaco	RF321-14746
Waters Bros. Texaco	RF321-11360

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, room 1E-234, Forestall Building, 1000 Independence Avenue, SW., Washington, DC 20585, Monday through Friday, between the hours of 1 p.m. and 5 p.m., except federal holidays. They are also available in Energy Management: Federal Energy /Guidelines, a commercially published loose leaf reporter system.

Dated: November 10, 1993.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 93-28278 Filed 11-16-93; 8:45 am]

BILLING CODE 6450-01-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-4800-9]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: Comments must be submitted on or before December 17, 1993.

FOR FURTHER INFORMATION CONTACT: For further information, or to obtain a copy of this ICR, contact Sandy Farmer at EPA, (202) 260-2740.

SUPPLEMENTARY INFORMATION:

Office of Prevention, Pesticides and Toxic Substances

Title: Polychlorinated Byphenils (PCBs): Exclusions, Exemptions, and Use Authorizations. (EPA ICR No: 1001.05; OMB No: 2070-0008). This is a request for extension of the expiration date of a currently approved collection with no changes.

Abstract: Section 6(e) of the Toxic Substances Control Act (TSCA), generally prohibits the manufacture, processing, distribution in commerce and use of PCBs. However, regulations under 40 CFR 761.1(f) excludes certain manufacturing processes from these prohibitions. To be eligible for such an exclusion, respondents must comply with certain reporting, certification and recordkeeping requirements.

Excluded chemical manufacturers must submit a notification to the EPA. The notification must identify the manufacturing processes that generate PCBs in products at levels above two parts per million (ppm), and they are also required to certify compliance with all PCB release conditions on excluded processes. They must state whether the certification is based on actual monitoring data or on theoretical analysis of the chemical reaction(s) involved in the manufacturing process. They must report to the Agency data on their processes during periods of unusually high generation or releases of PCBs. In addition, excluded chemical manufacturers must keep records of all their monitoring data (or other analysis) that were used to support determination of compliance, as well as records of copies of the signed certification of compliance.

The EPA uses these data to verify the generation of only trace quantities of PCBs, to ensure compliance with the regulations, and to identify sites for compliance inspections.

Burden Statement: Burden for this collection of information is estimated to average 25 hours per respondent for reporting and 5 hours per recordkeeper annually. This estimate includes the time needed to review instructions, gather and submit the information, maintain the data needed, and review the collection of information.

Respondents: Excluded chemical manufacturers.

Estimated Number of Respondents: 5 respondents will report and 160 will keep records.

Estimated Number of Responses per Respondents: 1.

Estimated Total Annual Burden on Respondents: 925 hours.

Frequency of Collection: On occasion.

Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (2136), 401 M Street, SW., Washington, DC 20460.

and

Matthew Mitchell, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20503.

Dated: November 10, 1993.

Paul Lapsley,

Director, Regulatory Management Division.

[FR Doc. 93-28279 Filed 11-16-93; 8:45 am]

BILLING CODE 6560-50-F

[OPPTS-00137; FRL-4589-9]

Archive of Human Monitoring Specimens; Disposition to Private Sector or Other Governmental Party; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice invites the public or any governmental party to apply to acquire by donation all or portion of a national repository of human adipose tissue specimens collected by EPA for monitoring human exposure to chemicals. This archive of some 14,000 specimens, collected according to a national design for representativeness between 1970 and 1992, is now available for donation by EPA to a private-sector organization or to other Federal or State or government-related organizations. This notice announces an initial period for making application so that EPA can gauge public interest in this acquisition. EPA hopes that qualified research institutes will be interested in acquiring portions of the repository or the archive as a whole.

DATES: Written requests for samples must be submitted on or before December 22, 1993.

ADDRESSES: Parties interested in this acquisition should submit a written request following the guidance suggested in Unit V of this notice and send two copies to the TSCA

Nonconfidential Information Center, Rm. E-G99, Office of Pollution Prevention and Toxics (7407), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Should the applicant be unable to meet the application deadline above, a written request for an extension along with partial information should be submitted prior to the deadline.

FOR FURTHER INFORMATION CONTACT: Sarah S. Shapley, Chemical Management Division (7404), Office of Pollution Prevention and Toxics, Rm. NE-G012, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, Telephone: (202) 260-3979, Fax: (202) 260-0001.

SUPPLEMENTARY INFORMATION:

I. Repository Description

The National Human Adipose Tissue Survey (NHATS) has been part of EPA's program to monitor pesticides and other toxic substances in human tissues and fluids since the early 1970's. Monitoring data are used in exposure assessments and are important elements in the quantitative evaluations of hazard and risk. Researchers use the data to monitor the prevalence and levels of selected toxic substances in the general U.S. population. Data are also used to provide average baseline levels for the U.S. population, to identify trends in exposure, and to assess the effects of regulatory action.

Specimens have been collected in 47 metropolitan statistical areas (MSAs) according to a statistically determined survey design. Design specifications include age, sex, and race of the U.S. Census population for the area. The geographic stratification ensures a representative sample for all regions of the country. More than 90 pathologists and medical examiners participated in the collection network each fiscal year (October-September). However, for the years 1970–1987 there is not available a complete set for each since specimens have been the subject of chemical analysis by the EPA. Table 1 below gives the number of specimens remaining by year. More detailed information can be made available to applicants.

Table 1.—Number of Specimens Available by Year

Year	Total Number of Remaining Specimens
1970	0
1971	249
1972	405
1973	850
1974	656
1975	545
1976	323
1977	551
1978	384
1979	570
1980	1,158
1981	963
1982	689
1983	454
1984	641
1985	689
1986	718
1987	946
1988	1,248
1989	1,625
1990	1,461
1991	1,329
1992	1,183
TOTAL	14,058

Physically, the specimens are stored in 1 inch-diameter glass vials, ranging from 2 to 3 inches in height. The specimens are the only contents in the vial; there is no preservative solution. The 14,000 vials take approximately 400 square feet of refrigerated storage space.

Over the years, EPA has concentrated its chemical and statistical analysis of organochlorine pesticides, polychlorinated biphenyls, dioxins and furans, as well as certain special studies of selected volatile compounds and semi-volatile compounds. A listing of the latter and a complete bibliography of reports available in the public docket are in Unit VII of this notice. Chemical analysis has been by both individual and composite samples.

As an illustration of the usage possible with such a data base, a special study by EPA may be helpful. EPA used FY82 NHATS data to determine the presence of compounds cited in the Superfund Amendments and Reauthorization Act (SARA) as chemicals of interest or identified as present at hazardous waste sites. A partial listing of these chemicals and related factors, along with the frequency of detection (%) for composite samples is given below.

Volatile Compounds	Frequency of Detection (%)	Semi-Volatile Compounds	Frequency of Detection (%)
Benzene	96	Biphenyl	20
Chloroform	76	Bis(ethylhexyl) Phthalate	91
Dichlorobenzene	81	Cresol	88
Ethyl Isovalerate	96	Diphenyl Ether	91
Limonene	100	2-Phenyl phenol	48
Pentyl Alcohol	83		
Styrene	100		
Toluene	91		
Trichloroethylene	43		
Xylene	100		

II. Ancillary Contents: Analytic Documentation

The recipient would receive vials, each containing a human adipose tissue sample. Each vial will have a coded label on the top of the vial. The coded label establishes a link between the sample and the information pertaining to that sample.

Information on the samples is stored in computer files. The recipient may receive, at his or her own cost, a computer diskette with the sample information in a PC-SAS file. Sensitive information, such as donor initials, donor identification number, and hospital/medical examiner name, will not be released. The cost of masking such sensitive information on the vials themselves will be borne by the recipient.

For specimens in the vials, the following data are available: date specimen was collected; State where specimen was collected; sex of donor, race of donor, age of donor, and occupation of donor; whether specimen was collected at surgery or post-mortem; and whether donor was hospitalized more than 24 hours before the sample was taken. For specimens previously analyzed, the results of the chemical analysis can also be made available.

III. Terms of Transfer of Custody and Disposal by EPA

Since EPA intends to relinquish possession and custody of the NHATS Repository, as a whole or in portions, the terms of transfer will involve the recipient's taking both legal possession to the repository property and also immediate custody by physical transfer of the property. EPA will effectuate this transfer in concert with the General Services Administration. EPA will also announce its disposition from the initial pool of applicants in November 1993 and may re-open the offer should some portion of the archive remain after this initial disposition.

IV. Criteria for Donation

The criteria for awarding this property to a research or medical institute or governmental party are as follows: Clearly defined and programmed environmental or medical goals for usage; usage in the near-term; commitment to publication and public presentation of results of both chemical and statistical analyses; adequate facilities for maintaining the storage and retrieval of specimens; adequate analytic instrumental capability to undertake chemical analysis of specimens; and commitment and capability for using and continuing the statistical aspect of data analysis possible with this archive. Priority will be given to Federal and then State governmental agencies before private-sector institutions.

V. Request for Samples

Interested parties should submit two copies of a written request for samples. Applicants may wish to include the following information in their requests:

1. Name of research/medical organization proposed to take legal title to property. Other organizational identification as needed.
2. Address of proposed legal title-holder and other addresses as needed.
3. Official point of contact for EPA in consultation on this offer. Include person's name, position, address, telephone and telefax numbers.
4. Annual reports for calendar years 1990–1992.
5. Proof of federal tax status.
6. Brief summary of mission and business structure relevant to this offer.
7. Proposed technical program personnel taking receipt of property and responsible for its use. Include resumes.
8. Statement of intent for use of repository. This is not a binding statement but should include institution's policy and specifics on public communication of results of the institution's use. It should also cover how and where this repository fits into its current program and projection in time for such use.

VI. Public Docket For Applicants

A public docket for this proceeding is established in the TSCA Nonconfidential Information Center referred to above under the unit ADDRESSES. It contains the following documents.

(1) USEPA. "Quality Assurance Project Plan...Analysis of Adipose Tissue for Dioxins and Furans." Contractor Report, MRI #68–02–4252. August 11, 1988.

(2) USEPA. "Quality Assurance Project Plan...Broad Scan Analysis of Adipose Tissue from the FY 1986 EPA NHATS Repository." Contractor Report, MRI #68–02–4252. September 29, 1988.

(3) USEPA. "National Human Adipose Tissue Survey: Operations Manual." Contractor Report, MRI #68–DO–0137. As revised February 28, 1992. The second group are reports published using NHATS data.

(4) USEPA. "NHATS"/National Human Adipose Tissue Survey. August 1990. Pamphlet.

(5) NAS/NRC. "Monitoring Human Tissues for Toxic Substances." 1991.

(6) USEPA. "Baseline Estimates and Time Trends for Beta-benzene hexachloride, Hexachlorobenzene, and Polychlorinated Biphenyls in Human Adipose Tissue, 1970–1983." 1985. EPA #560/5–85–025.

(7) USEPA. "Analysis for Polychlorinated Dibenzo-p-Dioxins (PCDD) and Dibenzofurans (PCDF) in Human Adipose Tissue: Method Evaluation Study." 1986. EPA #560/5–86–020.

(8) USEPA. "Broad Scan Analysis of the FY82 National Human Adipose Tissue Survey Specimens." Vol. I - Executive Summary. 1986. EPA #560/5–86–035.

(9) USEPA. "Broad Scan Analysis of the FY82 National Human Adipose Tissue Survey Specimens." Vol. II - Volatile Organic Compounds. 1986. EPA #560/5–86–036.

(10) USEPA. "Broad Scan Analysis of the FY82 National Human Adipose Tissue Survey Specimens." Vol. III - Semi-Volatile Organic Compounds. 1986. EPA #560/5–86–037.

(11) USEPA. "Broad Scan Analysis of the FY82 National Human Adipose Tissue Survey Specimens." Vol. IV - Polychlorinated Dibenzo-p-Dioxins (PCDD) and Polychlorinated Dibenzofurans (PCDF)." 1986. EPA #560/5–86–038.

(12) USEPA. "Broad Scan Analysis of the FY82 National Human Adipose Tissue Survey Specimens." Vol. V - Trace Elements. 1986. EPA #560/5–86–039.

(13) USEPA. "Characterization of HRGC/MS Unidentified Peaks from the Analysis of Human Adipose Tissue." Vol. I - Technical Approach. 1987. EPA #560/5-87-002A.

(14) USEPA. "Characterization of HRGC/MS Unidentified Peaks from the Analysis of Human Adipose Tissue." Vol. II - Appendices. 1987. EPA #560/5–87–002B.

(15) USEPA. "Volatile Organic Compounds in Whole Blood-Determination by Heated Dynamic Headspace Purge and Trap Isotope Dilution GC/MS." 1987. EPA #560/5–87–008.

(16) USEPA. "Identification of SARA Compounds in Adipose Tissue." 1989. EPA #560/5–89–003.

(17) USEPA. "Broad Scan Analysis: Population Estimates from Fiscal Year 1982 Specimens." 1989. EPA #560/5–90–001.

(18) USEPA. "Brominated Dioxins and Dibenzofurans in Human Adipose Tissue." 1990. EPA #560/5–90–005.

(19) USEPA and DVA. "Pattern Recognition Analysis of VA/EPA PCDD and PCDF Data." 1990. With the Office of Environmental Epidemiology, Department of Veterans Affairs. EPA #560/5–90–006.

(20) USEPA. "Mass Spectral Confirmation of Chlorinated and Brominated Diphenylethers in Human Adipose Tissues." 1990. EPA #560/5–90–012.

(21) USEPA and DVA. "Dioxins and Dibenzofurans in Adipose Tissue of U.S. Vietnam Veterans and Controls." With the Veterans Health Services Research Administration. 1990.

(22) USEPA. "Chlorinated Dioxins and Furans in the General U.S. Population: NHATS FY87 Results." 1991. EPA #560/5–91–003.

(23) USEPA. "Chlorinated Dioxins and Furans in the General U.S. Population: NHATS FY87 Results. Executive Summary." 1991.

(24) USEPA. "NHATS Comparability Study." 1992. EPA #700/R92010.

List of Subjects

Environmental protection.

Dated: November 9, 1993.

John W. Melone,

Director, Chemical Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 93-28288 Filed 11-16-93; 8:45 am]

BILLING CODE 6560-50-F

[FRL-4802-6]

Clean Air Scientific Advisory Committee; Public Meeting

Pursuant to the Federal Advisory Committee Act, Public Law 92-463, notice is hereby given that the Clean Air Scientific Advisory Committee will hold a conference call from 1 p.m. until 3 p.m. on December 2, 1993.

The Committee will receive briefings from Agency personnel on the requested retrospective analysis of air quality models required by the Clean Air Act Amendments of 1990. The Committee will also review appropriate documents and provide comments.

The conference call lines are open to the public, but the number of lines available is limited. Callers will be able to access the call until all lines are in use. Any member of the public wishing further background information on this call should contact Mr. Jim DeMocker of EPA's Office of Air and Radiation at (202) 260-8980. Any member of the public who wishes to submit oral or written comments should contact the Designated Federal Official, Mr. Randall C. Bond, Science Advisory Board (1400), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; telephone 202/260-8414; FAX 202/260-1889.

Dated: November 9, 1993.

Edward S. Bender,

Acting Staff Director, Science Advisory Board.

[FR Doc. 93-28280 Filed 11-16-93; 8:45 am]

BILLING CODE 6560-50-P

[FRL-4803-1]

Public Hearing on Proposal of the Ozone Transport Commission for a Regional Low Emission Vehicle (LEV) Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of public hearing and availability of proposal.

SUMMARY: The United States Environmental Protection Agency is announcing a public hearing of the Ozone Transport Commission, which is preparing a proposal for regional implementation of a program calling for more stringent emission standards for new light duty motor vehicles. The resulting pollution reductions can then be used by States in their ozone State Implementation Plans. Under Section 177 of the Clean Air Act, States choose to have vehicles certified to California emission standards (rather than Federal emission standards), a program which is widely known as the Low Emission Vehicle (LEV) program. Under Section 184(c) of the Clean Air Act, the Ozone Transport Commission (OTC), after notice and opportunity for public comment, may recommend to the U.S. Environmental Protection Agency (EPA) control measures for EPA to require in all or part of the Ozone Transport Region. The Ozone Transport Region created by Section 184(a) of the Clean Air Act, includes the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont, the District of Columbia, and that portion of the State of Virginia within the Washington, DC, Consolidated Metropolitan Statistical Area (CMSA).

The proposal along with a technical support document, will be available from the OTC office (see below) starting on the afternoon of Tuesday, November 16, 1993. Information on the public hearing and the public comment period is provided below.

DATES: The public hearing will be held on December 16-17, 1993. Comments must be received by January 7, 1994. Proposals submitted as alternatives to a regional LEV program must be submitted by December 17, 1993.

TIME AND PLACE: The public hearing will be held at: Connecticut Department of Environmental Protection, 79 Elm Street, Hartford, CT 06102-5066.

Times: December 16, 1993-1 p.m.-5 p.m., December 17, 1993-9 a.m.-5 p.m.

ADDRESSES: Comments may be mailed to David Foerter, Ozone Transport Commission, 444 North Capitol Street, NW., suite 604, Washington, DC 20001. Copies of documents relevant to this action, including all comments received, are available for public inspection during normal business hours at the Connecticut Department of Environmental Protection, Bureau of Air Management, 79 Elm Street, Hartford, Connecticut 06106.

FOR FURTHER INFORMATION CONTACT:

David Foerter, Ozone Transport Commission, (202) 508-3840

Doug Gutro, U.S. Environmental Protection Agency, Region I, (617) 565-3383

FOR PRESS INQUIRIES CONTACT: Margot Callahan, Connecticut Department of Environmental Protection, (203) 566-3489.

FOR DOCUMENTS CONTACT: Stephanie Cooper, Ozone Transport Commission, (202) 508-3840.

SUPPLEMENTARY INFORMATION: The Ozone Transport Commission is actively encouraging submission of alternative proposals to the OTC proposal which will be available on November 16, 1993. However, any alternatives to the OTC proposal which are submitted as comments must be submitted by December 17, 1993, so that the public may also comment on the alternative prior to the conclusion of the public comment period on January 7, 1994. Copies of all comments will be available for public inspection (see address above).

David A. Fierra,

Acting Regional Administrator, EPA Region I.

[FR Doc. 93-28263 Filed 11-16-93; 8:45 am]

BILLING CODE 6560-50-M

[FRL-4802-5]

Technical Workshop on WTI Incinerator Risk Issues

AGENCY: U.S. Environmental Protection Agency.

ACTION: Notice of meeting.

SUMMARY: This notice announces a workshop sponsored by the U.S. Environmental Protection Agency's (EPA's) Risk Assessment Forum. This workshop is a technical review of an EPA plan, called a "project plan", for conducting a science-based assessment of risk for the Waste Technologies Incorporated (WTI) incinerator in East Liverpool, Ohio.

DATES: The workshop will begin on Wednesday, December 8, 1993, at 8:30 a.m. and end on Thursday, December 9, 1993, at 1 p.m. Members of the public may attend as observers.

ADDRESSES: The meeting will be held at the Holiday Inn Capitol, 550 C Street, SW., Washington, DC 20024. Eastern Research Group, Inc., an EPA contractor, is providing logistical support for the workshop. To attend the workshop as an observer, contact Helen Murray, Eastern Research Group, Inc., 110 Hartwell Avenue, Lexington, Massachusetts 02173, Tel: 617/674-7307 by December 1, 1993. Space is limited, so please register early.

FOR FURTHER INFORMATION CONTACT: For technical inquiries, or to obtain a copy of the draft project plan, contact Dr. Mario Mangino, U.S. EPA Region V, 77 West Jackson Boulevard, Chicago, IL 60604, Telephone (312) 353-0398.

For other workshop information, contact Clare Stine, U.S. Environmental Protection Agency (8101), 401 M Street, SW., Washington, DC 20460, Telephone (202) 260–6743.

SUPPLEMENTARY INFORMATION: EPA risk assessment activities for the WTI incinerator consist of two phases. In 1992, EPA Region V conducted a risk assessment before authorizing interim operations of the WTI incinerator (Phase I). This risk assessment, which was developed by a contractor, focused on direct exposure through the inhalation pathway in accordance with EPA's Office of Solid Waste guidelines. Early this year, EPA's Office of Health and Environmental Assessment conducted an additional screening level analysis, with preliminary risk estimates for four exposure scenarios, each of which included indirect exposures through the food chain.

For Phase II, which EPA expects to complete next spring, EPA has undertaken additional studies to evaluate exposure pathways. Meteorological data collected over a one-year period from the WTI site will be utilized, as well as emissions monitoring data from the recent trial burn and subsequent performance test. These data will be used to perform air-dispersion and deposition modeling for emission constituents. Other site-specific data related to exposure are being collected for the risk assessment so that it will reflect the characteristics of the site to the extent possible.

On December 8 and 9, EPA will hold the first of two external peer reviews of Phase II risk assessment work. For this December meeting, EPA is asking several scientific experts to comment on the draft plan for conducting the risk assessment. EPA will use the expert recommendations to complete the plan and conduct the risk assessment. At the second meeting, currently projected to be held next spring, EPA will seek expert peer review of the draft risk assessment report.

For each meeting, EPA will convene a peer review panel of independent scientists from the fields of toxicology, environmental fate and transport, combustion engineering, atmospheric modeling, and exposure assessment. These experts will focus on scientific data, methods, and analyses, along with the related assumptions and uncertainties that describe risk at the site.

Dated: November 10, 1993.

Carl Gerber,

Acting Assistant Administrator for Research and Development.

[FR Doc. 93–28283 Filed 11–16–93; 8:45 am]

BILLING CODE 6560–50–M

[OPP–66185; FRL–4648–6]

Request for Voluntary Cancellation of Calo-Clor and Calo-Gran Brand Turf Fungicides; and Cancellation Order

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Agency decision.

SUMMARY: This Notice, issued pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) announces that Grace Sierra Crop Protection Company (Grace Sierra) has voluntarily requested that EPA cancel the registrations of two of its products, Calo-Gran and Calo-Clor Brand Turf Fungicide Products, and that EPA has granted this request. Both products each contain the two active ingredients mercuric chloride and mercurous chloride. These two products were the last mercurial based pesticide products registered under FIFRA. The cancellation became effective on November 1, 1993. This Notice also discusses the disposition of existing stocks.

DATES: The cancellation order became effective on November 1, 1993.

FOR FURTHER INFORMATION CONTACT: By mail: Tom Moriarty, Special Review and Reregistration Division (7508W), Office of Prevention, Pesticides and Toxic Substances, U.S. Environmental Protection Agency, 401 M St., SW., Washington DC, 20460. Office location and phone number: Special Review Branch, 3rd Floor, Crystal Station, 2800 Crystal Drive, Arlington, VA, (703) 308–8035.

SUPPLEMENTARY INFORMATION: This Notice announces the Agency's decision on a request for voluntary cancellation of two products, Calo-Gran and Calo-Clor (EPA registrations number 58185–4 and 58185–1 respectively). This Notice also specifies the effective date of the cancellation and describes the provisions for sale, distribution, and use of the existing stocks of these two products.

I. Request for Voluntary Cancellation

Calo-Clor and Calo-Gran are mercurial based fungicides used on golf course turfs and greens. Each product contains two active ingredients, mercuric chloride and mercurous chloride, at different percentages. Calo-Clor and Calo-Gran were registered to control Pink Snow Mold (*Fusarium nivale*) and Grey Snow Mold (*Typhula incarnata* and *Typhula ishikarinsis*).

In 1992 the Agency issued two Data Call-In Notices (DCI) under FIFRA section 3(c)2(B) to Grace Sierra requiring data in order to maintain the product registrations. One DCI, issued February 19, 1992, required economic benefits information on Calo-Clor and Calo-Gran and a worker exposure study. The second DCI, issued on June 18, 1992, was issued under Phase 4 of the reregistration program pursuant to section 4(f)(1)(B) of FIFRA. The second DCI required data from several guideline studies. In the course of generating the required data, Grace Sierra requested voluntary cancellation of these two products.

In a letter dated June 25, 1993, Grace Sierra requested voluntary cancellation of the registrations of Calo-Clor and Calo-Gran. Evidence has been submitted to the Agency which demonstrates that Grace Sierra was last in compliance with the DCIs on June 25, 1993. Accordingly, Grace Sierra has voluntarily requested cancellation of its two products, Calo-Clor and Calo- Gran, and an existing stocks provision based on that date.

In a letter dated August 20, 1993, Grace Sierra amended its original request for voluntary cancellation by also waiving any comment period associated with its original request for voluntary cancellation as well as the requirement for **Federal Register** publication of a notice announcing the Agency's receipt of this request prior to the Agency's acceptance of this request.

II. EPA's Decision on the Request for Voluntary Cancellation, the Cancellation Order, and Provision for Existing Stocks

Under section 6(f)(1) of FIFRA, a pesticide registrant may request at any time that EPA cancel any of its pesticide registrations. EPA must publish in the **Federal Register** a notice of receipt of the request and allow public comment before granting the request unless either the registrant requests a waiver of the notice or the Administrator determines that the continued use of the pesticide would pose an unreasonable adverse effect on human health or the environment. In a letter dated August 20, 1993, amending its request for voluntary cancellation, Grace Sierra also requested that EPA waive the comment period and the requirement for publication of a notice in the **Federal Register** announcing the Agency's receipt of the request for voluntary cancellation prior to the Agency's

acceptance of Grace Sierra's request. Accordingly, the Agency is announcing its receipt of this request and its acceptance in this Notice.

EPA has reviewed Grace Sierra's requests for voluntary cancellation and for a 1-year existing stocks provision for the two affected products. In accordance with the Agency's existing stocks policy (56 FR 29363), the Agency has concluded that the requests can be accepted.

EPA hereby grants Grace Sierra's requests that the registrations of the products Calo-Clor (EPA registration number 58185-1) and Calo-Gran (EPA registration number 58185-4) be voluntarily canceled and that there be a 1-year existing stocks provision for these products. The products are hearby canceled. The additional terms and conditions of the cancellation order follow. Grace Sierra will have 1 year from June 25, 1993 to sell, distribute, or use any existing stocks of Calo-Gran and Calo-Clor which were packaged, labeled, and released for shipment or sale on or before June 25, 1993. Grace Sierra's 1-year existing stocks provision ends on June 24, 1994; any further sale, distribution, or use of any quantity of either of these products by Grace Sierra after June 24, 1994 would be a violation of this cancellation order and of FIFRA. All other distributors and users may sell, distribute, or use their stocks of Calo-Gran and Calo-Clor until such stocks are exhausted.

Any sale, distribution or other disposition of existing stocks that is not consistent with the terms of this Order will be considered a violation of FIFRA section 12(a)(2)(K) and/or section 12(a)(1)(A) as appropriate.

List of Subjects

Environmental protection.

Dated: November 1, 1993.

Daniel M. Barolo,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 93-28115 Filed 11-16-93; 8:45 am]

BILLING CODE 6560-50-F

[OPP-34047; FRL 4738-5]

Notice of Receipt of Requests for Amendments to Delete Uses in Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of request for amendment by registrants to delete uses in certain pesticide registrations.

DATES: Unless a request is withdrawn, the Agency will approve these use deletions and the deletions will become effective on February 15, 1994.

FOR FURTHER INFORMATION CONTACT: By mail: James A. Hollins, Office of Pesticide Programs (7502C), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Office location for commercial courier delivery and telephone number: Room 216, Crystal Mall No. 2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 305-5761.

SUPPLEMENTARY INFORMATION:

I. Introduction

Section 6(f)(1) of FIFRA, provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be amended to delete one or more uses. The Act further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the Federal Register. Thereafter, the Administrator may approve such a request.

II. Intent to Delete Uses

This notice announces receipt by the Agency of applications from registrants to delete uses in the seven pesticide registrations listed in the following Table 1. These registrations are listed by registration number, product names and the specific uses deleted. Users of these products who desire continued use on crops or sites being deleted should contact the applicable registrant before February 15, 1994, to discuss withdrawal of the applications for amendment. This 90-day period will also permit interested members of the public to intercede with registrants prior to the Agency approval of the deletion.

TABLE 1. — REGISTRATIONS WITH REQUESTS FOR AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE REGISTRATIONS

Registration No.	Product Name	Delete from Label
000264-00454	Lindane Crystals Insecticide	Apples, apricots, asparagus, avocados, cherries, grapes, guavas, mangos, mushrooms, nectarines, peaches, pears, pecans, pineapples, plums, prunes, quinces, strawberries, tobacco, ornamental plants, beef cattle, goats, hogs, horses, mules, sheep, human skin/clothing, in or around any structure
000264-00455	Lindane Powder	Apples, apricots, asparagus, avocados, cherries, grapes, guavas, mangos, mushrooms, nectarines, peaches, pears, pecans, pineapples, plums, prunes, quinces, strawberries, tobacco, ornamental plants, beef cattle, goats, hogs, horses, mules, sheep, human skin/clothing, in or around any structure
009754-00006	Sunbugger #6	All indoor uses, dogs and cats, citrus (lime, lemons, & tangerines)
034147-00005	Lindane 99.5% Technical	Apples, apricots, asparagus, avocados, cherries, grapes, guavas, mangos, mushrooms, nectarines, peaches, pears, pecans, pineapples, plums, prunes, quinces, strawberries, tobacco, ornamental plants, beef cattle, goats, hogs, horses, mules, sheep, human skin/clothing, in or around any structure
034147-00006	Lindane Dust Concentrate	Apples, apricots, asparagus, avocados, cherries, grapes, guavas, mangos, mushrooms, nectarines, peaches, pears, pecans, pineapples, plums, prunes, quinces, strawberries, tobacco, ornamental plants, beef cattle, goats, hogs, horses, mules, sheep, human skin/clothing, in or around any structure
034704-00685	Simazine 80W Herbicide	Asparagus, artichokes, sugarcane, Florida citrus
034704-00686	Simazine 90 Water Dispersible Granula Herbicide	Asparagus, artichokes, sugarcane, Florida citrus, Florida turf

TABLE 1. — REGISTRATIONS WITH REQUESTS FOR AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE REGISTRATIONS—Continued

Registration No.	Product Name	Delete from Label
034704–00687	Simazine 4L Flowable Herbicide	Asparagus, artichokes, sugarcane, Florida citrus
040083–00001	Lindane Technical	Apples, apricots, asparagus, avocados, cherries, grapes, guavas, mangos, mushrooms, nectarines, peaches, pears, pecans, pineapples, plums, prunes, quinces, strawberries, tobacco, ornamental plants, beef cattle, goats, hogs, horses, mules, sheep, human skin/clothing, in or around any structure
051036–00127	Simazine 4 FL	Asparagus, artichokes, sugarcane, non-cropland areas

The following Table 2, includes the names and addresses of record for all registrants of the products in Table 1, in sequence by EPA company number.

TABLE 2. — REGISTRANTS REQUESTING AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE REGISTRATIONS

EPA Company No.	Company Name and Address
000264	Rhone-Poulenc, 2 T.W. Alexander Dr., Research Triangle Park, NC 27709.
009754	Gro-Lyte Division of Sungro Chemicals, Inc., P.O. Box 24632, Los Angeles, CA 90024.
034704	Platte Chemical Co., P.O. Box 667, Greeley, CO 80632.
034147	Hoechst-Roussel Agri-Vet Co., Route 202-206, P.O. Box 2500, Somerville, NJ 08876.
040083	Inquinosa, c/o McKenna & Cuneo, 1575 Eye St., NW., Washington, DC 20005.
051036	Micro Flo Co., P.O. Box 5948, Lakeland, FL 33807.

III. Existing Stocks Provisions

The Agency has authorized registrants to sell or distribute product under the previously approved labeling for a period of 18 months after approval of the revision, unless other restrictions have been imposed, as in special review actions.

List of Subjects

Environmental protection, Pesticides and pests, Product registrations.

Dated: November 3, 1993.

Daniel M. Barolo,

Acting Director, Office of Pesticide Programs.

[FR Doc. 93–27992 Filed 11–16–93; 8:45 am]

BILLING CODE 6560–50–F

[OPP–180905; FRL–4739–1]

Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted specific exemptions for the control of various pests to the 15 States as listed below and one to the United States Department of Agriculture. There were also 10 crisis exemptions initiated by various States. These exemptions, issued during the months of January through August 1993, are subject to application and timing restrictions and reporting requirements designed to protect the environment to the maximum extent possible. EPA has denied specific exemption requests from the North Dakota and Texas Departments of Agriculture and one public health exemption from the Alaska Department of Environmental Conservation. Information on these restrictions is available from the contact persons in EPA listed below.

DATES: See each specific and crisis exemption for its effective date.

FOR FURTHER INFORMATION CONTACT: See each emergency exemption for the name of the contact person. The following information applies to all contact persons: By mail: Registration Division (7505W), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: 6th Floor, CS #1, 2800 Jefferson Davis Highway, Arlington, VA, (703–308–8417).

SUPPLEMENTARY INFORMATION: EPA has granted specific exemptions to the:

1. Arizona Department of Agriculture for the use of bifenthrin on broccoli, cauliflower, and head lettuce to control the sweet potato whitefly; August 5, 1993, to May 15 ,1994. (Andrea Beard)

2. Arizona Department of Agriculture for the use of avermectin on head lettuce to control leafminers; July 27, 1993, to July 26, 1994. (Larry Fried)

3. Arizona Department of Agriculture for the use of avermectin on melons to control leafminers; July 30, 1993, to July 28, 1994. (Larry Fried)

4. Arizona Department of Agriculture for the use of imidacloprid on broccoli, cauliflower, cabbage, and head lettuce to control the sweet potato whitefly; August 5, 1993, to May 15, 1994. A notice published in the **Federal Register** of July 28, 1993 (58 FR 40424), and no comments were received. The exemption was issued because EPA determined that an urgent, nonroutine situation exists, and growers could suffer significant losses. This chemical is systemic and is to be used at or near planting only, to protect the germinating seedlings. (Andrea Beard)

5. Arkansas State Plant Board for the use of fomesafen on snap beans to control morningglory and pigweed *spp.*; June 10, 1993, to September 5, 1993. (Larry Fried)

6. California Environmental Protection Agency for the use of bifenthrin on broccoli, cauliflower, cabbage, rapini, and head lettuce to control the sweet potato whitefly; August 17, 1993, to April 30, 1994. (Andrea Beard)

7. California Environmental Protection Agency for the use of imidacloprid on broccoli, cauliflower, cabbage, rapini, and head/leaf lettuce to control the sweet potato whitefly; August 20, 1993, to December 31, 1993. (Andrea Beard)

8. California Environmental Protection Agency for the use of

avermectin on pears to control two-spotted spider mites; May 7, 1993, to September 15, 1993. California had initiated a crisis exemption for this use. (Larry Fried)

9. California Environmental Protection Agency for the use of avermectin on tomatoes to control leafminers; July 15, 1993, to July 14, 1994. (Larry Fried)

10. California Environmental Protection Agency for the use of avermectin on peppers to control leafminers; July 30, 1993, to July 29, 1994. (Larry Fried)

11. California Environmental Protection Agency for the use of avermectin on celery to control leafminers; April 7, 1993, to April 6, 1994. (Larry Fried)

12. California Environmental Protection Agency for the use of avermectin on strawberries to control two-spotted spider mites; March 26, 1993, to March 25, 1994. (Larry Fried)

13. California Environmental Protection Agency for the use of avermectin on head lettuce to control leafminers; July 27, 1993, to July 26, 1994. (Larry Fried)

14. California Environmental Protection Agency for the use of bayleton on peppers to control powdery mildew; April 19, 1993, to November 1, 1993. (Larry Fried)

15. Colorado Department of Agriculture for the use of bifenthrin on corn to control mites; August 25, 1993, to August 31, 1993. Colorado had initiated a crisis exemption for this use. (Andrea Beard)

16. Idaho Department of Agriculture for the use of avermectin on pears to control spider mites and pear psylla; May 7, 1993, to August 30, 1993. (Larry Fried)

17. Idaho Department of Agriculture for the use of avermectin on hops to control spider mites; May 14, 1993, to September 20, 1993. (Larry Fried)

18. Idaho Department of Agriculture for the use of pirimicarb on seed alfalfa to control alfalfa aphids and blue aphids; June 18, 1993, to August 31, 1993. (Larry Fried)

19. Illinois Department of Agriculture for the use of fomesafen on snap beans to control puncturevine; July 13, 1993, to September 1, 1993. (Larry Fried)

20. Michigan Department of Agriculture for the use of avermectin on pears to control spider mites and pear psylla; May 7, 1993, to September 30, 1993. (Larry Fried)

21. Minnesota Department of Agriculture for the use of 2,4-D on wild rice to control common water plantain; June 9, 1993, to July 31, 1993. (Larry Fried)

22. Nevada Department of Agriculture for the use of pirimicarb on seed alfalfa to control alfalfa aphids and blue aphids; June 18, 1993, to August 31, 1993. (Larry Fried)

23. New York Department of Environmental Conservation for the use of fomesafen on snap and dry beans to control broadleaf weeds; August 13, 1993, to August 31, 1993. New York had initiated a crisis exemption for this use. (Larry Fried)

24. New York Department of Environmental Conservation for the use of avermectin on pears to control spider mites and psylla; May 17, 1993, to September 30, 1993. (Larry Fried)

25. Oregon Department of Agriculture for the use of avermectin on pears to control spider mites and psylla; May 7, 1993, to August 30, 1993. (Larry Fried)

26. Oregon Department of Agriculture for the use of oxyfluorfen on blackberries to control primocanes; April 19, 1993, to July 31, 1993. (Larry Fried)

27. Oregon Department of Agriculture for the use of avermectin on hops to control spider mites; May 14, 1993, to September 20, 1993. (Larry Fried)

28. Oregon Department of Agriculture for the use of oxyfluorfen on grasses grown for seed to control various weeds, grasses, and volunteer crop seedlings; August 26, 1993, to January 15, 1994. (Larry Fried)

29. Oregon Department of Agriculture for the use of oxyfluorfen on raspberries to control primocanes; April 19, 1993, to May 15, 1993. Oregon had initiated a crisis exemption for this use. (Larry Fried)

30. Oregon Department of Agriculture for the use of pirimicarb on seed alfalfa to control alfalfa aphids and blue aphids; June 18, 1993, to August 31, 1993. (Larry Fried)

31. Pennsylvania Department of Agriculture for the use of avermectin on pears to control spider mites and psylla; May 7, 1993, to September 30, 1993. (Larry Fried)

32. Texas Department of Agriculture for the use of cyfluthrin on sugarcane to control Mexican rice borers; August 13, 1993, to September 30, 1993. (Libby Pemberton)

33. Texas Department of Agriculture for the use of avermectin on bell, chili, and jalapeno peppers to control broad mites; January 27, 1993, to October 13, 1993. Texas had initiated a crisis exemption for this use. (Larry Fried)

34. Utah Department of Agriculture for the use of avermectin on pears to control spider mites and psylla; May 7, 1993, to September 1, 1993. (Larry Fried)

35. Washington Department of Agriculture for the use of avermectin on pears to control pear psylla; May 7, 1993, to September 1, 1993. (Larry Fried)

36. Washington Department of Agriculture for the use of chlorothalonil on rhubarb to control Ramularia leaf and stalk spot; August 17, 1993, to September 15, 1993. Washington had initiated a crisis exemption for this use. (Susan Stanton)

37. Washington Department of Agriculture for the use of avermectin on hops to control spider mites; May 14, 1993, to September 20, 1993. (Larry Fried)

38. Washington Department of Agriculture for the use of oxyfluorfen on raspberries to control primocanes; April 19, 1993, to June 1, 1993. Washington had initiated a crisis exemption for this use. (Larry Fried)

39. Washington Department of Agriculture for the use of pirimicarb on seed alfalfa to control alfalfa aphids and blue aphids; June 18, 1993, to August 31, 1993. (Larry Fried)

40. United States Department of Agriculture for the use of brodifacoum and bromethalin on Rose Island, Rose Atoll National Wildlife Refuge to control the Polynesian rat; April 19, 1993, to April 18, 1994. (Larry Fried)

Crisis exemptions were initiated by the:

1. California Environmental Protection Agency on May 20, 1993, for the use of avermectin on pears to control two spotted spider mites. This program has ended. (Larry Fried)

2. Idaho Department of Agriculture on August 27, 1993, for the use of paraquat on dry peas and lentils to control weeds. This program has ended. (Susan Stanton)

3. Idaho Department of Agriculture on July 30, 1993, for the use of chlorpyrifos on hops to control hop aphids. This program has ended. (Andrea Beard)

4. Minnesota Department of Agriculture on August 3, 1993, for the use of metalaxyl on potatoes to control late blight. This program has ended. (Susan Stanton)

5. Nebraska Department of Agriculture on July 24, 1993, for the use of propiconazole on corn to control fungal diseases. This program has ended. (Andrea Beard)

6. North Dakota Department of Agriculture on August 4, 1993, for the use of metalaxyl on potatoes to control late blight. This program has ended. (Susan Stanton)

7. Texas Department of Agriculture on June 3, 1993, for the use of avermectin on melons to control leafminers. This program has ended. (Larry Fried)

8. Virginia Department of Agriculture and Consumers Services on August 18, 1993, for the use of bifenthrin on peanuts to control mites. This program has ended. (Andrea Beard)

9. Washington Department of Agriculture on August 27, 1993, for the use of paraquat on dry peas and lentils to control weeds. This program has ended. (Susan Stanton)

10. Washington Department of Agriculture on April 30, 1993, for the use of avermectin on pears to control pear psylla. This program has ended. (Larry Fried)

EPA has denied specific exemption requests from the:

1. North Dakota Department of Agriculture for the use of mancozeb on sunflowers to control rust. The Agency denied the exemption because an emergency condition does not exist. It cannot be determined that an economic loss will result without the use of mancozeb. (Margarita Collantes)

2. Texas Department of Agriculture for the use of oxyfluorfen on leucaena leucocephala to control various weed species. The specific exemption was denied based on the determination that an emergency condition did not exist. The section 18 crisis exemption issued April 8, 1993, for this chemical was revoked. (Larry Fried)

3. Texas Department of Agriculture for the use of metolachlor on leucaena leucocephala to control various weed species. The Agency determined that an emergency condition does not exist. In addition, the Agency believes that the section 18 process is not the appropriate mechanism for EPA to make pesticides available to control routine pest problems on new crops. The crisis exemption declared by Texas was revoked. (Larry Fried)

EPA denied a public health exemption on August 12, 1993, from the Alaska Department of Environmental Conservation for the use of capsaicin products to repel wild bear and moose. June 28, 1993, EPA issued a memorandum announcing the implementation of two-part strategy concerning the unregistered use of bear repellants which includes a provision to excercise enforcement discretion and defer taking additional actions against these types of products for a 1-year period. Because of the enforcement discretion, the requested products are available for use and an emergency condition does not exist. (Susan Stanton)

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection, Pesticides and pests, Crisis exemptions.

Dated: October 25, 1993.

Daniel M. Barolo,

Acting Director, Office of Pesticide Programs.

[FR Doc. 93-27993 Filed 11-16-93; 8:45 am]

BILLING CODE 6560-50-F

[OPP-66186; FRL 4739-3]

Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of requests by registrants to voluntarily cancel certain pesticide registrations.

DATES: Unless a request is withdrawn by February 15, 1994, orders will be issued cancelling all of these registrations.

FOR FURTHER INFORMATION CONTACT: By mail: James A. Hollins, Office of Pesticide Programs (7502C), Environmental Protection Agency, 401 M Street SW, Washington, DC 20460. Office location for commercial courier delivery and telephone number: Room 216, Crystal Mall No. 2, 1921 Jefferson Davis Highway, Arlington, VA (703) 305-5761.

SUPPLEMENTARY INFORMATION:

I. Introduction

Section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, provides that a pesticide registrant may, at any time, request that any of its pesticide registrations be cancelled. The Act further provides that EPA must publish a notice of receipt of any such request in the **Federal Register** before acting on the request.

II. Intent to Cancel

This notice announces receipt by the Agency of requests to cancel some 56 pesticide products registered under section 3 or 24(c) of FIFRA. These registrations are listed in sequence by registration number (or company number and 24(c) number) in the following Table 1.

TABLE 1. — REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product Name	Chemical Name
000004-00126	Bonide Flower-Vegetable 4-In-1 Spray	Methoxychlor (2,2-bis(*p*-methoxyphenyl)-1,1,1-trichloroethane) 2,4-Dinitro-6-octyl* phenyl crotonate, 2,6-dinitro-4-octyl* phenyl crotonate and *O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate
000004-00303	Zinc Phosphide Bait	Zinc phosphide
000070-00117	Kill-Ko New Improved Roach and Ant Killer	*o*-Isopropoxyphenyl methylcarbamate 2,2-Dichlorovinyl dimethyl phosphate
000100 IA-91-0004	Beacon Herbicide	Methyl 2-[[[[[4,6-bis(difluoromethoxy)-2-pyrimidinylaminocarbonylaminosulfo
000100 MS-92-0004	Beacon Herbicide	Methyl2-[[[[[4,6-bis(difluoromethoxy)-2-pyrimidinylaminocarbonylaminosulfo
000100 NJ-91-0005	Larvadex 2SL	*N*-Cyclopropyl-1,3,5-triazine-2,4,6-triamine
000100 PA-91-0002	Larvadex 2 SL	*N*-Cyclopropyl-1,3,5-triazine-2,4,6-triamine
000100 UT-91-0002	Larvadex 2 SL	*N*-Cyclopropyl-1,3,5-triazine-2,4,6-triamine
000230-00073	CDB Clearon Detergent Sanitizer	Sodium dichloroisocyanurate dihydrate
000270-00181	Fly Stop Sticky Fly Trap	(*Z*)-9-Tricosene
000279-02234	Niagara Ferbam 7-G-3 Dust	Ferric dimethyldithiocarbamate *O,O*-Dimethyl *S*-((4-oxo-1,2,3-benzotriazin-3(4*H*)-yl)methyl) phosphorodithioate

TABLE 1. — REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Product Name	Chemical Name
000279 MT-84-0004	Dimethoate 267 Systemic Insecticide	*O,O*-Dimethyl *S*-((methylcarbamoyl)methyl)phosphorodithioate
000279 MT-84-0006	Dimethoate 267 Systemic Insecticide	*O,O*-Dimethyl *S*-((methylcarbamoyl)methyl)phosphorodithioate
000875-00151	Oxford Kilz-M	*o*-Isopropoxyphenyl methylcarbamate *N*-Octyl bicycloheptene dicarboximide Pyrethrins
000935-00035	ACL-59	Potassium dichloro-*s*-triazinetrione
000935-00043	SPA-60 Chlorinating Granules	Sodium dichloro-*s*-triazinetrione
000935-00044	SPA-90 Chlorinating Tablet 1≥	Trichloro-*s*-triazinetrione
000935-00046	Shielded Shock Granules	Sodium dichloro-*s*-triazinetrione
000935-00049	MWWS 60 Wash and Surface Sanitizer	Sodium dichloro-*s*-triazinetrione
000935-00051	MAWS 60 Acid Wash Sanitizer	Sodium dichloro-*s*-triazinetrione
000935-00052	MAS 60 Alkaline Sanitizer	Sodium dichloroisocyanurate dihydrate
000935-00053	MDS 60 Detergent Sanitizer	Sodium dichloro-*s*-triazinetrione
000935-00056	MFDS 60 Fabric and Diaper Sanitizer	Sodium dichloro-*s*-triazinetrione
000935-00060	Convert-A-Clor Brominating Granules	Sodium bromide Sodium dichloroisocyanurate dihydrate
001258-00745	Olin Pool Chlorine	Potassium dichloro-*s*-triazinetrione
001258-00897	Olin HTH Brand Plus Two Pool Chlorine Concentrate	Sodium dichloro-*s*-triazinetrione
001258-00898	HTH Brand Hold Pool Chlorine Concentrate	Sodium dichloro-*s*-triazinetrione
001629-00016	Weevil-Cide Toxi-Fog Fogging Spray	Methoxychlor (2,2-bis(*p*-methoxyphenyl)-1,1,1-trichloroethane) *O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate (Butylcarbityl)(6-propylpiperonyl) ether 80% and related compounds 20% Pyrethrins
002139 AZ-89-0009	Carzol SP	*m*-(((Dimethylamino)methylene)amino)phenyl-*N*-methylcarbamate, hydrochloride
003640-00061	Sanitergent Mark X	Sodium dichloro-*s*-triazinetrione
003876-00138	Betz Slimicide C-58P	Trichloro-*s*-triazinetrione
006284-00038	CPC Algazine	2-Chloro-4,6-bis(ethylamino)-*s*-triazine
007616-00054	Kem-Tek Algy-Cop	Copper (from triethanolamine complex)
007679-00023	American Brand Nicotine Sulfate	Nicotine
009157-00033	Sun Fast Tabs	Trichloro-*s*-triazinetrione
009429-00002	Welgicide Cleaner	Sodium metasilicate Sodium hydroxide
010163-00025	Prokil Malathion Cryolite 4.50 Dust	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate Cryolite
010163-00066	Prokil Malathion-Cryolite 6-50 Dust	*O,O*-Dimethyl phosphorodithioate of diethyl mercaptosuccinate Cryolite
010182 AZ-91-0009	Stauffer Eptam 10.G Granules	*S*-Ethyl dipropylthiocarbamate
010182 FL-91-0005	Gramoxone Extra Herbicide	1,1'-Dimethyl-4,4'-bipyridinium dichloride
010182 MS-87-0006	Gramoxone Super Herbicide	1,1'-Dimethyl-4,4'-bipyridinium dichloride
010428-00016	Chlor-San 16	Sodium dichloroisocyanurate dihydrate
011649-00015	Avitrol FC Corn Chops-99s	4-Aminopyridine
011715-00211	Famam No-Gnaw	Benzyl diethyl ((2,6-xylylcarbamoyl)methyl) ammoniumbenzoate Essential oils Thymol
034571-00007	Betz Entec 346	Sodium dichloro-*s*-triazinetrione
037982-00004	Pure - Chlor Jumbo 100 Swimming Pool Chlorinating Table	Trichloro-*s*-triazinetrione
037982-00006	Pure-Chlor Swimming Pool Chlorinating Tablets	Trichloro-*s*-triazinetrione
037982-00019	Spachlor Chlorinating Granules	Sodium dichloro-*s*-triazinetrione
037982-00022	All Pure Dry Algaecide	Trichloro-*s*-triazinetrione
037982-00023	All Pure Chlorinating Granules	Sodium dichloro-*s*-triazinetrione

TABLE 1. — REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION—Continued

Registration No.	Product Name	Chemical Name
043680–00009	C-960	Sodium dichloroisocyanurate dihydrate
045309–00008	Aqua Clear Hydro Tabs	Trichloro-s-triazinetrione
045309–00015	Aqua Clear Mini Rapid Tabs	Trichloro-s-triazinetrione
045309–00022	Aqua Clear Econo-Gran	Trichloro-s-triazinetrione
045309–00023	Aqua Clear Tri-Gran	Trichloro-s-triazinetrione
045309–00024	Aqua Clear Tri-Shock	Trichloro-s-triazinetrione

Unless a request is withdrawn by the registrant within 90 days of publication of this notice, orders will be issued cancelling all of these registrations. Users of these pesticides or anyone else desiring the retention of a registration should contact the applicable registrant directly during this 90–day period. The following Table 2 includes the names and addresses of record for all registrants of the products in Table 1, in sequence by EPA Company Number.

TABLE 2. — REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA Company No.	Company Name and Address
000004	Bonide Products Inc., 2 Wurz Ave., Yorkville, NY 13495.
000070	Wilbur-Ellis Co., Box 16458, Fresno, CA 93755.
000100	Ciba-Geigy Corp., Box 18300, Greensboro, NC 27419.
000230	Olin Corp., CDB Products, 120 Long Ridge Rd., Stamford, CT 06904.
000270	Farnam Companies Inc., 301 W. Osborn Rd, Phoenix, AZ 85013.
000279	FMC Corp., ACG Speciality Products, 1735 Market Street, Philadelphia, PA 19103.
000875	Diversey Corp., 12025 Tech Center Dr., Livonia, MI 48150.
000935	Occidental Chemical Corp., Development Center, V-81, Box 344, Niagara Falls, NY 14302.
001258	Olin Corp., Box 586, Cheshire, CT 06410.
001629	McShares, Inc., Box 1460, Salina, KS 67402.
002139	Nor-Am Chemical Co, Little Falls Centre One, 2711 Centerville Rd, Wilmington, DE 19808.
003640	Steams Packaging Corp., Box 3216, Madison, WI 53704.
003876	Betz Laboratories, Inc., 4636 Somerton Rd., Trevose, PA 19053.
006284	Richey Industries, Inc., Box 928, Medina, OH 44258.
007616	Chem Lab Products Inc., 5160 E. Airport Dr., Ontario, CA 91761.
007679	American Brand Chemical Co., Box 4, Bonham, TX 75418.
009157	Morgan Gallacher Inc., 8707 Millergrove Dr., Santa Fe, CA 90670.
009429	Cotey Chemical Co., 1939 Ave., H., Lubbock, TX 79404.
010163	Gowan Co, Box 5569, Yuma, AZ 85366.
010182	Zeneca Inc., Zeneca Ag Products, New Murphy Rd. & Concord Pike Box 751, Wilmington, DE 19897.
010428	Wesmar Co., Inc., 1451 NW 46th, Seattle, WA 98107.
011649	Avitrol Corp., 7644 E. 46th Street, Tulsa, OK 74145.
011715	Speer Products Inc., Box 18993, Memphis, TN 38181.
034571	Betz Entec Inc., 508 Prudential Rd., Horsham, PA 19044.
037982	All-Pure Chemical Co, 26700 S. Banta Rd - Box 268, Tracy, CA 95376.
043680	Weas Engineering Inc., Box 816, Carmel, IN 46032.
045309	Aqua Clear Industries Inc., Box 5430, Albany, NY 12205.

III. Loss of Active Ingredients

Unless these requests for cancellation are withdrawn, one pesticide active ingredient will no longer appear in any registered products. Those who are concerned about the potential loss of this active ingredient for pesticidal use are encouraged to work directly with the registrants to explore the possibility of their withdrawing the request for cancellation. This active ingredient is listed in the following Table 3, with the EPA Company Number of the registrant:

TABLE 3. — ACTIVE INGREDIENTS WHICH WOULD DISAPPEAR AS A RESULT OF REGISTRANTS' REQUESTS TO CANCEL

CAS No.	Chemical Name	EPA Company No.
3734-33-6	Benzyl diethyl((2,6-xylylcarbamoyl)methyl) ammonium benzoate	011715

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation must submit such withdrawal in writing to James A. Hollins, at the address given above, postmarked before February 15, 1994. This written withdrawal of the request for cancellation will apply only to the applicable 6(f)(1) request listed in this notice.

If the product(s) have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling. The withdrawal request must also include a commitment to pay any reregistration fees due, and to fulfill any applicable unsatisfied data requirements.

V. Provisions for Disposition of Existing Stocks

The effective date of cancellation will be the date of the cancellation order. The orders effecting these requested cancellations will generally permit a registrant to sell or distribute existing stocks for 1 year after the date the cancellation request was received. This policy is in accordance with the Agency's statement of policy as prescribed in **Federal Register** No. 123, Vol. 56, dated June 26, 1991. Exceptions to this general rule will be made if a product poses a risk concern, or is in noncompliance with reregistration requirements, or is subject to a data call-in. In all cases, product-specific disposition dates will be given in the cancellation orders.

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which have been packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Unless the provisions of an earlier order apply, existing stocks already in the hands of dealers or users can be distributed, sold or used legally until they are exhausted, provided that such further sale and use comply with the EPA-approved label and labeling of the affected product(s). Exceptions to these general rules will be made in specific cases when more stringent restrictions on sale, distribution, or use of the products or their ingredients have already been imposed, as in Special Review actions, or where the Agency has identified significant potential risk concerns associated with a particular chemical.

List of Subjects

Environmental protection, Pesticides and pests, Product registrations.

Dated: November 8, 1993.

Douglas D. Campt,

Director, Office of Pesticide Programs.

[FR Doc. 93-28286 Filed 11-16-93; 8:45 am]

BILLING CODE 6560-50-F

[OPP-180907; FRL 4742-9]

Receipt of Application for Emergency Exemption to use Imidacloprid; Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received a specific exemption request from the Florida Department of Agriculture and Consumer Services (hereafter referred to as the "Applicant") to use the pesticide imidacloprid (CAS 105827-78-9) to treat up to 50,000 acres of tomatoes to control the sweet potato whitefly *Bemesia tabaci*. The Applicant proposes the use of a new chemical; therefore, in accordance with 40 CFR 166.24, EPA is soliciting public comment before making the decision whether or not to grant the exemption.

DATES: Comments must be received on or before December 2, 1993.

ADDRESSES: Three copies of written comments, bearing the identification notation "OPP-180907," should be submitted by mail to: Public Docket and Freedom of Information Section, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 1132, Crystal Mall #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 Rm. 1132, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA, from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Andrea Beard, Registration Division (7505W), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW, Washington, DC 20460. Office location and telephone number: Floor 6, Crystal Station #1, 2800 Jefferson Davis Highway, Arlington, VA, 703-308-8791.

SUPPLEMENTARY INFORMATION: Pursuant to section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), the Administrator may, at her discretion, exempt a state agency from any registration provision of FIFRA if she determines that emergency conditions exist which require such exemption. The Applicant has requested the Administrator to issue a specific exemption for the use of imidacloprid on tomatoes to control the sweet potato whitefly (SPWF). Information in accordance with 40 CFR part 166 was submitted as part of this request.

The SPWF was discovered in Florida in 1900, and has been a pest in the "desert-cropping systems" in California and Arizona for some time. It is common on many wild and cultivated crops such as tomatoes, cotton, cucurbits and solanaceae. The Applicant states that the SPWF first caused economic impacts in Florida in 1987, and since then, its impacts have rapidly expanded over the total production area. The SPWF causes direct damage to the tomato plant through its feeding activity and the production of honeydew which enhances sooty mold development. The

SPWF is also considered responsible for the introduction and distribution of at least one geminivirus (which can lead to extreme yield losses), and also causes a physiological disorder resulting in irregular ripening of fruit. The Applicant claims that adequate control of the SPWF is not being achieved with the currently registered compounds.

Along with this request, the Applicant has also requested a specific exemption for use of a different chemical (fenpropathrin) on tomatoes, also for control of the SPWF. The Applicant justifies requests for two chemicals, by stating that the imidacloprid would be applied at or near transplanting, as a soil-incorporated treatment; since imidacloprid is a systemic, it would be taken up by the small tomato transplants, and protect them from SPWF feeding during this early stage of development. The Applicant states that fenpropathrin, being non-systemic, is only of use as a foliar spray, which is of little value during the early phase of development, as there is limited leaf area at that time. Thus the Applicant proposes that use of fenpropathrin be allowed later in the crop season, as a foliar treatment, to maintain season-long control. The Applicant indicates that imidacloprid would not be of use as both a soil treatment and a foliar spray, because its mode of action is such that resistance development is a concern. The Registrant of imidacloprid will not support the use of this chemical further into the growing season for this reason. The Applicant claims that without control of the SPWF, individual fields could experience 100 percent yield loss. Yield losses due to geminivirus can be 25 to 70 percent; irregular ripening can reduce yields by 36 to 100 percent; and direct feeding losses can be as much as 10 to 15 percent.

The Applicant proposes to apply imidacloprid at a maximum rate of 0.25 pound (dry) active ingredient (16 fluid ounces of product) per acre with a maximum of one application per crop season on a total of 50,000 acres of tomatoes. It is possible to produce two tomato crops per calendar year on a given acre, and therefore, the acreage could potentially receive two applications of imidacloprid per calendar year. Therefore, use under this exemption could potentially amount to a maximum total of 25,000 pounds of active ingredient, or 12,500 gallons of product. This is the first time that the Applicant has applied for the use of imidacloprid on tomatoes. However, the Applicant requested, and was granted, specific exemptions for the use of fenpropathrin for SPWF control in tomatoes for the past 2 years (this is the third consecutive year for this request for fenpropathrin). This notice does not constitute a decision by EPA on the application itself. The regulations governing section 18 require publication of a notice of receipt of an application for a specific exemption proposing use of a new chemical (i.e., an active ingredient not contained in any currently registered pesticide). Such notice provides for opportunity for public comment on the application. Accordingly, interested persons may submit written views on this subject to the Field Operations Division at the address above.

The Agency, accordingly, will review and consider all comments received during the comment period in determining whether to issue the emergency exemption requested by the Florida Department of Agriculture and Consumer Services.

List of Subjects

Environmental protection, Pesticide and pests, Crisis exemptions.

Dated: November 4, 1993.

Stephanie R. Irene,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 93-27988 Filed 11-16-93; 8:45 am]

BILLING CODE 6560-50-F

[FRL-4802-2]

Greenback Industries, Inc., Site, Greenback, TN; Proposed Settlement

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed settlement.

SUMMARY: Under section 122(h) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended 42 U.S.C. 9601 *et seq.*, the Environmental Protection Agency (EPA) has agreed to settle claims for response costs at the Greenback Industries Site, Greenback, Tennessee, with Handy and Harman, parent firm of Greenback Industries. EPA will consider public comments on the proposed settlement for thirty (30) days. EPA may withdraw from or modify the proposed settlement should such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate. Copies of the proposed settlement are available from: Ms. Carolyn McCall, Waste Programs Branch, Waste Management Division, U.S. EPA, Region, IV, 345 Courtland Street, NE., Atlanta, Georgia 30365, 404-347-5059.

Written comments must be submitted to the person above by thirty days from the date of publication.

Dated: November 5, 1993.

Richard D. Green,

Acting Director, Waste Management Division.

[FR Doc. 93-28282 Filed 11-16-93; 8:45 am]

BILLING CODE 6560-50-M

[FRL-4802-3]

Sapp Battery Company Site: Proposed Settlement

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed settlement.

SUMMARY: Under section 122 (g) and (h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended 42 U.S.C. 9601 *et. seq.*, the Environmental Protection Agency (EPA) has agreed to settle claims for response costs at the Sapp Battery Company Site, Cottondale, Florida with the following Potentially Responsible Parties:

Alabama Power Company
Atlanta Metal Company, Inc.
Pete Bates #1 Auto Parts
Dekalb County, Georgia
Falk Steel & Metals Company
Ralph Heath
James Auto Parts
Mills Auto Parts
Mobile Power & Brake Equipment-Company Inc.
Mobile Electric Garage Inc.
National Automotive Parts Assoc.
Estate of Joseph Treadwell
Curt Miller Oil Company

EPA will consider public comments on the proposed settlements for thirty (30) days. EPA may withdraw from or modify the proposed settlements should such comments disclose facts or considerations which indicate the proposed settlements are inappropriate, improper, or inadequate. Copies of the proposed *De Minimis* settlements are available from: Ms. Carolyn McCall, Waste Programs Branch, Waste Management Division, U.S. EPA, Region IV, 345 Courtland Street, NE., Atlanta, Georgia 30365, 404/347-5059.

Written comments must be submitted to the person above within 30 days from the date of publication.

Dated: November 14, 1993.

Richard D. Green,

Acting Director, Waste Management Division.

[FR Doc. 93-28281 Filed 11-16-93; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA-997-DR]

Illinois; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Illinois (FEMA-997-DR), dated July 9, and related determinations.

EFFECTIVE DATE: November 5, 1993.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, effective this date and pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint David Skarosi of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

This action terminates my appointment of Walter Pierson as Federal Coordinating Officer for this disaster.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

James L. Witt,

Director.

[FR Doc. 93-28206 Filed 11-16-93; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-996-DR]

Iowa; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Iowa (FEMA-996-DR), dated July 9, and related determinations.

EFFECTIVE DATE: November 5, 1993.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, effective this date and pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Edward Thomas of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

This action terminates my appointment of Richard A. Buck as Federal Coordinating Officer for this disaster.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

James L. Witt,

Director.

[FR Doc. 93-28207 Filed 11-16-93; 8:45 am]

BILLING CODE 6718-02-M

[FEMA-1000-DR]

Kansas; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Kansas (FEMA-1000-DR), dated July 22, and related determinations.

EFFECTIVE DATE: November 5, 1993.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Disaster Assistance Programs, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, effective this date and pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Charles Biggs of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

This action terminates my appointment of John W. McKay as Federal Coordinating Officer for this disaster.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance.)

James L. Witt,

Director.

[FR Doc. 93-28208 Filed 11-16-93; 8:45 am]

BILLING CODE 6718-02-M

FEDERAL MARITIME COMMISSION

[Petition Nos. P87-93, P88-93, P89-93]

Seaboard Marine Ltd., et al.; Petition for Temporary Exemption From Electronic Tariff Filing Requirements

In the Matter of Petition of Seaboard Marine Ltd., Petition of Distribution Services Ltd., Petition of Tropical Shipping & Construction Co., Ltd.

Notice is hereby given of the filing of petitions by the above named petitioners, pursuant to 46 CFR 514.8(a), for temporary exemption from electronic tariff filing requirements of the Commission's ATFI System.

To facilitate thorough consideration of the petitions, interested persons are requested to reply to the petition no later than November 23, 1993. Replies shall be directed to the Secretary, Federal Maritime Commission, Washington, DC 20573-0001, shall consist of an original and 15 copies, and shall be served as follows:

P87-93—Mr. Jose Concepcion, Vice President, Pricing, Seaboard Marine Ltd., 1306 Port Boulevard, Dodge Island, Florida 33132

P88-93—David P. Street, Esq., Galland, Kharasch, Morse & Garfinkle, P.C., 1054 31st Street, NW., Washington, DC 20007-4492

P89-93—Paul D. Coleman, Esq., Hoppel, Mayer & Coleman, 1000 Connecticut Avenue, NW., Washington, DC 20036

Copies of the petitions are available for examination at the Washington, DC Office of the Secretary of the Commission, 800 N. Capitol Street, NW., room 1046.

Joseph C. Polking,

Secretary.

[FR Doc. 93-28192 Filed 11-16-93; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

Agency Forms Under Review

BACKGROUND: Notice is hereby given of the submission of proposed information collection(s) to the Office of Management and Budget (OMB) for its review and approval under the Paperwork Reduction Act (title 44 U.S.C. chapter 35) and under OMB regulations on Controlling Paperwork Burdens on the Public (5 CFR part 1320). A copy of the proposed information collection(s) and supporting documents is available from the agency clearance officer listed in the notice. Any comments on the proposal should be sent to the agency clearance officer and to the OMB desk officer listed in the notice.

DATES: Comments should be submitted on or before November 24, 1993.

FOR FURTHER INFORMATION CONTACT: *Federal Reserve Board Clearance Officer:* Mary M. McLaughlin (202-452-3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551. For the hearing impaired

only, Telecommunications Device for the Deaf (TDD), Dorothea Thompson (202-452-3544), Board of Governors of the Federal Reserve System, Washington, DC 20551.

OMB Desk Officer: Gary Waxman (202-395-3740), Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, room 3208, Washington, DC 20503.

Request for OMB Approval To Extend, Without Revision, The Following Report:

1. *Report title:* Country Exposure Report for U.S. Branches and Agencies of Foreign Banks

Agency form number: FFIEC 019

OMB Docket number: 7100-0213

Frequency: Quarterly

Reporters: U.S. branches and agencies of foreign banks

Annual reporting hours: 12,320

Estimated average hours per response: 10 hours

Number of respondents: 308

Small businesses are not affected.

General Description of Report

This information collection is mandatory (12 U.S.C. 3105, 3108 for the Board of Governors of the Federal Reserve System; sections 7 and 10 of the Federal Deposit Insurance Act (12 U.S.C. 1817, 1820) for the Federal Deposit Insurance Corporation; and the National Bank Act (12 U.S.C. 161) for the Office of the Comptroller of the Currency) and is given confidential treatment (5 U.S.C. 552(b)(8)).

SUMMARY: All individual U.S. branches and agencies of foreign banks that have more than $30 million in direct claims on residents of foreign countries must file the FFIEC 019 report quarterly. Currently, all respondents report adjusted exposure amounts to the five largest countries having at least $5 million in total adjusted exposure. The proposed revision would increase the total adjusted exposure reporting threshold to $20 million. The data collected are used to monitor the extent to which such branches and agencies are pursuing prudent country risk diversification policies and limiting potential liquidity pressures.

Board of Governors of the Federal Reserve System, November 10, 1993.

William W. Wiles,

Secretary of the Board.

[FR Doc. 93-28197 Filed 11-16-93; 8:45 am]

BILLING CODE 6210-01-F

[Docket R-0813]

Federal Reserve Bank Services

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice.

SUMMARY: The Board has approved a Private Sector Adjustment Factor (PSAF) for 1994 of $103.6 million, as well as 1994 fee schedules for Federal Reserve priced services. These actions were taken in accordance with the requirements of the Monetary Control Act of 1980, which requires that fees for Federal Reserve priced services be established on the basis of all direct and indirect costs, including the PSAF. The Board also has approved the elimination of the blended fee option that is currently offered in connection with the tiered prices used for some check collection products.

DATES: The PSAF, the fee schedules, and the elimination of the blended fee option for check collection products become effective January 3, 1994.

FOR FURTHER INFORMATION CONTACT: For questions regarding the Private Sector Adjustment Factor: Gwendolyn Mitchell, Senior Accounting Analyst, (202/452-3841), or Gregory Evans, Project Leader, (202/452-3945), Division of Reserve Bank Operations and Payment Systems; for questions regarding fee schedules: Edith Collis, Financial Services Analyst, Check Payments (202/452-3638), Jack Walton, Manager, Automated Clearing House (202/452-2660), Darrell Mak, Financial Services Analyst, Funds Transfer (202/452-3223), Kirstin Wells, Assistant Financial Services Analyst, Book Entry (202/452-5871), Kenneth Buckley, Manager, Information Technology (202/452-3646), Michael Bermudez, Financial Services Analyst, Fiscal Agency & Definitive Securities (202/452-2216), and Ruth Robinson, Senior Financial Services Analyst, Cash (202/452-3944), Division of Reserve Bank Operations and Payment Systems; for the hearing impaired only: Telecommunication Device for the Deaf, Dorothea Thompson (202/452-3544).

Copies of the 1994 fee schedules for check collection, automated clearing house, funds transfer and net settlement, book-entry securities, noncash collection, special cash services, and electronic connections to the Federal Reserve are available from the Reserve Banks.

SUPPLEMENTARY INFORMATION:

Private Sector Adjustment Factor

The Board approved a 1994 Private Sector Adjustment Factor (PSAF) for Federal Reserve Bank priced services of $103.6 million. This amount represents an increase of $12.2 million or 13.3 percent over the PSAF of $91.4 million targeted for 1993.

As required by the Monetary Control Act, the Federal Reserve's fee schedule for priced services includes "taxes that would have been paid and the return on capital that would have been provided had the services been furnished by a private business firm." These imputed costs are based on data developed in part from a model comprised of the nation's 50 largest (in asset size) bank holding companies (BHCs).

The methodology first entails determining the value of Federal Reserve assets that will be used in producing priced services during the coming year. Short-term assets are assumed to be financed by short-term liabilities; long-term assets are assumed to be financed by a combination of long-term debt and equity derived from the BHC model. The mix of long-term debt and equity was modified slightly to ensure an imputed equity to asset ratio of 4 percent as required for adequately capitalized institutions under provisions of Regulation F.

Imputed capital costs are determined by applying related interest rates and rates of return on equity derived from the bank holding company model. The rates drawn from the BHC model are based on consolidated financial data for the 50 largest BHCs in each of the last five years. Because short-term debt, by definition, matures within one year, only data for the most recent year are used for computing the short-term debt rate.

The PSAF comprises capital costs, imputed sales taxes, expenses of the Board of Governors related to priced services, and an imputed FDIC insurance assessment on clearing balances held with the Federal Reserve to settle transactions.

Asset Base—The estimated value of Federal Reserve assets to be used in providing priced services in 1994 is reflected in Table 11. Table 12 shows that the assets assumed to be financed through debt and equity are projected to total $651.5 million. As shown in Table 13, this represents a net decrease of $5.6 million or 0.9 percent from 1993. This decrease results primarily from lower priced asset base levels at the Reserve Banks, partially offset by higher short-term assets resulting from a revision to the estimated average level of accrued service revenue.

Cost of Capital, Taxes, and Other Imputed Costs—Table 13 shows the financing and tax rates as well as the other required PSAF recoveries

proposed for 1994 and compares the 1994 rates with the rates used for developing the PSAF for 1993. The pre-tax return on equity rate increased from 8.6 percent in 1993 to 12.7 percent for 1994. The increase is a result of stronger 1992 BHC financial performance included in the 1994 BHC model, relative to the 1987 BHC financial performance, included in the 1993 BHC model.

The decrease in the FDIC insurance assessment from $21.3 million in 1993 to $19.8 million in 1994, as shown in Table 13, is attributable to lower adjusted gross CIPC and, to a lesser extent, lower clearing balances. The FDIC rate of $0.26 for every $100 in clearing balances, remains unchanged from the 1993 final PSAF.

Capital Adequacy—As shown on Table 14, the amount of capital imputed for the proposed 1994 PSAF totals 31.6 percent of risk-weighted assets, well in excess of the 8 percent capital guideline for state member banks and BHCs.

1994 Fee Schedules

Overview—Based on the Reserve Banks' estimates of costs, volumes, and revenues, the proposed 1994 fees for priced services are expected to yield net income of $20.2 million for the year, compared with a targeted return on equity (ROE) of $34.6 million.[1] Thus, the Reserve Banks project that 98.2 percent of total expenses, including targeted ROE, will be recovered. In addition, during 1994, approximately $25 million of automation consolidation special project costs will be deferred and financed.[2]

Unique situations are facing the check, automated clearing house (ACH), and noncash collection services that contribute to the projected, lower-than-targeted return on equity. First, the same-day settlement (SDS) regulation will be effective on January 3, 1994. Under the SDS regulation, private collecting institutions will be able to present checks directly to payor institutions and to demand settlement in same-day funds. It is anticipated that many institutions currently using intermediaries, such as the Reserve Banks, to collect checks will begin to present checks directly to payor institutions. The Reserve Banks expect the total number of checks collected by the System to decline by approximately 10 percent.

While the Reserve Banks are taking a number of steps to control costs and to enhance their check services, the resource adjustments (both labor and equipment) that will most likely be needed can only be made over time, following actual volume losses. As a result, the Reserve Banks are proposing modest increases in check fees for 1994 and projecting net income of $14.8 million, compared with a targeted ROE of $26.3 million. In addition, all automation consolidation costs are being deferred and financed.

Experience following the initial implementation of Regulation CC in 1988 indicates that the Reserve Banks are able to adjust to structural changes and fully recover total expenses, plus targeted ROE, in a relatively short time period (see Table 1). Further, raising check fees substantially in 1994 could reduce the overall efficiency of the check collection mechanism.

Second, the ACH service continues to be affected by the one-time expenses associated with the transition to consolidated automation operations and the new Fednet® data communications network. Although priced service management may defer and finance a portion of automation consolidation special project costs, a substantial portion of the costs incurred to implement the Federal Reserve Automation Service (FRAS) and Fednet® are being charged to operating expenses as they are incurred. In addition, new ACH application software is being developed to support consolidated operations and to enhance the Reserve Banks' ACH services. All costs incurred to develop the new software are included in current expenses as well as the costs associated with maintaining the current ACH software.

The Reserve Banks are taking steps to reduce ACH direct and overhead costs, are deferring all special project costs, and are proposing to raise selected fees. Estimates indicate that these efforts will permit the ACH service to realize $1.3 million in net income, compared with a targeted ROE of $3.4 million. If fees were raised in an attempt to generate the revenue needed to realize the targeted ROE, future ACH volume growth could be negatively affected. The Federal Reserve's electronic payment services will benefit from automation consolidation and Fednet® in the future through enhanced reliability and increased efficiency. In addition, users of the System's ACH services will benefit from flow processing and enhanced delivery options when the new ACH software is implemented. Each of these efforts is expected to contribute to growth in the use of electronic payments.

Third, the noncash collection service has faced rapidly declining volume levels since the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) was enacted. Following the enactment of TEFRA, many bearer municipal securities were "immobilized," or converted to book-entry form, thus eliminating interest coupons. Largely due to significant volume losses, the Reserve Banks incurred an operating loss in 1992 and project operating losses in 1993 and 1994.

The number of institutions providing noncash collection services is dwindling. Even though the Reserve Banks are not currently among the highest volume service providers, offering noncash collection services provides a measure of stability in a volatile environment.

To address the difficulties associated with recovering noncash collection costs in a declining market, the Reserve Banks have reduced the number of operating sites to four and plan to reduce the number to three by year-end 1994 and to two by year-end 1995. In addition, the Board approved a modified fee structure that more effectively reflects the composition of costs and the demand of both low-volume and high-volume users of the service. (See Docket R–0814 elsewhere in today's **Federal Register**.) Once all operational adjustments are made, the Reserve Banks believe that the total costs of providing noncash collection services can be recovered.

The 1994 fees approved by the Board result in a projected ROE that is below the target established using the 50 bank holding company model. Both the MCA and the Board's pricing principles indicate that fees for Federal Reserve priced services should be set to recover costs, including the PSAF, over the long run. The Board believes that the Reserve Banks have demonstrated their ability to adjust to structural changes since the MCA was implemented and believes that the Reserve Banks will be able to make the appropriate adjustments in the future. In addition, the Board believes that the Federal Reserve's efforts to enhance its data processing and data communications facilities will provide

[1] As required by the Monetary Control Act (MCA), the Federal Reserve's fees for priced services are set to recover all direct and indirect costs of providing the services plus imputed costs, such as taxes that would have been paid and the return on capital that would have been provided had the services been furnished by a private business firm. These imputed costs are based on data developed in part from a model comprised of the nation's 50 largest (in asset size) bank holding companies (BHCs). The ROE is derived from the BHC model based on consolidated financial data for each of the last five years.

[2] In 1981, the Board adopted a policy that permits the Reserve Banks to defer and finance development costs if the development costs would have a material affect on unit costs, provided a conservative time period is set for full cost recovery and a financing factor is applied to the deferred portion of development costs.

significant benefits to all users of Federal Reserve payment services in the future.

Discussion—The 1993 fees approved by the Board were expected to recover 99.1 percent of the costs of providing priced services in 1993, including imputed expenses, automation consolidation special project costs, and targeted ROE. Through September 1993, the System recovered 99.7 percent of total priced services expenses plus ROE. The Reserve Banks now estimate that, priced services revenues will yield net income of $18.3 million for the year, compared with a targeted ROE of $24.8 million. The recovery rate after targeted ROE is estimated to be 99.2 percent. Approximately $27.1 million in automation consolidation special project costs will be recovered in 1993 and $12.2 million will be financed and recovered later. (See Table 1.)

Total priced services costs including special project costs recovered and ROE are expected to be 1.1 percent below original projections and total revenue is estimated to be about 1.0 percent lower than original projections.

In 1994, priced service expenses before special project costs (see Table 1, column 2) are projected to increase 2 percent compared with 1993 levels. Approximately $24.7 million of automation consolidation special project costs will be deferred and financed, resulting in accumulated special project costs to be recovered in the future of $36.9 million.

Total revenue is projected to decrease 0.3 percent compared with the 1993 level. Based on the Reserve Banks' estimates of costs, volumes, and revenues, the 1994 fees are expected to yield net income of $20.2 million for the year, compared with a targeted return on equity of $34.6 million. These estimates result in a recovery rate after targeted ROE of 98.2 percent. Table 1 highlights the cost and revenue performance for priced services since 1989.

TABLE 1.—COST AND REVENUE PERFORMANCE [1]

[$ millions]

Year	Revenue	Operating costs & imputed expenses [2]	Special project costs recovered	Total expense [2+3]	Net income (ROE) [3] [1–4]	Target ROE [4]	Recovery rate after target ROE (percent) [1÷(4+6)]	Special project costs deferred & financed [5]
	1	2	3	4	5	6	7	8
1989	718.6	691.0	4.6	695.6	23.0	32.9	98.6	0.0
1990	746.5	696.0	2.8	698.8	47.7	33.6	101.9	0.0
1991	750.2	708.4	1.6	710.0	40.2	32.5	101.0	0.0
1992	760.8	723.1	11.2	734.2	26.6	26.0	100.1	1.6
1993 (Est) [6]	776.4	730.9	27.1	758.1	18.3	24.8	99.2	12.2
1994 (Bud)	774.4	745.5	8.8	754.2	20.2	34.6	98.2	36.9

[1] Details may not sum to totals because of rounding.
[2] Imputed expenses include interest on debt, taxes, FDIC insurance, and the cost of float. Credits for prepaid pension costs under FASB 87 and the charges for post-retirement benefits in accordance with FASB 106 are included beginning in 1993.
[3] Net income was less than targeted ROE during 1989 due to structural adjustments associated with implementing Regulation CC in 1988.
[4] Targeted ROE has not been adjusted to reflect automation consolidation expenses deferred and financed. The Reserve Banks plan to recover these costs in the future.
[5] Totals are cumulative and include financing costs.
[6] The modified methodology adopted by the Board on September 28, 1993, for imputing net income on clearing balances is reflected in revenue beginning in 1993.

Check

Table 2 presents the actual 1992, estimated 1993, and projected 1994 cost recovery performance for the check collection service.

TABLE 2.—PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	Revenue	Operating costs & imputed expenses	Special project costs recovered	Total expense [2+3]	Net income (ROE) [1–4]	Target ROE	Recovery rate after target ROE (percent) [1÷(4+6)]	Special project costs Ddferred & financed
	1	2	3	4	5	6	7	8
1992	578.4	552.7	6.6	559.3	19.1	19.3	100.0	(0.4)
1993 (Est)	600.6	565.4	14.2	579.5	21.0	18.6	100.4	(0.1)
1994 (Bud)	593.5	578.7	0.0	578.7	14.8	26.3	98.1	11.8

1992 Performance—Revenues from the check service recovered 100.0 percent of total expenses, including targeted ROE in 1992. The volume of checks collected increased 1.9 percent over 1991 levels and the volume of return items decreased 6.0 percent.

1993 Performance—Through September 1993, revenues from the check service recovered 100.7 percent of total expenses, including targeted ROE. The volume of checks collected increased less than 0.1 percent and return item volume decreased 2.1 percent, compared with 1992 volume levels. The Reserve Banks originally projected an increase of 1.9 percent for

checks collected and a decrease of 0.9 percent for return items.

The Reserve Banks now project net income to amount to $21.0 million, compared with a targeted ROE of $18.6 million. Total expenses and revenues are expected to be lower than original projections by approximately 1.0 percent and 0.4 percent, respectively. The volume of checks collected is now projected to increase only 0.3 percent over 1992 levels and return item volume is expected to decline by 4.7 percent. Because the Reserve Banks have controlled costs effectively during 1993, the Board believes that the Reserve Banks' projections are reasonable.

1994 Issues—The Reserve Banks will be challenged by a changing check environment in 1994 as a result of the implementation of the SDS regulation on January 3. The regulation will permit collecting institutions to present checks to payor institutions for payment in same-day funds without the imposition of presentment fees if the checks are presented by 8:00 a.m. local time. Many collecting banks currently using the Federal Reserve's check collection services are expected to begin presenting checks directly to payor institutions. As a result, the Reserve Banks estimate that total check collection volume will decline by 10 percent; reflecting decreases of 32.5 percent for fine sort deposits and 2.3 percent for processed deposits. Return item volumes are expected to decline by 1.9 percent.

In light of the changes in the check collection mechanism that implementation of the SDS regulation will create, the Reserve Banks are (1) instituting cost containment efforts, (2) taking steps to adjust fees to encourage more efficient use of Federal Reserve services, and (3) introducing forward collection products with attractive deadlines.

The Board also approved the elimination of the blended fee option from the check service's tiered pricing structure. Tiered pricing enables Reserve Banks to establish prices that more precisely reflect their costs to collect checks drawn on paying institutions within a given check collection zone. Under a tiered pricing structure, different fees are assessed depending on whether a check is presented to a high-cost or low-cost endpoint in a collection zone. The blended fee option is currently offered as an alternative to tiered prices within most collection zones where tiered prices have been implemented. The blended fee option was included to address the concerns raised by public commenters regarding the complexities associated with monitoring and reconciling bills for products with tiered prices. At that time, the Board committed to evaluating the need to offer the blended fee option after experience was gained with this pricing methodology.

The Board believes that the circumstances supporting the need for the blended fee option have changed. In the SDS environment, Reserve Banks expect to lose volume drawn on low-cost/low-tier endpoints. The proportional increase in volume drawn on high-cost/high-tier endpoints will result in increases in the blended fees, which will make the difference between them and the high-tier fees insignificant. Thus, the usefulness of a blended fee will be significantly reduced. In 1992, the Minneapolis Reserve Bank received approval to eliminate the blended fee alternative because the difference between the blended fee and the high-tier fee became insignificant. In addition, experience has shown that the billing reconcilement complexities associated with tiered pricing have not been an obstacle to most depositors because few depositors have chosen the blended fee option.

1994 Fees—Overall, 1994 check prices will increase 2.4 percent on a weighted average basis, compared with 1993 fees. To reflect the fixed and variable costs of providing check collection services more accurately, cash letter fees and fine sort package fees are increasing, on average, 21 percent and 46 percent, respectively. Forward processed and fine sort per-item fees are decreasing 1.4 percent and 12.6 percent, respectively. Of the 2,126 forward collection and fine-sort fees, 13 percent are lower than 1993 fees, almost 37 percent are unchanged, and 15 percent represent new product offerings. Eighty-seven forward fees have been discontinued, largely due to the elimination of the blended fee option for products with tiered prices.

Fees for return items are increasing 8.1 percent overall, reflecting in part increases in return cash letter and package fees. Of the 1,489 return fees, 6 percent will decrease, 44 percent are unchanged, 46 percent will increase, and 4 percent represent new fees.

Table 3 highlights selected price ranges for 1993 and 1994 check collection fees.

TABLE 3.—PRICE RANGES

Products	1993 Price Ranges	1994 Price Ranges
Items	(per item)	(per item)
Forward processed		
City	$0.008 to 0.049	$0.003 to 0.049.
RCPC	0.007 to 0.060	0.005 to 0.077.
Fine Sort		
City	0.002 to 0.009	0.002 to 0.012.
RCPC	0.002 to 0.015	0.002 to 0.012.
Qualified return items		
City	0.110 to 0.530	0.100 to 0.530.
RCPC	0.120 to 0.570	0.120 to 0.600.
Raw return items		
City	0.580 to 1.680	0.580 to 1.680.
RCPC	0.800 to 1,680	0.800 to 1.680.
Cash Letters	(per cash letter)	(per cash letter)
Forward processed	0.50 to 4.50	1.50 to 7.50.
Forward fine-sort package	1.50 to 4.50	3.00 to 11.00.
Return items: raw and qualified	0.50 to 4.50	1.50 to 7.50.

