SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34-15776]

Delegation of Authority to the Director of the Division Market Regulation

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is amending its rules to delegate authority to the Director of the Division of Market Regulation to approve amendments to plans filed by self-regulatory organizations to implement the FOCUS reporting system.

EFFECTIVE DATE: May 4, 1979.

FOR FURTHER INFORMATION CONTACT: Elizabeth S. York, Esq., Office of Financial Responsibility and Securities Processing Regulations, Division of Market Regulations, Securities and Exchange Commission, 500 North Capital Street, Washington, D.C. 20549, (202) 376-8137.

SUPPLEMENTARY INFORMATION: Section 17(a) of the Securities Exchange Act of 1934 (the "Act") authorizes the Commission by rule to prescribe, among other things, such reports as are necessary or appropriate in the public interest, for the protection of investors, or are otherwise in furtherance of the purposes of the Act. Rules 17a-5 (17 CFR 240.17a-5) and 17a-10 (17 CFR 240.17a-10) adopted thereunder prescribe that every registered broker and dealer shall file specified periodic reports on Form X-17A-5 (17 CFR 249.617) with the Commission unless the Commission has approved a plan, submitted by the self-regulatory organization which is the designated examining authority for the broker-dealer, for the collection of such reports.[1] The Commission has approved such a plan for each national securities exchange and registered securities association.

From time to time, those plans require amendment, among other reasons, to conform to revisions in the reporting structure implemented under Rules 17a-5 and 17a-10 and to establish parameters for special reports. In order to expedite action on such filings where they do not necessitate consideration by the Commission itself, the Commission is amending its Rules of General Organization Rule 30-3 (17 CFR 200.30-3) to delegate to the Director of the Division of Market Regulation the authority to approve amendments to these plans.

[1] Rule 17d-1 (17 CFR 240.17d-1).

The Commission finds, in accordance with 5 U.S.C. 533(b)(A) and 5 U.S.C. 533(d) of the Administrative Procedure Act, that the foregoing action relates solely to a rule of agency organization, procedure, or practice and does not relate to a substantive rule. Accordingly, the foregoing action becomes effective immediately. In addition, the Commission finds that there is not burden on competition imposed by the foregoing action.

Part 200 of Title 17 of the Code of Federal Regulations is amended by adding paragraph (a)(30) to § 200.30-3, as follows:

§ 200.30-3 Delegation of Authority to Director of Division of Market Regulation.

* * * * *

(a) * * *

(30) Pursuant to Section 17(a) of the Act, 15 U.S.C. 78q, to approve amendments to the plans which are consistent with the reporting structure of Rules 17a-5(a)(4) and 17a-10(b) filed by self-regulatory organizations pursuant to Rules 17a-5(a)(4) and 17a-10(b).

(Sec. 2, Pub. L. 94-29, 89 Stat. 97 (15 U.S.C. 78b);
(Sec. 25, Pub. L. 94-29, 89 Stat. 163 (15 U.S.C. 78d-1);
(Sec. 16, Pub. L. 94-29, 89 Stat. 146 (15 U.S.C. 78s);
(Sec. 18, Pub. L. 94-29, 89 Stat. 155 (15 U.S.C. 78w)).

* * * * *

By the Commission.

George A. Fitzsimmons,

Secretary.

May 4, 1979.

[FR Doc. 79-15901 Filed 5-21-79; 8:45]

BILLING CODE 8010-01-M

17 CFR Part 270

[Release No. IC-10690]

Unit Investment Trust Start-up Exemptions

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Securities and Exchange Commission is adopting a rulemaking which provides certain unit investment trusts with "start-up" exemptions from requirements of the Investment Company Act of 1940 pertaining to minimum net worth, frequency of capital gains distributions, and forward pricing. This rulemaking will obviate the need for an individual investment company to seek exemptive applications under circumstances in which the Commission has granted a number of orders.

EFFECTIVE DATE: May 15, 1979.

FOR FURTHER INFORMATION CONTACT: Mark J. Mackey, Esq., Investment Company Act Study Group, Division of Investment Management, Securities and Exchange Commission, 500 N. Capitol Street, Washington, D.C. 20549, (202) 755-1547.

