(Sec. 161, Pub. L. 83-703, 68 Stat. 948 (42 U.S.C. § 2201); Sec. 201, Pub. L. 93-438, 88 Stat. 1242 (42 U.S.C. § 5841); and Sec. 515, Pub. L. 95-105 (5 U.S.C. § 7342).)

Dated at Bethesda, Md., this 9th day of January 1978.

For the Nuclear Regulatory Commission.

LEE V. GOSSICK,
Executive Director for Operations.

[FR Doc. 78-923 Filed 1-12-78; 8:45 am]

[3128-01]

CHAPTER II—FEDERAL ENERGY ADMINISTRATION[1]

PART 205—ADMINISTRATIVE PROCEDURES AND SANCTIONS

Amendments to Administrative Procedures Regarding Issuance of Remedial Orders

AGENCY: Economic Regulatory Administration, Department of Energy.

ACTION: Interim rule.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) hereby amends its administrative procedures regulations regarding the manner in which remedial orders are issued. The purpose of the amendments is to provide a fuller administrative review of the issues raised in each remedial order proceeding prior to issuance of the order in final form. Remedial orders will be issued in proposed form and aggrieved or interested parties will be able to present evidence relevant thereto prior to issuance of the order in final form. Evidentiary hearings will be convened where appropriate and an opportunity for oral argument provided as a matter of right. The revised procedures will also apply to remedial orders for immediate compliance and orders of disallowance.

EFFECTIVE DATE: January 6, 1978; Comments by February 15, 1978.

ADDRESSES: Written Comments to: Department of Energy, Office of Regulations Management, Room 2214, 2000 M Street, Box QW, Washington, D.C. 20461.

FOR FURTHER INFORMATION CONTACT:

Deanna Williams (DOE Reading Room), 12th and Pennsylvania Avenue NW., Room 2107, Washington, D.C. 20461, 202-566-9161.

Ed Vilade (Media Relations), 12th and Pennsylvania Avenue NW., Room 3104, Washington, D.C. 20461, 202-566-9833.

Melvin Goldstein (Office of Administrative Review), 2000 M Street NW., Room 8002, Washington, D.C. 20461, 202-254-5134.

Nancy E. Williams (Office of General Counsel), 12th and Pennsylvania Avenue NW., Room 7132, Washington, D.C. 20461, 202-566-2454.

SUPPLEMENTATY INFORMATION: (A) Background, (B) Amendments Adopted, (C) Comment Procedure, (D) Interim Requirements, (E) Other Procedural Considerations.

A. BACKGROUND

The procedures which now govern the issuance of remedial orders pursuant to the Emergency Petroleum Allocation Act of 1973, as amended, are found in Subpart O of 10 CFR Part 205. ERA wishes to revise these procedures in order to produce a more fully developed administrative record prior to issuance of a remedial order. The development of a record through the hearing process described below will assist any reviewing authority in considering arguments on the appeal of a remedial order in an effective and efficient manner. These procedures will also give interested parties a better chance to present facts and legal arguments in support of the position they contend the ERA should adopt in the remedial order.

The ERA has separated the prosecutorial and adjudicatory functions which are within the jurisdiction of the Administrator. Under the amendments, the offices of the Special Counsel for Compliance and of the Assistant Administrator for Enforcement will issue proposed remedial orders. Those proposed orders will then be subject to review by the Office of Administrative Review. In any proceeding before the Office of Administrative Review regarding a proposed remedial order, the enforcement office that issued the proposed order will be a party to the proceeding and will submit its position in the same manner as any other party.

B. AMENDMENTS ADOPTED

Under the new procedures the Special Counsel for Compliance or the Assistant Administrator for Enforcement of the ERA will issue notices of probable violation or proposed remedial orders under Subpart O of Part 205 in order to commence most formal compliance proceedings. If a notice of probable violation is served, the person upon whom it is served will continue to have an opportunity to file a reply as now provided in § 205.191. If the enforcement office then finds that a violation exists or is about to occur, it will issue a proposed remedial order. it may also eliminate the notice of probable violation step and proceed immediately to the issuance of a proposed remedial order. In either case, the proposed remedial order will be served upon all parties to the compliance proceeding. Once the proposed remedial order is issued, further proceedings in the matter will be before the Office of Administrative Review.

Any aggrieved party will have the opportunity to file briefs and other documents specifying the errors which it is believed appear in the proposed remedial order. Parties will also have the opportunity to request that an evidentiary hearing be convened with respect to relevant, substantial and material issues of fact. An opportunity for oral argument will, in addition, be provided as a matter of right, and the parties to the proceeding will be afforded an opportunity to respond in a formal manner to the written submissions of any other party.

The amendments also include provisions which will permit various types of prehearing discovery. A prior showing will, however, have to be made that the discovery is necessary to obtain relevant and material evidence and that discovery will not unduly delay the proceeding.

After the completion of such proceedings, the proposed remedial order will be considered in view of the material presented and, if appropriate, a final remedial order will be issued by the Office of Administrative Review.

The amendments provide that decisions with respect to the issuance of final remedial orders will be made solely by the Office of Administrative Review. Consequently, individuals in the Office of Administrative Review who are responsible for deciding a case will not be permitted to receive ex parte communications from persons outside that Office regarding matters involved in a remedial order proceeding.

The new procedures will apply to remedial orders for immediate compliance and orders of disallowance as well as to remedial orders.

The amendments provide that a recipient of a remedial order issued pursuant to a NOPV issued after October 1, 1977, may request a review of that order by the Federal Energy Regulatory Commission, in accord with the DOE Organization Act. For purposes of the amendments, the contest and review of a remedial order as described in section 503 of the DOE Act shall be deemed to be an Appeal, and governed by § 205.199C of the new regulations, "Appeal of Remedial Order."

Nothing in these amendments is intended to prohibit the Special Counsel for Compliance or the Assistant Administrator for Enforcement, in coordination with the Department of

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[1] Editorial Note: Chapter II will be renamed at a future date to reflect that it contains regulations administered by the Economic Regulatory Administration of the Department of Energy.

Justice, from initiating an appropriate civil or criminal enforcement action in court rather than utilizing the administrative procedures established in these regulations.

C. COMMENT PROCEDURE

No substantial issue of fact or law exists with respect to the amendments, and the amendments are unlikely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses. Thus, ERA will not provide opportunity for oral presentation of views, data, or arguments regarding the amendments.

You are, however, invited to submit written views, data or arguments regarding the amendments set forth in this notice. Submit comments to the address indicated in the "addresses" section of this preamble and write on the outside of the envelope the designation "Amendments to Administrative Procedures Regarding Issuance of Remedial Orders." Fifteen copies should be submitted. You may inspect all comments received by DOE in the DOE Reading Room, Room 2107, Federal Building, 12th and Pennsylvania Avenue NW., between 8 a.m. and 4:30 p.m., Monday through Friday, and in the Office of the Administrative Review Public Docket Room, Room B-120, 2000 M Street NW., between 1 p.m. and 5 p.m., Monday through Friday.

D. INTERIM REQUIREMENTS

The amendments will be adopted immediately by the ERA for purposes of further remedial order proceedings, although the regulations will not be promulgated as final rules until public comment thereon has been received and analyzed. Immediate adoption of the new procedures will provide for a consistent approach with respect to remedial order proceedings in the period until these regulations are adopted as final rules.

The ERA also believes immediate adoption of the procedures in the amendments will aid in effectuating the intent of Congress as expressed in the conference report accompanying the DOE Organization Act, i.e., to guarantee a "separation of the prosecutorial and judicial functions relating to enforement." Further, since the new procedures provide additional rights in that a greater opportunity is afforded for submission of factual data and legal arguments in support of a party's position prior to the issuance of a final Order, the ERA believes it is appropriate, and that no party will be adversely affected thereby, to adopt the new procedures effective immediately.

Since the proposed regulations will be adopted immediately, any formal administrative remedial action which is taken by the Assistant Administrator for Enforcement or the Special Counsel for Compliance subsequent to the issuance of these amendments will be issued in the form of a proposed remedial order. The procedures of the amendments will then be applicable to issuance of the proposed remedial order as a final Order.

E. OTHER PROCEDURAL CONSIDERATIONS

These amendments do not affect the quality of the environment, and therefore the provisions of section 7(a)(1) of the Federal Energy Administration Act of 1974, as amended, are not applicable to the amendments.

This document does not contain a major proposal requiring preparation of an inflation impact statement under Executive Order 11821 and OMB Circular A-107.