In order to improve the efficiency of the payments mechanism through the promotion of electronic check presentment, a revised framework for pricing electronic check products was implemented in mid-1993. Under that

framework, fees for payor bank information products are to be set at a higher level than fees for presentment products. All Reserve Banks have adopted this pricing structure for 1994. Prices for less efficient, non-electronic methods of delivery for both information and presentment services will be set higher than electronic delivery methods.

Service Level Changes—Beginning in 1994, all Reserve Banks will offer a basic electronic check presentment service (BECP) and local truncation (safekeeping) services, with the capability of handling at least two distinct customer account number ranges. Each of the electronic check presentment products will have a separate per-item fee. Fees for BECP will be set at lower levels and fees for truncation products will be set at the higher levels.

Enhancements to the minimum check service level standards approved by the Board in 1992 will be fully implemented by all Reserve Banks in 1994. These enhancements are designed to speed interdistrict check collection, to be responsive to depositors' needs for improved deadlines and availability, and to offer more uniform national check collection services.

The Reserve Banks have taken steps to control operating costs and will defer $11.8 million of automation consolidation special project costs, which will be financed and recovered later. The Board approved the 1994 fees for the check service, although net income is projected to be $11.5 million below the targeted ROE of $26.3 million. Increasing check fees more than the planned 2.4 percent could contribute to inefficiencies in check collection markets. Moreover, the Reserve Banks have demonstrated their ability to adjust to structural changes in the past, and the Board believes that the Reserve Banks will be able to make the appropriate adjustments in the future.

Automated Clearing House (ACH)

Table 4 below presents the actual 1992, estimated 1993, and projected 1994 cost recovery performance for the commercial ACH service.

TABLE 4.—PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	Revenue	Operating costs & imputed expenses	Special project costs recovered	Total expense [2+3]	Net income (ROE) [1−4]	Target ROE	Recovery rate after target ROE (percent) [1+(4+6)]	Special project costs deferred and financed
	1	2	3	4	5	6	7	8
1992	60.2	60.6	0.0	60.6	(0.4)	2.4	95.6	2.3
1993 (Est)	60.1	62.9	0.0	62.9	(2.7)	2.5	92.0	10.9
1994 (Bud)	67.9	66.6	0.0	66.6	1.3	3.4	96.9	19.9

1992 Performance—Revenues from the ACH service recovered 95.6 percent of total expenses, including targeted ROE, during 1992. The principal factors contributing to the revenue shortfall were (1) higher than planned automation consolidation-related expenses and (2) lower than anticipated non-automated revenue due to a more rapid conversion to the all electronic ACH than planned. Commercial ACH volume increased 18.6 percent, compared with 1991 volume levels.

1993 Performance—Through September 1993, revenues from the ACH service recovered 92.1 percent of total expenses plus ROE, compared with a targeted recovery rate of 92.3 percent for the year. Commercial ACH volume increased 16.4 percent, compared with 1992 volume levels.

Consistent with their original projections, the Reserve Banks now project an operating loss of $2.7 million, compared with a targeted ROE of $2.5 million. Total expenses and revenues are expected to be lower than original projections by 2.1 percent and 2.4 percent, respectively. Commercial ACH volume is now anticipated to increase 14.6 percent above 1992 levels, compared with an original projection of 16.3 percent.

While the Reserve Banks' revised volume projections appear somewhat pessimistic, the implementation of two additional ACH processing cycles on October 1, 1993, could increase operating costs. In addition, revenues could decline because the new processing schedules enable some originating institutions to avoid the surcharge on debit transactions processed on the last, or premium, cycle.

1994 Issues—Several significant factors continue to affect the costs of the ACH service and its ability to recover total expenses, including the targeted ROE allocated to the service. First, the Reserve Banks are continuing their multi-year effort to implement FRAS and the improved data communications network, Fednet®. Both of these efforts will enhance the reliability and the quality of the ACH service. While all automation consolidation special project costs are being deferred and financed, all other costs associated with the implementation of FRAS and Fednet® are expensed in the year they are incurred.

Second, the ACH service is in the midst of a multi-year effort to develop application software designed to operate in the consolidated processing environment. The software, known as FedACH, will also provide enhanced services, such as flow processing, to depository institutions. The development costs of the FedACH software are being expensed as they are incurred, while the Reserve Banks continue to incur expenses to maintain and operate the current ACH application software.

Third, the projected 13.8 percent increase in commercial ACH transaction volume reflects a continuing reduction in the growth rate of commercial ACH transactions. At the same time, total expenses are projected to rise by only 5.9 percent due to the Reserve Banks' cost control programs.

1994 Fees—Given the magnitude and nature of the one-time expenses described above, the Board continues to believe that increasing ACH fees by the amount necessary to recover the targeted ROE in 1994 would have a negative effect on the continued growth of the ACH because it would introduce short-term price aberrations into the market.[4] This conclusion is supported by the scale economies that exist in producing ACH services, which are demonstrated by the 12.1 percent average annual decrease in per-item

[4] Docket R-0779, 57 FR 53740, November 10, 1992.

ACH processing costs from 1988 through 1992. If the Federal Reserve were to raise ACH transaction fees substantially in 1994 and 1995, the potential to realize the long-term benefits of this efficient payment mechanism would likely be diminished.

At the same time, the Board believes that it is beneficial to structure fees for the ACH service in a manner that more accurately reflects the service's underlying cost structure and that will facilitate the transition to the future operating environment. In particular, a significant proportion of the costs incurred in providing ACH services are fixed, but the majority of ACH revenues are derived from transaction fees. As a result, the current fee structure may discourage use of ACH services because transaction fees are considerably higher than average variable costs. Further, the eventual consolidation of ACH processing will eliminate the differences in processing local and interregional transactions. Thus, when the new FedACH processing system is implemented, only one transaction fee would be assessed. The Reserve Banks' staffs are currently developing a proposal to modify the ACH fee structure and are planning to request that the Board issue it for public comment during early 1994.

The 1994 price changes are listed in Table 5.

TABLE 5.—PRICE CHANGES

Product	1993	1994 (proposed)
Interregional Transaction Fee	$0.015	$0.014
Account Servicing Fee (monthly)	10.00	20.00

TABLE 5.—PRICE CHANGES—Continued

Product	1993	1994 (proposed)
File Processing Fee	1.50	1.75
Discrete File Delivery	NA	10.00

In addition, the premium processing cycle surcharge of $0.01 on all items processed on the fourth exchange (last processing exchange of the day) will go into effect January 3, 1994.[5] All other ACH transaction fees, such as the local, presort, and return item fees, will remain unchanged in 1994.

Each of the fee changes listed above was designed to meet System pricing goals. First, lowering the interregional (IRE) transaction fee to $0.014 from $0.015 per transaction begins the transition to a single transaction fee, which is consistent with the consolidated processing environment that will exist when the FedACH software is implemented.

Second, the Account Servicing Fee (ASF), previously referred to as the "Participation Fee," will be increased from $10 to $20 per month per routing transit number (RTN). The ASF is intended to recover a greater portion of the fixed costs incurred in providing ACH services. Third, increasing the input file fee from $1.50 to $1.75 per file will better reflect the incremental cost of processing ACH files. Finally, one of the service improvements offered beginning October 1, 1993, is a value-added delivery service that will allow receiving institutions, such as third-party processors and correspondent banks, to receive ACH transactions sorted separately by individual institutions. A subscription fee of $10 per month per file requested will be assessed for this service. For example, if a correspondent bank receives commercial ACH transactions for 10 institutions, including itself, and requests to receive files sorted by individual institution, the monthly cost for the service would be $90.

The effect of the fee changes on depository institutions' monthly ACH charges will be small. For example, the ASF will increase annual charges for the large majority of depository institutions by only $120. The increase in the file fee will have a negligible effect (ranging from an average of $0.16 per month for low-volume institutions to approximately $30 per month for the highest volume institutions).

The discrete file fee will not affect the ACH costs for most receiving institutions, but will provide enhanced services to the institutions that select this delivery option. And, the reduction in the IRE transaction fee will benefit all users of Federal Reserve ACH services. The cumulative effect of these proposed fee changes vary based on individual depository institutions' volume levels. On average, low-volume institutions will face an average monthly increase of about $10, or 42 percent of their current ACH charges. Conversely, high-volume institutions should realize a reduction of about 2 percent in their monthly ACH charges.

Although net income is projected to be $2.1 million below the targeted ROE of $3.4 million, the Board approved the 1994 fees for the ACH service.

Funds Transfer and Net Settlement

Table 6 presents the actual 1992, estimated 1993, and projected 1994 cost recovery performance for the funds transfer and net settlement service.

TABLE 6.—PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	Revenue	Operating costs & imputed expenses	Special project costs recovered	Total expense [2+3]	Net income (ROE) [1–4]	Target ROE	Recovery rate after target ROE (percent) [1÷(4+6)]	Special project costs deferred & financed
	1	2	3	4	5	6	7	8
1992	85.6	73.3	3.8	77.1	8.5	3.3	106.5	(0.4)
1993 (Est)	88.6	75.0	11.2	86.2	2.5	2.9	99.5	0.3
1994 (Bud)	86.5	75.6	7.2	82.7	3.8	3.6	100.0	3.4

[5] The premium processing cycle surcharge, effective October 1, 1993, was approved by the Director of Reserve Bank Operations and Payment Systems under delegated authority on March 18, 1993. Due to concerns expressed by the private-sector about the ability of receiving institutions to post payments timely under the new operating schedule, an announcement was issued on August 27, 1993, delaying the implementation of the surcharge until January 1, 1994.

1992 Performance—Revenues from the funds transfer and net settlement service recovered 106.5 percent of total expenses, including targeted ROE. Funds transfer volume increased 4.4 percent over 1991 levels.

1993 Performance—Through September 1993, revenues from the funds transfer and net settlement service recovered 101.1 percent of total expenses, including ROE. During the same period funds transfer volume increased 1.4 percent, compared with a projected increase of 4.7 percent for the year. The decline in the volume growth rate is due to a variety of market factors, including merger activity and shifting payment patterns.

The Reserve Banks now project net income of $2.5 million, compared with a targeted ROE of $2.9 million. Total expenses are expected to be about 1.7 percent lower than original projections and revenue is anticipated to be approximately 2.2 percent below original estimates. Funds transfer volume is now projected to increase only 0.5 percent over 1992 levels.

1994 Issues—The Reserve Banks expect funds transfer volume to decline nearly 2 percent in 1994, due to continuing volume shifts to CHIPS related to format differences between the two funds transfer networks and the implementation of charges for intraday overdrafts in Federal Reserve accounts in April 1994. In light of declining volume levels, the Reserve Banks are taking steps to control costs and plan to defer approximately $3.1 million of automation consolidation special project costs for recovery in the future.

1994 Fees—The Board approved the Reserve Banks' maintaining the current funds transfer and net settlement fees in 1994.

Book-Entry Securities

Table 7 presents the actual 1992, estimated 1993, and projected 1994 cost recovery performance for the book-entry securities service.[6]

TABLE 7.—PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	Revenue	Operating costs & imputed expenses	Special project costs recovered	Total expense [2+3]	Net income (ROE) [1–4]	Target ROE	Recovery rate after target ROE (percent) [1÷(4+6)]	Special project costs deferred & financed
	1	2	3	4	5	6	7	8
1992	13.1	11.8	0.7	12.5	0.6	0.4	101.2	(0.1)
1993 (Est)	14.2	11.8	1.8	13.6	0.7	0.4	101.7	0.8
1994 (Bud)	15.9	13.5	1.7	15.2	0.7	0.7	100.3	1.6

1992 Performance—Revenues from the book-entry securities service recovery 101.2 percent of total expenses, including targeted ROE, in 1992. Government agency securities transfer volume increased 16.7 percent over 1991 levels, reflecting an increase in mortgage refinancings.

1993 Performance—Through September 1993, revenues from the book-entry securities service recovered 100.6 percent of total expenses, including ROE. The volume of on-line book-entry securities transfers originated increased 10.7 percent, compared with an original projection of 9.7 percent for 1993.

The Reserve Banks now project net income of $0.7 million, compared with a targeted ROE of $0.4 million. Total expenses are expected to be about 1.4 percent below original estimates and revenue is projected to equal original projections. Despite a higher than projected volume growth through September, the Reserve Banks now project that on-line book-entry securities transfers will increase only 8.6 percent over 1992 levels.

1994 Projections—Total 1994 expenses for the book-entry securities service are projected to increase 13.6 percent, reflecting the increasing costs associated with the continued implementation of Fednet® and the development of the new book-entry applications software. Securities transfer volume is projected to increase 9.1 percent, reflecting continued increases in the trading of agency mortgage-backed securities.

1994 Fees—To reflect the increasing costs of handling telephone requests for book-entry securities transfers, the Board approved an increase in the current off-line transfer fee of $8.50 to $10.00, and the retention of all other fees at 1993 levels.

Purchase and Sale

On September 24, 1993, the Board approved the consolidation of purchase and sale activities at the Federal Reserve Bank of Chicago, effective on January 1, 1994. Consolidation is expected to reduce purchase and sale costs in 1994 by 16.1 percent. The increase in the purchase and sale fee to $34.00 from $30.00, which was approved under delegated authority, and the cost reductions related to consolidation should result in full cost recovery for the service. The purchase and sale activities will be transferred to the book-entry securities service line for cost recovery reporting purposes in 1994.

Electronic Connections

The Federal Reserve charges fees for electronic connections to the Reserve Banks for accessing priced services. The costs and revenues associated with electronic access are allocated to the various priced services based on the relative number of endpoints that access each service.

The Board approved retaining most electronic connection fees at their 1993 levels for 1994. In particular, the monthly fees for Receive Only Dial, Receive and Send Dial, Multi-Drop Leased, and Dedicated Leased (up to and including speeds of 9.6 Kbps) connections will be retained at $30, $65, $300, and $700, respectively.

The Board also approved the following new standard monthly fees for several categories of high-speed connections: $850 and $1000 for High-Speed Dedicated Leased connections with speeds of 19.2 and 56 Kbps, respectively, and $350 for High-Speed Dial connections. The Board believes it

[6] These financial data reflect the costs and revenues for book-entry transfers of government agency securities, which are priced by the Federal Reserve. The U.S. Treasury establishes fees for book-entry transfers of Treasury securities.

is appropriate that uniform national prices be adopted for high-speed connections, consistent with the treatment of other types of electronic connections.

Finally, the Board approved the elimination of the monthly Gateway Connection surcharge. A gateway connection allows a depository institution (or its designated processor) to have electronic access to Federal Reserve services at more than one Reserve Bank via a single physical connection. Because processing for most payment services and the accounting system is being centralized at a single site, the Gateway Connection surcharge is no longer appropriate. The costs for activities related to initiating a gateway connection to support non-centralized applications, such as check, however, will continue to be incurred by the Reserve Banks. Therefore, the Board approved retaining the current Installation and Software Certification charges for initiating such gateway connections.

Definitive Safekeeping

Table 8 presents the actual 1992 and estimated 1993 cost recovery performance for the definitive safekeeping service.

TABLE 8.—PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	Revenue	Operating costs & imputed expenses	Special project costs recovered	Total expense [2+3]	Net income (ROE) [1–4]	Target ROE	Recovery rate after target ROE (percent) [1÷(4+6)]	Special project costs deferred & financed 1992
	1	2	3	4	5	6	7	8
1992	3.1	3.8	0.0	3.8	(0.7)	0.2	78.4	0.0
1993 (Est)	1.6	3.9	0.0	3.9	(2.3)	0.2	40.4	0.0

1992 Performance—Revenues from the definitive safekeeping service recovered 78.4 percent of total expenses, including targeted ROE in 1992.

1993 Performance—Through September 1993, revenues from the definitive safekeeping service recovered 49.7 percent of total expenses, including targeted ROE. Reflecting the Reserve Banks' withdrawal from the definitive safekeeping service, volume decreased 49 percent, compared with 1992 volume levels.

The Reserve Banks will complete full withdrawal from the definitive safekeeping service by year-end 1993. The Reserve Banks now project an operating loss of $2.3 million, compared with the planned operating loss of $2.1 million. The increase in the projected operating loss results from the faster than anticipated withdrawals of securities and the absorption of associated processing and shipping costs.

Noncash Collection

Table 9 presents the actual 1992, estimated 1993 and projected 1994 cost recovery performance for noncash collection.

TABLE 9.—PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	Revenue	Operating costs & imputed expenses	Special project costs recovered	Total expense [2+3]	Net income (ROE) [1–4]	Target ROE	Recovery rate after target ROE (percent) [1÷(4+6)]	Special project costs deferred & financed
	1	2	3	4	5	6	7	8
1992	7.5	8.3	0.0	8.3	(0.8)	0.3	86.6	0.0
1993 (Est)	4.9	5.7	0.0	5.7	(0.8)	0.2	83.3	0.2
1994 (Bud)	4.5	5.0	0.0	5.0	(0.5)	0.2	85.5	0.2

1992 Performance—Revenues from the noncash collection service recovered 86.6 percent of total expenses, including targeted ROE, during 1992. The principal factor contributing to the revenue shortfall was the 28 percent decrease in the volumes of coupons and bonds deposited for collection, compared with 1991 levels.

1993 Performance—Through September 1993, revenues from the noncash collection service recovered 85.3 percent of total expenses plus ROE, compared with a targeted recovery rate of 97.3 percent for the year. Noncash collection volumes decreased 42.6 percent, compared with 1992 volume levels.

The Reserve Banks now project an operating loss of $0.8 million, compared with a targeted ROE of $0.2 million. The Reserve Banks have reduced the number of offices providing noncash collection services from eight in 1992 to four at present, contributing to a reduction in total expenses of about 3.3 percent, compared with original estimates. Revenues, however, are now expected to decline nearly 17 percent, due to continuing volume declines.

1994 Issues—Since the mid 1980s, the noncash collection service has faced rapidly declining volume levels. Following enactment of the Tax Equity and Fiscal Responsibility Act of 1982, many bearer municipal securities have been "immobilized," or converted to book-entry form, thus eliminating interest coupons. In addition, the number of institutions providing noncash collection services is dwindling.

To address the difficulties associated with recovering costs in a declining market, the Reserve Banks are planning to reduce the number of operating sites to three by year-end 1994 and to two sites by year-end 1995. Through the

consolidation of operating sites, the Reserve Banks have been able to reduce operating costs by approximately 48 percent since 1991. Nevertheless, because of the continuing rapid decline in volume and the complications in processing caused by the increasing number of changes in paying agents, the Reserve Banks do not expect to recover costs in 1994.

1994 Fees—Because of the volatility in the current market, the System's noncash collection service offers a measure of stability even though the Reserve Banks are not among the highest volume service providers. To improve the ability of the Reserve Banks to recover costs, the Board approved 1994 fees which are based on a modified fee structure that more effectively reflects the composition of costs and the demand of both low-volume and high-volume users. (See Docket R–0814 elsewhere in today's **Federal Register**.) Once the new fee schedule is implemented and all operational adjustments are made, the Reserve Banks believe that the total costs of providing noncash collection services can be recovered.

Cash Services

Cash services that are priced by the Federal Reserve Banks include cash transportation, coin wrapping, nonstandard packaging of currency orders and deposits, and nonstandard frequency of access to cash services.

Data on priced cash services are being included to provide a complete view of Reserve Bank priced service performance. Cash transportation fee changes do not require Board approval. The staff, however, is notified when changes occur. The fees for the other priced cash services have been approved by the Director of the Division of Reserve Bank Operations and Payment Systems under delegated authority.

Table 10 presents actual 1992, estimated 1993, and projected 1994 cost recovery performance for the priced cash services.

TABLE 10.—PRO FORMA COST AND REVENUE PERFORMANCE

[$ millions]

Year	Revenue	Operating costs & imputed expenses	Special project costs recovered	Total expense [2+3]	Net income (ROE) [1−4]	Target ROE	Recovery rate after target ROE (percent) [1÷(4+6)]	Special project costs deferred & financed
	1	2	3	4	5	6	7	8
1992	12.9	12.6	0.0	12.6	0.3	0.1	102.0	0.0
1993 (Est)	6.2	6.3	0.0	6.3	(0.1)	0.1	97.8	0.0
1994 (Bud)	6.0	6.0	0.0	6.0	0.0	0.1	98.7	0.0

The operating loss of $0.1 million for 1993 reflects the full-year effect of the discontinuation of transportation services in the Cleveland office and the San Francisco District. By mid-year 1994, the Chicago office plans to discontinue offering registered mail shipments, which contributes to the projected recovery rate after targeted ROE of 98.7 percent for 1994.

The 1994 fees for wrapped coin, nonstandard packaging, and nonstandard access, as well as fees for other cash transportation services and registered mail fees can be obtained by contacting the individual Reserve offices.

Competitive Impact Analysis

All operational and legal changes considered by the Board that have a substantial effect on payment system participants are subject to the competitive impact analysis described in the March 1990 policy statement "The Federal Reserve in the Payments System." In this analysis, staff assesses whether the proposed change would have a direct and material adverse effect on the ability of other service providers to compete effectively with the Federal Reserve in providing similar services due to differing legal powers or constraints or due to a dominant market position of the Federal Reserve deriving from such legal differences.

The Board believes that the price and service level changes would not have a substantial effect on payments system participants and would not have a direct and material effect on the ability of other service providers to compete effectively with the Federal Reserve in providing similar services. The Board recognizes that the 1994 fees proposed by the Reserve Banks result in a projected ROE that is below the target based on the 50 bank holding company model. The Board believes, however, that the Reserve Banks have demonstrated their ability to adjust to structural changes since the MCA was implemented and believes that the Reserve Banks will be able to make the appropriate adjustments in the future. The Board believes that the approach that is being recommended to set fees for the ACH, check, and noncash collection services is consistent with the approach that would be used by a private-sector firm, which would absorb the results of one-time structural changes through its retained earnings account or would borrow funds to finance capital improvements. Therefore, the Board does not believe that the 1994 fees for Federal Reserve priced services should have an adverse effect on the ability of other service providers to compete with the Reserve Banks.

By order of the Board of Governors of the Federal Reserve System, November 10, 1993.

William W. Wiles,

Secretary of the Board.

TABLE 11.—COMPARISON OF PRO FORMA BALANCE SHEETS FOR FEDERAL RESERVE PRICED SERVICES

[Millions of dollars—average for year]

	1994	1993
Short-term assets:		
Imputed reserve requirement on clearing balances	$593.6	$534.8
Investment in marketable securities	5,342.3	5,465.2

TABLE 11.—COMPARISON OF PRO FORMA BALANCE SHEETS FOR FEDERAL RESERVE PRICED SERVICES—Continued

[Millions of dollars—average for year]

	1994	1993
Receivables [1]	64.3	32.6
Materials and supplies [1]	5.5	5.4
Prepaid expenses [1]	16.1	9.3
Items in process of collection	3,198.9	3,826.4
Total short-term assets	$9,220.7	$9,873.7
Long-term assets:		
Premises [1 2]	$349.9	$359.0
Furniture and equipment [1]	183.1	201.0
Leasehold improvements and long-term prepayments [1]	32.1	49.8
Capital leases	0.6	0.0
Total long-term assets	565.6	609.8
Total assets	$9,786.4	$10,483.5
Short-term liabilities:		
Clearing balances and balances arising from early credit of uncollected items	$5,935.9	$6,652.4
Deferred credit items	3,198.9	3,174.1
Short-term debt [3]	85.9	47.3
Total short-term liabilities	$9,220.7	$9,873.7
Long-term liabilities:		
Obligations under capital leases	$0.0	$0.0
Long-term debt [3]	174.1	201.8
Total long-term liabilities	174.1	201.8
Total liabilities	$9,394.8	$10,075.5
Equity [3]	391.5	408.0
Total liabilities and equity	$9,786.4	$10,483.5

Note: Details may not add to totals due to rounding.
[1] Financed through PSAF; other assets are self-financing.
[2] Includes allocations of Board of Governors' assets to priced services of $0.4 million for 1994 and $0.4 million for 1993.
[3] Imputed figures represent the source of financing for certain priced services assets.

TABLE 12.—DERIVATION OF THE 1994 PSAF

[millions of dollars]

A. Assets to be Financed [1]			
Short-term	$85.9		
Long-term [2]	565.6		$651.5
B. Weighted Average Cost:			
1. Capital Structure [3]			
Short-term Debt	13.2%		
Long-term Debt	26.7%		
Equity	60.1%		
2. Financing Rates/Costs [3]			
Short-term Debt	4.3%		
Long-term Debt	8.7%		
Pre-tax Equity [4]	12.7%		
3. Elements of Capital Costs			
Short-term Debt	$85.9	× 4.3% =	$3.7
Long-term Debt	174.1	× 8.7% =	15.2
Equity	391.5	× 12.7% =	49.7
			$68.6
C. Other Required PSAF Recoveries:			
Sales Taxes	$12.5		
Federal Deposit Insurance Assessment	19.8		
Board of Governors Expenses	2.7		$35.0
D. Total PSAF Recoveries			$103.6
As a percent of capital			15.9%
As a percent of expenses [5]			17.0%

[1] Priced service asset base is based on the direct determination of assets method.

[2] Consists of total long-term assets, including the priced portion of FRAS assets, less capital leases, which are self financing.
[3] All short-term assets are assumed to be financed by short-term debt. Of the total long-term assets, 31 percent are assumed to be financed by long-term debt and 69 percent by equity.
[4] The pre-tax rate of return on equity is based on the average after-tax rate of return on equity, adjusted by the effective tax rate to yield the pre-tax rate of return on equity for each bank holding company for each year. These data are then averaged over five years to yield the pre-tax return on equity for use in the PSAF.
[5] Systemwide 1994 budgeted priced service expenses less shipping are $608.5 million.

TABLE 13.—COMPARISON BETWEEN 1994 AND 1993 PSAF COMPONENTS

	1994	1993
A. Assets to be Financed (millions of dollars):		
Short-term	$85.9	$47.3
Long-term	565.6	609.8
Total	$651.5	$657.1
B. Cost of Capital:		
Short-term Debt Rate	4.3%	6.2%
Long-term Debt Rate	8.7%	9.0%
Pre-tax Return on Equity	12.7%	8.6%
Weighted Average Long-term Cost of Capital	11.5%	8.8%
C. Tax Rate	30.4%	29.5%
D. Capital Structure:		
Short-term Debt	13.2%	7.8%
Long-term Debt	26.7%	30.5%
Equity	60.1%	61.7%
E. Other Required PSAF Recoveries (millions of dollars)		
Sales Taxes	$12.5	$11.4
Federal Deposit Insurance Assessment	19.8	21.3
Board of Governors Expenses	2.7	2.3
F. Total PSAF:		
Required Recovery	$103.6	$91.4
As Percent of Capital	15.9%	13.9%
As Percent of Expenses	17.0%	15.1%

TABLE 14.—COMPUTATION OF CAPITAL ADEQUACY FOR FEDERAL RESERVE PRICED SERVICES

[millions of dollars]

	Assets	Risk weight	Weighted assets
Imputed reserve requirement on clearing balances	$593.6	0.0	$0.0
Investment in marketable securities	5,342.3	0.0	0.0
Receivables	64.3	0.2	12.9
Materials and supplies	5.5	1.0	5.5
Prepaid expenses	16.1	1.0	16.1
Items in process of collection	3,198.9	0.2	639.8
Premises	349.9	1.0	349.9
Furniture and equipment	183.1	1.0	183.1
Leases & long-term prepayments	32.7	1.0	32.7
Total	$9,786.4		$1,239.9
Imputed Equity for 1994	$391.5		
Capital to Risk-Weighted Assets	31.6%		
Capital to Total Assets	4.0%		

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BILLING CODE 6210-01-P

(Docket No. R-0814)

Federal Reserve Bank Services

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice.

SUMMARY: The Board has approved the use of volume-based cash letter and coupon envelope fees for the Reserve Banks' noncash collection service; option pricing for the following check products offered by the Federal Reserve Bank of Minneapolis—weekday and weekend Other Fed deposits, City Fine Sort deposits, and payor bank truncation products; and option pricing for two payor bank products offered by all offices in the Richmond Federal Reserve District—Account Total and Account Total Plus products. The specific noncash collection and check fees appear in the 1994 priced services' fee schedules, which are available from the Reserve Banks.

DATES: January 3, 1994.

FOR FURTHER INFORMATION CONTACT: Florence M. Young, Assistant Director, Division of Reserve Bank Operations and Payment Systems (202/452-2745). For questions regarding noncash collection services: Michael Bermudez, Financial Services Analyst, Fiscal Agency & Definitive Securities (202/452-2216); for questions regarding check services: Edith Collis, Financial Services Analyst, Check Payments (202/452-3638). For the hearing impaired *only:* Telecommunications Device for the Deaf, Dorothea Thompson (202/452-3544).

SUPPLEMENTARY INFORMATION:

Introduction

The Monetary Control Act (MCA) requires the Federal Reserve to set fees for its payment services based on all direct and indirect costs actually incurred in providing the services plus imputed costs that would be incurred by a private-sector service provider, such as interest on debt, taxes, and return on capital. These imputed costs are called the private sector adjustment factor (PSAF). While the MCA also indicates that due regard should be given to competitive factors and the provision of an adequate level of service nationwide, it does not indicate how the Reserve Banks should accomplish these goals.

In setting fees to recover the total costs of payment services, the Reserve Banks have tended to use cost-based pricing methodologies. Because the technologies for providing payment services generally require fairly large capital expenditures and there can be increasing returns to scale associated with the provision of such services, the Reserve Banks have developed fee schedules for most services that consist of a combination of fixed and variable fees. This approach provides a means to set variable fees near the incremental costs of providing the service and to recover total costs, including the PSAF. Using such combinations of fees contributes to efficient use of services.

In some cases, the Reserve Banks have modified the cost-based methodology to reflect premium service levels and demand considerations. It is not clear, however, that the approaches that have been used by the Reserve Banks to set fees address competitive factors effectively nor result in the most economically efficient prices. The depository institutions that comprise the customer base for Federal Reserve priced services range from large money-center banks with affiliates nationwide to small credit unions and one-office rural community banks. Such widely divergent institutions have vastly different business needs. While significant attention has been given to increasing the sophistication of cost-based pricing methodologies, the Reserve Banks have generally attempted to address demand considerations through product design. For example, the mixed check deposit product was designed for smaller depository institutions for whom any amount of sorting would be burdensome. These institutions deposit a single cash letter that contains both local items and items payable in other Federal Reserve territories. The per-item fees for this product are high, relative to other check products, because the Reserve office performs all check sorting. On the other hand, check deposit products called "group sorts" have been designed to appeal to larger institutions that typically have the technological capability and capacity to perform a substantial amount of check sorting. Depositors are charged lower per-item fees or are offered later deposit deadlines for these products because Reserve offices perform less sorting and can use their check sorting equipment more efficiently.

It is difficult, however, to satisfy the needs of both high-volume and low-volume institutions solely through differing product offerings. High-volume users typically have the ability to select among a number of sources to obtain payment services, including acquiring expensive equipment to perform functions in-house or purchasing the services from a variety of suppliers. Fewer options are available to low-volume users because the costs associated with many of the alternatives are relatively high. In part, it appears that some of the differences in the alternatives available to smaller institutions reflect the higher costs associated with providing service to large numbers of institutions depositing small transaction volumes. Fee structures that do not reflect such cost differences result in competition among service providers for the low-cost customers, but not for the high-cost customers. Similar situations exist in other industries. For example, in the telecommunication area, AT&T charged that MCI eschewed high-cost, low-return services for more profitable services. AT&T also alleged that Comsat syphoned off low-cost customers.[1]

Providing services that meet the needs of low-volume customers, in particular, may require a pricing methodology that addresses the demands of both high- and low-volume users. Specifically, without high-volume customers, all of the fixed costs associated with the provision of services would have to be borne by the low-volume customers. Thus, low-volume customers would face either higher prices or lower quality services. This conclusion reflects the level of fixed costs required to provide payment services and the fact that, at low-volume levels, scale economies could not be achieved.

The distributors of natural gas face similar pricing concerns. The 1978 Natural Gas Policy Act created the possibility for industrial plants to bypass local distribution utilities by building direct connections to pipelines, gas producers, or intermediaries.[2] Without big industrial customers, however, all of the fixed costs associated with local gas distribution would be borne by the smaller industrial plants and consumers. The loss of the high-volume customers would raise the rates of low-volume commercial and residential users or would reduce the quality of their service because economies of scale could not be attained without both user groups. Thus, social costs would be higher because scale economies would not be achieved and, most likely, some pipeline capacity would remain idle. On the other hand, a volume-based pricing strategy could be used to retain high-volume customers and achieve scale economies.

Several automated clearing house (ACH) service providers that have a customer base of both low- to high-volume users offer volume-based pricing strategies. Visa U.S.A., a national service provider, offers a transaction discount of 10 percent to institutions with transactions volumes greater than 500,000 transactions per month. Deluxe ACH Services, a regional service provider, charges lower transaction fees for transaction volumes over 5 million items per month, and still lower fees for transactions in excess of 10 million items.[3] In each case the price structure is designed to meet different customers' needs for essentially the same product.

The Clearing House Interbank Payment System (CHIPS), operated by the New York Clearing House Association, allocates its total costs for operations among the participants according to usage, that is, the number of messages sent and received during the previous month. There is a minimum charge of $1,500 per month. High-volume users with over 80,000 messages a month are charged $0.13 to send a message and $0.13 to receive a message. Senders of fewer than 80,000 messages per month are charged $0.18 to $0.40, depending upon whether their messages are coded with the receiver's identification.[4]

In approving the use of volume-based pricing for the noncash collection service and for selected check products at the Federal Reserve Banks of Richmond and Minneapolis, which is discussed below, the Board requested the staff to recommend principles that

[1] Jean-Jacques Laffont and Jean Tirole, "Optimal Bypass and Cream Skimming," American Economic Review, vol. 80 (December 1990), pp. 1042–1061.

[2] Ibid., p. 1042.

[3] Woolworth/Dudley Associates, "Comparative Analysis of ACH Service Providers," April 1991.

[4] New York Clearing House Association.

would be used in the future to determine when and how volume-based pricing might be used in setting fees for Federal Reserve priced services. Following review by the Board, public comment will be requested on the proposed principles.

Discussion

Noncash Collection Service—Noncash collection volume levels began to decline rapidly after 1983, when the issuance of bearer securities was discontinued following the enactment of the Tax Equity and Fiscal Responsibility Act of 1982. Since that time, many bearer municipal securities have been "immobilized," or converted to book-entry form. Moreover, recent low interest rates have prompted many municipalities to call outstanding bonds and reissue securities in either registered or book-entry form. Largely due to the significant reduction in volume, the Reserve Banks incurred an operating loss in 1992 and project an operating loss in 1993.

To address the difficulties associated with recovering the Reserve Banks' costs in a declining market, the Reserve Banks (1) have reduced the number of noncash operating sites to four offices (Cleveland, Jacksonville, New York, and Chicago) and plan to reduce the number of offices to three by year-end 1994, and to two by year-end 1995 and (2) are adopting a modified fee structure that more effectively reflects the composition of the Reserve Banks' costs and the demand of both low- and high-volume users.

Currently, the Reserve Banks assess a variable fee for each envelope containing matured coupons that is deposited. Higher fees are generally assessed for interregional deposits than for local deposits and some Reserve offices apply separate postage and insurance charges. As is the case for other services, there are fixed and variable costs associated with processing coupon deposits. An analysis of the costs incurred in processing coupon deposits indicated that approximately 35 percent of the costs is associated with cash letter processing. Because these costs do not vary significantly across the volume of coupon envelopes received, the costs incurred in providing coupon collection services cannot be recovered effectively solely by charging variable fees. As a result, the Board approved a fee structure under which both cash letter and coupon envelope fees will be assessed. In addition, shipping expenses will be recovered through the coupon envelope fees.

Further, a wide variety of depository institutions use the noncash collection service. Implementing cash letter fees will raise the cost of using this service for institutions that deposit relatively few coupon envelopes and should reduce the cost for institutions that deposit relatively higher volumes. To address the potential cost increase for low-volume depositors and the price sensitivity of high-volume depositors, the Board approved cash letter and coupon envelope fees that vary based on the number of coupon envelopes included in a deposit. For example, for local deposits containing five or fewer coupon envelopes, the cash letter fee would be $7.50 and coupon envelope fees would be $4.25 or $4.50. For local deposits containing more than five coupon envelopes, the cash letter fee would be $15.00 with coupon envelope fees of $2.50 or $3.00. Higher coupon envelope fees would be assessed for interregional deposits. (The 1994 fee schedules with the specific fees to be assessed by each of the four offices providing noncash collection services are available from the Reserve Banks.)

The noncash collection service faces significant uncertainty due to declining volumes, a dwindling number of other service providers, and the adjustment to a more consolidated operating environment. The Board believes that implementing a combination of cash letter and coupon envelope fees, which vary based on the size of the deposit, will improve the Reserve Banks' ability to recover the costs of providing noncash collection service over the longer run.

Check Service

The Board approved the use of option pricing for the following deposit products and payor bank services—the Minneapolis office's weekday and weekend Other Fed deposits, its City Fine Sort deposits, and its payor bank truncation products and the Richmond District's Account Total and Account Total Plus payor bank services.

Traditionally, the Reserve Banks have charged the same price for a given check product, regardless of the number of items processed for an individual depository institution. As noted above, some products have been designed to appeal either to high-volume or low-volume institutions. Nevertheless, a single fee is assessed for each Federal Reserve product without regard to the number of items that are processed. Private-sector service providers frequently set prices that take into account the efficiencies that can be realized in handling high transaction volumes. Option pricing will allow the Reserve Banks to recognize these economies in the fees charged for check services.

Option pricing for deposit products and payor bank services will be structured similarly. Each depository institution will be presented with the same set of pricing options. One option will combine a relatively low cash letter fee (for deposit products) or daily minimum fee (for payor bank services) with a relatively high per-item fee. The other option will combine a relatively high cash letter or minimum fee with a relatively low per-item fee. It is expected that low-volume institutions would find the first alternative more attractive, while high-volume institutions would prefer the second option. Both options, however, will be presented to every institution, and the user will decide which option is more appropriate for the institution's business needs.

The following table demonstrates how option pricing would affect a depository institution's costs over a range of transaction volumes. In this example, Option I would consist of a $1.50 fixed fee and a $0.05 per-item fee. Option II would combine a $7.50 fixed fee with a per-item fee of $0.044. At volumes under 1,000 items, a user would face lower costs by selecting Option I. At volumes above 1,000 items, a user would incur lower charges by selecting Option II.

Number of items	Option I		Option II	
	Total cost	Unit cost	Total cost	Unit cost
100	$6.50	$0.065	$11.90	$0.119
500	26.50	0.053	29.50	0.059
1,000	51.50	0.052	51.50	0.052
2,000	101.50	0.051	95.50	0.048
10,000	501.50	0.050	447.50	0.045

The application of option pricing would be most beneficial for check products that are used by institutions of varying sizes, such as the city, RCPC, country, and Other Fed deposit options and most payor bank services. It would provide little benefit for products that were designed specifically to appeal to a single user class, such as mixed deposits.

The Board believes that option pricing is an efficient pricing methodology and that it should ultimately benefit both high- and low-volume users.

Competitive Impact Analysis

In assessing the competitive impact of implementing a volume-based pricing alternative, the staff considered whether there would be a direct and material adverse effect on the ability of other service providers to compete effectively with the Federal Reserve in providing similar services and, if so, whether the effects are due to legal differences or to a dominant market position deriving from such differences. The Board believes that use of volume-based pricing in the noncash collection service and for selected check products at the Richmond and Minneapolis Reserve Banks should not adversely affect the ability of private-sector providers to compete with the Federal Reserve in providing similar services. A number of private-sector service providers use comparable pricing methodologies.

Noncash Collection Service—The Federal Reserve does not have a dominant market position in the noncash collection business although the number of service providers is diminishing. The System's efforts to reduce operating costs by consolidating processing sites and to set fees that are attractive to both high- and low-volume users is intended to provide a stabilizing presence in the market. Because there are very few competing service providers, the use of volume-based pricing should be viewed positively by institutions collecting municipal coupons.

Check Service—Although the Federal Reserve is currently a dominant provider of interterritory check collection services, the implementation of the same-day settlement regulation provides private-sector banks the right to present checks directly to payor banks and should enhance the ability of private-sector banks to compete with Federal Reserve check collection services. The Board believes that the use of volume-based pricing for selected check products by the Richmond and Minneapolis Reserve Banks will not have a direct and material adverse effect on the ability of other service providers to compete with the Federal Reserve. Permitting the Reserve Banks to implement volume-based fees should stimulate competition and lead to more efficient use of check services.

By order of the Board of Governors of the Federal Reserve System, November 10, 1993.

William W. Wiles,

Secretary of the Board.

[FR Doc. 93-28196 Filed 11-16-93; 8:45 am]

BILLING CODE 6210-01-P

FEDERAL TRADE COMMISSION

Appliance Labeling Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of Application to OMB under the Paperwork Reduction Act (44 U.S.C. 3501-3518) for information collection requirements contained in proposed amendments to the Commission's Appliance Labeling Rule, 16 CFR part 305.

SUMMARY: The FTC is seeking OMB clearance for information collection requirements contained in proposed amendments to the Commission's Appliance Labeling Rule.

The Energy Policy Act of 1992 ("EPA"), Public Law 102-486, amends the Energy Policy and Conservation Act of 1975, which directed the Commission to issue the Appliance Labeling Rule. The Appliance Labeling Rule establishes labeling requirements for the disclosure of energy cost or energy consumption information for eight appliance categories: (1) Refrigerators, refrigerator-freezers and freezers; (2) dishwashers; (3) clothes washers; (4) water heaters; (5) room air conditions; (6) furnaces; (7) central air conditioners and heat pumps; and (8) fluorescent lamp ballasts. EPA 92 adds three new categories of lamp products (general service fluorescent lamps, medium base compact fluorescent lamps, and general service incandescent lamps, both reflector and non-reflector) to the products under EPCA for which the Commission must issue labeling rules. The proposed amendments would require manufacturers to retain records to substantiate required discloses on product labels, in catalogs, and in point-of-sale written materials. The proposed amendments also would require manufacturers covered by minimum efficiency standards to submit to the Commission annually, trade names, model numbers, and energy usage information.

Estimate of Information Collection Burden

Commission staff believes that approximately 100 industry members currently are covered by the bookkeeping and reporting requirements of the Rule for the eight covered product categories. For approximately 85% of the manufacturers of covered products, the reporting burden has been reduced to zero because these manufacturers submit product information for publication in trade association directories in the normal course of their business activities. The other 15% of manufacturers, however, must fulfill the reporting requirement by submitting individual company reports to the Commission. Staff estimates that each of these companies would expend no more than 10 hours to comply with this requirement. Therefore, staff estimates that the maximum current total yearly burden of the Rule is 150 hours (10 hours per year times 15 industry members).

The Commission has underway a proceeding to amend the existing Rule to add pool heaters and two specialized types of water heaters (instantaneous water heaters and heat pump water heaters) to the Rule. 58 FR 7852 (Feb. 9, 1993). After considering comments received from the public, Commission staff estimates that no more than 50 companies would be affected and that each company would expend less than 10 hours to comply, for a total burden of approximately 500 hours.

In addition, the Commission has underway a proceeding to amend the existing Rule to add four categories of plumbing products (showerheads, faucets, water closets, and urinals) to the list of covered products. 58 FR 26715 (May 5, 1993). At this time, staff estimates that approximately 100-120 plumbing products manufacturers would be affected and that it would take each manufacturer less than a half hour per year to comply with the requirements, resulting in a total of less than 60 hours of paperwork burden.

In the proceeding to add lamp products to the Rule, staff estimates that approximately 50 or fewer lamp products manufacturers could be affected by the proposed recordkeeping and reporting requirements. Staff estimates that it will take each of the manufacturers less than an additional five hours per year to comply with the proposed requirements, resulting in a total of approximately 250 hours of paperwork burden. This estimate is small because manufacturers already maintain some of the required records in the normal course of business.

Records that are likely to be retained by industry members during the normal course of business are excluded from the "burden" for OMB purposes. See 5 CFR 1320.7(b)(1).

Based on these figures, staff estimates that the current total yearly burden of the Rule is 150 hours (10 hours per year times 15 industry members). The water heater amendment would add 10 hours per year times 50 industry members. Staff further estimates that the total additional yearly burden imposed by the proposed amendment to add plumbing products would be 60 hours (30 minutes per year times 120 industry members). The proposal to add lamp products would result in approximately 250 hours for a new burden total of approximately 960 hours, which has been rounded up to 1,000 hours.

DATES: Comments on this application must be submitted on or before December 17, 1993.

ADDRESSES: Send comments both to Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, room 3228, Washington, DC 20503, ATN: Desk Officer for the Federal Trade Commission and to the Office of the General Counsel, Federal Trade Commission, Washington, DC 20580. Copies of the submission to OMB, including the application, may be obtained from the Public Reference Section, Room 130, Federal Trade Commission, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Elaine W. Crockett, Attorney, Office of the General Counsel, Federal Trade Commission, Washington, DC 20580 (202) 326–2453.

Donald S. Clark,

Secretary.

[FR Doc. 93–28184 Filed 11–16–93; 8:45 am]

BILLING CODE 6750–01–M

[File Nos. 911–0020, and 901–0109]

Homecare Oxygen & Medical Equipment Co., et al, Home Oxygen & Medical Equipment Co., et al., and Certain Home Oxygen Pulmonologists; Proposed Consent Agreements With Analyses to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, these three consent agreements, accepted subject to final Commission approval, would require, among other things, two California-based suppliers of oxygen systems prescribed for home use—respectively located in Contra Costa County and Almeda County—to make divestitures such that 25 percent or fewer of the pulmonologists in each of the two relevant geographic markets would be affiliated with each partnership. It would also prohibit the forming of any new oxygen company which would have market power over oxygen referrals in the relevant geographic market.

DATES: Comments must be received on or before January 18, 1994.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, room 159, 6th St. and Pa. Ave., NW., Washgington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Linda Badger or Kerry O'Brien, San Francisco Regional Office, Federal Trade Commission, 901 Market Street, suite 570, San Francisco, CA 94103, 415–744–7920.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreements containing consent orders to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, have been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Agreement Containing Consent Order

In the Matter of: Homecare Oxygen & Medical Equipment Company, a limited partnership, Michael, L. Cohen, M.D., Harry J. MacDannald, M.D., Gerald R. Del Rio, M.D., Ravinder N. Gupta, M.D., Gregory D. Anderson, M.D., David S. Safianoff, M.D., Richard S. Kops, M.D., Richard A. Bordow, M.D., Herman R. Bruch, M.D., Frederick J. Nachtwey, M.D., and Jorge A. Salazar-Suero, M.D., individually and as partners, trading and doing business as Homecare Oxygen & Medical Equipment Company.

The Federal Trade Commission having initiated an investigation of certain acts and practices of Homecare Oxygen & Medical Equipment Company, a limited partnership, Michael L. Cohen, M.D., Harry J. MacDannald, M.D., Gerald R. Del Rio, M.D., Ravinder N. Gupta, M.D., Gregory D. Anderson, M.D., David S. Safianoff, M.D., Richard S. Kops, M.D., Richard A. Bordow, M.D., Herman R. Bruch, M.D., Frederick J. Nachtwey, M.D., and Jorge A. Salazar-Suero, M.D., individually and as partners, trading and doing business as Homecare Oxygen & Medical Equipment Company (collectively "proposed respondents"), and it now appearing that proposed respondents are willing to enter into an agreement containing an order to remedy the acts and practices being investigated,

It Is Hereby Agreed by and between proposed respondents and their duly authorized attorneys and counsel for the Federal Trade Commission ("Commission") that:

1. Proposed respondent Homecare Oxygen & Medical Equipment Company (hereinafter "Homecare") is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 4041 Pike Lane, suite C, Concord, California 94520.

2. Proposed respondent Michael L. Cohen, M.D., is an individual who has been, and is now, a general partner of Homecare. His place of business is located at 130 La Casa Via, Building 2, suite 208, Walnut Creek, California 94598.

3. Proposed respondent Harry J. MacDannald, M.D., is an individual who has been, and is now, a general partner of Homecare. His place of business is located at 130 La Casa Via, Building 2, suite 208, Walnut Creek, California 94598.

4. Proposed respondent Gerald R. Del Rio, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2220 Gladstone, No. 3, Pittsburg, California 94565.

5. Proposed respondent Ravinder N. Gupta, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 3741 Sunset Lane, Antioch, California 94509.

6. Proposed respondent Gregory D. Anderson, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 130 La Casa Via, Building 2, suite 208, Walnut Creek, California 94598.

7. Proposed respondent David S. Safianoff, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2222 East Street, suite 300, Concord, California 94520.

8. Proposed respondent Richard S. Kops, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2222 East Street, suite 300, Concord, California 94520.

9. Proposed respondent Richard A. Bordow, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2000 Vale Road, San Pablo, California 94806.

10. Proposed respondent Herman R. Bruch, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2000 Vale Road, San Pablo, California 94806.

11. Proposed respondent Frederick J. Nachtwey, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2000 Vale Road, San Pablo, California 94806.

12. Proposed respondent Jorge A. Salazar-Suero, M.D., is an individual who has been, and is now, a limited partner in Homecare. His place of business is located at 2211 East Street, Concord, California 94520.

13. Proposed respondents admit all the jurisdictional facts set forth in the draft of Complaint here attached.

14. Proposed respondents waive:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered pursuant to this agreement; and

(d) Any claim under the Equal Access to Justice Act.

15. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of Complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its Complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

16. This agreement is for settlement purposes only and does not constitute an admission by proposed respondents of facts, other than jurisdictional facts, or of violations of law as alleged in the draft of Complaint here attached.

17. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its Complaint corresponding in form and substance with the draft of Complaint here attached and its decision containing the following Order in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the Order shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The Order shall become final upon service. Delivery by the U.S. Postal Service of the Complaint and decision containing the agreed-to Order to proposed respondents at their addresses as stated in this agreement shall constitute service. Proposed respondents waive any right they may have to any other manner of service. The Complaint may be used in construing the terms of the Order, and no agreement, understanding, representation, or interpretation not contained in the Order or the agreement may be used to vary or contradict the terms of the Order.

18. Proposed respondents have read the proposed Complaint and Order contemplated hereby. They understand that once the Order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the Order. The proposed respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the Order after it becomes final.

Order

I

As used in this Order, the following definitions shall apply:

A. "Durable medical equipment" or "DME" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

B. "Oxygen systems" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

C. "Hospital" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

D. "Medical Professional" means any individual who is licensed by the State of California as a Medical Doctor.

E. "Pulmonologist" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of patients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

F. "Practicing" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

G. "Relative" means an individual who is related to the individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, half-sister, or who is the grandfather or grandmother of the spouse of the individual.

H. "Own" or "Ownership interest" means any and all stock, share, capital, equity or other interest, asset, property, license, lease, or other right or privilege, tangible or intangible, whether obtained or held, directly or indirectly, through any relative, employee or agent, or through any corporate or other device.

I. "Affiliated with" means having an ownership interest in the entity or being

a member of the same group practice as an investor in the entity.

J. "Relevant geographic market" means Contra Costa County, California, including the south-east portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

K. "Service Area" means the geographic area in which an entity engages in the sale, rental, or lease of oxygen systems.

L. "Intended Service Area" means the service area that the entity plans to have the capacity to service during its first several years of operation.

II.

It Is Ordered that, within eight (8) months from the date this Order becomes final, as many of the pulmonologist respondents as are necessary divest, absolutely and in good faith, their ownership interests in Homecare such that no greater than twenty-five (25) percent of the pulmonologists practicing in the relevant geographic market are affiliated with Homecare. Any divestiture pursuant to this provision must comply with the provision of Paragraph IV of this Order.

III

It Is Further Ordered that, if the divestitures required by paragraph II of this Order have not been completed within the eight (8) month period, all respondents who are pulmonologists shall each divest, absolutely and in good faith, their ownership interest in respondent Homecare within twelve (12) months from the date this Order becomes final.

IV

It Is Further Ordered that the divestitures required by paragraphs II and III of this Order shall not be effected by a transfer or sale, with or without valuable consideration, to Home Oxygen & Medical Equipment Company located in Alameda County, California, or to any of its current or former owners.

V

It Is Further Ordered that, for a period of ten (10) years from the date of this Order, no respondent shall grant or acquire, with or without valuable consideration, an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems in the relevant geographic market if, after such grant or acquisition, more than twenty-five (25) percent of the pulmonologists practicing in the relevant geographic market would be affiliated with the entity.

VI

It Is Further Ordered that for a period of ten (10) years from the date this Order becomes final, the individual respondents shall notify the Commission within thirty (30) days after acquiring, either directly or indirectly, or through any corporate or other device, any ownership interest in an entity engaged in the sale, rental, or lease of oxygen systems. Such notification shall include:

(a) An identification of all owners of the entity;

(b) An identification of any pulmonologist practicing in the entity's service area or intended service area who has an ownership interest in the entity;

(c) A list of all pulmonologists practicing in the entity's service area or intended service area;

(d) A description of the products or services offered, or to be offered by the entity;

(e) A copy of the entity's offering memorandum and/or prospectus; and

(f) An identification of the entity's location, including the location of any and all of the entity's parent organizations, and subsidiaries.

Respondents shall comply with requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

Provided, However, that nothing in this Order shall require notice for acquisitions of voting securities of any publicly traded company involved in the sale, rental, or lease of oxygen systems unless, as a result of such acquisition, the respondent would hold more than one (1) percent of such company.

VII

It Is Further Ordered that the respondent Homecare shall:

A. Within thirty (30) days from the date this Order becomes final, distribute a copy of the Complaint and Order to each managerial employee;

B. For a period of five (5) years from the date this Order becomes final, distribute a copy of the Complaint and Order to each new managerial employee within thirty (30) days of the entrance of such employee to employment;

C. For a period of five (5) years from the date this Order becomes final, distribute a copy of the Complaint and Order to each new partner within thirty (30) days of the entrance of such partner to the partnership.

VIII

It Is Further Ordered that each respondent shall, within sixty (60) days from the date of this Order becomes final and every sixty (60) days thereafter until it has fully complied with the provisions of paragraphs II and III of this Order, submit a report in writing to the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with these provisions.

Such compliance reports shall include a summary of all contacts and negotiations with potential purchasers of the ownership interests to be divested under this Order, the identity and address of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

The respondents shall submit such further written reports as the staff of the Commission may from time to time request in writing to assure compliance with this Order.

IX

It Is Further Ordered that:

A. Within sixty (60) days from the date this Order becomes final, each respondent shall file with the Commission a verified written report of compliance with this Order;

B. One year from the date this Order becomes final and annually thereafter for nine (9) years, each respondent shall file with the Commission a verified written report of compliance with this Order.

X

It Is Further Ordered that respondent Homecare, upon written request of the staff of the Federal Trade Commission, made to Homecare, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Commission:

A. Reasonable access during Homecare's office hours, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in Homecare's possession or control that relate to any matter contained in this Order; and

B. An opportunity, subject to Homecare's reasonable convenience, to interview general partners or employees of Homecare, who may have counsel present, regarding such matters.

XI

It Is Further Ordered that respondent Homecare notify the Commission at least thirty (30) days prior to any consummation of an organizational change, such as dissolution, assignment

or sale resulting in the emergence of a successor organization, or any other change in the organization that may affect compliance with the obligations arising out of the Order.

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from respondents Homecare Oxygen and Medical Equipment Company ("Homecare Oxygen"), a California partnership, and its investor pulmonologists, individually and as partners in the company.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns the allegedly anticompetitive conduct of a durable medical equipment ("DME") company located in Contra Costa County, California. The Commission's complaint charges that respondents engaged in unfair methods of competition in the market for home oxygen systems, a type of DME used by patients suffering from pulmonary disorders. Specifically, the complaint alleges that Homecare Oxygen aggregated approximately sixty (60) percent of the most prominent pulmonologists practicing in the relevant geographic market as partners in the company. Because pulmonologists have the ability to influence the choice of oxygen systems suppliers to service patients needing oxygen at home, Homecare Oxygen was able to acquire and maintain market power in the relevant market.

The proposed consent order contains provisions designed to remedy the violations charged and to prevent the respondents from engaging in similar acts or practices in the future. To remedy the respondent's current anticompetitive impact on the market, the proposed order requires that a certain percentage of Homecare Oxygen's investor pulmonologists divest their ownership interests in the company. The proposed order requires only a partial divestiture so that any possible quality of care benefits from pulmonologists involvement in the company would remain intact. The order also contains prospective relief, preventing the respondents from granting or acquiring an ownership interest in an oxygen systems company that would create similar antitrust concerns in the future.

Part I of the proposed order consists of definitions necessary to interpret and implement the provisions that follow. Part II of the proposed order requires that as many of the investor pulmonologists as are necessary divest their interests in Homecare Oxygen such that no greater than twenty-five percent of the pulmonologists practicing in the relevant geographic market are affiliated with Homecare Oxygen. This partial divestiture is designed to diffuse Homecare Oxygen's power over oxygen referrals. The twenty-five percent threshold was chosen to prevent Homecare Oxygen from maintaining a captive source of referrals large enough to confer market power. This percentage affords some "fencing-in relief" to account for the fact that Homecare Oxygen's partnership included many of the most prominent pulmonologists in the area, including many of the medical directors of the respiratory therapy departments of the largest private hospitals located in the relevant geographic market. Finally, this provision requires the respondents to accomplish the necessary divestiture within eight months.

To ensure that the partial divestiture occurs, Part III of the proposed order requires a total divestiture by the Homecare Oxygen pulmonologists if the partial divestiture is not completed within eight months. Part IV of the proposed order specifies that the divestitures required by parts II and III cannot be fulfilled by any sale or transfer to Home Oxygen and Medical Equipment Company, a DME company located in Alameda County, California. This company, located in a neighboring county, has allegedly engaged in similar acts and practices as those alleged against Homecare Oxygen, and is the subject of a similar proposed order.

Part V of the proposed order contains prospective relief. This provision prevents the respondents from selling or acquiring an interest in any oxygen systems company if such transaction would cause more than twenty-five percent of the pulmonologists who practice in the area to be affiliated with the company. This provision will prevent the respondents from forming a new oxygen company which would have market power over oxygen referrals in the relevant geographic market.

Part VI of the proposed order is a notification provision which requires the proposed respondents to notify the Commission when they acquire an interest in an oxygen systems company. In the absence of this provision, the proposed respondents would be free to enter into similar structural arrangements in other areas of the country. This provision is necessary to notify the Commission of other physician joint ventures which may be structured by the respondents to create market power in an oxygen systems market.

Part VII of the proposed order requires Homecare Oxygen to give a copy of the complaint and order to current and future managerial employees, and to new partners. The remaining parts of the proposed order are standard reporting provisions designed to ensure that the proposed respondents comply with the order.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Agreement Containing Consent Order

In the Matter of: Home Oxygen & Medical Equipment Co., a limited partnership, Mitchell P. Tarkoff, M.D., Revels M. Cayton, M.D., Robert I. Deutsch, M.D., Leland G. Dobbs, M.D., Fredric N. Hershkowitz, M.D., Jerrold A. Kram, M.D., R. Wayne Mall, M.D., Richard A. Nusser, M.D., Joel H. Richert, M.D., John E. Sailer, M.D., Herbert M. Schub, N.D., Jamil S. Sulieman, M.D., and T. Craig Williams, M.D., individually, and as partners, trading and doing business as Home Oxygen & Medical Equipment Company.

The Federal Trade Commission having initiated an investigation of certain acts and practices of Home Oxygen & Medical Equipment Co., a limited partnership, Mitchell P. Tarkoff, M.D., Revels M. Cayton, M.D., Robert I. Deutsch, M.D., Leland G. Dobbs, M.D., Fredric N. Herskowitz, M.D., Jerrold A. Kram, M.D., R. Wayne Mall, M.D., Richard A. Nusser, M.D., Joel H. Richert, M.D., John E. Sailer, M.D., Herbert M. Schub, M.D., Jamil S. Sulieman, M.D., and T. Craig Williams, M.D., individually, and as partners, trading and doing business as Home Oxygen & Medial Equipment Company (collectively "proposed respondents"), and it now appearing that proposed respondents are willing to enter into an agreement containing an order to remedy the acts and practices being investigated,

It Is Hereby Agreed by and between proposed respondents and their duly authorized attorneys and counsel for the Federal Trade Commission ("Commission") that:

1. Proposed respondent Home Oxygen & Medical Equipment Co. (hereinafter "Home Oxygen") is a limited

partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 2456 Verna Court, San Leandro, California, 94577.

2. Proposed respondent Mitchell P. Tarkoff, M.D., is an individual who has been, and is now, a general partner of Home Oxygen. His place of business is located at 350 30th Street, suite 526, Oakland, California 94609.

3. Proposed respondent Revels M. Cayton, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 400 29th Street, suite 419, Oakland, California 94609.

4. Proposed respondent Robert I. Deutsch, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2070 Clinton Avenue, Almeda, California 94051.

5. Proposed respondent Leland G. Dobbs, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, suite 520, Oakland, California 94609.

6. Proposed respondent Fredric N. Herskowitz, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, suite 520, Oakland, California 94609.

7. Proposed respondent Jerrold A. Kram, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 350 30th Street, suite 520, Oakland, California 94609.

8. Proposed respondent R. Wayne Mall, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2000 Mowry Avenue, Fremont, California 94538.

9. Proposed respondent Richard A. Nusser, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 365 Hawthorne Avenue, suite 202, Oakland, California 94609.

10. Proposed respondent Joel H. Richert, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2557 Mowry Avenue, suite 12, Fremont, California 94538.

11. Proposed respondent John E. Sailer, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business was located at 13851 East 14th Street, suite 302, San Leandro, California 94578.

12. Proposed respondent Herbert M. Schub, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 2070 Clinton Avenue, Alameda, California 94501.

13. Proposed respondent Jamil S. Sulieman, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 550 South Beretania Street, Honolulu, Hawaii 96813.

14. Proposed respondent T. Craig Williams, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 13851 East 14th Street, suite 302, San Leandro, California 94578.

15. Proposed respondents admit all the jurisdictional facts set forth in the draft of Complaint here attached.

16. Proposed respondents waive:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered pursuant to this agreement; and

(d) Any claim under the Equal Access to Justice Act.

17. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of Complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its Complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

18. This agreement is for settlement purposes only and does not constitute an admission by proposed respondents of facts, other than jurisdictional facts, or of violations of law as alleged in the draft of Complaint here attached.

19. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its Complaint corresponding in form and substance with the draft of Complaint here attached and its decision containing the following Order in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the Order shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The Order shall become final upon service. Delivery by the U.S. Postal Service of the Complaint and decision containing the agreed-to Order to proposed respondents at their addresses as stated in this agreement shall constitute service. Proposed respondents waive any right they may have to any other manner of service. The Complaint may be used in construing the terms of the Order, and no agreement, understanding, representation, or interpretation not contained in the Order or the agreement may be used to vary or contradict the terms of the Order.

20. Proposed respondents have read the proposed Complaint and Order contemplated hereby. They understand that once the Order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the Order. The proposed respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the Order after it becomes final.

Order

I

As used in this Order, the following definitions shall apply:

A. "Durable medical equipment" or "DME" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

B. "Oxygen systems" means DME used to service individuals who are unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

C. "Hospital" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

D. "Medical Professional" means any individual who is licensed by the State of California as a Medical Doctor.

E. "Pulmonologist" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of patients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

F. "Practicing" means having staff privileges, including, but not limited to, active or courtesy staff privileges, at any hospital.

G. "Relative" means an individual who is related to the individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, half-sister, or who is the grandfather or grandmother of the spouse of the individual.

H. "Own" or "Ownership interest" means any and all stock, share, capital, equity or other interest, asset, property, license, lease, or other right or privilege, tangible or intangible, whether obtained or held, directly or indirectly, through any relative, employee or agent, or through any corporate or other device.

I. "Affiliated with" means having an ownership interest in the entity or being a member of the same group practice as an investor in the entity.

J. "Relevant geographic market" means Alameda County, California, excluding the south-east portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

K. "Service Area" means the geographic area in which an entity engages in the sale, rental, or lease of oxygen systems.

II

It Is Ordered that, within eight (8) months from the date this Order becomes final, as many of the pulmonologist respondents as are necessary divest, absolutely and in good faith, their ownership interests in Home Oxygen such that no greater than twenty-five (25) percent of the pulmonologists practicing in the relevant geographic market are affiliated with Home Oxygen. Any divestiture pursuant to this provision must comply with the provision of paragraph IV of this Order.

III

It is Further Ordered that, if the divestitures required by Paragraph II of this Order have not been completed within the eight (8) month period, all respondents who are pulmonologists shall each divest, absolutely and in good faith, their ownership interest in respondent Home Oxygen within twelve (12) months from the date this Order becomes final.

IV

It Is Further Ordered that the divestitures required by Paragraphs II and III of this Order shall not be effected by a transfer or sale, with or without valuable consideration, to Homecare Oxygen & Medical Equipment Company located in Contra Costa County, California, or to any of its current or former owners.

V

It Is Further Ordered that, for a period of ten (10) years from the date of this Order, no respondent shall grant or acquire, with or without valuable consideration, an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems in the relevant geographic market if, after such grant or acquisition, more than twenty-five (25) percent of the pulmonologists who practice in the relevant geographic market would be affiliated with the entity.

VI

It Is Further Ordered that for a period of ten (10) years from the date this Order becomes final, the individual respondents shall notify the Commission within thirty (30) days after acquiring, either directly or indirectly, or through any corporate or other device, any ownership interest in an entity engaged in the sale, rental, or lease of oxygen systems. Such notification shall include:

(a) An identification of all owners of the entity;

(b) An identification of any pulmonologist practicing in the entity's service area or intended service area who has an ownership interest in the entity;

(c) A list of all pulmonologists who practice in the entity's service area or intended service area;

(d) A description of the products or services offered, or to be offered by the entity;

(e) A copy of the entity's offering memorandum and/or prospectus; and

(f) An identification of the entity's location, including the location of any and all of the entity's parent organizations, and subsidiaries.

Respondents shall comply with requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

Provided, However, that nothing in this order shall require notice for acquisitions of voting securities of any publicly traded company involved in the sale, rental, or lease of oxygen systems unless, as a result of such acquisition, the respondent would hold more than one (1) percent of such company.

VII

It Is Further Ordered that the respondent Home Oxygen shall:

A. Within thirty (30) days from the date this Order becomes final, distribute a copy of the Complaint and Order to each managerial employee;

B. For a period of five (5) years from the date this Order becomes final, distribute a copy of the Complaint and Order to each new managerial employee within thirty (30) days of the entrance of such employee to employment;

C. For a period of five (5) years from the date this Order becomes final, distribute a copy of the Complaint and Order to each new partner within thirty (30) days of the entrance of such partner to the partnership.

VIII

It Is Further Ordered that each respondent shall, within sixty (60) days from the date this Order becomes final and every sixty (60) days thereafter until it has fully complied with the provisions of Paragraphs II and III of this Order, submit a report in writing to the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with these provisions.

Such compliance reports shall include a summary of all contacts and negotiations with potential purchasers of the ownership interests to be divested under this Order, the identity and address of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

The respondents shall submit such further written reports as the staff of the Commission may from time to time request in writing to assure compliance with this Order.

IX

It Is Further Ordered that:

A. Within sixty (60) days from the date this Order becomes final, each respondent shall file with the Commission a verified written report of compliance with this Order;

B. One year from the date this Order becomes final and annually thereafter for nine (9) years, each respondent shall file with the Commission a verified written report of compliance with this Order.

X

It Is Further Ordered that respondent Home Oxygen, upon written request of the staff of the Federal Trade Commission, made to Home Oxygen, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Commission:

A. Reasonable access during Home Oxygen's office hours, in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in Home Oxygen's possession or control that relate to any matter contained in this Order; and

B. An opportunity, subject to Home Oxygen's reasonable convenience, to interview general partners or employees of Home Oxygen, who may have counsel present, regarding such matters.

XI

It Is Further Ordered that respondent Home Oxygen notify the Commission at least thirty (30) days prior to any proposed organizational change, such as dissolution, assignment or sale resulting in the emergence of a successor organization, or any other change in the organization that may affect compliance with the obligations arising out of the Order.

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from respondents Home Oxygen and Medical Equipment Company ("Home Oxygen"), a California partnership, and thirteen of its investor pulmonologists, individually and as partners in the company. Home Oxygen's remaining pulmonologist investors agreed to a separate, but virtually identical, proposed consent order with the caption "Certain Home Oxygen Pulmonologists."

The proposed consent orders have been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreements and take other appropriate action or make final the agreements' proposed orders.

This matter concerns the allegedly anticompetitive conduct of a durable medical equipment ("DME") company located in Alameda County, California. The Commission's complaints charge that respondents engaged in unfair methods of competition in the market for home oxygen systems, a type of DME used by patients suffering from pulmonary disorders. Specifically, the complaints allege that Home Oxygen aggregated approximately sixty (60) percent of the most prominent pulmonologists practicing in the relevant geographic market as partners in the company. Because pulmonologists have the ability to influence the choice of oxygen systems suppliers to service patients needing oxygen at home, Home Oxygen was able to acquire and maintain market power in the relevant market.

The proposed consent orders contain provisions designed to remedy the violations charged and to prevent the respondents from engaging in similar acts or practices in the future. To remedy the respondent's current anticompetitive impact on the market, the proposed orders require that a certain percentage of Home Oxygen's investor pulmonologists divest their ownership interests in the company. The proposed orders require only a partial divestiture so that any possible quality of care benefits from pulmonologist involvement in the company would remain intact. The orders also contain prospective relief, preventing the respondents from granting or acquiring an ownership interest in an oxygen systems company that would create similar antitrust concerns in the future.

Part I of the proposed order against Home Oxygen and its thirteen investor pulmonolgists consists of definitions necessary to interpret and implement the provisions that follow. Part II of the proposed order requires that as many of the investor pulmonologists as are necessary divest their interests in Home Oxygen such that no greater than twenty-five percent of the pulmonologists practicing in the relevant geographic market are affiliated with Home Oxygen. This partial divestiture is designed to diffuse Home Oxygen's power over oxygen referrals. The twenty-five percent threshold was chosen to prevent Home Oxygen from maintaining a captive source of referrals large enough to confer market power. This percentage affords some "fencing-in relief" to account for the fact that Home Oxygen's partnership included many of the most prominent pulmonologists in the area, including many of the medical directors of the respiratory therapy departments of the largest private hospitals located in the relevant geographic market. Finally, this provision requires the respondents to accomplish the necessary divestiture within eight months.

To ensure that the partial divestiture occurs, Part III of the proposed order requires a total divestiture by the Home Oxygen pulmonologists if the partial divestiture is not completed within eight months. Part IV of the proposed order specifies that the divestitures required by parts II and III cannot be fulfilled by any sale or transfer to Homecare Oxygen and Medical Equipment Company, a DME company located in Contra Costa County, California. This company, located in a neighboring county, has allegedly engaged in similar acts and practices as those alleged against Home Oxygen, and is the subject of a similar proposed order.

Part V of the proposed order contains prospective relief. This provisions prevents the respondents from selling or acquiring an interest in any oxygen systems company if such transaction would cause more than twenty-five percent of the pulmonologists who practice in the area to be affiliated with the company. This provision will prevent the respondents from forming a new oxygen company which would have market power over oxygen referrals in the relevant geographic market.

Part VI of the proposed order is a notification provision which requires the proposed respondents to notify the Commission when they acquire an interest in an oxygen systems company. In the absence of this provision, the proposed respondents would be free to

enter into similar structural arrangements in other areas of the country. This provision is necessary to notify the Commission of other physician joint ventures which may be structured by the respondents to create market power in an oxygen systems market.

Part VII of the proposed order requires Home Oxygen to give a copy of the complaint and order to current and future managerial employees, and to new partners. The remaining parts of the proposed orders are standard reporting provisions designed to ensure that the proposed respondents comply with the order.

The proposed order relating to the remaining pulmonologist investors, captioned "Certain Home Oxygen Pulmonologists," is virtually identical to the order described above. The material difference in the two orders relates only to the divestiture provision. The divestiture provision in the proposed order against "Certain Home Oxygen Pulmonologists" requires that all four of these investor pulmonologists divest their ownership interests in Home Oxygen only if the twenty-five percent threshold has not already been met pursuant to the divestiture provision in Part II of the proposed order against Home Oxygen, et al.

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the agreements and proposed orders or to modify in any way their terms.

Agreement Containing Consent Order

In the Matter of: Certain Home Oxygen Pulmonologists, Barry R. Horn, M.D., Alan Lifshay, M.D., Gerald L. Meyers, M.D., Oscar R. Scherer, M.D., individually and as limited partners in a business known as Home Oxygen & Medical Equipment Company.

The Federal Trade Commission having initiated an investigation of certain acts and practices of Barry R. Horn, M.D., Alan Lifshay, M.D., Gerald L. Meyers, M.D., and Oscar R. Scherer, M.D., individually and as limited partners, in a business known as Home Oxygen & Medical Equipment Company (collectively "proposed respondents"), and its now appearing that proposed respondents are willing to enter into an agreement containing an order to remedy the acts and practices being investigated,

It is Hereby Agreed by and between proposed respondents and their duly authorized attorneys and counsel for the Federal Trade Commission ("Commission") that:

1. Proposed respondent Barry R. Horn, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California 94705.

2. Proposed respondent Alan Lifshay, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California 94705.

3. Proposed respondent Gerald L. Meyers, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California 94705.

4. Proposed respondent Oscar R. Scherer, M.D., is an individual who has been, and is now, a limited partner in Home Oxygen. His place of business is located at 3001 Colby Street, Berkeley, California 94705.

5. Proposed respondents admit all the jurisdictional facts set forth in the draft of Complaint here attached.

6. Proposed respondents waive:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered pursuant to this agreement; and

(d) Any claim under the Equal Access to Justice Act.

7. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of Complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its Complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

8. This agreement is for settlement purposes only and does not constitute an admission by proposed respondents of facts, other than jurisdictional facts, or of violations of law as alleged in the draft of Complaint here attached.

9. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its Complaint corresponding in form and substance with the draft of Complaint here attached and its decision containing the following Order in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the Order shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The Order shall become final upon service. Delivery by the U.S. Postal Service of the Complaint and decision containing the agreed-to Order to proposed respondents at their addresses as stated in this agreement shall constitute service. Proposed respondents waive any right they may have to any other manner of service. The Complaint may be used in construing the terms of the Order, and no agreement, understanding, representation, or interpretation not contained in the Order or the agreement may be used to vary or contradict the terms of the Order.

10. Proposed respondents have read the proposed Complaint and Order contemplated hereby. They understand that once the Order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the Order. The proposed respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the Order after it becomes final.

Order

I

As used in this Order, the following definitions shall apply:

A. "Home Oxygen & Medical Equipment Company" or "Home Oxygen" is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California. It has its principal place of business at 2456 Verna Court, San Leandro, California 94577.

B. "Durable medical equipment" or "DME" means medical equipment sold, rented, or leased to customers for home use. DME includes, but is not limited to, ambulatory aids, wheelchairs, walkers, hospital beds, commodes and respiratory therapy equipment, such as oxygen systems. "DME" encompasses all aspects of supplying DME, including, but not limited to, delivering and servicing the equipment, and rendering accompanying services to customers.

C. "Oxygen systems" means DME used to service individuals who are

unable to obtain adequate oxygen through independent breathing. Oxygen systems include, but are not limited to, oxygen gas contained in tanks; liquid oxygen stored in reservoirs and smaller, portable containers; and electrically-operated oxygen concentrators. "Oxygen systems" encompasses all aspects of supplying these oxygen systems, including, but not limited to, delivering and servicing the equipment, supplying oxygen content, and rendering accompanying services to customers.

D. "Hospital" means a health facility, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility and an organized professional staff that provides 24-hour inpatient care, and whose primary function is to provide inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. "Hospital" includes any affiliate, subsidiary, or partnership in which the hospital holds a ten (10) percent or greater interest.

E. "Medical Professional" means any individual who is licensed by the State of California as a Medical Doctor.

F. "Pulmonologist" means a medical professional who specializes in the diagnosis and treatment of pulmonary disease, regardless of whether the medical professional has been certified as a specialist in pulmonary disease. "Pulmonologist" does not include medical professionals who specialize in the diagnosis and treatment of patients who would not use the type of oxygen systems defined herein, such as patients suffering from allergies and pediatric patients requiring oxygen systems specially designed for children.

G. "Practicing" means having staff privileges, including but not limited to, active or courtesy staff privileges, at any hospital.

H. "Relative" means an individual who is related to the individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, half-sister, or who is the grandfather or grandmother of the spouse of the individual.

I. "Own" or "Ownership interest" means any and all stock, share, capital, equity or other interest, asset, property, license, lease, or other right or privilege, tangible or intangible, whether obtained or held, directly or indirectly, through any relative, employee or agent, or through any corporate or other device.

J. "Affiliated with" means having an ownership interest in the entity or being a member of the same group practice as an investor in the entity.

K. "Relevant geographic market" means Alameda County, California, excluding the south-east portion of Alameda County referred to as the "Tri-Valley" area. The Tri-Valley area includes the cities of Livermore, Dublin and Pleasanton.

L. "Service Area" means the geographic area in which an entity engages in the sale, rental, or lease of oxygen systems.

II

It Is Ordered that all respondents shall each divest, absolutely and in good faith, their ownership interest in Home Oxygen within twelve (12) months from the date this Order becomes final. Any divestiture pursuant to this provision must comply with the provisions of Paragraphs III and IV of this Order.

Provided, However, that no such divestiture is required if, within eight (8) months from the date this Order becomes final, no greater than twenty-five (25) percent of the pulmonologists practicing in the relevant geographic market are affiliated with Home Oxygen.

III

It Is Further Ordered that the divestiture required by Paragraph II of this Order shall not be effected by a transfer or sale, with or without valuable consideration, to Homecare Oxygen & Medical Equipment Company located in Contra Costa County, California, or to any of its current or former owners.

IV

It Is Further Ordered that, for a period of ten (10) years from the date of this Order, no respondent shall grant or acquire, with or without valuable consideration, an ownership interest in any entity engaged in the sale, rental, or lease of oxygen systems in the relevant geographic market if, after such grant or acquisition, more than twenty-five (25) percent of the pulmonologists who practice in the relevant geographic market would be affiliated with the entity.

V

It Is Further Ordered that for a period of ten (10) years from the date this Order becomes final, the respondents shall notify the Commission within thirty (30) days after acquiring, either directly or indirectly, or through any corporate or other device, any ownership interest in an entity engaged in the sale, rental, or lease of oxygen systems. Such notification shall include:

(a) An identification of all owners of the entity;

(b) An identification of any pulmonologist practicing in the entity's service area or intended service area who has an ownership interest in the entity;

(c) A list of all pulmonologists who practice in the entity's service area or intended service area;

(d) A description of the products or services offered, or to be offered by the entity;

(e) A copy of the entity's offering memorandum and/or prospectus; and

(f) An identification of the entity's location, including the location of any and all of the entity's parent organizations, and subsidiaries.

Respondents shall comply with requests by the Commission staff for additional information within fifteen (15) days of service of such requests.

Provided, However, that nothing in this Order shall require notice for acquisitions of voting securities of any publicly traded company involved in the sale, rental, or lease of oxygen systems unless, as a result of such acquisition, the respondent would hold more than one (1) percent of such company.

VI

It Is Further Ordered that each respondent shall, within sixty (60) days from the date this Order becomes final and every sixty (60) days thereafter until it has fully complied with the provisions of Paragraph II of this Order, submit a report in writing to the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with these provisions.

Such compliance reports shall include a summary of all contacts and negotiations with potential purchasers of the ownership interests to be divested under this Order, the identity and address of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

The respondents shall submit such further written reports as the staff of the Commission may from time to time request in writing to assure compliance with this Order.

VII

It Is Further Ordered that:

A. Within sixty (60) days from the date this Order becomes final, each respondent shall file with the

Commission a verified written report of compliance with this Order;

B. One year from the date this Order becomes final and annually thereafter for nine (9) years, each respondent shall file with the Commission a verified written report of compliance with this Order.

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from respondents Home Oxygen and Medical Equipment Company ("Home Oxygen"), a California partnership, and thirteen of its investor pulmonologists, individually and as partners in the company. Home Oxygen's remaining pulmonologist investors agreed to a separate, but virtually identical, proposed consent order with the caption "Certain Home Oxygen Pulmonologists."

The proposed consent orders have been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreements and the comments received and will decide whether it should withdraw from the agreements and take other appropriate action or make final the agreements' proposed orders.

This matter concerns the allegedly anticompetitive conduct of a durable medical equipment ("DME") company located in Alameda County, California. The Commission's complaints charge that respondents engaged in unfair methods of competition in the market for home oxygen systems, a type of DME used by patients suffering from pulmonary disorders. Specifically, the complaints allege that Home Oxygen aggregated approximately sixty (60) percent of the most prominent pulmonologists practicing in the relevant geographic market as partners in the company. Because pulmonologists have the ability to influence the choice of oxygen systems suppliers to service patients needing oxygen at home, Home Oxygen was able to acquire and maintain market power in the relevant market.

The proposed consent orders contain provisions designed to remedy the violations charged and to prevent the respondents from engaging in similar acts or practices in the future. To remedy the respondent's current anticompetitive impact on the market, the proposed orders require that a certain percentage of Home Oxygen's investor pulmonologists divest their ownership interests in the company. The proposed orders require only a partial divestiture so that any possible quality of care benefits from pulmonologist involvement in the company would remain intact. The orders also contain prospective relief, preventing the respondents from granting or acquiring an ownership interest in an oxygen systems company that would create similar antitrust concerns in the future.

Part I of the proposed order against Home Oxygen and its thirteen investor pulmonologists consists of definitions necessary to interpret and implement the provisions that follow. Part II of the proposed order requires that as many of the investor pulmonologists as are necessary divest their interests in Home Oxygen such that no greater than twenty-five percent of the pulmonologists practicing in the relevant geographic market are affiliated with Home Oxygen. This partial divestiture is designed to diffuse Home Oxygen's power over oxygen referrals. The twenty-five percent threshold was chosen to prevent Home Oxygen from maintaining a captive source of referrals large enough to confer market power. This percentage affords some "fencing-in relief" to account for the fact that Home Oxygen's partnership included many of the most prominent pulmonologists in the area, including many of the medical directors of the respiratory therapy departments of the largest private hospitals located in the relevant geographic market. Finally, this provision requires the respondents to accomplish the necessary divestiture within eight months.

To ensure that the partial divestiture occurs, Part III of the proposed order requires a total divestiture by the Home Oxygen pulmonologists if the partial divestiture is not completed within eight months. Part IV of the proposed order specifies that the divestitures required by parts II and III cannot be fulfilled by any sale or transfer to Homecare Oxygen and Medical Equipment Company, a DME company located in Contra Costa County, California. This company, located in a neighboring county, has allegedly engaged in similar acts and practices as those alleged against Home Oxygen, and is the subject of a similar proposed order.

Part V of the proposed order contains prospective relief. This provision prevents the respondents from selling or acquiring an interest in any oxygen systems company if such transaction would cause more than twenty-five percent of the pulmonologists who practice in the area to be affiliated with the company. This provision will prevent the respondents from forming a new oxygen company which would have market power over oxygen referrals in the relevant geographic market.

Part VI of the proposed order is a notification provision which requires the proposed respondents to notify the Commission when they acquire an interest in an oxygen systems company. In the absence of this provision, the proposed respondents would be free to enter into similar structural arrangements in other areas of the country. This provision is necessary to notify the Commission of other physical joint ventures which may be structured by the respondents to create market power in an oxygen systems market.

Part VII of the proposed order requires Home Oxygen to give a copy of the complaint and order to current and future managerial employees, and to new partners. The remaining parts of the proposed order are standard reporting provisions designed to ensure that the proposed respondents comply with the order.

The proposed order relating to the remaining pulmonologist investors, captioned "Certain Home Oxygen Pulmonologists," is virtually identical to the order described above. The material difference in the two orders relates only to the divestiture provision. The divestiture provision in the proposed order against "Certain Home Oxygen Pulmonologists" requires that all four of these investor pulmonologists divest their ownership interests in Home Oxygen only if the twenty-five percent threshold has not already been met pursuant to the divestiture provision in part II of the proposed order against Home Oxygen, et al.

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the agreements and proposed orders or to modify in any way their terms.

Donald S. Clark,

Secretary.

Concurring Statement of Commissioner Mary L. Azcuenaga in Home Oxygen & Medical Equipment Co., File 901-0109, and Homecare Oxygen & Medical Equipment, File 911-0020

Although I have joined in the Commission's decision to accept these consent agreements for public comment, I have reservations about the usefulness of the orders to which the respondents have consented and about the advisability, on the basis of the information we have, of charting the new territory that these cases represent.

Here, I believe, sufficient evidence exists to satisfy the statutory standard of reason to believe the law has been violated but precious little more. As I have said before, the truncated record on which consent agreements ordinarily are based leaves something to be desired as a basis for establishing new Commission policy.

Antitrust analysis, as we know it today, requires a search for understanding of markets, an understanding that, experience shows, may be founded on elements that lie well below the surface of what even those in a particular industry may readily comprehend. See, *e.g.*, *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1 (1979). It is easy to underestimate the difficulty of showing justifications that are cognizable under the antitrust laws and sufficient to defend against the application of novel antitrust theories. The Commission may not be as well positioned as the parties to identify and understand justifications for the challenged conduct. Yet the parties may be ill-equipped to undertake the esoteric analytic endeavor that modern antitrust law may demand. When neither the parties nor the Commission fully comprehends the justifications, "ignorance leads straight to condemnation," *Chicago Professional Sports Limited Partnership* v. *NBA*, 961 F.2d 667, 676 (7th Cir. 1992), and condemnation without understanding may lead to consumer harm.

It is useful, indeed, advisable for the Commission to continue to evaluate new factual situations and to develop new theories under section 5 of the Federal Trade Commission Act to remedy anticompetitive effects. But it is well, in doing so, to keep in mind the admonition of the court in *Chicago Professional Sports Limited Partnership* v. *NBA*, 961 F.2d at 676, that "[e]xplanations of problematic conduct take time to develop and more time to test. . . . Understanding novel practices may require years of study and debate."

I have voted to publish the consent agreements for comment but remain mindful of these concerns.