SUPPLEMENTARY INFORMATION: The Commission today adopted rule 14a-3 (17 CFR 270.14a-3), and amended rules 19b-1 (17 CFR 270.19b-1), and 22c-1 (17 CFR 270.22c-1) under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) ("Act"). This rulemaking will provide certain unit investment trusts with "start-up" exemptions from the Act's requirements pertaining to minimum net worth,[1] frequency of capital gains distribution,[2] and forward pricing.[3]

In response to its request for comments regarding the rulemaking set forth in Investment Company Act Release No. 10545 (Jan. 8, 1979, 44 FR 3376, Jan. 16, 1979), the Commission received and considered 14 letters. All comments received appeared to favor the Commission's adopting the proposed rulemaking; but, with a single exception, each commentator suggested modifications to the proposals. As a result of considering these comments, the Commission has decided to adopt, with minor modifications, that part of the rulemaking which relates solely to unit investment trusts, and to republish today for public comment a revision of that part of the rulemaking which relates to the pricing of investment company shares generally.[4]

Trust Start-up Exemptions

After considering the comments received, the Commission has determined to include under the exemptions certain unit investment trusts which could not have relied on the rulemaking as proposed.

The proposed rulemaking would have provided exemptions only to those unit investment trusts which engaged exclusively in the business of investing in specified trust debt securities, generally including corporate and

[1] Section 14(a) of the Act (15 U.S.C. 80a-14(a)) generally requires an investment company to have an initial net worth of at least $100,000.

[2] Rule 19b-1 under the Act generally limits distributions of capital gains by an investment company to once in any taxable year.

[3] Rule 22c-1(a) under the Act requires that an investment company sell, redeem or repurchase its redeemable securities only at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

[4] Investment Company Act Release No. 10691, May 15, 1979.

municipal bonds, government securities, and certain units of a previously issued series of the trust. In response to a comment, the Commission has determined that the rulemaking should apply additionally to other unit investment trusts which invest in securities which are issued by a corporation, and which have their interest or dividend rate fixed at the time they are issued since such securities share many of the characteristics of income oriented investments in which such unmanaged trusts typically invest. Because these securities would include certain issues of preferred stock,[5] the term "trust debt securities" which was used in the proposed rulemaking is replaced by the term "eligible trust securities."

The Commission notes that, from time-to-time in the future, trusts may be organized to invest in new classes of portfolio securities that theretofore had not been considered "eligible trust securities" for purposes of satisfying this package of trust start-up exemptive rules. Consequently, the Commission has instructed the Division of Investment Management to monitor developments among unit investment trusts, especially those providing new types of portfolio investments. When it has had sufficient experience with trusts offering any new portfolio investments the Division will consider the propriety of recommending to the Commission that such trusts be included under the start-up exemptive rules.

Layering of Fees

In its release, the Commission specifically requested comments concerning the practice of depositing units of a previously issued series of a trust in the portfolio of a new series of the same trust, which may result in the "layering" of trustee's and evaluator's fees. It requested comment on any economic impact of such "layering" and any steps which would be necessary and appropriate to alleviate any unfairness resulting from that practice.

Only one commentator addressed this concern and asserted that any "layering" of fees properly reflects the services being provided. Based on this limited response, the Commission has determined for the time being not to prohibit such practice *per se*. However, it notes that important disclosure obligations may arise whenever "layering" of fees exists.

Final Rulemaking

Rule 14a–3

Rule 14a–3 provides that, subject to certain conditions, a registered trust engaged exclusively in the business of investing in "eligible trust securities" ("Trust") and any principal underwriter for the Trust, is exempt from section 14(a) of the Act with respect to a public offering of Trust units. The conditions which must be met in order for the exemption offered by the rule to apply are as follows:

(1) At the commencement of the public offering, the Trust holds at least $100,000 principal amount of "eligible trust securities;"

(2) If, within ninety days from the time that the Trust's registration statement has become effective under the Securities Act of 1933 the net worth of the Trust declines to less than $100,000 or the Trust is terminated, the sponsor for the Trust must (i) refund, on demand and without deduction, all sales charges to any unitholders who purchased Trust units from the sponsor (or from any underwriter or dealer participating in the distribution), and (ii) liquidate the "eligible trust securities" held by the Trust and distribute the proceeds thereof to the unitholders of the Trust;

(3) The sponsor must instruct the trustee when the "eligible trust securities" are deposited in the Trust that, in the event that redemptions by the sponsor or underwriter (if any) of units constituting a part of the unsold units results in the Trust's having a net worth of less than 40 percent of the principal amount of the "eligible trust securities" initially deposited in the Trust, (i) the trustee shall terminate the Trust and distribute the assets to the unitholders of the Trust, and (ii) the sponsor for the Trust must refund, on demand and without deduction, all sales charges to any unitholder who purchased Trust units from the sponsor or from any underwriter or dealer participating in the distribution.