In accord with section 404 of the DOE Organization Act, the Federal Energy Regulatory Commission was notified that the Administrator intended to adopt these amendments, and the Commission has not determined that the regulations would significantly affect any function within its jurisdiction pursuant to Section 402(a)(1), (b) and (c)(1) of that Act.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act. Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267.)

In consideration of the foregoing, Part 205 of Chapter II, Title 10 of the Code of Federal Regulations, is amended as set forth below, effective immediately.

Issued in Washington, D.C., January 6, 1978.

DAVID J. BARDIN,
Administrator, Economic Regulatory Administration.

1. The table of contents for Part 205, Subpart O, is amended by revising the entries for § 205.190 through 205.197 and by adding § 205.198 through 205.199J, as follows:

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Subpart O—Notice of Probable Violation, Remedial Order, Notice of Proposed Disallowance, and Order of Disallowance

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Sec.
205.190 Purpose and scope.
205.191 Notice of probable violation, commencement of enforcement proceedings.
205.192 Issuance of proposed remedial order.
205.193 Notice of objection.
205.194 Statement of objections.
205.195 Response to statement of objections.
205.196 Motion for evidentiary hearing.
205.197 Decision with respect to motion for evidentiary hearing.
205.198 Discovery.
205.199 Evidentiary hearing.
205.199A Hearing for the purpose of oral argument only.
205.199B Issuance of remedial order.
205.199C Appeal of remedial order.
205.199D Interim remedial order for immediate compliance.
205.199E Notice of proposed disallowance, proposed order of disallowance, and order of disallowance.
205.199F Ex parte communications.
205.199G Extension of time; interim and ancillary orders.
205.199H Actions not subject to administrative appeal.
205.199I Remedies.
205.199J Consent orders.

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Sections 205.190, 205.191, 205.192, 205.193, 205.194, 205.195, 205.196, and 205.197 are revised and §§ 205.198 through 205.199J are added as follows:

§ 205.190 Purpose and scope; commencement of enforcement proceedings.

(a) This subpart establishes the procedures for determining the nature and extent of violations of the ERA regulations and the procedures for issuance of a notice of probable violation, a proposed remedial order, a remedial order, or a remedial order for immediate compliance, except that it shall not apply with respect to violations of Parts 209 and 213. Nothing in these regulations is intended to affect the authority of ERA enforcement officials in coordination with the Department of Justice to initiate appropriate civil or criminal enforcement actions in court without first initiating administrative proceedings pursuant to this subpart.

(b) When any report required by the ERA or any audit or investigation discloses, or the ERA otherwise discovers, that there is reason to believe a violation of any provision of this chapter, or any order issued thereunder, has occurred, is continuing or is about to occur, the ERA may conduct proceedings to determine the nature and extent of the violation and may issue a Remedial Order thereafter. The ERA may commence such proceeding by serving a notice of probable violation, a proposed remedial order, or an interim remedial order for immediate compliance.

§ 205.191 Notice of probable violation.

(a) The ERA may begin a proceeding under this subpart by issuing a notice of probable violation if the ERA has reason to believe that a violation has occurred, is continuing or is about to occur.

(b) Within 10 days of the service of a notice of probable violation, the person upon whom the notice is served may file a reply with the ERA office that issued the notice of probable violation at the address provided in § 205.12. The ERA may extend the 10-day period for good cause shown.

(c) The reply shall be in writing and signed by the person filing it. The reply shall contain a full and complete statement of all relevant facts pertaining to the act or transaction that is the subject of the notice of probable violation. Such facts shall include a complete statement of the business or other reasons that justify the act or transaction, if appropriate; a detailed description of the act or transaction; and a full discussion of the pertinent provisions and relevant facts reflected in any documents submitted with the reply. Copies of all relevant contracts, agreements, leases, instruments, and other documents shall be submitted with the reply. When the notice of probable violation pertains to only one step of a larger integrated transaction, the facts, circumstances, and other relevant information regarding the entire transaction shall be submitted.

(d) The reply shall include a discussion of all relevant authorities which support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE or its predecessor agencies.

(e) The reply should indicate whether the person requests or intends to request a conference regarding the notice. Any request not made at the time of the reply shall be made as soon thereafter as possible to insure that the conference is held when it will be most beneficial. A request for a conference must conform to the requirements of § 205.171.

(f) If a person has not filed a reply with the ERA within the 10-day period provided, and the ERA has not extended the 10-day period, the person shall be deemed to have conceded the accuracy of the factual allegations and legal conclusions stated in the notice of probable violation.

(g) If the ERA finds, after the 10-day period provided in § 205.191(b), that no violation has occurred, is continuing, or is about to occur, or that for any reason the issuance of a remedial order would not be appropriate, it shall rescind the notice of probable violation and inform the person to whom the notice was issued of the rescission.

§ 205.192 Issuance of proposed remedial order.

(a) If the ERA finds, after the 10-day period provided in section 205.191(b), that a violation has occurred, is continuing, or is about to occur, it may issue a proposed remedial order, which shall set forth the relevant facts and legal basis for the conclusions reached therein.

(b) The ERA may issue a proposed remedial order at any time it finds that a violation has occurred, is continuing, or is about to occur even if it has not previously issued a notice of probable violation.

(c) The ERA shall serve a copy of the proposed remedial order upon the person to whom it is directed and upon any other person readily identifiable by the ERA as likely to be aggrieved by issuance of the proposed remedial order as a final order.

(d) A proposed remedial order may be referred at any time to the Department of Justice for appropriate action in accordance with subpart P.

§ 205.193 Notice of objection.

(a) Within 10 days of service of the proposed remedial order any aggrieved person may file a notice of objection to the order with the National Office of Administrative Review. The notice shall briefly describe how the person would be aggrieved by issuance of the proposed remedial order as a final order.

(b) Any person who fails to file a timely notice of objection shall be deemed to consent to the issuance of the proposed remedial order as a final order.

(c) Any person who files a notice of objection shall serve a copy of the Notice upon each person who is readily identifiable as a person who will be aggrieved by the ERA action sought, including those persons who have been served copies of the proposed remedial order, and upon the person who issued the proposed remedial order.

(d) The notice shall include a certification of compliance with the provisions of this section, the names and addresses of each person served with a copy of the notice, and the date and manner of service.

(e) The Office of Administrative Review may issue a final remedial order without further proceedings if no person files a timely notice of objection.

(f) In order to exhaust administrative remedies with respect to a remedial order proceeding, a party must file a timely notice of objection with the Office of Administrative Review.

§ 205.194 Statement of objections.

(a) *Filing requirement.* A statement of objections to a proposed remedial order must be filed within 30 days of service of the proposed remedial order. A request for an extension of time for filing must be submitted in writing and may be granted for good cause shown.

(b) *Filing and service of statement of objections and related documents.* (1) Statements of objections, responses to such statements, and any motions or other documents filed in connection with the proceeding shall be filed with the National Office of Administrative Review.

(i) Any document referred to in (b)(1) shall be filed in triplicate.

(ii) If a party claims that any portion of a document referred to in (b)(1) contains confidential information, such information should be deleted from two (2) of the copies which are filed. One copy from which confidential information has been deleted will be placed in the Public Docket Room described in § 303.13.

(2) A copy of each of the documents referred to in subsection (b)(1) shall be served upon each person who is readily identifiable as a person who will be aggrieved by the ERA action sought, including those persons who have been served copies of the proposed remedial order, and upon the person who issued the proposed remedial order.

(3) Any filing made under this section shall include a certification of compliance with the provisions of this section, the names and addresses of each person served, and the date and manner of service.

(c) *Contents of statement of objections.* The statement of objections shall set forth the basis for the objections to the issuance of the proposed remedial order as a final order, including a specification of every issue of fact or law which the party intends to contest in any further proceeding involving the compliance matter which is the subject of the proposed remedial order. The statement shall set forth the particular findings of fact contained in the proposed remedial order which are contested and the alternative findings which are sought. The statement shall include a discussion of all relevant authorities which support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE or its predecessor agencies.

§ 205.195 Response to statement of objections.

Within 20 days of receipt of a statement of objections any party may file a response. The response shall contain a full discussion of the position which the party asserts should be adopted in the matter and a discussion of the legal and factual basis which supports that position.

§ 205.196 Motion for evidentiary hearing.

Any party may file a motion requesting that an evidentiary hearing be convened with respect to relevant, substantial and material issues of fact at the same time that it files a statement of objections. A motion requesting an evidentiary hearing may be filed by any other party within 15 days after that party is served with a statement of objections.