Statement of Commissioner Roscoe B. Starek, III

In the Matters of Home Oxygen and Medical Equipment Co. and Homecare Oxygen and Medical Equipment Co.

I respectfully dissent from the Commission's decision to accept for public comment the consent orders in these matters. The challenged conduct does appear to have the potential to be anticompetitive. Under the rule of reason, however, the evidence presented does not indicate that the conduct of the respondents was anticompetitive or that it is likely to have been anticompetitive.[1] Therefore, I do not have reason to believe that the respondents have violated section 5 of the FTC Act, as the complaints allege.

The complaints name two limited partnerships and 28 pulmonologist partners in these ventures. The complaints allege that the respondents have "acquired and maintained market power" (¶ 18) as a consequence of the fact that a "majority" of the pulmonologists in each of the two areas in which the two partnerships operate are partners in the ventures (¶ 14). I am concerned that this might be read to imply that the Commission will take enforcement actions against physician-owned ancillary joint ventures simply because participating physicians constitute a majority of those practicing in the relevant market, without regard to the ventures' effects or likely effects on the market.

The complaints do not challenge, and the consent agreements do not prohibit, "self-referral" of patients to entities owned by the respondent physicians.[2] However, the Analysis of Proposed Consent Order to Aid Public Comment states the respondents were able to "acquire and maintain market power" because "pulmonologists have the ability to influence the choice of oxygen suppliers to service patients needing oxygen at home." Because pulmonologists make referrals to providers of home oxygen services, they do have the ability to influence their patients' choice of oxygen suppliers. But this "influence" does not necessarily equate to or result in any market power.

Market power is the focus of the Commission's analysis of physician-owned ancillary joint ventures. In fact, the very violation alleged in the complaints in these matters is that the ventures "acquired and maintained market power." Market power is not necessarily created when a majority share of a relevant market is attained. Market power is defined as "the ability profitably to maintain prices above competitive levels for a significant period of time."[3] Within the context of a case under Section 5 of the FTC Act, the Commission has argued that

> The test for market power depends on all of the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few.[4]

Here, the two limited partnerships each have approximately 60% market shares in the respective counties in which they operate. Assuming, arguendo, that the alleged product and geographic markets are relevant antitrust markets, these market shares alone do not justify an inference of market power. In addition to the respondents, the evidence indicates that there are nine competing sellers of home oxygen in Alameda County, and eight competing sellers in Contra Costa County. Some of these firms have market shares of about 10%.

If these other firms suffer from substantial competitive weaknesses that prevent them from offering the same quality of services or the same low prices as the respondents, the respondents might be able to exercise market power through their joint ventures. I have not seen evidence that any of these competitors have such competitive weaknesses.[5]

Medicare patients, who apparently comprise the vast majority of patients purchasing home oxygen services, might

[1] The challenged conduct must be analyzed under the rule of reason. The arrangements at issue cannot be characterized as naked restraints of the trade subject to summary condemnation, and thus the rule of reason applies. See *NCAA* v. *Board of Regents*, 468, U.S. 85, 103 (1984). The joint DOJ/FTC Health Care Enforcement Guidelines indicate that the antitrust agencies will apply a rule of reason to conduct falling outside of well defined "safety zones." Statements of Antitrust Enforcement Policy in the Health Care Area, Department of Justice and Federal Trade Commission, September 15, 1993, at 10–11, 36. The six policy statements of these Guidelines do not explicitly cover the type of conduct at issue here, i.e., physician-owned ancillary joint ventures. In any case, the arrangements here most likely would fall outside of any safety zone similar to those defined in the Guidelines, because they appear to have market shares of about 60% in their respective markets.

[2] The President recently signed legislation prohibiting physicians from self-referral of Medicare patients for several categories of services, including those services provided by the respondents. Omnibus Budget Reconciliation Act of 1993, Public Law 103–66, ch. 2, section 5074 because the vast majority of home oxygen services apparently are sold to Medicare patients, it may be the case that virtually no home oxygen provider would be willing to maintain physician ownership that would cut itself off from the vast majority of market demand. If that is the case, Commission action on this matter is moot. However, I am not certain that this is true, and more importantly, this case might be viewed as precedent for Commission actions outside of the services covered by the recent legislation.

[3] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13104, section 0.1 ("Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.")

[4] General Foods Corp. 103 FTC 204, 345 (1984).

[5] In fact, one major third-party payer in the region purchases home oxygen primarily from one of the respondents' ventures in one county, while in the other county it purchases home oxygen primarily from one of the respondents' competitors. While hardly dispositive on this issue, this suggests that this major customer considers the available services of the respondents' competitors to be of acceptable and comparable quality and price.

be less price sensitive than third-party payers such as HMOs, and thus might appear to be vulnerable to anticompetitive behavior. Medicare's restrictive reimbursement policies may severely limit suppliers' potential ability to exercise market power. But it is doubtful that these policies eliminate the possibility of an exercise of market power in these markets.

It sometimes has been argued that physician ownership can create an incentive to refer for financial gain for services that are not medically necessary. But it is critical to distinguish between the potential for anticompetitive harm and the potential for inappropriate or excessive referrals resulting from physician ownership. Regardless of market share or market power, physicians sometimes may make inappropriate treatment referrals to facilities in which they have a financial interest.[6] While real consumer injury can result from such "self-referral," this behavior is not by itself actionable under the antitrust laws. Of course, this does not mean that anticompetitive behavior could not occur in these markets. But we should be careful to distinguish anticompetitive behavior from other forms of imperfect market performance.

If patients seldom question their physicians' referrals, physicians could profit from directing patients to home oxygen providers in which they have an ownership interest. But any such "vertical control" that physicians have does not necessarily result in any horizontal market power of the ancillary ventures in which they have an interest. An ancillary venture can enable the participating physicians to coordinate some of their competitive activities. But an exercise of market power is possible only when the coordination of activities within such a venture insulates the participating physicians from outside competition sufficiently that they are able to raise prices or reduce services.

For example, in some cases, an exercise of market power may be possible if enough of the market is aggregated through the joint venture so that there is insufficient remaining market demand to sustain viable competitors. That clearly is not the case here. The evidence is at best ambiguous as to whether these ventures, which have been in operation since 1984, have had any anticompetitive effect.

Physician-owned ancillary joint ventures have a potential to accomplish significant cost savings that can be passed on to consumers in the form of lower prices and higher quality of care. Physicians frequently may be in the best position to recognize a potential demand for an ancillary medical service in their community, to back up this perception with their own capital, and to operate and monitor the venture's performance. Clearly physicians and hospitals could have more control over the quality of a service by owning a supplier of that service than by merely writing a prescription. Evidence that physician investors frequently are passive with respect to the operation of these companies does not dismiss the potential of these ventures to accomplish substantial efficiencies.

Of course, the respondents' large scale and market share may not be necessary to achieve the potential efficiencies of such arrangements. But even incontrovertible evidence that these firms did not gain additional efficiency by growing to their current size would be relevant only after a determination that the firms had acted anticompetitively.

The orders continue to allow self-referral, and only limit the market share of the respondent pulmonologists associated with an entity providing home oxygen. Thus, the remedy does not address any harm that might result from the mere fact of self-referral.[7] The order also would allow efficiencies from self-referral to occur, but it is far from clear that the restructuring of the two ventures required under the orders would preserve all of the efficiencies that they may have been able to accomplish. Thus it may be the case that the orders reduce efficiency, do not reduce market power, and also fail to address any real harm to consumers that might result from self-referral.

The overriding reason to cast my vote against the acceptance of these consents is the precedential effect of discouraging physicians and hospitals from forming ancillary ventures, particularly in circumstances in which it may be important to achieve a high market share in order to gain efficiencies, or even to be able to introduce a service that benefits consumers in the area. Thus, enforcement actions should be limited to conduct for which anticompetitive harm is demonstrable or highly likely to occur. Because that burden has not been met, I respectfully dissent from the Commission's actions in these matters.

[FR Doc. 93-28186 Filed 11-16-93; 8:45 am]

BILLING CODE 6750-01-M

[6] The potential problem of inappropriate referrals made for financial gain is not limited to instances in which physicians have financial interests in facilities, equipment, or service providers that are physically or legally separate from their primary practices. The potential problem is present whenever a physician performs both diagnosis and treatment. Patients and third-party payers have limited information about whether treatments are medically necessary, and thus physicians frequently have some degree of discretion to recommend treatments that are not necessary.

[7] As I noted above, self-referral by itself is not actionable under the antitrust laws. Thus it is appropriate that any such perceived harm is not addressed in an order resolving the allegations in these complaints.

[Dkt. C-3468]

McCormick & Company, Inc.; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Consent order.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order requires, among other things, the largest spice and seasonings company in the U.S. to divest enough specifically-bred seeds to produce a total of 100 million pounds of low-water onions and at last 5,000 pounds of additional onion seeds for future planting, and to provide the Commission-approved purchaser certain technical assistance upon request for one year.

DATES: Compliant and Order issued October 25, 1993.[1]

FOR FURTHER INFORMATION CONTACT:

Claudia Higgins or Ann Malester, FTC/S-2308, Washington, DC 20580. (202) 326-2682.

SUPPLEMENTARY INFORMATION: On Tuesday, August 10, 1993, there was published in the **Federal Register**, 58 FR 42552, a proposed consent agreement with analysis In the Matter of McCormick & Company, Inc., for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of the order.

A comment was filed and considered by the Commission. The Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered an order to divest, as set forth in the proposed consent agreement, in disposition of this proceeding.

[1] Copies of the Complaint and the Decision and Order are available from the Commission's Public Reference Branch, H-130, 6th Street & Pennsylvania Avenue, NW., Washington, DC 20580.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended; sec. 7, 38 Stat. 731, as amended; 15 U.S.C. 45, 18)

Donald S. Clark,

Secretary.

[FR Doc. 93-28185 Filed 11-16-93; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Committee for Energy-Related Epidemiologic Research: Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following committee meeting.

Name: Advisory Committee for Energy-Related Epidemiologic Research.

Times and dates: 8:30 a.m-5 p.m., December 2, 1993. 8:30 a.m.-12 noon, December 3, 1993.

Place: Sheraton Suites Hotel, 801 North St. Asaph Street, Alexandria, Virginia 22314.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 50 people.

Purpose: This committee is charged with providing advice and recommendations to the Secretary of Health and Human Services (HHS); the Assistant Secretary for Health; the Director, CDC; and the Administrator, Agency for Toxic Substances and Disease Registry (ATSDR), on the establishment of a research agenda and the conduct of a research program pertaining to energy-related analytic epidemiologic studies. The committee will take into consideration information and proposals provided by the Department of Energy (DOE), the Advisory Committee for Environment Safety and Health which was established by DOE under the guidelines of a Memorandum of Understanding between HHS and DOE, and other agencies and organizations, regarding the direction HHS should take in establishing the research agenda and in the development of a research plan.

Matters to be discussed: The National Institute for Occupational Safety and Health will make presentations on additions to their research agenda and progress of current studies. Additional agenda items will include: Public involvement activities, the National Center for Environmental Health (NCEH) activities, ATSDR updates, and reports from the Oak Ridge Institute for Science and Education, the Los Alamos National Laboratory, the Pacific Northwest Laboratory, and the Hanford Environmental Health Foundation.

Agenda items are subject to change as priorities dictate.

Contact person for more information: Nadine Dickerson, Program Analyst, Radiation Studies Branch, Division of Environmental Hazards and Health Effects, NCEH, CDC, 4770 Buford Highway, NE., (F-35), Atlanta Georgia 30341-3724, telephone 404/488-7040.

Dated: November 10, 1993.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 93-28191 Filed 11-16-93; 8:45 am]

BILLING CODE 4160-18-M

Board of Scientific Counselors, National Center for Infectious Diseases: Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following committee meeting.

Name: Board of Scientific Counselors, National Center for Infectious Diseases (NCID).

Times and Dates: 8:30 a.m.-5:30 p.m., December 2, 1993. 8:30 a.m.-4 p.m., December 3, 1993.

Place: CDC, Auditorium B, 1600 Clifton Road, NE, Atlanta, Georgia 30333.

Status: Open to the public, limited only by the space available.

Purpose: The Board of Scientific Counselors, NCID, provides advice and guidance to the Director, CDC, and Director, NCID, in the following areas: program goals and objectives; strategies; program organization and resources for infectious disease prevention and control; and program priorities.

Matters To Be Discussed: The agenda will focus on health reform and implications for NCID, the President's childhood immunization practices initiative, CDC Emerging Infections Plan, CDC's role in global surveillance, and minority and underserved population health priorities/NCID prevention agenda. Infectious disease updates will be provided on the following topics: Hantaviruses, other viruses, Guinea worm surveillance, group B streptococcal disease, opportunistic infections, and tuberculosis. Other agenda items include announcements/introductions; NCID update; and follow-up on actions recommended by the Board (May 1993).

The discussion will include presentations by community, State, and Federal representatives. Agenda items are subject to change as priorities dictate.

Written comments are welcome and should be received by the contact person listed below prior to the opening of the meeting.

Contact Person for More Information: Diane S. Holley, Office of the Director, NCID, CDC, Mailstop C-20, 1600 Clifton Road, NE, Atlanta, Georgia 30333, telephone 404/639-0044.

Dated: November 10, 1993.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 93-28190 Filed 11-16-93; 8:45 am]

BILLING CODE 4160-18-M

Food and Drug Administration

[Docket No. 93F-0402]

Lonza, Inc.; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Lonza, Inc., has filed a petition proposing that the food additive regulations be amended to provide for the safe use of decylisononyldimethyl ammonium chloride as a slimicide in the manufacture of paper and paperboard intended to contact food.

DATES: Written comments on the petitioner's environmental assessment by December 17, 1993.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Mitchell Cheeseman, Center for Food Safety and Applied Nutrition (HFS-216), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-254-9511.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a food additive petition (FAP 4B4405) has been filed by Lonza, Inc., c/o Delta Analytical Corp., 7910 Woodmont Ave., Bethesda, MD 20814. The petition proposes to amend the food additive regulations to provide for the safe use of decylisononyldimethyl ammonium chloride as a slimicide in the manufacture of paper and paperboard intended to contact food.

The potential environmental impact of this action is being reviewed. To encourage public participation consistent with regulations promulgated under the National Environmental Policy Act (40 CFR 1501.4 (b)), the agency is placing the environmental assessment submitted with the petition that is the subject of this notice on public display at the Dockets Management Branch (address above) for public review and comment. Interested

persons may, on or before December 17, 1993, submit to the Dockets Management Branch (address above) written comments. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday. FDA will also place on public display any amendments to, or comments on, the petitioner's environmental assessment without further announcement in the Federal Register. If, based on its review, the agency finds that an environmental impact statement is not required and this petition results in a regulation, the notice of availability of the agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the Federal Register in accordance with 21 CFR 25.40(c).

Dated: November 8, 1993.

Fred R. Shank,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 93-28163 Filed 11-16-93; 8:45 am]

BILLING CODE 4160-01-F

Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). This notice also summarizes the procedures for the meeting and methods by which interested persons may participate in open public hearings before FDA's advisory committees.

MEETING: The following advisory committee meeting is announced:

Vaccines and Related Biological Products Advisory Committee

Date, time, and place. December 1, 1993, 2 p.m., Food and Drug Administration, Bldg. 29, conference room 121, 8800 Rockville Pike, Bethesda, MD.

Type of meeting and contact person. This meeting will be held by a telephone conference call. A speaker telephone will be provided in the conference room to allow public participation in the meeting. Open committee discussion on review of research, 2 p.m. to 2:45 p.m.; closed committee deliberations on review of research, 2:45 p.m. to 3:45 p.m.; open public hearing, 3:45 p.m. to 4:45 p.m., unless public participation does not last that long; Nancy Cherry or Stephanie Milwit, Center for Biologics Evaluation and Research (HFM-21), Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20892, 301-594-1054.

General function of the committee. The committee reviews and evaluates data on the safety and effectiveness of vaccines intended for use in the diagnosis, prevention, or treatment of human diseases.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before November 24, 1993, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

Open committee discussion. The committee will discuss the intramural scientific programs of the Laboratory of Molecular Pharmacology and the Laboratory of Method Development.

Closed committee deliberations. The committee will discuss the intramural scientific program. This portion of the meeting will be closed to prevent disclosure of personal information concerning individuals associated with the research program, disclosure of which would constitute a clearly unwarranted invasion of personal privacy (5 U.S.C. 552b(c)(6)).

FDA regrets that it is publishing this notice in the Federal Register less than 15 days prior to the meeting of the Vaccines and Related Biological Products Advisory Committee because of time constraints due in part to the holiday.

Each public advisory committee meeting listed above may have as many as four separable portions: (1) An open public hearing, (2) an open committee discussion, (3) a closed presentation of data, and (4) a closed committee deliberation. Every advisory committee meeting shall have an open public hearing portion. Whether or not it also includes any of the other three portions will depend upon the specific meeting involved. The dates and times reserved for the separate portions of each committee meeting are listed above.

The open public hearing portion of each meeting shall be at least 1 hour long unless public participation does not last that long. It is emphasized, however, that the 1 hour time limit for an open public hearing represents a minimum rather than a maximum time for public participation, and an open public hearing may last for whatever longer period the committee chairperson determines will facilitate the committee's work.

Public hearings are subject to FDA's guideline (subpart C of 21 CFR part 10) concerning the policy and procedures for electronic media coverage of FDA's public administrative proceedings, including hearings before public advisory committees under 21 CFR part 14. Under 21 CFR 10.205, representatives of the electronic media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants.

Meetings of advisory committees shall be conducted, insofar as is practical, in accordance with the agenda published in this Federal Register notice. Changes in the agenda will be announced at the beginning of the open portion of a meeting.

Any interested person who wishes to be assured of the right to make an oral presentation at the open public hearing portion of a meeting shall inform the contact person listed above, either orally or in writing, prior to the meeting. Any person attending the hearing who does not in advance of the meeting request an opportunity to speak will be allowed to make an oral presentation at the hearing's conclusion, if time permits, at the chairperson's discretion.

The agenda, the questions to be addressed by the committee, and a current list of committee members will be available at the meeting location on the day of the meeting.

Transcripts of the open portion of the meeting may be requested in writing from the Freedom of Information Office (HFI-35), Food and Drug Administration, rm. 12A-16, 5600 Fishers Lane, Rockville, MD 20857, approximately 15 working days after the meeting, at a cost of 10 cents per page. The transcript may be viewed at the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857, approximately 15 working days after the meeting, between the hours of 9 a.m. and 4 p.m., Monday through Friday. Summary minutes of the open portion of the meeting may be requested in writing from the Freedom of Information Office (address above) beginning approximately 90 days after the meeting.

The Commissioner has determined for the reasons stated that those portions of the advisory committee meetings so

designated in this notice shall be closed. The Federal Advisory Committee Act (FACA) (5 U.S.C. app. 2, 10(d)), permits such closed advisory committee meetings in certain circumstances. Those portions of a meeting designated as closed, however, shall be closed for the shortest possible time, consistent with the intent of the cited statutes.

The FACA, as amended, provides that a portion of a meeting may be closed where the matter for discussion involves a trade secret; commercial or financial information that is privileged or confidential; information of a personal nature, disclosure of which would be a clearly unwarranted invasion of personal privacy; investigatory files compiled for law enforcement purposes; information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action; and information in certain other instances not generally relevant to FDA matters.

Examples of portions of FDA advisory committee meetings that ordinarily may be closed, where necessary and in accordance with FACA criteria, include the review, discussion, and evaluation of drafts of regulations or guidelines or similar preexisting internal agency documents, but only if their premature disclosure is likely to significantly frustrate implementation of proposed agency action; review of trade secrets and confidential commercial or financial information submitted to the agency; consideration of matters involving investigatory files compiled for law enforcement purposes; and review of matters, such as personnel records or individual patient records, where disclosure would constitute a clearly unwarranted invasion of personal privacy.

Examples of portions of FDA advisory committee meetings that ordinarily shall not be closed include the review, discussion, and evaluation of general preclinical and clinical test protocols and procedures for a class of drugs or devices; consideration of labeling requirements for a class of marketed drugs or devices; review of data and information on specific investigational or marketed drugs and devices that have previously been made public; presentation of any other data or information that is not exempt from public disclosure pursuant to the FACA, as amended; and, notably deliberative session to formulate advice and recommendations to the agency on matters that do not independently justify closing.

This notice is issued under section 10(a)(1) and (2) of the Federal Advisory Committee Act (5 U.S.C. app. 2), and FDA's regulations (21 CFR part 14) on advisory committees.

Dated: November 10, 1993.

Jane E. Henney,

Deputy Commissioner for Operations.

[FR Doc. 93-28209 Filed 11-12-93; 11:47 am]

BILLING CODE 4160-01-F

National Institutes of Health

Reestablishment

Pursuant to the Federal Advisory Committee Act of October 6, 1972 (Pub. L. 92-463, 86 Stat. 770-776) and section 402(b)(6), of the Public Health Service Act, as amended (42 U.S. Code 282(b)(6), the Acting Director, National Institutes of Health (NIH), announces the reestablishment of the Sickle Cell Disease Advisory Committee.

This Committee advises the Secretary; the Assistant Secretary for Health; the Director, NIH; the Director, National Heart, Lung, and Blood Institute (NHLBI); and the Director of the Division of Blood Diseases and Resources on the Sickle Cell Disease Program, NHLBI; recommends priorities within the program; identifies research opportunities and needs; and makes recommendations concerning the planning, execution and evaluation of the program.

Unless renewed by appropriate action prior to its expiration, the Committee will terminate two years from the date of establishment.

Dated: November 8, 1993.

Ruth L. Kirschstein,

Acting Director, National Institutes of Health.

[FR Doc. 93-28166 Filed 11-16-93; 8:45 am]

BILLING CODE 4140-01-M

National Institutes of Health (NIH)

National Heart, Lung, and Blood Institute; Meeting

Notice is hereby given of the meeting of the National Heart Attack Alert Program Coordinating Committee, sponsored by the National Heart, Lung, and Blood Institute (NHLBI) on Tuesday, December 14, 1993 from 8:30 am to 3:15 pm at the Bethesda Marriott Hotel, 5151 Pooks Hill Road, Bethesda, MD 20814, (301) 897-9400. The entire meeting is open to the public. The Coordinating Committee is meeting to discuss the progress of the National Heart Attack Alert Program with its participating organizations.

Attendance by the public will be limited to space available.

For detailed program information, agenda, list of participants, and meeting summary, contact Ms. Mary McDonald Hand, Coordinator of the National Heart Attack Alert Program, Health Education Branch, Office of Prevention, Education and Control, NHLBI, NIH, Bldg 31, room 4A18, Bethesda, MD 20892, (301) 496-1051.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. McDonald Hand, in advance of the meeting.

Dated: November 8, 1993.

Ruth L. Kirschstein,

Acting Director, NIH.

[FR Doc. 93-28167 Filed 11-16-93; 8:45 am]

BILLING CODE 4140-01-M

Prospective Grant of Exclusive License: Antigen-specific T-cell Death for the Treatment of Autoimmune Disorders and Graft Rejection

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: This notice is in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i) that the National Institutes of Health (NIH), Department of Health and Human Services, is contemplating the grant of a limited field of use exclusive license in the United States to practice the invention embodied in U.S. Patent Application Numbers 07/751,090 entitled "Interleukin-2 stimulated T Lymphocyte Cell Death for the Treatment of Autoimmune Diseases, Allergic Disorders, and Graft Rejection", and 07/926,290 entitled "Interleukin-4 Stimulated T Lymphocyte Cell Death for the Treatment of Autoimmune Diseases, Allergic Disorders and Graft Rejection" to Alexion Pharmaeuticals, Inc., having a place of business in New Haven, CT. The patent rights in these inventions have been assigned to the United States of America.

The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within 60 days from the date of this published Notice, NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

The field of use would be limited to T-cell mediated human diseases applicable to autoimmune and graft rejection but specifically excluding allergenic disorders.

The present inventions relate to diseases mediated by T-lympocytes, including graft rejection, autoimmune disorders. The subject intellectual property makes claims for broad paradigms of therapeutic regimens. In principle, the paradigm, which consists of a process which induces antigen-specific lymphocyte death, should be applicable to the treatment of any disease in which activated lymphocytes contribute to the clinical condition. It has been shown that IL-2 and IL-4 can potentially predispose T lymphocytes of undergo antigen-specific death. This mechanism, termed propriocidal regulation, may govern the replicative potential of lymphocytes during normal immune responses.

ADDRESSES: Requests for a copy of these patent applications, inquiries, comments and other materials relating to the contemplated license should be directed to: Mr. Daniel R. Passeri, Office of Technology Transfer, National Institutes of Health, Box OTT, Bethesda, MD 20892. Telephone: (301) 496-7735; Facsimile: (301) 402-0220. Properly filed competing applications for a license filed in response to this notice will be treated as objections to the contemplated license. Only written comments and/or application of a license which are received by the NIH Office of Technology Transfer within sixty (60) days of this notice will be considered.

Dated: November 4, 1993.

Donald P. Christoferson,

Acting Director, Office of Technology Transfer.

[FR Doc. 93-28168 Filed 11-16-93; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF THE INTERIOR

National Park Service

Final Environmental Impact Statement/ General Management Plan/ Development Concept Plan, Fort Laramie National Historic Site, WY

AGENCY: National Park Service, Department of the Interior.

ACTION: Availability of Final Environmental Impact Statement/ General Management Plan/Development Concept Plan for Fort Laramie National Historic Site.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969, the National Park Service (NPS) announces the availability of a Final Environmental Impact Statement/ General Management Plan/Development Concept Plan (FEIS/GMP/DCP) for Fort Laramie National Historic Site, Wyoming.

DATES: A 30-day no-action period will follow the Environmental Protection Agency's notice of availability of the FEIS/GMP/DCP.

ADDRESSES: Public reading copies of the FEIS/GMP/DCP will be available for review at the following locations:

Office of the Superintendent, Fort Laramie National Historic Site, P.O. Box 86, Fort Laramie, WY 82212, Telephone: (307) 837-2221.

Division of Planning and Compliance, Rocky Mountain Regional Office, National Park Service, 12795 W. Alameda Parkway, Lakewood, CO 80225, Telephone: (303) 969-2828.

Office of Public Affairs, National Park Service, Department of the Interior, 18th and C Streets NW., Washington, DC 20240, Telephone: (202) 208-6843.

SUPPLEMENTARY INFORMATION: In November 1992, the National Park Service released for a 60-day public review a Draft Environmental Impact Statement/General Management Plan/ Development Concept Plan (DEIS/GMP/ DCP) that evaluated three alternatives that provided for the preservation of historic resources while providing for visitor use. Under the no-action alternative, existing management activities would continue. Under alternative A, the minimum-action alternative, the existing level and degree of interpretive, administrative, resource management, and visitor services would be maintained; twentieth century intrusions on the historic site would be limited; exhibitry, circulation, visitor contact and maintenance operations would all be improved; and the interpretive theme would have the narrow focus of the role Fort Laramie National Historic Site played as a military fort, with only minor discussion and interpretation of other interpretive topics. The preferred alternative and proposed action would expand the interpretive theme to include the fort's complete and complex role over decades in American history.

The DEIS/GMP/DCP in particular evaluated the environmental consequences of the proposed action and the other alternatives on soils and vegetation associated with uncontrolled pedestrian trailing near visitor use areas, floodplains and wetlands, wildlife, threatened and endangered species, surrounding land uses, and socioeconomic resources. The environmental consequences of the proposed action and alternatives considered are fully disclosed in the FEIS/GMP/DCP. Also included are the results of the public involvement and consultation and coordination for this project.

FOR FURTHER INFORMATION CONTACT: Superintendent, Fort Laramie National Historic Site, at the above address and telephone number.

Dated: November 1, 1993.

Ronald E. Everhart,

Acting Regional Director, Rocky Mountain Region, National Park Service.

[FR Doc. 93-28198 Filed 11-16-93; 8:45 am]

BILLING CODE 4310-70-P

National Park Service

Acadia National Park Advisory Commission; Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Public Law 92-463, 86 Stat. 770, 5 U.S.C. Ap. 1, sec. 10), that the Acadia National Park Advisory Commission will hold a meeting on Monday, December 6, 1993.

The Commission was established pursuant to Public Law 99-420, sec. 103. The purpose of the commission is to consult with the Secretary of the Interior, or his designee, on matters relating to the management and development of the park, including but not limited to the acquisition of lands and interests in lands (including conservation easements on islands) and termination of rights of use and occupancy.

The meeting will convene at Acadia National Park Headquarters, Bar Harbor, Maine, at 1 p.m. to consider the following agenda:

1. Review and approval of minutes from the meeting held August 30, 1993.

2. Report of the Conservation Easement Subcommittee.

3. Report of the Acquisition Subcommittee.

4. Superintendent's report.

5. Public comments.

6. Proposed agenda and date of next Commission meeting.

The meeting is open to the public. Interested persons may make oral/ written presentations to the Commission or file written statements. Such requests should be made to the Superintendent at least seven days prior to the meeting. Further information concerning this meeting may be obtained from the Superintendent, Acadia National Park, P.O. Box 177, Bar Harbor, Maine 04609, telephone: (207) 288-3338.

Dated: November 9, 1993.

John C. Reed,

Acting Regional Director.

[FR Doc. 93-28200 Filed 11-16-93; 8:45 am]

BILLING CODE 4310-70-P

Cape Cod National Seashore Advisory Commission; Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770, 5 U.S.C. App 1, section 10), that a meeting of the Cape Cod National Seashore Advisory Commission will be held on Friday, December 3, 1993.

The Commission was reestablished pursuant to Public Law 99-349, Amendment 24. The purpose of the Commission is to consult with the Secretary of the Interior, or his designee, with respect to matters relating to the development of the Cape Cod National Seashore, and with respect to carrying out the provisions of sections 4 and 5 of the Act establishing the Seashore.

The commission members will then meet at 1 p.m. at Park Headquarters, Marconi Station for their regular business meeting which will be held for the following reasons:

1. Adoption of Agenda.
2. Approval of Minutes of Previous Meeting.
3. Reports of Officers.
4. Old Business.
5. Superintendent's Report.
6. GMP Subcommittee Report.
7. National Biological Survey.
8. Commercial Certificates.
9. Improved Properties.
10. New Business.
11. Agenda for next meeting.
12. Date for next meeting.
13. Communications/Public Comment.
14. Adjournment.

The business meeting is open to the public. It is expected that 15 persons will be able to attend the meeting in addition to the Commission members.

Interested persons may make oral/written presentations to the Commission during the business meeting or file written statements. Such requests should be made to the park superintendent at least seven days prior to the meeting. Further information concerning the meeting may be obtained from the Superintendent, Cape Cod National Seashore, So. Wellfleet, MA 02663.

Dated: November 9, 1993.

John C. Reed,

Acting Regional Director.

[FR Doc. 93-28201 Filed 11-16-93; 8:45 am]

BILLING CODE 4310-70-P

Denali National Park Subsistence Resource Commission; Meeting

AGENCY: National Park Service, Interior.

ACTION: Subsistence Resource Commission meeting.

SUMMARY: The Superintendent of Denali National Park and the Chairperson of the Subsistence Resource Commission for Denali National Park announce a forthcoming meeting of the Denali National Park Subsistence Resource Commission.

The following agenda items will be discussed:

1. Introduction of commission members and guests.
2. Superintendent's welcome.
3. Old business:
   a. Approval of summary of minutes.
   b. Review of SRC function and purpose.
   c. South Slope Denali Development Concept Plan.
4. Federal Subsistence Management Program update.
   a. Federal Subsistence Board.
   b. Federal Regional Advisory Councils.
   c. Denali Federal Registration Permit Hunts.
   d. Appeal of Hwy residents C&T, GMU-20C.
5. New business:
   a. Update of wildlife surveys and studies.
   b. Proposed DOT routes, Parks Hwy to McGrath.
   c. Hunting regulations review.
6. Hunting Plan recommendations work session.
7. Public and other agency comments.
8. Set time and place of next SRC meeting.
9. Adjournment.

DATES: The meeting will be held Tuesday, November 30, 1993. The meeting will begin at 10 a.m. and conclude around 5 p.m.

LOCATION: The meeting will be held at the Denali Park Headquarters, Recreation Hall, in Denali Park, Alaska.

FOR FURTHER INFORMATION CONTACT: Russ Berry, Superintendent, PO Box 9, Denali Park, Alaska 99755. Phone (907) 683-2294.

SUPPLEMENTARY INFORMATION: The Subsistence Resource Commissions are authorized under title VIII, section 808, of the Alaska National Interest Lands Conservation Act, Pub. L. 96-487, and operate in accordance with the provisions of the Federal Advisory Committees Act.

Judith C. Gottlieb,

Acting Regional Director.

[FR Doc. 93-28199 Filed 11-16-93; 8:45 am]

BILLING CODE 4310-70-M

Sudbury, Assabet and Concord Rivers Study Committee; Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770, 5 U.S.C. App. 1 Section 10), that there will be a meeting of the Sudbury, Assabet and Concord Rivers Study Committee on Thursday, December 2, 1993.

The Committee was established pursuant to Public Law 101-628. The purpose of the Committee is to consult with the Secretary of the Interior and to advise the Secretary in conducting the study of the Sudbury, Assabet and Concord River segments specified in section 5 (a) (110) of the Wild and Scenic Rivers Act. The Committee shall also advise the Secretary concerning management alternatives, should some or all of the river segments studied be found eligible for inclusion in the National Wild and Scenic Rivers System.

The meeting will be held at 7:30 p.m. at the Wayland Town Offices, 41 Cochituate Road, Wayland, Massachusetts. Driving Directions: Wayland Town Hall is located on the west side of Rte. 27, just south of the intersection of Rtes. 20 and 27 in Wayland center. From the north, take Rte. 27 south and turn right at first driveway after crossing Rte. 27. From the west, take Rte. 20 east, turn left on Rte. 27 south and take immediate right into driveway. Parking lot is behind building.

The agenda is as follows:

I. Welcome and introductions, approval of minutes from 9/23/93 and 10/28/93 meetings.

II. Brief questions and comments from public.

III. Subcommittee Reports—Subcommittee Chairs.

A. River Conservation Planning Subcommittee.

B. Water Resources Subcommittee: Water Resources Study.

C. Public Participation Subcommittee.

V. Issues of Local Concern.

VI. Opportunity for public questions and comments.

VII. Other Business.

A. Next meeting dates and locations.

Dated: November 9, 1993.

John C. Reed,

Acting Regional Director.

[FR Doc. 93-28202 Filed 11-16-93; 8:45 am]

BILLING CODE 4310-70-P

New Bedford, MA, Special Resource Study; Public Review and Comment

In accordance with Public Law 101-512, the National Park Service announces that the Draft New Bedford (Massachusetts) Special Resource Study is available for public review and comment.

A special resource study is used by the National Park Service to evaluate a resource for national significance and to assess its suitability and feasibility for inclusion in the National Park system. Based on the results of this assessment, the study presents a range of possible management alternatives. In order for an area to become a National Park unit, it must meet all three criteria identified in the NPS "Criteria for Parklands."

National Significance: A proposed unit will be considered nationally significant if it meets all four of the following standards:

—It is an outstanding example of a particular type of resource.
—It possesses exceptional value or quality in illustrating or interpreting the natural or cultural themes of our Nation's heritage.
—It offers superlative opportunities for recreation, for public use and enjoyment, or for scientific study.
—It retains a high degree of integrity as a true, accurate, and relatively unspoiled example of the resource.

Suitability: To be suitable for inclusion in the System an area must represent a natural or cultural theme or type of recreational resource that is not already adequately represented in the National Park System or is not comparably represented and protected for public enjoyment by another land managing entity.

Feasibility: To be feasible as a new unit of the National Park System an area's natural systems and/or historic settings must be of sufficient size and appropriate configuration to ensure long-term protection of the resources and to accommodate public use. It must have potential for efficient administration at a reasonable cost.

The draft "New Bedford (Massachusetts) Special Resource Study is available for review at the Waterfront Historic Area League (WHALE) offices at 13 Centre Street, New Bedford, MA, 02740 from November 18, 1993, through December 20, 1993. Copies are also available at the North Atlantic Regional Office of the National Park Service, 15 State Street, Attn: Ellen Levin, Boston, MA, 02109. Call 617-223-5048 for further information. Written comments will be accepted through December 24, 1993 at North Atlantic Regional Office, National Park Service, 15 State Street, Boston, MA 02109; Attn: Ellen Levin.

Dated: November 9, 1993.

John C. Reed,

Acting Regional Director.

[FR Doc. 93-28203 Filed 11-16-93; 8:45 am]

BILLING CODE 4310-70-P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 731-TA-669-670 (Preliminary)]

Certain Cased Pencils From the People's Republic of China and Thailand

AGENCY: United States International Trade Commission.

ACTION: Institution and scheduling of preliminary antidumping investigations.

SUMMARY: The Commission hereby gives notice of the institution of preliminary antidumping investigations Nos. 731-TA-669-670 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from the People's Republic of China and Thailand of certain pencils with leads encased in a rigid sheath, provided for in subheading 9609.10.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value. The Commission must complete preliminary antidumping investigations in 45 days, or in this case by December 27, 1993.

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

EFFECTIVE DATE: November 10, 1993.

FOR FURTHER INFORMATION CONTACT: Valerie Newkirk (202-205-3190), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000.

SUPPLEMENTARY INFORMATION:

Background

These investigations are being instituted in response to a petition filed on November 10, 1993, by the Pencil Makers Association, Inc., Marlton, NJ.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these preliminary investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made not later than seven (7) days after the publication of this notice in the **Federal Register.** A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference

The Commission's Director of Operations has scheduled a conference in connection with these investigations for 9:30 a.m. on December 1, 1993, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Parties wishing to participate in the conference should contact Valerie Newkirk (202-205-3190) not later than November 23, 1993, to arrange for their appearance. Parties in support of the imposition of antidumping duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written Submissions

As provided in §§ 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before December 6, 1993, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference no later than three (3) days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either

the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: November 12, 1993.

Donna R. Koehnke,

Secretary.

[FR Doc. 93-28352 Filed 11-16-93; 8:45 am]

BILLING CODE 7020-02-P

[Investigation No. 337-TA-360]

Certain Devices for Connecting Computers via Telephone Lines; Notice of Investigation

AGENCY: International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on October 12, 1993, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Farallon Computing, Inc., 2470 Mariner Square Loop, Alameda, California 94501. An amendment to the complaint was filed on November 1, 1993, and a supplement to the complaint was filed on November 2, 1993. The complaint, as amended and supplemented, alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain devices for connecting computers via telephone lines by reason of alleged direct or induced infringement of claim 10, 18, and 20 of U.S. Letters Patent 5,003,579, and that there exists an industry in the United States as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and issue a permanent exclusion order and a permanent cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., room 112, Washington, DC 20436, telephone 202-205-1802. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

FOR FURTHER INFORMATION CONTACT: Steven A. Glazer, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202-205-2577.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.12 of the Commission's Interim Rules of Practice and Procedure, 19 CFR 210.12.

Scope of Investigation

Having considered the complaint, the U.S. International Trade Commission, on November 10, 1993, *Ordered That*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection 337(a)(1)(B) in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain devices for connecting computers via telephone lines by reason of alleged infringement of claim 10, 18, or 20 of U.S. Letters Patent 5,003,579, and whether there exists an industry in the United States as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—Farallon Computing, Inc., 2470 Mariner Square Loop, Alameda, California 94501.

(b) The respondents are the following companies alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

ABL Electronics Corp., 2155 Greenspring Drive, Timonium, Maryland 21093
Caltechnology International Ltd., 17th Floor, 167 Hsin Hai Road, Section 2, Taipei City, Taiwan
CPU Products, 144 North Water, Derby, Kansas 67037
Enhance Cable Technology, 730 North Ninth Street, Suite Q, San Jose, California 95112
Focus Enhancements, Inc., 800 West Cummings Park, Suite 4500, Woburn, Massachusetts 01801
Full Enterprises Corp., 24 Alley 23 Lane 482, Chung Shan Road, Section 2, Chung Ho City, Taipei County, Taiwan
Good Way Industrial Co. Ltd., Room 502, 159 Keelung Road, Section 1, Taipei City, Taiwan
MACProducts USA, 608 West 22nd Street, Austin, Texas 78705
MicroComputer Cable Co., Inc., 12200 Delta Drive, Taylor, Michigan 48180
Ming Technology Corporation, 52 Alley 1 Lane 131, 7th Floor, Yen Chi Street, Taipei City, Taiwan
Pan International (USA), 9477 Archibald Avenue, Rancho Cucamonga, California 91730
Shiunn Yang Enterprises Co. Ltd., 1st Floor, 11 Huai Jen Street, Pan Chiao City, Taipei County, Taiwan
Taiwan Techtron Corporation, 5th Floor-1, 115 Pa Teh Road, Section 4, Taipei City, Taiwan
Technology Works, Inc., 4030 Braker Lane West, Suite 350, Austin, Texas 78759
Total Technologies, Ltd., 2110 South Anne Street, Santa Ana, California 92704
Tremon Enterprises Co. Ltd., 14th Floor-2, 420 Fu Hsing North Road, Taipei City, Taiwan

(c) Steven A. Glazer, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., room 401-K, Washington, DC 20436, who shall be the Commission investigative attorney, party to this investigation; and

(3) For the investigation so instituted, Janet D. Saxon, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.21 of the Commission's Interim Rules of Practice and Procedure, 19 CFR 210.21. Pursuant to sections 201.16(d) and 210.21(a) of the Commission's Rules, 19 C.F.R. §§ 201.16(d) and 210.21(a), such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting responses to the complaint will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings, and may result in the issuance of a limited exclusion order or a cease and desist order or both directed against such respondent.

By order of the Commission.

Issued: November 12, 1993.

Donna R. Koehnke,

Secretary.

[FR Doc. 93-28292 Filed 11-16-93; 8:45 am]

BILLING CODE 7020-02-P

[Investigation No. 337-TA-358]

Commission Determination Not to Review an Initial Determination Terminating the Temporary Relief Phase of the Investigation as to Three Respondents on the Basis of a Consent Order; Issuance of Consent Order; Denial of Motion To Shorten Public Comment Period and the Period for Commission Consideration of Initial Determination

In the matter of certain recombinantly produced human growth hormone.

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's (ALJ) initial determination (ID) in the above-captioned investigation granting a joint motion to terminate the temporary relief phase of the investigation as to three respondents on the basis of a consent order. The Commission has also determined to deny movants' motion to shorten the public comment period and the period for Commission consideration of the ID.

FOR FURTHER INFORMATION CONTACT: Jean Jackson, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-205-3104.

SUPPLEMENTARY INFORMATION: On October 14, 1993, complainant Genentech Inc., ("Genentech") and respondents Novo-Nordisk A/S; Novo-Nordisk of North America, Novo-Nordisk Pharmaceuticals, Inc.; and ZymoGenetics, Inc. (collectively, "the Novo respondents") moved jointly pursuant to interim rule 210.51 to terminate the investigation as to the Novo respondents on the basis of a proposed consent order and consent order agreement. The Commission investigative attorney filed a response in support of the joint motion. On October 19, 1993, the presiding ALJ issued an ID (Order No. 22) granting the motion. No petitions for review or agency or public comments were received.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, and Commission interim rule 210.53(h), 19 CFR 210.53(h).

Copies of the ID and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, D.C. 20436, telephone 202-205-2000. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

By order of the Commission.

Issued: November 10, 1993.

Donna R. Koehnke,

Secretary.

[FR Doc. 93-28291 Filed 11-16-93; 8:45 am]

BILLING CODE 7020-02-P

INTERSTATE COMMERCE COMMISSION

[Docket Nos. AB-369 (Sub-No. 2X) and AB-55 (Sub-No. 457X)]

Buffalo & Pittsburgh Railroad, Inc.—Discontinuance and Abandonment Exemption—Between DC Tower and Homer City, in Jefferson and Indiana Counties, PA, Between Ridge Branch Junction and Clarksburg, in Indiana County, PA and Between Lucerne Junction and Lucerne Mines, in Indiana County, PA and CSX Transportation, Inc.—Discontinuance of Service Exemption—in Jefferson and Indiana Counties, PA

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Commission, under 49 U.S.C. 10505, exempts from the prior approval requirements of 49 U.S.C. 10903 and 10904: (1) Buffalo & Pittsburgh Railroad, Inc.'s (B&P) discontinuance of operations over 58.58 miles of track, in Jefferson and Indiana Counties, PA; (2) B&P's abandonment of 1.86 miles of track, in Indiana County, PA; and (3) CSX Transportation, Inc.'s (CSXT) discontinuance of service over 58.58 miles of track, in Jefferson and Indiana Counties, PA. The exemptions will be subject to standard labor protective conditions.

DATES: The exemption is effective on December 17, 1993. Petitions to stay must be filed by December 2, 1993. Petitions to reopen must be filed by December 13, 1993.

ADDRESSES: Send pleadings referring to Docket No. AB-369 (Sub-No. 2X) or Docket No. AB-55 (Sub-No. 457X) to: (1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423; (2) B&P's representative, Charles D. Cramton, Esq., Harter, Secrest & Emery, 700 Midtown Tower, Rochester, New York 14604; and (3) CSXT's representative, Charles M. Rosenberger, Esq., CSX Transportation, Inc., Law Department, 500 Water Street, Jacksonville, Florida 32202.

FOR FURTHER INFORMATION CONTACT: Deputy Director Richard Felder (202) 927-5610. [TDD for hearing impaired: (202) 927-5721.]

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC. 20423. Telephone: (202) 289-4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 927-5271.]

Decided: November 2, 1993.

By the Commission, Chairman McDonald, Vice Chairman Simmons, Commissioners Phillips, Philbin, and Walden.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 93-28205 Filed 11-16-93; 8:45 am]

BILLING CODE 7035-01-P

DEPARTMENT OF JUSTICE

Antitrust Division

U.S. v. Primestar Partners, L.P. et al.; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States publishes below the comments received on the proposed Final Judgment in *United States* versus *Primestar Partners, L.P.; ATC Satellite, Inc.; Comcast Corporation; Comcast DBS, Inc.; Continental Cablevision, Inc.; Continental Satellite Company, Inc.; Cox Enterprises, Inc.; Cox Satellite, Inc.; GE American Communications, Inc.; GE Americom Services, Inc.; Newhouse Broadcasting Corporation; New Vision Satellite; Tele-Communications, Inc.; TCI K-1, Inc.; Time Warner Inc.; United Artists K-1 Investments, Inc.; Viacom Inc.; Viacom K-Band, Inc.; and Warner Cable SSD, Inc.*, Civil Action No. 93-CIV-3913, United States District Court for the Southern District of New York, together with the response of the United States to the comments.

Copies of the response and the public comments are available on request for inspection and copying in room 3233 of the Antitrust Division, U.S. Department of Justice, Tenth Street and Pennsylvania Avenue, NW., Washington, DC 20530, and for inspection at the Office of the Clerk of the United States District Court for the Southern District of New York, United

States Courthouse, Foley Square, New York, New York 10007.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

Response to Public Comments

Pursuant to section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. 16(b)–(h)) ("APPA"), the United States of America hereby files its Response to Public Comments.

I

Introduction

The United States has carefully reviewed the comments submitted on the proposed Final Judgment and remains convinced that entry of the Final Judgment is in the public interest.

II

Background

This action was commenced on June 9, 1993, when the United States filed a complaint alleging that the defendants have engaged in a continuing agreement, combination and conspiracy in restraint of competition in the provision of multichannel subscription television service, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. On the same date, the United States submitted a proposed Final Judgment and a Stipulation between the United States and the defendants pursuant to which the United States and the defendants consented to entry of the proposed Final Judgment. The Stipulation provides that the proposed Final Judgment may be entered by the Court after completion of the procedures required by the APPA.

III

Compliance With the APPA

Upon publication of this Response in the Federal Register, the procedures required by the APPA prior to entry of the proposed Final Judgment were completed, and the Court is free to enter the proposed Final Judgment.

IV

Response to Public Comments

The Department has received comments relating to the proposed Final Judgment from the following commenters or groups of commenters:

—Joint Comments filed by Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group, Southwestern Bell Corporation, US West, Inc., GTE Service Corporation, and the United States Telephone Association (hereinafter "Telcos");

—comments filed by the Wireless Cable Association International, Inc. (hereinafter "WCAI");

—joint comments filed by DirecTv, Inc., the National Rural Telecommunications Cooperative, Consumer Federation of America, and Television Viewers of America, Inc. (hereinafter "DirecTv Comments");

—comments filed by Continental Satellite Corporation (hereinafter "Continental");

—Advanced Communications Corporation (hereinafter "Advanced"); and

—the Attorney General of the State of Arkansas.

Issues raised by commenters relating to the standard of judicial review will be discussed below in Section IV(E).

A. Telco Comments

The Telcos comprise the eight largest local telephone companies in the country and their industry association. In 1992, the Telcos received authorization from the FCC to provide "video dialtone" services, in which the telephone companies provide the wires through which other parties can provide programming to customers, along with certain enhanced services. Several of the Telcos are beginning to introduce such services on a small scale. The Telcos believe that they are potentially effective competitors to cable systems, particularly if the current legal prohibition against their direct provision of programming to subscribers is removed.[1]

As providers of multichannel subscription television, the Telcos would fall within the protections of the program access provisions of Sections IV(A), IV(B), IV(C)(1), and IV(C)(2) of the proposed Final Judgment. They complain, however, that Section IV(C)(3)(a), which prevents the MSO defendants from entering into or renewing programming supply agreements that contain provisions that preclude specified types of providers of multichannel subscription television from gaining access to the programming services listed in Exhibit A of the proposed order, does not extend to them or their future video dialtone customer/programmers,[2] and that such exclusion places them at a competitive disadvantage in access to critical programming and is thus anticompetitive. The Telcos further argue that the proposed Final Judgment is insufficient as an antitrust remedy in that it is not broad enough to protect all competitors, is inconsistent with the government's purposes in filing the suit, and is contrary to the purposes of the Cable Television Consumer Protection and Competition Act of 1992, ("1992 Cable Act").[3]

The Telco Comments acknowledge that "the specific instances on which the complaint focused concerned the efforts of cable providers to thwart emerging competition from direct broadcast satellite (DBS) providers * * *" Telco Comments at 11, n. 12. The Telcos contend that the Complaint's prayer for relief and Competitive Impact Statement disclose an intent to prevent cable operators from denying program access to any potential competitors and that the exclusion was possibly inadvertent. Telco Comments at 11, 15. This is incorrect.

Notwithstanding the fact that DBS is but one of many types of multichannel subscription television service, the government's complaint was based upon the defendants' agreement and joint conduct in establishing the Primestar DBS joint venture to thwart competition from DBS entrants by delaying and raising barriers to entry into DBS, restraining the availability of programming to other DBS entrants or potential entrants, and facilitating a coordinated retaliatory response by the MSO defendants to DBS entry. Complaint, Para. 48. The government's investigation and complaint involves anticompetitive conduct with the effect of delaying, if not pre-empting, cable-competitive entry into DBS by imposition of unreasonable restraints on the availability of programming to DBS entrants. Complaint, Paras. 49–52. The investigation conducted by the government, and the complaint filed, did not address all competition to cable, nor did it have anything to do with entry by telephone companies into multichannel subscription television. In fact, at the time of the formation of the Preimestar venture and the investigation, the telephone companies did not have video dialtone authority and were not generally considered to be imminent entrants into multichannel subscription television. The investigation did not reveal any record

[1] In *C&P Telephone Company of Virginia* v. *United States*, No. 92–1751–A (E.D. Va., decided August 24, 1993), the district court held unconstitutional the provision of the 1992 Cable Act that bars local telephone companies from providing video programming directly to subscribers within its service area. The court's order applies only to Bell Atlantic.

[2] Section IV(C)(3)(c) expressly provides that the term "cable operator" does not include common carriers, such as the Telcos.

[3] Pub. L. No. 102–385, 106 Stat. 1460 (October 5, 1992), *codified at* 47 U.S.C. 521.

of denial of programming to telephone companies.[4]

The Telcos confuse the issue of whether the proposed Final Judgment is in the public interest with whether it gives them all they might wish for themselves. The government negotiated a consent judgment with the defendants that provided a complete remedy to the violation alleged, as well as additional relief relating to other types of multichannel subscription television not subject of the investigation and complaint, for which there seemed justification based on a history of difficulty in obtaining programming access. The additional relief includes the telephone companies in most cases. That the government did not obtain an even broader judgment covering conduct not alleged as a violation is not a grounds for rejecting the settlement under the public interest standard.[5]

The Telcos' contention that the proposed Final Judgment is contrary to the "policy judgment of Congress and the FCC that common carriers and their video dialtone customer/programmers should be included in whatever program access requirements are developed" is also incorrect and irrelevant. First, and most importantly, the proposed Final Judgment does not, nor could it, conflict with any portion of the Act or FCC regulations. Second, the proposed judgment simply prohibits many exclusive contracts; it does not expressly authorize others. Exclusive contracts are not automatically illegal under the antitrust laws. To the extent, however, that the 1992 Cable Act or FCC regulations thereunder prohibit such contracts, this proposed Final Judgment will not immunize them.[6]

It is also important to note that not only does the proposed Final Judgment not interfere with any rights of the Telcos under the 1992 Cable Act or FCC regulations, it also does not terminate any rights of the Telcos to bring their own suit under the Sherman Act if victimized by any violation of the antitrust laws.

B. WCAI Comments

The WCAI, a trade association for the wireless cable industry, believes that wireless cable (or Multichannel Multipoint Distribution Service ("MMDS") in the proposed Final Judgment), given recent technological and regulatory developments, also will provide meaningful competition to cable systems. The WCAI argues that Section IV(C)(3)(a) of the proposed Final Judgment does not fully resolve its members' problems caused by the MSO defendants in gaining access to programming.[7] This provision would prohibit the MSO defendants from entering into or renewing programming contracts that contain exclusivity provisions vis-a-vis DBS providers, MMDS providers, and others, that would prevent access by WCAI members. This provision would go farther for DBS providers, to enjoin enforcement of existing contracts that prevent access to programming, but would not go so far as to enjoin enforcement of existing agreements that prevent access by MMDS providers. Thus, while WCAI members gain some benefits in terms of programming access under this provision, they do not receive as much benefit as do DBS providers.

The response to this comment is similar to that made above with respect to the Telcos. The investigation conducted by the Department and the violation and effects alleged in the complaint relate to the Primestar venture and programming access by DBS providers, not the programming access problems of MMDS or other potential competitors to cable. Aware of a past history of complaints by MMDS providers relating to denials of access to programming that have nothing at all to do with the Primestar venture, the government also negotiated additional provisions that protect future competition by assuring that MMDS providers will not be unreasonably denied access to programming in the future. Absent a conclusion that existing programming contracts were illegal or closely related to the violation alleged in the complaint, enjoining the enforcement of existing exclusive contracts in all respects was not required for effective relief of the government's complaint. Finally, the rights of members of the WCAI to bring their own antitrust suit, or seek additional legislative protection, are in no way impaired by entry of the proposed Final Judgment.

C. DirecTv Comments

DirecTv, which is entering the DBS business,[8] believes that Section IV(D) is anticompetitive in that it undermines the 1992 Cable Act and permits the MSO defendants to continue their anticompetitive conduct with regard to DBS, and is concerned about the possibility of its persuasive or precedential effects on proceedings in other forums. Section IV(D) provides that Primestar may not license, and no defendant may license to Primestar, any exclusive rights to the programming specified in Exhibit A of the proposed Final Judgment, except that if a competing DBS venture obtains any exclusive programming, Primestar may upon notice to the Department obtain a "reasonably comparable amount of programming of a reasonably comparable type and quality on a reasonably comparable exclusive basis". This provision was included in the proposed Final Judgment to insure that Primestar's ability to compete with other DBS services was not inadvertently impaired by the programming access provisions of the proposed Final Judgment.

DirecTv argues that allowing any DBS firm to have exclusive access to some programming would harm consumers, since consumers wanting the full panoply of services would have to subscribe to both USSB and DirecTv. In particular, DirecTv claims that another DBS competitor, United States Satellite Broadcasting Company, Inc. (USSB), may be able to obtain some important programming on a basis that excludes DirecTv. DirecTv argues that this undermines and may violate the 1992 Cable Act and the implementing FCC regulations.

Contrary to DirecTv's arguments, Section IV(D) is consistent with the procompetitive purposes of the proposed Final Judgment by prohibiting *Primestar*, the defendants' DBS joint venture, from obtaining programming specified in Exhibit A of the proposed Final Judgment on an exclusive basis, except to respond in a reasonably comparable way to such action by a DBS

[4] On the other hand, other multichannel competitors, including SMATV and MMDS, did have a history of being denied access to programming. These firms are covered by Section III(C)(3)(a) of the proposed Final Judgment.

[5] It is axiomatic that in a settlement, one often gets less than all that one might want or get at trial, or there would be no settlement. *E.g., United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971).

[6] The 1992 Cable Act generally prohibits "unfair methods of competition * * * the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming * * * to consumers." 47 U.S.C. 548(b). Assuming that the Telcos are covered by the Act, it cannot be assumed that any denial of programming access to the Telcos is a violation, and it is left to the FCC to determine whether any particular access denial would be an unfair method of competition.

[7] The WCAI also argues that neither the 1992 Cable Act nor the order in *State of New York, et. al.* versus *Primestar Partners, L.P., et. al.*, 93 Civ. 3868 (JES) fully addresses its members' problems in gaining programming access.

[8] DirecTv is joined in its comments by the National Rural Telecommunications Cooperative ("NRTC"), which is also entering the DBS business, and two consumer organizations, Consumer Federation of America ("CFA") and Television Viewers of America ("TVA"). CFA and TVA obviously do not have the same commercial interests as DirecTv and NRTC, but our response to their comments does not depend on those commercial interests.

competitor. Section IV(D) does not create or ratify any exclusive arrangements between a programmer and a DBS provider otherwise prohibited by law. The provision allowing Primestar to obtain exclusive rights only to match its DBS competitors is intended to assure both that Primestar cannot block programming access to other DBS competitors and that it may offer competitive programming to compete against other DBS providers. The goal of free competition is not served by disadvantaging Primestar against other DBS competitors.

The proposed Final Judgment does not undermine the 1992 Cable Act. That statute prohibits exclusive arrangements between programming vendors and cable operators, but does not expressly prohibit such arrangements between programming vendors and a noncable firm such as USSB. The Department has no occasion on which to comment on whether such an arrangement violates the 1992 Cable Act's prohibition against unfair methods of competition in Section 19(b), or constitutes non-price discrimination in violation of Section 19(c)(2)(B). In any event, the proposed Final Judgment prohibits the defendants from granting programming to Primestar to the exclusion of all DBS competitors, and further prohibiting exclusive contracts as between DirecTv and USSB or any other DBS competitor is not necessary for the proposed Final Judgment to be in the public interest in light of the antitrust violation charged.[9]

The critical point with respect to DirecTv's 1992 Cable Act arguments is that the proposed Final Judgment in no way interferes with DirecTv's right to pursue claims of unfair competition or discrimination in the event that its feared scenario materializes. Indeed, DirecTv is in the process of arguing such claims before the FCC (DirecTv Comments at 18). DirecTv is concerned that entry of the proposed Final Judgment will have a persuasive or precedental effect on the forums considering programming access issues, and that the proposed Final Judgment will be construed to mean that a particular DBS industry structure or programming access principle has been ratified by the Department. DirecTv seeks a statement from the Department that the proposed judgment does not reflect its views on programming access obligations under any other legal authority.

The proposed Final Judgment is a negotiated settlement of a civil antitrust case that was brought to end specified collusive activities of the defendants. it is not a statement of interpretation of the 1992 Cable Act and does not reflect the views of the Department as to the interpretation of FCC rules or their application.

D. Other Comments

Continental and Advanced are DBS licensees with pending applications before the FCC seeking authority to launch high-power DBS satellites. Continental's comments relating specifically to the proposed Final Judgment urge that in addition to the proposed Final Judgment, the Court should prohibit the defendants from acquiring an ownership interest in any high-power satellite permittee until the last of the original nine DBS permittees has been in service for 8 years or the year 2010, whichever is sooner. Continental does not urge the Court to enjoin defendant TCI, through its permittee subsidiary Tempo Satellite Corporation, from fulfilling its license and entering DBS, although it would not oppose such action. Advanced also objects to aspects of the proposed Final Judgment, along with the states' judgment, because it believes that the federal and state settlements could have anticompetitive effects on the market for high-power DBS services, and because entry of the proposed judgments could undermine implementation of the 1992 Cable Act.

The Department does not agree with Continental that cable companies must be enjoined from entry into high-power DBS. While enjoining collusive conduct to deter entry into DBS promotes competition in multichannel subscription television, a flat ban that prevented cable operators from expanding into new technologies for delivering video services to consumers is unwarranted and may slow the development of DBS by depriving it of well-situated potential entrants. It is unnecessary to forego any potential benefits of cable entry into DBS in order to protect other DBS entrants from unlawful and anticompetitive conduct.

The bulk of Continental's comments relate to allegations of unlawful conduct by persons not party to this lawsuit directed at defrauding or depriving Continental of its DBS license, and request that the Department expand its investigation to include these allegations. These allegations have nothing to do with the government's complaint and proposed settlement relating to Primestar.[10]

E. Standard of Judicial Review

The standard of review is set forth in section 2(e) of the APPA,[11] which provides that "the court shall determine that entry of such judgment is in the public interest" and provides that in making such determination, the court may consider the competitive impact of the judgment and its impact on the public generally and individuals alleging injury from the violations charged. 15 U.S.C. 16(e). In addition to this statutory guidance as to the meaning of the "public interest," this term takes its meaning from the statute underlying the complaint—the Sherman Act—which has as its basis the protection of competition. See, e.g., *United States* versus *American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 1596 (1984); *United States* versus *Loew's Inc.*, 783 F. Supp. 211, 213 (S.D.N.Y. 1992); *United States* versus *Columbia Artists Management, Inc.*, 662 F. Supp. 865, 869 (S.D.N.Y. 1987).

Application of this standard starts with the principle that in enforcing the antitrust laws, the Department represents the public interest in competition. See, e.g., *United States* versus *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States* versus *Associated Milk Producers, Inc.*, 534 F.2d 113, 116–17 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976). It is part of the Department's responsibilities in representing the public interest to determine whether continued prosecution or one of a range of settlement options will best serve the public interest in competition. See, e.g., *Bechtel*, 648 F.2d at 665–66; *United States* versus *Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975).

[9] The effects of DirecTv's proposal on competition among DBS providers is not entirely clear. DirecTv will ultimately be in a position to sell approximately 150 channels of programming, as opposed to approximately 30 for USSB. If DirecTv were able to offer all of the attractive programming that was available to USSB, competition between DirecTv and USSB might be impaired. DirecTv appears to understand the need for differentiated programming between itself and USSB as it has, the Department understands, obtained certain exclusive programming rights vis-a-vis USSB.

[10] Similarly, the comments of Advanced and the Attorney General of Arkansas raise no specific objections to entry of the proposed Final Judgment.

[11] "Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider

(1) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) The impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial." 15 U.S.C. 16(e).

The courts have recognized that the Department has broad discretion in controlling the government's antitrust litigation. See, e.g., *Loew's*, 783 F. Supp. at 214; *Sam Fox Publishing Co.* versus *United States*, 366 U.S. 683, 689 (1961). The judicial role in determining under these circumstances whether a proposed Final Judgment is in the public interest is critical but limited. One frequently-cited description of this role, recently cited by Judge Conner in *Loew's* is as follows:

> Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government * * * and its responses to comments in order to determine whether those explanations are reasonable under the circumstances
>
> * * * * *
>
> The Court may not substitute its opinion or views concerning the prosecution of alleged violations of the antitrust laws or the determination of appropriate injunctive relief for the settlement of such cases absent proof of an abuse of discretion.

783 F. Supp. at 214 (quoting *United States* versus *Mid-America Dairymen, Inc.*, 1977–1 Trade Cas. ¶61,508 at 71,980, 1977 WL 4352 (W.D. Mo. 1977). The court is not required to find that the proposed Final Judgment is one that will best serve the public; its role "is one of insuring that the government has not breached its duty to the public in consenting to the decree," and to confirm whether the proposed settlement is "within the reaches of the public interest." *Bechtel*, 648 F.2d at 666 (quoting *Gillett*, 406 F. Supp. at 716).

Clearly, there has been no showing that the proposed settlement constitutes an abuse of the Department's discretion. Put simply, entry of the proposed Final Judgment enhances competition in a number of ways. Section IV (A) enjoins enforcement of provisions of the Primestar agreement that restrain access to programming by multichannel subscription television competitors. Section IV (B) enjoins collusive retaliation, actual or threatened, by the defendant cable companies with the purpose of deterring persons from providing programming or investing in such competitors. Section IV (C)(1) enjoins each programming service controlled by one or more MSO defendants from entering into any agreement with any other programming service that might restrict the availability of programming to competitors of the MSO defendants. Section IV (C)(2) enjoins agreements between cable systems controlled by the MSO defendants that would restrict the availability of programming to competitors of the MSO defendants. Section IV (C)(3) enjoins cable systems controlled by the MSO defendants from entering into or from renewing any agreements with any of the specified programming services that would limit the ability of such programming service to deal with any provider of the most significant existing types of multichannel subscription television services (direct-to-home satellite, MMDS, SMATV, and cable), as well as the DBS providers that were the focus of the government's complaint. Moreover, each MSO defendant is enjoined from enforcing any existing contract that would limit the rights of a programming service to deal with any DBS provider.

It cannot be denied that the effect of these provisions is to make it easier for DBS providers to enter the market, and thereby enhance competition in multichannel subscription television. This was the Department's objective in filing the complaint. In addition, the government was able to secure relief that would also remove some of the existing impediments faced by other types of providers of multichannel subscription television, albeit to a somewhat more limited extent than was provided to DBS providers which were the subject of the government's case. Nonetheless, the proposed Final Judgment clearly removes restrictions on competition that were imposed by the defendants, and will thus further the public interest.

Dated: November 2, 1993.

Respectfully submitted,

N. Scott Sacks,

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August 23, 1993

Richard L. Rosen,

Chief, Communications and Finance Section, United States Department of Justice, Antitrust Division, 555 Fourth Street NW., Room 8104, Washington, DC 20001

Re: *United States of America* v. *Primestar Partners, L.P., et al.*

Dear Mr. Rosen: I am writing on behalf of the Wireless Cable Association International, Inc. ("WCA") and pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act ("APPA")[1] to express WCA's serious reservations regarding the proposed Final Judgment submitted for entry in the above-referenced civil antitrust proceeding. Simply stated, the proposed decree fails to fully remedy the anticompetitive consequences caused by the formation of Primestar Partners, L.P. and its predecessors, while at the same time it unreasonably discriminates against wireless cable system operators in favor of competitors that employ Direct Broadcast Satellite ("DBS") technology.

WCA is the principal trade association of the wireless cable industry. A wireless cable system, which is referred to as "Multichannel Multipoint Distribution Service" or "MMDS" in the proposed Final Judgment, the Complaint, and the Competitive Impact Statement ("CIS"), utilizes frequencies licensed by the Federal Communications Commission ("FCC") in the 2 GHz band to transmit traditional cable television programming services (such as Home Box Office, ESPN and C-SPAN) to small antennas located on subscribers' rooftops as far as 40–50 miles away from the transmitters.

At the outset, WCA suspects that the Department's failure to adequately protect wireless cable system operators in crafting the Final Judgment may stem from a misconception of the ability of wireless cable technology to provide a meaningful competitive alternative to cable. In the CIS, the Department states that wireless cable suffers "technological limitations, including line-of-sight requirements, that limit its availability and attractiveness as an alternative to cable television service for most current or potential cable subscribers."[2] That simply is not correct; wireless cable technology has been proven superior to that employed by cable. While it is true that transmissions at 2 GHz require a direct "line-of-sight" between the transmission antenna and the reception antenna (*i.e.*, the signal cannot pass through buildings or terrain), the FCC has recently authorized wireless cable operators to employ low power signal repeaters to serve areas that are otherwise shadowed by buildings or terrain.[3] With the introduction of signal repeaters, technological criticism of wireless cable is moot.

Indeed, wireless cable has proven itself to be an extremely effective distribution medium for video programming, particularly in countries where programming has been readily available on equitable terms.[4] Congress and the FCC have frequently acknowledged that wireless cable is today "one of the most promising sources of multichannel competition in the local market."[5] The capital markets agree—today's

[1] 15 U.S.C. 16(d).

[2] CIS, at 4.

[3] *Amendment of parts 21, 43, 74,78, and 94 of the Commission's Rules Governing use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable television Relay Service*, 5 FCC Rcd 6410, 6422–23 (1990); *on recon.* 6 FCC Rcd 6764 (1991); *Amendment of parts 1, 2 and 21of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 8 FCC Rcd 1444, 1448 (1993).

[4] *See, e.g.*, "WCAI points to wireless success in overseas market," *Private Cable Plus Wireless Cable*, at 8 (July 1993); "Wireless World View," *Wireless Investor*, at 3 (May 13, 1993). The largest wireless cable system in operation currently has approximately 100,000 subscribers in the Mexico City area. *See* "Young wireless operation rates among largest in the country," *Private Cable Plus Wireless Cable*, at 6 (Oct. 1992).

[5] *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of*

Wall Street Journal reports that "on Wall Street 'wireless' is synonymous with skyrocketing stock prices."[6]

That is not to say, however, that there are no storm clouds on wireless cable's horizon. While the FCC has recently modified its rules to further promote wireless' competitive potential in the United States,[7] it has also recognized that wireless continues to be severely hampered by "unfair or discriminatory practices in the sale of video programming."[8] The effect of those anti-wireless practices will not be eliminated under the proposed Final Judgment.

Under section 2(3) of the APPA, a proposed settlement should not be proffered by the Department, and cannot be approved by the reviewing court, unless "it effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon the other aspects of the public interest * * *"[9] As summarized in the CIS, "the complaint seeks injunctive relief to assure that Primestar does not restrain the availability of programming to multichannel subscription television service competitors of the MSO defendants, or does not deter entry into multichannel subscription television by others by serving as a device to facilitate a coordinated retaliatory response by the MSO defendants."[10] Unfortunately, the proposed Final Judgment falls far short of fully opening the multichannel subscription television market to competition.

From the perspective of the wireless cable industry, the fundamental flaw in the Final Judgment is that it inexplicably fails to remedy the anticompetitive effect of conduct by the defendant cable operators that has deprived wireless cable operators of access to programming that is essential to competitive viability. Compounding this failure, the Final Judgment unreasonably discriminates against all competitors to cable other than DBS operators. Specifically, Section IV.C3.a. of the proposed Final Judgment provides that the defendant cable operators may continue to enforce exclusive rights to programming under existing agreements against all competitors except DBS providers. In other words, the defendant cable operators may no longer invoke exclusivity clauses in programming contracts against DBS operators, but may continue to do so against wireless cable operators and all other competitors to cable.

These exclusivity clauses have hobbled the wireless cable industry. Based on representations made before Congress, the FCC and elsewhere, WCA believes that the most important programming services that remain unavailable to wireless cable operators today are being withheld in many markets because exclusive local distribution rights have been granted to cable systems controlled by the defendants.[11] WCA further believes that in many cases, programmers have granted the defendant cable operators exclusive rights to programming simply because they feared a coordinated retaliatory response from the defendant cable operators if exclusivity rights were withheld. That fear would certainly be legitimate—as the Department expressly acknowledges in the CIS, the cable operator defendants in this action control access to a sufficient number of cable households that they can effectively retaliate against any programmer that deals with a competitive programming distributor.[12] Presumably, Section IV.C.3.a of the proposed Final Judgment is intended to remedy any anticompetitive consequences of that ability.

The Final Judgment fails to provide a complete remedy because under Section IV.C.3.a, access to essential programming subject to existing exclusivity provisions will be Balkanized based on technology. DBS will have access, other competitors will not. What possible pro-competitive purpose is served by providing DBS operators, but not wireless cable operators, access to this critical programming? Admittedly, DBS may someday in the future provide consumers a viable competitive alternative to cable. However, wireless cable operators are providing that alternative today. The public interest in providing the widest diversity of programming alternatives at the lowest possible cost cannot be advanced by permitting the defendant cable operators to select the technology against which they will compete, particularly where that technology has yet to prove itself in the marketplace.

Significantly, this flaw in the proposed Final Judgment is not rectified by either Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") or the proposed consent decrees in the action brought by the State of New York. Thus, the Department's assertion that those restraints upon the activities of these defendants "provide additional assurances that access to programming will not be unreasonably restricted by the defendants and others in the cable television industry" is simply not true.[13]

WCA has already briefed the United States District Court for the Southern District of New York on the fundamental defects in the proposed consent decrees in the state action. In the interest of brevity, WCA will refrain from repeating those arguments at length here. Rather, a copy of WCA's July 21, 1993 memorandum of law in opposition to the entry of those proposed decrees is attached and incorporated by reference.[14] Suffice it to say that in its memorandum, WCA establishes that the proposed state decrees in that *parens patriae* action, while appearing to serve the public interest by providing fair access to programming, are actually riddled with exceptions that effectively entrench the major cable operators in an advantaged position *vis a vis* other multichannel video programming distributors. Among the myriad flaws in the state consent decrees are provisions providing DBS operators with superior rights to programming than are afforded wireless cable operators.

Moreover, Section 19 of the 1992 Cable Act represents a series of political compromises and does not address fully the anticompetitive conduct that the defendants visited upon the wireless cable industry. First, the reach of Section 19 and the FCC's implementing rules is effectively limited to those programming services that are vertically integrated with a cable system operator, so that exclusive agreements between the cable system defendants and non-integrated programmers are unaffected. Second, Section 19 and the FCC's implementing rules have "grandfathered" numerous exclusive agreements between the cable operator defendants and vertically-integrated programmers that would be banned by Section 19 were they entered into today. Thus, the wireless cable operators will only be able to secure access to a wide variety of programming that is subject to exclusive rights granted the defendant cable operators if the Final Judgment is modified to provide all competitors to cable with the same rights currently afforded DBS operators.

In conclusion, while WCA applauds the Department's efforts to create a more competitive multichannel programming distribution marketplace, WCA is unable to support the proposed Final Judgment. The Final Judgment simply does not go far enough to correct the distortions in the marketplace that resulted from the formation of Primestar Partners, L.P. and the resulting establishment of a mechanism for facilitating coordinated retaliation against programmers that refused to grant exclusive program distribution rights.

Cable Television Service, MM Docket No. 89–600, at 20 (rel. Dec. 29, 1989). *See also* S.R. No. 102–92, 102d Cong., 1st Sess., at 14–15; H.R. No. 102–268, 102d Cong., 2d Sess., at 44–45; Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules, 5 FCC Rcd 971 (1990); *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 7 FCC Rcd 3266 (1992).

[6] Calian, "Wireless Cable Issues Are Flying High.," *Wall Street Journal*, at C1 (August 23, 1993).

[7] A full description of those efforts can be found at *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 7 FCC Rcd 3266 n. 8 (1992).

[8] *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 8 FCC Rcd 1444, 1444–45 (1993).

[9] *United States* v. *American Telephone and Telegraph Co.*, 552 F. Supp. 131, 153 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

[10] CIS, at 2.

[11] *See* S.R. No. 102–92, 102d Cong., 1st Sess., at 26–27; Comments of Turner Broadcasting System, MM Docket No. 92–265, at 6 (filed Jan. 28, 1993).

[12] *See* CIS, at 8.

[13] *Id.* at 13.

[14] In that memorandum, WCA also establishes the need for clarification that the state consent decrees, if entered, cannot serve as persuasive or precedential evidence in other proceedings in other forums as to the views of the state Attorneys Generals or the reviewing court for purposes of evaluating the propriety under the 1992 Cable Act and the implementing rules of the FCC of conduct that is condoned by the consent decrees. For the same reasons, the Department should take whatever steps are necessary to make certain that the Final Judgment is not mis-cited as representing the views of the Department concerning the propriety under the 1992 Cable Act and the FCC's implementing rules of conduct condoned by the Final Judgment.

Respectfully submitted,

Paul J. Sinderbrand,

Counsel to the Wireless Cable Association International, Inc.

93 Civ. 3868 (JES)

MEMORANDUM OF LAW OF AMICUS CURIAE THE WIRELESS CABLE ASSOCIATION INTERNATIONAL, INC., IN OPPOSITION TO PROPOSED CONSENT DECREES

Paul J. Sinderbrand (PS 2868),

Sinderbrand & Alexander, 888 Sixteenth Street NW., Suite 610, Washington, DC 20006–4103, (202) 835–8292, Counsel to The Wireless Cable, Association, International, Inc.

July 21, 1993.

I. Preliminary Statement

The Wireless Cable Association International, Inc. ("WCA") is the principal trade association of the wireless cable industry. Its members are among the intended beneficiaries of the program access and fair dealing provisions of the proposed consent decrees in this proceeding.[1] Because the interests of WCA's members are not entirely aligned with the other amici, WCA has sought and, by order of the Court on July 15, 1993, secured leave to file this separate memorandum in opposition to those proposed decrees.[2]

WCA is in general agreement with the memorandum of law submitted on July 16, 1993 by amici DirecTV, Inc. ("DirecTV"), National Rural Telecommunications Cooperative, Television Viewers of America, Inc. and Consumer Federation of America (collectively the "DBS Amici"). Specifically, WCA agrees with the DBS Amici: (a) that the Court has the power to reject proposed consent decrees in a *parens patriae* action if they fail to serve the public interest;[3] and (b) that the proposed consent decrees in this *parens patriae* action, while appearing to serve the public interest by obligating the Primestar Partners, Viacom and Liberty Media to provide fair access to programming, are actually riddled with exceptions that effectively entrench the major cable operators in an advantaged position *vis a vis* other multichannel video programming distributors ("MVPDs").[4] In the interest of brevity, WCA incorporates the DBS Amici's legal arguments on these points by reference.

II. The Proposed Consent Decrees Do Not Serve the Public Interest

While the DBS Amici focus on the adverse impact the proposed consent decrees will have on DirecTV, DirecTV is not the only MVPD that would be adversely affected by entry of those decrees. Indeed, the consent decrees will permit the Primestar Partners, Viacom and Liberty Media to continue courses of conduct that have frustrated the growth of wireless cable. Once the complex proposed consent decrees are parsed, it becomes evident that any purported benefits to wireless cable and other MVPDs are ephemeral—the Primestar Partners, Viacom and Liberty Media will remain free to withhold fair access to programming from all noncable MVPDs, not just DBS.

The Complaint correctly acknowledges that to succeed, a MVPD must not merely provide a substantial number of programming options, it must have access on reasonable terms to the particular programming services that consumers have come to associate with "cable." See Complaint, at ¶ 42. The fundamental flaw in the consent decrees is that while they may afford MVPDs employing one given technology improved access to some programming, and while they may afford MVPDs employing another technology improved access to some other programming, the consent decrees do not assure any non-cable MVPD fair access to the entire mix of programming services necessary to effectively compete. The net result is that the proposed consent decrees will not prevent the Primestar Partners, Viacom and Liberty Media from crippling any MVPD they choose.

A wireless cable system, which is referred to as "Multichannel Multipoint Distribution Service" or "MMDS" in the proposed decrees, utilizes frequencies licensed by the Federal Communications Commission ("FCC") in the 2 GHz band to transmit traditional cable television programming services (such as Home Box Office, ESPN and C-SPAN) to small antennas located on subscribers' rooftops as far as 40-50 miles away from the transmitters. Wireless cable has proven itself to be an extremely effective distribution medium for video programming, particularly in countries where programming has been readily available on equitable terms.[5] Congress and the FCC have frequently acknowledged that wireless cable is today "one of the most promising sources of multichannel competition in the local market."[6] While the FCC recently has modified its rules to promote wireless' competitive potential in the United States,[7] it has also recognized that wireless continues to be severely hampered by "unfair or discriminatory practices in the sale of video programming."[8] Those anti-wireless practices will not be eliminated under the proposed consent decrees.

A. The Consent Decrees Condone Discriminatory Pricing

Section IV.A.1. (f) of the proposed Viacom decree effectively condones Viacom's current practice of charging a wireless cable operator more for programming than a similarly situated cable operator. That Section permits Viacom to continue its discriminatory pricing policies for all services other than Nickelodeon and MTV. With respect to the Nickelodeon and MTV services, Section IV.A.1. (f) permits Viacom to engage in unreasonable price discrimination except with respect to wireless cable operators with 50,000 or more subscribers. No wireless cable operator serves 50,000 or more subscribers.[9] Similarly, Section IV.A.1. (b) of the Primestar decree, while banning discrimination with respect to future agreements, permits the Primestar Partners to continue to enforce existing

[1] For convenience of reference, the phrase "consent decrees" will be used herein to refer to the proposed final judgments against Viacom Inc. and Viacom K-Band Inc. (collectively, "Viacom") and against all Defendants other than Viacom (collectively, the "Primestar Partners"), as well as to the Agreement with Liberty Media Corp. ("Liberty Media") that is an integral part of the settlement of this case.

[2] Counsel for WCA has been authorized to state that Consumer Federation of American and Television Viewers of America, Inc. support the views expressed herein by WCA.

[3] See DBS Amici Memorandum at 4–5, citing In re Panasonic Consumer Electronic Products Antitrust Litigation, 1989–1 Trade Cas. (CCH) ¶ 68,613, at 61,243 (S.D.N.Y. 1989); *State of New York* v. *Dairylea Cooperative, Inc.*, 547 F. Supp. 306, 307–308 (S.D.N.Y. 1982).

[4] See DBS Amici Memorandum, at 16–20.

[5] See, *e.g.*, "Wireless World View," Wireless Investor, at 3 (May 13, 1993). The largest wireless cable system in operation currently has approximately 100,000 subscribers in the Mexico City area. See "Young wireless operation rates among largest in the country," Private Cable Plus Wireless Cable, at 6 (Oct. 1992).

[6] Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89–600, at 20 (rel. Dec. 29, 1989). See also S.R. No. 102–92, 102d Cong., 1st Sess., at 14–15; H.R. No. 102–268, 102d Cong., 2d Sess., at 44–45; Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules, 5 FCC Rcd 971 (1990); Amendment of Parts 1, 2, and 21 of the Commission's Rules, 7 FCC Rcd 3266 (1992).

[7] A full description of those efforts (which include a technological solution to the line of sight limitation cited in the Justice Department's Competitive Impact Statement as a drawback to wireless) can be found at Amendment of Paris 1, 2, and 21 of the Commission's Rules, 7 FCC Rcd 3266 n. 8 (1992).

[8] Amendment of Parts 1, 2 and 21 of the Commission's Rules, 8 FCC Rcd 1444, 1444–45 (1993).

[9] See "Young wireless operation rates among largest in the country," Private Cable Plus Wireless Cable, at 6 (Oct. 1992).

agreements that discriminate against non-cable MVPDs.

These provisions stand in stark contrast to Section 2(a)(ii) of the Liberty Media agreement, which provides that in dealing with DBS and wireless cable, Liberty Media "will not discriminate against such technology as compared to the most favorable price and other terms (taken as a whole) offered to a cable operator of comparable size."

There is no pro-competitive rationale for accepting any lesser commitment to fair pricing from the Primestar Partners and Viacom than agreed to by Liberty Media. Indeed, in comments submitted to the FCC less than six months ago, the Attorneys General of Texas, Maryland, Ohio, and Pennsylvania—all members of the National Association of Attorneys General Cable Television Investigative Group—advocated that the public interest would be served by adoption of rules under which all "[p]rogrammers should be required to offer their programming to competitors of cable operators at the same prices and on the same terms as they offer it to cable operators." [10] Those comments cannot be squared with the provisions of the proposed consent decrees.

B. The Consent Decrees Condone Unjustified Refusals to Deal

Other provisions of the proposed consent decrees directly favor DBS operators over wireless cable and other non-DBS MVPDS in gaining access to critical programming. Section IV.C.1 of the proposed Primestar decree and Section IV.C.1 of the proposed Viacom decree provide that the Primestar Partners and Viacom may continue to enforce exclusive rights to programming under existing agreements against all MVPDs except DBS providers. Based on representations made before Congress, the FCC and elsewhere, WCA believes that some of the most important programming services that remain unavailable (such as Turner Network Television ("TNT")) are withheld in many markets because exclusive local distribution rights have been granted to cable systems controlled by the Primestar Partners and Viacom [11]

Under the proposed decrees, access to this essential programming will be Balkanized based on technology; DBS will have access, other non-DBS MVPDs will not. What possible pro-competitive purpose is served by providing DBS operators, but not wireless cable operators, access to this critical programming? The public interest in providing the widest diversity of programming alternatives at the lowest possible cost cannot be advanced by permitting Primestar Partners and Viacom to select the technologies against which they will compete.

C. Critical Programming Services Are Excluded From The Reach of the Proposed Decrees

In their Memorandum, the DBS Amici correctly note that the Liberty Media agreement is rendered largely illusory because the definition of the services covered excludes virtually every important programming network in which Liberty Media holds an interest.[12] The Primestar Decree is similarly flawed—through a definitional construct it excludes from its reach critical programming services.

As noted above, perhaps the most important program service that is currently withheld from the wireless cable industry is TNT. TNT is owned by Turner Broadcasting System, Inc. ("TBS"), which is turn is owned by R.E. ("Ted") Turner, by numerous companies with cable interests—including several of the Primestar Partners—and by others. Under the terms of the Primestar Decree, the programming services owned by TBS are considered to be non-controlled programming services. Presumbly this is because "control" for purposes of the Primestar Decree is defined by reference to 16 CFR 801.1, which essentially requires the controlling entity to own 50% or more of the stock or have the ability to select 50% or more of the members of the board of directors. Apparently, the Primestar Partners do not fit that definition with respect to TBS.

However, it is well-recognized that two of the Primestar Partners—Tele-Communications, Inc. ("TCI") and Time Warner Inc. ("Time Warner")—exercise effective control over TBS through there ability to veto major TBS proposals that require super-majority board approval.[13] Thus, although TCI and Time Warner have the ability to assure that TNT and other TBS services are made available on fair terms and conditions to non-cable MVPDs through exercise of their extraordinary corporate powers, they are under no obligation to do so.

This omission is rendered particularly troubling by comparison of the Primestar Decree to the proposed consent decree in *United States* v. *Primestar Partners, L.P.* That proposed consent decree includes in its definition of control an ownership interest that gives "the right, contractual or otherwise, to direct the management decisions of an entity." [14] Thus, the programming services owned by TBS will be subject to the federal decree, if it is entered. It is understandable that the Primestar Partners would want to exclude the TBS services from the state decree, as it provides far greater relief to MVPDs that the federal decree. However, it is difficult to imagine why it is in the public interest to include the TBS programming services within the reach of the federal decree, but exclude them from the reach of the state decree.