The rule defines the term "eligible trust securities" to mean:[6]

(1) Securities (other than convertible securities) which are issued by a corporation and which have their interest or dividend rate fixed at the time they are issued;

(2) Interest bearing obligations issued by a state, or by any agency, instrumentality, authority or political subdivision thereof;

(3) Government securities;[7] and

(4) Units of a previously issued series of the Trust, provided that: (i) The aggregate principal amount of units of existing series so deposited will not exceed 10% of the aggregate principal amount of the portfolio of the new series; (ii) the aggregate principal amount of units of any particular existing series so deposited will not exceed 5% of the aggregate principal amount of the portfolio of the new series; (iii) no units will be so deposited which do not substantially meet investment quality criteria at least as high as those applicable to the new series in which such units are deposited; (iv) the value of the "eligible trust securities" underlying units of an existing series deposited in a new series will not, by reason of maturity of such securities according to their terms within ten years following the date of deposit, be reduced sufficiently for such existing series to be voluntarily terminated;[8] (v) units of existing series so deposited will constitute units purchased by the sponsor as market maker and not remaining unsold units from the original distribution of such units; and (vi) the sponsor will deposit units of existing series in the new series without a sales charge.

Amended Rule 19b–1

Paragraphs (c) and (d) of amended rule 19b–1[9] allows a Trust engaged exclusively in the business of investing in "eligible trust securities" (as defined in proposed rule 14a–3(b)) to make more than one capital gains distribution in any one taxable year, provided that:

(1) The capital gain distribution is a result of (i) an issuer's calling or redeeming the "eligible trust security" held by the Trust, (ii) the sale of an "eligible trust security" to provide funds for redemption of Trust units when the amount received by the Trust for such sale exceeds the amount required to satisfy the redemption distribution, (iii) sale of an "eligible trust security" to maintain qualification of the Trust as a

[5] Preferred stock with a convertible feature would not be considered to have its interest or dividend rate fixed at the time it is issued. Moreover, if the preferred security may be converted only upon the volition of the securityholder, the Commission believes that it would be inappropriate for a trust to pay a premium which represents the convertibility feature when a trust lacks any management which could exercise that convertibility option.

[6] To avoid ambiguity, the word "mean" has been substituted for the word "include," which was used in the proposed rulemaking. This substitution, however, is not intended to prevent the Division, in appropriate cases, from specifying by no-action letter whether particular securities are within the scope of the term "eligible trust securities."

[7] The term "government security" is defined in section 2(a)(16) of the Act (15 U.S.C. 80a–2(a)(16)).

[8] The term "voluntarily terminated" refers to termination of an existing trust (whose units are deposited in a subsequent series) resulting when a specified percentage of that trust's remaining securities matures. See, e.g., Cardinal Tax Exempt Bond Fund (Mar. 14, 1977) and Municipal Investment Trust Fund (Oct. 25, 1975).

[9] The amendments to rule 19b–1 do not change paragraphs (a) and (b) of existing rule 19b–1. Paragraph (c) of the existing rule is relettered paragraph (e), but otherwise remains unchanged.

"regulated investment company" under Section 851 of the Internal Revenue Code, (iv) regular distributions of principal and prepayment of principal on "eligible trust securities," or (v) sale of an "eligible trust security" to maintain the investment stability of the Trust; and

(2) Capital gains distributions are clearly described as such in a report to the unitholders which accompanies each such distribution.

A sale made in order to maintain the "investment stability" of the Trust is defined by rule 19b–1(d) to mean a sale made to prevent deterioration in the value of the "eligible trust securities" held by the Trust when one or more of the following factors exists: (1) A default in the payment of principal or interest on an "eligible trust security," (2) an action involving the issuer of an "eligible trust security," which adversely affects the ability of such issuer to continue payment of principal or interest on an "eligible trust security," or (3) an adverse change in the market, revenue, or credit factors which adversely affects the ability of such issuer to continue payent of principal or interest on its "eligible trust securities."