(a) *Contents of motion for evidentiary hearing.* A motion for evidentiary hearing shall specify the manner in which the movant proposes to establish the basis for the alternative findings it asserts in its statement of objections. The movant shall also describe the manner in which the issue of fact was raised in any prior administrative proceeding which led to issuance of the proposed remedial order. If the movant asserts that its position can only be established through the introduction of evidence at an evidentiary hearing, the movant shall with respect to each disputed finding of fact:

(1) Identify each witness whose testimony is required;

(2) State the reasons why the testimony of the witness is necessary; and

(3) State the reasons why the asserted position can be established only through the direct questioning of witnesses at an evidentiary hearing.

(b) *Statement of additional factual representations.* At the time a motion for an evidentiary hearing is filed, the movant may also file a statement of factual representations which are not referred to in the proposed remedial order that the movant contends are material and relevant to establish that the proposed remedial order is either erroneous in fact or law or is arbitrary or capricious. The statement shall set forth the particular findings of fact which the movant asserts should be made, the reasons why such representations are relevant and material, and the manner by which the validity of the factual representations will be established. The movant shall also specify if and how the issue of fact was raised in any prior administrative proceeding which led to issuance of the proposed remedial order. If the movant asserts that its position can only be established through the introduction of evidence at an evidentiary hearing, the movant shall:

(1) Identify each witness whose testimony is required;

(2) State the reasons why the testimony of the witness is necessary; and

(3) State the reasons why the asserted position can be established only through the direct questioning of witnesses at an evidentiary hearing.

(c) *Response to motion for evidentiary hearing.* Within 20 days of receipt of any motion for evidentiary hearing and accompanying statements, the person who has issued the proposed remedial order shall, and any aggrieved party may, file a response with the Office of Administrative Review. A response shall, with respect to each factual representation in the movant's statements:

(1) Specify the particular factual representations which are accepted as correct for purposes of the proceeding;

(2) Specify the particular factual representations which are denied;

(3) Specify the particular factual representations which the movant is not in a position to accept or deny;

(4) Specify the particular factual representations which are not accepted and the responding party wishes proven by the submission of evidence; and

(5) Specify the particular factual representations which the responding party is prepared to dispute through the testimony of witnesses or the submission of verified documents.

(d) *Motions to dismiss.* Within 20 days of receipt of any motion for evidentiary hearing and accompanying statements, any party may also file a motion to dismiss any factual representation put forward by the movant on the grounds of vagueness, immateriality, or irrelevance. Any party filing a motion to dismiss shall have 10 days following a decision on the motion to dismiss to file the response referred to in (c) above.

§ 205.197 Decision with respect to motion for evidentiary hearing.

(a) After all submissions with respect to a motion for evidentiary hearing are filed, the Office of Administrative Review may conduct conferences in order to resolve any differences of view and may convene a hearing for the presentation of oral argument. Any such hearing shall be convened pursuant to § 205.172. In addition, the Office of Administrative Review may adopt procedural measures which it concludes are appropriate to facilitate a resolution of the matter.

(b) After considering all relevant information received in connection with the motion, the Office of Administrative Review shall enter an order with respect to the motion. If the motion is granted in whole or in part, the order shall specify the particular issues of fact which will be set forth for the evidentiary hearing. If the motion is denied, the order may nevertheless permit the movant to file affidavits or other documents in support of the particular finding of fact(s) which it asserted should be reached in the motion.

(c) The order of the Office of Administrative Review with respect to a motion for evidentiary hearing shall be deemed to be an interlocutory order which is subject to further administrative review or appeal only upon issuance of the remedial order referred to in § 205.199B.

§ 205.198 Discovery.

(a) Any party may file a motion for discovery at the same time that it files the statement of objections referred to in § 205.194. A motion for discovery may be filed by any other party within 15 days after that party is served with a statement of objections.

(b) A motion for discovery may request that:

(1) A party produce for inspection and photocopying nonprivileged written material in its possession;

(2) A party respond to written interrogatories;

(3) A party admit to the genuineness of any relevant document or the truth of any relevant fact; or

(4) The deposition of a material witness be taken.

(c) Any motion for discovery shall set forth in detail the reasons why the particular discovery is necessary in order to obtain relevant and material evidence.

(d) Within 10 days after a motion for discovery is received, any party may file a request that the motion be denied in whole or in part, stating the reasons which support the request.

(e) Discovery may be conducted only pursuant to an order issued by the Office of Administrative Review. A motion for discovery will be granted only if it is concluded that discovery is necessary for the party to obtain relevant and material evidence and that discovery will not unduly delay the proceeding. Depostitions will be permitted only if a clear and convincing showing is made that the party cannot obtain the material through one of the other discovery means specified in § 205.198(b).

(f) The Director of the Office of Administrative Review or his designee may issue subpoenas in connection with the approval of a motion for discovery. The provisions of § 205.8 for witness fees shall apply to any such subpoena.

(g) Any direct expenses incurred by a party to produce evidence pursuant to a motion for discovery may be charged to the party who filed the motion, if so ordered by the Office of Administrative Review.

(h) (1) If a party fails to comply with an order relating to discovery, the Office of Administrative Review may take appropriate action, including but not limited to the following:

(i) Infer that the testimony, documents or other evidence sought to be discovered would have been adverse to the party;

(ii) Rule that for the purposes of the proceeding the matter or matters sought to be discovered be taken as established adversely to the party;

(iii) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party or the documents or other evidence;

(iv) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld testimony, documents or other evidence would have shown;

(v) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which discovery was sought, be stricken, or that a decision with regard to the proceeding be rendered against the party, or both.

(2) It shall be the duty of parties to request action of the foregoing types or to request that other appropriate relief be fashioned to compensate them for the lack of withheld testimony, documents or other evidence.

(3) For purposes of subsection (h)(1), an evasive or incomplete answer will be deemed a failure to answer.

(i) Any order issued by the Office of Administrative Review with respect to discovery shall be deemed to be an interlocutory order which is subject to further administrative review or appeal only upon issuance of the remedial order referred to in § 205.199B.

§ 205.199 Evidentiary hearing.

(a) All evidentiary hearings convened pursuant to this section shall be conducted by the Director of the Office of Administrative Review or his designee.

(b) At any evidentiary hearing, the parties shall have the opportunity to present evidence which:

(1) Directly relates to a particular issue of fact which has been set forth for hearing; and

(2) Is material and relevant to establish the validity of the position which it is asserted the ERA should adopt.

(c) The presiding officer shall afford the right of cross examination to the extent he determines that such is necessary for a full and true disclosure of the facts.

(d) The presiding officer may administer oaths and affirmations, rule on objections to the presentation of evidence, receive relevant material, dispose of procedural requests, determine the format of the hearing, direct that written motions or briefs be provided with respect to issues raised during the course of the hearing and otherwise regulate the course of the hearing. Further, the presiding officer may take reasonable measures to exclude duplicative material from the hearing. The presiding officer may also require that evidence be submitted through affidavits or other documents if he concludes that the presentation of evidence through the direct testimony of witnesses will unduly delay the orderly progress of the hearing and would add little substantive value in resolving the issues involved in the hearing.

(e) The provisions of § 205.8 of this part which relate to subpoenas and witness fees shall apply to any evidentiary hearing.

(f) Following the presentation of all evidence, the parties shall be afforded an opportunity to present oral argument. The presiding officer may direct that written memoranda, briefs or other documentary material be submitted in support of any position which a party advances or with respect to any other issue specified. If written submissions are requested, other parties shall be permitted to file responsive memoranda, briefs or documents.

§ 205.199A Hearing for the purpose of oral argument only.

(a) If an evidentiary hearing is not convened, any party may nevertheless request a hearing so that oral argument may be presented with respect to the proposed remedial order.

(1) If a party does not file a motion for evidentiary hearing at the time it files the statement of objections referred to in § 205.194, a request for oral argument shall be filed at the time a statement of objections is filed.

(2) If a party files a motion for evidentiary hearing at the time a statement of objections is filed, but that motion is subsequently denied, the party shall file a request for oral argument within 10 days of receipt of that denial.

(3) A request for a hearing for oral argument shall be filed by any other party within 10 days after that party is served with a statement of objections.

(b) Upon a timely request by any party or on its own initiative, the Office of Administrative Review shall conduct a hearing for the purpose of receiving oral argument. A hearing will generally be conducted only after the issues involved in the proceeding have been delineated and any written material which the Office of Administrative Review has requested as a supplement to the statement of objections, referred to in § 205.194, or the response, referred to in § 205.195, has been submitted. The procedures specified in § 205.172 shall generally apply to such hearings.