III. The Court Should Make Clear That the Consent Decrees Cannot Be Used as Persuasive or Precedential Evidence in Other Proceedings in Other Forums

In its memorandum, the DBS Amici explained in detail why the Court should clarify that the proposed decrees in no way supersede the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") or reflect the views of the Court or the plaintiffs for purposes of evaluating the propriety under the 1992 Cable Act and the implementing rules of the FCC of conduct that is condoned by the consent decrees.[15] WCA agrees.

Indeed, the need for a declaration along the lines requested by the DBS Amici has now become patent. As DBS Amici have firmly established, United States Satellite Broadcasting Company, Inc. ("USSB") is the beneficiary of many of the most discriminatory provisions in the proposed consent decrees. The FCC currently is considering whether Section 19 of the 1992 Cable Act mandates the adoption of rules that would invalidate exclusive distribution agreements entered into by USSB and certain programmers. Last week, USSB opposed the contention that the proposed rules are mandated by the 1992 Cable Act by arguing as follows:

> It should be noted that the proposed antitrust consent decree in the pending *Primestar Partners* suit brought by 40 states against Primestar Partners, L.P. and 19 other defendants recognizes that high-power DBS providers at the 101° orbital position may enter into exclusive contracts with cable program providers. It is unlikely that 40 states would have agreed to the provisions

[10] Comments of the Attorneys General, MM Docket No. 92-265, at 4 (filed Jan. 25, 1993).

[11] See S.R. No. 102-92, 102d Cong., 1st Sess., at 26-27; Comments of Turner Broadcasting System, MM Docket No 92-265, at 6 (filed Jan. 25, 1993).

[12] See DBS Amici Memorandum, at 15-16.

[13] See e.g., Carter, "Ted Turner's Time of Discontent," N.Y. Times, at § 3, p. 6 (June 6, 1993); Landro, "Time, TCI Mull Plan for Turner Assets," Wall St. J., at B1 (April 8, 1993); Lippman, "TBS Breakup Negotiations Appear To Be Breaking Up," L.A. Times, at D1 (April 21, 1993); "Ted Turner: putting his financial house in order," Broadcasting, at 40 (Feb. 29, 1988).

[14] See section II.A.

[15] See id., at 20-22.

that recognize such exclusive contracts if there was any question as to whether the Cable Act prohibited such exclusive arrangements.[16]

As this argument illustrates, the DBS Amici are correct when they argue that the proponents of the proposed consent decrees and the beneficiaries of those decrees can and will attempt to cite the consent decrees as evidence of the views of the State Attorneys General.

IV. Conclusion

This Court has an affirmative obligation to assure that the proposed consent decrees promote fair competition in the MVPD marketplace. It is clear, however, that they do not; Primestar Partners, Viacom and Liberty Media remain free to deny critical programming to any MVPD they choose. For this reason, this Court should reject the proposed consent decrees in their present form.[17]

July 21, 1993.

Respectfully submitted,

By: Paul J. Sinderbrand (PS 2868).

Sinderbrand & Alexander,

888 Sixteenth Street, NW., Suite 610, Washington, DC 20006–4103 (202) 835–8292.

The Honorable Webster L. Hubbell,
United States Department of Justice, Room 5111, 10th & Constitution Avenue NW., Washington, DC 20530.

Re: *United States* v. *Primestar Partners, et al.*, 93 CV–3913 (S.D.N.Y.)
State of New York, et al. v. *Primestar Partners L.P., et al., 93 CIV 3868 (S.D.N.Y.)*

Dear Web: We represent Advanced Communications Corporation, which is an Arkansas corporation licensed by the Federal Communications Commission to provide high-power direct broadcast services within the United States from orbital location 110°W. This emerging technology to be employed by our client promises to provide wireless data transmission, including cable tv-type entertainment services throughout the United States through the use of a dishplate size household receiver. This technology seems to be a critical extension of the electronic data highway discussed in the Campaign.

The Cable Television Consumer Protection and Competition Act of 1992 is major legislation designed to enhance the performance of the marketplace for electronic information including its response to this new emerging technology.

Prior to the passage of the 1992 Cable Act, several states attorneys general (proceeding in parens patria) and the United States Justice Department sued Primestar Partners and others accusing those defendants of violations of the Sherman Act. That litigation was designed to increase the access by cable companies and others to entertainment media allegedly "controlled" by the defendants. That litigation has been settled and the settlement is before the Honorable John Sprizzo of the United States District Court for the Southern District of New York for approval as required by applicable law.

My client objects to aspects of the settlement because among other things, it undermines the policies of the Cable Act and violates some of its express provisions. We believe that these two consent settlements could have serious and progressive anticompetitive impact on the market for high-power direct satellite broadcast information services. Although these proposed consents recite that the Cable Act is controlling in the event terms of the settlement deviate from its provisions, we believe the precedent set by the proposed consents are also dangerous to the implementation of the Cable Act.

Among the parties opposing the consents are the Federal Communications Commission, the National Rural Telecommunications Cooperative, Consumer Federation of America, and Television Viewers of America, Inc. Congressman Edward J. Markey highlighted the concerns shared by all of the parties opposing these consents in a letter to the attorney general of the state of New York dated July 1, 1993. That letter is attached.

We understand a hearing is scheduled in this matter for September 6, 1993. We have made known our opposition to Winston Bryant and other attorneys general in the parens patria litigation. This communication is to request that you review this matter with Assistant Attorney General Bingaman to determine whether this Justice Department should continue the settlement posture authored under the previous administration, which has become widely recognized as contrary to the Cable Act and potentially detrimental to consumers the Cable Act was intended to benefit. At a minimum we urge that the Justice Department request a continuance of the Tunney Act approval process to allow this Administration to consider carefully the long-term significance of its participation in the present settlement.

I know that time is short. This matter was only recently brought to our attention by Advanced Communications. It is only because of the shortness of the time that I impose upon our historic friendship to communicate this matter to the Justice Department in this fashion. Anything you can do to address this issue would be greatly appreciated.

Respectfully yours,

Williams & Anderson,

Peter G. Kumpe.

The Honorable Webster L. Hubbell,
United States Department of Justice, Room 5111, 10th and Constitution Avenue, NW., Washington, DC 10530.

Re: *United States* v. *Primestar Partners, et al.*, 93 CV-3913 (S.D.N.Y.)
State of New York, et al., v. *Primestar Partners L.P., et al.*, 93 Civ. 3868 (S.D.N.Y.)

Dear Webb: I have only recently become aware of serious concerns voiced by certain competitors and consumer groups about provisions in the settlement agreement and consent decrees filed in the above-styled cases, which are now pending before the Honorable Judge John Sprizzo of the United States District Court for the Southern District of New York. Arkansas is one of forty states which are signatory plaintiffs in the State of New York actions. While I remain convinced that the policy considerations underlying these proposed decrees are, in the main, exemplary, I am particularly troubled by what I have learned about one section of the Primestar decree, section IV A.1.(g). The FCC, and others, are concerned by the Justice settlement, as well.

While the technical issues involved are confusing to the untutored, I fear there is a danger that this provision may be used to craft anti-competitive arguments to weaken the future interpretation of Section 19 of the 1992 Cable Act. This certainly was not my intent in joining this action brought by our sister states. Because our discovery of this controversy is of such recent origin and because the rest of the proposed decree appears to accomplish laudable goals, the only action our office is positioned to take is to request that Justice take a hard look at requesting a continuance of the Tunney Act approval process and to suggest this also to the New York Attorney General, which we are doing by separate letter. This would permit all of us time to make a more reasoned examination of this issue, since it is my understanding that the matter is scheduled for hearing tomorrow, September 3 in Judge Sprizzo's court. I apologize for writing you on such short notice, but, nonetheless, feel compelled to share my reservations which are based on communications I received only yesterday. As always, I am proud of the outstanding job you are doing at Justice.

Sincerely,

Winston Bryant,

Attorney General.

Mr. Richard L. Rosen, Esq.,
Chief, Communications and Finance Section, U.S. Department of Justice, Antitrust Division, 555 Fourth Street, NW., Room 8104, Washington, DC 20001.

In Re: *United States of America* v. *Primestar Partners, et al.*, Civil Action No. 93–CIV–3913.

Public Comments of Continental Satellite Corporation Concerning Proposed Final Judgment, Stipulation, and Competitive Impact Statement.

Dear Mr. Rosen: Continental Satellite Corporation, by its Founder and President,

[16] Opposition of United States Satellite Broadcasting Co. to Petition for Reconsideration, MM Docket No. 92–265, at 6 n. 6 (filed July 14, 1993).

[17] The importance of the Viacom decree to the competitive marketplace is intensified by Viacom's pending petition to the FCC for rule changes that would exclude Viacom from the FCC's program access rules under the 1992 Cable Act. See Petition of Viacom International for Reconsideration and Clarification, MM Docket No. 92–265, at 2–8 (filed June 10, 1993). If Viacom prevails, the consent decree will be the effective check on Viacom's program access policies.

files these *Comments* concerning the above-captioned proceeding which was recently brought before the United States District Court for the Southern District of New York in *United States* v. *Primestar Partners, et al.*, Civil Action No. 93–CIV–3913. Pursuant to the Antitrust Procedures and Penalties Act, we request that these Comments be given due consideration by the Department of Justice.

Continental was licensed in August 1989 by the Federal Communications Commission (hereafter, the "FCC") to operate as a Part 100 Direct Broadcast Satellite licensee in the Ku-Band. In August 1990 Continental filed an Application for Launch Authority with the FCC, including a request for DBS channel and orbital assignments. As of this date, Continental is still awaiting grant of its Application. On 25 October 1991 Continental received a Subpoena Duces Tecum and Interrogatories relating to a multi-agency investigation into whether certain companies had committed violations of state and federal antitrust laws and prohibitions against restraints of trade, including, but not limited to:

1. Engaging in a joint venture that either has the effect of substantially lessening competition or creating a monopoly within the market for direct broadcast satellite Ku-band program delivery or whereby a monopoly within this market is or may be established, and,

2. Engaging in a combination and conspiracy to restrain trade and competition within the market for direct broadcast satellite Ku-Band program delivery.

In addition to these specific focal points of the investigation, certain questions were directed to us, as an FCC-licensed Part 100 DBS operator, as to whether or not certain companies may have delayed or hindered Continental's performance as a DBS operator.

Since we submitted our first Reply to that Subpoena, Continental has fully cooperated with the investigation. Besides filing our initial Reply in July 1992, we filed three additional Supplements to the original Reply as part of an ongoing attempt by us to keep both the Antitrust Division of the Department of Justice and the Antitrust Bureau of the New York State's Attorney General's Office fully appraised of certain alarming developments in the nascent Part 100 DBS industry.

In addition to these submissions, we provided regular progress reports to appropriate law enforcement agencies. These reports (in the form of letters, telephone call updates, and fax reports) were directed to specific individuals who were heavily involved in the day-to-day investigations. Their subject matter concerned mounting evidence that Loral Corporation (hereafter, "Loral"), through its subsidiary Space System/Loral (hereafter, "SS/Loral"), might have become involved in combination and conspiracy with Cablevision Systems (hereafter, "Cablevision"), with Cablevision's subsidiary Rainbow Programming Holdings, Inc. (hereafter "Rainbow"), and with Continental's former Chief Executive Officer James B. Dixon (collectively referred to hereafter as "the Parties") to restrain trade and competition within the market for direct broadcast satellite Ku-Band program delivery.

We also reported on what appeared to us to be continuing attempts by SS/Loral to violate and to contravene Section 310 of the Communications Act of 1934, as amended, which prohibits ownership of American telecommunications companies by foreign corporations.[1] We also filed a formal complaint of abusive business practices because of the growing harassment we were facing from SS/Loral as we attempted to prepare for final assignment by the FCC of our DBS channel assignment and orbital allocations.[2] These actions by SS/Loral led to the filing of a law suit by SS/Loral's parent company, Loral Aerospace Holdings, Inc. (hereafter, "LAHI") against Continental on Christmas Eve 1992. In its suit, LAHI sought issuance of a court order that, had it been granted, would have forced Continental's Chief Executive Officer James H. Schollard to commit perjury before the FCC in an involuntary, court-ordered filing of an illegal Application for Consent to Transfer Control of Continental's DBS license to SS/Loral or to LAHI. The suit between LAHI and Continental is now pending binding arbitration in California.

Request for Expanded Investigation of Possible Combination and Conspiracy To Restrain Trade in the Part 100 DBS Industry

Continental requests that the United States Department of Justice expand its investigation of abusive practices against the DBS industry to include investigation of a possible combination and conspiracy to restrain Continental's trade by the Parties. Toward that end, Continental is informed and believes, and on the basis of this information and belief, hereby alleges that:

1. Cablevision's Director of New Business Development Theodore ("Ted") May, former FCC Chairman Charles Ferris,[3] Cablevision's General Counsel David Deitch, Cablevision's DBS Consultant Michael ("Mickey") Alpert, Loral's Chief Executive Officer Bernard Schwartz, Loral's Senior Vice President Michael Targoff, Loral's Vice President of Policy and Planning Rex Hollis, SS/Loral's President Robert Berry, SS/Loral's Executive Director Dan Collins, and Continental's former Chief Executive Officer James B. Dixon formed a combination and conspiracy to restrain trade in the Part 100 DBS industry by unlawfully attempting to garner control of Continental's DBS construction permit.

2. Loral's Chief Executive Officer may have attempted to meet, or may have met with a representative or representatives of other Part 100 DBS applicants during the week of July 12–16, 1993 in an attempt to garner control of at least two other Part 100 DBS operators assigned to or about to be assigned to DBS orbital allocation 61.5° West Longitude. Should Loral and Cablevision be successful in their shared acquisition efforts (which we call and hope the Justice Department will soon call a "combination and conspiracy"), these two giant corporations will jointly control more than one quarter of the entire allotment of Part 100 DBS channels available.[4]

3. Continental's former CEO Dixon actively cooperated with Cablevision's Ted May, David Deitch, and Mickey Alpert in a conspiracy to defraud Continental of its DBS License. The methodology for accomplishing this conspiracy included the creation of a fake corporation, composition of falsified minutes of board meetings that never took place,[5] establishment of fraudulent bank accounts, diversion of interstate wire transfers, and multitudinous acts of *ultra vires* on the part of Continental's former CEO James Dixon.[6]

[1] Forty-nine percent of SS/Loral is owned by four foreign corporations.

[2] See our letter of 5 February 1993 to the U.S. Department of Justice appended to these Comments as Attachment 1.

[3] Continental alleges that former FCC Chairman Ferris, while acting in his capacity as communications counsel to Cablevision, utilized his considerable influence as former FCC Chairman in a deliberate and clandestine attempt to circumvent the Rules of the FCC with respect to an illegal takeover of Continental's DBS license by Cablevision. As part of his activities to assist Cablevision in restraining Continental's trade, Mr. Ferris secretly sent a letter to FCC Mass Media Bureau Chief Roy Stewart without notifying Continental of the letter's existence. Continental only learned of the letter's existence when it was accidentally made part of Continental's public file number DBS–87–01 through an inadvertent error apparently made by a filing clerk. (Mr. Ferris' letter is attached hereto as Attachment 3. Continental's response to Mr. Ferris letter is attached hereto as Attachment 4.)

[4] See specific excerpts from Satellite News, a respected satellite industry trade newsletter, attached to these Comments as Attachment 11. These excerpts report on possible unauthorized acquisition efforts with respect to Continental's DBS license, as well as other DBS licensees who may eventually be assigned by the FCC to 61.5° West Longitude. Continental has never received any purchase offers from Tele-Communications, Inc., or from any other company, for that matter. **Please Note:** If the press reports set forth in Attachment 11 are even marginally correct, then a combined Loral/TCI/Cablevision venture could easily garner 44 of the 128 Part 100 DBS channel assignments allocated by the FCC—i.e., about 35% of the entire US DBS market could come under control of only one business entity. If the possibility of such a scenario coming to reality does not warrant an immediate, full-scale investigation by the U.S. Department of Justice, then Continental's exhaustive efforts to cooperate with the Office of the Attorney General for the People of the State of New York in answer to its *Subpoena Duces Tecum and Interrogatories* will have been undertaken in vain and the "Gang of Three" (Loral, TCI, and Cablevision) will have pulled off the DBS Coup of the Century.

[5] See Attachment 9 and Attachment 10, included with these Comments. Note that Attachment 10 would have given Dixon authority to negotiate a deal to turn over the DBS license to a consortium of Cablevision and Loral.

[6] These parties executed a one-sided Lease Option agreement between Cablevision and a sham Oregon corporation that Dixon created with the same corporate name as Continental. The difference was that the California corporation is the true DBS licensee. The Oregon corporation, also named Continental Satellite Corporation, executed the Lease Option with Cablevision. A concise summary of the affair has been set forth by Continetal's Communication Counsel Lawrence Bernstein in a Request for Declaratory Ruling which was filed on 26 July 1993 at the FCC. In our Request, we are asking the FCC to rule that the Lease Option agreement, along with its attendant Lease Agreement and Management Agreement, be declared illegal and unenforceable. A copy of the Request is included herewith as Attachment 2.

4. Via interstate wire fraud, Dixon diverted a payment of $250,000 into his own personal bank account. The money had been intended by Cablevision to go to the DBS licensee as payment for a six-month lease option on Continental's DBS spectrum. Instead, Dixon violated federal RICO statutes by creating a sham corporation, which he named Continental Satellite Corporation, an Oregon Corporation. While using the Oregon corporation as a front for his embezzlement, Dixon diverted the funds to a bank account which he had set up in the name of James B. Dixon, DBA Continental Satellite Corporation. Dixon's own social security number was used as the Taxpayer Identification Number on the account in place of Continental's Employee Identification Number.

5. Loral and its subsidiaries LAHI and SS/Loral, through Loral's corporate counsel Philip Verveer, threatened on multiple occasions to destroy Continental's DBS license if Continental did not turn over 51% of its voting stock to SS/Loral.[7] When Continental refused to participate in such an illegal act,[8] LAHI sued Continental, as mentioned *supra*, requesting a court to turn Continental's controlling interest over to LAHI in a blatant attempt to skirt the requirements of Section 310 of the FCC's Rules.

6. In perhaps the most blatant evidence of conspiracy, Continental's fired CEO Dixon engaged in many conversations with SS/Loral's Dan Collins and Tom Johnson in an attempt to solicit financial aid in defending himself with respect to Continental's suit against him.[9] In one of the written records of these conversations, SS/Loral employee Tom Johnson was quoted by Dixon as stating that Loral would reward Dixon for his efforts in assisting Loral to take over controlling interest in Continental by giving him 28% of the remaining stock.[10]

7. Dixon and SS/Loral conspired together with respect to strategies intended to force Continental into a settlement with Cablevision, under the terms of which Loral would own 51% of Continental and Cablevision and Dixon would own the rest.[11]

Continental believes it has become the victim of a deliberate and concerted effort to defraud it of its DBS license. This effort has been undertaken with the full knowledge and consent of the highest senior management and executives of Loral Corporation, its subsidiaries Loral Aerospace Holdings and Space Systems/Loral, Cablevision Systems, its subsidiary Rainbow Programming Holdings, and Continental's disgraced and former Chief Executive Officer James B. Dixon.

Therefore, for the reasons so briefly summarized in these Comments, Continental respectfully requests that the United States Department of Justice expand its investigation to include the Parties named above before the proposed Final Judgment, Stipulation, and Competitive Impact Statement is placed into full force and effect by the United States District Court for the Southern District of New York in *United States* v. *Primestar Partners, et al.*, Civil Action No. 93–CIV–3913.

Questions concerning these Comments may be directed to Continental at the address and telephone numbers set forth in our letterhead.

Very truly yours,

For Continental Satellite Corporation.

William P. Welty,

Founder and President.

Mr. Richard L. Rosen, Esq.,
Chief, Communications and Finance Section, U.S. Department of Justice, Antitrust Division, 555 Fourth Street, NW., Room 8104, Washington, DC 20001.

In Re: *United States of America* v. *Primestar Partners, et al.*, Civil Action No. 93–CIV–3913.

Public Comments of Continental Satellite Corporation Concerning Proposed Final Judgment, Stipulation, and Competitive Impact Statement.

To Mr. Rosen, your Honor and all others:

I would like first to confirm the accuracy of the attached letter written by Mr. Welty.

My work with Continental Satellite Corporation began early 1989. Basically, Mr. Welty and I have done most of the work for our small corporation. We could be called a "mom and pop" company with the vision to spend hundreds of thousands of dollars and years of effort in pursuing our DBS business. At first, the large corporations either lacked the vision or were simply not interested in DBS at the time. Now their attitude seems to be "Let's get involved, anyway we can."

I am a very simple man with a simple background. I come from an industry (perishable meats) where you live and die by your word. If you didn't perform on what you said you would do, you would be out of business quickly.

How naive I was to think other industries would be so self-regulated for their corporate survival! In my business experience I've also had "first hand, in-your-face" looks at labor unions. I worked through four strikes. I have been threatened, harassed, and oh-so-much more, beyond the scope of this letter. But I have now seen college educated "gangsters-in-suits" who are far more subtle, cunning, deceptive, threatening and bullying than any of the thugs I survived from the unions.

I'm not telling you this to give you a "tough-guy" image of myself. I have always been described as more than fair to anyone who has had any business or personal dealings with me. But the folks we are dealing with are not fair—simply put, they want it all.

My greatest hope is that someone, somewhere, still cares about the things America is all about—proper preparation, honest hard work, followed by a moderate to large amount of success.

I see these things being tugged away from us by two well-oiled, well-financed, corporate machines who are trying to drag us into the Court system. We feel we're being worn down both financially and physically—but never in spirit. We'll fight them as long as possible and then fight them some more.

I only pray they do not succeed in the theft of our DBS license, even though "a size makes right" mentality seems to prevail in many peoples' minds. I expect the representatives of our United States government who are employed by the Department of Justice to rise above that mentality.

I close with the same words I used to say to our former CEO each time we spoke on the phone:

Do the right thing.

That's a simple statement, apparently very hard for some to follow. But please give us the benefit of the doubt.

Please grant Mr. Welty's request in his Public Comments and direct the United States Department of Justice to expand its investigation to include Loral Corporation, its subsidiaries Space Systems/Loral and Loral Aerospace Holdings, and Cablevision Systems and its subsidiary Rainbow Programming Holdings.

Very truly yours,

For Continental Satellite Corporation.

James H. Schollard,

Chief Executive Officer.

Mr. Richard L. Rosen, Esq.,
Chief, Communications and Finance Section, U.S. Department of Justice, Antitrust Division, 555 Fourth Street, NW., Room 8104, Washington, DC 20001.

In Re: *United States of America* v. *Primestar Partners, et al.*, Civil Action No. 93–CIV–3913.

Supplement to Public Comments of Continental Satellite Corporation Concerning Proposed Final Judgment, Stipulation, and Competitive Impact Statement.

Dear Mr. Rosen: On 28 July 1993, Continental Satellite Corporation filed Public Comments concerning the above-captioned proceeding which was recently brought before the United States District Court for the Southern District of New York in *United States* v. *Primestar Partners, et al.*, Civil Action No. 93–CIV–3913.

We filed these Comments in order to bring to the attention of the Court our allegations that Loral Corporation (hereafter, "Loral"), through its subsidiary Space Systems/Loral (hereafter, "SS/Loral"), may have become involved in a combination and conspiracy with Cablevision Systems (hereafter, "Cablevision"), with Cablevision's subsidiary Rainbow Programming Holdings, Inc.

[7] See the letter dated 18 December 1992 from Continental's Communications Counsel Lawrence Bernstein to Philip Verveer, included with these Comments as Attachment 5.

[8] Because SS/Loral is 49% foreign-owned, 51% ownership of Continental's stock by SS/Loral would mean that 24.99% of Continental would be controlled by foreign business entities (51%×49%=24.99%). Section 310 of the FCC's Rules prohibits foreign ownership of more than 20% of a U.S. telecommunications firm such as Continental. Thus SS/Loral is prohibited from owning controlling interest in DBS licensee Continental.

[9] Copies of correspondence from Dixon to his counsel Patrick O'Malley in the matter of *Continental Satellite Corporation* v. *James B. Dixon (Case No. 92–10–176)* dated 27 January 1993 and 18 February 1993 are included herewith as Attachment 6 and Attachment 7, respectively.

[10] See Attachment 6.

[11] See the letter dated 18 February 1993 from Dixon to his counsel Patrick O'Malley included herewith as Attachment 8.

(hereafter, "Rainbow"), and with Continental's former Chief Executive Officer James B. Dixon (collectively referred to hereafter as "the Parties") to restrain our trade in the Part 100 DBS industry.

We also hoped to encourage the Court to order a full-scale investigation into our charges by the United States Department of Justice or by other appropriate state and federal law enforcement agencies. On 9 August 1993 we received photocopies of the proposed Final Judgment for the Primestar Partners, the proposed Final Judgment for the Viacom defendants, and the Agreement for Liberty Media Corp. These documents were sent to us from the Antitrust Bureau of the New York Attorney General's Office.

Pursuant to the Antitrust Procedures and Penalties Act, we request that this Supplement to Public Comments of Continental Satellite Corporation (hereafter, the "Supplement") be given due consideration by the Department of Justice. We further request that its contents be published in the **Federal Register** along with our Public Comments of 28 July 1993.

As we noted in our Public Comments, in the interest of saving tax payers' money, we have no objection if the exhibits to this Supplement are omitted from publication in the **Federal Register**, so long as photocopies are made available to authorized parties upon request.

Comments With Respect to the Proposed Final Judgment

Continental believes that the American cable companies and other MSO's are now starting to attempt business operations in the high-powered Part 100 DBS in an attempt to avoid being accountable to the Cable Television Consumer Protection and Competition Act of 1992 (hereafter, the "1992 Cable Act").

To put it bluntly, high-powered Ku-band DBS is uncharted broadcast territory. It is comparatively unregulated. This relaxed regulatory climate enjoyed by the Part 100 DBS permittees was wisely intended by the Federal Communications Commission to encourage initial development of the nascent high-powered DBS industry by the "Gang of Nine" Part 100 licensees.

The relaxed regulatory climate was also intended to encourage investment on the part of the American financial community in the embryonic Part 100 DBS industry. By keeping governmental "red tape" to a minimum, it was thought that the hundreds of millions of dollars needed by the Part 100 "Gang of Nine" could be more easily raised. Unfortunately for the Part 100 DBS permittees, when the Cable Act was passed many MSO's started looking jealously to high-powered DBS in an attempt to avoid the standards of competitive accountability called for by the Cable Act.

Rather than letting the Part 100 DBS permittees use the relaxed regulatory climate as a means to ease the rigors of the funding process, the cable companies appear to be looking with envy at the comparatively "greener grass" on the other side of the regulatory fence. As noted in the comments that we filed on 28 July 1993 concerning this proceeding, Cablevision Systems is already on the prowl. We wonder how long it will take for the other MSO's to wake up to the potential of high-powered DBS.

According to the Federal Communications Commission's interpretation of the 1992 Cable Act, the purpose of the 1992 Cable Act is to mandate

That where competition is present, cable television rates shall not be subject to regulation by government but shall be regulated by the market. The Act contains a clear and explicit preference for competitive resolution of issues where that is feasible.[1]

While monopolistic or duopolistic business practices are endemic to terrestrially distributed cable television, healthy and legal competition is built into the very design fabric of the Part 100 DBS industry. As we noted recently in our Comments on Notice of Proposed Rule Making in MM Docket No.: 93–25

* * * Unlike the terrestrial cable television industry, DBS is not a duopoly * * *. Part 100 DBS operators are exempt from the business temptations that have resulted in abuses by terrestrial cable operators and by their host communities * * *. [By 1996 t]here will be nine Part 100 DBS competitors active in each community, not just two. The likelihood of duopolistic price manipulations or abusive practices is measurably reduced or even eliminated by a competitive business environment consisting of nine separate DBS operators allotted to each city.[2]

Continental urges the Court to ensure that cable television operators, besides abiding by the terms of the proposed Final Judgment, enjoin them from acquiring interest in any Part 100 DBS licenses.

In order to discourage the cable companies from "jumping ship" to the Part 100 DBS industry (and thus avoiding legal accountability for a season until the nascent Part 100 DBS industry becomes more regulated), we urge the Court to require that all of the Defendants in the instant proceeding, including Viacom, Viacom K-Band, Inc., and Liberty Media Corporation, be prohibited from owning or acquiring any ownership interest of any kind in any Part 100 DBS permittee.

We urge the Court to make this prohibition stay in full force and effect until the start of the eighth year after the final "Gang of Nine" licensee to commence operations actually begin on-orbit broadcast operations, or the year 2010, whichever year comes first.

As the Court will note from our Public Comments filed on 28 July 1993, Continental is already at loggerheads with one American cable company—Cablevision Systems—over precisely this issue of abuse by American cable companies. The unethical and untrustworthy conduct exhibited by Cablevision is utterly egregious and irredeemable.

Furthermore, early on during our applicable process before the FCC we were procedurally harassed by nitpicky and antagonistic filings against us committed by TEMPO Satellite Corporation, a subsidiary of defendant Tele-communications, Inc. (TCI).[3] We can only guess what the future might hold for us and for other smaller Part 100 permittees at the hands of the Defendants in the instant proceeding if the Court fails to protect us from the abusive business practices hinted at by the US Justice Department and the Attorneys General for 40 States.

To sum up, we urge the Court as part of the proposed Final Judgment to prohibit aggregate ownership of more than one percent in any Part 100 licensee by any of the Defendants until the commencement of the eighth year of on-orbit operations by the final Part 100 DBS licensee to commence broadcasting. Obviously, since TCI already owns a DBS license, we would not be so presumptuous as to request that the Court require TCI to surrender its Part 100 DBS license back to the FCC as part of the Final Judgment.[4]

Supplemental Comments With Respect to Previous Allegations Concerning Loral Corporation and Cablevision

Since the filing of our initial Public Comments on 28 July 1993, more events have occurred which corroborate our allegation that the Parties have attempted to restrain Continental's trade and competition within the market for direct broadcast satellite Ku-Band program delivery.

On 5 August 1993, we filed an Opposition to Cablevision's Request for Declaratory Ruling.[5] In our Opposition, we noted that Cablevision has admitted that the Lease

[1] Quoted in Appendix A: Cable Rate Regulation Executive Summary, Page 1, Section I, Paragraph 2, lines 1–5. Appendix A begins on page 358 of the Federal Communications Commission's Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92–266 (Adopted April 1, 1993 and Released May 3, 1993) in RE Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation.

[2] A copy of our Comments on Notice of Proposed Rule Making in MM Docket No.: 93–25 is included in this Supplement as Attachment Three.

[3] We are happy to report that these procedural harrassments appear to have ceased—for the moment at least. TEMPO recently withdrew an objection that it had filed three years ago against an Application for Launch Authority that we filed with the FCC in August 1990. We find it amusing that TEMPO's withdrawal of its objections of our 1990 Application was filed with the FCC about the time the proposed Fihal Judgment was published. Was this coincidence? We think not. We invite the Justice Department to keep a close eye on our DBS application (FCC file number DBS–87–01). Don't be surprised if over the next two years you see a huge influx of antagonistic filings on the part of MSO companies against smaller Part 100 DBS permittees such as Continental.

[4] On the other hand, we won't oppose such a forced surrender, either. Neither the Court, nor the US Justice Department, nor the Attorneys General for the various states that participated in this proceeding, nor the FCC, nor the other Part 100 DBS applicants will hear an objection from Continental if the Court elects to order TCI to so surrender its DBS construction permit back to the FCC as part of the Final Judgment in *United States of America* v. *Primestar Partners, et al.* We couldn't think of a better way to ensure a safe and truly competitive business environment for the nascent Part 100 DBS industry than for the Court to order cable companies to stay out of Part 100 DBS licensee ownership until the year 2010.

[5] See Attachment One to this Supplement.

Agreement and Management Agreement would have had the effect of creating an illegal transfer of control of Continental's DBS license away from Continental. We also noted that the essence of former FCC Chairman Charles Ferris' "Dear Roy" letter of 23 July 1993 was an admission that the Lease Agreement and the Management Agreement were in fact intended to force that transfer of control. "Luckily" for Cablevision, former Chairman Ferris has admitted that Cablevision has "abandoned" the illegal Lease Agreement and Management Agreement.

Instead, it now appears that Cablevision is about to try to force Continental to file a Transfer of Control application before the FCC in order to make Continental surrender its DBS license to Cablevision.[6]

Ex Parte Contact by Cablevision Before the Federal Communications Commission

On 9 August Continental received a copy of Cablevision's 1992 Form 10–K which had been filed with the Securities and Exchange Commission on 23 March 1993. On page 109 of that Form 10–K filing, former Federal Communications Commission Chairman Charles D. Ferris is listed as a member of the Board of Directors of Cablevision.[7] In fact, Mr. Ferris signed the Form 10–K in his official capacity as a member of the Board of Directors.[8]

Since we obtained a copy of Mr. Ferris' now infamous and illegally filed "Dear Roy" letter of 23 July 1993, a spirited correspondence has arisen between Continental's FCC counsel Lawrence Bernstein and former Chairman Ferris.[9] Nowhere in *any* of his correspondence to Continental, and nowhere in any of his filings before the FCC with respect to Continental's DBS construction permit did Mr. Ferris inform the FCC that he is a member of the board of directors of Cablevision.

Instead, Mr. Ferris filed his behind the scenes requests relying on his position as FCC counsel to Cablevision's subsidiary Rainbow. Mr. Ferris' more significant relationship to Cablevision is not his employment as FCC counsel but rather his vested interest as a board member of Cablevision. Accordingly, Mr. Ferris' filings represent unauthorized and prohibited *ex parte* contacts with the Commission.

Purchase Inquiry on Behalf of Loral

On 12 August 1993 Continental's Chief Executive Officer James H. Schollard and I visited Intraspace Corporation, the vendor of our DBS sparecraft. On 20 July 1993 our previous DBS spacecraft construction contract with SS/Loral had expired. On 19 July 1993 we had awarded a construction contract to Intraspace as a replacement to the contract with SS/Loral. The replacement contract was intended to go into effect concomitantly with the 20 July 1993 expiration date of our previous contract with SS/Loral.[10]

We were visiting Intraspace in order to confirm certain business plans and decisions regarding the new contract. While we were at lunch with Robert D'Ausilio, Chief Executive Officer of Intraspace, Mr. D'Ausilio received a phone call from Mr. Lonnie Kennedy, a low-to-mid level executive with one of Loral Corporation's offices in Texas.

Not knowing the reason for Mr. Kennedy's call, Mr. D'Ausilio innocently returned the call upon his return from our lunch appointment with him. Mr. James Mellos, Intraspace's Director of Marketing, Mr. Schollard, and I listened in on the telephone conversation via speakerphone. In the telephone conversation, Mr. Kennedy inquired as to whether or not Mr. D'Ausilio would be willing to sell Intraspace to Loral. He repeatedly stated that Loral "has lots and lots of money" to spend and that there was a strong interest in Loral purchasing Intraspace.

Our corporate counsel recommended we inform the Justice Department of this conversation. We believe that if Loral were to successfully acquire Intraspace, Loral would be in a position to default on Continental's contract with Intraspace, thus forcing Continental into default before the FCC with respect to its DBS due diligence showing. Naturally, Loral would then be in a position to "save the day" for Continental by forcing us to sign up again with Loral at twice the price of our contract with Intraspace. We believe Loral's surreptitious call to their direct DBS satellite construction competition demonstrates predatory intent and is a deliberate attempt to interfere with Continental's DBS business.

Summary and Conclusions

To sum up, we urge the Court as part of the proposed Final Judgment to prohibit aggregate ownership of more than one percent in any Part 100 licensee by any of the Defendants until the commencement of the eighth year of on-orbit operations by the final Part 100 DBS licensee to commence broadcasting. This prohibition will guard the nascent Part 100 DBS operators from heavy-handed takeover attempts by cable or other MSO's.

We again reiterate our call for a full scale criminal investigation of Loral's and Cablevision's deliberate and concerted effort to defraud Continental—and possibly other Part 100 DBS operators—of its DBS license.

Questions concerning these Comments may be directed to Continental at the address and telephone numbers set forth in our letterhead.

Very truly yours,

For Continental Satellite Corporation.

William P. Welty,

Founder and President.

WPW/pw

cc: Lawrence Bernstein, FCC communications counsel; Office of Attorney General for State of New York; Office of Attorney General for State of California; Continental's FCC Public File DBS–87–01

[6] See page one of Attachment Three of our Public Comments filed on 28 July 1993.

[7] See Attachment Two to this Supplement.

[8] See the yellow highlighted portion on page 2, lines 26 and 27 of Attachment Two.

[9] Copies of these letters are included in this Supplement as part exhibits to our Opposition. See Attachment One.

[10] A copy of this replacement contract with Intraspace was filed with the FCC on 21 July 1993. An amended due diligence showing and progress report accompanied the filing of the contract. A copy of this filing is available for inspection in Continental's public access file number DBS–87–01 at the offices of the Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

Joint Comments of the Common Carriers

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47 U.S.C. 522(12)
47 U.S.C. 533(b)(3)
47 U.S.C. 548(a)
47 U.S.C. 548(b)

Miscellaneous

House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102nd Cong. 2d Sess. (1992)

Joint Comments of the Common Carriers

The proposed consent decree in this case is marred by an important, but easily remedied, flaw. As currently drafted, the decree excludes common carriers (*i.e.*, telephone companies), their affiliates and subsidiaries, and their video dialtone customers from one of its most critical program access provisions. Neither the decree itself nor the Department's Competitive Impact Statement offers any explanation for this exclusion. Nor could any reasonable justification be offered. The exclusion is anticompetitive on its face, inconsistent with the remaining provisions of the decree, and contrary to the public interest determination of Congress in enacting the 1992 Cable Act.

Access to a wide variety of programming is essential to any viable competitor of the cable industry. The cable industry has sought to perpetuate its market power by locking up programs (either by buying the programmers or signing exclusive contracts with them) and then denying those programs to potential competitors. The whole point of this suit was to break that stranglehold and guarantee open access to cable programming for all. By settling for a remedy that denies common carriers—who are widely acknowledged as potent potential competitors of the cable industry—equal access to the most desirable programming covered by the decree, the proposed decree would put those carriers at a serious competitive disadvantage. Instead of prying open the cable industry to ensure competition for the benefit of the public, the proposed decree would permit the cable industry to manage competition for its own benefit.

Beyond this, the proposed consent decree must be measured against the declared public policy of the United States contained in the 1992 Cable Act. The 1992 Cable Act confers broad rights of access to programming at nondiscriminatory prices, terms and conditions to all cable competitors, on a technology neutral basis, and prohibits exclusive cable programming contracts unless they are proven to be in the public interest. By contrast, the proposed consent decree excludes common carriers and their video dialtone customers from access to the most desirable programming covered by the decree. Such a result is contrary to the public interest as determined by Congress.

Accordingly, Ameritech, Bell Atlantic Corporation, BellSouth Corporation, GTE Service Corporation, NYNEX Corporation, Pacific Telesis Group, Southwestern Bell Corporation, U S WEST, Inc., and the United States Telephone Association ("USTA")[1] ask the Department of Justice to modify the proposed consent decree to ensure that common carriers and their video transport customers receive the full program access protections afforded to other competitors of the cable industry.

Statement of Facts

A. The Current Video Distribution Marketplace

The distribution of multichannel video programming today is dominated by the cable industry. Cable systems are accessible to 96 percent of television households and over 60 percent of those households subscribe. Annual cable revenues now exceed $21 billion, and the industry is increasingly dominated by large entities called Multiple Systems Operators (MSOs).[2] Most significantly, in all but a handful of communities, there is only one cable provider. See Complaint ¶ 36. Moreover, the largest MSOs have entrenched their position by vertically integrating into cable programming (either through purchases or exclusive contracts) and then denying access to that programming to potential competitors.[3]

B. The Provision of Video Programming by Common Carriers

Under the 1984 Cable Act, common carriers are permitted to provide video programming outside their telephone service areas and in certain rural areas.[4] In addition, under recent FCC regulations, telephone companies may, within their service areas, provide "video dialtone" services, which allow customers to access a wide variety of video programs over the telephone

[1] USTA is the principal trade association of the local telephone industry, with about 1,100 members who together provide nearly all of the nation's telephone lines. The individual companies provide local telephone service, as well as a variety of other communications and information services, throughout most of the United States.

[2] The five largest MSOs, all of whom are defendants here, serve over 50 percent of all cable subscribers. See Complaint ¶ 37.

[3] House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102nd Cong. 2d Sess., 42-43 (June 29, 1992); *In re Implementation of Sections 11 and 13 of the Consumer Protection and Competition Act of 1992*, 8 F.C.C. Rcd 210, 216 (1992).

[4] See 47 U.S.C. 533(b)(3).

network.[5] Under the video dialtone regulations, telephone companies provide the transport and the programming is packaged by any number of third parties (generally referred to as "customer/programmers" of the video dialtone network). If the video dialtone networks are to succeed, however, those customer/programmers must have access to quality video programming. Without such access, the video dialtone networks will lose their customers, and the benefits sought by the FCC—"creating opportunities to develop an advanced telecommunications infrastructure, increasing competition in the video marketplace, and enhancing the diversity of video services to the American public"[6]—will not be realized.[7]

Common carriers are widely viewed as potent potential competitors of the cable industry, even in their role as transporters of third-party programming. Moreover, they may soon be allowed to provide video programming directly to subscribers within their service areas. All the expert federal agencies that have examined the issue have determined that the prohibition should be removed, and Congress is currently considering legislation to do so.[8] The ban is also facing a challenge in federal court in Virginia, where the Chesapeake and Potomac Telephone Company of Virginia (C&P), and its affiliate, Bell Atlantic Video Services Company (BVS), have challenged the constitutionality of the ban under the First Amendment.[9]

C. The 1992 Cable Act and the Proposed Consent Decree

In the 1992 Cable Act, Congress expressly guaranteed access to cable programming for new and existing competitors to cable.[10] The FCC has issued detailed regulations implementing these program access provisions.[11] Current federal protections extend to *all* actual and potential competitors of the cable industry, including telephone companies, their video programming affiliates, and the third-party customer/programmers of their video dialtone networks.

In many respects, the proposed consent decree complements the regulatory regime established by the 1992 Cable Act. Most of its program access provisions apply to "any provider of multichannel subscription television." See, *e.g.*, Proposed Decree at IV(A) (emphasis added) (prohibiting defendants from enforcing or carrying out any provision of the Partnership agreement that "affects the availability, price, terms or conditions of provision, sale, or licensure of programming to *any provider of multichannel subscription television*"); *id.* at IV(B) (emphasis added) (prohibiting defendants from retaliating or threatening to retaliate against a person that "provides, sells, or licenses programming to or invests in * * * *any provider of multichannel subscription television*"); *id.* at IV(C)(1) (emphasis added) (prohibiting defendants from entering into any agreement or understanding with any programming service "with respect to the terms or conditions on which [that] service will sell, provide or license, or refuse to sell, provide or license, programming to *any provider of multichannel subscription television*"); *id.* at IV(C)(2) (emphasis added) (prohibiting defendants from entering into any agreement or understanding with any cable system "to purchase, procure, or license programming, whereby such purchase, procurement or license is subject to any condition that prohibits the purchase or directly affects the availability, price, terms, or conditions of, the purchase, procurement or licensing of that programming by *any other provider of multichannel subscription television*").

"Multichannel subscription television" is defined in the decree as "a service providing multiple channels of video programming to consumers by *any* of various methods, and for which a periodic subscription fees is charged." Proposed Decree at II(C) (emphasis added). No invidious distinctions are drawn on the basis of the identity of the provider or the technology used for distribution. Thus, video dialtone customer/programmers—which provide multiple channels of video programming to consumers over common carrier video dialtone networks—clearly fall within the definition. Common carriers themselves also fall within the definition to the extent that they provide multiple channels of video programming to their customers.

In short, four of the program access provisions of the decree expressly apply to any provider or multichannel subscription television, including common carriers and their video dialtone customers. Inexplicably, however, the fifth and most important such provision, does not.

Section IV(C)(3) purports to prevent the defendants from entering into or renewing any exclusive distribution agreements or contracts with any national video programming service listed in Exhibit A of the decree or with any existing or new regional sports service. This is an absolutely critical provision. Exhibit A lists sixty-one national video programming services, including American Movie Classics, Black Entertainment Network, Cinemax, The Discovery Channel, The Disney Channel, Home Box Office (HBO), Music Television (MTV), Nickelodeon, and Turner Network Television (TNT). Exhibit A also lists thirty-three regional Sports services, including Home Team sports, and numerous regional affiliates of Prime Sports Network and Sports Channel.

These are the crown jewels of cable television. Access to these programs is essential to the success of a cable competitor. Yet these programs are denied to common carriers and their video dialtone customer/programmers. Section IV(C)(3)(a) only precludes the defendants from entering into "exclusivity provisions * * * that restrict or limit the rights of such programming service to deal with any direct-to-home satellite service, Multichannel Multipoint Distribution Service, Satellite Master Antenna Television Service (SMATV), or cable

[5] *In re Telephone Company/Cable Television Cross-Ownership Rules*, 7 F.C.C. Rcd 5781 (1992). Because the telephone network is interactive, telephone companies have the capability to offer "video on demand," *i.e.*, the ability of a customer to dial-up and view any television show or movie stored in an accessible database.

[6] *Id.* at 5783.

[7] Although telephone company video dialtone is a relatively new service, the FCC has already authorized two carriers to begin providing it. A number of additional applications are pending at the FCC.

[8] As the FCC recently explained, the ban was enacted at a time when cable was a "fledgling industry unable to compete"; today, by contrast, cable holds the "leading position in the delivery and provision of video programming to the American public." 7 F.C.C. Rcd at 5848. The Commission concluded that repeal of the ban would "increas[e] competition in the video marketplace, spur[] the investment necessary to deploy an advanced infrastructure, and increas[e] the diversity of services made available to the public." *Id.* at 5847. The two other federal agencies with primary responsibility for overseeing the telecommunications industry, the National Telecommunications and Information Administration (NTIA) of the Department of Commerce and the Department of Justice, have likewise urged entry of the telephone companies into the cable market. See Comments of NTIA at 3, *Telephone Company-Cable Television Cross-Ownership Rules*, CC Dkt. No. 87-266 (F.C.C. Feb. 3, 1992); Reply Comments of the United States Department of Justice at 44, CC Dkt. No. 87-266 (F.C.C. Mar. 13, 1992).

[9] *C&P Telephone Company of Virginia* v. *United States*, No. 92-1751-A (E.D. Va. 1992). Motions for summary judgment are pending before the court, and a decision is expected shortly.

[10] The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (Oct. 5, 1992), *codified at* 47 U.S.C. 521.

[11] *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 F.C.C. Rcd 3359, 3362-3363, 3404, 3412 (1993) (hereinafter *Program Access Regulations*).

operator." Common carriers, which do not fit into any of the other categories, are then expressly excluded from the definition of "cable operator."

For the purposes of this decree, a cable operator shall not include a common carrier, subject in whole or in part to Title II of the Communications Act of 1934 (47 U.S.C. 201–264), as it reads on the date of entry of this decree, or an affiliate owned by, operated by, or under common control with the common carrier that provides video programming to subscribers in its telephone service area, except to the extent that, on the date of entry of this decree, such carrier provides telephone exchange service in a rural area and is authorized by the Federal Communications Commission to provide video programming to subscribers in such rural area.

Proposed Consent Decree at IV(C)(3)(c). Section IV(C)(3) also excludes the customer/programmers of video dialtone networks. The decree defines a "cable operator" as an entity that must provide a programming service and have a significant ownership interest in the cable facility. Proposed Consent Decree at IV(C)(3)(c). A third party customer/programmer does not have any ownership interest in the local telephone company's network or transmission facilities.

It would have been easier, and more natural in light of the rest of the decree, to draft Section IV(C)(3) to preclude the defendants from entering into "exclusivity provisions * * * that restrict or limit the rights of such programming service to deal with [any provider of multichannel subscription television]." That is how the other decree provisions read. And that it what the Competitive Impact Statement claims the decree accomplishes. Why the decree suddenly imposes limitations on the most important of its program access provision—limitations that appear to exclude only common carriers and their video dialtone customer/programmers—is both unexplained and inexplicable.

ARGUMENT

The Proposed Consent Decree Should Be Modified so That Its Program Access Protections Extend to all Potential Competitors of the Cable Industry, Including Common Carriers and Their Video Dialtone Customer Programmers

It is well established that a properly fashioned antitrust remedy must "effectively pry open to competition a market that has been closed by defendants' illegal restraints." *International Salt Co.* v. *United States*, 332 U.S. 392, 401 (1947). The remedy "should operate as an effective deterrent to a repetition of the unlawful conduct"; it should "suppress the unlawful practices and * * * take such reasonable measures as would preclude their revival." *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186, 188 (1944). Thus, "[t]he remedy in an antitrust action—whether imposed by a court or agreed upon between the parties—is measured both by how well it halts the objectionable practices and by its prospects for minimizing the likelihood that such practices will occur in the future." *United States* v. *AT&T*, 552 F. Supp. 131, 165 (D.D.C. 1982). See also *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577 (1966); *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 128–129 (1948).

The proposed consent decree fails this test. It is anticompetitive on its face in that it leaves the defendants free to abuse their market power to impede entry by common carriers and their video dialtone customer/programmers. Insofar as it excludes common carriers from its most important protections, the decree is also contrary to the stated purpose of the United States in proposing this consent decree and to the public interest determination of Congress in enacting the 1992 Cable Act.

A. The Proposed Consent Decree is Anticompetitive Insofar as It Places Common Carriers and Their Video Transport Customers at a Competitive Disadvantage in Access to Video Programming

The development of a viable competitor to the current monopoly power of the cable industry no longer depends on technology—today, there are technological alternatives to cable. Competition depends on programming. As the Complaint in this case acknowledges (at ¶ 41), a viable competitor to the cable industry must be able to obtain "a sufficient quantity of popular programming, such as that currently provided to cable subscribers," if it is ever to get its foot (or wire, or satellite dish) in the door.

Recognizing this fact, the cable industry has used its power over the distribution of programming to lock up access to programming through a series of buyouts and exclusive contracts. The instant lawsuit was brought to obtain broad equitable relief, including an order that the defendant cable companies provide program access on reasonable terms to any provider of multichannel subscription television. Complaint at Prayer for Relief ¶¶ 2–3.[12]

The proposed consent decree falls short of that goal; indeed, the decree as written will affirmatively undermine it. Common carriers and their video dialtone customer/programmers are potent potential competitors of the cable industry. Yet Section IV(C)(3), by its express terms, allows the cable defendants to enter into exclusive distribution agreements denying to common carriers and their video dialtone customer/programmers access to the most desirable and popular programming in the country—the very shows that are critical to viable competition. That result cannot be reconciled with the mandate of the antitrust laws to knock down such anticompetitive barriers to entry. *Ford Motor Co.* v. *United States*, 405 U.S. 562, 578 (1972); *United States* v. *American Cyanamid Co.*, 556 F. Supp. 361, 364 (1983); *United States* v. *AT&T*, 552 F. Supp. at 150, n.80; *United States* v. *Carter Products Inc.*, 211 F. Supp. 144, 146 (S.D.N.Y. 1962). Nor can it be reconciled with the requirement that an antitrust decree, not merely protect a few potential competitors, but "effectively pry open to competition a *market* that has been closed by defendants' illegal restraints." *International Salt Co.* v. *United States*, 332 U.S. 392, 401 (1947) (emphasis added).

The proper purpose of an access provision in an antitrust decree is to make such access available "upon such just and reasonable terms * * * as will * * * place *every* such [competitor] upon as nearly as equal [a] plane as may be." *United States* v. *AT&T*, 524 F. Supp. 1336, 1353 (D.D.C. 1981) (emphasis added). See also *United States* v. *Terminal R.R. Association*, 224 U.S. 383, 411 (1912).[13] This decree, by

[12] Although the specific instances on which the complaint focused concerned the efforts of cable providers to thwart emerging competition from direct broadcast satellite (DBS) providers, it is clear from the prayer for relief and the Competitive Impact Statement that the government intended to prevent cable providers from denying program access to any potential competitors. See Part B, *infra*.

[13] Access provisions are found in numerous antitrust decrees. Invariably, they provide access to all of the defendant's competitors, not just some subset preferred by the defendant. See, *e.g.*, *United States* v *Glaxo Groups, Ltd.*, 410 U.S. 52, 60–64 (1973); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 135, 141 (1967); *International Boxing Club of New York Inc.* v. *United States*, 358 U.S. 242, 261 (1959); *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4–5 (1958); *United States* v. *Borden Company*, 347 U.S. 514, 518 (1954); *Besser Manufacturing Co.* v. *United States*, 343 U.S. 444, 447 (1952); *United States* v. *United States Gypsum Co.*, 340 U.S. 76,

Continued

contrast, singles out one subset of potential competitiors—those, apparently, that the cable industry fears the most—and subjects them to discriminatory treatment. Indeed, the decree gives the cable industry a virtual license to use program access restrictions to block entry by common carriers and their video dialtone customer/programmers.

It is no answer to say that common carriers and their video dialtone customer/programmers are free to bring their own suit. As an initial matter, this is their suit, in the sense that an antitrust action by the United States is supposed to be brought on behalf of those customers and businesses harmed by the anticompetitive practices of the defendants; and in negotiating the provisions of a consent decree, the United States is expected to represent the interest of the public in full and open competition. See 15 U.S.C. 16(e). See also *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. at 135; *United States* v. *Borden Company*, 347 U.S. at 518; *United States* v. *CIBA Corporation*, 50 F.R.D. 507, 513 (S.D.N.Y. 1970).

Second, a separate suit would take years to prosecute and, in the meantime the consent decree would place common carriers and their video dialtone customer/programmers at such a clear competitive disadvantage to the cable defendents and other cable competitors that it would create a strong disincentive for entry into the cable market. An important source of competition to the cable industry would thereby be weakened and potentially eliminated. Video customers generally would be the losers, because the lack of competition would force them to pay higher prices and enjoy fewer choices.

Finally, there is a significant danger that the cable industry would be able to use this consent decree as a shield in any judicial or regulatory proceedings designed to open access to programming to common carriers and their video dialtone customer/programmers. A finding by the Court that the decree is in the public interest, combined with the implied conclusion of the Department of Justice that the exclusion of common carriers and their video dialtone customer/providers from the benefits of open access to programming is appropriate, could provide a significant obstacle to any further action. See, *e.g.*, *Columbia Broadcasting System, Inc.* v. *ASCAP*, 562 F.2d at 139 n.25 (although a consent decree does not automatically insulate defendant from later suits, it would be inappropriate to give "no weight at all" to government consent decrees in future suits, since Department of Justice "has the responsibility for enforcing the Sherman Act").

B. The Proposed Consent Decree Is Inconsistent With the Goals of This Suit as Explained in the Complaint and the Competitive Impact Statement

The proposed consent decree is not merely anticompetitive on its face. It is also inconsistent with the stated purpose of the United States in bringing this litigation and proposing this decree, which was to break open the multichannel subscription television *market* to competition. As the government's Competitive Impact Statement indicates (at 2), '[t]he complaint seeks injunctive relief to assure that Primestar does not restrain the availability of programming to multichannel subscription television service competitors of the MSO defendants, or does not deter entry into multichannel subscription television by others by serving as a device to facilitate a coordinated retaliatory response by the MSO defendants."

No sub-class of "multichannel subscription television service competitors" is identified as somehow less deserving of such protection. Indeed, no rationale for the exclusion of common carriers and their video dialtone customer/programmers is ever given by the Department of Justice, whether in the complaint, the proposed decree, or the Competitive Impact Statement. In fact, there are some indications that the Department's acquiescence in the exclusion of common carriers and their video dialtone customer programmers from the protection of Section IV(C)(3) was inadvertent.

The Competitive Impact Statement describes Section IV(C)(3) as prohibiting exclusivity agreements that would limit the rights of programming services "to deal with other providers of multichannel subscription television, including any direct-to-home satellite service, MMDS, SMATV, or cable operator." Competitive Impact Statement at 11 (emphasis added). This passage seems to indicate that the specific technologies listed in Section IV(C)(3) were intended to be illustrative rather than exhaustive.

This impression is reinforced by the next paragraph in the Competitive Impact Statement, which states that Section IV(C)(3)'s anti-exclusivity provision "complement[s] the prohibitions of Section IV(C) (1) and (2) by prohibiting the MSO defendants from entering into or renewing program supply agreements that preclude *competing suppliers of multichannel subscription television* from gaining access to programming services that are most likely to be important to the success of potential competitors." Competitive Impact Statement at 11–12 (emphasis added). See also *id.* at 13 ("By restricting certain exclusive contracting practices of the MSO defendants, the proposed Final Judgment provides further assurance that * * * the MSO defendants will not coordinate their behavior through the ostensibly unilateral conduct of vertically integrated firms with common interests").

As it now stands, however, the wording of the proposed decree directly contradicts the assurances of the Competitive Impact Statement that Section IV(C)(3) protects providers of multichannel subscription television in general. The provision as written expressly excludes common carriers and their video dialtone customer/programmers. It is essential, therefore, that Section IV(C)(3) be amended so that it applies, as do the rest of the decree's protections, to "any provider of multichannel subscription television." Only when and if that is done will it be true that "the proposed Final Judgment fully addresses the antitrust violation alleged in the complaint." Competitive Impact Statement at 13.

C. The Proposed Consent Decree Is Contrary to the Access Provisions of the 1992 Cable Act and FCC Implementing Regulations

As currently worded, the proposed consent decree is also directly contrary to the policy judgment of Congress and the FCC that common carriers and their video dialtone customer/programmers should be included in whatever program access requirements are developed.

As noted, the Cable Act of 1992 contains a general prohibition against "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent *any* multichannel video programming distributor from providing satellite cable programming * * * to consumers." 47

94 (1950); *United States* v. *Crescent Amusement Co.*, 323 U.S. at 186; *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977); *Columbia Broadcasting System, Inc.* v. *ASCAP*, 562 F.2d 130, 139, n. 25 (2d Cir. 1977); *K-91, Inc.* v. *Gershwin Publishing Corporation*, 372 F.2d 1, 2 (9th Cir. 1967); *United States* v. *Columbia Artists Management, Inc.*, 662 F. Supp. 865 (S.D.N.Y. 1987); *United States* v. *AT&T*, 552 F. Supp. at 183–188.

U.S.C. 548(b) (emphasis added).[14] And the Act broadly defines a "multichannel video programming distributor" (MVPD) as any person "who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. 522(12). Unlike the proposed consent decree, the 1992 Cable Act does not exclude common carriers or their customers from its program access protections or create any other invidious distinctions among video programming distribution technologies by discriminating as to which technologies will receive the Act's protections. Congress concluded that the public interest would best be served by ensuring access for all potential competitors, thereby promoting the broadest range of "competition and diversity in the multichannel video programming market, * * * and spur[ing] the development of communications technologies." 47 U.S.C. 548(a).

The FCC's implementing regulations faithfully carry out this inclusive mandate. MVPDs subject to the protections of those regulations are defined by the FCC to include any entities "engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming."[15] Again, there is no exclusion for common carriers or their video dialtone customer/providers.

In short, the clear public policy expressed in the 1992 Cable Act and its implementing regulations is that access to cable programming should be extended to all potential competitors of the cable industry. By excluding common carriers and their video dialtone customer/programmers from the protection against defendants' exclusive distribution agreements under IV(C)(3)(a), the proposed settlement violates public policy and should therefore be modified. It is simply not in the public interest for any antitrust consent decree to codify a set of rules that run counter to the regulatory scheme fashioned by Congress.

It is no answer to say that the proposed consent decree merely supplements, but does not supplant, the program protections designed by Congress and the FCC. Congress and the FCC have made a considered policy judgment that all potential competitors to the cable industry should receive equal access to cable programming. For the United States, at the behest of the cable industry, to devise a supplemental regime that favors some competitors and disfavors others is directly antithetical to that policy judgment.

Conclusion

The proposed consent decree should be modified so that its program access protections extend to all potential competitors of the cable industry, including common carriers and their video dialtone customer/programmers.

Respectfully submitted.

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I. Preliminary Statement

On June 9, 1993, the U.S. Department of Justice ("Justice Department") and the Attorneys General of 40 states filed proposed consent decrees in the U.S. District Court for the Southern District of New York to settle an antitrust investigation into the formation of Primestar Partners. Primestar was formed as a direct broadcast satellite ("DBS") multichannel subscription television service by seven of the largest cable multisystem operators ("MSOs"), some of which are leading suppliers of video programming. Primestar and its cable owners were under investigation for conspiracy to raise barriers to entry by other DBS operators to the multichannel subscription television service market and to restrict access to programming by other DBS entrants.[1]

Although the proposed consent decrees were supposed to terminate and prevent the cable defendants' anticompetitive behavior alleged in the federal and state complaints, they actually do just the opposite sanctioning anticompetitive exclusive arrangements, thereby, undermining the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") enacted prior to their filing and intended to remedy the same behavior on the part of the cable defendants.

[14] The reference to "satellite cable programming" merely reflects the fact that all significant cable programming is delivered to program distributors by means of satellite. The distributors then determine the mode of distribution (DBS, cable, SMATV, etc.) to their customers.

[15] *Program Access Regulations*, 8 F.C.C. Rcd at 3362 n.3.

[1] *United States* v. *Primestar Partners, L.P.*, No. 93-CIV-3913 at ¶ 48 (S.D.N.Y. June 9, 1993) ("U.S. Complaint").

While the States' proposed consent decrees are ambitiously broad in their approach and purport to provide significant remedies to the cable defendants' anticompetitive behavior towards the various competitors to cable, they are so riddled with exceptions and exclusions that they are invidiously anticompetitive in their effects on the multichannel video programming marketplace.[2] They do not protect the public against the anticompetitive practices of the cable defendants. Rather, the States' proposed consent decrees have the effect of protecting the cable defendants from the full force and effect of the 1992 Cable Act.

The federal consent decree takes a fundamentally different approach and focusses more narrowly upon the specific provisions of the Primestar Partnership Agreement itself. The federal decree attempts to target and enjoin the enforcement of those provisions of the Primestar Partnership Agreement which create a framework for the cable defendants to engage in anticompetitive behavior. Inexplicably however, the proposed federal decree contains an exception to this approach—Section IV.D. This provision appears to be aimed at diminishing the competitiveness of the direct broadcast satellite ("DBS") industry by permitting the cable defendants to continue to engage in anticompetitive conduct with regard to access to programming for DBS. The Justice Department offers no legal or public policy rationale for the disadvantageous treatment of the DBS industry.

Section IV.D permits Primestar to enter into exclusive programming agreements if a competing DBS venture obtains any exclusive programming. During the term of the consent decree, there will likely be only two non-cable owned DBS competitors to Primestar. One of the DBS ventures may have already entered into exclusive arrangements with the cable defendants for "premium pay cable television" programming. Section IV.D would ratify these exclusive contracts and allow Primestar to lock up the remaining cable programming services under the control of its cable owners. This profoundly anticompetitive regime will reduce competition in the multichannel video programming market by denying video programming vital to the success of any cable competitor. The ultimate result of this reduced competition will be fewer viewing choices and higher prices for consumers.

The potential anticompetitive consequences of this provision would seem to be at odds with the objectives of the Justice Department in bringing this antitrust action and with the declared public policy of the United States embodied in the 1992 Cable Act. In enacting the 1992 Cable Act, the Congress envisioned the fullest competition to cable as being in the best interest of consumers.[3] Therefore, the Act confers broad access to programming rights at nondiscriminatory prices, terms and conditions to all cable competitors and prohibits exclusive cable programming contracts unless they are proven to be in the public interest. The regulations promulgated by the Federal Communications Commission ("FCC") implement Congressional intent.[4] Section IV.D sets up a clear conflict with the nondiscrimination provisions of the Act and the implementing regulations.

Therefore, DirecTv, Inc.[5], the National Rural Telecommunications Cooperative ("NRTC")[6], Consumer Federation of America ("CFA")[7], and Television Viewers of America, Inc. ("TVA")[8] request that the Department of Justice modify the proposed consent decree to eliminate the clause beginning with the word "provided" and the parenthetical information from Section IV.D.

II. Background of the Multichannel Video Programming Distribution Industry

The current multichannel video programming distribution marketplace is dominated by the cable industry. As the Complaint notes, "[m]ore than 90% of the more than 91 million television households in the United States are in areas served by cable," most of whom can purchase multichannel subscription television service only from a single local cable distributor. U.S. Complaint at ¶¶ 30, 36. The cable industry presently faces very limited competition from other multichannel video programming distributors ("MVPDs"), such as C-band satellite, Multichannel Multipoint Distribution Service ("MMDS"), and Satellite Master Antenna Television systems ("SMATV"). U.S. Complaint at ¶32.

High-power DBS has been viewed by the cable industry and the communications industry generally as having the potential to provide a competitive alternative to cable television service.[9] Its technological

[2] See discussion *infra* at 16. See also Joint Amicus Curiae Memorandum of Law of DirecTv, Inc., National Rural Telecommunications Cooperative, Consumer Federation of America and Television Viewers of America, Inc., *State of New York* v. *Primestar Partners*, No. 93 Civ. 3868 (S.D.N.Y. June 9, 1993) (included as Appendix A).

[3] See S. Rep. No. 102-92, 102d Cong., 1st Sess. at 1 (1991) ("The purpose of this legislation is to promote competition in the multichannel video marketplace and to provide protection for consumers against monopoly rates and poor customer service."); H. Rep. No. 102-628, 102d Cong., 2d Sess. at 26 (1992) ("The Legislation will protect consumers by preventing unreasonable rates, by improving the cable industry's customer service practices, and by sparking the development of a competitive marketplace.")

[4] First Order and Report, In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-265 (released April 30, 1993) ("Program Access Order).

[5] DirecTv, Inc. and Hughes Communications Galaxy, Inc. ("HCG") are sister subsidiaries of Hughes Communications, Inc. ("HCI"). HCG has been licensed by the FCC to provide high-power DBS service. DirecTv is the DBS operating, customer service and programming acquisition arm of the HCI family. DirecTv will launch, in December of this year, the first high-powered U.S. DBS satellite, and shortly thereafter will introduce American consumers to the first truly competitive service to cable television . As a high-power DBS provider, DirecTv will provide approximately 150 channels of high-quality subscription and pay-per-view video programming to the public.

[6] NRTC is a non-profit corporation, owned and controlled by 521 rural electric cooperatives and 231 rural telephone systems located throughout 49 states. Through the use of satellite distribution technology, NRTC is committed to extending the benefits of information, education and entertainment programming to rural America on an affordable basis. On April 10, 1992, NRTC signed a DBS Distribution Agreement with HCG to provide DBS services to rural subscribers across the country. Under the DBS Distribution Agreement, HCG provides NRTC, its members and affiliated companies the satellite capacity and other necessary services to market and distribute 20 channels of popular cable programming services to rural households equipped with 18" DBS receiving antennas. Most of the programming services to be offered are owned or controlled by cable companies.

[7] CFA is the nation's Largest consumer advocacy group, composed of more than 240 state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power, and cooperative organizations, with more than 50 million individual members. CFA was the lead representative of the public in the legislative deliberations that led to the 1992 Cable Act. The millions of television viewers and cable consumers who constitute the membership of CFA's affiliates have a "paramount" First Amendment right to receive a variety of information from diverse sources. *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 390 (1969). See also, *Office of Communications of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966) (Burger, J.). They have been undeniably harmed by the power that the cable industry has acquired and historically exercised to dominate the multichannel video programming distribution marketplace. CFA is therefore critically concerned with the anticompetitive and anti-consumer effects of the proposed decree on the public interest.

[8] With members in 19 states and the District of Columbia, TVA is a grassroots, non-profit public interest consumer organization devoted, *inter alia*, to competition in multichannel television delivery. Founded in 1991, TVA was active in the legislative struggle which resulted in the 1992 Cable Act.

[9] U.S. Complaint at ¶39. See also House Committee on Energy and Commerce, H.R. Rep. No. 102-268, 102d Cong., 2d Sess. (1992) at 46 (citing RAND Study below and agreeing that "during the 1990's, high-powered DBS systems have greater

capability is meaningless, however, without the ability to obtain and offer quality programming to subscribers. As the Complaint acknowledges, "[a]n important component of successful commercial development of DBS is obtaining sufficient quantity of popular programming, such as that currently provided to cable subscribers." [10] The Justice Department concludes that one of the primary purposes for which the cable defendants formed Primestar Partners was to make it more difficult or more costly for any other DBS service to obtain popular cable programming. *Id.* at ¶44.

Such anticompetitive activities of the cable industry spurred Congress to enact the program access provisions of the 1992 Cable Act. In order to prevent vertically integrated cable companies from choking off the program access essential to a vigorously competitive multichannel video programming distribution industry and vital to ensuring greater viewer choice and price competition for consumers, Section 19 of the 1992 Cable Act creates a broad prohibition against unfair and discriminatory practices in the sale of satellite cable and satellite broadcast programming.[11] The avowed objective of the program access provisions is to increase the availability of new and existing competitors to cable in order to promote diversity, competition, and new technologies.[12] The FCC's Program Access Order implements Congressional intent in enacting Section 19. The FCC's new rules are grounded in Congress' express concern that "potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public." [13]

III. DirecTv and the Proposed Federal Consent Decree

Following the launch of the first high-power DBS satellite scheduled for December 1993, DirecTv will initiate the first such DBS service in the United States in early 1994, operating from an FCC-assigned orbital location of 101°. Later in 1994 when the second satellite is in operation, DirecTv will have the technology to provide more than 150 channels of video programming directly to households throughout the United States. NRTC will market and distribute approximately 20 channels of video programming to rural households.

Another separate DBS provider, United States Satellite Broadcasting Company, Inc. ("USSB"), will also begin operation of a high-power DBS system from the 101° orbital position in 1994, utilizing a five-transponder "payload" located on the first of HCG's two satellites to be co-located at 101°.[14] USSB will thus have the technological capability to offer approximately 30 channels of video programming to consumers. Although a number of other applications to operate DBS satellite have been granted by the FCC, because of the significant capital costs of start-up, DirecTv and USSB are the only non-cable owned high-power DBS services likely to be operational in this decade. Thus, for the period of time encompassed by the proposed consent decree, the developing high-power DBS industry will consist of a universe of two non-cable owned licensees at 101° and possibly Primestar leasing capacity from TCI-owned Tempo licensed at 119°.[15] DirecTv will possess the greater amount of channel capacity at 101°.

As a DBS provider, DirecTv has had first-hand experience attempting to negotiate contracts with vertically integrated programmers to obtain programming that is vital to any viable MVPD. As of late January 1993, DirecTv had been unable to announce any programming deals with vertically integrated programmers. After the 1992 Cable Act passed, the "log jam" began to break and DirecTv was able to enter into its first agreements with vertically integrated programmers. But, to this date, less than six months from launch of its first satellite, DirecTv has still been unable to reach an agreement directly with either of the cable defendants Time Warner and Viacom to allow DirecTv and NRTC access to some of the most popular and most essential cable video programming, such as HBO and Showtime.

Section IV.D of the proposed consent decree generally prohibits, with certain exceptions, Primestar and the cable defendants from entering into exclusive arrangements for existing national video programming.[16] This programming, listed on Exhibit A to the decree, includes HBO, Cinemax, Showtime, MTV, Nickelodeon, and VH-1—readily acknowledged as some of the most popular cable programming.[17] However, this provision contains an exception which singles out DBS for disparate treatment from all other competitors to cable. Section IV.D permits Primestar to enter into exclusive programming contracts if a competing DBS venture obtains any exclusive programming. This exception will allow the cable defendants to carve up the video programming market between themselves and the competing DBS venture of their choice.

As indicated above, DirecTv/NRTC and USSB will be the only competing DBS providers in operation during the decree period. DirecTv understands that, after passage of the 1992 Cable Act but before the filing of the proposed consent decree, USSB had already entered into arrangements with varying degrees of exclusivity for access to "premium cable" programming—HBO,

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potential for widespread competition with cable systems than do other multichannel video alternatives"); Leland Johnson and Deborah R. Castleman, Direct Broadcast Satellites: A Competitive Alternative to Cable Television, R-4047-MF/RL (Rand 1991) at 78 (concluding that widespread competition to cable is most likely to come from high-power DBS).

[10] U.S. Complaint at ¶41. See also 138 Cong. Rec. H6533 (daily ed. July 23, 1992) (remarks of Rep. Tauzin) ("It will do us little good to hope in vain for the advent of a DBS, direct broadcast satellite, industry or for the expansion of wireless cable in America as competition to [the cable] monopoly if none of it can get programming. Programming is the key.").

[11] Section 19(b) provides: "It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. 628.

[12] See, e.g., House Committee on Energy and Commerce, H.R. Rep. No. 102-862, 102d Cong., 2d Sess. (1992) at 53 ("The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable.")

[13] Program Access Order at ¶9.

[14] Rather than constructing and launching its own satellite, USSB entered into an agreement with HCG to purchase a payload of 5 transponders on one of the HCG satellites to be located at 101°. USSB will retain full operational control over its transponders, and will have sole discretion as to the content of programming transmitted over those five transponders. See United Satellite Broadcasting Co. and Hughes Communications Galaxy, Inc., 7 FCC Rcd at 7249. Thus, although operating from the same satellite, DirecTv and USSB are direct competitors.

[15] See In re: Applications of Tempo Satellite, Inc. for Minor Modification of Construction Permit for its Direct Broadcast Satellite System, FCC File No.____(filed July 26, 1993). See also "ICI Buying $400 Million in Satellites," Broadcasting & Cable, Aug. 2, 1993 at 45, "Primestar Buys Compression for $250M," Broadcasting & Cable, Aug. 9, 1993 at 49.

[16] Section IV.D provides, in pertinent part: "Primestar is enjoined from licensing to itself, and each defendant is enjoined from licensing to Primestar, any exclusive rights to any national video programming service existing as of May 1, 1992; provided, however, that if a competing DBS venture obtains any exclusive programming, Primestar may, upon sixty (60) days prior written notice to the Department, obtain a reasonably comparable amount of programming of a reasonably comparable type and quality on a reasonably comparable exclusive basis." *United States* v. *Primestar Partners, L.P.*, No. 93-CIV-3913, 58 FR 33,944, 33946 (June 23, 1993).

[17] 58 FR at 33,947, 33,948.

Showtime owned by the cable defendants.[19] Thus the unambiguous effect of Section IV.D is to ratify in a consent degree the cable defendants' pre-existing arrangements with USSB and to authorize Primestar and the cable defendants to lock up the remaining comparable programming services to the exclusion of the only other DBS competitor. This profoundly anticompetitive market structure conflicts with Congress' mandatory program access policy and the FCC's implementation of that policy.

IV. The Proposed Consent Decree Undermines the 1992 Cable Act and the FCC's Implementing Regulations

The regime created by the 1992 Cable Act and the implementing regulations was intended to promote the broadest possible competition to cable. The Congress and the FCC deemed DBS to be a particularly strong potential competitor. The introduction of competition would help drive down prices and improve service quality for consumers. Congress specifically sought to create as much competition as the marketplace would permit and severely limited exclusive contracts because it perceived them to operate contrary to that objective in the current marketplace.[19] Section 19 of the 1992 Cable Act, one of the most intensely debated and vigorously contested provisions of the law, creates a broad prohibition against vertically integrated cable companies engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent *any* multichannel video programming distributor [e.g., a DBS provider] from providing satellite cable programming * * * to subscribers or consumers."[20] Section 19(c)(2)(C) prohibits exclusive contracts by vertically integrated cable companies in non-cabled areas[21] and Section 19(c)(2)(D) prohibits exclusive contracts between vertically integrated cable programmers and a cable operator in cabled areas unless the FCC finds that they serve the public interest, applying statutorily mandated criteria.[22]

V. The Proposed Consent Decree is Not in the Public Interest and Should be Modified

"Antitrust relief should unfetter a market from anticompetitive conduct and 'pry open to competition a market that has been closed by defendants' illegal restraints.'" *Ford Motor Company* v. *United States*, 405 U.S. 562, 578, 579 (1972) (quoting *International Salt Co.* v. *United States*, 332 U.S. 392, 401 (1947)). Such relief should "break up or render impotent the monopoly power found to be in violation of the Act." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577 (1966). See also *United States* v. *United Shoe Machinery Co.*, 391 U.S. 244, 251 (1968). Therefore, an antitrust consent decree "must leave the defendant without the ability to resume the actions which constituted the antitrust violation in the first place. For these reasons, the decree should not be limited to past violations; it must also effectively foreclose the possibility that antitrust violations will occur or recur." *United States* v. *AT&T*, 552 F. Supp. 131, 150 (D.D.C. 1982) *aff'd Maryland* v. *United States*, 460 U.S. 1001 (1983).

The proposed Federal consent decree does not meet this test. It permits the cable defendants to continue to abuse their monopoly power to impede the development of the DBS industry through restricting access to vital programming. This clearly contravenes the stated purpose of the United States in proposing this decree and to the public policy established by the U.S. Congress in the 1992 Cable Act.

A. The Consent Decree Permits the Cable Defendants To Continue Their Anticompetitive Behavior With Regard to the DBS Industry

At the conclusion of its investigation into the anticompetitive efforts to restrict program access by the cable defendants, the Justice Department contemporaneously filed the instant lawsuit and the proposed consent decree to remedy "anticompetitive effects of the Primestar venture."[23] The goal of the proposed Federal decree was "to assure that Primestar does not restrain the availability of programming to multichannnel subscription television service competitors of the MSO defendants."[24] However, as described above, the proposed Federal consent inexplicably permits the cable defendants to continue the monopolistic control over access to vital cable programming, thereby further impeding the development of DBS. This runs contrary to the Justice Department's obligation to ensure that the proposed federal consent decree both remedies past violations of the antitrust laws as well as forecloses the possibility of recurrence.

As DirecTv/NRTC and USSB will provide the only non-cable owned high-power DBS service in the foreseeable future, the proposed decree permits the cable defendants to pursue a strategy of excluding a DBS competitor from access to vital programming. Section IV.D of this decree contemplates that the cable defendants will be permitted to sell at their choice an incomplete set of different critical programming on an exclusive basis to each of USSB or DirecTv/NRTC, thus denying each access to the full menu of key programming they must have to attract subscribers. The cable defendants would then face only "hobbled" competition from DBS competitors. Indeed, USSB may have already obtained access to premium programming—HBO and Showtime—on an exclusive basis. Without these and other widely viewed services, both USSB and DirecTv/NRTC will stand at a severe competitive disadvantage relative to cable and the consuming public will ultimately suffer the consequences.

If the decree is entered unmodified, consumers will be harmed in several ways. If the exclusive arrangements which Section IV.D of the proposed federal consent decree permits are allowed to stand, the result will probably be a DBS alternative to cable that is decidedly less appealing and less friendly to consumers than would otherwise be the case. Under this scenario, since each DBS operator would have exclusive rights to only certain cable programming services offered to it by the cable-owned programmers, a potential DBS customer likely would have to subscribe to both

[18] See USSB Opposition to Petition for Reconsideration of the NRTC, Program Access Order, MM Docket No. 92–265 at 5 (filed July 14, 1993) ("USSB has already entered into contracts for many of the programming services that will be available on its DBS service, including contracts for the cable programming services of HBO, Cinemax, Showtime, The Move Channel, FLIX, Comedy Central, MTV, VH–1, and Nickelodeon. Programming has been acquired by USSB with varying degrees of exclusivity to USSB vis-a-vis other DBS providers.").

[19] See Program Access Order at 26, ¶63 ("Congress has clearly placed a higher value on new competitive entry than on continuation of exclusive distribution practices that impede this entry.")

[20] *See* 47 U.S.C. 628 (emphasis added).

[21] The NRTC is currently seeking a clarification of the FCC's regulation implementing this prohibition. See Petition for Reconsideration of the NRTC, Program Access Order, MM Docket No. 92–265 (filed June 10, 1993). DirecTv is supporting the NRTC's petition in this regard. USSB and cable defendant Viacom are opposing this petition for reconsideration. See note, 15 *supra*; Viacom International Inc. Opposition to Petition for Reconsideration, Program Access Order, MM Docket No. 92–265 (filed July 14, 1993).

[22] 47 U.S.C. 628(c)(2)(C) and (c)(2)(D).

[23] *United States* v. *Primestar Partners, L.P.*, No. 93–CIV–3913, Competitive Impact Statement, 58 FR at 33,948 (June 23, 1993) ("Competitive Impact Statement").

[24] *Ibid.*

DirecTv/NRTC and USSB to derive a competitive service to one offered by the local cable operator. MMDS operator or others able to provide the full multichannel benefits. That would mean most customers would probably be precluded from one-stop shopping. They would have to deal with two DBS providers, two billing entities, and two customer service centers.[25] The net effect would be to create customer confusion in a new marketplace. The pricing of the programming to either USSB or DirecTv without competition between the two could be managed by the programmer to the detriment of the consumer. These factors combine to weaken materially DBS as a competitive technology to cable. To require a particularly promising industry segment to suffer such artificial disadvantage, without rational justification, is contrary to the public interest. The end result will be higher prices and reduced program diversity for customers.

B. The Proposed Decree Is Inconsistent With the Market Structure Mandated by Congress in the 1992 Cable Act

The scheme permitted by the proposed federal consent decree sets up on a potential conflict with Congressional and FCC action implementing the 1992 Cable Act. By permitting exclusive arrangements between vertically integrated programmers and *one* DBS provider, the proposed consent decree appears to violate the Act's general prohibition as well as contravene the prohibitions regarding exclusive contracts by permitting such programmers to preclude completely another DBS provider from offering the programming to its subscribers.[26] Moreover, Section IV.D. of the proposed consent decree appears to run afoul of the non-price discrimination provisions of Section 19(c)(2)(B) of the 1992 Cable Act because it condones a refusal to sell "to a particular distributor when the vendor has sold its programming to that distributor's competitor."[27]

Congress has established a clear public policy for the regulation of this industry in the 1992 Cable Act. The Justice Department claims that passage of the 1992 Cable Act provides "additional assurances that access to programming will not be unreasonably restricted by the defendants and others in the cable television industry."[28] However, it is not in the public interest for this antitrust consent decree to be used to codify a set of rules for this industry which not only fails to protect competition as fully as the regulatory scheme established by the Congress and the FCC, but at its core contains a presumption that is contrary to that regulatory scheme. By creating this parallel but inconsistent regime, the proposed consent decree will sow confusion about which cable industry practices are impermissible and will weaken Congressional and FCC efforts to combat this problem, all to the detriment of competitors to cable and the consuming public.

C. The States' Proposed Consent Decrees Contain Profoundly Anticompetitive Flaws

Moreover, the Justice Department wrongly relies upon the proposed consent decrees filed by the States' Attorneys General in the parallel case[29] to provide "additional assurance" of access to programming.[30] The States' proposed consent decrees are so grossly riddled with exceptions and exclusions that they are invidiously anticompetitive in their effects on all segments of the multichannel video marketplace.[31]

The States' proposed consent decrees single out the high-power DBS industry with laser-like precision to enshrine a market allocation scheme which allows the cable defendants to carve up the DBS market between themselves and *one* DBS provider using exclusive contracts to block access to programming by other DBS competitors. Moreover, the States' decrees permit the cable defendants to charge substantially higher than cable rates to a DBS competitor.

These practices are in direct contravention to the stated purpose of the state and federal investigation into the formation of the Primestar Partners and the conclusions which were reached. It is clear that the Justice Department's reliance upon the States' proposed consent decrees as a supplement to the remedies contained in the proposed federal decree is entirely misplaced.

D. The Proposed Decree Should Be Modified To Eliminate the Possibility of any Persuasive or Precedential Effect on Other Proceedings in Other Forums

One additional significant danger that could result from the decree being entered without modification is that the cable defendants would argue in other forums that the decree reflects the views of the Justice Department and the Court on the appropriate structure of the multichannel video programming distribution market and competition principles. This is not a mere hypothetical issue. Indeed, USSB is currently citing with impunity the consent decrees filed by the States' Attorneys General for just such a proposition.[32] The FCC is in the midst of considering reconsideration petitions in its Program Access proceedings and thus the precise scope and operation of the rules are not yet finalized.

Moreover, even after the proceedings have been completed, certain crucial aspects of the rules with respect to exclusionary practices may call for an evaluation of a particular cable MSO's program access obligation under an antitrust standard.[33] A high-power DBS provider seeking to enforce its rights could be faced with a claim by the cable industry that the DBS industry structure sanctioned by the decree is dispositive.

Accordingly, the Justice Department should clarify that the proposed consent

[25] In addition, DirecTV understands that the exclusive arrangements reached between USSB and Viacom and Time Warner may be at rates significantly higher than those prices which comparable cable providers must pay and far higher than the non-discriminatory prices envisioned by the 1992 Cable Act. Because this is the case, consumers would presumably be forced to pay artificially high prices for such programming delivered by DBS.

[26] See discussion in *supra* at 11.

[27] See Program Access Order at 54, ¶116. The FCC construes non-price discrimination as falling within Section 19(c) of the Act. *Id.* The FCC has used the example of a vertically integrated cable programming supplier's "unreasonable refusal to sell" programming "to a class of distributors, or *refusing to initiate discussions with a particular distributor when the vendor has sold its programming to the distributor's competitor.*" *Id.* (emphasis added). Courts generally show great deference to the interpretation given a statute by the agency charged with its administration, particularly when the agency construction was rendered contemporaneously with the statutes' passage. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

[28] Competitive Impact Statement, 58 FR at 33,950.

[29] The States' Attorneys General filed three separate decrees: the Primestar Decree, the Viacom Decree, and the Liberty Media Agreement.

[30] Competitive Impact Statement, 58 FR at 33,950.

[31] See Appendix A for further discussion of the fatal flaws contained in the States' proposed consent decrees.

[32] See, USSB Opposition to Petition for Reconsideration of the NRTC, Program Access Order, MM Docket No. 92–265 at 9 (filed July 14, 1993) ("It should be noted that the proposed antitrust consent decree in the pending *Primestar Partners* suit brought by 40 states against Primestar Partners, , L.P. and 19 other defendants recognizes that high-power DBS providers at 101° orbital position may enter into exclusive contracts with cable program providers. It is unlikely that 40 states would have agreed to the provisions that recognize such exclusive contracts if there was any question as to whether the Cable Act prohibited such exclusive arrangements.")