Amended Rule 22c–1

Amended Rule 22c–1 provides, in pertinent part, that a sponsor of a Trust engaged in the business of investing in "eligible trust securities" may sell and repurchase Trust units in the secondary market at a price based on the offering side evaluation of the "eligible trust securities" in the Trust portfolio, determined on the last business day of each week, effective for all sales made during the following week, if on the days that such sales or repurchases are made the sponsor receives a letter from a qualified Evaluator [10] stating, in its opinion, that:

(1) In the case of repurchases, the current bid price is not higher than the offering side evaluation, computed on the last business day of the previous week, and

(2) In the case of resales, the offering side evaluation, computed as of the last business day of the previous week, is not more than one-half of one percent ($5.00 on a unit representing $1,000 principal amount of "eligible trust securities") greater than the current offering price.

Authority, Certain Findings, Effective Date

The Commission adopts new rule 14a–3 pursuant to the provisions of sections 6(c) (15 U.S.C. 80a–6(c)) and 38(a) (15 U.S.C. 80a–37(a)) of the Act. The Commission adopts amended rule 19(b) pursuant to the provisions of section 6(c), 19(b) (15 U.S.C. 80a–19(b)) and 38(a) of the Act. The Commission adopts amended rule 22c–1 pursuant to the provisions of sections 6(c), 22(c) (15 U.S.C. 80a–22(c)) and 38(a) of the Act.

Because the rulemaking is exemptive in nature, the foregoing adoptions become effective immediately.

Text of Adopted and Amended Rules

I. Part 270 of Chapter II of Title 17 of the Code of Federal Regulations is amended by adding § 270.14a–3 as follows:

§ 270.14a–3 Exemption from section 14(a) of the Act for certain registered unit investment trusts and their principal underwriters.

(a) A registered unit investment trust (hereinafter referred to as the "Trust") engaged exclusively in the business of investing in eligible trust securities, and any principal underwriter for the Trust, shall be exempt from section 14(a) of the Act with respect to a public offering of Trust units: *Provided*, That:

(1) At the commencement of such offering the Trust holds at least $100,000 principal amount of eligible trust securities (or delivery statements relating to contracts for the purchase of any such securities which, together with cash or an irrevocable letter of credit issued by a bank in the amount required for their purchase, are held by the Trust for purchase of the securities);

(2) If, within ninety days from the time that the Trust's registration statement has become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.) the net worth of the Trust declines to less than $100,000 or the Trust is terminated, the sponsor for the Trust shall—

(i) Refund, on demand and without deduction, all sales charges to any unitholders who purchased Trust units from the sponsor (or from any underwriter or dealer participating in the distribution), and

(ii) Liquidate the trust securities held by the Trust and distribute the proceeds thereof to the unitholders of the Trust;

(3) The sponsor instructs the trustee when the eligible trust securities are deposited in the Trust that, in the event that redemptions by the sponsor or any underwriter of units constituting a part of the unsold units results in the Trust having a net worth of less than 40 percent of the principal amount of the eligible trust securities (or delivery statements relating to contracts for the purchase of any such securities which, together with cash or an irrevocable letter of credit issued by a bank in the amount required for their purchase, are held by the Trust for purchase of the securities) initially deposited in the Trust—

(i) The trustee shall terminate the Trust and distribute the assets thereof to the unitholders of the Trust, and

(ii) The sponsor for the Trust shall refund, on demand and without deduction, all sales charges to any unitholder who purchased Trust units from the sponsor or from any underwriter or dealer participating in the distribution.

(b) For the purposes of determining the availability of the exemption provided by the foregoing subsection, the term "eligible trust securities" shall mean:

(1) Securities (other than convertible securities) which are issued by a corporation and which have their interest or dividend rate fixed at the time they are issued;

(2) Interest bearing obligations issued by a state, or by any agency, instrumentality, authority or political subdivision thereof;

(3) Government securities; and

(4) Units of a previously issued series of the Trust: *Provided*, That:

(i) The aggregate principal amount of units of existing series so deposited shall not exceed 10% of the aggregate principal amount of the portfolio of the new series;

(ii) The aggregate principal amount of units of any particular existing series so deposited shall not exceed 5% of the aggregate principal amount of the portfolio of the new series;

(iii) No units shall be so deposited which do not substantially meet investment quality criteria at least as high as those applicable to the new series in which such units are deposited;

(iv) The value of the eligible trust securities underlying units of an existing series deposited in a new series shall not, by reason of maturity of such securities according to their terms within ten years following the date of deposit, be reduced sufficiently for such existing series to be voluntarily terminated;

[10] The rule defines a "qualified Evaluator" to mean any Evaluator which represents it is in a position to determine, on the basis of an informal evaluation of the "eligible trust securities" held in the Trust's portfolio, whether (i) the current bid price is higher than the offering side evaluation, computed on the last business day of the previous week, and (ii) the offering side evaluation, computed as of the last business day of the previous week, is more than one-half of one percent ($5.00 on a unit representing $1,000 principal amount of "eligible trust securities") greater than the current offering price.