(c) The provisions of § 205.199(f) of this section with respect to written submission shall also apply to hearings convened pursuant to this section.

§ 205.199B Issuance of remedial order.

(a) After considering all information received during the proceeding, the Director of the Office of Administrative Review or his designee shall issue a final remedial order. The remedial order may adopt the findings and conclusions contained in the proposed remedial order or may modify or rescind any such finding or conclusion on the basis of a determination that the finding or conclusion is erroneous in fact or law or is arbitrary or capricious. The Office of Administrative Review may also reach the determination that no remedial order should be issued. Every determination issued pursuant to this section shall include a statement which sets forth the relevant facts and legal basis supporting the determination.

(b) The ERA shall serve a copy of any final remedial order upon the person to whom it is directed, any person who was served a copy of the proposed remedial order, the person who issued the proposed remedial order, and any other person readily identifiable by the ERA as one who is aggrieved by the order. A copy of each remedial order, modified to insure the confidentiality of information protected from disclosure under 18 U.S.C. 1905 and 5 U.S.C. 552, will also be placed on file in the public docket room described in § 303.13.

(c) A remedial order may be referred at any time to the Department of Justice for appropriate action in accordance with subpart P.

§ 205.199C Appeal of remedial order.

(a) An Appeal may be filed from the following remedial orders:

(1) Those issued prior to the effective date of these regulations and pursuant to a NOPV issued prior to October 1, 1977; and

(2) Those issued pursuant to NOPV's or proposed remedial orders issued subsequent to October 1, 1977;

(b)(1) An Appeal as described in (a)(1) shall be filed with and decided by the National Office of Administrative Review in accord with subpart H of this part. Any such appeal must be filed within 30 days of service of the order. In any such proceeding, the remedial order shall be sustained unless the appellant demonstrates that the order was erroneous in fact or law or was arbitrary or capricious.

(2) An appeal as described in (a)(2) shall be instituted by the recipient notifying the National Office of Administrative Review within 30 days of service of the order that it wishes to contest the Order.

(c) The Office of Administrative Review shall immediately advise the Federal Energy Regulatory Commission of its receipt of a notice described in (b)(2).

(d) The Office of Administrative Review may, on a case by case basis, set reasonable time limits for the Federal Energy Regulatory Commission to complete action on a proceeding referred to in (c).

(e) In order to exhaust administrative remedies with respect to a remedial order proceeding, a party must file a timely appeal pursuant to the procedures set forth in this section and await an order granting or denying the appeal.

§ 205.199D Interim remedial order for immediate compliance.

(a) Notwithstanding the provisions of §§ 205.191 through 205.199C, the ERA may issue an interim remedial order for immediate compliance, which shall be effective upon issuance and until rescinded or suspended, if it finds:

(1) There is a strong probability that a violation has occurred, is continuing or is about to occur;

(2) Irreparable harm will occur unless the violation is remedied immediately; and

(3) The public interest requires the avoidance of such irreparable harm through immediate compliance and waiver of the procedures afforded under §§ 205.191 through 205.199C.

(b) An interim remedial order for immediate compliance shall be served promptly upon the person against whom such Order is issued by telex or telegram, with a copy served by registered or certified mail. The copy shall contain a written statement of the relevant facts and the legal basis for the remedial order for immediate compliance, including the findings required by paragraph (a) of this section.

(c) The ERA may rescind or suspend an interim remedial order for immediate compliance if it appears that the criteria set forth in paragraph (a) of this section are no longer satisfied. When appropriate, however, such a suspension or rescission may be accompanied by a notice of probable violation issued under § 205.191.

(d) If at any time in the course of a proceeding commenced by a notice of probable violation the criteria set forth in paragraph (a) of the section are satisfied, the ERA may issue an interim remedial order for immediate compliance, even if the 10-day period for reply specified in § 205.191(b) has not expired.

(e) At any time after an interim remedial order for immediate compliance has become effective, the order may be referred to the Department of Justice for appropriate action in accordance with subpart P.

(f) Any person who is aggrieved by an interim remedial order for immediate compliance may contest the basis for the order by filing a notice of objection which meets the requirements of § 205.193 within 10 days of the issuance of the interim order. The person objecting to the issuance of the interim remedial order for immediate compliance shall follow the procedures specified in §§ 205.192 through 205.199C of this subpart to establish that the interim order is erroneous in fact or law or is arbitrary or capricious.

(g) Any aggrieved person who fails to file a timely notice of objection to the issuance of an interim remedial order shall be deemed to consent to issuance of the interim order in final form. Under those circumstances, the interim order shall as a matter of course be made a permanent order of the ERA.

(h) After considering all information received during a proceeding convened pursuant to a notice of objection described in (f), the Director of the Office of Administrative Review or his designee shall determine whether the interim order should be made permanent, should be modified, or should be rescinded. The general procedures in §§ 205.192 through 205.199D of this subpart shall apply to any such determination.

(i) Any party aggrieved by an interim order for immediate compliance may file an application for a temporary stay or an application for a stay of that order with the National Office of Administrative Review. The Office of Administrative Review shall decide on an application for a temporary stay within 48 hours of receipt of the application and on an application for stay within 10 working days of receipt of the application.

(1) Any party whose application for a stay of an interim remedial order is denied may appeal that denial to the Federal Energy Regulatory Commission. The Office of Administrative Review may, on a case by case basis, set reasonable time limits for the Commission to complete action on any such appeal.

(2) After reaching a decision on an appeal involving an application for stay, the Federal Energy Regulatory Commission shall refer the matter back to the Office of Administrative Review for proceedings on the merits of the interim remedial order pursuant to (f) through (h) above.

(j)(1) An Appeal from a remedial order for immediate compliance issued pursuant to § 205.199D(h) must be filed within 30 days of service of the Order.

(2) If a person who receives a remedial order for immediate compliance issued pursuant to a proceeding as to which no NOPV had been issued as of October 1, 1977, or issued pursuant to a NOPV issued on or after October 1, 1977, wishes to contest the remedial order, that person shall so notify the National Office of Administrative Review in accordance with the procedures set forth in § 205.199C(b)(2), and the procedures of § 205.199C (c) and (d) shall apply to the appeal.

(3) In order to exhaust administrative remedies with respect to a remedial order for immediate compliance proceeding, a party must file an appeal pursuant to the procedures set forth in this section and await an order granting or denying the appeal.

§ 205.199E Notice of proposed disallowance, proposed order of disallowance, and order of disallowance.

(a) The ERA shall begin a proceeding under this section by issuing a notice of proposed disallowance pursuant to the provisions of parts 205 and 212 of this chapter.

(b) Within 10 days of service, the person upon whom the notice of proposed disallowance is served may file a reply with the ERA office that issued the notice. The ERA may extend the 10-day period for good cause shown.

(c) The reply shall set forth all relevant facts pertaining to the matter that is the subject of the notice, and be signed by the person filing it.

(d) The reply shall include a discussion of all relevant authorities which support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE or its predecessor agencies.

(e) A request for a conference regarding the notice should be included in the reply, or made as soon as possible after the reply is filed. A request for a conference must conform to the requirements of § 205.171.

(f) If a reply has not been filed with the ERA within the 10-day or extended period provided, the recipient shall be deemed to have conceded the accuracy of the factual allegations and legal conclusions stated in the notice of proposed disallowance, and the notice shall become a proposed order of disallowance.

(g) After consideration of any timely reply filed, the ERA may adopt, modify, or rescind the notice of proposed disallowance and issue a proposed order of disallowance. The proposed order shall set forth the relevant facts and legal basis for the conclusions reached therein.

(h) The procedures specified in §§ 205.192 through 205.199C shall be applicable to proposed orders of disallowance, and shall govern the issuance of orders of disallowance and appeals from orders of disallowance.

(i) An order of disallowance shall be effective upon issuance.

(j) An order of disallowance may be referred at any time to the Department of Justice for appropriate action in accordance with subpart P.

§ 205.199F Ex Parte communications.

(a) No person who is not employed or otherwise supervised by the Office of Administrative Review shall submit ex parte communications to the Director or any person employed or otherwise supervised by the Office with respect to any matter involved in remedial order or order of disallowance proceedings.

(b) Ex parte communications includes any ex parte oral or written communications relative to the merits of a proposed remedial order, interim remedial order for immediate compliance, or proposed order of disallowance proceeding pending before the Office of Administrative Review. The term shall not, however, include requests for status reports, inquiries as to procedures, or the submission of statistical or technical data or reports containing proprietary or confidential information requested after notice to all parties by a person employed or otherwise supervised by the Office of Administrative Review.