[33] For example, with regard to its rules on non-price discrimination, the FCC stated: "Our implementation of the non-price discrimination aspects of Section 628(c) concerning unreasonable refusals to sell or similar exclusionary practices will draw upon certain antitrust precedents to define 'unreasonable' as well as other illegal principles, and will be addressed individually through the enforcement process." Program Access Order at 16, ¶41.

decree does not reflect the Department's views concerning the program access obligations of the cable defendants under any other legal authority.

VI. Conclusion

Section IV.D is inconsistent with the Justice Department's stated goal in proposing this consent decree. This provision will permit the cable defendants to continue to exercise their market power over access to programming to impede the development of the DBS industry. The resulting reduced level of competition in the multichannel video programming distribution marketplace will mean fewer programming choices and higher prices for consumers. The inclusion of Section IV.D as currently drafted ensures that the proposed consent decree will be unable to meet its public interest obligation. Therefore, the proposed consent decree should be modified to eliminate the clause beginning with word "provided" and the parenthetical information from Section IV.D.

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JOINT AMICUS CURIAE MEMORANDUM OF LAW OF DirecTv, INC.. NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE, CONSUMER FEDERATION OF AMERICA AND TELEVISION VIEWERS OF AMERICA, INC.

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I. Preliminary Statement

This case arises from the cable industry's monopolization of the multichannel video distribution market. By engaging in widespread unfair and discriminatory practices against emerging Multichannel Video Programming Distributors ("MVPDs") [1] the cable industry has denied to consumers the benefits of competition

[1] MVPDs are entities "engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming." In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, MM Docket No. 92-265 (released April 30, 1993), at 3, ¶ 6 n.3 ("Program Access Order."). For the convenience of the Court, the full text of the Program Access Order appears at Appendix 1.

and the ability to receive a wide variety of programming from diverse sources.

On June 9, 1993, forty States and the Justice Department filed proposed consent decrees (the "Decrees")[2] in this Court to settle antitrust lawsuits which sought to "enjoin, restrain and remedy monopolistic and anticompetitive conduct" within the multichannel video distribution industry.[3] The lawsuits arise from an antitrust investigation into the formation of Primestar Partners, L.P. ("Primestar"), a medium-power direct broadcast satellite ("DBS") multichannel pay television service[4] founded by seven of the nation's ten largest cable system operators, also known as multiple system operators ("MSOs").

Some of these cable MSOs possess substantial ownership interests in the leading suppliers of video programming, such as HBO, Showtime, Cinemax and MTV. Both the States and the United States alleged, *inter alia*, that Primestar and its cable owners conspired to delay, hinder and preempt entry by other firms into the multichannel video distribution market by restricting access to the programming that certain of these defendants control. Thus, the States' Complaint alleges that the MSO defendants "monopolized, attempted to monopolize, combined and conspired to monopolize and restrain trade in the delivery of multichannel subscription television programming to consumers." Complaint at ¶ 1.[5] The Complaint alleges that they designed and structured their DBS venture in order to reduce the potential for direct competition with the defendant MSOs' cable systems and undermine the ability of any cable competitive DBS service to develop."[6]

Pursuant to an Order dated June 17, 1993, this Court granted *amici curiae* leave to object to the proposed consent judgments. DirecTv, Inc. ("DirecTv"),[7] the National Rural Telecommunications Cooperative ("NRTC")[8] the Consumer Federation of America ("CFA")[9] and the Television Viewers of America, Inc. ("TVA")[10] have joined in objecting to the proposed Decrees. All *amici curiae* herein have a direct interest in furthering both competition and consumer protection in the multichannel video distribution industry.

The Decrees should be rejected, or their approval conditioned on their modification, for two reasons. First, although the Decrees are a significant part of the government's efforts to structure the MVPD industry, they neither benefit consumers nor protect competition. The Decrees compromise the MSO defendants' purported obligations to provide fair, reasonable and nondiscriminatory access to programming with a host of exceptions that benefit and entrench the MSOs. The advantages thus conferred on the MSOs will make it very difficult for any MVPD to compete with them. Second, the Decrees undercut the pro-competitive policies of the government's companion effort to structure the MVPD industry, the Cable Television Consumer Protection and Competition Act of 1992, Public Law 102–385, 102d Cong., 106 Stat. 1460 (Oct. 5, 1992) (the "Act"). The Decrees provide for far less competition than mandated by the Act, and position the cable industry to argue that the Act's competition requirements can and should be construed in accordance with the narrow provisions of the Decrees. It is not in the public interest for antitrust decrees to be used to structure an industry anticompetitively, particularly if they would impose a scheme that contravenes the pro-competitive statutory and regulatory structure that governs the industry.

II. The Court's Power To Reject the Proposed Consent Decrees, or To Require Modification as a Condition of Approval, if They Fail To Serve the Public Interest

The antitrust actions from which the Decrees arise were brought by the State Attorneys General as *parens patriae* pursuant to the Clayton Act. See *Complaint* ¶¶ 2, 6. As such, they cannot be settled "without the approval of the court." 15 U.S.C.§ 15c(c).[11]

In reviewing a proposed settlement of a *parens patriae* action, courts examine the proposed decrees to ensure that they are "fair, reasonable and adequate."[12] This inquiry involves the court in reviewing whether the proposed settlement "violates public policy," *Panasonic*, 1989–1 Trade Cas. (CCH) ¶ 68,613, at 61,244 (citing *Dairylea Cooperative*, 547 F. Supp. at 307–08),

[2] Three Decrees were filed in the actions brought by the States: (1) The Primestar Decree; (2) the Viacom Decree; and (3) the Liberty Media Decree. The Liberty Media Decree is actually styled as an "Agreement." It is unclear whether it has been or will be submitted to this Court. In any event, it is an integral part of the settlement "package" and its contents are highly relevant. The operation of the three Decrees is explained in more detail below.

[3] *State of New York* v. *Primestar Partners, L.P. et al., Complaint*, 93 Civ. No. 3868 (S.D.N.Y. June 9, 1993), at ¶ 1.

[4] Medium-power DBS service utilizes a medium-power satellite, which can transmit to a dish between 2.5–5 feet in diameter and can be installed more cheaply than larger television receive-only ("TVRO") dishes. Medium power DBS was seen as a potential advance over lower power TVRO service in terms of being more competitive with cable. Primestar is presently the only operating medium-power DBS service. *See United States* v. *Primestar Partners, L.P. et al.*, No. 93-Civ-3913, Competitive Impact Statement, 58 Fed. Reg. 33,948 (June 23, 1993), ("Competitive Impact Statement").

[5] The suit alleges that cable companies exercised their monopoly power to deny alternative MVPDs access to programming outright, or made it available only at discriminatory prices. Complaint at ¶¶ 40, 43–44, 50. The suit further alleges that the cable defendants formed the Primestar partnership, bought rights to a communications satellite, and set up a sham DBS system in an effort to "suppress and eliminate DBS competition in the delivery of multichannel subscription television programming," Complaint at ¶ 52.

[6] Complaint at ¶ 58.

[7] DirecTv will launch, in December of this year, the first high-powered U.S. DBS satellite, and shortly thereafter will introduce to American consumers the first truly competitive service to cable television. As a high-power DBS provider, DirecTv will provide approximately one hundred and fifty channels of high quality subscription and pay-per-view video programming to the public.

[8] NRTC is a non-profit corporation, owned and controlled by 521 rural electric cooperatives and 231 rural telephone systems located throughout 49 states. Through the use of satellite distribution technology, NRTC is committed to extending the benefits of information, education and entertainment programming to rural America on an affordable basis. On April 10, 1992, NRTC signed a DBS Distribution Agreement with HCG to provide DBS services to rural subscribers across the country. Under the DBS Distribution Agreement, HCG provides NRTC, its members and affiliated companies the satellite capacity and other necessary services to market and distribute 20 channels of popular cable programming services to rural households equipped with 18" DBS receiving antennas. Most of the programming services to be offered are owned or controlled by cable companies.

[9] CFA is the nation's largest consumer advocacy group, composed of more than 240 state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power, and cooperative organizations, with more than 50 million individual members. CFA was the lead representative of the public in the legislative deliberations that led to the 1992 Cable Act. The millions of television viewers and cable consumers who constitute CFA's affiliates' members have a "paramount" First Amendment right to receive a variety of information from diverse sources, *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 390 (1969), and have been undeniably harmed by the power that the cable industry has acquired and historically exercised to dominate the MVPD marketplace. CFA is therefore critically concerned with the anticompetitive and anti-consumer effects of the proposed Decrees on the public interest.

[10] With members in 19 states and the District of Columbia, Television Viewers of America is a grassroots, non-profit, public interest consumer organization devoted, *inter alia*, to competition in multi-channel television delivery. Founded in 1991, TVA was active in the legislative struggle which resulted in the Cable Television Consumer Protection and Competition Act of 1992.

[11] Section 15c's requirement of court approval applies to actions for injunctive relief as well as to damage actions. See *In re Montgomery County Real Estate Antitrust Litigation*, 452 F. Supp. 54, 57–60 (D. MD. 1978).

[12] See *States of New York and Maryland, et al.* v. *Nintendo of America, Inc.*, 775 F. Supp. 676, 680 (S.D.N.Y. 1991); *In re Panasonic Consumer Electronics Products Antitrust Litigation*, 1989–1 Trade Cas. (CCH) ¶ 68,613, at 61,243 (S.D.N.Y. 1989); *State of New York* v. *Dairylea Cooperative, Inc.*, 547 F. Supp. 306, 307–08 (S.D.N.Y. 1982).

i.e., whether the public interest in competition has been addressed fairly and adequately by the proposed settlement, and whether competition may be adversely affected by the settlement. See *e.g.*, *Dairylea Cooperative*, 547 F. Supp. at 307–08; see also Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. at 315.[13] If the interests of the public are not served by the terms of the settlement, the Court may exercise its discretion to reject or to approve the proposed decrees conditionally subject to certain modifications.[14]

III. The MVPD and DBS Industries, the Program Access Provisions of the Cable Act and an Overview of the Proposed Decrees

A. The MVPD and DBS Industries

MVPDs are entities "engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming." [15] Cable television operators, who transmit programming via wires directly to the home, have been the predominant type of MVPD. As Congress found in passing the Act:

> There has been a substantial increase in the penetration of cable television systems over the past decade. Nearly 56,000,000 households, over 69 percent of the households with televisions, subscribe to cable television, and this percentage is almost certain to increase. As a result of this growth, the cable television industry has become a dominant nationwide medium.[16]

Similarly, the Complaint points out that cable has replaced over-the-air broadcasting as "the nation's major television distribution medium," and notes that "approximately 3,660,000 households subscribe to a cable service" in New York. Complaint at ¶ 33.

Congress has expressly sought to encourage competition to cable, particularly because cable service is typically provided by only one operator in each local community.[17] Congress was concerned by rising cable rates, poor customer service and the general implications for "the flow of news, information and entertainment to the American people" arising from cable's market power.[18] It recognized the public importance of encouraging emerging MVPD competitors to cable, because "[f]air competition in the delivery of television programming should foster the greatest possible choice of programming and should result in lower prices for consumers."[19] Thus, a principal purpose of the legislation was to promote MVPDs using "alternative and new technologies."[20] Such alternative distribution media include: Multichannel Multipoint Distribution Service ("MMDS" or "Wireless Cable"), Satellite Master Antenna Television systems ("SMATV"), Television Receive-Only ("TVRO") satellite programming services [21] and DBS.[22] These alternative distribution media are in their commercial infancy. Each has its distinct characteristics which offer consumers a choice, but as yet remain untested in the mass market. Without access to programming, however, none of the MVPD competitors to cable using these new media will emerge as a strong and robust challenger.

Of all of the emerging MVPD alternatives technologies, high-power DBS has long been recognized as perhaps the most formidable nationwide potential medium capable of competing with cable television.[23] High-power DBS service involves the provision of multichannel video programming service to "dinner plate"-size home dishes approximately eighteen inches in diameter, via satellites operating at high-power levels in the higher frequency direct broadcast portion of the Ku Band.[24]

DirecTv and Hughes Communications Galaxy, Inc. ("HCG") are sister subsidiaries of Hughes Communications, Inc. ("HCI"). HCG has been licensed by the Federal Communications Commission ("FCC") to provide high-power DBS service.[25]

DirecTv is the DBS operating, customer service and programming acquisition arm of the HCI family. HRTC has entered into a DBS Distribution Agreement with HCG to provide services to rural subscribers across the country.[26]

Following the launch of the first high-power DBS satellite scheduled for December 1993, DirecTv will initiate the first such DBS service in the United States in early 1994, operating from an FCC-assigned orbital location of 101°. With its full complement of satellites in orbit, DirecTv will have the technology to provide more than 150 channels of video programming directly to households throughout the United States. NRTC will market and distribute approximately 20 channels of video programming to rural households.

Another separate DBS provider, United States Satellite Broadcasting Company, Inc. ("USSB"), will also begin operation of a high-power DBS system from the 101° orbital position in 1994, utilizing a five-transponder "payload" located on the first of HCG's two satellites to be co-located at 101°.[27] USSB will thus have the technological capability to offer approximately 30

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[13] The Court's public policy inquiry is particularly important where, as here, the interests affected by the proposed decrees "are far broader than those of the particular parties in a particular lawsuit." *Patterson* v. *Newspaper and Mail Deliverers' Union*, 384 F. Supp. 585, 588 (S.D.N.Y. 1974). In such cases, where significant public interests are at stake, the Court must "determine whether the decree adequately protects the public interest and is in accord with the dictates of Congress." *United States* v. *Hooker Chemical and Plastics Corp.*, 607 F. Supp. 1052, 1057 (D.C.N.Y. 1985); see *United States* v. *Ketchikan Pulp Co.*, 430 F. Supp. 83, 86 (D. Alaska 1977) (same, where "court is asked to enter a judgment which clearly will have an effect on the public").

[14] See, *e.g.*, *Dairylea Cooperative*, 547 F. Supp. at 307–08; *see also United States* v. *GTE Corp.*, 603 F. Supp. 730, 753 (D.D.C. 1984); *United States* v. *American Telephone and Telegraph Co.*, 552 F. Supp. 131, 216 (D.D.C. 1982); *United States* v. *Associated Milk Producers, Inc.*, 394 F. Supp. 29, 40 (W.D. Mo. 1975).

[15] *Program Access Order* at 3, ¶ 6 n.3.

[16] The Act, § 2(a)(3).

[17] See *id.* at (a)(2).

[18] House Committee on Energy and Commerce, H.R. Rep. No. 102–268, 102d Cong., 2d Sess. (1992) ("House Report") at 26.

[19] Act § 2(a) H.R. Rep. No. 102–862, House Comm. on Energy & Commerce, 102d Cong., 2d Sess. (1992) ("Conference Report"), at 53; see Act, § 2(a)(6) ("There is a substantial governmental and First Amendment interest in promoting a diversity of views through multiple technology media."); § 2(b)(1) (stating that it is the policy of Congress to "promote the availability to the public of a diversity of views through cable television and other distribution media").

[20] House Report at 27.

[21] Currently, using C-band technology, NRTC and its members provide various packages of satellite-delivered programming, called "Rural TV®," to more than 70,000 TVRO subscribers. C-band technology requires the use of six to twelve foot receiving antennas.

[22] See Competitive Impact Statement at 33,948 for a description of these MVPD services; see also 1990 Cable Report, 5 FCC Rcd 4962, 5013 (1990).

[23] See Competitive Impact Statement at 33948 (observing that because " of its small dish size and lower installation cost, high-power DBS is considered to be a potential competitive threat to cable"); House Report at 46 (citing RAND Study below and agreeing that "during the 1990's, high-powered DBS systems have greater potential for widespread competition with cable systems than do other multichannel video alternatives"); Leland Johnson and Deborah R. Castleman, Direct Broadcast Satellites: A Competitive Alternative to Cable Television, R–4047–MF/RL (Rand 1991), at 78 (concluding that widespread competition to cable is most likely to come from high-power DBS) (included as Appendix 2).

[24] See Competitive Impact Statement at 33,948.

[25] See United States Satellite Broadcasting Co. and Hughes Communications Galaxy, Inc., 7 FCC Rcd 7247 (1992).

[26] *See* supra note 8.

[27] Rather than constructing and launching its own satellite, USSB entered into an agreement with HCG to purchase a payload of 5 transponders on one of the HCG satellites to be located at 101°. USSB will retain full operational control over its transponders, and will have sole discretion as to the content of programming transmitted over those five transponders. See United Satellite Broadcasting Co. and Hughes Communications Galaxy, Inc., 7 FCC Rcd. at 7249. Thus, although operating from the same satellite, DirecTv and USSB are direct competitors.

channels of video programming to consumers. Although a number of other applications to operate DBS satellites have been granted by the FCC, only DirecTv and USSB are licensed to provide operational high-power DBS service in this decade. Thus, for the period of time encompassed by the Decrees, the developing high-power DBS industry will consist of a universe of two licensees, with DirecTv possessing the greater amount of channel capacity.[28]

Although high-power DBS may be the most promising nationwide potential technological competitor to cable television, technological capability is meaningless without the ability to obtain and offer quality programming to subscribers. Thus, in 1990 the FCC observed that DBS "could become a strong competitor [to cable] by the mid-1990s if .*.*. DBS can obtain reasonable access to programming."[29] Similarly, the Complaint acknowledges:

Programming is the lifeblood of the multichannel subscription television industry. A competitor to cable television must be able to offer a substantial number of programming options to consumers. Beyond mere possession of programming, a competitor must have the ability to deliver particular programming which consumers have come to associate with multichannel subscription television (*e.g.*, CNN, ESPN, MTV, HBO, Nickelodeon, Showtime, Cinemax, The Disney Channel, TNT and USA).[30]

In this regard, most "marquee" multichannel subscription programming is supplied by companies that are vertically integrated with cable MSOs.[31] Historically, these vertically integrated programmers have been either flatly unwilling to deal with alternative MVPD cable competitors, or have done so only at highly discriminatory rates, terms and conditions.[32]

As a DBS provider, DirecTv has had first-hand experience attempting to negotiate contracts with vertically integrated programmers to obtain programming that is vital to any viable MVPD business. As of late January 1993, DirecTv had been unable to announce any programming deals with vertically integrated programmers. After the Act was passed, the "log jam" began to break and DirecTv was able to enter into its first agreements with vertically integrated programmers. But, to this date, less than six months from launch of its first satellite, DirecTv has still been unable to reach an agreement directly with either of defendants Time Warner and Viacom to allow DirecTv and NRTC access to two of the most popular and most essential examples of multichannel programming, HBO and Showtime.

The cable industry also sought to hinder DBS providers' access to programming in another way as well. As alleged by both the plaintiff States and the Department of Justice, the MSOs formed Primestar in response to the "threat of cable-competitive entry into medium or high-power DBS,"[33] and in order to "suppress and eliminate DBS competition in the delivery of multichannel subscription television programming to consumers."[34] As further alleged by the plaintiff States, defendants "designed and structured their DBS venture in order to reduce the potential for direct competition" with their cable systems, in order to "undermine the ability of any cable competitive DBS service to develop."[35]

B. The Legislative and Regulatory Effort To Combat Cable's Anti-Competitive Effort To Dominate The MVPD Industry

Congress enacted the Cable Act in order to prevent the vertically integrated cable companies from choking off the program access that is essential to a pro-competitive MVPD industry structure and vital to ensuring and encouraging program diversity. First, Section 19 of the Act, 47 U.S.C. 628, expressly prohibits unfair and discriminatory practices in the sale of satellite cable and satellite broadcast programming. The avowed objective of Section 628's "program access" provisions is to increase the availability of programming to new and existing alternative MVPDs in order to promote diversity and competition.[36] The FCC's regulations contained in the Program Access Order implement Congressional intent in enacting Section 628.[37] The FCC's new rules are grounded in Congress's express concern that "potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public."[38]

C. Overview of the Proposed Consent Decrees

Both the Antitrust Division of the Justice Department and the Attorneys General of a large number of States also pursued a coordinated investigation into the cable MSOs' anticompetitive efforts to restrict program access. The State investigation concluded that alternative MVPDs "have been thwarted by the cable companies which conspired to prevent their competitors from obtaining good programming."[39] The instant lawsuit, arising from the investigation, was accordingly brought

[28] While high-power DBS is commercially attractive, there are only two orbital locations other than 101° that can offer optimum coverage of the entire continental United States. Moreover, the capital commitment required to construct, launch and operate a DBS satellite is quite extensive. These factors principally account for the limited number of competitors in this segment of the MVPD industry.

[29] *1990 Cable Report* at 5020 (emphasis supplied).

[30] Complaint at ¶ 42; see also 138 Cong. Rec. H6533 (daily ed. July 23, 1992) (remarks of Rep. Tauzin) ("It will do us little good to hope in vail for the advent of a DBS, direct broadcast satellite, industry or for the expansion of wireless cable in America as competition to [the cable] monopoly if none of it can get programming. Programming is the key.").

[31] The House Report notes that, according to the National Cable Television Association ("NCTA"), 39 of the 68 nationally delivered cable networks have some ownership affiliation with cable operators. House Report at 41. Two MSO defendants in this proceeding, for example, Time Warner and Viacom, supply such "showcase" services as Home Box Office, Cinemax, Showtime, The Movie Channel, MTV, Nickelodeon, Comedy Channel, Entertainment Television, among others. Competitive Impact Statement at 33,948; see Complaint at ¶ 44. TCI, the nation's largest MSO, owned financial interests in American Movie Classics, the Discovery Channel, QVC Networks, Inc., and Encore. Senate Comm. on Commerce, Science & Transportation, 102d Cong., 1st Sess. (1991) at 25 ("Senate Report"). These interests were subsequently transferred to its successor "spin off" corporation, Liberty Media. Liberty Media Decree at 2.

[32] See 1992 Cable Act § 2(a)(5) (finding that the cable industry has become vertically integrated; cable operators and cable programmers often have common ownership * * * vertically integrated program suppliers * * * have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies"); Program Access Order at 4, ¶ 9 (observing that "in enacting the program access provisions of the Cable Act, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public"); see also 1990 Cable Report, 5 FCC Rcd. at 5031 ("It seems fairly clear from the above facts that vertically integrated MSOs have the ability to limit competition to particular programming services."); *Id.* at 5015 ("The record shows that programming is not available on the same terms and conditions to wireless cable operators as it is to traditional cable operators.").

[33] Competitive Impact Statement at 33,949, see Complaint at ¶¶ 51–62.

[34] Complaint at ¶ 52.

[35] Complaint at ¶ 58.

[36] See e.g., Conference Report at 93 ("The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable").

[37] Significantly, however, the battle with respect to the FCC's program access regulations is not over. On June 10, 1993, nine petitions for reconsideration of the program access rules were filed at the FCC, including petitions by Liberty Media, Time Warner and Viacom. See 58 FR 34,800 (June 23, 1993) (providing public notice of nine petitions for reconsideration of the FCC's program access rules).

[38] Program Access Order at 4, ¶ 9.

[39] Abrams Announces Settlement With Cable Television Industry, Press Release (June 9, 1993) (included as Appendix 3).

to obtain broad equitable relief, including an order that the defendant MSOs provide program access or reasonable terms to all MVPD competitors. Complaint at Prayer for Relief ¶ D.

Nevertheless, the parties now seek approval of three separate Decrees with purported access protections so discriminatory as to certain MVPD industry segments, and so riddled with exceptions, that they are anticompetitive. These provisions are also fundamentally at odds with certain key Cable Act provisions protecting program access. The Decrees are described briefly below.

1. The Primestar Decree

The Primestar Decree constitutes the heart of this proceeding. The "Primestar Partner Services" listed on Exhibit B to the decree include HBO, The Discovery Channel, The Learning Channel, E! Entertainment Television and Cinemax.[40] The Primestar Decree generally requires the MSOs to provide these Primestar Partner Services to all MVPDs, subject to certain exceptions. In particular, subsections IV.A.1.(a)–(f) of the Primestar Decree impose upon the Primestar defendants certain obligations to deal with DBS and MMDS providers. These provisions appear to be generally consistent with (though much less pro-competitive than) the provisions of the Act and its regulations.[41]

Section IV.A.1.(g), however, singles out high-power DBS for especially unfavorable treatment. Subsection (g) "supersedes" the preceding protections of (a)–(f) by providing that the Primestar Partners need not deal with more than one high-power DBS provider at the 101° orbital location.[42] As indicated above, DirecTv/NRTC and USSB will be the only high-power DBS providers in operation during the Decree period, and will both operate at the 101° location. Thus, Subsection (g) expressly allows each Primestar Partner to refuse to deal with at least 50% of that industry segment.[43]

In addition, Section IV.A.1.(g) of the Primestar Decree states that any agreements made at orbital locations other 101° shall be made on terms which shall in no case be less favorable than the price or terms agreed to between the Primestar Partners and the first DBS provider at the 101° location. This is the only example in the Decree of rates *not* defined by reference to the prices and business terms offered to a cable operator serving a comparable number of subscribers. It is set instead by reference to whatever separate rate the MSOs are allowed to charge to high-power DBS providers. In other words, all competitors get access at cable rates—except high-power DBS providers, who get it at a separate high-power DBS rate, if they get it at all.[44]

The impact of this provision could well make it extraordinarily difficult for the high-power DBS industry to compete. DirecTv understands that, after the passage of the Act but before the filing of the Decree, USSB had already entered into arrangements for access to HBO, Showtime and MTV and other related services. DirecTv also understands that these agreements may have been entered into at rates far higher than those comparable cable providers must pay. Thus, the Primestar Decree for high-power DBS sets up a discriminatory market allocation scheme that allows for rates significantly higher than cable rates, and a market structure significantly at odds with Congress' policy and the FCC's implementation of that policy.[45]

2. The Viacom Decree

The proposed Viacom Decree, while organized and worded slightly differently, is substantially similar to the Primestar Decree. Like the Primestar Partners, Viacom controls several critical programming services: Showtime, The Movie Channel, MTV, VH–1 and Nickelodeon.[46] Section IV.A.1.(j) of the Viacom Decree essentially mirrors Section IV.A.1.(g) of the Primestar Decree, described above.

3. The Liberty Media Decree

The simplest of the Decrees is the proposed settlement between the plaintiff States and Liberty Media Corporation. Liberty Media is an owner of both cable programming and operating interests, with substantial ownership interests in Encore (90%) and American Movie Classics (50%), two premium movie channels, as well as minority interests in such services as The Family Channel, QVC Network, Black Entertainment Television ("BET"), The Jukebox Network, and Court TV.[47]

While the Liberty Media Decree does not contain the anticompetitive market allocation restrictions set forth in the other Decrees, the Liberty Media Decree's purported access protections are in fact meaningless, because the Decree expressly exempts from its coverage all of Liberty Media's prime services, along with virtually any others that might be remotely valuable to an MVPD cable competitor.[48] The Liberty Media Decree thereby reveals that the Primestar partners are willing to build legitimately pro-competitive terms into a settlement only if that settlement otherwise excludes any meaningful grant of program access from its scope.

IV. The Reasons the Proposed Consent Decrees Are Not in the Public Interest and Should Not Be Approved

A. The Consent Decrees Sanction an Anticompetitive and Discriminatory Scheme for High-Power DBS

As shown above, the two principal decrees overtly sanction an anticompetitive arrangement permitting access exclusion only with respect to high-power DBS. There is no legal or public policy rationale for singling DBS out in this fashion. Moreover, sanctioning such an arrangement will retard significantly the development of

[40] See Primestar Consent Decree at IV.A.1.(a).

[41] For programming services in which they do not have a controlling interest, the Primestar partners are obligated under Section IV.B. of the Decree not to "seek or support" conduct or arrangements inconsistent with the protections set forth in IV.A., were such services subject to them. These "non-controlled programming services" are listed on Exhibit D to the Decree.

[42] Although there are certain conditions that must be met in order to trigger Subsection (g)'s program access exception for DBS, see Primestar Consent Decree, Section IV A.1.(g)(i)–(iii), there is no realistic prospect that these conditions will not be met.

[43] Subsection (g) also allows for the similar exclusion of high-power DBS operators at other orbital locations, should any ever materialize, if the Primestar Partners deal with at least one provider (of their choosing) at that location.

[44] Significantly, the Liberty Media Decree does not single out DBS in this manner, and provides that the price and terms offered to individual DBS providers shall be compared against those offered to comparably sized cable operators. Liberty Media Decree at 5, ¶2(a)(ii). The reason is that the Liberty Media Decree does not cover any competitively significant programming. See infra at 15.

[45] The last sentence of IV.A.1.(g) of the Primestar Decree contains a so-called "savings clause," which purports to re-institute the access protections in (a)–(f) "for all DBS providers" if the Act or its implementing regulations prohibit the scheme set forth in (g), *i.e.*, prohibit exclusive contracts with high-power DBS providers or require that access be made available to all high-power DBS providers. As argued *infra*, this clause only highlights the Decree's anticompetitive effects on DBS and the MVPD industry.

[46] See Viacom Decree at IV.A.1.(a).

[47] See Senate Report at 25; Liberty Media Consent Decree at Exhibits B and C.

[48] The protections of the Liberty Media Decree apply only to "Wholly Owned Existing Services," which consist of three minor programming services listed on Exhibit B to the Decree. Liberty Media's competitively significant programming is either specifically exempted from the decree in the definition of "Existing Services," or is defined as a "Partially Owned Existing Service" listed on Exhibit C. As to these latter services, the decree merely obligates Liberty Media not to seek or support any conduct or arrangements inconsistent with the access protections for "Wholly Owned Existing Services," but does not obligate Liberty Media to provide or even to facilitate access to such programming, even though it owns as much as 50% of some of these services.

the service to the ultimate detriment of MVPD competition.

As DirecTv/NRTC and USSB will provide the only high-power DBS service in the foreseeable future, the proposed decrees permit the MSOs to pursue a strategy of excluding over 50% of that key industry segment (and probably the potentially strongest competitor) from access to vital programming. Indeed, USSB has already obtained access to the premium programming that "consumers have come to associate with multichannel subscription television"[49] HBO and Showtime. Without these services, DirecTv/NRTC would stand at a severe competitive disadvantage relative to cable.

The Decrees would also permit the defendants to sell an incomplete set of different critical programming on an exclusive basis to each of USSB or DirectTv, thus potentially denying high-power DBS providers at 101° access to the full menu of key programming they must have to attract subscribers. The cable monopolies would then face only "hobbled" DBS competitors.

The Decrees also fail to protect access to programming for DBS competitors to cable at reasonably competitive prices. By enshrining possibly higher than cable rate deals with MSO defendants as the benchmark for the reasonable price and business terms to be offered DBS providers operating from other orbital locations, Section IV.A.1.9(g) of the Primestar Decree and Section IV.A.1.(j) of the Viacom Decree effectively permit vertically integrated programmers to charge high-power DBS providers higher rates than they charge to comparably situated cable providers. There is neither a pro-competitive rationale for such a pricing differential, nor a principled justification for such a different benchmark for high-power DBS.

This is not a case that can be dismissed merely by invoking the litany that "the antitrust law protects competition and not competitors." The Decrees permit the defendant MSOs to refuse to deal at all with at least 50% of the high-power DBS industry, or to deny either high-power DBS provider a full and adequate menu of programming. By these means, the Decrees permit the defendant MSOs to cripple half or all of the high-power DBS segment of the MVPD industry. No reasonable basis exists for singling out potentially the strongest nationwide competitor to cable for such treatment. Moreover, if only a particular competitor and not competition is at stake, why are the MSO defendants so anxious to exclude high-power DBS providers from the protective scope of the Decrees?

If the Decrees are entered in their current form, high-power DBS can expect to be disadvantaged in crippling ways. Unlike other competitors, a high-power DBS competitor will be unable to enforce a right to program access through the simple mechanism of a Decree. It will be forced instead to rely on a comparatively complicated and expensive antitrust proceeding to enforce such rights, or to utilize FCC processes, the final contours of which are not yet clear. Moreover, the knowledge that all in the industry will have of any high-power DBS provider's inability to enforce a right to access through the Decrees—or to obtain that access at cable competitive prices—will inevitably weaken the high-power DBS provider's leverage as compared to other actors in the industry. It will be harder for the high-power DBS providers to negotiate their program access contracts, and for such providers to obtain access at reasonable rates.

To require a particularly promising industry segment to suffer such artificial disadvantage, without justification, is contrary to the public interest.[50] The end-result will likely be higher prices and reduced program diversity for customers.

B. The Proposed Decrees Are Utterly Inconsistent With the Market Structure Mandated by Congress in the Act

The Decrees do not stand simply as conventional settlements of private antitrust actions. First, the lawsuits by the States were one of two key steps in government's efforts to regulate the MVPD industry. The suits accordingly purport to address fundamental questions concerning what constitutes anticompetitive, unfair and discriminatory conduct in the MVPD industry. Second, a *parens patriae* case is by definition of public importance. See In re Montgomery County Real Estate Antitrust Litigation, 452 F. Supp. 54, 60 (D. Md. 1978).

The Decrees themselves correspond to the comprehensive scope of the States' complaints. They purport to impose a comprehensive scheme for enforcing program access. However, because the scheme established by the Decrees is fundamentally at odds with Congressional and FCC action implementing the Act, that scheme should be rejected.

The irony of a proposed antitrust settlement that undercuts a pro-competitive statutory and regulatory scheme is reflected in many facets of the Decrees. For example, Subsection IV.A.1.(g) of the Primestar Decree appears to violate the Act's general prohibition against "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent *any* multichannel video programming distributor from providing satellite cable programming * * * to consumers." 47 U.S.C. 628(b) (emphasis supplied). By sanctioning exclusive arrangements between vertically integrated programmers and one DBS provider at a particular orbital location, the provision permits such programmers to completely preclude another DBS provider operating from the same orbital location from offering the programming to its subscribers.[51] In addition, the provision runs afoul of the non-price discrimination provisions in Section 628(c) because it condones a refusal to sell "to a particular distributor when the vendor has sold its programming to that distributor's competitors."[52] Finally, if (as appears to be the case already) the pricing of the exclusive contract between the first DBS operator and a vertically integrated programmer is higher than comparable rates charged to cable operators, it enshrines a pricing term at odds with Section 628(c)(2)(b) of the Act.

Congress specifically sought to create as much competition as the marketplace would permit, and to severely limit exclusive contracts because it perceived them to operate in a manner contrary to that objective in the current marketplace.[53] Subsection (g) cuts in precisely the opposite direction by embracing refusals to deal and exclusivity, an approach explicitly rejected by Congress. It is not in the public interest for antitrust consent decrees to be used to codify a set of rules for an industry which not only

[49] Complaint at ¶42.

[50] Even if high-power DBS were to suffer these disadvantages only for the years it would take to establish and enforce a right to access in a legal proceeding, its unique lack of a full complement of key programming during that critical start-up period would surely render its viability more fragile than the interests of competition should permit.

[51] See 1992 Cable Act, Section 628(c)(2)(C).

[52] See Program Access Order at 54, ¶116. The FCC construes non-price discrimination by a programming vendor between competing distributors as falling within Section 628(c) of the Act *Id.* The FCC has used the example of a vertically integrated programming supplier's "unreasonable refusal to sell" programming "to a class of distributors, *or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor.*" *Id.* (emphasis supplied).

[53] See Program Access Order at 26, ¶63 ("Congress has clearly placed a higher value on new competitive entry than on continuation of exclusive distribution prices that impede this entry.").

fails to protect competition as fully as the regulatory scheme that governs that industry, but also begins with a presumption that is actively contrary to the regulatory scheme.

Subsection (g)'s last sentence is particularly revealing. It implicitly concedes that the exclusivity and discriminatory treatment it sanctions is fundamentally at odds with the intent of Congress and the Act. Its lame provision that it will be deemed to extend the pro-competitive protections of the Decree to high-power DBS only if federal law is determined to do so fails to alleviate the burdens on high-power DBS described above.

The "savings" clause essentially is an afterthought. In its affirmative operation, Subsection (g) presumptively favors the Primestar defendants' continued ability to engage in exclusionary and discriminatory practices over a significant class of MVPDs that the Decree as a whole purports to protect. In conducting its public interest inquiry, the Court should consider the Decree in the manner in which it is affirmatively intended to operate—not according to a "savings" clause which would require high-power DBS to prove that it is covered by the Act in order to win protection under the Decree. Further, if there is no public interest or consumer protection rationale for Subsection (g)'s anticompetitive exclusion, then its continued presence can serve no purpose other than to "muddy the waters" in interpreting and understanding the Act's protections. As argued directly below, this is a real and invidious danger of allowing the "savings" clause to justify Subsection (g)'s presence in the Decree.

C. In All Events The Proposed Decrees Should Be Modified To Eliminate The Possibility Of Any Persuasive Or Precedential Effect On Other Proceedings In Other Forums

One additional significant danger that could result from this Court's approval of the Decrees in their current form is that the cable monopolies would argue in other forums that the Decrees reflect the views of the State Attorneys General and the Court on the appropriate MVPD market structure and competition principles. This is not a mere hypothetical issue. The FCC is in the midst of considering reconsideration petitions in its Program Access proceedings and thus the precise operation and scope of the rules are not yet finalized.[54]

Moreover, even after the proceedings have been completed, certain crucial aspects of the rules with respect to exclusionary practices may call for an evaluation of a particular MSO's program access obligation under an antitrust standard requiring a competitive market structure. With regard to its rules on non-price discrimination, for example, the FCC has stated:

> Our implementation of the non-price discrimination aspects of Section 628(c) concerning unreasonable refusals to sell or similar exclusionary practices will draw upon certain antitrust precedents to define "unreasonable" as well as other illegal principles, and will be addressed individually through the enforcement process.[55]

This is by no means the only example of an area in the FCC's new rules that remains to be clarified through the FCC's enforcement process. For example, in interpreting Section 628(b)'s prohibition of "unfair practices" which hinder significantly or prevent any MVPD from obtaining access to cable programming, the FCC has stated:

> Elements of an offense under this provision would, however, include a demonstration that "the purpose or effect" of the conduct was to "hinder significantly or prevent any multichannel video programming distributor from providing * * * programming to subscribers or consumers."[56]

A high-power DBS provider seeking to enforce its rights under this provision could, in the absence of clarification from this Court, be faced with a claim by the cable industry that the DBS industry structure sanctioned by the Decrees is dispositive on the question of whether the high-power DBS provider has been hindered significantly in its ability obtain cable programming.

Accordingly, whatever results from this proceeding, the *amici* respectfully urge the Court to make a specific finding that this case in no way reflects the view of any party or the Court concerning the program access obligations the MSOs will have under other legal authorities, such as the Cable Act and the FCC's rules, or of what constitutes an adequately competitive market structure or conduct under those authorities.

D. The Court Should Exercise Its Equitable Discretion To Refuse To Sanction the Decrees Because of Their "Clear Anticompetitive Effect"

This Court has long since resolved the propriety of refusing to approve an antitrust consent decree with a "clear anticompetitive effect." Accordingly, the Court should adopt its previous approach in *State of New York* v. *Dairylea Cooperative, Inc.*, 547 F. Supp. 306, 308 (S.D.N.Y. 1982). In *Dairylea Cooperative*, the state of New York sued a dairy cooperative for conspiring to fix the wholesale and retail prices of milk and to allocate retail customers. As part of the proposed settlement, the defendant would have issued "cent-off coupons" redeemable for discounts on its products. *Id.* at 308. This Court rejected the proposed settlement based upon the "clear anticompetitive effect of the couponing plan." *Id.* The Court reasoned:

> The plan unquestionably both gives substantial future marketing advantages to Dairylea, the alleged antitrust wrongdoer, and makes no effort to at least endeavor to provide payments that are at a minimum made to those very customers actually injured in the past by Dairylea's allegedly wrongful conduct. As I read it, the plan which plaintiff and Dairylea propose converts a "compensatory" legal settlement into a marketing program.

Id. Significantly, the Court pointed out in rejecting the settlement the fact that the defendant's "competitors" were "disadvantaged at every turn" by the settlement, and that the parties should come up with "further proposals that adequately deal with the above concerns." *Id.* This Court should similarly require the parties to propose real program access protections as a condition of settlement, and should decline to lend its imprimatur to unreasonably discriminatory access protections presented in the guise of consumerism. The Decrees, like the *Dairylea Cooperative* plan, damage a significant group of competitors, competition, and consumers—and should therefore be rejected.

V. Conclusion

This Court should act to ensure that the Decrees promote fair competition in the MVPD industry, and should reject or conditionally approve the proposed settlements if they do not. See *United States* v. *American Telephone and Telegraph Co.*, 552 F. Supp. at 216. DBS providers are the primary nationwide emerging competitors to cable television, yet, the terms of the proposed settlements—in particular Section V.A.1.(g) of the Primestar Decree and Section IV.A.1.(j) of the Viacom Decree—disadvantage DBS providers "at every turn." *Dairylea Cooperative, Inc.*, 547 F. Supp. at 308. In particular, the proposed Decrees disadvantage DBS as a major class of cable competitors by expressly targeting and carving out from their protections

[54] See supra note 37.

[55] Program Access Order at 55 ¶116.

[56] Program Access Order at 10, ¶41.

over half of the Universe of DBS providers that can viably compete with cable; by sanctioning anticompetitive exclusive arrangements at other DBS orbital locations; by imposing a benchmark of allegedly "reasonable" rates on DBS providers that in reality ensures that DBS providers can only be charged anticompetitive rates; and by treating the DBS industry disparately in the decrees relative to other technologies.

This Court should accordingly reject the Decrees in their current form.

Respectfully submitted,

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Affidavit of Service

Sharon Cole, being duly sworn, deposes and says:

1. I am not a party to this action and I am over 18 years of age.

2. I am employed by Latham & Watkins, 885 Third Avenue, New York, New York 10022, attorneys for DirecTv, Inc.

3. On July 16, 1993, I caused to be served by hand true copies of the annexed Joint Amicus Curiae Memorandum Law of DirecTv, Inc., National Rural Telecommunications Cooperative, Consumer Federation of America and Television Viewers of America, Inc., together with Appendices 1, 2 and 3 thereto, on the following:

Robert Abrams,

Attorney General of the State of New York, 120 Broadway, suite 2601, New York, N.Y. 10271, Attn: Joseph Opper, Esq.

Kenneth R. Logan, Esq.,

Simpson Thacher & Bartlett, 435 Lexington Avenue, New York, New York 10017, Attorneys for Viacom Inc. and Viacom K-Band, Inc.

3. On July 16, 1993, I also caused to be served by hand true copies of the annexed Joint Amicus Curiae Memorandum of Law of DirecTv, Inc., National Rural Telecommunications Cooperative, Consumer Federation of America and Television Viewers of America, Inc., together with Appendices 1, 2 and 3 thereto, on Arthur F. Golden, Esq., Davis Polk & Wardwell, 450 Lexington Avenue, New York, NY 10017 counsel for Primestar Partners L.P. and coordinating counsel. We were instructed by Davis, Polk & Wardwell that as coordinating counsel they have the authority to accept service on behalf of all defendants in this action, except for Viacom Inc. and Viacom K-Band, Inc.

4. On July 16, 1993, I also caused copies of the documents identified above to be served by federal express mail upon the following:

Daniel E. Lungren,

Attorney General of the State of California, 300 South Spring Street, Suite 500N, Los Angeles, CA 90013.

J. Joseph Curran, Jr.,

Attorney General of the State of Maryland, 200 St. Paul Place, Baltimore, MD 21202.

Scott Harshbarger,

Attorney General of the Commonwealth of Massachusetts, One Ashburton Place, Boston, MA 02108.

Lee Fisher,

Attorney General of the State of Ohio, 65 East State Street, Suite 708, Columbus, OH 43266-0590.

Ernest D. Preate, Jr.,

Attorney General of the Commonwealth of Pennsylvania, Office of Attorney General, 14th Floor, Strawberry Square, Harrisburg, PA 17120.

Dan Morales,

Attorney General of the State of Texas, Office of the Attorney General, Capitol Station, P.O. Box 12548, Austin, Texas 78711-2548.

James H. Evans,

Attorney General of the State of Alabama, Office of the Attorney General, Antitrust Division, 5720 Carmichael Road, Montgomery, AL 36117.

Winston Bryant,

Attorney General of the State of Arkansas, 200 Tower Building, 323 Center Street, Little Rock, AR 72201.

Gale A. Norton,

Attorney General of the State of Colorado, 1525 Sherman Street, 5th Floor, Denver, Colorado 80203.

Richard Blumenthal,

Attorney General of the State of Connecticut, 110 Sherman Street, Hartford, CT 06105.

Charles M. Oberly, III,

Attorney General of the State of Delaware, Department of Justice, Delaware State Building, 820 N. French Street, Wilmington, Delaware 19801.

Robert A. Butterworth,

Attorney General of the State of Florida, Office of the Attorney General, PL-01 The Capital, Tallahassee, Florida 32399-1050.

Larry Echohawk,

Attorney General of the State of Idaho, Office of the Attorney General, Consumer Protection Unit, Statehouse, Room 119, Boise, ID 83720.

Roland W. Burris,

Attorney General of the State of Illinois, Illinois Attorney General's Office, 100 West Randolph Street, 13th Floor, Chicago, Illinois 60601.

Pamela Carter,

Attorney General of the State of Indiana, Office of the Attorney General, State of Indiana, 402 West Washington Street, Indianapolis, IN 46204-2794.

Bonnie J. Campbell,

Attorney General of the State of Iowa, Hoover Building, Second Floor, 1300 East Walnut Street, Des Moines, Iowa 50319.

Robert T. Stephen,

Attorney General of the State of Kansas, Kansas Judicial Center, 301 West 10th Street, Topeka, Kansas 66612.

Chris Gorman,

Attorney General of the Commonwealth of Kentucky, 209 St. Clair Street, Frankfort, KY 40601-1875.

Richard P. Ieyoub,

Attorney General of the State of Louisiana, P.O. Box 94095, Baton Rouge, LA 70804-9095.

Michael E. Carpenter,

Attorney General of the State of Maine, State House Station 6, Augusta, Maine 04333.

Frank J. Kelley,

Attorney General of the State of Michigan, P.O. Box 30215, Lansing, MI 48909.

Hubert H. Humphrey, III,

Attorney General of the State of Minnesota, 1400 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2131.

Joseph P. Mazurek,

Attorney General of the State of Montana, 215 North Sanders, Helena, MT 59620.

Don Stenberg,

Attorney General of the State of Nebraska, 2115 State Capitol, Lincoln, NE 68509-8920.

Frankie Sue Del Papa,

Attorney General of the State of Nevada, Office of the Attorney General, Capitol Complex, Carson City, NV 89710.

Jeffrey R. Howard,

Attorney General of the State of New Hampshire, 25 Capitol Street, Concord, N.H. 03301.

Robert J. Del Tufo,

Attorney General of the State of New Jersey, 25 Market Street—CN 085, Trenton, New Jersey 08625.

Tom Udall,

Attorney General of the State of New Mexico, P.O. Drawer 1508, Sante Fe, New Mexico 87504.

Michael F. Easley,

Attorney General of the State of North Carolina, NC Department of Justice, Post Office Box 629, Raleigh, N.C. 27609-0629.

Heidi Hietkamp,

Attorney General of the State of North Dakota, Office of the Attorney General, State

Capitol, 600 East Boulevard Ave., Bismarck, ND 58505.

Theodore R. Kulongoski,

Attorney General of the State of Oregon, 1162 Court Street NE., Salem, Oregon 97310.

Mark Barnett,

Attorney General of the State of South Dakota, 500 E. Capitol, Pierre, South Dakota 57501-5070.

Charles W. Burson,

Attorney General and Reporter, State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37243-0492.

Jan Graham,

Attorney General of the State of Utah, 111 State Capitol Bldg., Salt Lake City, UT 84114.

Jeffrey L. Amestoy,

Attorney General of the State of Vermont, 109 State Street, Montpelier, VT 05609-1001.

Stephen D. Rosenthal,

Attorney General of the Commonwealth of Virginia, Office of the Attorney General, 101 North Eighth Street, Richmond, Virginia 23219.

Christine O. Geogoire,

Attorney General of the State of Washington, 900 4th Avenue, Suite 2000, Seattle, WA 98164-1012.

James E. Doyle,

Attorney General of the State of Wisconsin, Wisconsin Department of Justice, Post Office Box 7857, Madison, Wisconsin 53707-7857.

Sharon Cole,

Sworn to before me this 16th day of July, 1993.

Alan L. Bushlow,

Notary Public, State of New York, No. 41-4940029, Qualified in Queens County, Commission Expires August 1, 1994.

September 9, 1993.

The Honorable Anne K. Bingaman,

Assistant Attorney General for Antitrust, Room 3101, Main Justice, 10th Street and Constitution Avenue NW., Washington, DC 20530.

Re: The Proposed Consent Decree in *U.S.* v. *Primestar Partners.*

Dear Anne: As you suggested, I am writing to elaborate upon some of the points we discussed during our conversation yesterday regarding the proposed federal consent decree in the *Primestar Partners* case.

As you know, we are particularly concerned about the provisions in the State and Federal decrees that permit or contemplate exclusive arrangements between the cable defendant programmers and one of the competitive direct broadcast satellite ("DBS") operators. We believe that these arrangements are antithetical to the purposes of the 1992 Cable Act and the FCC regulations implementing the Act. If these arrangements are permitted to stand, the result will probably be a DBS alternative to cable that is decidedly less appealing and more costly to consumers than would otherwise be the case. Ultimately DBS would be weakened materially as a competitor to the cable industry, precisely the end sought by the cable industry and absolutely contrary to the pro-competitive objectives of the Justice Department in bringing its antitrust action.

It is evident, however, from the hearing held on September 3, 1993 that the judge will sign the proposed decrees in the corresponding case between the state Attorneys General and the cable defendants. The judge based his decision on principles of federalism which he believed dictated that he defer to the judgment of the state Attorneys General. He made clear, however, that his acceptance of the state decrees can in no way be viewed as a judicial stamp of approval of the lawfulness or propriety of any particular arrangements, contracts or practices under the 1992 Cable Act, matters over which he disclaimed jurisdiction. He emphasized that his entry of final judgment on these decrees should not be given any weight in proceedings before the Federal Communications Commission or other courts where challenges might be asserted to exclusive contracts between a cable programmer and a DBS provider pursuant to the 1992 Cable Act.

To some extent, the court's statements according no precedential effect to the state decrees mitigates the substantial harm to the DBS industry that could result if the cable defendants were permitted to use these decrees to prejudice the rights available to their competitors in other fora. At a minimum, we would request that the Justice Department take a similar position to that adopted by the court regarding the use of these decrees in other proceedings brought under the 1992 Cable Act.

Accordingly, we asked that the Justice Department's Tunney Act filing with the court contain a statement to the effect that entry of the decree cannot be viewed as an approval by the U.S. Government of any contracting arrangements involving DBS exclusivity and that the DOJ does not intend that the decree in any way prejudice the rights or remedies afforded to multichannel video programming distributors under the 1992 Cable Act. Such a stand would bolster the court's statements with regard to the state decrees and further alleviate the potential for the federal decree to be misused to impede the enforcement of the 1992 Cable Act.

Obviously, DirecTv and the other signatories to its comments filed with the Justice Department on August 23, 1993, pursuant to the Tunney Act, continue to have serious, substantive objections to that portion of Section IV.D of the proposed federal consent decree dealing with DBS exclusivity. I would hope that you would give serious consideration to those arguments, as well.

If I may provide you with further information, please let me know. Thank you for your consideration and I look forward to further discussions with you.

With best regards.

Sincerely,

Harry McPherson.

[FR Doc. 93-27910 Filed 11-16-93; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Advisory Committee on Construction Safety and Health; Request for Nomination of Members

The Assistant Secretary of Labor for Occupational Safety and Health requests nominations for individuals to be appointed to the Advisory Committee on Construction Safety and Health. The Committee is established under section 107(e)(1) of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) and section 7(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 656). The function of the Committee is to advise the Assistant Secretary on occupational safety and health matters in the construction industry.

The Committee meets approximately four to six times per year for one or two days per meeting. The Committee has 15 members, categorized as follows:

—Five representatives of employee interests;
—Five representatives employer interests;
—Two representatives of State safety and health agencies;
—Two representatives qualified by knowledge and experience related to construction safety and health; and
—One representatives from the National Institute for Occupational Safety and Health.

Nominations of new members and renominations of current members will be accepted in all categories of membership.

The terms of the present members of the Committee will expire March 23, 1994. The term of office for the new and reappointed members is two years and will end on March 23, 1996.

Nominees must have specific experience and be actively engaged in work related to occupational safety or health in the construction industry. No member of the Committee (other than representatives of employers and employees) shall have an economic interest in any proposed rule. The category of membership for which the candidate is qualified should be specified in the nomination letter(s). Nominations for particular category of membership should come from organizations or individuals within that category.

A summary of the nominee's background, experience and qualifications with date of birth, current address, telephone number and Social Security number should be included

with the nomination. In addition, each nomination letter shall state that the person nominated is:

—Aware of the nomination;
—Willing to serve as a Committee member;
—Able to be present at meetings; and
—Free of apparent conflicts of interest that would preclude unbiased service on the Committee.

Nominations should be submitted to Tom Hall, Division of Consumer Affairs, Occupational Safety and Health Administration, room N–3647, 200 Constitution Avenue, NW., Washington, DC 20210, no later than January 15, 1994. For further information, contact Tom Hall at (202) 219–8615.

Signed at Washington, DC, this 9th day of November 1993.

Joseph A. Dear,

Assistant Secretary of Labor.

[FR Doc. 93–28276 Filed 11–16–93; 8:45 am]

BILLING CODE 4510–26–M

NATIONAL SCIENCE FOUNDATION

Permit Application Received Under the Antarctic Conservation Act of 1978

November 10, 1993.

AGENCY: National Science Foundation.

ACTION: Notice of Permit Application Received Under the Antarctic Conservation Act of 1978, P.L. 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act of 1978 at title 45 part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by December 11, 1993. Permit applications may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, room 627, Office of Polar Programs, National Science Foundation, Washington, DC 20550.

FOR FURTHER INFORMATION CONTACT: Guy G. Guthridge at the above address or (202) 357–7817.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Public Law 95–541), has developed regulations that implement the "Agreed Measures for the Conservation of Antarctic Fauna and flora" for all United States citizens. The Agreed Measures, developed by the Antarctic Treaty Consultative Parties, recommended establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas as requiring special protection. The regulations establish such a permit system to designate Specially Protected Areas and Sites of Special Scientific Interest.

The application received is as follows:

Applicant: David R. Merchant, Institute for Quaternary Studies/Room 320, 5711 Boardman Hall, University of Maine, Orono, ME 04469–5711.

Activity for Which Permit Requested

Two members of U.S. Antarctic Program project S–156 (D. Merchant and C. Narwhold) request permission to conduct glacial geology along the western boundary of the Site of Special Scientific Interest (SSSI) at Cape Crozier, Ross Island.

The ice-free land southwest of Post Office Hill at Cape Crozier represents that only locality in the entire McMurdo Sound region that shows late Quaternary glacial deposits above 600 meters elevation. A detailed map of these deposits, along with a collection of reworked marine shells and corals removed from these deposits (for radiocarbon dating), will afford the only geologic reconstruction of grounded ice in the Ross Embayment during late Quaternary time. Scientists have mapped similar, but lower elevation, glacial deposits east of Cape Crozier on Ross Island (Cape Bird, Cape Evans, Hut Point) and in the McMurdo Dry Valleys region (Taylor, Ferrar, Wright Garwood, and Marshall valleys), but now require the critical evidence from Cape Crozier to complete an understanding of (reconstruct) the extent of former ice-sheets in the region. This reconstruction represents the primary objective of the S–156 proposal. Understanding the extent of former ice sheets helps in understanding the relationship of ice sheets and climate change.

The glacial deposits that require study occur just along the border of the SSSI, and therefore some of the work may fall 100 to 200 meters within the SSSI. However, nearly all of the work will occur outside the SSSI, about 1 kilometer southwest of Post Office Hill and along a north-south transect at 600 to 700 meters elevation west of the main SSSI boundary. The applicants will not work near the sea ice and, therefore, will not disturb the emperor and Adélie penguins.

If this request is accepted, access to the work-site will be by helicopter, with a landing outside the SSSI. The scientists will walk into the work-site (no vehicles). They plan to map the terrain and survey the upper limit of glacial deposits using hand-held altimeters. They will collect reworked marine shells using small shovels and hand trowels. They will not use motorized machinery of any kind. They plan to spend a maximum of 2 days at the Cape Crozier site. It is very likely that they can accomplish the task in one good working day. Therefore, at present, they do not have any plans for camping at Cape Crozier. However, if they must set up a small campsite (one Scott tent), they will do so well outside the SSSI and walk to the work-site in a direction perpendicular to the border of the SSSI.

Location:

Cape Crozier.

Date: 12/13/93–03/1/94.

Guy G. Guthridge,

Permit Office.

[FR Doc. 93–28169 Filed 11–16–93; 8:45 am]

BILLING CODE 7555–01–M

Committee of Visitors of the Advisory Committee for Computer and Information Science and Engineering; Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Date and time: December 14, 1993, 8:30 a.m. to 5 p.m.

Place: National Science Foundation, 4201 Wilson Boulevard, Washington, DC, room 365.

Type of meeting: Closed.

Contact person: John C. Cherniavsky, Head, (OCDA), National Science Foundation, 1800 G St. NW., Washington, DC 20550. Telephone: (202) 357–7349.

Purpose of meeting: To carry out Committee of Visitors (COV) review, including examination of decisions on proposals, reviewer comments, and other privileged materials.

Agenda: To provide oversight review of the CISE Instrumentation awards and declinations.

Reason for closing: The meeting is closed to the public because the Committee is reviewing proposal actions that will include privileged intellectual property and personal information that could harm individuals if they were disclosed. If discussions were open to the public, these matters that are exempt under 5 U.S.C. 552b(c) (4) and (6) of the Government in the Sunshine Act would be improperly disclosed.

Dated: November 12, 1993.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 93-28303 Filed 11-16-93; 8:45 am]

BILLING CODE 7555-01-M

Special Emphasis Panel in Geosciences; Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation announces the following meeting:

Name: Special Emphasis Panel in Geosciences.

Date and time: December 7, 1993; 8:30 am-5 pm.

Place: St. James Hotel, 950 24th Street, NW., Washington, DC 20037.

Type of meeting: Closed.

Contact person: Dr. Joan R. Mitchell, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Telephone: (703) 306-1582.

Purpose of meeting: To provide advice and recommendations concerning proposals submitted to NSF for financial support.

Agenda: To review and evaluate Research Experiences for Undergraduate proposals as part of the selection process for awards.

Reason for closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: November 12, 1993.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 93-28304 Filed 11-16-93; 8:45 am]

BILLING CODE 7555-01-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-320]

General Public Utilities Nuclear Corp., Three Mile Island Nuclear Station, Unit 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption to License No. DPR-73, issued to GPU Nuclear Corporation (GPUN or the licensee), for the Three Mile Island Nuclear Plant, Unit 2 (TMI-2) located in Londonderry Township, Dauphin County, Pennsylvania, on an island in the Susquehanna River. The licensee holds a Possession Only License that allows GPUN to possess but not operate TMI-2.

Environmental Assessment

Identification of the Proposed Action

The NRC, on its own motion, is considering granting an exemption from the training program establishment, implementation, and maintenance requirements of 10 CFR 50.120. The licensee, in its letter of July 29, 1993, provided supplemental information supporting this action.

The Need for the Proposed Action

The TMI-2 is currently in the final stages of readying the facility for long term storage, termed Post Defueling Monitored Storage. The licensee has completed a multi-year fuel removal and decontamination program that began just after the March 28, 1979 accident. The reactor fuel has been shipped offsite and the facility is currently in a safe stable condition conducive to long term storage. There is no longer any requirement to have licensed operators at the facility and the Technical Specifications for TMI-2 do not require manning the control room. On September 14, 1993, GPUN was granted a Possession Only License which prohibits operation. The proposed exemption would relieve the licensee from the requirements of 10 CFR 50.120. However, it would not relieve the licensee from previous requirements or commitments to train and qualify facility personnel.

Environmental Impacts of the Proposed Action

The proposed action does not have any effect on accident risk and the possibility or environmental impact is extremely remote. The TMI-2 reactor vessel has been defueled and the fuel shipping offsite. Remaining residual fuel is of insufficient quantity and configuration to result in an inadvertent criticality. Many of the functional programs (i.e. training, site security, emergency preparedness and radcon) that were once required as facility specific to TMI-2 have been assumed by the Three Mile Island Nuclear Station, Unit 1 (TMI-1) organization. TMI-1 is required to comply with 10 CFR 50.120. The existing training programs for the few remaining TMI-2 personnel are deemed acceptable, given the low level of activity at the facility and the shutdown and defueled status of the plant.

Based on the staff review of the July 29, 1993 submittal, the staff concludes that the environmental and safety consequences of accidents which may potentially result in a radiological release are greatly decreased given the permanently shutdown and defueled status TMI-2.

Therefore, the proposed action does not increase the probability or consequences of any accidents, no changes are being made in the types of any effluents that may be released offsite, and there is no significant increase in the allowable individual or cumulative occupational radiation exposure onsite.

Accordingly, the NRC staff concludes that the proposed action would result in no significant radiological environment impact. With regard to potential nonradiological impacts, the proposed action does not affect nonradiological plant effluents and has no other environmental impact. Therefore, the NRC staff concludes that there are no significant nonradiological environmental impacts associated with the proposed action.

Alternative to the Proposed Action

Since the Commission concluded that there are no significant environmental effects that would result from the proposed action, any alternative with equal or greater environmental impacts need not be evaluated.

The principal alternative would be to deny the action. This would not reduce environmental impacts of plant activities and would not enhance the protection of the environment nor public health and safety.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Programmatic Environmental Statement for TMI-2, dated March 1981, as supplemented.

Agencies and Persons Consulted

The NRC staff consulted with representatives of the State of Pennsylvania regarding the environmental impact of the proposed action.

Finding of No Significant Impact

Based upon the foregoing environmental assessment, the NRC staff concludes that the proposed action will not have a significant effect on the quality of the human environment.

Accordingly, the NRC staff has determined, 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 the licensee letter dated July 29, 1993, which is available for public inspection at the Commission Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, and at the local public document

room for TMI-2 at the Government Publications Section, State Library of Pennsylvania, Walnut Street and Commonwealth Avenue, Box 1601 Harrisburg, Pennsylvania 17105.

Dated at Rockville, Maryland, this 10th day of November 1993.

For the Nuclear Regulatory Commission.

Richard F. Dudley, Jr.,

Acting Director, Non-Power Reactors and Decommissioning Project Directorate, Division of Operating Reactor Support, Office of Nuclear Reactor Regulation.

[FR Doc. 93-28212 Filed 11-16-93; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-344]

Portland General Electric Co. et al., Trojan Nuclear Plant; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption to Facility Operating License No. NPF-1, issued to Portland General Electric Company (PGE or the licensee), for the Trojan Nuclear Plant (Trojan), a permanently shutdown plant, located in Columbia County, Oregon, on the west bank of the Columbia River.

Environmental Assessment

Identification of the Proposed Action

The proposed action would grant an exemption from the requirements of title 10 § 50.54(w) of the Code of Federal Regulations (10 CFR 50.54(w)), which requires that each electric utility licensee maintain a minimum insurance coverage, or equivalent, of $1.06 billion for stabilization of the reactor and the decontamination of the reactor and the reactor station site in the event of an accident. The licensee requested the exemption in a letter dated July 8, 1993. The license committed, in the July 8, 1993 letter, to maintain for Trojan decontamination insurance, or demonstrate an equivalent level of protective coverage, in the amount of $5 million. The licensee stated, in the July 8, 1993 letter, that the $5 million is appropriate for postulated design basis accidents at a facility that is permanently defueled.

The Need for the Proposed Action

The requirements of 10 CFR 50.54(w) were promulgated to assure that sufficient funds were available at an operational facility to first stabilize the reactor and next to decontaminate the reactor and the reactor station site in the event of a major accident.

On February 2, 1993, the licensee informed the NRC that Trojan had permanently ceased power operations, all fuel had been removed from the reactor to the spent fuel pool, and that PGE had begun to develop detailed plans to decommission the facility. On March 24, 1993, the NRC staff issued a confirmary order that prohibits the licensee from placing any nuclear fuel into the Trojan reactor. Furthermore, on May 5, 1993, the NRC staff issued an amendment to the license for Trojan that allows PGE to possess, but not operate, the nuclear plant. When compared to an operational power reactor facility, the status of Trojan provides a significantly reduced risk from a radiological release and subsequent contamination of the site. Furthermore, with the removal of the fuel from the reactor there is no longer any need to assure there are sufficient funds available to stabilize and decontaminate the reactor in the event of an accident.

The range of credible accidents and accident consequences for Trojan are reduced because of its shutdown and defueled condition. The types of accidents defined in the regulation, 10 CFR 50.54(w)(2)(1), are not likely to occur at the facility. The licensee analysis shows that the worst case design basis accident for the facility, in its permanently shutdown defueled state, is a fire in the radioactive waste annex building. The licensee calculated that the postulated fire in the Trojan radioactive waste annex would result in an estimated cleanup cost of $4.9 million. To provide a conservation estimate the licensee estimated the cost to recover from the fire and added a 25 percent cushion to arrive at the value of $4.9 million. The staff agrees that the estimate to recover from the fire is conservative. The license also considered a second design basis accident scenario, a fuel handling accident involving the spent fuel stored in the spent fuel pool. The licensee estimated site decontamination cost for the fuel handling accident at $0.5 million. This estimate also contains the 25 percent cushion. The staff finds the licensee analysis consistent with past industry events. The staff also requested that the licensee examine a hypothetical accident sequence involving the complete or partial loss of water from the spent fuel pool as a result of a major seismic event near the plant. This beyond design basis accident, describe in NUREG-1353, could result in a zirconium fuel cladding fire in some of the recently irradiated spent reactor fuel stored in the spent fuel pool resulting in a significant radioactive release, and associated site contamination. Based on the licensee evaluation, and the NRC staff review of the evaluation, the staff concludes that the likelihood of a beyond design basis cladding fire in the spent fuel pool resulting in significant onsite contamination is extremely remote and insurance coverage to recover from this accident scenario is unnecessary.

Based on a thorough evaluation of potential accidents at the Trojan site, the staff concludes that a significant reduction in onsite liability coverage to stabilize and decontaminate the site is warranted.

Environmental Impacts of the Proposed Action

The proposed action does not involve any measurable environmental impacts, since the facility configuration or plant operations will not change. PGE conducted a safety analysis in support of the exemption requests which documents that there is no credible accident sequence that would result in significant onsite contamination or radiation doses greater than the U.S. Environmental Protection Agency Protective Action Guides.

The NRC staff, based on independent evaluation, finds that the licensee analyses demonstrates sufficient bases to conclude that the consequences of radiological accidents which may potentially result in a radiological release or site contamination are greatly decreased for Trojan given the permanently shutdown and defueled status of the facility. A reduction in onsite liability insurance coverage is therefore warranted.

Therefore, the proposed action does not increase the probability or consequences of any accidents, no changes are being made in the types of any effluents that may be released offsite, and there is no significant increase in the allowable individual or cumulative occupational radiation exposure onsite.

Accordingly, the Commission concludes that this proposed action would result in no significant radiological environmental impact.

With regard to potential nonradiological impacts, the proposed action does not affect noradiological plant effluents and has no other environmental impact. Therefore, the Commission concludes that there are no significant nonradiological environmental impacts associated with the proposed action.

Alternative to the Proposed Action

Since the Commission concluded that there are no significant environmental effects that would result from the proposed action, any alternative with equal or greater environmental impacts need not be evaluated.

The principal alternative would be to deny the action. This would not reduce environmental impacts of activities at the plant and would not enhance the protection of the environment nor public health and safety.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Environmental Statement for the Trojan Nuclear Plan, dated August 1973.

Agencies and Persons Consulted

The NRC staff consulted with representatives of the State of Oregon Department of Energy regarding the environmental impact of the proposed action. The State representatives had no comment.

Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed exemption.

Based upon the foregoing environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the licensee application for exemption dated July 8, 1993, which is available for public inspection at the Commission Public Document Room, Gelman Building, 2120 L Street, NW., Washington, DC 20555, and at the Local Public Document Room for the Trojan Nuclear Plant at the Branford Price Millar Library, Portland State University, Portland, Oregon 97207.

Dated at Rockville, Maryland, this 12th day of November 1993.

For the Nuclear Regulatory Commission.

Richard F. Dudley, Jr.,

Acting Director, Non-Power Reactors and Decommissioning Project Directorate, Division of Operating Reactor Support, Office of Nuclear Reactor Regulation.

[FR Doc. 93-28239 Filed 11-16-93; 8:45 am]

BILLING CODE 7590-01-M

Revision of Appendix A to 10 CFR Part 100; Meeting

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of meeting.

SUMMARY: The Nuclear Regulatory Commission Staff will meet with representatives of the Nuclear Management and Resources Council (NUMARC) to discuss their comments pertaining to the proposed revision of Appendix A, "Seismic and Geologic Siting Criteria for Nuclear Power Plants," to 10 CFR part 100.

DATES: November 30, 1993, 8 a.m. to 5 p.m. (If necessary, meeting will continue on December 1, 1993, at the same location and time).

ADDRESSES: 11555 Rockville Pike, Room: 1 F7/9, Rockville, Maryland.

FOR FURTHER INFORMATION CONTACT: Dr. Andrew J. Murphy, Chief, Structural and Seismic Engineering Branch, Office of Nuclear Regulatory Research, Nuclear Regulatory Commission, Washington, DC 20555. Telephone: (301) 492-3860.

SUPPLEMENTARY INFORMATION: The Nuclear Management and Resources Council, on behalf of the nuclear power industry, reviewed the proposed rule, 10 CFR parts 50, 52, and 100, Reactor Siting Criteria: Including Seismic and Earthquake Engineering Criteria for Nuclear Power Plants and Proposed Denial of Petition for Rulemaking From Free Environment, Inc., et al. (57 FR 47802), and offered comments in a letter dated March 24, 1993. The NRC staff reviewed the NUMARC comments and has identified areas where additional information or clarifications are needed.

The purpose of this meeting is to meet with NUMARC and other industry representatives to obtain the rationale for their suggested changes (Ref. Memorandum from Lawrence C. Shao, NRC to William H. Rasin, NUMARC, dated November 9, 1993, available at NRC Document Room at 2120 L Street NW., (Lower Level), Washington, DC). No specific agenda is being proposed.

Dated at Rockville, Maryland, this 9th day of November, 1993, for the Nuclear Regulatory Commission.

Lawrence C. Shao,

Director, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 93-28211 Filed 11-16-93; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-424 and 50-425]

Georgia Power Co., et al. Denial of Amendments to Facility Operating Licenses and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) has denied a request by the Georgia Power Company, et al. (the licensee) for amendments to Facility Operating License Nos. NPF-68 and NPF-81 issued to the licensee for operation of the Vogtle Electric Generating Plant, Units 1 and 2, located in Burke County, Georgia. A Notice of Consideration of Issuance of this amendment request was published in the **Federal Register** on July 8, 1992 (57 FR 30249).

The proposed amendment request was to revise Technical Specifications (TS) 3/4.6.1.7 and 4.6.1.2f to allow for quarterly leak rate testing to be performed outside containment by pressurizing between the containment purge supply and exhaust isolation valves. This results in the inboard valves being pressure tested in the direction opposite that which would be pressurized during accident conditions.

The NRC staff has concluded that testing of the valves in the reverse direction will not provide equivalent or more conservative results than that required by Section III.C of Appendix J to 10 CFR part 50, and that the request cannot be granted. The licensee was notified of the Commission's denial of the proposed change by letter dated November 10, 1993.

By December 17, 1993, the licensee may demand a hearing with respect to the denial described above. Any person whose interest may be affected by this proceeding may file a written petition for leave to intervene.

A request for hearing or petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 by the above date.

A copy of any petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Mr. Arthur H. Domby, Troutman Sanders, NationsBank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia 30308-2210, attorney for the licensee.

For further details with respect to this action, see (1) the application for amendments dated November 7, 1991, as revised June 17, 1992, and (2) the Commission's letter to the licensee dated November 10, 1993.

These documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, and at the local public document room located at the Burke County Public Library, 312 Fourth Street, Waynesboro, Georgia 30830. A copy of item (2) may be obtained upon request addressed to the

U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Document Control Desk.

Dated at Rockville, Maryland, this 10th day of November 1993.

For the Nuclear Regulatory Commission.

Robert A. Hermann,

Acting Director, Project Directorate II-3, Division of Reactor Projects-I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 93-28213 Filed 11-16-93; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee Cancellation of Open Committee Meeting

According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given that the meeting of the Federal Prevailing Rate Advisory Committee scheduled for Thursday, December 2, 1993, has been cancelled.

Information on other meetings can be obtained by contacting the Committee's Secretary, Office of Personnel Management, Federal Prevailing Rate Advisory Committee, room 1340, 1900 E Street, NW., Washington, DC 20415, (202) 606-1500.

Dated: November 9, 1993.

Anthony F. Ingrassia,

Chairman, Federal Prevailing Rate, Advisory Committee.

[FR Doc. 93-28176 Filed 11-16-93; 8:45 am]

BILLING CODE 6325-01-M

National Partnership Council; Meeting; Correction

AGENCY: Office of Personnel Management.

SUMMARY: This document corrects the place and point of contact for the November 19, 1993, 2 p.m., meeting of the National Partnership Council, which were published November 5, 1993 (58 FR 59082).

PLACE: Office of Personnel Management, Theodore Roosevelt Building, 1900 E Street, NW., Auditorium, Washington, DC 20415-0001. The auditorium is located on the ground level.

POINT OF CONTACT: Douglas K. Walker, Office of Communications, Office of Personnel Management, Theodore Roosevelt Building, 1900 E Street, NW., room 5F12, Washington, DC 20415-0001, (202) 606-1800.

Office of Personnel Management.

James B. King,

Director.

[FR Doc. 93-28232 Filed 11-16-93; 8:45 am]

BILLING CODE 6325-01-M

PENSION BENEFIT GUARANTY CORPORATION

Exemption From Bond/Escrow Requirement Relating to Sale of Assets by an Employer Who Contributes to a Multiemployer Plan; Plaid Holdings Corp.

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of exemption.

SUMMARY: The Pension Benefit Guaranty Corporation has granted a request from Plaid Holdings Corporation for an exemption from the bond/escrow requirement of section 4204(a)(1)(B) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). A notice of the request of exemption from the requirement was published on May 14, 1993 (58 FR 28646). The effect of this notice is to advise the public of the decision on the exemption request.

ADDRESSES: The nonconfidential portions of the request for an exemption and the PBGC response to the request are available for public inspection at the PBGC Communications and Public Affairs Department, suite 7100, at the address below, between the hours of 9 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT Nathaniel Rayle, Attorney, Office of General Counsel (22514), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006; telephone 202-778-8823 (202-956-5059 for TTY and TDD). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

Background

Section 4204 of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, ("ERISA") or "the Act"), provide that a bona fide arm's-length sale of assets of a contributing employer to an unrelated party will not be considered to result in a withdrawal if three conditions are met. These conditions, enumerated in section 4204(a)(1)(A)-(C), are that—

(A) The purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller was obligated to contribute;

(B) The purchaser obtains a bond or places an amount in escrow, for a period of five plan years after the sale, in an amount equal to the greater of the seller's average required annual contribution to the plan for the three plan years preceding the year in which the sale occurred or the seller's require annual contribution for the plan year preceding the year in which the sale occurred (the amount of the bond or escrow is doubled if the plan is in reorganization in the year in which the sale occurred); and

(C) The contract of sale provides that if the purchaser withdraws from the plan within the first five plan years beginning after the sale and fails to pay any of its liability to the plan, the seller shall be secondarily liable for the liability it (the seller) would have had but for section 4204.

The bond or escrow described above would be paid to the plan if the purchaser withdraws from the plan or fails to make any required contributions to the plan within the first five plan years beginning after the sale.

Additionally, section 4204(b)(1) provides that if a sale of assets is covered by section 4204, the purchaser assumes by operation of law the contribution record of the seller for the plan year in which the sale occurred and the preceding four plan years.

Section 4204(c) of ERISA authorizes the Pension Benefit Guaranty Corporation ("PBGC") to grant individual or class variances or exemptions from the purchaser/s bond/escrow requirement of section 4204(a)(1)(B) when warranted. The legislative history of section 4204 indicates a Congressional intent that the sales rules be administered in a manner that assures protection of the plan with the least practicable intrusion into normal business transactions. Senate Committee on Labor and Human Resources, 96th Cong., 2nd Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Considerations 16 (Comm. Print, April 1980); 128 Cong. Rec. S10117 (July 29, 1980). The granting of an exemption or variance from the bond/escrow requirement does not constitute a finding by the PBGC that a particular transaction satisfies the other requirements of section 4204(a)(1). Such questions are to be decided by the plan sponsor in the first instance, and any disputes are to be resolved in arbitration. 29 U.S.C. 1382, 13399, 1401.

Under the PBGC's regulation on variances for sales of assets (29 CFR part 2643), a request for a variance or waiver

of the bond/escrow requirement under any of the tests established in the regulation (29 CFR 2643.12–2643.14) is to be made to the plan in question. The PBGC will consider wavier requests only when the request is not based on satisfaction of one of the four regulatory tests or when the parties assert that the financial information necessary to show satisfaction of one of the regulatory tests is privileged or confidential financial information within the meaning of 5 U.S.C. 552(b)(4) (the Freedom of Information Act).

Under § 2643.3 of the regulation, the PBGC shall approve a request for a variance or exemption of it determines that approval of the request is warranted, in that it—

(1) Would more effectively or equitably carry out the purposes of title IV of the Act; and

(2) Would not significantly increase the risk of financial loss to the plan.

Section 4204(c) of ERISA and § 2643.3(b) of the regulation require the PBGC to publish a notice of the pendency of a request for a variance or exemption in the **Federal Register**, and to provide interested parties with an opportunity to comment on the proposed variance or exemption.

The Decision

On May 14, 1993 (58 FR 28646), the PBGC published a request from the Plaid Holdings Corporation ("the Buyer") for an exemption from the bond/escrow requirement of section 4204(a)(1)(B) with respect to its purchase of assets of the men's clothing business of Crystal Brands, Inc. ("the Seller"). The sale of assets became effective on October 19, 1992. No comments were received in response to the notice.

According to the request, the Seller was required to contribute to the Amalgamated Insurance Fund ("the Fund") for work at the purchased operations. At the time of the sale, the Buyer was (and continues to be) obligated to contribute to the Fund for operations other than the purchased operations.

As part of the purchase transaction, the Buyer agreed to comply with the terms of section 4204 of ERISA. The Buyer will post a bond or other security acceptable to the Fund in the event an exemption from the requirements of section 4204(a)(1)(B) is not granted. The Seller has agreed to be secondarily liable for its withdrawal liability should the Buyer withdraw from the Fund within five years of the transaction and fail to pay its withdrawal liability when due.

The amount of the bond/escrow that would be required of the Buyer under section 4204(a)(1)(B) of ERISA is $3,600,241. The Seller's potential withdrawal liability is estimated to be $22,021,073. The Buyer's withdrawal liability for its other operations if it withdrew with respect to such operations in 1992 would be $3,011,496.

The Buyer does not meet the net tangible assets test described in 29 CFR 2643.14(a)(2) as of the end of the plan year in which the transaction occurred. That provision requires that the Buyer's net tangible assets as of the end of its fiscal year preceding the year of the transaction equal or exceed the combined withdrawal liability for the purchased operations and its other operations. However, the Buyer has submitted pro forma financial statements as of December 31, 1992, showing that its net tangible assets as of that date exceed the combined liability for the purchased operations and its other operations. The Buyer has requested confidential treatment of the financial statements under 5 U.S.C. 552(b)(4) because the Buyer is a privately owned business whose financial records are not publicly available.

Based on the facts of this case and the representations and statements made in connection with the request for an exemption, the PBGC has determined that an exemption from the bond/escrow requirement is warranted, in that it would more effectively carry out the purposes of title IV of ERISA and would not significantly increase the risk of financial loss to the Fund. Therefore, the PBGC hereby grants the request for an exemption for the bond/escrow requirement. The granting of an exemption or variance from the bond/escrow requirement of section 4204(a)(1)(B) does not constitute a finding by the PBGC that the transaction satisfies the other requirements of section 4204(a)(1). The determination of whether the transaction satisfies such other requirements is a determination to be made by the Plan sponsor.

Issued at Washington, DC, on this 9th day of November, 1993.

Martin Slate,

Executive Director.

[FR Doc. 93–28187 Filed 11–16–93; 8:45 am]

BILLING CODE 7708–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–33180; File No. SR–BSE–93–20]

Self-Regulatory Organizations; Filing and Immediate Effectiveness of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to Its Smoking Policy

November 10, 1993.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on October 28, 1993, the Boston Stock Exchange, Inc. ("BSE" 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 Exchange seeks to amend its Smoking Policy to ban smoking in the hallways outside of the restrooms.

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

1. Purpose

The purpose of the proposed rule change is to amend the current Smoking Policy to redesignate the hallways outside of the restrooms as areas where smoking is prohibited. This change in policy is being adopted in response to concerns regarding the effects of smoking on non-smokers in the work environment, balancing these concerns with providing an area or areas for smokers. The stated policy of the Exchange provides that the Market

Performance Committee is authorized to make changes in the designated areas for smoking with due notice to the membership.[1] A memorandum was issued on October 22, 1993, informing members that the amended policy would become effective on November 22, 1993.

2. Statutory Basis

The statutory basis for the proposed smoking policy is section 6(b)(1) of the Act, in that the policy is an administrative action by the Exchange to require its members to comply with its rules and policies, and will ensure the orderly conduct of business on the floor and in the administrative areas without interfering with the personal comfort and safety of the members and staff.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change constitutes stated policy, practice or interpretation with respect to the meaning, administration or enforcement of an existing rule of the Exchange and therefore has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b-4 thereunder. 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.

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 at 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 BSE. All submissions should refer to File No. SR-BSE-93-20 and should be submitted by December 8, 1993.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-28227 Filed 11-16-93; 8:45 am]

BILLING CODE 8010-01-M

[1] See Securities Exchange Act Release No. 32552 (June 29, 1993), 58 FR 36714 (July 8, 1993) (order approving File No. SR-BSE-93-03).

[Release No. 34-33184; File No. SR-BSE-93-22]

Self-Regulatory Organizations; Filing and Immediate Effectiveness of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to an Extension of Amendments to its Transaction Fee Schedule for a Six Month Period

November 10, 1993.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on October 29, 1993, the Boston Stock Exchange, Inc. ("BSE" 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. On November 3, 1993, the BSE submitted Amendment No. 1 to the proposed rule change.[1] 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 BSE proposes to extend the temporary effectiveness of its fee schedule regarding certain Intermarket Trading System ("ITS") fees for a six month period.[2] The affected fees are as follows:

new language
[deleted language]
Value Charges
All [BSE] *other* Executions *(includes trades over 2,000 shares and ITS trades)*
First $10 million per month
  $.16 per $1,000 contract value
Next $40 million per month
  $.13 per $1,000 contract value
Next $50 million per month
  $.10 per $1,000 contract value
Next $100 million per month
  $.08 per $1,000 contract value
Next $300 million per month
  $.05 per $1,000 contract value
$500.1 + million per month
  $.01 per $1,000 contract value
Maximum charge per side (non-cross)
  $100.00
Maximum charge per side (cross)
  $75.00
I.T.S. User Fee
  No charge for non-specialist firms

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

1. Purpose

The purpose of the proposed rule change is to request a six month extension of the temporary approval of

[1] See letter from Karen A. Aluise, Assistant Vice President, BSE, to Diana Luka-Hopson, Branch Chief, Commission, dated October 29, 1993. Amendment No. 1 requested that the BSE value charges be extended for six months instead of one year.

[2] On November 24, 1992, the Commission announced the immediate effectiveness of a BSE proposal which, among other things, amended the BSE fee schedule to impose value charges on all non-specialist outbound ITS trades for a one year period. See Securities Exchange Act Release No. 31515 (November 24, 1992), 57 FR 56937 (December 1, 1992) (notice of immediate effectiveness of File No. SR-BSE-92-9).

the Exchange's fee schedule regarding certain ITS fees. At the request of the Commission, the BSE sought temporary approval of that portion of its proposed rule filing SR–BSE–92–9 regarding certain ITS transactions.[3] The affected fees are comprised of the value charges instituted on all non-specialist, outbound ITS trades which replaced the ITS User Fee of $.003 per share on all outbound trades incurred by non-specialist firms. The Commission granted temporary approval of the value charges on a one year basis pending the outcome of the Market 2000 Study.

2. Statutory Basis

The statutory basis for this proposal is section 6(b)(4) of the Act in that the proposal provides for the equitable allocation of reasonable dues, fees and other charges among the BSE's members, issuers and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Comments were solicited from the Fee Committee of the Board of Governors, comprised of representatives of dealer-specialist, retail, and institutional firms; from the Executive Committee, which serves as the Board of Governors of the Clearing Corporation; and from the Board of Governors of the Exchange.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange and therefore has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraphs (e) of Rule 19b–4 thereunder. 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.

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 at the Commission's Public Reference Room. Copies of this filing will also be available for inspection and copying at the principal office of the BSE. All submissions should refer to File No. SR–BSE–93–22 and should be submitted by December 8, 1993.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–28228 Filed 11–16–93; 8:45 am]

BILLING CODE 8010–01–M

[3] See Release No. 34–31515, *supra* note 2.

[Release No. 34–33166; File No. SR–CBOE–93–42]

Self-Regulatory Organizations; Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to Options on the Nasdaq 100 Index

November 8, 1993.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on September 22, 1993, the Chicago Board Options Exchange, Inc. ("CBOE" 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 CBOE.[1] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] The CBOE amended the rule change proposal on October 27, 1993 to include an updated list of the securities comprising the Nasdaq 100 Index. This list of securities became the basis of calculations of the value of the Nasdaq 100 Index as of October 26, 1993. See letter from Robert B. Wilcox, Jr., Schiff Hardin & Waite to Michael A. Walinskas, Staff Attorney, Division of Market Regulation, SEC, dated October 27, 1993 ("amendment No. 1").

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to list and trade options on the Nasdaq 100 Index ("Nasdaq Index" or "Index"). The text of the proposed rule change is available at the Office of the Secretary, the CBOE, and at the Commission.