(v) Units of existing series so deposited shall constitute units purchased by the sponsor as market maker and not remaining unsold units from the original distribution of such units; and

(vi) the sponsor shall deposit units of existing series in the new series without a sales charge.

II. Part 270 of Chapter II of Title 17 of the Code of Federal Regulations is amended by redesignating existing paragraph (c) of § 270.19b–1 as (e) and adding new paragraphs (c) and (d) as follows:

§ 270.19b–1 Frequency of distribution of capital gains.

* * * * *

(c) The provisions of this rule shall not apply to a unit investment trust (hereinafter referred to as the "Trust") engaged exclusively in the business of investing in eligible trust securities (as defined in Rule 14a–3(b) (17 CFR 270.14a–3(b)) under this Act); *Provided,* That:

(1) The capital gain distribution is a result of—

(i) An issuer's calling or redeeming an eligible trust debt security held by the Trust,

(ii) The sale of an eligible trust security by the Trust to provide funds for redemption of Trust units when the amount received by the Trust for such sale exceeds the amount required to satisfy the redemption distribution,

(iii) The sale of an eligible trust security to maintain qualification of the Trust as a "regulated investment company" under Section 851 of the Internal Revenue Code of 1954, as amended,

(iv) Regular distibutions of principal and prepayment of principal on eligible trust securities, or

(v) The sale of an eligible trust security in order to maintain the investment stability of the Trust; and

(2) Capital gains distributions are clearly described as such in a report to the unitholder which accompanies each such distribution.

(d) For purposes of paragraph (c) of this section, sales made to maintain the investment stability of the Trust means sales made to prevent deterioration of the value of the eligible trust securities held in the Trust portfolio when one or more of the following factors exist:

(1) A default in the payment of principal or interest on an eligible trust security;

(2) An action involving the issuer of an eligible trust security which adversely affects the ability of such issuer to continue payment of principal or interest on its eligible trust securities; or

(3) A change in market, revenue or credit factors which adversely affects the ability of such issuer to continue payment of principal or interest on its eligible trust securities.

[Existing paragraph (c) is redesignated paragraph (e).]

III. Part 270 of Chapter II of Title 17 of the Code of Federal Regulations is amended by amending paragraphs (a) and (b) of § 270.22c–1 as follows:

§ 270.22c–1 Pricing of redeemable securities for distribution, redemption and repurchase.

(a) No registered investment company issuing any redeemable security, no person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and no principal underwriter of, or dealer in, any such security shall sell, redeem, or repurchase any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security: *Provided,* That:

(1) This paragraph shall not prevent a sponsor of a unit investment trust (hereinafter referred to as the "Trust") engaged exclusively in the business of investing in eligible trust securities (as defined in Rule 14a–3(b) (17 CFR 270.14a–3(b))) from selling or repurchasing Trust units in a secondary market at a price based on the offering side evaluation of the eligible trust securities in the Trust's portfolio, determined at any time on the last business day of each week, effective for all sales made during the following week, if on the days that such sales or repurchases are made the sponsor receives a letter from a qualified evaluator stating, in its opinion, that:

(i) In the case of repurchases, the current bid price is not higher than the offering side evaluation, computed on the last business day of the previous week; and

(ii) In the case of resales, the offering side evaluation, computed as of the last business day of the previous week, is not more than one-half of one percent ($5.00 on a unit representing $1,000 principal amount of eligible trust securities) greater than the current offering price.

(b) For the purposes of this section, (1) the current net asset value of any such security shall be that computed on each day during which the New York Stock Exchange is open for trading, not less frequently than once daily as of the time of the close of trading on such Exchange, and (2) a "qualified evaluator" shall mean any evaluator which represents it is in a position to determine, on the basis of an informal evaluation of the eligible trust securities held in the Trust's portfolio, whether—

(i) The current bid price is higher than the offering side evaluation, computed on the last business day of the previous week, and

(ii) The offering side evaluation, computed as of the last business day of the previous week, is more than one-half of one percent ($5.00 on a unit representing $1,000 principal amount of eligible trust securities) greater than the current offering price.

By the Commission.

George A. Fitzsimmons,

Secretary.

May 15, 1979.