(c) If any communication occurs that violates the provisions of this section, the Office of Administrative Review shall take appropriate action to mitigate the adverse impact to any party of the ex parte contact.

§ 205.199G Extensions of time; interim and ancillary orders.

The Director of the Office of Administrative Review or his designee may permit any document or submission referred to in this subpart to be filed within a time period different from that specified. The Director or his designee may also issue any interim or ancillary orders or make any rulings or determinations which are deemed necessary to insure that the proceedings specified in this subpart are conducted in an appropriate manner and are not unduly delayed.

§ 205.199H Actions not subject to Administrative Appeal.

A notice of probable violation, notice of proposed disallowance, proposed remedial order or interim remedial order for immediate compliance issued pursuant to this subpart shall not be an action of which there may be an administrative appeal pursuant to subpart H. In addition, a determination by the Office of Administrative Review that a remedial order or a remedial order for immediate compliance should not be issued shall not be appealable pursuant to subpart H. Further, any remedial order which is first issued as a proposed remedial order pursuant to a NOPV issued prior to October 1, 1977, or any order of disallowance which is first issued as a proposed order of disallowance pursuant to a notice of proposed disallowance issued prior to October 1, 1977, shall not be appealable pursuant to subpart H.

§ 205.199I Remedies.

(a) A remedial order, a remedial order for immediate compliance, an order of disallowance, or a consent order may require the person to whom it is directed to roll back prices, to make refunds equal to the amount (plus interest) charged in excess of those amounts permitted under part 212, to make appropriate compensation to third persons for administrative expenses of effectuating appropriate remedies, and to take such other action as the ERA determines is necessary to eliminate or to compensate for the effects of a violation or any cost disallowance pursuant to §§ 212.83 or 212.84. Such action may include a direction to the person to whom the order is issued to make refunds directly to any purchasers of the products involved, notwithstanding that those purchasers obtained such products from an intermediate distributor of such person's products, and may require as part of the remedy that the person to whom the order is issued maintain his prices at certain designated levels, notwithstanding the presence or absence of other regulatory controls on such person's prices.

(b) The ERA may, when appropriate, issue orders ancillary to a remedial order, remedial order for immediate compliance, order of disallowance, or consent order requiring that a direct or indirect recipient of a refund passthrough, by such means as the ERA deems appropriate, including those described in paragraph (a) of this section, all or a portion of the refund, on a pro rata basis, to those customers of the recipient who were adversely affected by the initial overcharge.

§ 205.199J Consent orders.

(a) Notwithstanding any other provision of this subpart, the ERA may at any time resolve an outstanding compliance investigation or proceeding, or a proceeding involving the disallowance of costs pursuant to § 205.199E of this subpart, with a consent order. A consent order shall be the exclusive administrative means, besides a remedial order or order of disallowance, for resolving compliance proceedings in which the ERA has issued a notice of probable violation, a proposed remedial order, a notice of proposed disallowance or a proposed order of disallowance, and a violation or overrecovery has been found. A consent order must be signed by the person to whom it is issued, or a duly authorized representative, and must indicate agreement to the terms contained therein. A consent order need not constitute an admission by any person that ERA regulations have been violated, nor need it constitute a finding by the ERA that such person has violated ERA regulations. A consent order shall, however, set forth the relevant facts which form the basis for the order.

(b) A consent order is a final order of the ERA having the same force and effect as a remedial order issued pursuant to § 205.199B or an order of disallowance issued pursuant to § 205.199E, and may require one or more of the remedies authorized by § 205.199I and § 212.84(d)(3). A consent order becomes effective no sooner than 30 days after publication under paragraph (c) below, except that the ERA may make a consent order effective immediately if expressly deemed necessary in the public interest. However, all consent orders involving sums of less than $500,000 in the aggregate, excluding penalties, will be effective when signed both by the person to whom it is issued and the ERA, and will not be subject to the provisions of paragraph (c) unless the ERA determines otherwise. A consent order shall not be appealable pursuant to the provisions of § 205.199C or § 205.199D and subpart H, and shall contain an express waiver of such appeal or judicial review rights as might otherwise attach to a final order of the ERA.

(c) When a proposed consent order has been signed, both by the person to whom it is issued and the ERA, the ERA will publish notice of such proposed consent order in the FEDERAL REGISTER and in a press release to be issued simultaneously therewith. The FEDERAL REGISTER notice and the press release will state at a minimum the name of the company concerned, a brief summary of the consent order and other facts or allegations relevant thereto, and the address and telephone number of the ERA office at which copies of the proposed consent order will be available free of charge, the address to which comments on the proposed consent order will be received by the ERA, and the date by which such comments should be submitted, which date will not be less than 30 days from publication of the FEDERAL REGISTER notice. After the expiration of the comment period the ERA may withdraw its agreement to the consent order, attempt to negotiate a modification of the consent order, or issue the consent order as proposed. The ERA will publish in the FEDERAL REGISTER, and by press release, notice of any action taken on a proposed consent order and such explanation of the action taken as deemed appropriate. The provisions of this paragraph shall be applicable notwithstanding that a consent order may have been made immediately effective pursuant to paragraph (b) of this section (except in cases where the consent order involves sums of less than $500,000 in the aggregate, excluding penalties).

(d) At any time and in accordance with the procedures of Subpart J, a consent order may be modified or rescinded, upon petition by the person to whom the consent order was issued, and may be rescinded by the ERA upon discovery of new evidence which is materially inconsistent with evidence upon which the ERA's acceptance of the consent order was based. Modifications of a consent order which is subject to public comment under the provisions of Paragraph (c) of this section, which in the opinion of the ERA significantly change the terms or the impact of the original order, shall be republished under the provisions of that paragraph.

(e) Notwithstanding the issuance of a consent order, the ERA may seek civil or criminal penalties or compromise civil penalties pursuant to subpart P concerning matters encompassed by the consent order, unless the consent order by its terms expressly precludes the ERA from so doing.

(f) If at any time after a consent order becomes effective it appears to the ERA that the terms of the consent order have been violated, the ERA may refer such violations to the Department of Justice for appropriate action in accordance with subpart P.

[FR Doc. 78-956 Filed 1-10-78; 1:03 pm]

[6750-01]

Title 16—Commercial Practices

CHAPTER I—FEDERAL TRADE COMMISSION

SUBCHAPTER A—PROCEDURES AND RULES OF PRACTICE

PART 4—MISCELLANEOUS RULES

Commission Meetings

AGENCY: Federal Trade Commission.

ACTION: Final rule amendment.

SUMMARY: A stenographer or court reporter under contract to the Commission to transcribe Commission proceedings attends all closed Commission meeting or portions of such meetings for which a verbatim transcript is required by the Government in the Sunshine Act. This amendment to the Commission's rules provides that such stenographers or court reporters (1) may attend all closed Commission meetings at which their services are required, but (2) will not be listed by name and affiliation in the public notice of closed meetings that they do attend.

EFFECTIVE DATE: January 13, 1978.

FOR FURTHER INFORMATION CONTACT:

Harry Hull, Office of General Counsel, Federal Trade Commission, Washington, D.C. 20580, 202-523-3802.

Accordingly, 16 CFR 4.15(c)(1) is amended to read as follows:

§ 4.15 Commission meetings.

* * * * *

(c) *Closed Meetings*—(1) Whenever the Commission votes to close a meeting or series of meetings under these rules, it shall make publicly available within one day notices both of such vote and the General Counsel's determination regarding certification under 5 U.S.C. 552b(f)(1). Such determination by the General Counsel shall be made prior to the Commission vote to close a meeting or series of meetings. Further, except with respect to meetings closed under paragraph (c)(2) of this section, the Commission shall make publicly available within one day a full written explanation of its action in closing any meeting, and a list specifying the names and affilations of all persons expected to attend, except Commission employees and consultants and any stenographer or court reporter attending for the sole purpose of preparing a verbatim transcript. All Commission employees and consultants may attend nonadjudicative portions of any closed meeting and members of Commissioners' personal staffs, the General Counsel and his staff, and the Secretary and his staff may attend the adjudicative portions of any closed meeting except to the extent the notice of a particular closed meeting otherwise specifically provides. Stenographers or court reporters may attend any closed meeting at which their services are required by the Commission.

* * * * *

By direction of the Commission dated December 22, 1977.

CAROL M. THOMAS,
Secretary.