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 CBOE 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 CBOE 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 the Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to permit the Exchange to list and trade options based on the Nasdaq Index. Such options are sometimes referred to in this proposed rule change as "NDQ options." The Nasdaq Index is calculated and maintained by the Nasdaq Stock Market, Inc. ("Nasdaq"), a subsidiary of the National Association of Securities Dealers, Inc. ("NASD"). NDQ options will be cash-settled, European-style and A.M.-settled.

1. Index Design, Maintenance, and Calculation

The Nasdaq Index is a capitalization-weighted index composed of one hundred of the largest non-financial securities issued by U.S. issuers and traded on the Nasdaq National Market. No more than one security issued by an issuer may be included in the Index at any time. The Index is comprised of stocks that range in capitalization from $437 million to $26.8 billion, as of the market close on October 25, 1993. As of that time, the total capitalization of the Index was $253.8 billion, the median capitalization of the stocks in the Index was $1.3 billion, the largest stock in the Index accounted for 10.54% of the total capitalization of the Index, and the smallest stock in the Index accounted for 0.17% of the total capitalization of the Index.

As is true with respect to other capitalization-weighted indexes, the representation of each security in the

Index is proportional to its last sale price times the total number of shares outstanding, in relation to the total market value of all of the securities in the Index. The level of the Index is calculated as follows:

$$\text{Index Level} = \frac{\text{Current Market Value}}{\text{Adjusted Base Period Market Value}} \times 250$$

$$\text{Adjusted Base Period Market} = \frac{\text{Current Market Value After Adjustments}}{\text{Current Market Value Before Adjustments}} \times \text{Previous Base Period Market Value}$$

The numerical value of the Index was established at 250 prior to the opening of the market on February 1, 1985, and on November 3, 1993 was at approximately 776. Nasdaq has advised the CBOE that it has determined to split the value of the Index in half prior to the commencement of trading of NDQ options, and the current value of the Index, after giving effect to the split, would be approximately 388.

Nasdaq has notified the CBOE that it recently updated the list of securities comprising the Index and will continue to make revisions to the Index on an annual basis.[2] Nasdaq also, in its discretion, will make special adjustments to the securities comprising the Index to reflect such events as mergers, acquisitions, and capitalization changes and adjustments (resulting from stock splits, stock dividends, spin-offs and similar events). Updates to the Index and special adjustments result in value changes to both the current market value and adjusted base period market value in the formula set forth above, and therefore do not in and of themselves alter the level of the Index. The level of the Index therefore changes (except in the case of a split in the Index, as described above) only as a result of price changes in the securities comprising the Index.

The Index is calculated continuously by Nasdaq and disseminated no less often than every fifteen seconds. Index values are disseminated by Nasdaq to Level 2 and Level 3 Nasdaq terminals and to Level 1 vendors and the print media. Nasdaq will also calculate the exercise settlement value for each expiring series of NDQ options and make this value available to the CBOE for use by the Options Clearing Corporation in effecting settlement of exercises and assignments of the options.[3]

2. NDQ Option Trading

The Exchange is proposing in the proposed rule change to trade "regular" NDQ options and full-value and reduced-value long-term options ("LEAPS") based on the Nasdaq Index ("NDQ LEAPS"). Chapter XXIV of the CBOE's Rules, as modified by this rule change, will govern trading of NDQ options. The CBOE attached to its rule filing with the Commission an exhibit summarizing the proposed contract specifications for NDQ options.

(a) *Reporting authority.* The existing Interpretation to CBOE Rule 24.1 that identifies the "reporting authority" for each index underlying options traded on the Exchange will be amended to specify that the reporting authority for the Nasdaq Index is Nasdaq.

(b) *Current index value.* The "current index value" for regular NDQ options will be equal to the level of the Nasdaq Index as reported by Nasdaq (after giving effect to the split in the Index described above).[4] The "current index value" for reduced-value NDQ LEAPS will be one-tenth of the value of the related regular NDQ options.

(c) *Exercise and settlement.* Rule 24.9 will specify that NDQ options will have European-style exercise and will be "A.M.-settled index options." Regular NDQ options and NDQ LEAPS will expire on the Saturday following the third Friday of the expiration month, and the last day for trading in an expiring series will be the second business day (ordinarily a Thursday) preceding the expiration date.

(d) *Position limits.* The Exchange proposes initially[5] to establish the same position limits for NDQ options that are applicable to most index options trading on the Exchange, namely, 25,000 on the same side of the market, with no more than 15,000 of such contracts in the series with the nearest expiration date. The Exchange also proposes to apply the same hedge exemption provisions to NDQ options that are applied to all other index options (other than options on the S&P 500 Index), namely, a maximum of 75,000 contracts on the same side of the market. The existing provisions of Rule 24.4 (specifically, paragraph 24.4(a) and Interpretation .01 to Rule 24.4) implement these proposals without any change.

(e) *Strike prices.* Interpretation .01 to Rule 24.9, which describes the procedures for adding and deleting strike prices for index options, will apply to NDQ options.

(f) *Expiration cycle.* Existing Rule 24.9(a)(2), which describes the expiration months for regular index options, will apply to regular NDQ options, and NDQ options will have up to three near-term consecutive expiration months plus up to three farther-out expiration months at three-month intervals. Existing Rule 24.9(b), which describes the expiration months for LEAPS index options, will apply to LEAPS NDQ options.

3. Inclusion in Rules of Disclaimer of Liability on Behalf of Nasdaq

The CBOE has agreed with Nasdaq to place a disclaimer of liability on behalf of Nasdaq in the CBOE's Rules. The disclaimer is similar in concept to the disclaimers on behalf of Standard & Poor's Corporation, Frank Russell Company, and LIFFE Administration &

[2] Nasdaq has advised the CBOE that it will conduct an update of the components of the Index in each future year, that these annual future updates will be conducted using closing values for the final day of trading in November, that Nasdaq will make any changes in the Index publicly available in early December, and that the Index as updated will become the basis for calculations of values of the Index as of the first trading day following the third Friday of December in each year.

[3] Because NDQ options will be A.M.-settled, each exercise settlement value will be an "opening index value," i.e., a value derived from first reported sale (opening) prices of the securities in the Index on the last day of trading in the securities prior to expiration, or from the last reported sale prices of any securities that do not open for trading on that day.

[4] The "current index value" is defined in CBOE Rule 24.1(g) (as amended by File No. SR–CBOE–93–05) for regular options to mean "the level of the underlying index reported by the reporting authority for the index, or any multiple or fraction of such reported level specified by the Exchange."

[5] The Exchange may file a separate proposed rule change in the near future to revise the position limits applicable to all A.M.-settled index options. Approval of that proposed rule change would have the effect of revising the position limits applicable to NDQ options.

Management that are currently in the CBOE's Rules.

4. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act, in general, and furthers the objectives of section 6(b)(5) in particular, in that it will permit trading in NDQ options pursuant to rules designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade, and thereby providing investors with the ability to invest in options based on an additional index.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The CBOE does not believe that the proposed rule change will impose any inappropriate 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 solicited or received with respect to the proposed rule change.

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. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR-CBOE-93-42 and should be submitted by December 8, 1993.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-28214 Filed 11-16-93; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-33174; File No. SR-NASD-93-64]

Self-Regulatory Organizations; Notice of Filing and Order Granting Temporary Accelerated Approval of Proposed Rule Change by National Association of Securities Dealers, Inc. Extending the Advertising Prefiling Requirement as it Relates to Collateralized Mortgage Obligation (CMO) Advertisements

November 9, 1993.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on November 4, 1993, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

1. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD is proposing to amend Article III, section 35(c)(2) of the Rules of Fair Practice and section 8(c)(1)(B) of the Government Securities Rules to extend temporarily the effectiveness of the advertising prefiling requirement as it relates to collateralized mortgage obligation (CMO) advertisements. Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

Rules of Fair Practice

Article III

* * * * * * *

Communications With the Public

Sec. 35.

* * * * * * *

(c) Filing Requirements and Review Procedures

(2) Advertisements concerning collaterlized mortgage obligations registered under the Securities Act of 1933 shall be filed with the Association's Advertising Department for review at least 10 days prior to use (or such shorter period as the Department may allow in particular circumstances) for approval and, if changed or expressly disapproved by the Association, shall be withheld from publication or circulation until any changes specified by the Association have been made or, in the event of disapproval, until the advertisement has been refiled for, and has received, Association approval. This subsection (c)(2) shall remain in effect for one year from November 16, 199[2]*3* unless modified or extended prior thereto by the Board of Governors.

Government Securities Rules

* * * * *

Communications With the Public

Sec. 8

* * * * * * *

(c) Filing Requirements and Review Procedures

(1) Members shall file advertisements for review with the Association's Advertising Department as follows:

* * *

(B) advertisements concerning collateralized mortgage obligations shall be filed with the Association's Advertising Department for review at least 10 days prior to use (or such shorter period as the Department may allow in particular circumstances) for approval and, if changed or expressly disapproved by the Association, shall be withheld from publication or circulation until any changes specified by the Association have been made or, in the event of disapproval, until the advertisement has been refiled for, and has received, Association approval. This subsection (c)(1)(B) shall remain in effect for one year from November 16, 199[2]*3* unless modified or extended prior thereto by the Board of Governors.

* * * * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning

[6] 17 CFR 200.30-3(a)(12) (1993).

the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

As part of its continuing program to enhance the regulation of sales practices in connection with the marketing of CMOs, the NASD reviewed the CMO advertising pre-use filing provisions adopted by the NASD last year.[1] The provisions require members to file CMO advertising at least 10 days prior to first use and are set forth in Article III, Section 35(c)(2) of the Rules of Fair Practice and Section 8(c)(1)(B) of the Government Securities Rules. When adopted, the prefiling provisions contained sunset clauses which specified that they would be effective until November 16, 1993, unless modified or extended prior thereto by the NASD's Board of Governors.

On the basis of information provided by the NASD's Advertising Regulation Department staff, the NASD determined that the prefiling requirement has been an extremely effective tool in controlling the use of misleading advertising. There has been a significant decline in the number of non-complying filings as well as a marked reduction in the number of complaints relating to CMO advertising referred for disciplinary action. The NASD is, therefore, proposing in a separate rule filing submitted to the SEC, to amend the rules to eliminate the sunset provisions thereby making the filing requirement permanent.[2]

In the interim, until the SEC has had the opportunity to review and publish for public comment the NASD's proposal to make the prefiling provisions permanent, the NASD is proposing to extend temporarily the effectiveness of the prefiling provisions for one year.

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act[3] in that the amendments will ensure that the positive effect of the prefiling requirement in controlling the use of misleading advertising, which protects investors and the public interest by enhancing sales practices relating to CMOs, will be extended temporarily for one year while the proposal to make the prefiling provisions permanent is reviewed and published for public comment by the SEC.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The NASD has requested that the Commission find good cause pursuant to section 19(b)(2) for approving the proposed rule change prior to the 30th day after publication in the **Federal Register.** The NASD notes that: the proposed rule change is an interim rule; the NASD has filed a proposed rule change soliciting public comment concerning whether to make the prefiling requirement permanent; and the NASD previously has solicited member comment concerning the prefiling requirement.

Based on the NASD'S representations that: (1) The prefiling requirement has been an effective tool in controlling the use of misleading advertising, (2) there has been a marked decline in the number of advertising filings that do not comply with the rules, and (3) there has been a significant reduction in the number of complaints relating to CMO advertising referred for disciplinary action, 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 NASD and, in particular, the requirements of section 15A(b)(6). Section 15A(b)(6) requires, in part, that the rules of the NASD be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.

The Commission finds good cause for approving the proposal on an accelerated basis to avoid the operation of the current sunset clauses which would cause the prefiling provisions to expire on November 16, 1993. The Commission believes that the proposed rule change promotes the public interest by continuing a regulatory policy that has successfully reduced the use of misleading CMO advertising by NASD members and believes it is appropriate to continue these requirements uninterrupted.

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 Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by December 8, 1993.

It Is Therefore Ordered, Pursuant to section 19(b)(2)[4] that the proposed rule change (SR–NASD–93–64), extending until November 16, 1994 the requirement that collateralized mortgage obligation advertisements be prefiled with the NASD, is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–28175 Filed 11–16–93; 8:45 am]

BILLING CODE 8010–01–M

[1] See Securities Exchange Act Release No. 31369 (October 28, 1992), 57 FR 49732 (Nov. 3, 1992) (approving File No. SR–NASD–92–32).

[2] The proposed rule change, the text of which may be examined in the Commission's Public Reference Room, also would require the filing of advertisements and sales literature relating to investment companies. See File No. SR–NASD–93–66, filed with the Commission on November 4, 1993.

[3] 15 U.S.C. 78o–3.

[4] 15 U.S.C. 78s(b)(2).

[Release No. 34-33182; File No. SR-PSE-93-27]

Self-Regulatory Organizations; Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Stock Exchange, Inc. Relating to a Two Month Waiver of Certain Fees for Floor Members

November 10, 1993.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on October 29, 1993, the Pacific Stock Exchange, Inc. ("PSE" or "Exchange") filed with the Securities 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 PSE proposes to waive certain fees for floor members set forth in the PSE's Schedule of Rates for Exchange Services ("Schedule of Rates") for a two month period.

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

1. Purpose

The Exchange is proposing to waive the following monthly fees that are applicable to its equity and options floor members: (1) Equity Floor Broker Booth Fees of $125, $250 and $375 for small, large and area booths, respectively; (2) Equity Floor Privilege Fees of $165 per registered floor member and registered clerk; (3) approximately 31% of the Systems Fee of $1,700 per post on the equity floor; (4) approximately 45% of the Options Floor Booth Fees of $300, $400 and $500 for retail booths, clearing booths and stock execution booths, respectively, and approximately 45% of the $350 surcharge for prime location booths; and (5) approximately 45% of the Options Market Maker Fees of $725 per month. The Exchange proposes that the waivers be in effect for two months.

The purpose of the proposed waiver is to provide the Exchange's floor members, who have borne the most significant burden of fee increases in recent years, with a discount in floor fees in response to increased revenues for this year. The Exchange stated that the fees proposed to be waived correspond to fees that have been increased in recent years.[1]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)(4) of the Act in that it provides for the equitable allocation of reasonable fees and other charges among members using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee or other charge imposed by the Exchange and therefore has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b-4 thereunder. 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.

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 Room. Copies of the filing will also be available for inspection and copying at the principal office of the PSE. All submissions should refer to File No. SR-PSE-93-27 and should be submitted by December 8, 1993.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-28229 Filed 11-16-93; 8:45 am]

BILLING CODE 8010-01-M

[1] See letter from David P. Semak, Vice President, Regulation, PSE, to Louis A. Randazzo, Attorney, Commission, dated November 5, 1993.

[Release No. 34-33183; File No. SR-PSE-93-28]

Self-Regulatory Organizations; Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Stock Exchange, Inc. Relating to a Three Month Waiver of Market Maker Transaction Fees in Certain Issues

November 10, 1993.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on October 29, 1993, the Pacific Stock Exchange, Inc. ("PSE" 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 PSE is proposing to waive all market maker transaction fees for transactions in IDTI (Integrated Device Technology) and FPNX (First Pacific Network) options. The waiver will cover a three month period from November 1, 1993 to January 31, 1994.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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

1. Purpose

The Exchange believes that the proposed temporary waiver of market maker transactions fees will result in greater liquidity, enhanced competition and a higher quality of markets in IDTI and FPNX options on the Options Floor of the Exchange.

2. Statutory Basis

The proposed waiver is consistent with Section 6(b)(5) of the Act in that it will facilitate transactions in securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee or other charge imposed by the Exchange and therefore has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b–4 thereunder. 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.

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 at the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the principal office of the PSE. All submissions should refer to File No. SR–PSE–93–28 and should be submitted by December 8, 1993.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–28230 Filed 11–16–93; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–33179; File No. SR–Phlx–93–14]

Self-Regulatory Organizations; Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating To Hedge Orders

November 10, 1993.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on April 1, 1993, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Phlx. 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 Phlx, pursuant to Rule 19b–4, proposes to amend Exchange Rules 1033 and 1066, Options Floor Procedure Advice ("OFPA" or "advice") D–2, and OFPA F–4, as well as to adopt OFPA F–14 and OFPA F–16 to permit various types of hedge orders to attain spread priority.

The text of the proposed rule change is available at the Office of the Secretary, Phlx, and the Commission.

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 statutory 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 Phlx 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

The Phlx proposes to permit certain types of hedge orders to attain spread priority, that is, to be executed as a single transaction, with priority over certain existing bids/offers for each leg of the transaction. Accordingly, the Exchange proposes to amend Exchange Rule 1066 to define the types of hedge orders that would be eligible for spread priority. Specifically, paragraph (f) of Rule 1066 would be amended to define hedge orders as either spread type orders (spreads, straddles, and combinations) or synthetic orders (buy-writes, synthetic calls or synthetic puts). The current definition of a "spread order" [1] in Rule 1066(d) would be moved to Rule 1066(f)(1), as a sub-paragraph of the definition of hedge orders.

Currently, Phlx Rule 1033(d) affords priority to certain spread transactions. Under this provision, an eligible spread is executable as a single transaction at a total net credit/debit with one contra-side as long as that net credit/debit improves the established market for the spread as measured by the aggregate price of the respective legs, if executed individually. The proposed language to Rule 1033(d) would clarify the existing requirement to improve the established market so that at least one option leg is executed at a better price than the established market for the option and no option leg is executed outside of the established market. Pursuant to this

[1] A spread order is defined as an order to buy a stated number of option contracts and to sell the same number of option contracts, in a different series of the same class of options.

proposed rule change, all of the types of hedge orders defined in proposed Rule 1066(f) would be eligible for spread priority. Rule 1033 would also be amended to add headings to each paragraph for quick reference to appropriate topic.

As a result of the proposed changes to Rules 1066 and 1033, corresponding changes to OFPA D–2 and F–4 will be required. Specifically, OFPA D–2 (Instances of Non-Liability for Floor Brokers or Specialists) would be amended to include synthetic orders.[2] Currently, a floor broker and a specialist are not held liable for the non-execution of an order in two or more series based on transaction prices from any opening, closing or trading rotation. Synthetic orders would be added as an example of an order in two or more series.

In addition, OFPA F–4 (Orders Executed as Spreads, Straddles, or Combinations) would be amended to reflect the definitional changes to Rule 1066. Accordingly, the title would be changed to "Orders Executed as Spread, Straddle, Combination or Synthetic Orders," and the text would reflect the new term, synthetic orders. OFPA F–4 would additionally require the marking of order tickets executed in reliance upon the spread priority rules with a "syn" for synthetic orders in addition to the existing requirement that spreads, straddles, and combinations also be marked.[3] A new Advice enumerating the procedure for executing hedge orders is also proposed for both equity option and foreign currency option ("FCO") floors. OFPA F–14 (Executing Hedge Orders) restates the definitions in Rule 1066(f) and the procedures in Rule 1033(d) for easy reference by floor persons in the floor procedure advice handbook.

Certain changes proposed by the Phlx to Rules 1066 and 1033 are applicable solely to the trading of FCOs. First, because Rule 1033 deals with priority for different types of spreads, existing Commentary .02 of Rule 1066 is proposed to be moved to Rule 1033(f). A new Commentary .02 to Rule 1066 would be adopted containing a definition of multi-spread transactions in FCOs, because Rule 1066 generally contains definitional provisions.

Second, Rule 1033(f) is proposed to be added to state that a spread order may consist of a ratio spread. As a result, ratio spreads would become eligible for spread priority pursuant to Rule 1033(d). Rule 1033(f) defines the permissible ratios as one-to-one, one-to-two, one-to-three, and two-to-three.

Third, proposed Rule 1033(g) is a new paragraph governing multi-spread priority. Eligible multi-spread transactions in FCOs, as defined in new Commentary .02 of Rule 1066, could be executed as a single transaction as long as at least one leg of each spread improves the established market and no leg is executed outside of the established market. The language of Rule 1033(g) parallels existing language in Rule 1033(e), relating to three-way transactions.[4]

Lastly, OFPA F–16 (Two-Way and Multi-Spread Transactions) is proposed by the Phlx for adoption. This Advice would contain the aforementioned definitions and procedures regarding FCO spread priority.

As a whole, the Phlx believes that the proposed changes to Rule 1033, Rule 1066, OFPA D–2, and OFPA F–4, as well as the proposed adoption of OFPA F–14 and OFPA F–16, are consistent with section 6(b)(5) of the Act. The Exchange notes that the current text of Rule 1033(d) is understood to cover various types of spread orders. However, in order to prevent confusion and provide a more accommodating market for the execution of conservative hedge trading strategies involving hedge orders such as ratio spreads and three-way transactions, the Phlx seeks to incorporate both the definitions and execution procedures into express provisions in Exchange rules as well as floor procedure Advices. Accordingly, the Exchange believes that expanding the category of hedge transactions eligible for spread priority and clarifying the procedure for executing these transactions should promote just and equitable principles of trade and protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Phlx does not believe that the proposed rule change will impose any inappropriate 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. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to the file number in the caption above and should be submitted by December 8, 1993.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

[2] A synthetic option order is defined in Proposed Rule 1066(f)(4) a an order to buy or sell a stated number of option contracts and buy or sell the underlying stock in an amount that would offset (on a one-for-one basis) the option position.

[3] OFPA F–4 would also establish a fine schedule which is intended to be incorporated into the Exchange's minor rule violation enforcement and reporting plan, administered pursuant to Phlx Rule 970. Telephone Conversation between Jeffrey P. Burns, Attorney, Branch of Derivatives Regulation, SEC, and Edith Hallahan, Special Counsel, Regulatory Services, Phlx, on November 2, 1993.

[4] Proposed amended Rule 1033(e) defines three-way transactions as spread, straddle, and combination orders of three individual series in the same FCOs where (i) the order size for each of the three individual series are equal to each other, or (ii) the combined order size of any two series on the same side of the market is either equal to the order size of the third series or differs from the order size of the third series by a permissible ratio. A permissible ratio is any one of the following: one-to-one, one-to-two, one-to-three, and two-to-three.

[5] 17 CFR 200.30–3(a)(12) (1992).

Margaret H. McFarland,
Deputy Secretary.
[FR Doc. 93-28215 Filed 11-16-93; 8:45 am]
BILLING CODE 8010-01-M

[Rel. No. IC-19861; 811-4778]

MFS Lifetime High Income Fund; Application

November 10, 1993.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: MFS Lifetime High Income Fund.

RELEVANT ACT SECTION: Section 8(f)

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on November 5, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 6, 1993, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, 500 Boylston Street, Boston, Massachusetts 02116.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Staff Attorney, at (202) 272-3026, or Robert A. Robertson, Branch Chief, at (202) 272-3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end management investment company that was organized as a business trust under the laws of Massachusetts. On July 30, 1986, applicant registered under the Act as an investment company, and filed a registration statement to register its shares under the Securities Act of 1933. The registration statement was declared effective on December 29, 1986, and the initial public offering commenced on or about that date.

2. On April 14, 1993, applicant's board of trustees approved an agreement and plan of reorganization (the "Plan") between applicant and MFS Series Trust III, a registered open-end management investment company (formerly, Massachusetts Financial High Income Fund), on behalf of one of its series, MFS High Income Fund (the "Surviving Fund"). In addition, the board of trustees made the findings required by rule 17a-8 under the Act.[1]

3. On July 2, 1993, applicant distributed proxy materials to its shareholders. At a meeting held on August 27, 1993, applicant's shareholders approved the reorganization.

4. Pursuant to the Plan, on September 27, 1993, applicant transferred all of its assets to the Surviving Fund in consideration of the Surviving Fund's Class B shares with the equivalent net asset value. Applicant then distributed the Surviving Fund's shares to its shareholders. After completion of the reorganization, each shareholder of applicant owned Class B shares of the Surviving Fund with the same aggregate net asset value as the shares of applicant owned by the shareholder immediately prior to the reorganization. On September 27, 1993, applicant had 51,731,954.71 shares outstanding, having an aggregate net asset value of $322,565,970.20 and a per share net asset value of $6.24.

5. Applicant and the Surviving Fund assumed their own expenses in connection with the reorganization. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses in the approximate amount of $15,000, $1,245, $22,445, $14,066, $2,745, and $2,506 respectively, were borne by applicant. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses in the approximate amount of $23,824, $1,245, $8,239, $30,962, $10,362, and $2,807 respectively, were borne by the Surviving Fund.

6. There are no securityholders to whom distributions in complete liquidation of their interests have not been made. Applicant has no debts or other liabilities that remain outstanding. Applicant is not a party to any litigation or administrative proceeding.

7. Applicant will file certificates of dissolution with Massachusetts authorities after the requested order is obtained.

8. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,
Deputy Secretary.
[FR Doc. 93-28216 Filed 11-16-93; 8:45 am]
BILLING CODE 8010-01-M

[1] Rule 17a-8 provides an exemption from section 17(a) for certain reorganizations among registered investment companies that may be affiliated persons, or affiliated persons of an affiliated person, solely by reason of having a common investment adviser, common directors, and/or common officers.

[Rel. No. IC-19860; 811-4780]

MFS Lifetime Money Market Fund; Application

November 10, 1993.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: MFS Lifetime Money Market Fund.

RELEVANT ACT SECTION: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on November 5, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 6, 1993, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant, 500 Boylston Street, Boston, Massachusetts 02116.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Staff Attorney, at (202) 272-3026, or Robert A. Robertson,

Branch Chief, at (202) 272–3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end management investment company that was organized as a business trust under the laws of Massachusetts. On July 30, 1986, applicant registered under the Act as an investment company, and filed a registration statement to register its shares under the Securities Act of 1933. The registration statement was declared effective on December 29, 1986, and the initial public offering commenced on or about that date.

2. On April 14, 1993, applicant's board of trustees approved an agreement and plan of reorganization (the "Plan") between applicant and MFS Series Trust I (formerly, MFS Lifetime Managed Sectors Fund), a registered open-end management investment company on behalf of one of its series, MFS Cash Reserve Fund (the "Surviving Fund"). In addition, the board of trustees made the findings required by rule 17a–8 under the Act.[1]

3. On July 1, 1993, applicant distributed proxy materials to its shareholders. At a meeting held on July 30, 1993, applicant's shareholders approved the reorganization.

4. Pursuant to the Plan, on September 7, 1993, applicant transferred all of its assets to the Surviving Fund in consideration of the Surviving Fund's Class B shares with the equivalent net asset value. Applicant then distributed the Surviving Fund's shares to its shareholders. After completion of the reorganization, each shareholder of applicant owned Class B shares of Surviving Fund with the same aggregate net asset value as the shares of applicant owned by the shareholder immediately prior to the reorganization. On September 7, 1993, applicant had 114,566,047.856 shares outstanding, having an aggregate net asset value of $114,566,047.856 and a per share net asset value of $1.00.

5. The Surviving Fund assumed all expenses in connection with the reorganization. Legal, accounting, printing, transfer agency, and proxy solicitor expenses were in the approximate amount of $11,574, $1,245, $13,490, $10,338, and $1,850, respectively.

6. There are no securityholders to whom distributions in complete liquidation of their interests have not been made. Applicant has no debts or other liabilities that remain outstanding. Applicant is not a party to any litigation or administrative proceeding.

7. Applicant will file certificates of dissolution with Massachusetts authorities after the requested order is obtained.

8. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–28217 Filed 11–16–93; 8:45 am]

BILLING CODE 8010–01–M

[1] Rule 17a–8 provides an exemption from section 17(a) for certain reorganizations among registered investment companies that may be affiliated persons, or affiliated persons of an affiliated person, solely by reason of having a common investment adviser, common directors, and/or common officers.

[Rel. No. IC–19859; 811–4774]

MFS Lifetime Municipal Bond Fund; Application

November 10, 1993.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: MFS Lifetime Municipal Bond Fund.

RELEVANT ACT SECTION: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATES: The application was filed on November 5, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 6, 1993, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interests, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant, 500 Boylston Street, Boston, Massachusetts 02116.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Staff Attorney, at (202) 272–3026, or Robert A. Robertson, Branch Chief, at (202) 272–3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end management investment company that was organized as a business trust under the laws of Massachusetts. On July 30, 1986, applicant registered under the Act as an investment company, and filed a registration statement to register its shares under the Securities Act of 1933. The registration statement was declared effective on December 29, 1986, and the initial public offering commenced on or about that date.

2. On April 14, 1993, applicant's board of trustees approved an agreement and plan of reorganization (the "Plan") between applicant and MFS Municipal Series Trust (formerly, MFS Multi-State Municipal Bond Trust), a registered open-end management investment company, on behalf of one of its series, MFS Municipal Income Fund (the "Surviving Fund"). In addition, the board of trustees made the findings required by rule 17a–8 under the Act.[1]

3. On June 3, 1993, applicant distributed proxy materials to its shareholders. At a meeting held on July 30, 1993, applicant's shareholders approved the reorganization.

4. Pursuant to the Plan, on September 7, 1993, applicant transferred all of its assets to the Surviving Fund in consideration of the Surviving Fund's Class B shares with the equivalent net asset value. Applicant then distributed the Surviving Fund's shares to its shareholders. After completion of the reorganization, each shareholder of applicant owned Class B shares of the Surviving Fund with the same aggregate net asset value as the shares of applicant owned by the shareholder immediately prior to the reorganization. On

[1] Rule 17a–8 provides an exemption form section 17(a) for certain reorganizations among registered investment companies that may be affiliated persons, or affiliated persons of an affiliated person, solely by reason of having a common investment adviser, common directors, and/or common officers.

September 7, 1993, applicant had 58,432,387.786 shares outstanding, having an aggregate net asset value of $532,704,481.70 and a per share net asset value of $9.12.

5. The Surviving Fund assumed all expenses in connection with the reorganization. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses were in the approximate amount of $11,474, $1,245, $12,312, $11,948, $2,559, and $3,181, respectively.

6. There are no securityholders to whom distributions in complete liquidation of their interests have not been made. Applicant has no debts or other liabilities that remain outstanding. Applicant is not a party to any litigation or administrative proceeding.

7. Applicant will file certificates of dissolution with Massachusetts authorities after the requested order is obtained.

8. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-28210 Filed 11-16-93; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC—19858; 811-4779]

MFS Lifetime Total Return Fund; Application for Deregistration

November 10, 1993.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: MFS Lifetime Total Return Fund.

RELEVANT ACT SECTION: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on November 5, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 6, 1993, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant, 500 Boylston Street, Boston, Massachusetts 02116.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Staff Attorney, at (202) 272-3026, or Robert A. Robertson, Branch Chief, at (202) 272-3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end management investment company that was organized as a business trust under the laws of Massachusetts. On July 30, 1986, applicant registered under the Act as an investment company, and filed a registration statement to register its shares under the Securities Act of 1933. The registration statement was declared effective on December 29, 1986, and the initial public offering commenced on or about that date.

2. On April 14, 1993, applicant's board of trustees approved an agreement and plan of reorganization (the "Plan") between applicant and MFS Series Trust V (formerly, MFS Total Return Fund), a registered open-end management investment company, on behalf of one of its series, MFS Total Return Fund (the "Surviving Fund"). In addition, the board of trustees made the findings required by rule 17a-8 under the Act.[1]

3. On May 25, 1993, applicant distributed proxy materials to its shareholders. At a meeting held on July 23, 1993, applicant's shareholders approved the reorganization.

4. Pursuant to the Plan, on August 23, 1993, applicant transferred all of its assets to the Surviving Fund in consideration of the Surviving Fund's Class B shares with the equivalent net asset value. Applicant then distributed the Surviving Fund's shares to its shareholders. After completion of the reorganization, each shareholder of applicant owned Class B shares of the Surviving Fund with the same aggregate net asset value as the shares of applicant owned by the shareholder immediately prior to the reorganization. On August 23, 1993, applicant had 44,956,960.51 shares outstanding, having an aggregate net asset value of 498,557,128.70 and a per share net asset value of $11.09.

5. Applicant and the Surviving Fund assumed their own expenses in connection with the reorganization. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses in the approximate amount of $15,000, $1,245, $34,917, $34.654, $7,100, and $3,347 respectively, were borne by applicant. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses in the approximate amount of $28,474, $1,245, $19,526, $71,389, $22,640, and $6,096 respectively, were borne by the Surviving Fund.

6. There are no securityholders to whom distributions in complete liquidation of their interests have not been made. Applicant has no debts or other liabilities that remain outstanding. Applicant is not a party to any litigation or administrative proceeding.

7. Applicant will file certificates of dissolution with Massachusetts authorities after the requested order is obtained.

8. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-2826 Filed 11-16-93; 8:45 am]

BILLING CODE 8010-01-M

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[1] Rule 17a-8 provides an exemption from section 17(a) for certain reorganizations among registered investment companies that may be affiliated persons, or affiliated persons of an affiliated person, solely by reason of having a common investment adviser, common directors, and/or common officers.

[Rel. No. IC—19857; 811-4772]

MFS Lifetime Worldwide Equity Fund; Application for Deregistration

November 10, 1993.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: MFS Lifetime Worldwide Equity Fund.

RELEVANT ACT SECTION: Section 8(f)

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on November 5, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 6, 1993, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant, 500 Boylston Street, Boston, Massachusetts 02116.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Staff Attorney, at (202) 272–3026, or Robert A. Robertson, Branch Chief, at (202) 272–3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

1. Applicant is an open-end management investment company that was organized as a business trust under the laws of Massachusetts. On July 30, 1986, applicant registered under the Act as an investment company, and filed a registration statement to register its shares under the Securities Act of 1933. The registration statement was declared effective on December 29, 1986, and the initial public offering commenced on or about that date.

2. On April 14, 1993, applicant's board of trustees approved an agreement and plan of reorganization (the "Plan") between applicant and MFS Series Trust VI (formerly, MFS Worldwide Total Return Fund), a registered open-end management investment company, on behalf of one of its series, MFS World Equity Fund (the "Surviving Fund"). In addition, the board of trustees made the findings required by rule 17a–8 under the Act.[1]

3. On July 11, 1993, applicant distributed proxy materials to its shareholders. At a meeting held on July 30, 1993, applicant's shareholders approved the reorganization.

4. Pursuant to the Plan, on September 7, 1993, applicant transferred all of its assets to the Surviving Fund in consideration of the Surviving Fund's Class B shares with the equivalent net asset value. Applicant then distributed the Surviving Fund's shares to its shareholders. After completion of the reorganization, each shareholder of applicant owned Class B shares of the Surviving Fund with the same aggregate net asset value as the shares of applicant owned by the shareholder immediately prior to the reorganization. On September 7, 1993, applicant had 8,485,380.326 shares outstanding, having an aggregate net asset value of $133,764,131.10 and a per share net asset value of $15.76.

5. The Surviving Fund assumed all expenses in connection with the reorganization. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses were in the approximate amount of $15,624, $1,245, $14,021, $12,792, $2,641, and $1,174, respectively.

6. There are no securityholders to whom distributions in complete liquidation of their interests have not been made. Applicant has no debts or other liabilities that remain outstanding. Applicant is not a party to any litigation or administrative proceeding.

7. Applicant will file certificates of dissolution with Massachusetts authorities after the requested order is obtained.

8. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–28220 Filed 11–16–93; 8:45 am]

BILLING CODE 8010–01–M

[1] Rule 17a–8 provides an exemption from section 17(a) for certain reorganizations among registered investment companies that may be affiliated persons, or affiliated persons of an affiliated person, solely by reason of having a common investment adviser, common directors, and/or common officers.

[Rel. No. IC–19856; 811–2672]

MFS Managed Municipal Bond Trust; Application for Deregistration

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: MFS Managed Municipal Bond Trust.

RELEVANT ACT SECTION: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on November 5, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 6, 1993, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant, 500 Boylston Street, Boston, Massachusetts 02116.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Staff Attorney, at (202) 272–3026, or Robert A. Robertson, Branch Chief, at (202) 272–3030 (Division of Investment Management, Office of Investment Company Regulation.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end management investment company that was organized as a business trust under the laws of Massachusetts. On September 9, 1976, applicant registered under the Act as an investment company, and on December 6, 1976 filed a registration statement to register its shares under the Securities Act of 1933. The registration statement was declared effective on January 17, 1977, and the initial public offering commenced on or about that date.

2. On April 21, 1993, applicant's board of trustees approved an agreement and plan of reorganization (the "Plan") between applicant, on behalf of its sole series, MFS Municipal Bond Fund (the "Terminating Fund"), and MFS Series

Trust IV (formerly, Massachusetts Cash Management Trust), a registered open-end management investment company, on behalf of one of the MFS Series Trust IV's series, MFS Municipal Bond Fund (the "Surviving Fund"). In addition, the board of trustees made the findings required by rule 17a-8 under the Act.[1]

3. On June 9, 1993, applicant distributed proxy materials to its shareholders. At a meeting held on August 5, 1993, the Terminating Fund's shareholders approved the reorganization.

4. Pursuant to the Plan, on September 7, 1993, the Terminating Fund transferred all of its assets to the Surviving Fund in consideration of the Surviving Fund's Class A shares with the equivalent net asset value. The Terminating Fund then distributed the Surviving Fund's shares to its shareholders. After completion of the reorganization, each shareholder of the Terminating Fund owned Class A shares of the Surviving Fund with the same aggregate net asset value as the shares of the Terminating Fund owned by the shareholder immediately prior to the reorganization. On September 7, 1993, the Terminating Fund had 187,609,111.702 shares outstanding, having an aggregate net asset value of $2,185,149,277 and a per share net asset value of $11.67.

5. The Surviving Fund assumed all expenses in connection with the reorganization. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses were in the approximate amount of $18,599, $1,245, $14,207, $44,773, $9,206, and $6,400, respectively.

6. There are no securityholders to whom distributions in complete liquidation of their interests have not been made. Applicant has no debts or other liabilities that remain outstanding. Applicant is not a party to any litigation or administrative proceeding.

7. Applicant will file certificates of dissolution with Massachusetts authorities after the requested order is obtained.

8. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

[1] Rule 17a-8 provides an exemption from section 17(a) for certain reorganizations among registered investment companies that may be affiliated persons, or affiliated persons of an affiliated person, solely by reason of having a common investment adviser, common directors, and/or common officers.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-28221 Filed 11-16-93; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-19855; 811-4773]

MFS Lifetime Government Mortgage Fund; Application for Deregistration

November 10, 1993.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: MFS Lifetime Government Mortgage Fund.

RELEVANT ACT SECTION: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on November 5, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 6, 1993, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate or service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant, 500 Boylston Street, Boston, Massachusetts 02116.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Staff Attorney, at (202) 272-3026, or Robert A. Robertson, Branch Chief, at (202) 272-3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end management investment company that was organized as a business trust under the laws of Massachusetts. On July 30, 1986, applicant registered under the Act as an investment company, and filed a registration statement to register its shares under the Securities Act of 1933. The registration statement was declared effective on December 29, 1986, and the initial public offering commenced on or about that date.

2. On April 14, 1993, applicant's board of trustees approved an agreement and plan of reorganization (the "Plan") between applicant and MFS Government Mortgage Fund, a registered open-end management investment company (the "Surviving Fund"). In addition, the board of trustees made the findings required by rule 17a-8 under the Act.[1]

3. On May 25, 1993, applicant distributed proxy materials to its shareholders. At a meeting held on July 23, 1993, applicant's shareholders approved the reorganization.

4. Pursuant to the Plan, on September 7, 1993, applicant transferred all of its assets to the Surviving Fund in consideration of the Surviving Fund's Class B shares with the equivalent net asset value. Applicant then distributed the Surviving Fund's shares to its shareholders. After completion of the reorganization, each shareholder of applicant owned Class B shares of the Surviving Fund with the same aggregate net asset value as the shares of applicant owned by the shareholder immediately prior to the reorganization. On September 7, 1993, applicant had 250,015,381.4 shares outstanding, having an aggregate net asset value of $1,773,235,696 and a per share net asset value of $7.09.

5. Applicant and the Surviving Fund assumed their own expenses in connection with the reorganization. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses in the approximate amount of $15,000, $1,245, $55,691, $78,406, $16,539, and $38,406 respectively, were borne by applicant. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses in the approximate amount of $25,874, $1,245, $11,528, $32,356, $10,626, and $3,211 respectively, were borne by the Surviving Fund.

6. There are not securityholders to whom distributions in complete liquidation of their interests have not

[1] Rule 17a-8 provides an exemption from section 17(a) for certain reorganizations among registered investment companies that may be affiliated persons, or affiliated persons of an affiliated person, solely by reason of having a common investment adviser, common directors, and/or common officers.

been made. Applicant has no debts or other liabilities that remain outstanding. Applicant is not a party to any litigation or administrative proceeding.

7. Applicant will file certificates of dissolution with Massachusetts authorities after the requested order is obtained.

8. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-28222 Filed 11-16-93; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-19854; 811-4776]

MFS Lifetime Capital Growth Fund; Application for Deregistration

November 10, 1993.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission".

ACTION: Notice of application of deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: MFS Lifetime Capital Growth Fund.

RELEVANT ACT SECTION: Sction 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on November 5, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 6, 1993, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant, 500 Boylston Street, Boston, Massachusetts 02116.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Staff Attorney, at (202) 272-3026, or Robert A. Robertson, Branch Chief, at (202) 272-3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end management investment company that was organized as a business trust under the laws of Massachusetts. On July 30, 1986, applicant registered under the Act as an investment company, and filed a registration statement to register its shares under the Securities Act of 1933. The registration statement was declared effective on December 29, 1986, and the initial public offering commenced on or about that date.

2. On April 14, 1993, applicant's board of trustees approved an agreement and plan of reorganization (the "Plan") between applicant and MFS Series Trust II (formerly, MFS Lifetime Capital Growth Fund), a registered open—end management investment company, on behalf of one of its series, MFC Capital Growth Fund (the "Surviving Fund"). In addition, the board of trustees made the findings required by rule 17a-8 under the Act.[1]

3. On June 3, 1993, applicant distributed proxy materials to its shareholders. At a meeting held on July 30, 1993, applicant's shareholders approved the reorganization.

4. Pursuant to the Plan, on September 7, 1993, applicant transferred all of its assets to the Surviving Fund in consideration of the Surviving Fund's Class B shares with the equivalent net asset value. Applicant then distributed the Surviving Fund's shares to its shareholders. After completion of the reorganization, each shareholder of applicant owned Class B shares of the Surviving Fund with the same aggregate net asset value as the shares of applicant owned by the shareholder immediately prior to the reorganization. On September 7, 1993, applicant had 32,428,985.142 shares outstanding, having an aggregate net asset value of $475,836,679.70 and a per share net asset value of $14.67.

5. The Surviving Fund assumed all expenses in connection with the reorganization. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses were in the approximate amount of $12,324, $1,245, $17,352, $40,987, $8,521, and $2,980, respectively.

6. There are no securityholders to whom distributions in complete liquidation of their interests have not been made. Applicant has no debts or other liabilities that remain outstanding. Applicant is not a party to any litigation or administrative proceeding.

7. Applicant will file certificates of dissolution with Massachusetts authorities after the requested order is obtained.

8. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-28223 Filed 11-16-93; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-19853; 811-3228]

MFS Emerging Growth Fund; Application for Deregistration

November 10, 1993.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: MFS Emerging Growth Fund.

RELEVANT ACT SECTION: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on November 5, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 6, 1993, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

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[1] Rule 17a-8 provides an exemption from section 17(a) for certain reorganizations among registered investment companies that may be affiliated persons, or affiliated persons of an affiliated person, solely by reason of having a common investment adviser, common directors, and/or common officers.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant, 500 Boylston Street, Boston, Massachusetts 02116.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Staff Attorney, at (202) 272–3026, or Robert A. Robertson, Branch Chief, at (202) 272–3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end management investment company that was organized as a business trust under the laws of Massachusetts. On July 23, 1981, applicant registered under the Act as an investment company, and filed a registration statement to register its shares under the Securities Act of 1933. The registration statement was declared effective on December 4, 1981, and the initial public offering commenced on or about that date.

2. On April 21, 1993, applicant's board of trustees approved an agreement and plan of reorganization (the "Plan") between applicant and MFS Series Trust II (formerly, MFS Lifetime Emerging Growth Fund), a registered open-end management investment company, on behalf of one of its series, MFS Emerging Growth Fund (the "Surviving Fund"). In addition, the board of trustees made the findings required by rule 17a–8 under the Act.[1]

3. On June 2, 1993, applicant distributed proxy materials to its shareholders. At a meeting held on July 21, 1993, applicant's shareholders approved the reorganization.

4. Pursuant to the Plan, on September 13, 1993, applicant transferred all of its assets to the Surviving Fund in consideration of the Surviving Fund's Class A shares with the equivalent net asset value. Applicant then distributed the Surviving Fund's shares to its shareholders. After completion of the reorganization, each shareholder of applicant owned Class A shares of the Surviving Fund with the same aggregate net asset value as the shares of applicant owned by the shareholder immediately prior to the reorganization. On September 7, 1993, applicant had 16,509,906.97 shares outstanding, having an aggregate net asset value of $341,390,536.60 and a per share net asset value of $20.68.

5. Applicant and the Surviving Fund assumed their own expenses in connection with the reorganization. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses in the approximate amount of $15,000, $1,245, $52,209, $32,903, $6,985, and $2,408 respectively, were borne by applicant. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses in the approximate amount of $27,099, $1,245, $29,610, $43,459, $14,571, and $2,275 respectively, were borne by the Surviving Fund.

6. There are no securityholders to whom distributions in complete liquidation of their interests have not been made. Applicant has no debts or other liabilities that remain outstanding. Applicant is not a party to any litigation or administrative proceeding.

7. Applicant will file certificates of dissolution with Massachusetts authorities after the requested order is obtained.

8. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-28225, Filed 11–16–93; 8:45 am]

BILLING CODE 8010-01-M

[1] Rule 17a–8 provides an exemption from section 17(a) for certain reorganizations among registered investment companies that may be affiliated persons, or affiliated persons of an affiliated person, solely by reason of having a common investment adviser, common directors, and/or common officers.

[Rel. No. IC–19852; 811–5705]

MFS Lifetime Government Securities Fund; Application for Deregistration

November 10, 1993.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: MFS Lifetime Government Securities Fund.

RELEVANT ACT SECTION: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on November 5, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 6, 1993, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicant, 500 Boylston Street, Boston, Massachusetts 02116.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Staff Attorney, at (202) 272–3026, or Robert A. Robertson, Branch Chief, at (202) 272–3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is an open-end management investment company that was organized as a business trust under the laws of Massachusetts. On December 1, 1988, applicant registered under the Act as an investment company, and filed a registration statement to register its shares under the Securities Act of 1933. The registration statement was declared effective on January 6, 1989, and the initial public offering commenced on or about the date.

2. On April 14, 1993, applicant's board of trustees approved an agreement and plan of reorganization (the "Plan") between applicant and MFS Government Securities Fund, a registered open-end management investment company (the "Surviving Fund"). In addition, the board of trustees made the findings required by rule 17a–8 under the Act.[1]

3. On May 25, 1993, applicant distributed proxy materials to its shareholders. At a meeting held on July 23, 1993, applicant's shareholders approved the reorganization.

4. Pursuant to the Plan, on August 30, 1993, applicant transferred all of its

[1] Rule 17a–8 provides an exemption from section 17(a) for certain reorganizations among registered investment companies that may be affiliated persons, or affiliated persons of an affiliated person, solely by reason of having a common investment adviser, common directors, and/or common officers.

assets to the Surviving Fund in consideration of the Surviving Fund's Class B shares with the equivalent net asset value. Applicant then distributed the Surviving Fund's shares to its shareholders. After completion of the reorganization, each shareholder of applicant owned Class B shares of the Surviving Fund with the same aggregate net asset value as the shares of applicant owned by the shareholder immediately prior to the reorganization. On August 30, 1993, applicant had 10,819,799.24 shares outstanding, having an aggregate net asset value of $109,249,023.80 and per share net asset value of $10.10.

5. Applicant and the Surviving Fund assumed their own expenses in connection with the reorganization. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses in the approximate amount of $15,000, $1,245, $27,827, $4,636, $873, and $807 respectively, were borne by applicant. Legal, accounting, printing, transfer agency, proxy solicitor, and other expenses in the approximate amount of $31,024, $1,245, $4,612, $17,302, $5,813, and $1,085 respectively, were borne by the Surviving Fund.

6. There are no security holders to whom distributions in complete liquidation of their interests have not been made. Applicant has no debts or other liabilities that remain outstanding. Applicant is not a party to any litigation or administrative proceeding.

7. Applicant will file certificates of dissolution with Massachusetts authorities after the requested order is obtained.

8. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-28226 Filed 11-16-93; 8:45 am]

BILLING CODE 8010-01-M1

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Approval of Noise Compatibility Program; Cincinnati/Northern Kentucky International Airport, Covington, KY

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its findings on the noise compatibility program submitted by the Kenton County Airport Board under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96-193) and 14 CFR part 150. These findings are made in recognition of the description of Federal and nonfederal responsibilities in Senate Report No. 96-52 (1980). On April 28, 1993, the FAA determined that the noise exposure maps submitted by the Kenton County Airport Board under part 150 were in compliance with applicable requirements. On October 25, 1993, the Administrator approved the Cincinnati/Northern Kentucky International Airport noise compatibility program. All of the recommendations of the program were approved in full or in part. The noise compatibility program supplements the original noise compatibility program, approved August 6, 1991, for Cincinnati/Northern Kentucky International Airport.

EFFECTIVE DATE: The effective date of the FAA's approval of the Cincinnati/Northern Kentucky International noise compatibility program is October 25, 1993.

FOR FURTHER INFORMATION CONTACT: Peggy S. Kelley, Federal Aviation Administration, Memphis Airports District Office, 2851 Directors Cove, suite 3, Memphis, Tennessee 38131-0301; Telephone 901-544-3495. Documents reflecting this FAA action may be reviewed at this same location.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA has given its overall approval to the noise compatibility program for Cincinnati/Northern Kentucky International Airport, effective October 25, 1993.

Under section 104(a) of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as "the Act"), an airport operator who has previously submitted a noise exposure map may submit to the FAA a noise compatibility program which sets forth the measures taken or proposed by the airport operator for the reduction of existing noncompatible land uses and prevention of additional noncompatible land uses within the area covered by the noise exposure maps. The Act requires such programs to be developed in consultation with interested and affected parties including local communities, government agencies, airport users, and FAA personnel.

Each airport noise compatibility program developed in accordance with Federal Aviation Regulations (FAR) part 150 is a local program, not a Federal program. The FAA does not substitute its judgment for that of the airport proprietor with respect to which measures should be recommended for action. The FAA's approval or disapproval of FAR part 150 program recommendations is measured according to the standards expressed in part 150 and the Act and is limited to the following determinations:

a. The noise compatibility program was developed in accordance with the provisions and procedures of FAR part 150;

b. Program measures are reasonably consistent with achieving the goals of reducing existing noncompatible land uses around the airport and preventing the introduction of additional noncompatible land uses;

c. Program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types or classes of aeronautical uses, violate the terms of airport grant agreements, or intrude into areas preempted by the Federal Government; and

d. Program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the navigable airspace and air traffic control systems, or adversely affecting other powers and responsibilities of the Administrator prescribed by law.

Specific limitations with respect to FAA's approval of an airport noise compatibility program are delineated in FAR part 150, section 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, state or local law. Approval does not by itself constitute an FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action. Approval does not constitute a commitment by the FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant-in aid funding from the FAA. Where federal funding is sought, requests for project grants must be submitted to the FAA Airports District office in Memphis, Tennessee.

The Kenton County Airport Board submitted to the FAA on November 2, 1992, the noise exposure maps, descriptions, and other documentation produced during the FAR part 150 supplemental noise compatibility

planning study conducted from April through October 1992. The Cincinnati/Northern Kentucky International Airport noise exposure maps were determined by FAA to be in compliance with applicable requirements on April 28, 1993. Notice of this determination was published in the **Federal Register** on May 11, 1993.

The Cincinnati/Northern Kentucky International Airport FAR part 150 Supplemental Study contains a proposed noise compatibility program comprised of actions designed for phased implementation by airport management and adjacent jurisdictions from the date of study completion beyond the year 1997. It was requested that the FAA evaluate and approve this material as a noise compatibility program as described in section 104(b) of the Act. The FAA began its review of the program on April 28, 1993, and was required by provision of the Act to approve or disapprove the program within 180 days (other than the use of new flight procedures for noise control). Failure to approve or disapprove such program within the 180-day period shall be deemed an approval of such a program.

The submitted program contained 14 operational measures, 12 land use measures and 3 implementation measures for noise mitigation on and off the airport. Some of the measures had been approved in 1991 in the original noise compatibility study for Cincinnati/Northern Kentucky International Airport. The FAA completed its review and determined that the procedural and substantive requirements of the Act and FAR part 150 have been satisfied. The overall program, therefore, was approved by the Administrator effective October 25, 1993.

Approval for part 150 was granted, in total or in part, for all of the proposed operational measures. Most of the operational procedures will require an environmental decision before implementation by FAA. The approval for one operational measure will not be effective for part 150 purposes until such time that this procedure will in fact reduce non-compatible land uses. Based on the part 150 Supplemental Study this will be true in the long term. One operational measure, extension of Runway 18R/36L, was approved in part. The request to establish a declared distance of 10,000 feet for takeoffs, after the extension of Runway 18R–36L, was disapproved because it did not provide any tangible noise benefit and would have no effect on runway use patterns. Another operational measure, use of hold short capability on 18R after extension of 18R/36L, was approved but is subject to the discretion of the pilot in command. Approval was granted for all the land use and implementation actions. Land Use measures include purchase assurance, soundproofing, acquisition in the DNL 75, voluntary acquisition within the DNL 65 contour in the preferential nighttime corridor, and soundproofing of eligible schools. The Implementation Plan includes an ARTS tracking system.

These determinations are set forth in detail in a Record of Approval endorsed by the Administrator on October 25, 1993. The Record of Approval, as well as other evaluation materials and the documents comprising the submittal, are available for review at the FAA office listed above and at the administrative offices of the Kenton County Airport Board.

Issued in Memphis, Tennessee, October 29, 1993.

Billy J. Langley,

Manager, Memphis Airports District Office.

[FR Doc. 93–28270 Filed 11–16–93; 8:45 am]

BILLING CODE 4910–13–M

Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Jacksonville International Airport, Jacksonville, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Jacksonville International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before December 17, 1993.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Orlando Airport District Office, 9677 Tradeport Dr., Suite 130, Orlando, Florida 32827.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Jay R. Stucki, Director of Aviation of the Jacksonville Port Authority at the following address: P.O. Box 3005, Jacksonville, Florida 32206.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Jacksonville Port Authority under § 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Carlos E. Maeda, Plans and Programs Manager, Orlando Airport District Office, 9677 Tradeport Dr., Suite 130, Orlando, Florida 32827, (407) 648–6583. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Jacksonville International Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and part 158 of the Federal Aviation regulations (14 CFR part 158).

On November 2, 1993, the FAA determined that the application to impose and use the revenue from a PFC submitted by Jacksonville Port Authority was substantially complete within the requirements of section 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than February 2, 1994.

The following is a brief overview of the application:

Level of the proposed PFC: $3.00; Proposed charge effective date: March 1, 1994; Proposed charge expiration date: August 31, 1997; Total estimated PFC revenue: $12,300,000.

Brief description of proposed project(s): Rehabilitate runway 7–25; Extend runway 7–25; Install glide slope/MALSR runway 25; Reconstruct taxiways C and E; Install taxiway guidance signs; Lighting improvements runway 13–31; Construct ARFF facility.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Air Taxi/Commercial Operators filing FAA Form 1800–31.

Any person may inspect the application in person at the FAA office listed above under "**FOR FURTHER INFORMATION CONTACT.**"

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Jacksonville Port Authority, 2831 Talleyrand Avenue, Jacksonville, Florida 32206–0005.

Issued in Atlanta, Georgia on November 2, 1993.

Dell T. Jernigan,

Manager, Planning and Development Branch, Airports Division, Southern Region.

[FR Doc. 93–28194 Filed 11–16–93; 8:45 am]

BILLING CODE 4910–13–M

National Highway Traffic Safety Administration

Rulemaking, Research and Enforcement Programs Meetings

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of NHTSA industry meetings.

SUMMARY: This notice announces a public meeting at which NHTSA will answer questions from the public and the automobile industry regarding the agency's rulemaking, enforcement and other programs. In addition, NHTSA will hold a separate public meeting to describe and discuss specific research and development projects.

DATES: The Agency's regular, quarterly public meeting relating to the agency's rulemaking, enforcement and other programs will be held on December 16, 1993, beginning at 9:30 a.m. and ending at approximately 12:30 p.m. Questions relating to the agency's rulemaking, enforcement and other programs must be submitted in writing by December 8, 1993, to the address shown below. If sufficient time is available, questions received after the December 8 date may be answered at the meeting. The individual, group or company submitting a question(s) does not have to be present for the question(s) to be answered. A consolidated list of the questions submitted by December 8, 1993, and the issues to be discussed will be mailed to interested personnel by December 10, 1993, and will be available at the meeting.

Also, the agency will hold a second public meeting on December 15 devoted exclusively to a discussion of research and development programs. The meeting will begin at 1 p.m. and end at approximately 4:30 p.m. This meeting is described more fully in a separate announcement.

ADDRESSES: Questions for the December 16 NHTSA Technical Industry Meeting, to be held from 9:30 a.m. to 12:30 p.m., relating to the agency's rulemaking, research, and enforcement programs should be submitted to Barry Felrice, Associate Administrator for Rulemaking, National Highway Traffic Safety Administration, room 5401, 400 Seventh Street, SW., Washington, DC 20590. Questions for the Research and Development Program Meeting to be held December 15 from 1 p.m. to 4:30 p.m. should be submitted to George L. Parker, Associate Administrator for Research and Development, NRD–01, National Highway Traffic Safety Administration, room 6206, 400 Seventh Street, SW., Washington, DC 20590. Both meetings will be held in room 2230, Department of Transportation Headquarters Building, 400 Seventh Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION: NHTSA will hold its regular, quarterly meeting from 9:30 a.m. to 12:30 p.m., to answer questions from the public and the regulated industries regarding the agency's rulemaking, enforcement and other programs, on December 16, 1993. Since the agency is holding a separate meeting on its research and development programs, any questions on those issues will only be answered at the afternoon meeting to be held on December 15, 1993 from 1 p.m. to 4:30 and should be submitted to the Research and Development Office. However, questions on aspects of the agency's research and development activities that relate to ongoing rulemaking procedures should be submitted, as in the past, to the agency's Rulemaking Office. The meeting will be held in room 2230, Department of Transportation Headquarters Building, 400 Seventh Street, SW., Washington, DC 20590. The purpose of the meeting is to focus on those phases of NHTSA activities which are technical, interpretative or procedural in nature. Transcripts of the meetings will be available for public inspection in the NHTSA Technical Reference Section in Washington, DC, within four weeks after the meetings. Copies of the transcript will then be available at ten cents a page, (length has varied from 100 to 150 pages) upon request to NHTSA Technical Reference Section, room 5108, 400 Seventh Street, SW., Washington, DC 20590. The Technical Reference Section is open to the public from 9:30 a.m. to 4 p.m.

NHTSA will provide auxiliary aids to participants as necessary, during the NHTSA Technical Industry Meeting and the NHTSA Industry Research and Development Meeting. Thus, any person desiring assistance of "auxiliary aids" (e.g., sign-language interpreter, telecommunications devices for deaf persons (TDDs), readers, taped texts, Brailled materials, or large print materials and/or a magnifying device), please contact Barbara Carnes on (202) 366–1810, by COB December 8, 1993, for the 9:30 a.m. to 12:30 p.m. portion of the meeting or Barbara Coleman (202) 366–1537 by COB December 8, 1993 for the 1 p.m. to 4:30 p.m. portion.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 93–28179 Filed 11–16–93; 8:45 am]

BILLING CODE 4910–59–M

Research and Special Programs Administration

Applications for Exemptions

AGENCY: Research and Special Programs Administration, DOT.

ACTION: List of applicants for exemptions.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, exemptions from the Department of Transportation's Hazardous Materials Regulations (49 CFR part 107, subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications described herein. Each mode of transportation for which a particular exemption is requested is indicated by a number in the "Nature of Application" portion of the table below as follows: 1—Motor vehicle; 2—Rail freight; 3—Cargo vessel; 4—Cargo aircraft only; 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before December 17, 1993.

ADDRESS COMMENTS TO: Dockets Unit, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the exemption application number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Dockets Unit, room 8426, Nassif Building, 400 7th Street SW., Washington, DC.

NEW EXEMPTIONS

Application No.	Applicant	Regulation(s) affected	Nature of exemption thereof
11148–N	Wilfert Home Products, St. Louis, MO.	49 CFR 172.101, 173.156	To authorize the transportation of up to 16 ounces of hydrofluoric acid, solution Class 8 or sodium dithionite, Division 4.1 contained in polyethylene bottles overpacked in a fiberboard box, described as consumer commodity. (mode 1)
11151–N	SET Environmental, Inc., Wheeling, IL.	49 CFR 177.848(d)	To authorize the transportation of hazardous waste, classed as Division 6.1, Hazard Zone A material in combination packaging in the same transport vehicle with Class 3 and 8, Division 4.1, 4.2, 4.3, 5.1 and 5.2. (mode 1)
11153–N	SET Environmental, Inc., Wheeling, IL.	49 CFR 177.848(d)	To authorize the shipment of lab packs containing hazardous wastes, classed as Division 4.2 and Class 8 in the same transport vehicle. (mode 1)
11156–N	Austin Powder Company, Cleveland, OH.	49 CFR 173.62	To authorize the transport of ammonium nitrate-fuel oil mixture, classed as Division 1.5 in specially designed multi-wall plastic lined bags meeting UN packaging criteria except not sift-proof. (mode 1)
11157–N	Northwest Ohio Towing & Recovery, Beaverdam, OH.	49 CFR 173.242(b)	To authorize the transport of gasoline residue, Class 3, in non-DOT specification cargo tanks used in airport operations to be secured to a flat bed truck and transported to a repair facility. (mode 1)
11158–N	CEM International Pty Ltd., Coolarro Victoria, Australia.	49 CFR 178.245	To authorize the manufacture, mark and sell of non-DOT specification portable tanks built comparable to a DOT-Specification 51 for use in transporting liquefied petroleum gas, Division 2.1. (modes 1, 3)
11159–N	Fort Container Systems Inc., Brampton, Ontario, Canada.	49 CFR 178.253, CFR part 173, subpart F, 178.19.	To authorize the manufacture, mark and sell of rotationally moulded polyethylene intermediate bulk containers equipped with stackable steel frame, with a capacity of 300 gallons, for shipment of Class 8 material. (modes 1, 2)
11160–N	Dow Chemical Company, Freeport, TX.	49 CFR 173.247	To authorize the bulk transport of molten magnesium, Class 9, in specially design stainless steel 600 gallon container via specially built road vehicles on private roads that cross state highways. (modes 1, 2)
11163–N	Control Instruments Corporation, Fairfield, NJ.	49 CFR 172.101	To authorize the transport of hydrogen, compressed, Division 2.1, otherwise forbidden on passenger aircraft, as part of a portable monitoring system. (mode 5)
11164–N	Elastochem, Inc., Chardon, OH	49 CFR 173.225	To authorize the shipment of 70 percent organic peroxide, Type F Solid, Division 5.2, as nonregulated based on test criteria, contained in heavy gauge polyethylene bags containing not more than 25 kilos of material and unitized on wooden pallets. (mode 1)
11165–N	Oxford Container Co., New Oxford, PA.	49 CFR 178.205	To authorize the manufacture, mark and sale of corrugated fiberboard, slotted boxes constructed to DOT–12B–65 specification equipped with two hinged handholes for use as overpack for shipment of various classes of hazardous material. (mode 1)
11166–N	Sun Company, Inc., Philadelphia, PA.	49 CFR 173.29(a)(2)	To authorize a one-time shipment of out-of-test DOT Specification 111A100W rail car, containing combustible liquid residue. (mode 2)
11167–N	Eco-Pak, Inc., Elizabeth, TN	49 CFR 173.240–244	To manufacture, marking and sell a non-DOT specification 250 gallon capacity packaging system, consisting of an inner and outer cylindrical metal container meeting group I packaging criteria, for shipment of all packaging group I materials, solids and liquids. (modes 1, 2, 3, 4)
11168–N	Aldrich Chemical Company, Inc., Milwaukee, WI.	49 CFR 173.21(b), 173.54(k), 173.57(a), 173.124(a).	To authorize the transportation of small quantities of 1-methyl-3-nitro-1-nitrosoguanidine (MNNG) a thermally unstable material, which is forbidden for transportation, to be shipped as a Division 4.1 when contained in specially designed packaging. (modes 1, 2)

Note: Notice of Application No. 11142–N appeared at page 53239 of the **Federal Register** for October 14, 1993, should have Air Products and Chemicals Inc. that appeared 11161–N.

This notice of receipt of applications for new exemptions is published in accordance with part 107 of the Hazardous Materials Transportation Act (49 U.S.C. 1806; 49 CFR 1.53(e)).

Issued in Washington, DC, on November 10, 1993.

J. Suzanne Hedgepeth,

Chief, Exemption Programs, Office of Hazardous Materials Exemptions and Approvals.

[FR Doc. 93-28237 Filed 11-16-93; 8:45 am]

BILLING CODE 4910-60-M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Applications for Modification of Exemptions or Applications To Become a Party to an Exemption

AGENCY: Research and Special Programs Administration, DOT.

ACTION: List of applications for modification of exemptions or applications to become a party to an exemption.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, exemptions from the Department of Transportation's Hazardous Materials Regulations (49 CFR part 107, subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Requests for modifications of exemptions (e.g. to provide for additional hazardous materials, packaging design changes, additional mode of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix "X" denote a modification request. Application numbers with the suffix "P" denote a party to request. These applications have been separated from the new applications for exemptions to facilitate processing.

DATES: Comments must be received on or before December 2, 1993.

ADDRESS COMMENTS TO: Dockets Unit, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the exemption number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Dockets Unit, room 8426, Nassif Building, 400 7th Street SW., Washington, DC.

Application No.	Applicant	Modification of exemption
9355-X	Ultralife Batteries, Inc., Newark, NY [1]	9355
10755-X	Minnesota Mining and Manufacturing Company (3M), St. Paul, MN [2]	10775
10911-X	The Pallet Reefer Company, Seaford, DE [3]	10911

[1] To modify exemption to provide for shipment of lithium manganese dioxide batteries, Class 8, containing no more than 8.0 grams of lithium and cells containing no more than 1.5 grams per cell.

[2] To modify exemption to delete the provision that material for which no exceptions are permitted in column 8 of 49 CFR 172.101 Table are not authorized to be shipped under this exemption.

[3] To modify exemption to provide for air as an additional mode of transportation.

Application No.	Applicant	Parties to exemption
4803-P	D-H Acquisition, Inc., Dallas, TX	4803
4850-P	Halliburton Energy Services, Houston, TX	4850
5951-P	Rowell Chemical Corporation, Hinsdale, IL	5951
6691-P	United States Welding, Inc., Denver, CO	6691
6810-P	ILL-MO Products Company, Jacksonville, IL [1]	6810
6971-P	Protocol Analytical Supplies, Inc., Middlesex, NJ	6971
7879-P	Halliburton Energy Services, Houston, TX	7879
7887-P	North Coast Operations/North Coast Rocketry, Inc., Salt Lake City, UT	7887
7991-P	Abbeville & Grimes Railroad, Panama City, FL	7991
8006-P	Daisy Manufacturing Company, Rogers, AR	8006
8009-P	KC Resources, Inc., Cardiff, CA	8009
8196-P	Elf Atochem North America, Inc., Philadelphia, PA	8196
8451-P	Halliburton Energy Services, Houston, TX	8451
8451-P	Ferranti Technologies, Inc., Lancaster, PA	8451
8451-P	Chemical Waste Management, Inc., Oakbrook, IL	8451
8845-P	Halliburton Energy Services, Houston, TX	8845
8871-P	Chase Packaging, Inc., Newport News, VA	8871
9262-P	Halliburton Energy Services, Houston, TX	9262
9275-P	Sanofi Beaute, Inc., Edison, NJ	9275
9281-P	Halliburton Energy Services, Houston, TX	9281
9372-P	Halliburton Energy Services, Houston, TX	9372
9549-P	Halliburton Energy Services, Houston, TX	9549
9769-P	Chemical Waste Management, Inc., Oak Brook, IL	9769
9781-P	Rowell Chemical Corporation, Hinsdale, IL	9781
9880-P	Halliburton Energy Services, Houston, TX	9880
10307-P	Boliden Intertrade Inc., Atlanta, GA	10307
11055-P	Chemical Waste Management, Inc., Oak Brook, IL	11055
11119-P	Marson Corporation, Chelsea, MA	11119
11119-P	Crater Auto Supply, Inc., Medford, OR	11119

Application No.	Applicant	Parties to exemption
11119–P	Fibre Glass Evercoat Co., Inc., Cincinnati, OH	11119
11119–P	Akzo Coatings, Inc., Norcross, GA	11119
11150–P	Casco Bay Island Transit District, Portland, ME[2]	11150

[1] To authorize party status and modify exemption provided for 10 tank configuration for the shipment of helium which was originally issued on an emergency basis.
[2] To reissue party status originally issued on an emergency basis.

This notice of receipt of applications for modification of exemptions and for party to an exemption is published in accordance with part 107 of the Hazardous Materials Transportations Act (49 U.S.C. 1806; 49 CFR 1.53(e)).

Issued in Washington, DC, on November 10, 1993.

J. Suzanne Hedgepeth,

Chief, Exemption Programs, Office of Hazardous Materials Exemptions and Approvals.

[FR Doc. 93–28238 Filed 11–16–93; 8:45 am]

BILLING CODE 4910–60–M

UNITED STATES INFORMATION AGENCY

Privacy Act of 1974; Amendments to the Appendix I—Prefatory Statement of General Routine Uses

AGENCY: United States Information Agency.

ACTION: Amendments to the routine use statement of notice of systems of records adding debt collection use.

SUMMARY: In accordance with the Private Act of 1974, as amended (5 U.S.C. 552a(e)(4)), the United States Information Agency (USIA) is publishing amendments to its Routine Use Statement adding debt collection use. The Debt Collection Act of 1982, as amended (31 U.S.C. 3302, 3701 (1988)), requires agencies to refer commercial and consumer, non-employee, delinquent debt, on a non-exclusive basis, to credit bureaus (referred to as Credit Agencies). Passage of the Cash Management Improvement Act Amendments of 1992 (Pub. L. 102–589), requires agencies to refer non-employee delinquent debt to the Internal Revenue Service for offset of individual tax refunds and/or salaries.

These two new Routine Use statements are necessary for USIA to participate in the Tax Refund Offset Program for the 1994 tax year, as well as eventual salary offset for employees. Collection procedures will use USIA's Accounts Receivable System. The system covers procedures whereby delinquent debts owed to USIA will be referred to credit agencies (4 CFR parts 101–105) that will incorporate account information into its data files, credit reports, and other business information, and procedures whereby delinquent debts owed USIA will further be referred to the Internal Revenue Service (IRS) for collection either by offset against Federal income tax refunds under 31 U.S.C. 3720A, or by salary offset of Federal government employees.

EFFECTIVE DATE: November 17, 1993.

ADDRESSES: 301 4th Street, SW., Washington, DC 20547.

FOR FURTHER INFORMATION CONTACT: Lola L. Secora (202) 619–5499.

SUPPLEMENTARY INFORMATION: Agencies must comply with the Debt Collection Act of 1982, as amended, the Federal Claims Collection Standards, OMB Circular A–129 and the Treasury Financial Manual Credit Supplement when reporting information to credit bureaus. Agencies must comply with the provisions of the Privacy Act of 1974, as amended (5 U.S.C. 552a, Pub. L. 93–579, 88 Stat. 1896), and OMB Guidelines (54 FR 25818, June 19, 1989) on implementation of the requirements of the Computer Matching and Privacy Protection Act (Pub. L. 100–503).

New Routine Use Statements:

* * * * *

16. To Credit Agencies, on a non-exclusive basis, information on its commercial debts as described in the Treasury Financial Manual Credit Supplement. The Credit Agency will incorporate this account information into its data files, credit reports, and other business information products and services. Before furnishing the account information, USIA will verify its accuracy in accordance with its standard procedures for debt verification.

17. To the Internal Revenue Service (IRS), U.S. Postal Service and the Defense Manpower Data Center, Department of Defense, to conduct computer matching programs for the purpose of identifying and locating individuals who are receiving Federal salaries or benefit payments and are delinquent in their repayment of debts owned to the U.S. Government under certain programs administered by the United States Information Agency in order to collect the debts under the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365) by voluntary repayment, tax refund procedures, or by administrative or salary offset procedures.

To any other Federal agency for the purpose of effecting administrative or salary offset procedures against a person employed by that agency or receiving or eligible to receive some benefit payments from the agency when the United States Information Agency as a creditor has a claim against that person.

Disclosure of information about persons who are receiving Federal salaries or benefit payments and are delinquent in their repayment of debt owned to the U.S. Government under certain programs administered by the United States Information Agency may be made to other Federal agencies, but only to the extent of determining whether the person is employed by that agency and, if so, effecting administrative or salary offset procedures against the person.

R. Wallace Stuart,

Acting General Counsel.

[FR Doc. 93–28233 Filed 11–16–93; 8:45 am]

BILLING CODE 8230–01–M

Sunshine Act Meetings

Federal Register
Vol. 58, No. 220
Wednesday, November 17, 1993

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 58 FR 52138, Thursday, November 4, 1993.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 2:00 p.m. (Eastern Time) Tuesday, November 16, 1993.

CHANGE IN THE MEETING:

Closed Session

The closed portion of the meeting has been cancelled.

CONTACT PERSON FOR MORE INFORMATION: Frances M. Hart, Executive Officer on (202) 663–4070.

Dated: November 15, 1993.

Frances M. Hart,

Executive Officer, Executive Secretariat.

[FR Doc. 93–28408 Filed 11–15–93; 1:04 pm]

BILLING CODE 6750-06-M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of November 15, 22, 29, and December 6, 1993.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of November 15

Wednesday, November 17

9:30 a.m.
Affirmation/Discussion and Vote (Public Meeting)
a. Final Rule, 10 CFR Parts 30, 40, 50, 70, and 72, "Self-Guarantee as an Additional Financial Assurance Mechanism" (Tentative)
(Contact: Clark Prichard, 301–492–3734)
(Postponed from November 10)

Week of November 22–Tentative

Wednesday, November 24

9:00 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of November 29—Tentative

Friday, December 3

10:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of December 6—Tentative

Tuesday, December 7

10:00 a.m.
Periodic Briefing on EEO Program (Public Meeting)
(Contact: Vandy Miller, 301–504–2326)

Thursday, December 9

10:00 a.m.
Briefing on Status of TVA Nuclear Programs (Public Meeting)

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

2:00 p.m.
Briefing by Northeast Utilities (Public Meeting)

Friday, December 10

10:00 a.m.
Briefing by IG on Fee Audit (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.

The schedule for commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 504–1292.

CONTACT PERSON FOR MORE INFORMATION: William Hill (301) 504–1661.

Dated: November 10, 1993.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary.

[FR Doc. 93–28353 Filed 11–15–93; 8:45 am]

BILLING CODE 7590-01-M

Corrections

Federal Register
Vol. 58, No. 220
Wednesday, November 17, 1993

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

FEDERAL HOUSING FINANCE BOARD

[No. 93-80]

Pricing of Services

Correction

In notice document 93-27423 beginning on page 59468 in the issue of Tuesday, November 9, 1993, make the following correction:

On page 59468, in the second column, in DATES:, in the last line, "January 10, 1993." should read "January 10, 1994."

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ-020-03-5410-11-A004; AZA-28010]

Receipt of Conveyance of Mineral Interest Application

Correction

In notice document 93-18882 beginning on page 42096 in the issue of Friday, August 6, 1993, make the following correction:

On page 42097, in the first column, under parcel 2, the land description for T. 5 N., R. 4 W. is corrected to read "Sec. 33, S½SW¼NW¼SE¼."

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ-040-4210-03-03; AZA 28166]

Realty Action; Recreation and Public Purposes Act Classification; Arizona

Correction

In notice document 93-25134 beginning on page 53209 in the issue of Thursday, October 14, 1993, on page 53209, in the third column, in land description T. 17 S., R. 12 E., in Sec. 11, "SE¼" should read "SW¼".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA-062-04-5440-10-B043; CACA 33071]

Realty Action; Exchange of Public and Private Lands, San Bernardino County, CA

Correction

In notice document 93-26013 beginning on page 54599 in the issue of Friday, October 22, 1993, on page 54599, in the second column, in land description T.16N., R.13E., in Section 12, in the second line, "S½SE¼SE¼SE¼NE¼," should read "S½SE¼SE¼NE¼,".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA-940-4210-06; CACA 33164]

Proposed Withdrawal; California

Correction

In notice document 93-25189 beginning on page 53211 in the issue of Thursday, October 14, 1993, make the following corrections:

1. On page 53212, in the first column:

a. In T. 13 N., R. 10 E., in Sec. 30, in the second line, "and 5," should read "and 6,".

b. In T. 14 N., R. 10 E., in Sec. 30, in the second line, "lot 178," should read "lot 18,".

c. In T. 13 N., R. 11 E., in Sec. 4, in the first line, insert "2" after "lot".

d. In T. 14 N., R. 11 E., in Sec. 32, in the first line, "S½N½SE¼," should read "S½N½SE¼;".

e. In the same T. and R., in the same Sec., remove the second line.

f. Under the heading **National Forest System Lands**, in the heading Tahoe and Eldora National Forests, "Eldora" should read "Eldorado".

g. In the first paragraph of text, in the third line, "1,361" should read "1,361", and "served" should read "reserved".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Part 69

[CGD 93-069]

Measurement of Vessels; Water Ballast Exemption

Correction

In rule document 93-26463 beginning on page 57747 in the issue of Wednesday, October 27, 1993, make the following corrections:

1. On page 57747, in the 3d column, in SUPPLEMENTARY INFORMATION, in the 1st paragraph, in the 16th line from the end, "waster" should read "water".

2. On page 57748, in the first column, in next to last line of the first paragraph, "to benefit" should read "to the benefit".

3. On the same page, in the same column, in the first full paragraph, in the seventh line from the end, "section" should read "sections".

BILLING CODE 1505-01-D

federal register

Wednesday
November 17, 1993

Part II

Department of Transportation

Federal Highway Administration

49 CFR Chapter III

Regulatory Guidance for the Federal Motor Carrier Safety Regulations; Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Chapter III

Regulatory Guidance for the Federal Motor Carrier Safety Regulations

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Regulatory guidance.

SUMMARY: This document presents interpretive guidance material for the Federal Motor Carrier Safety Regulations (FMCSRs) now contained in the FHWA's Motor Carrier Regulation Information System (MCREGIS). The FHWA has consolidated previously issued interpretations and regulatory guidance materials and developed concise interpretive guidance in question and answer form for each part of the FMCSRs. These questions and answers are generally applicable to drivers, commercial motor vehicles, and motor carrier operations on a national basis. All prior interpretations and regulatory guidance of the FMCSRs issued previously in the **Federal Register**, as well as FHWA memoranda and letters, may no longer be relied upon as authoritative insofar as they are inconsistent with the guidance published today. Many of the interpretations of the FMCSRs published on November 23, 1977, and the interpretations of the Inspection, Repair, and Maintenance regulations published on July 10, 1980, have been revised. These revisions are reflected in the new questions and answers. Future interpretive guidance will be issued within the MCREGIS which will be kept current in the FHWA's Office of Motor Carrier Standards. The MCREGIS will also be updated periodically and published in the **Federal Register** so that interested parties may have ready reference to official interpretations and guidance regarding the FMCSRs. This guidance will provide the motor carrier industry with a clearer understanding of the applicability of many of the requirements contained in the FMCSRs in particular situations.

EFFECTIVE DATE: November 17, 1993.

FOR FURTHER INFORMATION CONTACT: Mr. David J. Osiecki, Office of Motor Carrier Standards, (202) 366–4009, or Mr. Charles E. Medalen, Office of the Chief Counsel, (202) 366–0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal legal holidays.

SUPPLEMENTARY INFORMATION: This document contains revised and new regulatory guidance pertaining to Title 49, Code of Federal Regulations (CFR), parts 325, 383, 386, 387, 390 to 393, 395 to 397, and 399 of the FMCSRs. The information published in this document supersedes all previously issued interpretations and regulatory guidance, to the extent they are inconsistent with the guidance published today, including that published on November 23, 1977, at 42 FR 60078, and on July 10, 1980, at 45 FR 46425. In addition, much of the previously issued guidance was issued in the form of letters to individuals and motor carriers. These previous interpretations may no longer be relied upon as authoritative. To the maximum extent possible, those opinions have been incorporated into this document. If an individual or a motor carrier has an interpretive letter issued by the FHWA that is not addressed in this document, a copy of the letter may be sent to the FHWA Office of Motor Carrier Standards at the above address for consideration in a future update of this guidance. Periodic updates of this guidance will be published in future issues of the **Federal Register**.

Members of the motor carrier industry and other interested parties may access the guidance in this document through the FHWA's Electronic Bulletin Board System (FEBBS) using a microcomputer and modem. The FEBBS is a read-only facility. The telephone number for FEBBS is Area Code 202–366–3764. While the system supports 300, 1200, and 2400 baud line speeds, and a variety of terminal types and protocols, setting the modem for 2400 baud, 8 data bits, full duplex, and no parity will give optimal performance. Once a connection has been established and the <R<egistration item completed, callers should go to the C>onferences M>otor Carrier section and select either <M<CREGIS Questions and Answers, or <I<nformation for more detailed help.

For Technical Assistance to gain access to FEBBS, contact: FHWA Computer Help Desk, HMS–40, room 4401, 400 Seventh Street, SW., Washington, DC 20590. (202) 366–1120.

Specific questions addressing any of the interpretive material published in this document may be directed to the contact persons listed above, the FHWA Regional Offices, or the FHWA Division Office in each State.

For ease of reference, the following listing of acronyms used throughout this document is provided:

Appendix G The Minimum Periodic Inspection Standards published as an appendix to the Federal Motor Carrier Safety Regulations
CDL Commercial Driver's License
CDLIS Commercial Driver's License Information System
CFR Code of Federal Regulations
CMV Commercial Motor Vehicle
CMVSA Commercial Motor Vehicle Safety Act of 1986
COE Cab-over-engine truck tractor
CVSA Commercial Vehicle Safety Alliance
DOT U.S. Department of Transportation
DVIR Driver Vehicle Inspection Report
DWI Driving While Intoxicated
EAP Employee Assistance Program
EPA U.S. Environmental Protection Agency
FHWA Federal Highway Administration
FMCSRs Federal Motor Carrier Safety Regulations
FMVSS Federal Motor Vehicle Safety Standards (developed and issued by the National Highway Traffic Safety Administration)
FR Federal Register
FRSI Farm-Related Service Industries
GCWR Gross Combination Weight Rating
GVW Gross Vehicle Weight
GVWR Gross Vehicle Weight Rating
HM Hazardous Materials
HMRs Hazardous Materials Regulations
HMTUSA Hazardous Materials Transportation, Uniform Safety Act of 1990
ICC Interstate Commerce Commission
Form MCS–90 Endorsement(s) for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980 issued by an insurer
MCSA Motor Carrier Safety Act of 1984
MPH Miles Per Hour
MRO Medical Review Officer
NDR National Driver Register
NHTSA National Highway Traffic Safety Administration within DOT
RDMC Regional Director of Motor Carriers
SSN Social Security Number
STAA Surface Transportation Assistance Act of 1982
U.S.C. United States Code

Questions and Answers

Table of Contents

Part 325—Compliance with Interstate Motor Carrier Noise Emission Standards
Part 383—Commercial Driver's License Standards; Requirements and Penalties
Part 386—Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings
Part 387—Minimum Levels of Financial Responsibility for Motor Carriers
Part 390—Federal Motor Carrier Safety Regulations; General
Part 391—Qualifications of Drivers
Part 391—SubPart H—Controlled Substances Testing Requirements
Part 392—Driving of Motor Vehicles
Part 393—Parts and Accessories Necessary for Safe Operation
Part 395—Hours of Service of Drivers
Part 396—Inspection, Repair and Maintenance
Part 397—Transportation of Hazardous Materials; Driving and Parking Rules
Part 399—Employee Safety and Health Standards

Part 325—Compliance With Interstate Motor Carrier Noise Emission Standards

Sections Interpreted

325.1

Section 325.1 Scope of the Rules in This Part

Question 1: What noise emission requirements are applicable to auxiliary generators?

Guidance: Auxiliary generators which normally operate only when a CMV is stopped or moving at 5 mph or less are "auxiliary equipment" of the kind contemplated by EPA and are, therefore, exempt from the noise limits in Part 325. However, noise from generators that run while the CMV is moving at higher speeds would be measured as Part of total vehicle noise.

Question 2: Do refrigeration units on tractor-trailer combinations fall within the exemption listed in Part 325, subpart A of the FMCSRs?

Guidance: No.

Part 383—Commercial Driver's License Standards; Requirements and Penalties

Sections Interpreted

383.3 Applicability
383.5 Definitions
383.7 Waiver Provisions
383.21 Number of Drivers' Licenses
383.23 Commercial Driver's License
383.33 Notification of Driver's License Suspensions
383.37 Employer Responsibilities
383.51 Driver Disqualifications—General Questions—
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383.71 Driver Application Procedures
383.73 State Procedures
383.75 Third Party Testing
383.77 Substitute for Driving Skills Test
383.91 Vehicle Groups
383.93 Endorsements
383.95 Air Brake Restriction
383.131 Test Procedures
383.133 Testing Methods
383.153 Information on the Document and Application
Special Topics—Motor Coaches and CDL
Special Topics—State Reciprocity

Section 383.3 Applicability

Question 1: Are school and church bus drivers required to obtain a CDL?

Guidance: Yes, if they drive vehicles designed to transport 16 or more people.

Question 2: Do mechanics, shop help and other occasional drivers need a CDL if they are operating a CMV or if they only test drive a vehicle?

Guidance: Yes, if the vehicle is operated or test-driven on a public highway.

Question 3: Does part 383 apply to drivers of recreational vehicles?

Guidance: No, if the vehicle is used strictly for non-business purposes.

Question 4: Does part 383 apply to drivers of vehicles used in "van pools"?

Guidance: Yes, if the vehicle is designed to transport 16 or more people.

Question 5: May a person operate a CMV wholly on private property, not open to public travel, without a CDL?

Guidance: Yes.

Question 6: Does the FHWA include off-road motorized construction equipment under the definitions of "motor vehicle" and "CMV" as used in §§ 390.5 and 383.5?