[FR Doc. 78-964 Filed 1-12-78; 8:45 am]

[6750-01]

PART 4—MISCELLANEOUS RULES

Public Records

AGENCY: Federal Trade Commission.

ACTION: Final rule amendment.

SUMMARY: This amendment to the Commission's rules provides that copies of minutes of open Commission meetings held under the Government in the Sunshine Act, as well as copies of all explanatory material provided to members of the public who attend open meetings, will be routinely available for public inspection and copying.

EFFECTIVE DATE: January 13, 1978.

FOR FURTHER INFORMATION CONTACT:

Barry R. Rubin, Office of General Counsel, Federal Trade Commission, Washington, D.C. 20580, 202-523-3865.

Accordingly, 16 CFR 4.9(b)(25) is revised to read as follows:

§ 4.9 Public records.

* * * * *

(b) * * *

(25) Summaries of or other explanatory materials relating to matters to be considered at open meetings made available pursuant to § 4.15(b)(3), and Commission minutes of open meetings held pursuant to § 4.15(b);

* * * * *

By direction of the Commission dated December 22, 1977.

CAROL M. THOMAS,
Secretary.

[FR Doc. 78-965 Filed 1-12-78; 8:45 am]

[4810-22]

Title 19—Customs Duties

CHAPTER I—U.S. CUSTOMS SERVICE, DEPARTMENT OF THE TREASURY

[T.D. 78-17]

PART 174—PROTESTS

Judicial Review of Denied Protests

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by setting forth the statutory right to judicial review of certain administrative decisions of Customs Officers. The right of judicial review is being restated in the regulations to ensure that all parties who are entitled to seek judicial review of administrative decisions are aware of their right to do so.

EFFECTIVE DATE: January 13, 1978.

FOR FURTHER INFORMATION CONTACT:

Terry Polino, Regulations and Legal Publications Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229, 202-566-8237.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Under sections 514 and 515 of the Tariff Act of 1930, as amended (19 U.S.C. 1514, 1515), and Part 174 of the Customs Regulations (19 CFR Part 174), a party dissatisfied with any of certain decisions made by a district director of Customs may obtain administrative review of that decision by filing a written protest with the district director who made the decision. Instead of having the review made by the district director, a party may seek further review of a protest and have the matter reviewed by a regional Commissioner of Customs or, in certain stated circumstances, by the Commissioner of Customs. In either event, the appropriate Customs officer must review the protest and either allow it or, if denied in whole or in part, mail a notice of the denial to the protesting party. The party may then contest the denial by bringing a civil action in the United States Customs Court in accordance with 28 U.S.C. 2632.

It has come to the attention of the Customs Service that occasionally a party may not be aware of its right to seek judicial review of a denial of a protest. To ensure that all parties are aware of this right, on June 17, 1977, the Customs Service published a notice in the FEDERAL REGISTER (42 FR 30961) announcing that it had adopted a new procedure whereby parties whose protests have been denied would be individually notified in writing of the right to seek judicial review at the same time they are given notice of the denial. It has been determined advisable to amend Part 174 of the Customs Regulations to set forth the statutory right to judicial review of the denial of protests.

This amendment will not affect the previously announced procedure. Customs will continue to notify each party individually of his right to seek judicial review of the denial of a protest. Setting forth the statutory right in the Customs Regulations, together with continuing the individual notification procedure, will ensure that all parties are aware of the right to seek judicial review of the denial of any protest.

Inasmuch as this amendment places no affirmative duty or burden on the public, notice and public procedure are unnecessary and good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553.

DRAFTING INFORMATION

The principal author of this amendment was Terry Polino, Regulations and Legal Publications Division of the Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices of the Customs Service participated in its development, both on matters of substance and style.

AMENDMENT TO THE REGULATIONS

Part 174 of the Customs Regulations (19 CFR Part 174) is amended by adding a new § 174.31 to read as follows:

§ 174.31 Judicial review of denial of protest.

Any person whose protest has been denied, in whole or in part, may contest the denial by filing a civil action in the United States Customs Court in accordance with 28 U.S.C. 2632 within 180 days after—

(a) The date of mailing of notice of denial, in whole or in part, of a protest, or

(b) The date a protest, for which accelerated disposition was requested, is deemed to have been denied in accordance with § 174.22(d).

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624).)

R. E. CHASEN,
Commissioner of Customs.

Approved: January 3, 1978.

BETTE B. ANDERSON,
Under Secretary of the Treasury.

[FR Doc. 78-982 Filed 1-12-78; 8:45 am]

[4110-07]

Title 20—Employees' Benefits

CHAPTER III—SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

[Reg. Nos. 4 and 16]

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950 ——)

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Substantial Gainful Activity

AGENCY: Social Security Administration, HEW.

ACTION: Final rule.

SUMMARY: These amendments increase the monetary amounts of the substantial gainful activity guidelines under Title II (Federal Old-Age, Survivors, and Disability Insurance Benefits) and Title XVI (Supplemental Security Income for the Aged, Blind, and Disabled) of the Social Security Act, to conform more closely to increases in earnings levels of workers in the national labor market. These earnings guidelines are evaluation measures used for determining, in the absence of evidence to the contrary, ability to engage in substantial gainful activity. Under the increased amounts, an individual's earnings from work activities averaging in excess of $230 per month beginning for the calendar year 1976 shall be deemed to demonstrate the ability to engage in substantial gainful activity. Earnings from work activities which average less than $150 a month beginning for the calendar year 1976 will not demonstrate that an employee is able to engage in substantial gainful activity. Under regulations in effect before these amendments, these amounts were $200 and $130, and these amounts will remain in effect for calendar years prior to 1976. However, in a Notice of Proposed Rulemaking being published in the FEDERAL REGISTER today, the Social Security Administration is proposing to increase the earnings guideline amounts again for the calendar years after 1976.

The systematic adjustment mechanism provision upon which future adjustments were proposed to be made is being withdrawn because of excessive program costs and the effects of Pub. L. 94-202, which makes the proposed method for computing the adjustment unworkable. This withdrawal will mean that the earnings guidelines will not be increased automatically in future years, as proposed in the Notice of Proposed Rulemaking which preceded this final regulation.

EFFECTIVE DATE: This amendment shall be effective on January 13, 1978.

FOR FURTHER INFORMATION CONTACT:

William J. Ziegler, Legal Assistant, Office of Policy and Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, Md. 21235, telephone 301-594-7415.

SUPPLEMENTARY INFORMATION: On February 18, 1976, there was published in the FEDERAL REGISTER (41 FR 7415) a Notice of Proposed Rulemaking with proposed amendments revising the substantial gainful activity monetary guidelines used for assessing work activity of disability claimants and beneficiaries under title II and title XVI of the Social Security Act. These proposed amendments to the regulations provided a mechanism for the systematic adjustment of the substantial gainful activity amounts in the earnings guidelines and also calculated the first monetary adjustment under this procedure. The initial adjustment, which was proposed to be effective back to January 1976, would increase the primary substantial gainful activity amount from $200 to $230 and the secondary substantial gainful activity amount from $130 to $150. Future increases in these earnings guidelines were also proposed to be based on the systematic adjustment mechanism.

Interested persons were given the opportunity to submit, within 30 days, data, views, or arguments with regard to the proposed changes. Public comments on the Notice of Proposed Rulemaking were received from only three sources. While all comments were favorable to increasing the monetary amounts of the substantial gainful activity guidelines, one correspondent questioned whether they were being raised high enough.

After due consideration of the comments received and other information which has become available after publication of the Notice of Proposed Rulemaking, the proposal for using the systematic adjustment mechanism for determining substantial gainful activity earnings guidelines is being withdrawn. The decision to not use the proposed systematic adjustment was made because Pub. L. 94-202 changes earnings reporting to the Social Security Administration from a quarterly basis to an annual basis, rendering the proposed adjustment mechanism unworkable, and because, if it were applied to the substantial gainful activity levels of $230 and $150 respectively for 1976, significant additional long-range cost would result. However, the monetary amounts of $230 and $150 announced as new substantial gainful activity guidelines for the calendar year 1976 in the Notice of Proposed Rule Making are being adopted.

The proposed systematic adjustment procedure was based on the rate of increase in average taxable wages reported to the Social Security Administration for the first calendar quarter of each year. Under this proposal, the substantial gainful activity earnings amounts would be determined by multiplying the substantial gainful activity earnings amounts in effect by the ratio of average taxable wages reported for the first quarter in one year to the average taxable wages reported for the first quarter of the previous base period. The first calculation under this formula resulted in a maximum substantial gainful activity monetary guideline amount of $230 for 1976 and required that future increases be adjusted on the basis of this $230 amount computed for 1976. Applying the formula to determine the 1977 substantial gainful activity amounts would have resulted in a maximum monetary guideline amount of $250 for that calendar year.