Guidance: No, because it is neither used on the highway nor used in the transportation of passengers or property.

Question 7: What types of equipment are included in the category of off-road motorized construction equipment?

Guidance: The definition of off-road construction equipment is to be narrowly construed and limited to equipment which, by its design, appearance and function, is obviously not intended for use on a public road. Such equipment would include motorscrapers, backhoes, motorgraders, compactors, excavators, tractors, trenchers and bulldozers.

Question 8: Do operators of motorized cranes and vehicles used to pump cement at construction sites have to meet the testing and licensing requirements of the CDL program?

Guidance: Yes, because such vehicles are designed to be operated on the public highways and therefore do not qualify as off-road construction equipment. The fact that these vehicles are only driven for limited distances, at less than normal highway speeds and/or incidental to their primary function, does not exempt the operators from the CDL requirements.

Question 9: May a State require persons operating recreational vehicles or other CMVs used by family members for non-business purposes to have a CDL?

Guidance: Yes. States may extend the CDL requirements to recreational vehicles.

Question 10: Do drivers of either a tractor trailer or straight truck that is converted into a mobile office need a CDL?

Guidance: Yes, if the vehicle meets the definition of a CMV.

Question 11: Do State motor vehicle inspectors who drive trucks and motorcoaches on an infrequent basis and for short distances as part of their job have to obtain a CDL?

Guidance: Yes.

Question 12: Are State, county and municipal workers operating CMVs required to obtain CDLs?

Guidance: Yes, unless they are waived by the State under the firefighting and emergency equipment exemption.

Question 13: Do the regulations require that a person driving an empty school bus from the manufacturer to the local distributor obtain a CDL?

Guidance: Yes. Any driver of a bus that is designed to transport 16 or more persons, or that has a GVWR of 26,001 pounds or more, is required to obtain a CDL in the applicable class with a passenger endorsement.

Question 14: Are employees of any governmental agency who drive emergency response vehicles that transport HM in quantities requiring placarding subject to the CDL regulations?

Guidance: No, as long as the vehicle does not meet the weight/configuration thresholds for Groups A or B (in § 383.91). The HMTUSA of 1990 provides one exception from the need for government-employed CMV drivers to obtain a CDL. Under the HMTUSA of 1990, only when a government agency, Federal, State or local, "offers HM for transportation in commerce or transports HM in furtherance of a commercial enterprise" are its vehicles subject to the placarding requirements of part 172, subpart F. Therefore, vehicles that are controlled and operated by government agencies in the conduct of governmental functions are not subject to placarding. Based on the above stated conditions, local police emergency responders driving a vehicle having a gross vehicle or combination weight rating under 26,001 pounds do not need a CDL, according to the Federal minimum standards, when transporting HM as a function of their agency. The drivers should check with their State licensing agency to determine what class of license the State may require to operate the vehicles.

Question 15: Are public transit employees known as "hostlers," who maintain and park transit buses on transit system property, subject to CDL requirements?

Guidance: No, unless operating on public roads.

Question 16: Are non-military amphibious landing craft that are usually used in water but occasionally used on a public highway CMVs?

Guidance: Yes, if they are designed to transport 16 or more people.

Section 383.5 Definitions

Question 1: a. Does "designed to transport" as used in the definition of a CMV in § 383.5 mean original design or current design when a number of seats are removed?

b. If all of the seats except the driver's seat are removed from a vehicle originally designed to transport only passengers to convert it to a cargo-carrying vehicle does this vehicle meet the definition of a CMV in § 383.5?

Guidance: a. "Designed to transport" means the original design. Removal of seats does not change the design capacity of the CMV.

b. No, unless this modified vehicle has a GVWR over 26,000 pounds or is used to transport placarded HM.

Question 2: Are rubberized collapsible containers or "bladder bags" attached to a trailer considered a tank vehicle, thus requiring operators to obtain a CDL with a tank vehicle endorsement?

Guidance: Yes.

Question 3: a. Who may lawfully change the original GVWR plate by issuing a new GVWR plate to reflect a revised rating due to vehicle modifications?

b. What would be the CDL requirements for the driver of a modified and recertified vehicle?

Guidance: a. Only a manufacturer that is registered with the NHTSA in accordance with 49 CFR 566.5.

b. If under the revised rating, the vehicle still meets the definition of a CMV a CDL would be required.

Question 4: When a State agency contracts with private parties for services involving the operation of CMVs, is the State agency or contractor considered the employer?

Guidance: If the contractor employs individuals and assigns and monitors their driving tasks, the contractor is considered the employer. If the State agency assigns and monitors driving tasks, then the State agency is the employer for purposes of part 383.

Question 5: A driver operates a tractor of exactly 26,000 pounds GVWR, towing a trailer of exactly 10,000 pounds GVWR, for a GCWR of 36,000 pounds. Hazardous materials and passengers are not involved. Is it a CMV and does the driver need a CDL?

Guidance: No to both questions. Although the vehicle has a GCWR of 36,000 pounds, it is not a CMV under any part of the definition of that term in § 383.5, and a CDL is not federally required.

Question 6: Can the actual gross weight or registered vehicle weight be used when the GVWR or the GCWR cannot be determined?

Guidance: Yes, the actual gross weight or registered vehicle weight may be used when the GVWR or the GCWR cannot be determined.

Section 383.7 Waiver Provisions

Question 1: Are operators of farm vehicles required to get CDLs?

Guidance: Yes; however, the State may waive the CDL requirements for operators of farm vehicles which are:

a. controlled and operated by a farmer;

b. used to transport either agricultural products, farm machinery, farm supplies or some combination thereof to or from a farm;

c. not used in the operation of a common or contract motor carrier; and

d. used within 150 miles of the person's farm.

"Operated by a farmer" in condition (a) above includes employees or family members of the farmer, as long as the vehicle is controlled by the farmer and conditions (b) through (d) are met.

Question 2: Does the farmer waiver option apply to tree farmers, lumbering operations, livestock operations and nursery operations?

Guidance: Yes, as long as all four of the conditions are met, including control and operation of the vehicle by "a farmer."

Question 3: Is the 150-mile criterion for waivers of farm vehicle operators intended to mean air miles or highway miles?

Guidance: Either, at the State's discretion.

Question 4: If adjoining States adopt different versions of the farm waiver, how would a farmer who lives on the border of these States be affected?

Guidance: It would depend on the agreement between the adjoining States. While there is no Federal requirement to provide reciprocity of a CDL farm waiver as there is for a CDL, reciprocity may be granted between adjoining States. In the absence of an agreement, the farmer would be required to obtain a CDL to drive in the adjoining State.

Question 5: Do drivers of rice and cane mill product vehicles qualify under the Federal farm waiver provisions?

Guidance: No. Mill drivers employed by agricultural processing plants or contract motor carriers do not qualify because the vehicles are not controlled and operated by a farmer.

Question 6: May States grant CDL waivers to drivers of firefighting and other emergency equipment?

Guidance: Yes. The intent of the waiver was to include the drivers of these vehicles that meet the conditions of the waiver, whether or not they are part of a volunteer or paid fire organization, provided the vehicles are equipped with audible and visual signals and are not subject to normal traffic regulation. The decision to grant the waiver and the conditions of the waiver are up to each individual State.

Question 7: a. Are police officers who operate buses and vans which are designed to carry 16 or more persons and are used to transport police officers during demonstrations and other crowd control activities required to obtain a CDL?

b. May the CDL requirements be waived for police officers who operate vehicles that are over 26,000 pounds GVWR and used in SWAT team activities?

Guidance: a. Yes. The CMVSA applies to anyone who operates a CMV, including employees of Federal, State and local governments. Crowd control activities do not meet the conditions for a waiver of operators of firefighting and other emergency vehicles.

b. Yes, if the vehicle is used in the execution of emergency governmental functions performed under emergency conditions.

Question 8: May fuel be considered "farm supplies" as used in the four conditions for waivers of operators of farm vehicles?

Guidance: Yes, subject to the provisions of 53 FR 37314, September 26, 1988. The decision to grant the waiver is left to each individual State.

Question 9: Is the transportation of seed-cotton modules from the cotton field to the gin by a module transport vehicle considered a form of custom harvesting activity that may be included under the FRSI waiver?

Guidance: Yes. The transportation of seed-cotton modules from field to gin may, at the State's discretion, and can be considered as custom harvesting and therefore eligible for the FRSI waiver. However, cotton ginning operations as an industry and, specifically the transport of cotton from the gin, are not eligible activities under the FRSI waiver because these activities are not considered appropriate elements of custom harvesting.

Question 10: Does the Motor Carrier Act of 1991 amendment of Section 12019(5) of the CMVSA of 1986 (CMVSA) exempt all custom harvesting operations from the CDL requirements or only when operating combines?

Guidance: Section 4010 of the Motor Carrier Act of 1991 modifies the definition of a CMV in Section 12019(5) of the CMVSA of 1986 by excluding "custom harvesting farm machinery" from the definition. The conference report clarifies the intent of the

exclusion by stating: "The substitute removes custom harvesting farm machinery from the Act. Operators of such machinery are not covered by the Commercial Motor Vehicle Safety Act of 1986. A State, however, may still impose a requirement for a commercial driver's license if it so desires. The change does not apply to vehicles used to transport this type of machinery." (H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 449 (1991)).

Therefore, the intent of Congress was only to exempt operators of combines and other equipment used to cut the grain and not the operators of trucks, truck-trailers, trailers, semitrailers or any other CMV.

Question 11: Are endorsements permitted on a FRSI-restricted CDL?

Guidance: No, the endorsements mentioned in §§ 383.93 and 383.153 may not appear on an FRSI-restricted CDL.

Question 12: What endorsement privileges, if any, does the FRSI-restricted CDL confer on its holders?

Guidance: The FRSI-restricted CDL automatically confers, without testing and without addition of the endorsement to the license, the following privileges:

a. The tank vehicle ("N") endorsement, in Group B and C vehicles and, for allowable HM, subject to capacity/volume restrictions; and

b. The following commodities under the HM "H" endorsement:

1. Diesel fuel in quantities of 1,000 gallons or less;

2. Liquid fertilizers in vehicles or implements of husbandry with total capacities of 3,000 gallons or less; and

3. Solid fertilizers that are not transported with any organic substance.

c. No other § 383.93 endorsement privileges are obtainable by an FRSI-restricted CDL holder.

Question 13: May the holder of a FRSI-restricted CDL drive vehicles for which a passenger endorsement would be required under part 383?

Guidance: No, the holder of a FRSI-restricted CDL may not drive a CMV designed to transport 16 or more passengers, including the driver.

Question 14: May a State issue a FRSI-restricted CDL that shows more than one season of commercial validity at a time, particularly if the State performs a revalidation on the holder's driving record prior to each of the seasons shown?

Guidance: No, the license document may not show more than one period of seasonal validity at a time, irrespective of any procedures performed by the State.

Question 15: May a person hold an unrestricted CDL and a FRSI-restricted CDL at the same time?

Guidance: No; this would constitute a multiple license as prohibited under § 383.21.

Question 16: May a State (1) require an applicant for a CDL farm waiver to take HM training as a condition for being granted a waiver and (2) reduce the 150-mile provision in the waiver to 50 miles if the driver is transporting HM?

Guidance: Yes. The Federal farm waiver is permissive, not mandatory.

Question 17: Do active duty military personnel, not wearing military uniforms, qualify for a waiver from the CDL requirements if the CMVs are rental trucks or leased buses from the General Services Administration?

Guidance: Yes. The drivers in question do not need to be in military uniforms to qualify for the waivers as long as they are on active duty. In regard to the vehicles, they may be owned or operated by the Department of Defense.

Question 18: Does the waiver of the CDL requirements for military personnel include National Guard technicians?

Guidance: Yes. The intent of the military waiver was to include National Guard technicians who are civilians and required to wear military uniforms.

Question 19: Does the waiver of the CDL requirements for military personnel include U.S. Army Reserve technicians?

Guidance: No. U.S. Reserve technicians fail to meet either of the conditions that would distinguish them from other civilian drivers who are working for the military. These conditions are that they are required to wear military uniforms or are subject to the code of military justice while in their employment as technicians.

Question 20: Does the waiver of the CDL requirements for non-civilian operators of military equipment include U.S. Coast Guard?

Guidance: Yes. The intent of the waiver was to include all military services and the Coast Guard.

Question 21: Are custom harvesters who harvest trees for tree farmers eligible to be considered "custom harvesters" for purposes of the FRSI waiver from selected CDL requirements?

Guidance: If the State considers a firm that harvests trees for tree farmers to be a custom harvesting operation, then its employees could qualify for the FRSI-restricted CDLs, subject to the stringent conditions and limitations of the waiver notice.

Question 22: May a farmer who meets all of the conditions for a farm waiver be waived from the CDL requirements when transporting another farmer's products absent any written contract?

Guidance: If a farmer is transporting another farmer's products and being paid for doing so, he or she is acting as a contract carrier and does not meet the conditions for a farm waiver. The existence of a contract, written or verbal, is not relevant to the CDL waiver provisions.

Section 383.21 Number of Drivers' Licenses

Question 1: Are there any circumstances under which the driver of a CMV as defined in § 383.5 is allowed to hold more than one driver's license?

Guidance: Yes. A recipient of a new driver's license may hold more than one license during the 10 days beginning on the date the person is issued a driver's license.

Question 2: Is a person from Puerto Rico required to surrender his or her driver's license in order to obtain a nonresident CDL?

Guidance: Since Puerto Rico and the U.S. Territories are not included in the definition of a State in § 12016 of the CMVSA, they must be considered a foreign country for purposes of the CDL requirements. Under part 383, a person domiciled in a foreign country is not required to surrender his or her foreign license in order to obtain a nonresident CDL. There are two reasons for permitting this dual licensing to a person domiciled in Puerto Rico:

a. There is no reciprocal agreement with Puerto Rico recognizing its CMV testing and licensing standards as equivalent to the standards in part 383 and,

b. The nonresident CDL may not be recognized as a valid license to drive in Puerto Rico.

Section 383.23 Commercial Driver's License

Question 1: May a holder of a CMV learner's permit continue to hold his/her basic driver's license from any State without violating the single-license rule?

Guidance: Yes, since the learner's permit is not a license.

Question 2: The requirements for States regarding CMV learners' permits in § 383.23 appear to be ambiguous. For example, if the CMV learner's permit is "considered a valid CDL" for instructional purposes, is the State to enter the learner's permit issuance as a CDLIS transaction?

Guidance: No such requirement currently exists.

Section 383.33 Notification of Driver's License Suspensions

Question 1: When a driver receives an Administrative Order of Suspension due to a blood alcohol reading in excess of the legal limit with notice that the suspension is not to be effective until 45 days after the notice or after an administrative hearing, and a hearing is subsequently held, in effect suspending the license, what is the effective date of suspension for purposes of notifying the employer under § 383.33?

Guidance: The effective date of the suspension for notification purposes, is the day the employee received notice of the suspension.

Section 383.37 Employer Responsibilities

Question 1: Section 383.37(a) does not allow employers to knowingly use a driver whose license has been suspended, revoked or canceled. Do motor carriers have latitude in their resulting actions: firing, suspension, layoff, authorized use of unused vacation time during suspension duration, transfer to non-driving position for duration of the suspension?

Guidance: Yes. The employer's minimum responsibility is to prohibit operation of a CMV by such an employee.

Question 2: a. A motor carrier recently found a driver who had a detectable presence of alcohol, placed him off-duty in accordance with § 392.5, and ordered a blood test which disclosed a blood alcohol concentration of 0.05 percent. Is the carrier obligated to place the driver out of service for 24 hours as prescribed by § 392.5(c)?

b. Is the carrier obligated to disqualify the driver for a period of one year as prescribed by §§ 383.51(b) and 391.15(c)(3)(i) of the FMCSRs?

Guidance: a. Only a State or Federal official can place a driver out of service. Instead, the carrier is obligated to place the driver off-duty and prevent him/her from operating or being in control of a CMV until he/she is no longer in violation of § 392.5.

b. No. A motor carrier has no authority to disqualify a driver. Disqualification for such an offense only occurs upon a conviction.

Question 3: If an individual driver had two convictions for serious traffic violations while driving a CMV, and neither FHWA nor his/her State licensing agency took any disqualification action, does the motor carrier have any obligation under FHWA regulations to refrain from using this driver for 60 days? If so, when did that time period begin?

Guidance: No. Only the State or the FHWA has the authority to take a disqualification action against a driver. The motor carrier's responsibility under § 383.37(a) to refrain from using the driver begins when it learns of the disqualification action and continues until the disqualification period set by the State or the FHWA is completed.

Question 4: Is a driver who has a CDL, and has been convicted of a felony, disqualified from operating a CMV under the FMCSRs?

Guidance: Not necessarily. The FMCSRs do not prohibit a driver who has been convicted of a felony, such as drug dealing, from operating a CMV unless the offense involved the use of a CMV.

If the offense involved a non-CMV, or was unrelated to motor vehicles, there is no FMCSR prohibition to employment of the person as a driver.

Section 383.51 Driver Disqualifications

General Questions

Question 1: a. If a driver received one "excessive speeding" violation in a CMV and the same violation in his/her personal passenger vehicle, would the driver be disqualified? or,

b. If a driver received two "excessive speeding" violations in his/her personal passenger vehicle, would the driver be disqualified?

Guidance: No in both cases. Convictions for serious traffic violations, such as excessive speeding, only result in disqualification if the offenses were committed in a CMV—unless the State has stricter regulations.

Question 2: Section 383.51 of the FMCSRs disqualifies drivers if certain offenses were committed while operating a CMV. Will the States be required to identify on the motor vehicle driver's record the class of vehicle being operated when a violation occurs?

Guidance: No, only whether or not the violation occurred in a CMV. The only other indication that may be required is if the vehicle was carrying placardable amounts of HM.

Question 3: If a CDL holder commits an offense that would normally be disqualifying, but the CDL holder is driving under the farm waiver, must conviction result in disqualification and action against the CDL holder?

Guidance: Yes. Possession of the CDL means the driver is not operating under the waiver. In addition, the waiver does not absolve the driver from disqualification under part 391.

Question 4: What is meant by leaving the scene of an accident involving a CMV?

Guidance: As used in part 383, the disqualifying offense of "leaving the scene of an accident involving a CMV" is all-inclusive and covers the entire range of situations where the driver of the CMV is required by State law to stop after an accident and either give information to the other party, render aid, or attempt to locate and notify the operator or owner of other vehicles involved in the accident.

Question 5: If a State disqualifies a driver for two serious traffic violations under § 383.51(c)(2)(i), and that driver, after being reinstated, commits a third serious violation, what additional period of disqualification must be imposed on that driver?

Guidance: If three years have not elapsed since the original violation, then the driver is now subject to a full 120-day disqualification period.

Question 6: May a State issue a "conditional," "occupational" or "hardship" license that includes CDL driving privileges when a CDL holder loses driving privileges to operate a private passenger vehicle (non-CMV)?

Guidance: Yes, provided the CDL holder loses his/her driving privileges for operating a non-CMV as the result of a conviction for a disqualifying offense that occurred in a non-CMV. A State is prohibited, however, from issuing any type of license which would give the driver even limited privileges to operate a CMV when the conviction is for a disqualifying offense that occurred in a CMV.

Question 7: What information needs to be contained on a "conditional," "occupational" or "hardship" license document that includes CDL driving privileges?

Guidance: The same information that is required under § 383.153, including an explanation of restrictions of driving privileges.

Question 8: Is a State obligated to grant reciprocity to another State's "conditional," "occupational" or "hardship" license that includes CDL driving privileges?

Guidance: Yes, in regard to operating a CMV as stated in § 383.73(h).

Section 383.51 Driver Disqualifications

Alcohol Questions

Question 1: Are States expected to make major changes to their enforcement procedures in order to apply the alcohol disqualifications in the Federal regulations?

Guidance: No. Sections 383.51 and 392.5 do not require any change in a State's existing procedures for initially stopping vehicles and drivers.

Roadblocks, random testing programs, or other enforcement procedures which

have been held unconstitutional in the State or which the State does not wish to implement are not required.

Question 2: Is a driver disqualified for driving a CMV while off-duty with a blood alcohol concentration over 0.04 percent?

Guidance: Yes. Section 383.51 applies to any person who is driving a CMV, as defined in § 383.5, regardless of the person's duty status under other regulations. Therefore, the driver, if convicted, would be disqualified under § 383.51.

Question 3: Does a temporary license issued pursuant to the administrative license revocation (ALR) procedure authorize the continued operation of CMVs when the license surrendered is a CDL? Does the acceptance of a temporary driver's license place the CDL holder in violation of the one driver's license requirement?

Guidance: The ALR procedure of taking possession of the driver's CDL and issuing a "temporary license" for individuals who either fail a chemical alcohol test or refuse to take the test is valid under the requirements of part 383. Since the CDL that is being held by the State is still valid until the administrative revocation action is taken, the FHWA would interpret the document given to the driver as a "receipt" for the CDL, not a new "temporary" license. The driver violates no CDL requirements for accepting the receipt which may be used to the extent authorized.

Question 4: Is a driver disqualified under § 383.51 if convicted of driving under the influence of alcohol while operating a personal vehicle?

Guidance: The convictions triggering mandatory disqualification under § 383.51 all pertain to offenses that occur while the person is driving a CMV. However, a driver could be disqualified under § 383.51(b)(2)(i) if the State has stricter standards which apply to offenses committed in a personal vehicle. (The same principle applies to all other disqualifying offenses listed in § 383.51.)

Question 5: Would a driver convicted under a State's "open container" law be disqualified under the CDL regulations if the violation occurred while he/she was operating a CMV?

Guidance: If a conviction under a particular State's "open container law" is a conviction for "driving under the influence" or "driving while intoxicated," and if the person committed the violation while driving a CMV, then the driver is disqualified for one year under § 383.51, assuming it is a first offense.

Section 383.71 Driver Application Procedures

Question 1: What must a driver certify if he/she is in interstate commerce but is excepted or exempted from part 391 under the provisions of parts 390 or 391?

Guidance: The State should instruct the driver to certify that he/she is not subject to part 391.

Question 2: Since an applicant is required to turn in his/her current license when issued a FRSI-restricted CDL, should the applicant return to the State exam office and be re-issued the old license when the seasonal validation period expires?

Guidance: No. This approach violates the requirements of part 383 and the FRSI waiver regarding the single-license concept. It violates the waiver requirement that the FRSI-restricted CDL is to have the same renewal cycle as an unrestricted CDL and shall serve as an operator's license for vehicles other than CMVs. The license issued under the waiver is a CDL and must be treated the same as an unrestricted CDL in regard to the driver record being maintained through the CDLIS and subject to all disqualifying conditions for the full renewal cycle. The restriction determining when the driver may use the CDL to operate a CMV should be clearly printed on the license.

Question 3: Do the regulations require that a driver be recertified for the hazardous materials "H" endorsement every two years?

Guidance: No. If the driver wishes to retain a hazardous materials endorsement, he/she is required at the time of license renewal to pass the test for such endorsement. The only times a driver may be required to pass the test for such endorsement in a condensed time frame is within the 2 years preceding a license transfer if he/she is transferring a CDL from one State of domicile to a new State of domicile [see § 383.73(b)(4)], or if the State has exercised its prerogative to establish more stringent requirements.

Section 383.73 State Procedures

Question 1: Does the State have any role in certifying compliance with § 391.11(b)(2) of the FMCSRs, which requires driver competence in the English language?

Guidance: No. The driver must certify that he or she meets the qualifications of part 391. The State is under no duty to verify the certification by giving exams or tests.

Question 2: Are States required to change their current medical standards for drivers who need CDLs?

Guidance: No, but interstate drivers must continue to meet the Federal standards, while intrastate drivers are subject to the requirements adopted by the State.

Question 3: To what does the phrase "* * * as contained in § 383.51" refer to in § 383.73(a)?

Guidance: The phrase refers only to the word "disqualification." Thus the State must check the applicant's record to ensure that he/she is not subject to any suspensions, revocations, or cancellations for any reason, and is not subject to any disqualifications under § 383.51.

Question 4: Is a State required to refuse a CDL to an applicant if the NDR check shows that he/she had a license suspended, revoked, or cancelled within 3 years of the date of the application?

Guidance: Yes, if the person's driving license is currently suspended, revoked, or cancelled.

Question 5: Must a new State of record accept the out-of-State driving record on CDL transfer applications and include this record as a permanent part of the new State's file?

Guidance: Yes.

Question 6: What does the term "initial licensure" mean as used in § 383.73?

Guidance: The term "initial licensure" as used in the context of § 383.73 is meant to refer to the procedures a State must follow when a person applies for his/her first CDL.

Question 7: May a State allow an applicant to keep his/her current valid State license when issued a FRSI-restricted CDL?

Guidance: No. It would violate the single-license concept.

Question 8: Does the word "issuing" as used in § 383.73(a) include temporary 60-day CDLs as well as permanent CDLs?

Guidance: Yes, the word "issuing" applies to all CDLs whether they are temporary or permanent.

Section 383.75 Third Party Testing

Question 1: May the CDL knowledge test be administered by a third party?

Guidance: No. The third party testing provision found in § 383.75 applies only to the skills portion of the testing procedure. However, if an employee of the State who is authorized to supervise knowledge testing is present during the testing, then the FHWA regards it as being administered by the State and not by the third party.

Question 2: Do third party skills test examiners have to meet all the requirements of State-employed examiners—i.e. all the State's qualification and training standards?

Guidance: No. Section 383.75(a)(2)(iii) requires third party examiners to meet the same standards as State examiners only "to the extent necessary to conduct skills tests."

Question 3: Do third-party skills test examiners have to be qualified to administer skills tests in all types of CMVs?

Guidance: No.

Section 383.77 Substitute for Driving Skills Test

Question 1: May a State grandfather drivers from skills testing under § 383.77?

Guidance: Yes, provided the applicant meets all the eligibility conditions under § 383.77, including current operation of a CMV (§ 383.77(b)(1)). Therefore, the pool of applicants eligible for grandfathering is limited to drivers with current CMV operating experience under a CDL waiver (e.g., farm, FRSI, firefighting, emergency and military vehicles).

Question 2: May a driver applicant be "grandfathered" from any CDL knowledge test?

Guidance: No. "Grandfathering" of CDL basic or endorsement knowledge testing is not permitted by part 383.

Section 383.91 Vehicle Groups

Question 1: May a State expand a vehicle group to include vehicles that do not meet the Federal definition of the group?

Guidance: Yes, if:

a. A person who tests in a vehicle that does not meet the Federal standard for the Group(s) for which the issued CDL would otherwise be valid, is restricted to vehicles not meeting the Federal definition of such Group(s); and

b. The restriction is fully explained on the license.

Question 2: Is a driver of a combination vehicle with a GCWR of less than 26,001 pounds required to obtain a CDL even if the trailer GVWR is more than 10,000 pounds?

Guidance: No, because the GCWR is less than 26,001 pounds. The driver would need a CDL if the vehicle is transporting HM requiring the vehicle to be placarded or if it is designed to transport 16 or more persons.

Question 3: Can a State which expands the vehicle group descriptions in § 383.91 enforce those expansions on out-of-State CMV drivers by requiring them to have a CDL?

Guidance: No. They must recognize out-of-State licenses that have been validly issued in accordance with the Federal standards and operative licensing compacts.

Question 4: What CMV group are drivers of articulated motorcoaches (buses) required to possess?

Guidance: Drivers of articulated motorcoaches are required to possess a Class B CDL.

Section 383.93 Endorsements

Question 1: Is the hazardous materials endorsement needed for operation of State and local government vehicles carrying hazardous materials?

Guidance: No.

Question 2: Are drivers of double and triple saddle mount combinations required to have the double/triple trailers endorsement on their CDLs?

Guidance: Yes. If the GCWR is 26,001 or more pounds and the GVWR of the vehicles being towed is in excess of 10,000 pounds.

Question 3: Are drivers delivering empty buses required to have the passenger endorsement on their CDLs?

Guidance: Yes.

Question 4: Would the driver in the following scenarios be required to have a CDL with a hazardous materials endorsement?

a. A driver transports 1,000 or more pounds of Division 1.4 (Class C explosive) materials in a vehicle with a GVWR of less than 26,001 pounds?

b. A driver transports less than 1,000 pounds of Division 1.4 (Class C explosive) materials in a vehicle with a GVWR of less than 26,0001 pounds?

c. The driver transports any quantity of Division 1.1, 1.2 or 1.3 (Class A or B explosive) materials in any vehicle.

Guidance: a. Yes.

b. No.

c. Yes.

Question 5: Do ready mix concrete mixers need a tank vehicle endorsement ("N") on their CDL?

Guidance: No.

Question 6: Does an unattached tote or portable tank with a cargo capacity of 1,000 gallons or more meet the definition of "portable tank" requiring a tank vehicle endorsement on the driver's CDL?

Guidance: Yes.

Question 7: Must all drivers of vehicles required to be placarded have CDLs containing the hazardous materials endorsement?

Guidance: Yes, unless waived.

Question 8: Is a driver who operates a truck tractor pulling a heavy-haul trailer with a "jeep" attached to the front of the trailer that meets the definition of a CMV under part 383 required to have a CDL with a double/triple trailer endorsement?

Guidance: Yes. The "jeep," also referred to as a dolly or load divider, is defined by the FHWA as a short frame-type trailer complete with upper coupler, fifth wheel and undercarriage assembly and designed in such a manner that when coupled to a semitrailer and tractor it carries a portion of the trailer kingpin load while transferring the remainder to the tractor fifth wheel.

Question 9: Do persons transporting battery-powered fork-lifts need to obtain a hazardous materials endorsement?

Guidance: No.

Section 383.95 Air Brake Restrictions

Question 1: A driver has a Group B or C CDL valid for air-brake-equipped vehicles. He or she later upgrades to a Group A license by testing in a vehicle that is not equipped with air brakes. Must the State restrict the upgraded license to non-air-brake-equipped vehicles?

Guidance: No, because the air brake systems on combination versus single vehicles do not differ significantly.

Section 383.131 Test Procedures

Question 1: Are there any Federal regulations which require the States to retain for a specified period of time the CDL knowledge tests (or the test results) used to test CMV drivers?

Guidance: No, there are no Federal regulations regarding such record retention.

Section 383.133 Testing Methods

Question 1: May States administer the CDL knowledge and endorsement test in foreign languages or in other than a written format?

Guidance: Yes.

Question 2: Do the Federal standards limit the number of times a driver may take a test if he or she fails?

Guidance: The rule does not limit the number of times a driver may take a test.

Question 3: Is a State allowed to provide for an alternative test (e.g., oral) or administer alternate exam formats providing it meets FHWA requirements?

Guidance: Yes. The knowledge portion of the test may be administered in written form, verbally, in automated formats, or otherwise at the discretion of the State.

Section 383.153 Information on the Document and Application

Question 1: May a State use the residence address as opposed to the mailing address on the CDL?

Guidance: Yes.

Question 2: May a State issue temporary non-photo CDLs?

Guidance: Yes, as long as—

a. The State does not liberalize any existing procedures for issuing non-photo licenses; and

b. The State does not allow drivers to operate CMVs indefinitely without a CDL which meets all the standards of § 383.153.

Question 3: May a State choose to implement a driver license system involving multiple part license documents?

Guidance: Yes. A two or more part document, as currently used in some States, is acceptable, provided:

a. All of the documents must be present to constitute a "license;"

b. Each document is explicitly "tied" to the other document(s), and to a single driver's record. Each document must indicate that the driver is licensed as a CMV driver, if that is the case, and;

c. The multi-part license document includes all of the data elements specified in part 383, subpart J.

Question 4: If the State restricts the CDL driving privilege, must that restriction be shown on the license?

Guidance: Yes.

Question 5: Is a State required to show the driver's SSN on the CDL?

Guidance: No. Section 383.153 does not specify the SSN as a required element of the CDL document; although, the regulation does require a driver applicant who is domiciled in the U.S. to provide his or her SSN on the CDL application.

Question 6: Is a State prohibited from issuing a CDL to an applicant who, for religious reasons, does not possess a SSN?

Guidance: No. The determination of whether a person needs a SSN is left up to the Social Security Administration.

Question 7: Is a color-digitized image of a driver acceptable for purposes of a CDL?

Guidance: Yes. The FHWA will accept a color-digitized image of a driver on a CDL in lieu of a color photograph.

Special Topics—Motor Coaches and CDL

Question 1: May a State develop a knowledge test exclusively for motorcoach operators which excludes cargo handling and hazardous materials?

Guidance: Yes. A State could develop a basic knowledge test for bus drivers only, by deleting the cargo handling and HM questions from its normative basic knowledge test. In that case, the driver applicant would still need to pass the specialized knowledge and skills tests for the passenger endorsement, and the State would need to restrict the CDL to passenger operations only.

Question 2: What skills test is required for a CDL holder seeking to add a passenger endorsement? If a person already holds a CDL without a passenger endorsement, and subsequently applies for such endorsement, three situations may arise:

a. The passenger test vehicle is in the same vehicle group as that shown on the CDL.

This situation poses no problem since there is no discrepancy.

b. The passenger test vehicle is in a greater vehicle group than that shown on the preexisting CDL.

This is an upgrade situation. The driver and the State must meet the requirements of §§ 383.71(d) and 383.73(d), and the upgraded CDL must show the vehicle group of the passenger test vehicle.

c. The passenger test vehicle is in a lesser vehicle group than that shown on the preexisting CDL.

In this situation, the CDL retains the vehicle group of the preexisting CDL, but also restricts the driver, when engaged in CMV passenger operations, to vehicles in the group in which the passenger skills test was taken, or to a lesser group.

Special Topics—State Reciprocity

Question 1: May a State place an "intrastate only" or similar restriction on the CDL of a driver who certifies that he or she is not subject to part 391?

Guidance: Yes; however, this restriction would not apply to drivers in interstate commerce who are excepted or exempted from part 391 under the provisions of parts 390 or 391.

Question 2: May a State allow a driver possessing an out-of-State CDL containing an intrastate restriction to operate a CMV in their jurisdiction?

Guidance: Yes, provided the driver operates exclusively intrastate.

Question 3: May States choose to interpret "intrastate" in ways that differ from established transportation practice?

Guidance: No. States do not have the discretion to change the Federal definition of either "interstate" or "intrastate" commerce.

Part 386—Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings

Sections Interpreted

386.1 Scope of Rules in this Part

Section 386.1 Scope of Rules in This Part

Question 1: What is the authority of the RDMC to issue provisions as a part of the terms in a Notice of Abatement, Notice of Assessment, Compliance Order and Consent Order?

Guidance: The MCSA of 1984 provided the authority to penalize violators of Notices and Orders issued by the FHWA. Regulations were issued under part 386 which specify these penalties. Notices to Abate and Notices of Assessment/Claim generally deal with specific regulatory requirements. Consent Orders and Compliance Orders often require remedial measures not specifically mentioned in the FMCSRs since the motor carrier's compliance record often indicates that additional measures are needed to improve safety and compliance with the regulations. Violations of specific provisions of Consent or Compliance Orders may result in penalties up to $10,000 per day.

Part 387—Minimum Levels of Financial Responsibility for Motor Carriers

Sections Interpreted

Subpart A Motor Carriers of Property
387.1 Purpose and Scope
387.3 Applicability
387.5 Definitions
387.7 Financial Responsibility Required
387.11 State Authority and Designation of Agent
387.15 Forms
Subpart B Motor Carriers of Passengers
387.25 Purpose and Scope
387.27 Applicability
387.31 Financial Responsibility Required
387.39 Forms

Subpart A Motor Carriers of Property

Section 387.1 Purpose and Scope

Question 1: May a State require a higher level of financial responsibility coverage than is required by part 387?

Guidance: Yes.

Section 387.3 Applicability

Question 1: At what GVWR, as assigned by a manufacturer, does the requirement to comply with the financial responsibility regulations begin?

Guidance: Generally, part 387 subpart A applies if the vehicle has a GVWR of 10,000 pounds or more. Part 387 subpart A does not apply to the intrastate transportation of non-bulk oil, non-bulk hazardous materials, substances or wastes. Motor vehicles used to transport any quantity of Divisions 1.1, 1.2 or 1.3 (explosive) materials, poison gas, or highway route controlled quantity of radioactive materials in interstate or foreign commerce are subject to Federal regulation regardless of the GVWR.

Question 2: Does the GVWR apply to the power unit only?

Guidance: No.

Question 3: When are tow trucks subject to financial responsibility coverage?

Guidance: For-hire tow trucks with a GVWR or GCWR of 10,000 pounds or more performing emergency moves in interstate or foreign commerce are required to maintain minimum levels of financial responsibility in the amount of $750,000. For-hire tow trucks performing secondary moves are required to maintain levels of coverage applicable to the commodity being transported by the vehicle being towed.

Question 4: Are Federal, State or local political subdivisions subject to the financial responsibility regulations?

Guidance: No.

Question 5: Is a motor vehicle owned by an owner-operator, and being dead-headed (returning empty), or a tractor that is being bobtailed (operating without a trailer), subject to the financial responsibility regulations?

Guidance: A motor vehicle deadheading or bobtailing while in the service of a motor carrier would be subject to the financial responsibility regulations.

Question 6: Is a motor carrier transporting mail under contract for the U.S. Postal Service wholly within the boundaries of a single State subject to the minimum levels of financial responsibility requirements of part 387?

Guidance: Yes. The transportation of U.S. mail is considered to be interstate commerce because of the intermingling of inter- and intrastate mail on every vehicle.

Question 7: Are motor carriers transporting hazardous materials that are excepted from the HMRs subject to financial responsibility regulations?

Guidance: Yes. Packaging or transportation exceptions in the HMRs do not change the need for financial responsibility at the appropriate level commensurate with the commodity being transported.

Question 8: Are motor vehicles being transported, for purposes of the financial responsibility requirements, considered to be hazardous materials requiring the higher limits set forth in the regulations?

Guidance: No, while motor vehicles are identified as hazardous materials in the Hazardous Materials Table at § 172.101, motor vehicles, by themselves, are not to be treated as hazardous materials and should be considered non-hazardous property.

Question 9: Is a travel trailer or motor home that has propane cylinders attached subject to part 387 of the FMCSRs?

Guidance: No. The FHWA considers such propane cylinders to be an integral part of the recreational vehicle and not subject to the financial responsibility regulations.

Section 387.5 Definitions

Question 1: Does the definition of the term "in bulk" include solids as well as liquids even though the definition refers to containment systems with capacities in excess of 3,500 water gallons?

Guidance: Yes, the term "3,500 water gallons" is used as a volumetric value and includes solids as well as liquids.

Question 2: What is the definition of a "hopper type" vehicle as indicated in § 387.9?

Guidance: A "hopper type" vehicle is one which is capable of discharging its load through a bottom opening without tilting. This vehicle type would also include belly dump trailers. Rear dump trailers and roll-off containers do not meet the definition of a bottom discharging vehicle.

Section 387.7 Financial Responsibility Required

Question 1: May a large corporation which has many wholly-owned subsidiaries have one policy for the parent corporation and maintain the policy and the Form MCS–90 at the corporate headquarters?

Guidance: Generally, the required financial responsibility must be in the exact name of the motor carrier and the proof of that coverage must be maintained at the motor carrier's principal place of business. A parent corporation may, however, have a single policy of insurance or surety bond covering the parent and its subsidiaries, provided the name of the parent and the name of each subsidiary are listed on the policy or bond. Further, the required proof must have listed thereon the name of the parent and its subsidiaries. A copy of that proof of financial responsibility coverage must be maintained at each motor carrier subsidiary's principal place of business.

Question 2: What is the definition of "Certificate of Registration" in § 387.7(b)(3)?

Guidance: "Certificate of Registration" means a document issued by the ICC to all Mexican motor carriers, for-hire as well as private, that allows them to enter the U.S., but restricts them to the ICC's commercial zone for a particular border municipality. The border municipality is the Port of Entry wherever the motor carrier's vehicle enters the U.S.

Question 3: How does a Mexican motor carrier prove that it is complying with § 387.7?

Guidance: Mexican motor carriers are permitted to obtain trip insurance and are required to carry, on the vehicle, a Form MCS–90 along with an insurance verification document listing the date and time the insurance coverage began and expires.

Question 4: Is the financial responsibility requirement met when an owner-operator (lessor) provides the motor carrier (lessee) a copy of the policy and Form MCS–90 where the carrier is named as an additional insured to the policy (Form MCS–90)?

Guidance: No. The motor carrier has the responsibility to obtain the proper financial responsibility levels.

Section 387.11 State Authority and Designation of Agent

Question 1: How does a Mexican motor carrier demonstrate that its insurance company complies with § 387.11?

Guidance: With a properly executed Form MCS–90 from an insurance company licensed in the U.S.

Section 387.15 Forms

Question 1: May the motor carrier meet the financial responsibility requirements by aggregating insurance in layers?

Guidance: Yes. A motor carrier may aggregate coverage, by purchasing insurance in layers with each layer consisting of a separate policy and endorsement. The first layer of coverage is referred to as primary insurance and each additional layer is referred to as excess insurance.

Example: ABC Motor Carrier transports Class A explosives and is required to maintain $5 million coverage. ABC Motor Carrier decides to meet this requirement by purchasing a primary insurance policy of $1 million from insurance company A, an excess policy of $1 million from insurance company B, and a $3 million excess policy from insurance company C. Each policy would have a separate endorsement (Form MCS–90). The endorsement provided by insurer A would state "This insurance is primary and the company shall not be liable for amounts in excess of $1,000,000 for each accident." The endorsement provided by insurer B would state "This insurance is excess and the company shall not be liable for amounts in excess of $1 million for each accident in excess of the underlying limit of $1 million for each accident." The endorsement provided by insurer C would state "This insurance is excess and the company shall not be liable for amounts in excess of $3 million for each accident in excess of the underlying limit of $2 million for each accident."

Question 2: May the Form MCS–90 required by part 387 for proof of minimum financial responsibility be modified?

Guidance: The prescribed text of the document may not be changed. However, the format (i.e., number of pages, layout of the text, etc.) may be altered.

Question 3: Is the use of a printed or stamped signature on the Form MCS–90 endorsement acceptable?

Guidance: Yes.

Question 4: Must a motor carrier obtain a new Form MCS–90 each year if it retains the same insurance company?

Guidance: If the insurance policy, as identified by the policy number on the Form MCS–90, is still valid upon the renewal of insurance, no new Form MCS–90 is required. If the policy number has changed or the insurance policy has been cancelled in accordance with the terms shown on Form MCS–90, then a new Form MCS–90 must be completed and attached to the valid insurance policy.

Subpart B—Motor Carriers of Passengers

Section 387.25 Purpose and Scope

Question 1: May a State require a higher level of financial responsibility coverage than is required by part 387?

Guidance: Yes.

Section 387.27 Applicability

Question 1: Is a non-profit corporation, providing for-hire interstate transportation of passengers, subject to the minimum levels of financial responsibility for motor carriers of passengers?

Guidance: Yes.

Question 2: What determines the level of coverage required for a passenger carrier, the number of passengers or the number of seats in the vehicle?

Guidance: The level of financial responsibility required is predicated upon the manufacturer's designed seating capacity, not on the number of passengers riding in the vehicle at a particular time. The minimum levels of financial responsibility required for various seating capacities are found in § 387.33.

Question 3: Are luxury limousines with a seating capacity of fewer than seven passengers and not operated on a regular route or between specified points exempted under § 387.27(b)(2)?

Guidance: No. Taxi cab service is highly regulated by local governments, usually conducted in marked vehicles, which makes them readily identifiable to enforcement officials. Limousines are not taxi cabs and are therefore not exempted from the financial responsibility requirements.

Question 4: When must a contract school bus operator comply with part 387?

Guidance: When the contractor is not engaged in transportation to or from school and the transportation is not organized, sponsored, and paid for by the school district.

Question 5: Does the exemption for the transportation of school children end at the high school level or does it extend to educational institutions beyond high school, for example junior college or college?

Guidance: The exemption does not extend beyond the high school level.

Section 387.31 Financial Responsibility Required

Question 1: May a large corporation which has many wholly-owned subsidiaries have one policy of insurance for the parent corporation and maintain the policy and Form MCS–90B at the corporate headquarters?

Guidance: Generally, the required financial responsibility must be in the exact name of the motor carrier and the proof of that coverage must be maintained at the motor carrier's principal place of business. A parent corporation may, however, have a single policy of insurance or surety bond covering the parent and its subsidiaries, provided the name of the parent and the name of each subsidiary are listed on the policy or bond. Further, the required proof must have listed thereon the name of the parent and its subsidiaries. A copy of that proof of financial responsibility coverage must be maintained at each motor carrier subsidiary's principal place of business.

Section 387.39 Forms

Question 1: May the motor carrier meet the financial responsibility requirements by aggregating insurance in layers?

Guidance: Yes. A motor carrier may aggregate coverage, by purchasing insurance in layers with each layer consisting of a separate policy and endorsement. The first layer of coverage is referred to as primary insurance and each additional layer is referred to as excess insurance.

Example: ABC Motor Carrier transports Class A explosives and is required to maintain $5 million coverage. ABC Motor Carrier decides to meet this requirement by purchasing a primary insurance policy of $1 million from insurance company A, an excess policy of $1 million from insurance company B, and a $3 million excess policy from insurance company C. Each policy would have a separate endorsement (Form MCS–90). The endorsement provided by insurer A would state "This insurance is primary and the company shall not be liable for amounts in excess of $1,000,000 for each accident." The endorsement provided by insurer B would state "This insurance is excess and the company shall not be liable for amounts in excess of $1 million for each accident in excess of the underlying limit of $1 million for each accident." The endorsement provided by insurer C would state "This insurance is excess and the company shall not be liable for amounts in excess of $3 million for each accident in excess of the underlying limit of $2 million for each accident."

Question 2: May the Form MCS–90 required by part 387 for proof of minimum financial responsibility be modified?

Guidance: The prescribed text of the document may not be changed. However, the format (i.e., number of pages, layout of the text, etc.) may be altered.

Question 3: Is the use of a printed or stamped signature on the Form MCS–90 endorsement acceptable?

Guidance: Yes.

Part 390—Federal Motor Carrier Safety Regulations; General

Sections Interpreted

390.3 General Applicability
390.5 Definitions
390.9 State and Local Laws, Effect on
390.15 Assistance in Investigations and Special Studies
390.21 Marking of Commercial Motor Vehicles
390.23 Relief From Hours-of-Service Regulations—Disasters
Section 390.31 Copies of Records or Documents

Section 390.3 General Applicability

Question 1: Does the government exception in § 390.3(f)(2) apply to motor carriers doing business with the government?

Guidance: No. The exception applies only when the government is the motor carrier.

Question 2: Are intrastate drivers of an interstate motor carrier subject to the FMCSRs?

Guidance: No, except when carrying hazardous materials.

Question 3: Are the FMCSRs applicable to drivers and CMVs which transport tools, equipment and supplies across State lines in a CMV?

Guidance: Yes, the FMCSRs are applicable to drivers and CMVs in interstate commerce which transport property. The property in this situation is the tools, equipment and supplies.

Question 4: Are the operations of a church which provides bus tours to the general public for compensation subject to the FMCSRs as a for-hire motor carrier?

Guidance: Yes, the church is a for-hire motor carrier of passengers subject to the FMCSRs (see 58 FR 27328, May 7, 1993).

Question 5: Are the FMCSRs applicable to the rail movement of trailers and intermodal container chassis that previously or subsequently

moved by highway by a motor carrier in interstate commerce?

Guidance: No. They are only subject when being moved as a motor vehicle by highway by a motor carrier.

Question 6: Are personnel involved in road testing CMVs across a State line subject to the FMCSRs?

Guidance: Yes, any driver (including mechanics, technicians, driver trainees and other personnel) operating a CMV in interstate commerce must be in compliance with the FMCSRs.

Question 7: How does one distinguish between-intra- and interstate commerce for the purposes of applicability of the FMCSRs.

Guidance: Interstate commerce is determined by the essential character of the movement, manifested by the shipper's fixed and persistent intent at the time of shipment, and is ascertained from all of the facts and circumstances surrounding the transportation. When the intent of the transportation being performed is interstate in nature, even when the route is within the boundaries of a single State, the driver and CMV are subject to the FMCSRs.

Question 8: Are Red Cross vehicles/drivers subject to the FMCSRs?

Guidance: Red Cross vehicles/drivers used to provide emergency relief per the provisions of § 390.23 are not subject to the FMCSRs while providing the relief. However, these vehicles/drivers would be subject when operating at other times provided they are used in interstate commerce and the vehicles meet the definition of a CMV.

Question 9: May a motor carrier require fingerprinting as a pre-employment condition?

Guidance: The FMCSRs do not require or prohibit fingerprinting as a condition of employment. Section 390.3(d) allows employers to enforce more stringent requirements.

Question 10: Are the FMCSRs applicable to drivers/vehicles operated by a State or local educational institution which is a political subdivision of the State?

Guidance: Section 390.3(f)(2) specifically exempts transportation performed by a State or a political subdivision including any agency of a State or locality from the FMCSRs. The drivers, however, may be subject to the CDL requirements and/or State laws that are similar to the FMCSRs.

Question 11: Are the FMCSRs applicable to drivers/vehicles operated by a transit authority owned and operated by a State or a political subdivision of the State?

Guidance: Section 390.3(f)(2) specifically exempts transportation performed by the Federal Government, a State, or any political subdivision of a State from the FMCSRs. However, this exemption does not apply to the CDL requirements in part 383. Also, if governmental entities engage in interstate charter transportation of passengers, they must comply with accident report retention requirements of part 390.

Question 12: Is the interstate transportation of students, teachers and parents to school events such as athletic contests and field trips performed by municipalities subject to the FMCSRs? If a fee is charged to defer the municipality's expenses, does this affect the applicability of the regulations?

Guidance: Section 390.3(f)(2) specifically exempts transportation performed by the Federal Government, a State, or any political subdivision of a State from the FMCSRs. Charging a fee to defer governmental costs does not affect this exemption. However, this exemption does not apply to the CDL requirements in part 383. Also, if governmental entities engage in interstate charter transportation of passengers, they must comply with accident report retention requirements of part 390.

Question 13: What is the applicability of the FMCSRs to school bus operations performed by Indian Tribal Governments?

Guidance: Transportation performed by the Federal Government, States, or political subdivisions of a State is generally excepted from the FMCSRs. This general exception includes Indian Tribal Governments, which for purposes of § 390.3(f) are equivalent to a State governmental entity. When a driver is employed and a bus is operated by the governmental entity, the operation would not be subject to the FMCSRs, with the following exceptions: The requirements of part 383 as they pertain to commercial driver licensing standards are applicable to every driver operating a CMV and the accident report retention requirements of part 390 are applicable when the governmental entity is performing interstate charter transportation of passengers.

Question 14: A motor carrier dispatches an empty CMV from State A into adjoining State B in order to transport cargo or passengers between two points in State B, and then to return empty to State A. Does the transportation of cargo or passengers within State B constitute interstate commerce?

Guidance: Yes. The courts and the ICC developed a test that clarifies the legal status of intrastate portions of interstate trips. The character of the intrastate leg depends on the shipper's fixed and persistent intent when the transportation began. The fixed and persistent intent in this case was to move property—the vehicle itself—across State lines and between two points in State B where it was used to haul cargo or passengers. The transportation within State B, therefore, constitutes interstate commerce. In some cases the motor carrier may be the shipper.

Question 15: What is the applicability of the FMCSRs to motor carriers owning and operating school buses that contract with a municipality to provide pupil transportation services?

Guidance: For the purposes of the FMCSRs, parts 390–399, "school bus operation" means the use of a school bus to transport school children and/or school personnel from home to school and from school to home. A "school bus" is a passenger motor vehicle designed to carry more than 10 passengers in addition to the driver, and used primarily for school bus operations (see § 390.5). School bus operations and transportation performed by government entities are specifically exempted from the FMCSRs under § 390.3(f). However, anyone operating school buses under contract with a school is a for-hire motor carrier. When a non-government, for-hire motor carrier transports children to school-related functions other than "school bus operation" such as sporting events, class trips, etc., and operates across State lines, its operation must be conducted in accordance with the FMCSRs. This applies to motor carriers that operate CMVs as defined under part 390 which includes vehicles which have a GVWR of 10,001 pounds or more or are designed to carry more than 15 passengers, including the driver.

In certain instances, carriers providing school bus transportation are not subject to the Bus Regulatory Reform Act of 1982 and the minimum financial responsibility requirements (part 387) issued under this Act. Transportation of school children and teachers that is organized, sponsored, and paid for by the school district is not subject to part 387. Therefore, school bus contractors must comply with the FMCSRs for interstate trips such as sporting events and class trips but are not required by Federal regulations to carry a specific level of insurance coverage.

For those operations provided by school bus contractors that are subject to the FMCSRs, the motor carriers must keep driver and vehicle records as required by the regulations. This would include driver qualifications records (part 391), driver records-of-duty-status

(part 395), accident report retention (part 390), and inspection, repair, and maintenance records (part 396) for the drivers and vehicles that are used on the trips that are subject to the FMCSRs. These records are not required under the FMCSRs for the other vehicles in the motor carrier's fleet that are not subject to the regulations.

Question 16: May drivers be coerced into employing loading or unloading assistance (lumpers)?

Guidance: No. The Motor Carrier Act of 1980 made it illegal to coerce someone into unwanted loading or unloading and require payment for it. The ICC is responsible for the enforcement of regulations forbidding coercion in the use of lumpers.

Question 17: a. Are vehicles which, in the course of interstate transportation over the highway, are off the highway; loading, unloading or waiting, subject to the FMCSRs during these times?

b. Are vehicles and drivers used wholly within terminals and on premises or plant sites subject to the FMCSRs?

Guidance: a. Yes.

b. No.

Question 18: What protection is afforded a driver for refusing to violate the FMCSRs?

Guidance: Section 405 of the STAA (49 U.S.C. App. Section 2305) states, in part, that no person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rule, regulation, standard, or order applicable to CMV safety. In such a case, a driver may submit a signed complaint to the Occupational Safety and Health Administration.

Section 390.5 Definitions

Question 1: Do the definitions of "farm," "farmer" and "agricultural crops" apply to greenhouse operations?

Guidance: Yes.

Question 2: Is a vehicle used to transport or tow anhydrous ammonia nurse tanks considered a CMV and subject to FMCSRs?

Guidance: Yes, provided the vehicle's GVWR or GCWR meets or exceeds that of a CMV as defined in § 390.5 and/or the vehicle transports hazardous materials in a quantity that requires placarding.

Question 3: Do modifications to a vehicle that reduce the GVWR below that specified as a CMV render the vehicle and its drivers exempt from the FMCSRs, provided the vehicle does not transport hazardous materials or passengers?

Guidance: No. The applicability of the FMCSRs is based on the GVWR specified by the manufacturer.

Question 4: A driver used by a motor carrier operates a CMV to and from his/her residence out of State. Is this considered interstate commerce?

Guidance: If the driver is operating a CMV at the direction of the motor carrier it is considered interstate commerce and is subject to the FMCSRs. If the motor carrier is allowing the driver to use the vehicle for private personal transportation, such transportation is not subject to the FMCSRs.

Question 5: Is transporting an empty CMV across State lines for purposes of repair and maintenance considered interstate commerce?

Guidance: Yes. The FMCSRs are applicable to drivers and CMVs in interstate commerce which transport property. The property in this situation is the empty CMV.

Question 6: Is "off-road" motorized construction equipment, i.e., "motorscrapers, backhoes, motorgraders, compactors, excavators, tractors, trenchers and bulldozers," subject to the FMCSRs?

Guidance: Such equipment is routinely found at construction sites and is operated by personnel requiring specialized skills. Occasionally, such equipment is moved to or from construction sites by "driving" the "vehicles" short distances on public highways. Their appearance on the highway is only incidental to their primary function, they are not designed to operate in traffic, and their mechanical manipulation often requires a different set of knowledge and skills. The types of construction equipment discussed above do not come within the definition of a "CMV" and hence the operators and equipment are not subject to the FMCSRs.

Question 7: Are mobile cranes operating in interstate commerce subject to the FMCSRs?

Guidance: Yes, the definition of CMV encompasses mobile cranes.

Question 8: Does the FHWA define for-hire transportation of passengers identically as the ICC?

Guidance: To the extent our authority stems from 49 USC § 3102 or other sections of Title 49 which are rooted in the Interstate Commerce Act, we are bound by judicial precedent and legislative history in interpreting that Act, much of which relates to the operations of the ICC. However, since the MCSA of 1984 reestablished our jurisdictional authority and resulted in a repromulgation of the FMCSRs, the FHWA has been establishing its own precedents based on "safety" rather than "economics" as the overriding consideration. This has resulted in some deviation in the definition of terms by the two agencies, e.g., commercial zones, for-hire transportation, etc.

The term "for-hire motor carrier" as defined in part 390 means a person engaged in the transportation of goods or passengers for compensation. The FHWA has determined that any business entity that assesses a fee, monetary or otherwise, directly or indirectly for the transportation of passengers is operating as a for-hire carrier. Thus, when operating in interstate commerce, the transportation of passengers in motor vehicles designed to convey more than 15 passengers, including the driver, associated with the following operations would typically be subject to all parts of the FMCSRs, including part 387, since some fee is charged, usually indirectly in a total package charge or other assessment, for transportation performed: Whitewater river rafters, hotel/motel shuttle transporters, rental car shuttle services, etc (see 58 FR 27328, May 7, 1993).

Question 9: A company has a truck with a GVWR under 10,001 pounds towing a trailer with a GVWR under 10,001 pounds. However, the GVWR of the truck added to the GVWR of the trailer is greater than 10,001 pounds. Would the company operating this vehicle in interstate commerce have to comply with the FMCSRs?

Guidance: Section 390.5 of the FMCSRs includes in the definition of CMV a vehicle with a GVWR or GCWR of 10,001 or more pounds. The section further defines GCWR as the value specified by the manufacturer as the loaded weight of a combination (articulated) vehicle. In the absence of a value specified by the manufacturer, the GCWR will be determined by adding the GVWR of the power unit and the total weight of the towed unit and any weight thereon. Therefore, if the GVWR of the truck added to the GVWR of the trailer exceeds 10,001 pounds, the driver and vehicle are subject to the FMCSRs.

Question 10: A CMV becomes stuck in a median or on a shoulder, and has had no contact with another vehicle, a pedestrian, or a fixed object prior to becoming stuck. If a tow truck is used to pull the CMV back onto the travelled portion of the road, would this be considered an accident?

Guidance: No.

Question 11: To what extent would the windshield and/or mirrors of a vehicle have to be damaged in order for

it to be considered "disabling damage" as used in the definition of an accident in § 390.5?

Guidance: The decision as to whether damage to a windshield and/or mirrors is disabling is left to the discretion of the investigating officer.

Section 390.9 State and Local Laws, Effect On

Question 1: If an interstate driver gets stopped by a State enforcement officer for an inspection, would the inspecting officer be enforcing the Federal regulations or State regulations?

Guidance: A State enforcement officer can only enforce State laws. However, under the Motor Carrier Safety Assistance Program, quite often State laws are the same as or similar to the FMCSRs.

Section 390.15 Assistance in Investigations and Special Studies

Question 1: May a motor carrier create an accident register of its own, or is there a specified form that must be used?

Guidance: There is no specified form. A motor carrier may create or use any accident register as long as it includes the elements required by § 390.15.

Question 2: Would the accident report retention requirement in § 390.15(b)(2) include an "Adjuster's Report" that is normally considered to be an internal document of an insurance company?

Guidance: No. The intent of § 390.15(b)(2) is for motor carriers to maintain copies of all documents that the motor carrier is required by the insurance company to complete and/or maintain. Section 390.15(b)(2) does not require motor carriers to maintain documents, such as "Adjuster's Reports," that are typically internal documents of the insurance company.

Section 390.21 Marking of Commercial Motor Vehicles

Question 1: What markings must be displayed on a CMV when used by two or more motor carriers?

Guidance: The markings of the motor carrier responsible for the operation of the CMV must be displayed at the time of transportation. If 2 or more names are on the vehicle, the name of the operating motor carrier must be preceded by the words "operated by."

Section 390.23 Relief From Hours-of-Service Regulations—Disasters

Question 1: Does § 390.23 create an exemption from the FMCSRs each and every time the delivery of electricity is interrupted, no matter how isolated or minor the occurrence?

Guidance: The rule creates an exemption from the FMCSRs when interruptions of electricity are severe enough to trigger a declaration of an emergency by a public official authorized to do so.

An interruption of electricity that does not produce a declaration by a public official is not an emergency for purposes of the regulation and does not exempt a motor carrier or driver from the FMCSRs. A call reporting a downed power line, whether directed to the State police or a public utility company, does not create a declared emergency.

The authority to declare emergencies has been delegated to different officials in the various States. The FHWA has not attempted to list these officials. In order to utilize the exemption provided by § 390.23, drivers and motor carriers must therefore ascertain that a declaration of an emergency was made by a State or local official authorized to do so.

Question 2: Section 390.23(a) provides that parts 390 through 399 do not apply to any motor carrier or driver operating a CMV to provide direct assistance in an emergency. Is a motor carrier or driver required to keep a record of the driver's on-duty or driving time while providing relief?

Guidance: No.

Question 3: After providing emergency relief under § 390.23, what on-duty hours must a driver use to determine how much off-duty time he/she must have before returning to the service of the employing motor carrier?

Guidance: The driver must total the number of hours worked while the driver actually provided direct assistance to the emergency relief effort.

Section 390.31 Copies of Records or Documents

Question 1: May records required by the FMCSRs be maintained in an automated format?

Guidance: Yes, provided the motor carrier can produce the information required by the regulations. Documents requiring a signature must be capable of replication (i.e., photocopy, facsimile, etc.) in such form that will provide an opportunity for signature verification upon demand.

Question 2: How long does a motor carrier have to produce records if a motor carrier maintains all records in an automated format?

Guidance: A motor carrier must produce all records maintained in an automated format within 2 working days after the request. Documents requiring a signature must be capable of replication (e.g., photocopy, facsimile, etc.) in such form that will provide an opportunity for signature verification upon demand.

Part 391—Qualification of Drivers

Sections Interpreted

391.2 General Exemptions
391.11 Qualifications of Drivers
391.15 Disqualification of Drivers
391.21 Application for Employment
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391.25 Annual Review of Driving Record
391.27 Record of Violations
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391.43 Medical Examination; Certificate of Physical Examination
391.45 Persons Who Must Be Medically Examined and Certified
391.47 Resolution of Conflicts of Medical Evaluation
391.51 Driver Qualification Files
391.63 Intermittent, Casual, or Occasional Drivers
391.65 Drivers Furnished By Other Motor Carriers

Section 391.2 General Exemptions

Question 1: Must exempt intracity zone (see § 390.5) drivers comply with the medical requirements of this subpart?

Guidance: No, provided:

a. the driver was otherwise qualified and operating in a municipality or exempt intracity zone thereof throughout the 1 year period ending November 18, 1988, and;

b. the driver's medical condition has not substantially worsened since August 23, 1988.

Question 2: What driver qualification requirements must a farm vehicle driver (as defined in § 390.5) comply with in part 391?

Guidance: Drivers meeting the definition of "farm vehicle driver" who operate straight trucks of any GVWR and articulated vehicles rated at 10,000 GVWR and less are exempted from all driver qualification requirements of part 391. All drivers of articulated motor vehicles at 10,001 GVWR or greater are required to possess a current medical certificate as required in §§ 391.41 and 391.45 and a current drug test as required in part 391 subpart H (see § 391.67).

Section 391.11 Qualifications of Drivers

Question 1: Is there a maximum age limit for driving in interstate commerce?

Guidance: The FMCSRs do not specify any maximum age limit for drivers.

Question 2: Does the age requirement (in § 391.11(b)(1)) apply to CMV drivers involved entirely in intrastate commerce?

Guidance: No. Neither the CDL requirements in part 383 nor the FMCSRs in parts 390–399 require drivers engaged purely in intrastate commerce to be 21 years old. The States may set age thresholds for intrastate drivers.

Question 3: What role does the Age Discrimination in Employment Act play in minimum and maximum age of an interstate driver?

Guidance: None. The Age Discrimination in Employment Act, 29 U.S.C. 621–634, recognizes an exception when age is a bona fide occupational qualification. 29 U.S.C. 623(f)(1).

Question 4: May a motor carrier be exempt from driver qualification requirements by hiring a driver leasing company or temporary help service?

Guidance: No. The FMCSRs apply to, and impose responsibilities on, motor carriers and their drivers. The FHWA does not regulate driver leasing companies or temporary help service companies.

Question 5: May a motor carrier lawfully permit a person not yet qualified as a driver in accordance with § 391.11 to operate a vehicle in interstate commerce for the purpose of attending a training and indoctrination course in the operation of that specific vehicle?

Guidance: No. If the trip is in interstate commerce, the driver must be fully qualified to operate a CMV.

Question 6: Is there a requirement that a driver must personally load, block, brace, and tie down the cargo on the property carrying CMV he/she drives?

Guidance: No. There is no requirement that the driver must personally secure the cargo, nor is there one prohibiting him/her from doing so. The driver is required to be familiar with methods and procedures for securing cargo in or on the vehicle he/she drives.

Question 7: Does the Military Selective Service Act of 1967 require a motor carrier to place a returning veteran in his/her previous position (driving interstate) even though he/she fails to meet minimum physical standards?

Guidance: No. The Act does not require a motor carrier to place a returning veteran who does not meet the minimum physical standards into his/her previous driving position. The returning veteran must meet the physical requirements and obtain a medical examiners certificate before driving in interstate operations.

Section 391.15 Disqualification of Drivers

Question 1: May a driver convicted of a disqualifying offense be "disqualified" by a motor carrier?

Guidance: No. Motor carriers have no authority to disqualify drivers. However, a conviction for a disqualifying offense automatically disqualifies a driver from driving for the period specified in the regulations. Thus, so long as a motor carrier knows, or should have known, of a driver's conviction for a disqualifying offense, it is prohibited from using the driver during the disqualification period.

Question 2: Is a decision of probation before judgment sufficient for disqualification?

Guidance: Yes, provided the State process includes a finding of guilt.

Question 3: Is a driver holding a valid driver's license from his or her home State but whose privilege to drive in another State has been suspended or revoked, disqualified from driving by § 391.15(b)?

Guidance: Yes, the driver would be disqualified from interstate operations until his privileges are restored by the authority that suspended or revoked them, provided the suspension resulted from a driving violation. It is immaterial that he holds a valid license from another State. All licensing actions should be accomplished through the CDLIS or the controlling interstate compact.

Question 4: What are the differences between the disqualification provisions listed in §§ 383.51 and 383.5 and those listed in § 391.15?

Guidance: Part 383 disqualifications are applicable generally to drivers who drive CMVs above 26,000 pounds GVWR, regardless of where the CMV is driven in the U.S. Part 391 disqualifications are applicable generally to drivers who drive CMVs above 10,000 pounds GVWR, only when the vehicle is used in interstate commerce in a State, including the District of Columbia.

Question 5: Do the disqualification provisions of § 391.15 apply to offenses committed by a driver who is using a company vehicle, for personal reasons, while off-duty?

Guidance: No. The disqualification provisions of § 391.15 do not apply to a driver using a company vehicle, for personal reasons, while off-duty. For example, an owner-operator using his own vehicle in an off-duty status, or a driver using a company truck, or tractor for transportation to a motel, restaurant or home, would be outside the scope of this section if he returns to the same terminal from which he went off-duty (see § 383.51 for additional information).

Question 6: If a driver has his/her privileges to drive a pleasure vehicle revoked or suspended by State authorities, but his/her privileges to operate a CMV are left in tact, would the driver be disqualified under the terms set forth in § 391.15?

Guidance: No. The driver would not be disqualified from operating a CMV.

Question 7: If a driver is convicted of one of the specified offenses in § 391.15(c), but is allowed to retain his driver's license, is he/she still disqualified?

Guidance: Yes. A driver who is convicted of one of the specified offenses in § 391.15(c), or has forfeited bond in collateral on account of one of these offenses, and who is allowed to retain his/her driver's license, is still disqualified. The loss of a driver's license and convictions of certain offenses in § 391.15(c) are entirely separate grounds for disqualification.

Question 8: If a driver has his/her license suspended for driving while under the influence of alcohol, and two months later, as a result of this same incident, the driver is convicted of a DWI, must the periods of disqualification be combined since these are both disqualifying offenses?

Guidance: No. Disqualification during the suspension of an operating license continues until the license is restored by the jurisdiction that suspended it. Disqualification for conviction of DWI is for a fixed term. The fact that the driver was already disqualified for driving under the influence of alcohol because of the suspension action may mean that the total time under disqualification for the DWI conviction may exceed the stated term.

Question 9: If a driver commits a felony while operating a CMV not in the employ of a motor carrier, is it a disqualifying offense?

Guidance: No. There are 2 conditions required to be present for a felony conviction to be a disqualifying offense: (1) the offense was committed during on-duty time; and, (2) the driver was employed by a motor carrier or was engaged in activities that were in furtherance of a commercial enterprise.

Section 391.21 Application for Employment

Question 1: If a driver submits an application for employment and has someone else type, write or print the answers to the questions for him and he signs the application, does this constitute a valid application?

Guidance: Yes. The applicant, by signing the application, certifies that all entries on it and information therein are true and complete to the best of the applicant's knowledge.

Question 2: Is there a prescribed or specified form that must be used when a driver applies for employment, or can a carrier develop it's own application?

Guidance: There is no specified form to be used in an application for employment. Carriers may develop their own forms, which may be tailored to their specific needs. The application form must, at the minimum, contain the information specified in § 391.21(b).

Section 391.23 Investigation and Inquiries

Question 1: When a motor carrier receives a request for driver information from another motor carrier about a former or current driver, is it required to supply the requested information?

Guidance: No.

Section 391.25 Annual Review of Driving Record

Question 1: To what extent must a motor carrier review a driver's overall driving record to comply with the requirements of § 391.25?

Guidance: The motor carrier must consider as much information about the driver's experience as is reasonably available. This would include all known violations, whether or not they are part of an official record maintained by a State, as well as any other information that would indicate the driver has exercised a lack of due regard for the safety of the public. Violations of traffic and criminal laws, as well as the driver's involvement in motor vehicle accidents, are such indications and must be considered. A violation of size and weight laws should also be considered.

Question 2: Is a driver service or leasing company that is not a motor carrier permitted to perform annual reviews of driving records (§ 391.25) on the drivers it furnishes to motor carriers?

Guidance: The driver service or leasing company may perform annual reviews if designated by a motor carrier to do so.

Section 391.27 Record of Violations

Question 1: Are notifications to a motor carrier by a driver convicted of a driver violation as required by § 383.31 to be maintained in the driver's qualification file as part of the supporting documentation or certifications noted in the requirements listed in § 391.27(d)?

Guidance: Section 391.27(d) does not require documentation in the qualification file. However, § 391.51 does require that such notifications be maintained in the qualification file.

Question 2: Must violations of size and weight laws be reported on the annual record of violations the driver furnishes to the carrier every 12 months?

Guidance: Yes.Violations of size and weight laws are considered motor vehicle traffic laws and must be reported to the carrier.

Section 391.31 Road Test

Question 1: Are employers still required to administer road tests since all States have implemented CDL skills testing?

Guidance: Section 391.33(a)(1) allows an employer to accept, in lieu of the road test, a CDL. However, if the employer intends to assign to the driver a vehicle necessitating the doubles/triples or tank vehicle endorsement, the employer still needs to administer the road test under § 391.31 in that type of vehicle.

Question 2: How does a student enrolled in a driver training school comply with the requirement to pass a road test?

Guidance: The road test is administered only after the student has demonstrated a sufficient degree of proficiency on a range or off-road course. A student who passes the road test and is qualified to operate in interstate commerce could cross a State line in the process of receiving training.

Question 3: May a carrier use a blanket certification of road test for specific vehicles (driver's names, etc., left out)?

Guidance: No.

Question 4: May a motor carrier designate another person or organization to administer the road test?

Guidance: Yes. A motor carrier may designate another person or organization to administer the road test as long as the person who administers the road test is competent to evaluate and determine the results of the tests.

Section 391.41 Physical Qualifications for Drivers

Question 1: Who is responsible to insure medical certification requirements are met?

Guidance: Medical certification determinations are the responsibility of the medical examiner. The motor carrier has the responsibility to ensure that the medical examiner is informed of the minimum medical requirements and the characteristics of the work to be performed. The motor carrier is also responsible for ensuring only medically qualified drivers are operating CMVs in interstate commerce.

Question 2: Do the physical qualification requirements of the FMCSRs infringe upon a person's religious beliefs if such beliefs prohibit being examined by a licensed doctor of medicine or osteopathy?

Guidance: No. To determine whether a governmental regulation infringes on a person's right to freely practice his religion, the interest served by the regulation must be balanced against the degree to which a person's rights are adversely affected. *Biklen* v. *Board of Education*, 333 F. Supp. 902 (N.D.N.Y. 1971) aff'd 406 U.S. 951 (1972).

If there is an important objective being promoted by the requirement and the restriction on religious freedom is reasonably adapted to achieving that objective, the requirement should be upheld. *Burgin* v. *Henderson*, 536 F.2d 501 (2d. Cir. 1976).

Based on the tests developed by the courts and the important objective served, the regulation meets Constitutional standards. It does not deny a driver his First Amendment rights.

Question 3: What medical/physical conditions prohibit a driver from being qualified to operate a CMV in interstate commerce?

Guidance: Drivers are prohibited from being qualified if they do not meet the standards for vision, hearing, diabetes, epilepsy, or loss of a limb. The exception to these prohibitions is if the individual has received a waiver from the FHWA.

Question 4: What other medical/physical conditions prohibit a driver from being qualified to operate a CMV in interstate commerce?

Guidance: All other medical conditions listed in § 391.41 render a driver unqualified unless a medical examiner makes a determination that the driver is capable of safely operating a CMV.

Question 5: Is a driver who is taking prescription methadone qualified to drive a CMV in interstate commerce?

Guidance: Methadone is a habit-forming narcotic which can produce drug dependence and is not an allowable drug for operators of CMVs.

Section 391.43 Medical Examination; Certificate of Physical Examination

Question 1: May a motor carrier accept medical examination results conducted under other Federal or State agencies or foreign jurisdiction requirements?

Guidance: Yes, as long as the driver is medically certified in accordance

with the procedures in part 391 subpart E.

Question 2: May a urine sample collected for purposes of performing a subpart H test be used to test for diabetes as part of a driver's FHWA-required physical examination?

Guidance: In general, no. However, the Department has recognized an exception to this general policy whereby, after 60 milliliters of urine have been set aside for subpart H testing, any remaining portion of the sample may be used for other non-drug testing, but only if such other non-drug testing is required by the FHWA (under part 391, subpart E) such as testing for glucose and protein levels.

Question 3: Is a chest X-ray required under the minimum medical requirements of the FMCSRs?

Guidance: No, but a medical examiner may take an x-ray if appropriate.

Question 4: Does § 391.43 of the FMCSRs require that physical examinations of applicants for employment be conducted by medical examiners employed by or designated by the carrier?

Guidance: No.

Question 5: Does a medical certificate displaying a facsimile of a medical examiner's signature meet the "signature of examining health care professional" requirement?

Guidance: Yes.

Section 391.45 Persons Who Must be Medically Examined and Certified

Question 1: Is it intended that the words "person" and "driver" be used interchangeably in § 391.45?

Guidance: Yes.

Question 2: Do the FMCSRs require applicants, possessing a current medical certificate, to undergo a new physical examination as a condition of employment?

Guidance: No. However, if a motor carrier accepts such a currently valid certificate from a driver subject to subpart H, the driver is subject to additional controlled substance testing requirements unless otherwise excepted in subpart H.

Question 3: Must a driver who is returning from an illness or injury undergo a medical examination even if his current medical certificate has not expired?

Guidance: The FMCSRs do not require an examination in this case unless the injury or illness has impaired the driver's ability to perform his/her normal duties. However, the motor carrier may require a driver returning from any illness or injury to take a physical examination. But, in either case, the motor carrier has the obligation to determine if an injury or illness renders the driver medically unqualified.

Section 391.47 Resolution of Conflicts of Medical Evaluation

Question 1: Does the FHWA issue formal medical decisions as to the physical qualifications of drivers on an individual basis?

Guidance: No, except upon request for resolution of a conflict of medical evaluations.

Section 391.51 Driver Qualification Files

Question 1: When a motor carrier purchases another motor carrier, must the drivers of the acquired motor carrier be requalified by the purchasing motor carrier?

Guidance: No.

Question 2: Is a driver training school required to keep a driver qualification file on each student?

Guidance: Yes, but only when operating in interstate commerce.

Section 391.63 Intermittent, Casual, or Occasional Drivers

Question 1: Is a person employed by a non-motor carrier in his normal duties considered an intermittent, casual or occasional driver when employed by a motor carrier as a driver on a part time basis?

Guidance: No. A person who drives for one motor carrier (even if it is only one day per month) would not meet the definition of an intermittent, casual or occasional driver in § 390.5 since he/she is employed by only one motor carrier. The motor carrier must fully qualify the driver and maintain a qualification file on the employee as a regularly employed driver.

Section 391.65 Drivers Furnished by Other Motor Carriers

Question 1: May a non-motor carrier which owns a CMV prepare the qualification certificate provided for in § 391.65?

Guidance: No, only a motor carrier which regularly employs a driver may issue the required certification.

Question 2: May the certificate of qualification as prescribed by § 391.65 be incorporated into another carrier's forms such as a lease and/or interchange agreement?

Guidance: Yes. However, the certificate of qualification must be signed and dated by an officer or authorized employee of the regularly employing carrier.

Question 3: Is a motor carrier required to accept a certificate from the driver's regularly employing motor carrier certifying that the driver is qualified per § 391.65?

Guidance: No. If the motor carrier chooses not to accept the certificate issued by the regularly employing motor carrier furnishing the driver, the motor carrier must then assume responsibility for assuring itself that the driver is fully qualified in accordance with part 391.

Question 4: If a driver furnished by another motor carrier is in the second carrier's service for a period of 7 consecutive days or more, may the driver still fall under the exemption in § 391.65?

Guidance: No.The driver becomes a regularly-employed driver of the second motor carrier and the exemption in § 391.65 is inapplicable.

Part 391 Subpart H Controlled Substances Testing Requirements

Sections Interpreted

391.81 Purpose and Scope
391.83 Applicability
391.87 Notification of Test Results and Recordkeeping
391.89 Access to Individual Test Results or Test Findings
391.93 Implementation Schedule
391.95 Drug Use Prohibitions
391.97 Prescribed Drugs
391.103 Pre-Employment Testing Requirements
391.105 Biennial (Periodic) Testing Requirements
391.109 Random Testing Requirements
391.113 Post-Accident Testing Requirements
391.117 Disqualification
391.121 EAP Training Program
391.123 After-Care Monitoring

Special Topics

Section 391.81 Purpose and Scope

Question 1: May a motor carrier test for additional drugs that are not part of the DOT drug rule?

Guidance: Section 391.81(c) of the FHWA regulation states that a motor carrier may test for additional drugs only as a part of reasonable cause testing and only if approved by the FHWA Administrator under part 40. This section further indicates that such approval will only be granted for a substance for which the Department of Health and Human Services has established an approved testing protocol and positive threshold.

Section 391.83 Applicability

Question 1: Do the FHWA's controlled substances testing regulations apply to motor carriers and drivers in Puerto Rico and Guam?

Guidance: No.

Question 2: Which drivers are to be included in a drug testing program under the FHWA's rule?

Guidance: Any person who operates a CMV, as defined in § 391.85, in interstate commerce and is subject to the driver qualification requirements of part 391 is to be included in the program.

Question 3: Is a foreign resident driver operating between the U.S. and a foreign country from a U.S. terminal for a U.S.-based motor carrier subject to the FHWA drug testing regulations?

Guidance: Yes. The driver would not be protected by foreign law since he is operating for a U.S.- based motor carrier and is subject to subpart H.

Question 4: Would a foreign resident driver operating from a foreign terminal of a U.S.-based carrier between a foreign country and the U.S. be subject to the FHWA drug testing regulations?

Guidance: No. The motor carrier that is operating from the foreign terminal would have to comply with the requirements of the foreign government. Therefore, the driver would not be required to comply with the controlled substances testing requirements.

Section 391.87 Notification of Test Results and Recordkeeping

Question 1: Where must the records required by § 391.87(f) be maintained?

Guidance: The driver's qualification file need not be physically one recordkeeping medium such as a file folder, but must be a filing system that is identifiable to a specific individual. Examples would include, in addition to a file folder, an electronic file such as a record on a database program, or a filing system which may contain several physical files each labeled to a specific individual. These records are to be maintained at the carrier's principal place of business, unless they have divided records authority. Participation in a consortium does not relieve a motor carrier of its responsibility to comply with these recordkeeping requirements.

Question 2: May a motor carrier as a member of a consortium satisfy the annual summary requirements by using the aggregate testing information of the consortium?

Guidance: No. A motor carrier's annual summaries must be employer specific.

Question 3: May a motor carrier, as a part of its annual summary, include records of drug tests of employees covered by other U.S. DOT agencies?

Guidance: Yes.

Question 4: What if a motor carrier's MRO refuses to maintain the records required by § 391.87(e) for a 5-year period?

Guidance: The motor carrier must instruct the MRO to maintain the records or the carrier should use the services of another MRO who will maintain the records.

Question 5: When subsidiaries of a parent company join together as a consortium for the purpose of satisfying the FHWA's random drug testing requirements, is it permissible for each subsidiary to use the aggregate testing totals to satisfy the annual summary requirements of § 391.87(h)?

Guidance: No. The annual summary must be specific to each subsidiary.

Question 6: While completing the annual summary required under § 391.87(h), must the motor carrier include the information required by § 391.87(h) (6) and (7) if it is likely that information about an individual's test can be readily inferred?

Guidance: No. If the monthly statistical summaries received from the laboratory or consortium include data from which the existence of these elements can be readily inferred, a motor carrier is not required to complete these items.

Section 391.89 Access to Individual Test Results or Test Findings

Question 1: A driver whose test is returned positive is subsequently terminated by the employer. The driver initiates an unemployment or workers compensation proceeding. May an employer, without a driver's authorization, disclose information to a decision-maker in an unemployment or workers compensation proceeding?

Guidance: An employer may release information concerning a driver's drug test results after these four actions have taken place:

1. The driver initiates a claim for benefits;

2. The adjudicator requests information from the employer concerning the circumstances under which the driver's employment was terminated;

3. The employer responds to the adjudicator that the driver is medically unqualified to operate a CMV in interstate commerce because the driver does not meet the medical qualification standards of part 391, subpart E; and

4. The adjudicator requests the employer to identify which Federal medical qualification standard in subpart E the driver does not meet.

At this point, the employer may release the information that the driver tested positive for controlled substances during a test which was conducted in accordance with U.S. DOT procedures found at 49 CFR part 40.

Section 391.93 Implementation Schedule

Question 1: If a motor carrier commenced operations after 01/01/92, is the carrier entitled to take advantage of the 12-month phase-in period for random testing provided in § 391.93(e)?

Guidance: Yes.

Question 2: What does the phrase "spread reasonably through the 12-month period" in § 391.93(e)(1) mean?

Guidance: The FHWA regulations do not set the number of selection periods a motor carrier must use during the year. The agency believes, however, that larger motor carriers should perform the selection at least four times a year. A small motor carrier which chooses not to belong to or is not able to belong to a consortium may choose to randomly select drivers fewer than four times a year.

Section 391.95 Drug Use Prohibitions

Question 1: What must be done in order to allow a CMV driver who has been tested and confirmed positive for the use of controlled substances to return to driving in interstate commerce?

Guidance: The driver would have to submit to another controlled substances test with a negative result and be medically recertified by a medical examiner. (See § 391.97, Question Number 2 for additional guidance)

Question 2: When a driver tests positive for controlled substances, may that driver be assigned to non-driving duties?

Guidance: Yes. A driver may be assigned non-driving duties until such time as the driver may successfully pass another controlled substances test.

Question 3: If a driver refuses to submit to a controlled substances test, would he/she be considered medically unqualified?

Guidance: Yes. A refusal to test is considered the same as a positive test and the driver is considered medically unqualified.

Section 391.97 Prescribed Drugs

Question 1: May an MRO declare a positive drug test negative without impugning the laboratory or the methods of collection of the specimen?

Guidance: Yes. The MRO's responsibility is to find possible alternative medical explanations for a positive drug test result. When an MRO contacts a driver to discuss a confirmed positive test result, the MRO is attempting to discover whether any medical explanation that the driver may provide could explain why a positive test was obtained. An MRO's decision to

change a laboratory-confirmed positive test result to an MRO-verified negative test result does not impugn the laboratory or the collection methods.

Question 2: If a driver tests positive, is the driver required to be medically recertified?

Guidance: Yes. The medical examiner must examine the driver again because of the prior use of drugs and certify that the driver is medically qualified to drive. The complete examination need not always be given. The extent to which the driver must be physically reexamined must be determined by the medical examiner.

Section 391.103 Pre-Employment Testing Requirements

Question 1: Must a motor carrier wait for the results from a pre-employment drug test prior to using a driver in interstate commerce?

Guidance: A driver who is required to submit to a pre-employment controlled substance test may not drive until the subpart H drug test negative results are received by the motor carrier using the driver.

Question 2: Must all drivers who do not work for an extended period of time (such as layoffs over the winter months) be pre-employment drug tested each season when they return to work?

Guidance: If the driver is considered to be an employee of the company during the extended (layoff) period, a pre-employment test would not be required so long as the driver has been included in the company's random testing program during the layoff period. However, if the driver was not considered to be an employee of the company at any point during the layoff period, or was not covered by a program, or was uncovered for more than 30 days, then a pre-employment test would be required.

Section 391.105 Biennial (Periodic) Testing Requirements

Question 1: When may biennial (periodic) testing be discontinued?

Guidance: A motor carrier may discontinue biennial (periodic) testing of a specific driver when that specific driver has had at least one prior biennial, pre-employment or random test and the motor carrier is testing at the 50 percent or higher rate under its random program. A motor carrier that is phasing in random testing during the first 12 months cannot discontinue periodic testing until such time as testing is conducted at the 50 percent annualized rate.

Question 2: Must a drug test which will become a part of the periodic physical examination be administered by the company or may the driver choose a medical practitioner himself?

Guidance: The rule clearly places the responsibility for compliance with the rule on the motor carrier. If the motor carrier decides to have the test performed by another entity, FHWA will continue to look to the motor carrier to ensure that any testing performed complies with the rule.

Question 3: What is the relationship between a medical examination and a periodic drug test?