The office of the Actuary of the Social Security Administration indicated that the increased program costs which were anticipated from future adjustments under this systematic adjustment provision tied to $230 for base year 1976 would require an increase in social security taxes or a decrease in benefits. Recommending an increase in taxes to cover the additional costs is not now a viable alternative. Nor can benefits be reduced in other program areas in order to compensate for the increased cost that would result from implementation of the automatic adjustment mechanism with $230 for base year 1976. Therefore, the maximum substantial gainful activity amount of $230 for calendar year 1976 will not be used as a frame of reference for future actuarial estimates of cost or as a base figure for making projections for increasing the substantial gainful activity guideline amounts in the future.

Moreover, the $230 figure does not maintain the historical relationship to earnings as existed with prior substantial gainful activity amounts. The $230 amount maintains the same relationship to earnings as did the current maximum substantial gainful activity amount of $200, which became effective on January 1974, but for actuarial purposes the relationship must be maintained with the maximum substantial gainful activity amounts which were in effect prior to January 1974; i.e., $125 effective July 1966, and $140 effective January 1968. The resulting equivalent maximum substantial gainful activity amounts would be $220 for 1976 and $240 for 1977. However, the maximum substantial gainful activity amount can be increased to $230 for 1976, at negligible cost, as long as the increase for 1977 is held to $240. This is so because actuarial estimates for future years must be based on the $240 amount for 1977, rather than $230 amount for 1976; this will maintain the relationship to earnings which has existed since July 1966.

Since the public has been promised a higher substantial gainful activity guideline amount of $230 for 1976, the Social Security Administration is promulgating these final regulations to provide for this guideline amount beginning for the calendar year 1976. However, the systematic adjustment provision must be withdrawn; otherwise, this substantial gainful activity guideline amount would under the formula be increased automatically to $250 for calendar year 1977. In order to make an adjustment for the excess of this substantial gainful activity guideline amount of $230 for calendar year 1976 over the actuarially correct estimated amount of $220 for that year, the Social Security Administration is proposing to limit the 1977 maximum substantial gainful activity guideline amount to $240.

Also, the systematic adjustment of substantial gainful activity guideline amounts under the Notice of Proposed Rulemaking, published in the FEDERAL REGISTER on February 18, 1976 (41 FR 7415), is based on the rate of increase in average taxable wages and salaries of covered employees as reported to the Social Security Administration by employers for the first calendar quarter of each year. Under the provisions of Pub. L. 94-202, enacted January 2, 1976, the Social Security Administration will no longer receive employers' quarterly wage reports. The Social Security Administration will rely upon annual reports of earnings. The first annual reports to be processed by the Social Security Administration are expected to be for wages paid in 1978. This change from quarterly to annual reporting of earnings makes the proposed version of the systematic adjustment mechanism inoperative.

Although the automatic adjustment feature is being withdrawn, the Social Security Administration is studying the feasibility of introducing another systematic adjustment concept with a formula which will be consistent with the actuarial integrity of the programs. The systematic adjustment concept under consideration will also be adapted to the new system of annual reporting of earnings provided by Pub. L. 94-202.

Under these new amendments, earnings from work activities by an individual averaging in excess of $230 a month beginning for calendar year 1976 will be considered sufficient earnings to demonstrate an ability to engage in substantial gainful work activity, unless there is other evidence to establish that the individual does not have such ability. Under regulations in effect prior to these amendments, this earnings guideline amount was $200. The $200 amount will remain in effect for evaluating earnings in calendar years prior to 1976.

Earnings from work activities by an employee which average less than $150 a month beginning for calendar year 1976 will be considered insufficient earnings to demonstrate that the individual is able to engage in substantial gainful work activity in absence of evidence to the contrary. This earnings guideline monetary amount is being increased from $130, which was in effect before these amendments. The $130 amount will continue to apply in evaluating earnings in calendar years prior to 1976.

Where an individual's earnings from work activities average between $150 and $230 a month beginning for calendar year 1976, other facts and circumstances relating to the person's work and his medical restrictions will be evaluated together with the amount of his earnings in determining whether or not such individual is able to engage in substantial gainful work activity. As presently in effect, these amounts will remain $130 and $200 for evaluating earnings in calendar years prior to 1976.

The new higher earnings amounts will apply in the adjudication of any disability claim involving earnings by a claimant on or after January 1, 1976. Any claim involving earnings on or after that date will be considered or reopened on the basis of those higher amounts as appropriate.

Sections 404.1534 and 416.934 of Title 20 CFR Parts 404 and 416 respectively are being amended to reflect these new earnings guideline amounts.

In addition, in a Notice of Proposed Rulemaking, which is also being published in the FEDERAL REGISTER today, we are proposing to raise these amounts again, to $240 and $160 respectively for calendar years after 1976.

After due consideration of the comments received and other information which has become available, the proposed amendments pertaining to the systematic adjustment provisions are withdrawn and the amendments establishing new substantial gainful activity guideline amounts beginning for calendar year 1976 are hereby adopted as set forth below.

(Secs. 205, 223, 1102, 1614, 1631, Social Security Act, as amended; 53 Stat. 1368, as amended, 70 Stat. 815, as amended, 49 Stat. 647, as amended, 86 Stat. 1471, 1475, as amended; (42 U.S.C. 405, 423, 1302, 1382c, 1383))

(Catalog of Federal Domestic Assistance Program No. 13.802, Disability Insurance; No. 13.807, Supplemental Security Income Program)

NOTE.—The Social Security Administration has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107.

Dated: October 21, 1977.

J. B. CARDWELL,
Commissioner of Social Security.

Approved: January 3, 1978.

JOSEPH A. CALIFANO, Jr.,
Secretary of Health, Education, and Welfare.

Chapter III of Title 20 of the Code of Federal Regulations is amended as follows:

1. Section 404.1534 is amended by revising paragraphs (b), (c), and (d) to read as follows:

§ 404.1534 Evaluation of earnings from work.

* * * * *

(b) *Earnings sufficient to demonstrate an ability to engage in substantial gainful activity.* Unless there is evidence that an individual's work activities establish that the individual does not have the ability to engage in substantial gainful activity under the criteria in §§ 404.1532 and 404.1533 and paragraph (a) of this section, an individual's earnings from work activities shall be deemed to demonstrate ability to engage in substantial gainful activity if:

(1) In calendar years prior to 1976, earnings average more than $200 a month; or

(2) Beginning in calendar year 1976, earnings average more than $230 a month.

(c) *Earnings insufficient to demonstrate an ability to engage in substantial gainful activity.* Unless an evaluation of the work performed by an individual (see § 404.1532) establishes that the person is able to engage in substantial gainful activity, regardless of the amount of average monthly earnings, an individual's earnings from work activities as an employee shall not demonstrate that the person is able to engage in substantial gainful activity if:

(1) In calendar years prior to 1976, earnings average less than $130 a month; or

(2) Beginning in calendar year 1976, earnings average less than $150 a month.

(d) *Earnings neither high enough or low enough to determine whether an individual is able to engage in substantial gainful activity.* (1) Consideration will be given to the amount of an individual's earnings together with other circumstances relating to the work activities (see §§ 404.1532 and 404.1533), the medical evidence relating to the person's impairment or impairments, and other factors (see § 404.1502) to determine whether the individual is able to engage in substantial gainful activity if:

(i) In calendar years prior to 1976, earnings from work activities average between $130 and $200 a month; or

(ii) Beginning in calendar year 1976, earnings from work activities average between $150 and $230 a month.

(2) However, such activities and such earnings ordinarily would not establish the ability to engage in substantial gainful activity in the case of an individual working in a sheltered workshop (such as a workshop especially organized for disabled persons) or comparable facility, whose activities are limited by his or her impairment if:

(i) In calendar years prior to 1976, earnings average $200 a month or less; or

(ii) Beginning in calendar year 1976, earnings average $230 a month or less.

* * * * *

2. Section 416.934 is amended by revising paragraphs (b), (c), and (d) to read as follows:

§ 416.934 Evaluation of earnings from work.