Guidance: Subpart H testing for controlled substances may be performed as an integral part of the medical examination; as a separate collection activity during the visit to the medical examiner's office; or as a totally separate activity from the medical examination.

If subpart H testing is performed as a part of the medical examination, the medical examiner should receive the results of the test from the MRO or the motor carrier. (A release from the person being tested will be needed in order to obtain the results.) If the results are negative and the driver is otherwise physically qualified, the medical examiner should sign the medical examiner's certificate.

If, however, the medical examiner does not receive the subpart H test results or if the testing is performed as a separate activity from the medical examination (either the specimen is collected during the same visit or as a totally separate activity), the medical examiner should perform the medical examination as has been done in the past and sign the certificate if the driver is physically qualified in accordance with § 391.41. In such cases, the medical examiner should line out the reference to subpart H on the medical examiner's certificate and initial the line out. The motor carrier is responsible to ensure that controlled substances tests are performed when and as required and are documented in the drivers' qualification files. Furthermore, a motor carrier may not use a driver until the motor carrier has received negative results of a controlled substances test for pre-employment or periodic testing if the driver's current medical examiner's certificate has expired.

If a periodic test for controlled substances is performed separately from the medical examination, the test should be performed before the expiration of the driver's medical certificate, but no more than 60 days prior to such expiration, to ensure that the subpart H test results are received before the expiration of the certificate.

Question 4: Does subpart H require a CMV driver be issued and carry a medical examiner's certificate which states the outcome of a controlled substances test performed in accordance with subpart H and part 40?

Guidance: No. The only certificate that is required to be in the driver's possession while operating a CMV is the medical examiner's certificate required in § 391.41(a) and, if applicable, a waiver of certain physical defects issued under § 391.49.

Section 391.109 Random Testing Requirements

Question 1: Once an employee is randomly tested during a calendar year, is his/her name removed from the pool of names for the calendar year?

Guidance: No, the names of those tested earlier in the year must be returned to the pool for each new selection. Each driver must be subject to an equal chance of being selected during each selection process.

Question 2: May a motor carrier or consortium include intrastate drivers and other non-covered employees into one random pool?

Guidance: Yes, as long as the motor carrier or consortium can document that it is meeting or exceeding the 50 percent testing rate of U.S. DOT-covered positions.

Question 3: Is it permissible to make random selections by terminals?

Guidance: It would be permissible to use a random selection method that is based on geographic locations or terminals. If random selection is done based on location, a two-stage selection process must be utilized. The first selection would be the location and the second selection would be of employees at that location.

Question 4: When a driver works for two or more different companies in whose random pool must the driver be included?

Guidance: The driver must be in the pool of each motor carrier for which the driver works.

Question 5: After what period of time may a motor carrier remove a casual driver from a random pool?

Guidance: A motor carrier may remove a casual driver, who is not used by the carrier, from its random pool when it no longer expects the driver to be used. The time period should be no longer than one year.

Question 6: If an employee is off work due to a letter of layoff or a long-term illness or injury, should that individual's name be removed from the random pool?

Guidance: No. When the individual is randomly selected for drug testing, the driver's name may be skipped and another driver would be tested. The driver's name would remain in the

selection pool for each period the driver is employed by the motor carrier. The driver's test should not be deferred until the driver returns to duty.

Question 7: When a driver is off because of long-term illness, injury or layoff, how will a motor carrier document its random testing program to indicate the driver was included in the random pool?

Guidance: A notation that the driver was in the random pool and that the driver was ill, injured or laid off would suffice.

Question 8: If an employee is on vacation when randomly selected may the collection of the driver's urine be deferred until he returns to work?

Guidance: Yes. The test should be deferred. A motor carrier may collect urine specimens at any time during a selection period. The motor carrier has from the time of selection of the driver's name until the next selection period to require a driver to submit a urine specimen. In many cases, a driver may return from vacation prior to the next selection and would be required to be tested.

Question 9: An employee takes five consecutive weeks of vacation. The motor carrier selects drivers' names 12 times each year. Is the driver considered to be not employed by the carrier for more than thirty days?

Guidance: No. The driver does not leave the motor carrier's employ when on vacation. A selected driver's name may be skipped. Another driver would be selected and the vacationing driver's name would be placed in the pool for the next selection period.

Question 10: Is it necessary for an individual (owner-operator) to belong to a consortium?

Guidance: Owner-operators are required to belong to a consortium.

Question 11: If a motor carrier joins a consortium, and the consortium is randomly testing at the 50 percent rate, will this rate meet the requirement of the controlled substances testing for the motor carrier even though 50 percent of the motor carriers drivers were not randomly tested?

Guidance: Yes.

Question 12: What evidence should a motor carrier maintain to document that a participating consortium is testing according to the rules?

Guidance: Motor carriers are responsible for documenting compliance with subpart H, including that the random testing program in which their drivers participate is testing at the 50 percent rate. Members should obtain a complete and comprehensive description of the procedures to be used by the consortium. With respect to random testing, this description would include: the random testing pool, the method of selection and notification of drivers, the method of collection (at terminal sites, clinics, "on the road", etc.), methods of reporting the results of the tests on an individual basis as well as summary reports to the members. A key issue is the determination and documentation that the consortium is testing at the prescribed rate.

Question 13: Is it permissible to combine the drivers from the subsidiaries of a parent company into one pool, with the parent company acting as a consortium?

Guidance: Yes, if this newly created consortium is testing at the random rate of 50 percent.

Question 14: When must a motor carrier notify a driver who has been selected for random testing, and when must the driver submit the specimen?

Guidance: A driver does not have to be notified immediately after being selected. A motor carrier may notify and test the selected driver any time before the next selection is made. However, the fact that a driver has been selected shall remain confidential until notification.

Motor carriers must ensure a selected driver, once notified, proceeds immediately to a collection site. Immediately, in this context, means that all the driver's actions, after notification, lead to the expeditious submission of the specimen. This ensures that a driver selected for testing will not have an opportunity to do anything which may affect the outcome of the test. Any activity (e.g., loading, unloading, accepting a new dispatch, making a delivery, completing required paperwork, performing vehicle inspections, etc.) which does not directly lead to submitting a specimen should be deferred by the driver until the specimen is collected. There may be a few activities which must be completed by the driver prior to submitting a specimen. Motor carriers should clearly indicate, in their random testing procedures, what these activities are so that there will be no misunderstandings among their drivers.

Motor carriers choosing to notify their drivers while they are "on the road" should establish procedures which will allow drivers to report to a nearby collection facility before continuing their current trip. This may require a driver to detour from a planned route. Notifying drivers at terminals and while they are in heavily populated areas should minimize any negative effect the expedited compliance may have on a motor carrier's operation.

Question 15: How should a motor carrier compute the number of random tests to be given to ensure that the 50 percent testing rate is achieved given the fluctuations in driver populations and in the high turnover rate of drivers?

Guidance: A motor carrier should take into account fluctuations by estimating the number of random tests needed to be performed over the course of the year. If the carrier's driver workforce is expected to be relatively constant (i.e., the total number of driver positions are approximately the same) then the number of tests to be performed in any given year could be determined by multiplying the average number of driver positions by the testing rate.

If there are large fluctuations in the number of driver positions throughout the year without any clear indication of the average number of driver positions, the motor carrier should make a reasonable estimate of the number of positions. After making the estimate, the motor carrier should then be able to determine the number of tests necessary.

Section 391.113 Post-Accident Testing Requirements

Question 1: If a driver receives a citation for a moving violation by mail, more than 32 hours after a recordable accident as defined in § 390.15, is this cause for a post-accident drug test?

Guidance: No. A post-accident controlled substances test should not be initiated after the 32nd hour following a recordable accident.

Question 2: May a driver subject to post-accident drug testing continue to drive pending receipt of the results of the drug test?

Guidance: A driver could continue to drive, if there is no reasonable cause to believe that the driver used drugs in violation of the FHWA's regulations, and there is no other reason to believe that the driver is not qualified or has been disqualified from driving.

Section 391.117 Disqualification

Question 1: Is a driver who tests positive for controlled substances disqualified under § 391.117?

Guidance: In addition to being medically unqualified, a driver who tests positive or refuses to be tested after a fatal accident will be disqualified by issuance of a letter of disqualification for a period of one year.

Section 391.121 EAP Training Program

Question 1: Does § 391.121 require motor carriers to provide recurrent education and training to drivers or supervisory personnel?

Guidance: No. Section 391.121 provides that EAP training for all

drivers and supervisory personnel must consist of at least 60 minutes. Such training is to be provided to drivers or supervisors used for the first time by the motor carrier.

Question 2: How does a motor carrier document that an employee has completed an EAP?

Guidance: The company should keep in the employee's file documentation that at least 60 minutes of drug information and training were provided to the employee.

Question 3: May a motor carrier accept proof of EAP training for a driver from another motor carrier?

Guidance: Yes. This information should be transmitted from the company that administered the training directly to the company needing documentation of that program.

Question 4: How soon after being hired does the driver have to complete EAP?

Guidance: The FMCSRs are silent on this issue. However, it is recommended that a newly hired driver undergo the mandatory 60 minutes of drug education and training before beginning work for a company.

Section 391.123 After-Care Monitoring

Question 1: Is a driver who tested positive for drug use required to participate in an after-care monitoring program?

Guidance: Subpart H does not require an after-care monitoring program. However, motor carriers providing employees with after-care monitoring programs are required to have drivers continue in the after-care monitoring program.

Question 2: If a driver tests positive and is retained as an employee, but not as a CMV operator, does § 391.123 still apply to that employee?

Guidance: No. The FMCSRs are only applicable to drivers of CMVs in interstate commerce.

Question 3: If a driver who tested positive, but was no longer subject to § 391.123 due to non-driving duties, decides to bid on a CMV driver position, is this driver subject to § 391.123, based on the prior positive drug test?

Guidance: Yes.

Special Topics—Controlled Substances Testing

Question 1: May a motor carrier use more than one MRO?

Guidance: Yes.

Question 2: Who is responsible for the cost of controlled substances tests, the driver, the owner-operator or the motor carrier?

Guidance: The FHWA leaves these decisions to be made between the drivers, owner-operators and the motor carriers.

Question 3: A medical examiner conducts a medical examination of a driver and also acts as MRO for the driver's pre-employment drug test. Though the driver is otherwise physically qualified, the medical examiner declines to issue a medical examiner's certificate because the driver tested positive for controlled substances. What should the medical examiner do when the same driver, under the aegis of a different motor carrier, returns a short period later, is otherwise physically qualified, and tests negative for controlled substances? What, if anything, may the medical examiner reveal to the second motor carrier if he/she declines to issue a certificate to the driver?

Guidance: The driver may be physically unqualified under § 391.41(b)(12) if the medical examiner determines, based on evidence other than the drug test, including knowledge of the prior positive test result, that the driver continues to use prohibited drugs. If the medical examiner so determines, a medical examiner's certificate may not be issued. If the medical examiner determines that the driver does not use prohibited drugs, a medical examiner's certificate may be issued.

The FHWA does not regulate communications between a medical examiner and motor carrier, other than requiring notification by the MRO to the carrier of drug test results under subpart H (see § 391.87(a)). Though medical examiners must retain the physical examination form, motor carriers are not required to do so. Many motor carriers choose, however, to contract with medical examiners to provide copies of the "long form" to the carriers. The FMCSRs leave it solely a matter between the medical examiner and the motor carrier whether the medical examiner merely declines to issue a medical examiner's certificate or also makes available to the carrier the long form, which may include notes on drug use.

Part 392—Driving of Motor Vehicles

Sections Interpreted

392.3 Ill or Fatigued Operator
392.5 Intoxicating Beverage
392.6 Schedules to Conform With Speed Limits
392.7 Equipment, Inspection and Use
392.9 Safe Loading
392.14 Hazardous Conditions; Extreme Caution
392.16 Use of Seat Belts
392.42 Notification of License Revocation
392.60 Unauthorized Persons Not To be Transported
392.62 Bus Driver; Distraction

Section 392.3 Ill or Fatigued Operator

Question 1: What protection is afforded a driver for refusing to violate the FMCSRs?

Guidance: Section 405 of the Surface Transportation Assistance Act of 1982 (49 U.S.C. App. Section 2305) states, in part, that no person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rule, regulation, standard, or order applicable to CMV safety. In such a case, a driver may submit a signed complaint to the Occupational Safety and Health Administration.

Section 392.5 Intoxicating Beverage

Question 1: Do possession and use of alcoholic beverages in the passenger area of a motorcoach constitute "possession" of such beverages under § 392.5(a)(3)?

Guidance: No.

Question 2: Can a motor carrier, which finds a driver with a detectable presence of alcohol, place him/her out of service in accordance with § 392.5?

Guidance: No. The term "out of service" in the context of § 392.5 refers to an act by a State or Federal official. However, the motor carrier must prevent the driver from being on duty or from operating or being in physical control of a CMV for at least as long as is necessary to prevent a violation of § 392.5.

Question 3: Does the prohibition against carrying alcoholic beverages in § 392.5 apply to a driver who is using a company vehicle, for personal reasons, while off-duty?

Guidance: No. For example, an owner-operator using his own vehicle in an off-duty status, or a driver using a company truck, or tractor for transportation to a motel, restaurant or home, would normally be outside the scope of this section.

Section 392.6 Schedules to Conform With Speed Limits

Question 1: How many miles may a driver record on his/her daily record of duty status and still be presumed to be in compliance with the speed limits?

Guidance: Drivers are required to conform to the posted speed limits prescribed by the jurisdictions in or through which the vehicle is being operated. Where the total trip is on

highways with a speed limit of 65 mph, trips of 550–600 miles completed in 10 hours are considered questionable and the motor carrier may be asked to document that such trips can be made. Trips of 600 miles or more will be assumed to be incapable of being completed without violations of the speed limits and may be required to be documented. In areas where the 55 mph speed limit is in effect, trips of 450–500 miles are open to question, and runs of 500 miles or more are considered incapable of being made in compliance with the speed limit and hours of service limitation.

Section 392.7 Equipment, Inspection and Use

Question 1: Must a driver prepare a written report of a pre-trip inspection performed under § 392.7?

Guidance: No.

Question 2: Must both drivers of a team operation comply with the provisions of § 392.7 before driving?

Guidance: Section 392.7 of the FMCSRs states that a driver must be satisfied that the vehicle is in good working order before operating the vehicle. If a driver is satisfied with a co-driver's inspection, or a safety lane inspection, then the requirement of this section will have been met.

Section 392.9 Safe Loading

Question 1: Is a vehicle's cargo compartment considered sealed according to the terms of § 392.9(b)(4) when it is secured with a padlock, to which the driver holds a key?

Guidance: No. The driver has ready access to the cargo compartment by using the padlock key and would be required to perform the examinations of the cargo and load-securing devices described in § 392.9(b).

Question 2: Does the FHWA have authority to enforce the safe loading requirements against a shipper that is not the motor carrier?

Guidance: No, unless hazardous materials as defined in § 172.101 are involved. It is the responsibility of the motor carrier and the driver to ensure that any cargo aboard a vehicle is properly loaded and secured.

Question 3: How may the motor carrier determine safe loading when a shipper has loaded and sealed the trailer?

Guidance: Under these circumstances, a motor carrier may fulfill its responsibilities for proper loading a number of ways. Examples are:

a. Arrange for supervision of loading to determine compliance; or

b. Obtain notation on the connecting line freight bill that the lading was properly loaded; or

c. Obtain approval to break the seal to permit inspection.

Section 392.14 Hazardous Conditions; Extreme Caution

Question 1: Who makes the determination, the driver or carrier, that conditions are sufficiently dangerous to warrant discontinuing the operation of a CMV?

Guidance: Under this section, the driver is clearly responsible for the safe operation of the vehicle and the decision to cease operation because of hazardous conditions.

Section 392.16 Use of Seat Belts

Question 1: May a driver be exempted from wearing seat belts because of a medical condition such as claustrophobia?

Guidance: No.

Question 2: Are motorcoach passengers required to wear seat belts?

Guidance: No.

Section 392.42 Notification of License Revocation

Question 1: If a driver's driving privilege is suspended as a result of a violation committed off-duty, in a personal vehicle, is the driver required to notify the employing motor carrier under the provisions of § 392.42?

Guidance: Yes.

Section 392.60 Unauthorized Persons not to be Transported

Question 1: Does § 392.60 require a driver to carry a copy of the written authorization (required to transport passengers) on board a CMV?

Guidance: No, the authorization must be maintained at the carrier's principal place of business. At the discretion of the motor carrier, a driver may also carry a copy of the authorization.

Section 392.62 Bus Driver; Distraction

Question 1: Are drivers prohibited by § 392.62 from using CB radios and earphones?

Guidance: No, CB radios and earphones are not prohibited under the regulations, as long as they do not distract the driver and the driver is capable of complying with § 391.41(b)(11).

Part 393—Parts and Accessories Necessary for Safe Operation

Sections Interpreted

393.11 Lighting Devices and Reflectors
393.17 Lamps and Reflectors-Combinations in Driveaway-Towaway Operation
393.24 Requirements for Head Lamps and Auxiliary Road Lighting Lamps
393.25 Requirements for Lamps Other Than Head Lamps
393.28 Wiring to be Protected
393.31 Overload Protective Devices
393.40 Required Brake Systems
393.41 Parking Brake Systems
393.42 Brakes Required on All Wheels
393.43 Breakaway and Emergency Braking System
393.44 Front Brake Lines, Protection
393.48 Brakes to be Operative
393.49 Single Valve to Operate All Brakes
393.51 Warning Devices and Gauges
393.52 Brake Performance
393.60 Glazing in Specified Openings
393.61 Window Construction
393.62 Window Obstructions
393.65 All Fuel Systems
393.67 Liquid Fuel Tanks
393.70 Coupling Devices and Towing Methods, Except for Driveaway-Towaway Operations
393.71 Coupling Devices and Towing Methods, Driveaway-Towaway Operations
393.75 Tires
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393.81 Horn
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393.83 Exhaust System
393.87 Flags on Projecting Loads
393.88 Television Receivers
393.89 Buses, Driveshaft Protection
393.92 Buses, Marking Emergency Doors
393.93 Seats, Seat Belt Assemblies and Seat Belt Assembly Anchorages
393.95 Emergency Equipment on All Power Units
393.100 General Rules for Protection Against Shifting or Falling Cargo
393.102 Securement Systems
393.106 Front-End Structure
393.201 Frames

Special Topics

Section 393.11 Lighting Devices and Reflectors

Question 1: What is the definition of "body" with respect to trucks and trailers?

Guidance: The FMCSRs do not include a definition of "body." However, a truck or trailer body generally means the structure or fixture designed to contain, or support, the material or property to be transported on the vehicle.

Section 393.17 Lamps and Reflectors-Combinations in Driveaway-Towaway Operation

Question 1: What are the lighting requirements when a tow truck is pulling a wrecked or disabled vehicle?

Guidance: A wrecker pulling a vehicle would be considered a driveaway-towaway operation and would have to be equipped with the lighting devices specified in § 393.17 when operating in interstate commerce.

Section 393.24 Requirements for Head Lamps and Auxiliary Road Lighting Lamps

Question 1: Must additional lamps that are not required be operative if all required lamps are operative?

Guidance: No.

Section 393.25 Requirements for Lamps Other Than Head Lamps

Question 1: Are lighting devices on mobile homes/house trailers required to be permanently mounted?

Guidance: No. The movement of mobile homes/house trailers is considered to be a driveaway-towaway operation.

Question 2: Are there any special lighting requirements for large containers?

Guidance: No.

Question 3: What are the lighting requirements when a container assumes the structural requirements of a trailer?

Guidance: All relevant requirements of the regulations must be met by this container/trailer.

Section 393.28 Wiring to be Protected

Question 1: Does a frame channel of a CMV constitute a protective "sheath or tube" as specified in § 393.28?

Guidance: No. To be acceptable, a sheath or tube must enclose the wires throughout their circumference. In the absence of a sheath or tube, the group of wires must be protected by nonconductive tape, braid, or other covering capable of withstanding severe abrasion.

Section 393.31 Overload Protective Devices

Question 1: Must all trailers be equipped with overload protective devices?

Guidance: No. Trailers do not need overload protective devices when protection of trailer circuits is provided on the towing vehicle. A circuit breaker is required only when the head lamp circuit is protected in common with one or more other circuits. A circuit breaker, if required, must be an automatic reset type.

Section 393.40 Required Brake Systems

Question 1: May a system such as "driveline brakes" be used as an emergency brake provided it complies with the requirements of § 393.52?

Guidance: Yes. Commercial motor vehicles which were not subject to the emergency brake requirements of FMVSS Nos. 105 or 121 may use "driveline brakes" provided those vehicles meet the requirements of § 393.52.

Section 393.41 Parking Brake Systems

Question 1: May the "park" position of a CMV's transmission be used as a parking brake to comply with the § 393.41?

Guidance: No. The "park" position of the transmission is only a locking device used to lock the transmission.

Question 2: Does § 393.41 prohibit air brake systems from being equipped with a means to release the spring brakes for purposes of towing disabled vehicles in emergency situations?

Guidance: No, provided the brakes are designed and maintained so they cannot be released unless adequate energy is available to make immediate reapplication of the brakes when the brake system is operable.

Question 3: Are parking brakes required on every CMV manufactured before March 7, 1990?

Guidance: No.

Section 393.42 Brakes Required on All Wheels

Question 1: Do retractable or lift axles have to be equipped with brakes?

Guidance: Yes, when the wheels are in contact with the roadway.

Question 2: How does the term GVW, as used in the diagram in the FMCSRs under § 393.42, relate to the term GVWR used in § 393.42(b)(3)?

Guidance: GVW was originally used to determine whether a CMV was required to be equipped with brakes. In the December 7, 1988, **Federal Register** (53 FR 49380), the term GVWR was erroneously substituted for GVW.

Question 3: Are unladen converter dollies covered by the exemption in § 393.42(b)(3)?

Guidance: Yes. However, if the converter dolly is laden, the brakes must be operable.

Question 4: Is a three-axle steering pole trailer (dolly) required to have operable brakes on the steering axle?

Guidance: Such trailers do not have to have operable brakes on the steering axle, provided the combination of vehicles meets the stopping distance requirements of § 393.52.

Question 5: Section 393.42(b)(3) of the FMCSRs states that any full trailer, any semitrailer, or any pole trailer having a GVWR of 3,000 pounds or less must be equipped with brakes if the weight of the towed vehicle resting on the towing vehicle exceeds 40 percent of the GVWR of the towing vehicle. Is the manufacturer of the trailer responsible for ensuring that the trailer is equipped with brakes when required?

Guidance: No. The motor carrier pulling the trailer is responsible for ensuring that the trailer is in compliance with all applicable FMCSRs.

Section 393.43 Breakaway and Emergency Braking System

Question 1: Are tractor protection valves required by § 393.43(b), or may similar devices be used?

Guidance: No. Similar devices may be used provided the devices meet the performance requirements of § 393.43(b).

Question 2: Are all brakes on a trailer required to be applied automatically upon breakaway?

Guidance: Yes.

Section 393.44 Front Brake Lines, Protection

Question 1: Does the term "rear wheels" include the tag axle on a bus/motorcoach?

Guidance: Yes. The braking system on a bus/motorcoach must be constructed so that if any brake line to either front wheel is broken, the driver can apply the brakes to all of the wheels on each rear axle.

Section 393.48 Brakes to be Operative

Question 1: Do surge brakes comply with § 393.48?

Guidance: No. Section 393.48 requires that brakes be operable at all times. Generally, surge brakes are only operative when the vehicle is moving in the forward direction and as such do not comply with § 393.48 (see question number 1 in § 393.49).

Question 2: If a CMV manufactured on or after July 25, 1980 (see § 393.42) has brake components on the front axle, and the brakes are not operable, does the vehicle comply with § 393.48?

Guidance: No.

Section 393.49 Single Valve to Operate All Brakes

Question 1: Does a combination of vehicles using a surge brake to activate the towed vehicle's brakes comply with § 393.49?

Guidance: No. The surge brake cannot keep the trailer brakes in an applied position. Therefore, the brakes on the combination of vehicles are not under the control of a single valve as required by § 393.49 (see question number 1 in § 393.48).

Section 393.51 Warning Devices and Gauges

Question 1: Is the low pressure warning device required to operate before the tractor protection valve?

Guidance: No. Section 393.51 does not explicitly require the warning device to operate before the protection valve. It is implied that if the operating

pressure of the warning device is at least 1/2 of the governor cut-out pressure, and that pressure is not less than the pressure at which the protection valve (or similar device) activates, the requirements of § 393.51 are satisfied.

Question 2: Is the vacuum portion of vacuum-assisted hydraulic brake systems required to have a warning device?

Guidance: No. Only the hydraulic portion of vacuum-assisted hydraulic brake systems is required to have a warning device. FMVSS No. 105 does not require a warning device for the vacuum portion of the vacuum-assisted hydraulic brake systems. It is the intention of the FHWA that § 393.51 be consistent with FMVSS No. 105.

Question 3: Are vacuum gauges required on the vacuum portion of vacuum-assisted hydraulic brakes?

Guidance: No. Section 393.51(d)(2) requires that only CMVs with vacuum brakes (not hydraulic brakes applied or assisted by vacuum) be equipped with a vacuum gauge.

Question 4: Is a warning device required in a CMV with a single hydraulic brake system which uses the driveline parking brake as the emergency brake system?

Guidance: No. Warning devices are not required on such CMVs because the driver will be given ample warning of system failure by the movement and feel of the brake pedal.

Question 5: What difference, if any, is there between a warning device and a warning signal?

Guidance: For purposes of § 393.51, the terms may be used interchangeably.

Section 393.52 Brake Performance

Question 1: May the information in the stopping distance table be used to determine the stopping distances at speeds greater than 20 mph?

Guidance: No, it is not intended to be used to predict or determine stopping distances at speeds greater than 20 mph.

Section 393.60 Glazing in Specified Openings

Question 1: May windshields and side windows be tinted?

Guidance: Yes, as long as the light transmission is not restricted to less than 70 percent of normal (refer to the American Standards Association publication Z26.1–1966 and Z26.1a–1969).

Question 2: May a decal designed to comply with the periodic inspection documentation requirements of § 396.17 be displayed on the windshields or side windows of a CMV?

Guidance: Yes, provided the decal is being used in lieu of an inspection report and is in compliance with § 393.60(c).

Question 3: If a crack extended into the thickness of the glass at such an angle as to measure ¼" or more, measuring from the top edge of the crack on the outside surface of the windshield to vertical line drawn through the windshield to the far edge of this angled crack on the inside of the windshield, would this constitute a crack of ¼" or more in width as defined in § 393.60(b)(2)?

Guidance: No. The crack, in order to fall outside the exception, would have to be a gap of ¼" or more on the same surface of the windshield.

Section 393.61 Window Construction

Question 1: Do school buses used for purposes other than school bus operations (as defined in § 390.5), have to meet additional emergency exits requirements under § 393.61?

Guidance: Yes. Section 393.61(b)(2) says that "a bus, including a school bus, manufactured on and after September 1, 1973," [emphasis added] must conform with NHTSA's § 571.217 (FMVSS 217). At the time this provision was adopted, FMVSS 217 applied only to other buses and it was optional for school buses. The FHWA inserted the language, "including school buses," in § 393.61(b)(2) to make clear that school buses used in interstate commerce and, therefore, subject to the FMCSRs, were required to comply with the bus exit standards in Standard FMVSS 217. Section 393.61(b)(3) regarding push-out windows provides that older buses must conform with the requirements of §§ 393.61(b) or 571.217. Buses which are subject to § 571.217 would follow NHTSA's interpretation on push-out windows. Buses which are subject to § 393.61(b)(1) of the FMCSRs are required to have emergency windows that are either push-out windows or that have laminated safety glass that can be pushed out in a manner similar to a push-out window.

Section 393.62 Window Obstructions

Question 1: May a bus being operated by a for-hire motor carrier of passengers, under contract with a governmental agency to provide transportation of prisoners in interstate commerce, be allowed to operate with security bars covering the emergency push out windows, and with locked emergency door exits?

Guidance: Yes. Even when the transportation is performed by a contract carrier, the welfare, safety and security of the prisoners is under the authority of the governmental corrections agency and, thus, the agency may require additional security measures. For these types of operations, a carrier may meet the special security requirements of the governmental corrections agency regarding emergency exits. However, CMVs that have been modified to meet the security requirements of the corrections agency may not be used for other purposes that are subject to the FMCSRs unless they meet the emergency exit requirements.

Section 393.65 All Fuel Systems

Question 1: May a fuel fill pipe opening be placed above the passenger floor level if it is not physically within the passenger compartment?

Guidance: Yes. In addition, the fill pipe may intrude into the passenger compartment as long as the fill pipe opening complies with § 393.65(b)(4), and the fill pipe is protected by a housing or covering to prevent leakage or fumes into the passenger compartment.

Section 393.67 Liquid Fuel Tanks

Question 1: May a properly vented fuel cap be used on a fuel tank equipped with another fuel venting system?

Guidance: Yes (see § 393.3).

Question 2: Do the FMCSRs specify a particular pressure relief system?

Guidance: No, but the performance standards of § 393.67(d) must be met.

Question 3: What standards under the FMCSRs must be met when a liquid fuel tank is repaired or replaced?

Guidance: A replacement/repaired tank must meet the applicable standards in § 393.67.

Section 393.70 Coupling Devices and Towing Methods, Except for Driveaway-Towaway Operations

Question 1: Is there a minimum number of fasteners required to fasten the upper fifth wheel plate to the frame of a trailer?

Guidance: The FMCSRs do not specify a minimum number of fasteners. However, the industry recommends that a minimum of 10 5/8 inch bolts be used. If 1/2 inch bolts are used, the industry recommends at least 14 bolts. The CVSA has adopted these industry standards as a part of its vehicle out-of-service criteria.

Question 2: When two safety chains are used, must the ultimate combined breaking strength of each chain be equal to the gross weight of the towed vehicle(s) or would the requirements be met if the combined breaking strength of the two chains is equal to the gross weight of the towed vehicle(s).

Guidance: If the ultimate combined breaking strength of the two chains is equal to the gross weight of the towed

vehicle(s), the requirements of § 393.70(d) are satisfied. It should be noted that some States may have more stringent requirements for safety chains.

Section 393.71 Coupling Devices and Towing Methods, Driveaway-Towaway Operations

Question 1: May a fifth wheel be considered as a coupling device when towing a semi-trailer in a driveaway-towaway operation?

Guidance: Yes. Section 393.71(g) requires the use of a tow-bar or a saddle-mount. Since a saddle-mount performs the function of a conventional fifth wheel the use of a fifth wheel is consistent with the requirements of this section.

Section 393.75 Tires

Question 1: If a CMV has a defective tire, may the driver remove the defective tire from the axle and drive with three tires on an axle instead of four?

Guidance: Yes, provided the weight on the single remaining tire does not exceed the maximum allowed under § 393.75(f).

Question 2: May a CMV be operated with tires that carry a greater weight than the weight marked on the sidewall of the tires?

Guidance: Yes, but only if the CMV is being operated under the terms of a State-issued special permit, and at a reduced speed that is appropriate to compensate for tire loading in excess of the rated capacity.

Question 3: May a vehicle transport hazardous materials when equipped with retreaded tires?

Guidance: Yes. The only CMV that may not utilize retreaded tires is a bus, and then only on its front wheels.

Question 4: May tires be filled with materials other than air (e.g., silicone, polyurethane)?

Guidance: Section 393.75 does not prohibit the use of tires filled with material other than air. However, § 393.3 may prohibit the use of such tires under certain circumstances. Some substances used in place of air in tires may not maintain a constant physical state at different temperatures. While these substances are solid at lower temperatures, the increase in temperature from highway use may result in the substance changing from a solid to a liquid. The use of a substance which could undergo such a change in its physical characteristics is not safe, and is not in compliance with § 393.3.

Section 393.76 Sleeper Berths

Question 1: If a compartment in a CMV is no longer used as a sleeper berth, must it be maintained and equipped as a sleeper berth as required in § 393.76?

Guidance: No.

Section 393.78 Windshield Wipers

Question 1: Are windshield washer systems required?

Guidance: No, only windshield wipers are required.

Section 393.81 Horn

Question 1: Do the FMCSRs specify what type of horn is to be used on a CMV?

Guidance: No.

Question 2: Are there established criteria in the FMCSRs to determine the minimum sound level of horns on CMVs?

Guidance: No.

Section 393.82 Speedometer

Question 1: What does the phrase "reasonable accuracy" mean?

Guidance: "Reasonable accuracy" is interpreted to mean accuracy to within plus or minus 5 mph at a speed of 50 mph.

Section 393.83 Exhaust System

Question 1: Is a heat shield mandatory on a vertical exhaust stack?

Guidance: No. However, § 393.83 requires the placement of the exhaust system in such a manner as to prevent the burning, charring, or damaging of the electrical wiring, the fuel supply, or any combustible part of the CMV.

Question 2: Does § 393.83 specify the type of exhaust system, vertical or horizontal, to be used on trucks or truck-tractors?

Guidance: No.

Section 393.87 Flags on Projecting Loads

Question 1: May a triangular-shaped flag or device be used by itself to mark an oversized load?

Guidance: No. However, nothing prohibits using a triangular-shaped flag in conjunction with the prescribed flag.

Section 393.88 Television Receivers

Question 1: Does § 393.88 restrict the use of closed circuit monitor devices being used as a safety viewing system that would eliminate blind-side motor carrier accidents?

Guidance: No. The restriction of this section would not apply because the device cannot receive television broadcasts or be used for the viewing of video tapes.

Section 393.89 Buses, Driveshaft Protection

Question 1: For the purposes of § 393.89, would a spline and yoke that is secured by a nut be considered a sliding connection?

Guidance: No. To be considered a sliding connection, the spline must be able to move within the sleeve. When the end of the spline is secured by a nut, it no longer has that freedom.

Question 2: On multiple driveshaft buses, does § 393.89 require that all segments of the driveshaft be protected no matter the segments' length?

Guidance: Yes. Each driveshaft must have one guard or bracket for each end of a shaft which is provided with a sliding connection (spline or other such device).

Question 3: How does an existing pillow bearing (shaft support) on a multiple driveshaft system affect the requirement?

Guidance: It does not affect the requirement. It is part of the requirement.

Section 393.92 Buses, Marking Emergency Doors

Question 1: Is a contractor-operated school bus operating in interstate commerce required to have emergency lights over the exit door?

Guidance: Yes. Any bus used in interstate commerce for other than school bus operations, as defined in § 390.5, is subject to the FMCSRs.

Section 393.93 Seats, Seat Belt Assemblies and Seat Belt Assembly Anchorages

Question 1: If a CMV, other than a motorcoach, is equipped with a passenger seat, is a seat belt required for the passenger seat?

Guidance: Yes.

Section 393.95 Emergency Equipment on all Power Units

Question 1: May other warning devices be used in lieu of the devices required by § 393.95?

Guidance: No. However, other additional warning devices may be used in conjunction with the required devices provided those devices do not decrease the effectiveness of the required warning devices.

Question 2: Are pressure gauges the only acceptable means for a visual determination that a fire extinguisher is fully charged?

Guidance: No, as long as there is some means to permit a visual determination that a fire extinguisher is fully charged.

Section 393.100 General Rules for Protection Against Shifting or Falling Cargo

Question 1: When securing cargo, is the use of a tiedown every 10 linear feet, or fraction thereof, adequate?

Guidance: Yes, as long as the aggregate strength of the tiedowns is equal to the requirements of § 393.102, and each article is secured.

Question 2: Are CMVs transporting metal objects required to use option C?

Guidance: Only those CMVs which cannot comply with options A, B, or D are required to conform to option C (see § 393.100(c)).

Question 3: Are the requirements of § 393.100 the only cargo securement requirements motor carriers must comply with?

Guidance: No. A motor carrier, when transporting cargo, must comply with all the applicable cargo securement requirements of subpart I and § 392.9.

Question 4: Do the rules for protection against shifting or falling cargo apply to CMVs with enclosed cargo areas?

Guidance: Yes. All CMVs transporting cargo must comply with the applicable provisions of §§ 393.100–393.106 (subpart I) to prevent the shifting or falling of cargo aboard the vehicle.

Question 5: May an intermodal container be transported aboard a flatbed or lowboy trailer?

Guidance: Yes, if the flatbed or lowboy trailer is equipped with integral latching devices.

Question 6: How many tiedowns are required for the transportation of logs on pole trailers with trip-bolsters or other stanchions?

Guidance: Section 393.100(b) provides motor carriers with several options for complying with § 393.100. Although option B specifically addresses the use of tiedowns for each 10 linear feet of lading or fraction thereof (with certain exceptions), option D indicates the motor carrier may use "other means * * * which are similar to, and at least as effective * * *" as options A, B, and C. Therefore, the trip-bolsters or other stanchions in conjunction with securement devices meeting the requirements of § 393.102 may (depending on the amount by which the logs exceed the length of the trailer) be used to satisfy option D.

Section 393.102 Securement Systems

Question 1: What is the relationship between the working-load limit of the securement device and the ultimate breaking strength of the same device?

Guidance: The working-load limit, as used in the CVSA/FHWA out of service criteria, is equal to one-third of the ultimate breaking strength of the same device.

Section 393.106 Front-end Structure

Question 1: When describing a headerboard or cab protection device, the regulations state that similar devices may be used. What is meant by the term similar devices?

Guidance: The term similar devices has reference to devices equivalent in strength and function, though not necessary in appearance and construction as headerboards.

Section 393.201 Frames

Question 1: Are cross members of CMVs considered part of the frame?

Guidance: Yes.

Question 2: Does § 393.201 of the FMCSRs apply to trailers?

Guidance: No. Section 393. 201 is specific to buses, trucks, and truck tractors.

Special Topics—CMV Parts and Accessories

Question 1: Do tires marked "NHS" (not for highway service) mean that highway use is prohibited by § 393.75?

Guidance: No, provided the use of such tires does not decrease the safety of operations (see Periodic Inspection Requirements, Appendix G to subpart B).

Part 395—Hours of Service of Drivers

Sections Interpreted

395.1 Scope of the Rules in This Part
395.2 Definitions
395.3 Maximum Driving and On-Duty Time
395.8 Drivers's Record of Duty Status
395.13 Drivers Declared Out of Service

Section 395.1 Scope of the Rules in This Part

Question 1: If a driver invokes the exception for adverse driving conditions, does a supervisor need to sign the driver's record of duty status when he/she arrives at the destination?

Guidance: No.

Question 2: May a driver use the adverse driving conditions exception if he/she has accumulated driving time and on-duty (not driving) time, that would put the driver over 15 hours or over 70 hours in 8 consecutive days?

Guidance: No. The adverse driving conditions exception applies only to the 10-hour rule.

Question 3: Are there allowances made in the FMCSRs for delays caused by loading and unloading?

Guidance: No. Although, the regulations do make some allowances for unforeseen contingencies such as in § 395.1(b) adverse driving conditions, and § 395.1(b)(2) emergency conditions, loading and unloading delays do not fall within the definition of these sections.

Question 4: May time spent in sleeping facilities being transported as cargo (e.g., boats, campers, travel trailers) be recorded as sleeper berth time?

Guidance: No, it cannot be recorded as sleeper berth time.

Question 5: May sleeper berth time and off-duty periods be combined to meet the 8-hour off-duty requirement?

Guidance: Yes, as long as the 8 hour period is consecutive and not broken by on duty or driving activities. This does not apply to drivers at natural gas or oil well locations who may separate the periods.

Question 6: What constitutes the 100 air-mile radius exemption?

Guidance: The term "air-mile" is internationally defined as a "nautical mile" which is equivalent to 6,076 feet/1,852 meters. Thus, the 100 air miles are equivalent to 115.08 statute-miles or 185.2 kilometers.

Question 7: What documentation must a driver claiming the 100 air-mile radius exemption (§ 395.1(e)) have in his/her possession?

Guidance: None.

Question 8: Must a motor carrier retain 100 air-mile driver time records at its principal place of business?

Guidance: No. However, upon request by an authorized representative of the FHWA or State official, the records must be produced within a reasonable period of time (2 working days) at the location where the review takes place.

Question 9: How may a driver utilize the adverse driving conditions exception, or the emergency conditions exception as found in § 395.1(b), to preclude an hour of service violation?

Guidance: An absolute prerequisite for any such claim must be that the trip involved is one which could normally and reasonably have been completed without a violation and that the unforeseen event occurred after the driver began the trip.

Drivers who are dispatched after the motor carrier has been notified or should have known of adverse driving conditions are not eligible for the two hours additional driving time provided for under § 395.1(b), Adverse driving conditions. The term "in any emergency" shall not be construed as encompassing such situations as a driver's desire to get home, shippers' demands, market declines, shortage of drivers, or mechanical failures.

Question 10: May a driver record sleeper berth time as off-duty time on line one of the record of duty status?

Guidance: No. The driver's record of duty status must accurately reflect the driver's activities.

Question 11: May an operation that changes its normal work-reporting location on an intermittent basis utilize the 100 air-mile radius exemption?

Guidance: Yes. However, when the motor carrier changes the normal

reporting location to a new reporting location, that trip (from the old location to the new location) must be recorded on the record of duty status because the driver has not returned to his/her normal work reporting location.

Question 12: When must a driver prepare a record of duty status for a day when the driver exceeds the 100 air-mile radius exemption criteria?

Guidance: A driver must begin to prepare the record of duty status for the day immediately after he/she becomes aware that the terms of the 100 air-mile radius exemption cannot be met.

Question 13: When a driver fails to meet the provisions of the 100 air-mile radius exemption (§ 395.1(e)), is the driver required to have copies of his/her records of duty status for the previous seven days? Must the driver prepare daily records of duty status for the next seven days?

Guidance: The driver must only have in his/her possession a record of duty status for the day he/she does not qualify for the exemption.

Question 14: May a driver use a record of duty status form as a time record to meet the requirement contained in the 100 air-mile radius exemption?

Guidance: Yes, provided the form contains the mandatory requirements.

Question 15: Must the driver's name and each date worked appear on the time record prepared to comply with § 395.1(e), 100 air-mile radius driver?

Guidance: Yes. The driver's name or other identification and date worked must be shown on the time record.

Question 16: May drivers who work split shifts take advantage of the 100 air-mile radius exemption found at § 395.1(e)?

Guidance: Yes. Drivers who work split shifts may take advantage of the 100 air-mile radius exemption if:

1. The drivers operate within a 100 air-mile radius of their normal work-reporting locations;
2. The drivers return to their work-reporting locations and are released from work at the end of each shift and each shift is less than 12 consecutive hours;
3. The drivers are off-duty for more than 8 consecutive hours before reporting for their first shift of the day and spend less than 12 hours, in the aggregate, on-duty each day;
4. The drivers do not exceed a total of 10 hours driving time and are afforded 8 or more consecutive hours off-duty prior to their first shift of the day; and
5. The employing motor carriers maintain and retain the time records required by 395.1(e)(5).

Question 17: A company prepares and maintains time records for drivers classified as 100 air-mile radius drivers. The drivers usually do not work every day of the week. Does the motor carrier have to maintain time records for the days the drivers do not work?

Guidance: The motor carrier must maintain time records stating that the drivers were off-duty during the days the drivers did not work. However, if the drivers are off consecutive days, the employer may prepare a single time record stating the days each driver was off-duty.

Question 18: May a driver who is taking advantage of the 100 air-mile radius exemption in § 395.1(e) be intermittently off-duty during the period away from the work-reporting location?

Guidance: Yes, a driver may be intermittently off-duty during the period away from the work-reporting location provided the driver meets all requirements for being off-duty. If the driver's period away from the work-reporting location includes periods of off-duty time, the time record must show both total on duty time and total off-duty time during his/her tour of duty. In any event, the driver must return to the work-reporting location and be released from work within 12 consecutive hours.

Question 19: Is the exemption contained in § 395.1(f) concerning department store deliveries during the period from December 10 to December 25 limited to only drivers employed by department stores?

Guidance: No. The exemption applies to all drivers engaged solely in making local deliveries from retail stores and/or retail catalog businesses to the ultimate consumer, when driving solely within a 100-air mile radius of the driver's work-reporting location, during the dates specified.

Section 395.2 Definitions

Question 1: A company told all of its drivers that it would no longer pay for driving from the last stop to home and that this time should not be shown on the time cards. Is it a violation of the FMCSRs to operate a CMV from the last stop to home and not show that time on the time cards?

Guidance: The FMCSRs do not address questions of pay. All the time spent operating a CMV for, or at the direction of, a motor carrier must be recorded as driving time.

Question 2: What conditions must be met for a CMV driver to record meal and other routine stops made during a tour of duty as off-duty time?

Guidance: 1.The driver must have been relieved of all duty and responsibility for the care and custody of the vehicle, its accessories, and any cargo or passengers it may be carrying.

2. The duration of the driver's relief from duty must be a finite period of time which is of sufficient duration to ensure that the accumulated fatigue resulting from operating a CMV will be significantly reduced.

3. If the driver has been relieved from duty, as noted in (1) above, the duration of the relief from duty must have been made known to the driver prior to the driver's departure in written instructions from the employer. There are no record retention requirements for these instructions on board a vehicle or at a motor carrier's principal place of business.

4. During the stop, and for the duration of the stop, the driver must be at liberty to pursue activities of his/her own choosing and to leave the premises where the vehicle is situated.

Question 3: Do telephone calls to or from the motor carrier that momentarily interrupt a driver's rest period constitute a change of the driver's duty status?

Guidance: Telephone calls of this type do not prevent the driver from obtaining adequate rest. Therefore, the FHWA does not consider these brief telephone calls to be a break in the driver's off-duty status.

Question 4: If a driver is required, by a motor carrier, to carry a pager/beeper to receive notification to contact the motor carrier for a duty assignment, how should this time be recorded?

Guidance: The time is to be recorded as off-duty.

Question 5: May a sleeper berth be used for a period of less than 2 hours' duration?

Guidance: Yes. The sleeper berth may be used for such periods of inactivity. Periods of time of less than 2 hours spent in a sleeper berth may not be used to accumulate the 8 hours of off-duty time required by § 395.3 of the FMCSRs.

Question 6: If a "driver trainer" occasionally drives a CMV, thereby becoming a "driver" (regardless of whether he/she is paid for driving), must the driver record all non-driving (training) time as on-duty (not driving)?

Guidance: Yes.

Question 7: A driver drives on streets and highways during the week and jockeys CMVs in the yard (private property) on weekends. How is the yard time to be recorded?

Guidance: On-duty, driving.

Question 8: If a driver is permitted to use a CMV for personal reasons, how must the driving time be recorded?

Guidance: When a driver is relieved from work and all responsibility for

performing work, time spent traveling to and from the driver's work reporting location is considered off-duty time. The type of conveyance used between the terminal and the driver's home, restaurant, etc., would not alter the situation. The driver who uses a motor carrier's CMV for transportation home, and is subsequently called by the employing carrier and is dispatched from home, would be on-duty from the time the driver leaves home. A driver placed out of service for exceeding the requirements of the hours of service regulations may not drive a CMV to any location to obtain rest.

Question 9: How does compensation relate to on-duty time?

Guidance: The fact that a driver is paid for a period of time does not always establish that the driver was on-duty for the purposes of part 395 during that period of time. A driver may be relieved of duty under certain conditions and still be paid.

Question 10: Must non-transportation-related work for a motor carrier be recorded as on-duty time?

Guidance: Yes. All work for a motor carrier, whether compensated or not, must be recorded as on-duty time. The term "work" as used in the definition of "on-duty time" in § 395.2 of the FMCSRs is not limited to driving or other non-transportation-related employment.

Question 11: How should time spent in transit on a ferry boat be recorded?

Guidance: Time spent on a ferry by drivers may be recorded as off-duty time if they are completely relieved from work and all responsibility and obligation to the motor carriers for which they drive. This relief must be consistent with existing regulations of the ferry company and the U.S. Coast Guard.

Question 12: What is the duty status of a co-driver (truck) who is riding seated next to the driver?

Guidance: On-duty (not driving).

Question 13: How must a CMV driver driving a non-CMV at the direction of a motor carrier record this time?

Guidance: If CMV drivers operate motor vehicles with GVWRs of 10,000 pounds or less at the direction of a motor carrier, the FHWA requires those drivers to maintain records of duty status and record such time operating as on-duty (not driving).

Question 14: How must the time spent operating a motor vehicle on the rails (roadrailers) be recorded?

Guidance: On-duty (not driving).

Question 15: Must a driver engaged in union activities affecting the employing motor carrier record such time as on-duty (not driving) time?

Guidance: A driver's union activities which involve the employing motor carrier must be recorded as on-duty (not driving) time.

Question 16: How is the 50 percent driving time in the definition of "driver-salesperson" in § 395.2 determined?

Guidance: The driving time is determined on a weekly basis. The driver must be employed solely as a driver-salesperson. The driver-salesperson may not participate in any other type of work activity.

Question 17: May a driver change from and to a driver salesman status at any time?

Guidance: Yes, if the change is made on a weekly basis.

Question 18: Is the time spent by CMV drivers, submitting to random and post-accident drug tests, and time spent traveling to and from collection sites at the direction of the motor carrier, on-duty time within the meaning of § 395.2(a)?

Guidance: The time spent at a collection site, as well as traveling to and from a collection site, at the direction of a motor carrier is considered to be on-duty time.

Question 19: May the time a driver spends attending safety meetings, ceremonies, celebrations, or other company-sponsored safety events be recorded as off-duty time?

Guidance: Yes, if attendance is voluntary.

Question 20: How must a driver record time spent on-call awaiting dispatch?

Guidance: The time that a driver is free from obligations to the employer and is able to use that time to secure appropriate rest may be recorded as off-duty time. The fact that a driver must also be available to receive a call in the event the driver is needed at work, even under the threat of discipline for non-availability, does not by itself impair the ability of the driver to use this time for rest. If the employer generally requires its drivers to be available for call after a mandatory rest period which complies with the regulatory requirement, the time spent standing by for a work-related call, following the required off-duty period, may be properly recorded as off-duty time.

Question 21: How does a driver record the hours spent driving in a school bus operation when he/she also drives a CMV for a company subject to the FMCSRs?

Guidance: If the school bus meets the definition of a CMV, it must be recorded as driving time.

Question 22: A motor carrier relieves a driver from duty. What is a suitable facility for resting?

Guidance: The only resting facility which the FHWA regulates is the sleeper berth. The sleeper berth requirements can be found in § 393.76.

Question 23: How many times may a motor carrier relieve a driver from duty within a tour of duty?

Guidance: There is no limitation on the number of times a driver can be relieved from duty during a tour of duty.

Question 24: If a driver is transported by automobile from the point of a breakdown to a terminal, and then dispatched on another run, how is the time spent in the automobile entered on the record of duty status? How is the time entered if the driver goes off-duty once he reaches the terminal?

Guidance: The time spent in the automobile would be on-duty (not driving) if dispatched on another run once he/she reaches the terminal, and off-duty if he/she is given 8 consecutive hours off-duty upon reaching the terminal.

Question 25: When a driver experiences a delay on an impassable highway, should the time he/she is delayed be entered on the record of duty status as driving time or on-duty (not driving)?

Guidance: Delays on impassable highways must be recorded as driving time because § 395.2 defines "driving time" as all time spent at the driving controls of a CMV in operation.

Question 26: A driver has been given written permission by his/her employer to record meal and other routine stops made during a tour of duty as off-duty time. Is the driver required to record such time as off-duty, or is it the driver's decision whether such time is recorded as off-duty?

Guidance: It is the employer's choice whether the driver shall record stops made during a tour of duty as off-duty time. However, employers may permit drivers to make the decision as to how the time will be recorded.

Question 27: A driver has been given written permission by his/her employer to record meal and other routine stops made during a tour of duty as off-duty time. Is the driver allowed to record his stops during a tour of duty as off-duty time when the CMV is laden with hazardous materials and the CMV is parked in a truck stop parking lot?

Guidance: Drivers may record meal and other routine stops made during a tour of duty as off-duty time, except when a CMV is laden with explosive hazardous materials classified as hazard divisions 1.1, 1.2, or 1.3 (formerly Class A or B explosives). In addition, when hazardous materials classified under hazard divisions 1.1, 1.2, or 1.3 are on a CMV, the employer and the driver

must comply with § 397.5 of the FMCSRs.

Section 395.3 Maximum Driving and On-Duty Time

Question 1: May a motor carrier switch from a 60-hour/7-day limit to a 70-hour/8-day limit or vice versa?

Guidance: Yes. The only restriction regarding the use of the 70-hour/8-day rule is that the motor carrier must have CMVs operating every day of the week. The 70-hour/8-day rule is a permissive provision in that a motor carrier with vehicles operating every day of the week is not required to use the 70-hour/8-day rules for calculating its drivers' hours of service. The motor carrier may, however, assign some or all of its drivers to operate under the 70-hour/8-day rule if it so chooses. The assignment of individual drivers to the 60-hour/7-day or the 70-hour/8-day time rule is left to the discretion of the motor carrier.

Question 2: Does a driver, employed full time by one motor carrier using the 60-hours in 7-days rule, and part-time by another motor carrier using the 70-hours in 8-days rule, have the option of using either rule in computing his hours of service?

Guidance: No. The motor carrier that employs the driver on a full-time basis determines which rule it will use to comply with § 395.3(b). The driver does not have the option to select the rule he/she wishes to use.

Question 3: May a carrier which provides occasional, but not regular service on every day of the week, have the option of the 60 hours in 7 days or 70 hours in 8 days with respect to all drivers, during the period in which it operates one or more vehicles on each day of the week?

Guidance: Yes.

Question 4: A Canadian driver is subjected to a log book inspection in the U.S. The driver has logged one or more 13-hour driving periods while in Canada during the previous 7 days, but has complied with all the FMCSRs while operating in the U.S. Has the driver violated the 10-hour driving requirement in the U.S.?

Guidance: No. Canadian drivers are required to comply with the FMCSRs only when operating in the U.S.

Section 395.8 Driver's Record of Duty Status

Question 1: How should a change of duty status for a short period of time be shown on the driver's record of duty status?

Guidance: Short periods of time (less than 15 minutes) may be identified by drawing a line from the appropriate on-duty (not driving) or driving line to the remarks section and entering the amount of time, such as "six minutes," and the geographic location of the duty status change.

Question 2: May a rubber stamp signature be used on a driver's record of duty status?

Guidance: No, a driver's record of duty status must bear the signature of the driver whose time is recorded thereon.

Question 3: If a driver's record of duty status is not signed may enforcement action be taken on the current day's record if it contains false information?

Guidance: Enforcement action can be taken against the driver even though that record may not be signed. The regulations require the driver to keep the record of duty status current to the time of last change of duty status (whether or not the record has been signed). Also, § 395.8(e) states that making false reports shall make the driver and/or the carrier liable to prosecution.

Question 4: Must drivers, alternating between interstate and intrastate commerce, record their intrastate driving time on their record of duty status?

Guidance: Yes, to account for all on-duty time for the prior seven or eight days preceding an interstate movement.

Question 5: May a driver, being used for the first time, submit records of duty status for the preceding seven days in lieu of a signed statement?

Guidance: The carrier may accept true and accurate copies of the driver's record of duty status for the preceding seven days in lieu of the signed statement required by § 395.8(j)(2).

Question 6: How should multiple short stops in a town or city be recorded on a record of duty status?

Guidance: All stops made in any one city, town, village or municipality may be computed as one. In such cases the sum of all stops should be shown on a continuous line as on-duty (not driving). The aggregate driving time between such stops should be entered on the record of duty status immediately following the on-duty (not-driving) entry. The name of the city, town, village, or municipality, followed by the State abbreviation where all the stops took place, must appear in the "remarks" section of the record of duty status.

Question 7: Is the Canadian bilingual or any other record of duty status form acceptable in the U.S.?

Guidance: Yes, provided the grid format and specific information required are included.

Question 8: May a motor carrier return a driver's completed record of duty status to the driver for correction of inaccurate or incomplete entries?

Guidance: Yes, although the regulations do not require a driver to submit "corrected" records of duty status. A driver may submit corrected records of duty status to the motor carrier at any time. It is suggested the carrier mark the second submission "CORRECTED COPY" and staple it to the original submission for the required retention period.

Question 9: May a duplicate copy of a record of duty status be submitted if an original was seized by an enforcement official?

Guidance: A driver must prepare a second original record of duty status to replace any page taken by an enforcement official. The driver should note that the first original had been taken by an enforcement official and the circumstances under which it was taken.

Question 10: What regulation, interpretation, and/or administrative ruling requires a motor carrier to retain supporting documents and what are those documents?

Guidance: Section 395.8(k)(1) requires motor carriers to retain all supporting documents at their principal places of business for a period of 6 months from date of receipt.

Supporting documents are the records of the motor carrier which are maintained in the ordinary course of business and used by the motor carrier to verify the information recorded on the driver's record of duty status. Examples are: bills of lading, carrier pros, freight bills, dispatch records, driver call-in records, gate record receipts, weight/scale tickets, fuel receipts, fuel billing statements, toll receipts, international registration plan receipts, international fuel tax agreement receipts, trip permits, port of entry receipts, cash advance receipts, delivery receipts, lumper receipts, interchange and inspection reports, lessor settlement sheets, over/short and damage reports, agricultural inspection reports, Commercial Vehicle Safety Alliance reports, accident reports, telephone billing statements, credit card receipts, driver fax reports, on-board computer reports, border crossing reports, custom declarations, traffic citations, overweight/oversize reports and citations, and/or other documents directly related to the motor carrier's operation, which are retained by the motor carrier in connection with the operation of its transportation business. Supporting documents may include other documents which the motor

carrier maintains and can be used to verify information on the driver's records of duty status. If these records are maintained at locations other than the principal place of business but are not used by the motor carrier for verification purposes, they must be forwarded to the principal place of business upon a request by an authorized representative of the FHWA or State official within 2 business days.

Question 11: Is a driver who works for a motor carrier on an occasional basis and who is regularly employed by a non-motor carrier entity required to submit either records of duty status or a signed statement regarding the hours of service for all on-duty time as "on-duty time" as defined by § 395.2?

Guidance: Yes.

Question 12: May a driver use "white-out" liquid paper to correct a record of duty status entry?

Guidance: Any method of correction would be acceptable so long as it does not negate the obligation of the driver to certify by his or her signature that all entries were made by the driver and are true and correct.

Question 13: Are drivers required to draw continuous lines between the off-duty, sleeper berth, driving, and on-duty (not driving) lines on a record of duty status when changing their duty status?

Guidance: No. Under § 395.8(h) the FMCSRs require that continuous lines be drawn between the appropriate time markers within each duty status line, but they do not require that continuous lines be drawn between the appropriate duty status lines when drivers change their duty status.

Question 14: What documents satisfy the requirement to show a shipping document number on a record of duty status as found in § 395.8(d)(11)?

Guidance: The following are some of the documents acceptable to satisfy the requirement: shipping manifests, invoices/freight bills, trip reports, charter orders, special order numbers, bus bills or any other document that identifies a particular movement of passengers or cargo.

In the event of multiple shipments, a single document will satisfy the requirement. If a driver is dispatched on a trip, which is subsequently completed, and then is dispatched on another trip on that calendar day, two shipping document numbers or two shippers and commodities must be shown in the remarks section of the record of duty status.

Question 15: If a driver from a foreign country only operates in the U.S. one day a week, is he required to keep a record of duty status for every day?

Guidance: A foreign driver, when in the U.S., must produce a current record of duty status, and sufficient documentation to account for his duty time for the previous 6 days.

Question 16: Are drivers required to include their total on duty time for the previous 7/8 days (as applicable) on the driver's record of duty status?

Guidance: No.

Section 395.13 Drivers Declared Out of Service

Question 1: May a driver operate any motor vehicle, at the direction of the motor carrier, after being placed out of service for an hours of service violation?

Guidance: An out of service order issued under § 395.13 extends only to the operation of CMVs. State procedures may differ.

Question 2: May a driver operating a CMV under a lease arrangement with a motor carrier, after being placed out of service for an hours of service violation, cancel the lease and continue to operate the vehicle as a private personal conveyance?

Guidance: No. Cancellation of a lease does not relieve the driver of the responsibility of complying with the out of service order which prohibits the driver from operating a CMV.

Part 396—Inspection, Repair and Maintenance

Sections Interpreted

396.1 Scope
396.3 Inspection, Repair, and Maintenance
396.9 Inspection of Motor Vehicles in Operation
396.11 Driver Vehicle Inspection Report(s)
396.13 Driver Inspection
396.17 Periodic Inspection
396.19 Inspector Qualifications
396.21 Periodic Inspection Recordkeeping Requirements
396.25 Qualifications of Brake Inspectors

Section 396.1 Scope

Question 1: What vehicles are subject to part 396?

Guidance: All vehicles falling within the definition of a CMV as defined in § 390.5.

Section 396.3 Inspection, Repair, and Maintenance

Question 1: What is meant by "systematic inspection, repair and maintenance"?

Guidance: Generally, systematic means a regular or scheduled program to keep vehicles in a safe operating condition. Section 396.3 does not specify inspection, maintenance or repair intervals because such intervals are fleet specific and, in some instances, vehicle specific. The inspection, repair and maintenance intervals are to be determined by the motor carrier. The requirements of §§ 396.11, 396.13, and 396.17 are in addition to the systematic inspection, repair and maintenance required by § 396.3.

Question 2: Section 396.3(b)(5) refers to a record of tests. What tests are required of push-out windows and emergency door lamps on buses?

Guidance: Generally, inspection of a push-out window would require pushing out the window. However, if the window may be destroyed by pushing out to test its proper functioning, a visual inspection may qualify as a test if the inspector can ascertain the proper functioning of the window without opening it. Checking to ensure that the rubber push-out molding is properly in place and has not deteriorated and that any handles or marking instructions have not been tampered with would meet the test requirement. Inspection of emergency door marking lights would require opening the door to test the lights.

Question 3: Who has the responsibility of inspecting and maintaining leased vehicles and their maintenance records?

Guidance: The motor carrier must either inspect, repair, maintain, and keep suitable records for all vehicles subject to its control for 30 consecutive days or more, or cause another party to perform such activities. The motor carrier is solely responsible for ensuring that the vehicles under its control are in safe operating condition and that defects have been corrected.

Question 4: Is computerized recordkeeping of CMV inspection and maintenance information permissible under § 396.3 of the FMCSRs?

Guidance: Yes, if the minimum inspection, repair, and maintenance records required are included in the computer information system and can be reproduced on demand.

Question 5: Where must vehicle inspection and maintenance records be retained if a vehicle is not housed or maintained at a single location?

Guidance: The motor carrier may retain the records at a location of its choice. If the vehicle maintenance records are retained at a location apart from the vehicle, the motor carrier is not relieved of its responsibility for ensuring that the records are current and factual. In all cases, however, upon request of the FHWA the maintenance records must be made available within a reasonable period of time (2 working days).

Section 396.9 Inspection of Motor Vehicles in Operation

Question 1: Under what conditions may a vehicle that has been placed "out of service" under § 396.3 be moved?

Guidance: The vehicle may be moved by being placed entirely upon another vehicle, towed by a vehicle equipped with a crane or hoist, or driven if the "out of service" condition no longer exists.

Question 2: Is it the intent of § 396.9 to allow "out of service" vehicles to be towed?

Guidance: Yes; however, not all out of service vehicles may be towed away from the inspection location. The regulation sets up a flexible situation that will permit the inspecting officer to use his/her best judgment on a case-by-case basis.

Section 396.11 Driver Vehicle Inspection Report(s)

Question 1: Does § 396.11 require the DVIR to be turned in each day by a driver dispatched on a trip of more than one day's duration?

Guidance: A driver must prepare a DVIR at the completion of each day's work and shall submit those reports to the motor carrier upon his/her return to the home terminal. This does not relieve the motor carrier from the responsibility of effecting repairs and certification of any items listed on the DVIR, prepared at the end of each day's work, that would be likely to affect the safety of the operation of the motor vehicle.

Question 2: Does § 396.11 require that the power unit and the trailer be inspected?

Guidance: Yes. A driver must be satisfied that both the power unit and the trailer are in safe operating condition before operating the combination.

Question 3: May more than one power unit be included on the DVIR if two or more power units were used by a driver during one day's work?

Guidance: No. A separate DVIR must be prepared for each power unit operated during the day's work.

Question 4: Does § 396.11 require a motor carrier to use a specific type of DVIR?

Guidance: A motor carrier may use any type of DVIR as long as the report contains the information and signatures required.

Question 5: Does § 396.11 require a separate DVIR for each vehicle and a combination of vehicles or is one report adequate to cover the entire combination?

Guidance: One vehicle inspection report may be used for any combination, provided the defects or deficiencies, if any, are identified for each vehicle and the driver signs the report.

Question 6: Does § 396.11(c) require a motor carrier to effect repairs of all items listed on a DVIR prepared by a driver before the vehicle is subsequently driven?

Guidance: The motor carrier must effect repairs of defective or missing parts and accessories listed in Appendix G to the FMCSRs before allowing the vehicle to be driven.

Question 7: What constitutes a "certification" as required by § 396.11(c)(1) and (2)?

Guidance: A motor carrier or its agent must state, in writing, that certain defects or deficiencies have been corrected or that correction was unnecessary. The declaration must be immediately followed by the signature of the person making it.

Question 8: Who must certify under § 396.11(c) that repairs have been made when a motor vehicle is repaired en route by the driver or a commercial repair facility?

Guidance: Either the driver or the commercial repair facility.

Question 9: Must certification for trailer repairs be made?

Guidance: Yes. Certification must be made that all reported defects or deficiencies have been corrected or that correction was unnecessary. The certification need only appear on the carrier's copy of the report if the trailer is separated from the tractor.

Question 10: What responsibility does a vehicle leasing company, engaged in the daily rental of CMVs, have regarding the placement of the DVIR in the power unit?

Guidance: A leasing company has no responsibility to comply with § 396.11 unless it is the carrier. It is the responsibility of a motor carrier to comply with part 396 regardless of whether the vehicles are owned or leased.

Question 11: Which carrier is to be provided the original of the DVIR in a trip lease arrangement?

Guidance: The motor carrier controlling the vehicle during the term of the lease (i.e. the lessee) must be given the original of the DVIR. The controlling motor carrier is also responsible for obtaining and retaining records relating to repairs.

Question 12: Must the motor carrier's certification be shown on all copies of the DVIR?

Guidance: Yes.

Question 13: Must a DVIR carried on a power unit during operation cover both the power unit and trailer being operated at the time?

Guidance: No. The DVIR must cover the power unit being operated at the time. The trailer identified on the report may represent one pulled on the preceding trip.

Question 14: In instances where the DVIR has not been prepared or cannot be located, is it permissible under § 396.11 for a driver to prepare a DVIR based on a pre-trip inspection and a short drive of a motor vehicle?

Guidance: Yes. Section 396.11 of the FMCSRs places the responsibility on the motor carrier to require its drivers to prepare and submit the DVIR. If, in unusual circumstances, the DVIR has not been prepared or cannot be located the motor carrier may cause a road test and inspection to be performed for safety of operation and the DVIR to be prepared.

Question 15: Is it permissible to use the back of a record of duty status (daily log) as a DVIR?

Guidance: Yes, but the retention requirements of § 396.11 and § 395.8 must be met.

Question 16: Does § 396.11 require that specific parts and accessories that are inspected be identified on the DVIR?

Guidance: No.

Question 17: Is the Ontario pre-trip/post-trip inspection report acceptable as a DVIR under § 396.11?

Guidance: Yes, provided the report from the preceding trip is carried on board the motor vehicle while in operation and all entries required by §§ 396.11, 396.13 are contained on the reports.

Question 18: Where must DVIRs be maintained?

Guidance: Since § 396.11 is not specific, the DVIRs may be kept at either the motor carrier's principal place of business or the location where the vehicle is housed or maintained.

Question 19: Who is responsible for retaining DVIRs for leased vehicles including those of owner-operators?

Guidance: The motor carrier is responsible for retaining the original copy of each DVIR and the certification of repairs for at least 3 months from the date the report was prepared.

Question 20: Is a multi-day DVIR acceptable under §§ 396.11 and 396.13?

Guidance: Yes, provided all information and certifications required by §§ 396.11 and 396.13 are contained on the report.

Question 21: Is a DVIR required by a motor carrier operating only one tractor trailer combination?

Guidance: No. One tractor semi-trailer/full trailer combination is considered one motor vehicle. However, a carrier operating a single truck tractor and multiple semi-trailers which are not

capable of being operated as one combination unit would be required to prepare DVIRs.

Question 22: Are motor carriers required to retain the "legible copy" of the last vehicle inspection report (referenced in § 396.11(c)(3)) which is carried on the power unit?

Guidance: No. The record retention requirement refers only to the original copy retained by the motor carrier.

Question 23: Does the record retention requirement of § 396.11(c)(2) apply to all DVIRs, or only those reports on which defects or deficiencies have been noted?

Guidance: The record retention requirement applies to all DVIRs.

Section 396.13 Driver Inspection

Question 1: If a DVIR does not indicate that certain defects have been repaired, and the motor carrier has not certified in writing that such repairs were considered unnecessary, may the driver refuse to operate the motor vehicle?

Guidance: The driver is prohibited from operating the motor vehicle if the motor carrier fails to make that certification. Operation of the vehicle by the driver would cause the driver and the motor carrier to be in violation of § 396.11(c) and both would be subject to appropriate penalties. However, a driver may sign the certification of repairs as an agent of the motor carrier if he/she is satisfied that the repairs have been performed.

Question 2: At the end of the day's work and upon completion of the required DVIR, what does the driver do with the copy of the previous DVIR carried on the power unit?

Guidance: There is no requirement that the driver submit the copy of that previous DVIR to the motor carrier nor is there a retention requirement for the motor carrier.

Section 396.17 Periodic Inspection

Question 1: Some of a motor carrier's vehicles are registered in a State with a mandated inspection program which has been determined to be as effective as the Federal periodic inspection program, but these vehicles are not used in that State. Is the motor carrier required to make sure the vehicles are inspected under that State's program in order to meet the Federal periodic inspection requirements?

Guidance: No. Those CMVs that are subject to a mandatory State inspection program may meet the periodic inspection requirements through that State's inspection program. Section 396.17 through 396.23 requirements may be met through a motor carrier self-inspection, a third party inspection, a CVSA inspection, or a periodic inspection performed in any State with a program that FHWA determines as effective as the part 396 requirements. However, compliance with the Federal periodic inspection requirements does not relieve a motor carrier from State registration requirements.

Question 2: May the due date for the next inspection satisfy the requirements for the inspection date on the sticker or decal?

Guidance: No. The rule requires that the date of the inspection be included on the report and sticker or decal. This date may consist of a month and a year.

Question 3: Must each vehicle in a combination carry separate periodic inspection documentation?

Guidance: Yes, unless a single document clearly identifies all of the vehicles in the CMV combination.

Question 4: Does the sticker have to be located in a specific location on the vehicle?

Guidance: No. The rule does not specify where the sticker, decal or other form of documentation must be located. It is the responsibility of the driver to produce the documentation when requested. Therefore, the driver must know the location of the sticker and ensure that all information on it is legible and current. The driver must also be able to produce the inspection report if that form of documentation is used.

Question 5: Is new equipment required to pass a periodic inspection under § 396.17?

Guidance: Yes, but a dealer who meets the inspection requirements may provide the documentation for the initial periodic inspection.

Question 6: Are the Federal periodic inspection requirements applicable to U.S. Government trailers operated by motor carriers engaged in interstate commerce?

Guidance: Yes. The transportation is not performed by a governmental entity but by a for-hire carrier in interstate commerce.

Question 7: Does a CMV equipped with tires marked "Not for Highway Use" meet the periodic inspection requirements?

Guidance: No. Appendix G to Subchapter B—Minimum Periodic Inspection Standards, lists tires so labeled as a defect or deficiency which would prevent a vehicle from passing an inspection.

Question 8: Is a CMV subject to a roadside inspection by State or Federal inspectors if it displays a periodic inspection decal or other evidence of a periodic inspection being conducted in the past 12 months?

Guidance: Yes. Evidence of a valid periodic inspection only precludes a citation for a violation of § 396.17.

Question 9: Is a State required to accept the periodic inspection program of another State having a periodic inspection program meeting minimum FHWA standards as contained in Appendix G to the FMCSRs?

Guidance: Yes. Section 210 of the Motor Carrier Safety Act of 1984 establishes the principle that State inspections meeting federally approved criteria must be recognized by every other State.

Question 10: Do vehicles inspected under a periodic Canadian inspection program comply with the FHWA periodic inspection standards?

Guidance: Yes. The FHWA has determined that the inspection programs of all of the Canadian Provinces meet or exceed the Federal requirements for a periodic inspection program.

Question 11: Must a specific form be used to record the periodic inspection mandated by § 396.17?

Guidance: No. Section 396.21 does not designate any particular form, decal or sticker, but does specify the information which must be shown on these documents.

Question 12: May an inspector certify a CMV as meeting the periodic inspection standards of § 396.17 if he/she cannot see all components required to be inspected under Appendix G?

Guidance: No. The affixing of a decal or sticker or preparation of a report as proof of inspection indicates compliance with all requirements of Appendix G to part 396.

Question 13: If an intermodal container is attached to a chassis at the time of a periodic inspection, must the container also be inspected to comply with § 396.17 inspection requirements?

Guidance: Yes. Safe loading is one of the inspection areas covered under Appendix G. If the chassis is loaded at the time of inspection, the method of securement of the container to the chassis must be included in the inspection. Although integral securement devices such as twist locks are not listed in Appendix G, the operation of these devices must be included in the inspection without removal of the container.

Section 396.19 Inspector Qualifications

Question 1: May an entity other than a motor carrier maintain the evidence of inspector qualifications required by § 396.19(b)?

Guidance: Yes. In those cases in which the inspection is performed by a commercial garage or similar facility or a leasing company, the motor carrier may allow the commercial garage or leasing company to maintain a copy of the inspector's qualifications on behalf of the motor carrier. The motor carrier, however, is responsible for obtaining copies of evidence of the inspector's qualifications upon the request of Federal, State or local officials. If, for whatever reason, the motor carrier is unable to obtain this information from the third party, the motor carrier may be cited for non-compliance with § 396.19.

Question 2: Is there a specific form or format to be used in ensuring that inspectors are qualified in accordance with § 396.19?

Guidance: No. Section 396.19(b) requires the motor carrier to retain evidence satisfying the standards without specifying any particular form.

Section 396.21 Periodic Inspection Recordkeeping Requirements

Question 1: What recordkeeping requirements under § 396.21 is a carrier subject to when it utilizes an FHWA-approved State inspection program?

Guidance: The motor carrier must comply with the recordkeeping requirements of the State. The requirements specified in § 396.21(a) & (b) are applicable only in those instances where the motor carrier self-inspects its CMVs or has an agent perform the periodic inspection.

Section 396.25 Qualifications of Brake Inspectors

Question 1: Does a CDL with an air brake endorsement qualify a person as a brake inspector under § 396.25?

Guidance: No.

Question 2: May a driver who does not have the necessary experience perform the adjustment under directions issued by telephone by a qualified inspector?

Guidance: Yes. A driver is permitted to perform brake adjustments at a roadside inspection providing they are done under the supervision of a qualified brake adjuster and the carrier is willing to assume responsibility for the proper adjustment.

Question 3: May a driver or other motor carrier employee be qualified as a brake inspector under § 396.25 by way of experience or training to perform brake adjustments without being qualified to perform other brake-related tasks such as the repair or replacement of brake components?

Guidance: Yes. A driver may be qualified by the motor carrier to perform a limited number of tasks in connection with the brake system, e.g., inspect and/or adjust the vehicle's brakes, but not repair them.

Question 4: Would a mechanic who is employed by a leasing company and only works on CMVs that the leasing company leases to other motor carriers be required to meet the brake inspector certification requirements?

Guidance: No. The mechanic is not required to meet the certification requirements of § 396.25(d) since he/she is not employed by a motor carrier.

Part 397—Transportation of Hazardous Materials; Driving and Parking Rules

Sections Interpreted

397.1 Application of the Rules in this Part
397.5 Attendance and Surveillance of Motor Vehicles
397.7 Parking
397.9 Routes
397.13 Smoking

Section 397.1 Application of the Rules in This Part

Question 1: Who is subject to part 397?

Guidance: Part 397 applies to interstate motor carriers that transport hazardous materials in types and quantities requiring marking or placarding under § 177.823. Wholly intrastate operations of an interstate motor carrier, when hauling hazardous materials subject to § 177.823, are subject to this part. Clearly the intrastate operations of an interstate motor carrier are subject to part 397 when § 177.823 is applicable.

Question 2: Is the interstate transportation of anhydrous ammonia, in nurse tanks, subject to part 397?

Guidance: The requirements of part 397 do not apply to the direct application of ammonia to fields from nurse tanks. However, part 397 does apply to the transportation of nurse tanks on public highways, when performed by interstate motor carriers.

Section 397.5 Attendance and Surveillance of Motor Vehicles

Question 1: What defines a "public highway" or "shoulder" of a public highway for the purpose of determining violations under § 397.5(c)?

Guidance: The applicable engineering/highway design plans.

Question 2: Must a driver of a motor vehicle transporting hazardous materials, other than Division 1.1, 1.2, or 1.3 (Class A or B) explosives, always maintain an unobstructed view and be within 100 feet of that vehicle?

Guidance: No. If the vehicle is not located on a public street or highway or on the shoulder of a public highway, then the vehicle need not be within 100 feet of the driver's unobstructed view, unless it contains Division 1.1, 1.2, or 1.3 (Class A or B) materials.

Question 3: May a motor carrier consider fuel stop operators as "qualified representative(s)" for purposes of the attendance and surveillance requirements of § 397.5?

Guidance: Yes. However, the fuel stop operator must be able to perform the required functions.

Question 4: Who determines what is a "safe haven"?

Guidance: The selection of safe havens is a decision of the "competent government authorities" having jurisdiction over the area. The definition found in § 397.5(d)(3) is purposely void of any specific guidelines or criteria. A truck stop may be considered a safe haven if it is so designated by local or State governmental authorities.

Section 397.7 Parking

Question 1: When is a vehicle considered "parked"?

Guidance: For the purposes of part 397, "parked" means the vehicle is stopped for a purpose unrelated to the driving function (e.g., fueling, eating, loading, unloading).

Question 2: What constitutes "knowledge and consent of the person in charge," as used in § 397.7(a)(2)?

Guidance: In order to satisfy the requirement for "knowledge and consent," actual notice of "the nature of the hazardous materials the vehicle contains" must be given to the person in charge, and that person must affirmatively agree to allow the vehicle to be parked on the property under his/her control.

Question 3: Is the motor carrier or driver relieved from the requirements of § 397.7(a)(3) if the person in charge of the private property is notified of the explosive hazardous materials contained in the vehicle?

Guidance: No. A vehicle transporting Division 1.1, 1.2, or 1.3 (Class A or B) explosives must meet the 300-foot separation requirement, regardless of any notification made to any person.

Question 4: What is meant by the term "brief periods when necessities of operation require . . ." in § 397.7(a)(3)?

Guidance: Brief periods of time depend upon the "necessities of operation" in question. Parking a vehicle containing Division 1.1, 1.2 or 1.3 (Class A or B) materials closer than 300 feet to buildings, dwellings, etc. for periods up to 1 hour for a driver to eat would not be permitted under the provisions of § 397.7(a)(3). Parking at fueling facilities to obtain fuel, oil, etc., or at a carrier's terminal would be considered necessities of operation.

Question 5: May a safe haven be designated within 300 feet of an area where buildings and other structures are likely to be occupied by large numbers of people?

Guidance: The selection and designation of safe havens are a decision of the "competent government authorities" having jurisdiction over the area.

Question 6: If a motor vehicle is transporting Division 1.1, 1.2, or 1.3 (Class A or B) explosives and is parked in a safe haven, must it be in compliance with the parking requirements of § 397.7?

Guidance: Yes. Safe havens, as outlined in § 397.5, relate to attendance and surveillance requirements. The parking restrictions of § 397.7 still apply.

Question 7: May a driver transporting Division 1.1, 1.2 or 1.3 (Class A or B) materials park within 100 feet of an eating establishment in order to meet the attendance and surveillance requirements?

Guidance: No, because it will result in a violation of § 397.7(a)(3).

Section 397.9 Routes

Question 1: May a motor vehicle which contains hazardous materials use expressways or major thoroughfares to make deliveries within a populated area?

Guidance: Yes, unless otherwise specifically prohibited by State or local authorities. In many instances a more circuitous route may present greater hazards due to increased exposure. However, in those situations where a vehicle is passing through a populated or congested area, use of a beltway or other bypass would be considered the appropriate route, regardless of the additional economic burden.

Section 397.13 Smoking

Question 1: May a driver of a CMV transporting hazardous materials, listed in § 397.13, smoke while at the controls or in the sleeper berth of the vehicle?

Guidance: No. All persons are prohibited from smoking or carrying lighted smoking materials at any time while "on or within 25 feet" of such a vehicle. The word "on" includes any time while in the cab, sleeper berth, etc.

Part 399—Employee Safety and Health Standards

Sections Interpreted

399.207 Truck and Truck-Tractor Access Requirements

Section 399.207 Truck and Truck-Tractor Access Requirements

Question 1: If a high-profile COE truck or truck-tractor is equipped with a seat on the passenger's side, must steps and handholds be provided for any person entering or exiting on that side of the vehicle?

Guidance: Yes, all high-profile COE trucks and truck-tractors shall be equipped on each side of the vehicle where a seat is located, with a sufficient number of steps and handholds to comply with the requirements of § 399.207(a).

Question 2: What does the foot accommodation rule mean when it states: "The step need not retain the disc at rest"?

Guidance: The note under § 399.207(b)(4) states that the disc referred to is a measuring device. The step or rung does not have to be configured in such a manner as to keep the measuring disc from falling off the step or rung.

Question 3: In § 399.207(b)(4), Illustration III, what does the unshaded area within the disc suggest?

Guidance: The unshaded area illustrates the height of the open area required for a driver to insert his or her foot.

Question 4: May the step be a rung? If so, what minimum diameter must the rung be?

Guidance: Yes, the step may be a rung. There is no minimum requirement for the diameter of a step rung. However, it must meet the performance requirements in § 399.207(b)(5).

(5 U.S.C. 553(b); 49 CFR 1.48)

Issued on: November 3, 1993.

Rodney E. Slater,

Federal Highway Administrator.

[FR Doc. 93-27711 Filed 11-16-93; 8:45 am]

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federal register

Wednesday
November 17, 1993

Part III

Department of Justice

Bureau of Prisons

28 CFR Part 504

Control, Custody, Care, Treatment and Instruction of Inmates; Acceptance of Donations; Rule

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 504

Control, Custody, Care, Treatment and Instruction of Inmates; Acceptance of Donations

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: In this document, the Bureau of Prisons is amending its regulations on the acceptance of donations for use by the Bureau of Prisons or Federal Prison Industries, Inc. This amendment delegates to the Warden the authority to accept unsolicited donations to an institution of printed material, audio tapes, or video tapes. The intended effect of this action is to ensure the efficient and economical operation of the Bureau of Prisons and Federal Prison Industries, Inc.

EFFECTIVE DATE: November 17, 1993.

ADDRESSES: Office of General Counsel, Bureau of Prisons, room 754, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 514-6655.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons is amending its regulations on the acceptance of donations for use by the Bureau of Prisons or Federal Prison Industries, Inc. The authority to accept such donations was statutorily provided to the Attorney General in 18 U.S.C. 4044. This authority has been delegated by the Attorney General to the Director of the Bureau of Prisons in 28 CFR 0.96(s). A final rule on this subject was published in the **Federal Register** on September 22, 1989 (54 FR 39094).

The current rulemaking revises 28 CFR 504.1 in order to include specific delegation of authority to the Warden and to make an editorial change. Section 504.2 is amended by revising paragraph (a) to include procedures pertinent to the Warden's authority to accept or reject donations.

Because these regulations pose no burden on the public, and are intended to provide agency management guidelines for implementing 18 U.S.C. 4044, the Bureau finds good cause for exempting the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public comment, and delay in effective date. Members of the public may submit comments concerning this rule by writing the previously cited address. These comments will be considered but will receive no response in the **Federal Register**.

The Bureau of Prisons has determined that this rule is not a significant regulatory action for the purpose of E.O. 12866. After review of the law and regulations, the Director, Bureau of Prisons has certified that this rule, for the purpose of the Regulatory Flexibility Act (Pub. L. 96-354), does not have a significant impact on a substantial number of small entities.

List of Subjects in 28 CFR Part 504

Administrative practice and procedure, Prisoners.

Kathleen M. Hawk,

Director, Bureau of Prisons.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(p), subchapter A of 28 CFR chapter V is amended as set forth below.

SUBCHAPTER A—GENERAL MANAGEMENT AND ADMINISTRATION

PART 504—ACCEPTANCE OF DONATIONS

1. The authority citation for 28 CFR part 504 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 4001, 4003, 4042, 4044, 4081; 28 U.S.C. 509, 510; 28 CFR 0.95-0.99.

2. Section 504.1 is revised to read as follows:

§ 504.1 Purpose and scope.

Pursuant to 18 U.S.C. 4044, and as delegated to the Director, Bureau of Prisons, in 28 CFR 0.96(s), any devise, bequest, gift or donation of money or property for use by the Bureau of Prisons or Federal Prison Industries, Inc., may be accepted in accordance with these rules. Pursuant to 28 CFR 0.97, the Director's authority to accept such donations is redelegated to the Assistant Directors and Regional Directors of the Bureau of Prisons. Authority to accept unsolicited donations to an institution of printed material, audio tapes, or video tapes is further delegated to the Warden.

3. Section 504.2 is amended by revising paragraph (a) to read as follows:

§ 504.2 Procedures.

(a)(1) Other than as provided for in paragraph (a)(2) of this section, in accepting any devise, bequest, gift or donation, the Regional Director or Assistant Director must determine in writing that the property or money is appropriate to the program and mission of the Bureau of Prisons or Federal Prison Industries, Inc., that it does not create a conflict of interest for the Bureau of Prisons or Federal Prison Industries, Inc., and that it provides benefits to the Bureau of Prisons or Federal Prison Industries, Inc., in excess of any incidental costs incurred in obtaining or operating the donation.

(2) In accepting a donation to an institution of printed material, audio tapes, or video tapes, the Warden must determine if the material is consistent with the intent of Bureau policy (including the provisions of paragraph (a)(1) of this section). The Warden shall document in writing the type of donation, the donor organization, and the decision to accept or reject such donation.

* * * * *

[FR Doc. 93-28183 Filed 11-16-93; 8:45 am]

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