* * * * *

(b) *Earnings sufficient to demonstrate an ability to engage in substantial gainful activity.* Unless there is evidence that an individual's work activities establish that the individual does not have the ability to engage in substantial gainful activity under the criteria §§ 416.932 and 416.933 and paragraph (a) of this section, an individual's earnings from work activities shall be deemed to demonstrate ability to engage in substantial gainful activity if:

(1) In calendar years prior to 1976, earnings averaged more than $200 a month; or

(2) Beginning in calendar year 1976, earnings averaged more than $230 a month.

(c) *Earnings insufficient to demonstrate an ability to engage in substantial gainful activity.* Unless an evaluation of the work performed by an individual (see § 416.932) establishes that the person is able to engage in substantial gainful activity, regardless of the amount of average monthly earnings, an individual's earnings from work activities as an employee shall not demonstrate that the person is able to engage in substantial gainful activity if:

(1) In calendar years prior to 1976, earnings averaged less than $130 a month; or

(2)Beginning in calendar year 1976, earnings averaged less than $150 a month.

(d) *Earnings neither high enough nor low enough to determine whether an individual is able to engage in substantial gainful activity.*

(1) Consideration will be given to the amount of an individual's earnings together with other circumstances relating to the work activities (see §§ 416.932 and 416.933), the medical evidence relating to the person's impairment or impairments, and other factors (see § 416.902) to determine whether the individual is able to engage in substantial gainful activity if:

(i) In calendar years prior to 1976, earnings from work activities averaged between $130 and $200 a month; or

(ii) Beginning in calendar year 1976, earnings from work activities average between $150 and $230 a month.

(2) However, such activities and such earnings ordinarily would not establish the ability to engage in substantial gainful activity in the case of an individual working in a sheltered workshop (such as a workshop especially organized for disabled persons) or comparable facility, whose activities are limited by his or her impairment if:

(i) In calendar years prior to 1976, earnings averaged $200 a month, or less; or

(ii) Beginning in calendar year 1976, earnings average $230 a month or less.

* * * * *

[FR Doc. 78-835 Filed 1-11-78; 8:45 am]

[1505-01]

Title 21—Food and Drugs

CHAPTER I—FOOD AND DRUG ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SUBCHAPTER A—GENERAL

SUBCHAPTER H—MEDICAL DEVICES

[Docket No. 76N-0324]

PART 25—ENVIRONMENTAL IMPACT CONSIDERATIONS

PART 813—INVESTIGATIONAL EXEMPTIONS FOR INTRAOCULAR LENSES

Intraocular Lenses; Investigational Device Exemption Requirements

Correction

In FR Doc. 77-32258, appearing at page 58874 in the issue for Friday, November 11, 1977:

1. On page 58889, third column, sixth line from the top, the word "reviewing" should read "revising".

2. On page 58892, first column, in (a)(6) of § 813.25, "Indentification" should read "Identification".

3. On page 58893, middle column, fourth line of (b) in § 813.35, "disapproved" should read "disapproval".

4. On page 58893, third column, the paragraph numbered "(12)" should be "(2)".

5. On page 58899, first column, in the fourth line of (a) of § 813.150, the "." after "Administration" should be ",".

6. On page 58899, third column, in the twelfth line of (c) in § 813.155, "deports" should read "reports".

[1505-01]

SUBCHAPTER B—FOOD FOR HUMAN CONSUMPTION

[Recodification Docket No. 15; Docket No. 76N-0501]

Reorganization and Republication

Correction

In FR Doc. 77-31096, appearing at page 56728 in the issue for Friday, October 28, 1977:

1. On page 56728, middle column, in the last line of 2a, "NA" should read "NA"., and in the second line of 3, the number "121.060" should read "121.1060".

[1505-01]

[Docket No. 76F-0461]

PART 177—INDIRECT FOOD ADDITIVES: POLYMERS

Styrene Block Polymers

Correction

In FR Doc. 77-25093 appearing in the issue of Tuesday, August 30, 1977 on page 43621, second column 3d paragraph, the 5th line should read, "for the safe use of styrene block polymers".

[1505-01]

[Docket No. 76F-0342]

PART 178—INDIRECT FOOD ADDITIVES: ADJUVANTS, PRODUCTION AIDS, AND SANITIZERS

Subpart B—Substances Utilized To Control the Growth of Microorganisms

Correction

In FR Doc. 77-21241 appearing in the issue of Tuesday, July 26, 1977 on page 37974 in the middle column § 178.1010(b)(16), the last line should read, "hydroxypoly (oxyethylene) having an av-[erage] * * *".

[1505-01]

[Docket No. 76F-0370]

PART 178—INDIRECT FOOD ADDITIVES: ADJUVANTS, PRODUCTION AIDS, AND SANITIZERS

Antioxidants and/or Stabilizers

Correction

In FR Doc. 77-33220 appearing at page 59496 in the issue for Friday, November 18, 1977, first column, in the second line under "*Substances*" of § 178.2010(b), "P-cresol" should read "*p*-cresol".

[1505-01]

SUBCHAPTER D—DRUGS FOR HUMAN USE

[Docket No. 77N-0062; DESI 10106]

PART 444—OLIGOSACCHARIDE ANTIBIOTIC DRUGS

Certain Antibiotic-Containing Ophthalmic Combination Drugs; Effective Date of Order Revoking Provisions for Certification

Correction

In FR Doc. 77-21245 appearing in the issue of Tuesday, July 26, 1977 on page 37974, on page 37975 in paragraph, "SUPPLEMENTARY INFORMATION", the 5th line should read, "provisions of § 148i.15 (21 CFR § 148i.15)".

[4160-03]

[Docket No. 77N-0420]

PART 514—NEW ANIMAL DRUG APPLICATIONS

Notice of Reinstatement

AGENCY: Food and Drug Administration.

ACTION: Reinstatement.

SUMMARY: This document amends the animal drug regulations to reinstate a provision regarding failure to file a written appearance that was inadvertently deleted when the administrative practices and procedures final regulations were issued.

EFFECTIVE DATE: January 13, 1978.

FOR FURTHER INFORMATION CONTACT:

Robert S. Brigham, Bureau of Veterinary Medicine (HFV-238), Food and Drug Administration, Department of Health, Education, and Welfare, 5600 Fishers Lane, Rockville, Md. 20857, 301-443-6243.

SUPPLEMENTARY INFORMATION: In the FEDERAL REGISTER of January 25, 1977 (42 FR 4680), the Food and Drug Administration issued final regulations on general provisions for its administrative practices and procedures. A conforming amendment to the animal drug regulations inadvertently deleted 21 CFR 514.201 Failure to file an appearance and codified a hearing procedure provision at 21 CFR 514.201.

This document restores the failure to file an appearance provision by incorporating it into an existing regulation (21 CFR 514.200 Contents of notice of opportunity for hearing).

Since this document merely reinstates a provision that was inadvertently deleted, notice and public procedure and delayed effective date are not required.

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 701(a), 52 Stat. 1055 (21 U.S.C. 371(a))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.1), Part 514 is amended in § 514.200 by redesignating paragraph (b) as (c), and paragraph (c) as (d), and adding new paragraph (b) to read as follows:

§ 514.200 Contents of notice of opportunity for a hearing.

* * * * *

(b) If the applicant fails to file a written appearance in answer to the notice of opportunity for hearing, his failure will be construed as an election not to avail himself of the opportunity for the hearing, and the Commissioner without further notice may enter a final order.

* * * * *

Effective date: This amendment shall be effective January 13, 1978.

(Sec. 701(a), 52 Stat. 1055 (21 U.S.C. 371(a)).)

Dated: January 9, 1978.

JOSEPH P. HILE,
Associate Commissioner for Compliance.

[FR Doc. 78-941 Filed 1-12-78; 8:45 am]

[1505-01]

SUBCHAPTER E—ANIMAL DRUGS, FEEDS, AND RELATED PRODUCTS

PART 520—ORAL DOSAGE FROM NEW ANIMAL DRUGS NOT SUBJECT TO CERTIFICATION

Haloxon Drench

Correction

FR Doc. 77-27253 (42 FR 47192, September 20, 1977), was corrected on page 61255 of the issue for Friday, December 2, 1977. In the fifth line of that correction, "141.5 grains" should read "141.5 grams".

[4110-03]

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS NOT SUBJECT TO CERTIFICATION

Gentamicin Sulfate Injection

AGENCY: Federal Insurance Administration.

ACTION: Final rule.

SUMMARY: The animal drug regulations are amended to reflect approval of a new animal drug application (NADA) submitted by the Schering Corp. for the subcutaneous use of a new animal drug for preventing early mortality in day-old chickens.

EFFECTIVE DATE: January 13, 1978.