[FR Doc. 79–15871 Filed 5–21–79; 8:45 am]

BILLING CODE 8010–01–M

TENNESSEE VALLEY AUTHORITY

18 CFR Part 308

Adoption of New Part To Implement the Contract Disputes Act of 1978

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Final rule.

SUMMARY: This rule adds a new part 308 to Chapter II to implement the Contract Disputes Act of 1978, 92 Stat. 2382 ("the Act"), as it relates to TVA. This part prescribes procedures for use in the determination of contract disputes, including Contracting Officers' decisions, decisions by the TVA Board of Contract Appeals, hearing and prehearing procedures, and issuance and enforcement of TVA administrative subpoenas.

DATES: The part applies to any covered TVA contract having an effective date on or after March 1, 1979, or, at the Contractor's election, to disputes pending on that date or subsequently initiated under contracts effective prior to March 1, 1979.

FOR FURTHER INFORMATION CONTACT: Herbert S. Sanger, Jr., General Counsel, Tennessee Valley Authority, 400 Commerce Avenue, Knoxville, Tennessee 37902.

SUPPLEMENTARY INFORMATION: On March 23, 1979, TVA published a proposed rule in the **Federal Register** (44 FR 17715) to implement the Act. The proposal prescribed procedures for use

in the determination of disputes relating to certain TVA contracts containing disputes clauses, including Contracting Officer's decisions, decisions by the TVA Board of Contract Appeals, hearing and prehearing procedures, and issuance and enforcement of administrative subpoenas. Althugh the proposal was exempt from public rulemaking proceedings, the TVA Board wished to receive comments on it from the public. Four comment letters were received during the notice period, and were given due consideration. There was no other response. A correction document respecting certain typographical errors was published on April 4, 1979 (44 FR 20175).

A. As a result of comments received, the following changes have been made in the rule, in addition to typographical corrections:

1. The definition of "contract" in § 308.2(d) has been revised by adding to it the exclusionary term "any TVA contract for the sale of fertilizer or electric power, or any TVA contract related to the conduct or operation of the electric power system," previously found in § 308.3(a). The purpose of this change is to make clear that the exclusionary term means the same as the identical language in the second sentence of section 3(b) of the Act. The contracts covered by this exclusionary term are not administered by TVA's Division of Purchasing; an example would be an interconnection agreement under 16 U.S.C. 831n–4(a) (1976). On the other hand, a contract to procure construction of a power-related facility, such as a power service center, would be covered by § 308.2(d)(3), and subject to this part if it contained a disputes clause, by virtue of the first sentence of section 3(b) of the Act.

2. The language of § 308.6(c) has been amended to provide more flexibility in seeking to secure voluntary payment of fraudulent claims prior to suit, and to provide Contractors with copies of opinions of decisionmakers concerning fraudulent claims. In view of the Act's provisions taking decisions on such claims out of the disputes process, such opinions are not part of the decision in the dispute.

3. The specific reference to the Renegotiation Board in § 308.5(b) has been removed. Congress did not amend the Act when it abolished that Board effective March 31, 1979, and § 308.5(b) has been revised to state that interest is payable pursuant to section 12 of the Act, to avoid the need for change in the regulations when the Act is changed.

4. Section 308.13(a) has been revised for clarity, and is intended to track the time limits contained in section 6(c)(1) of the Act.

5. A new paragraph (d) has been added to § 308.21 to make explicit the Chairman's intended but inadvertently unstated power to act to effectuate the procedures and the parties' rights, if an assigned Hearing Officer becomes unavailable, or incapacitated, or action is necessary for other reasons.

6. The legal phraseology "sua sponte" in § 308.25 and "noticing a deposition" § 308.32(d) has been put into less technical language.

7. A sentence has been added to § 308.25 to ensure that the need for prompt and expeditious action on appeals is taken into account, along with other factors, in the issuance of stay orders.

B. Certain other recommendations, after careful consideration, were not accepted for the following reasons:

1. The comment was made that the definition of "Contracting Officer" could lead to possible confusion. Under TVA's standard contract clause and practice, the Contractor is at all times aware of the identity of the Contracting Officer. The definition in § 308.2(e) follows the definition in the standard clause, and the Contractor is notified of any change.

2. It was suggested either that interest run from the "earlier" rather than the "later" of the two dates specified in § 308.5(a), or that reference to the contractual payment date be deleted. This provision serves to ensure timely submission by Contractors of necessary information. The suggested changes would tend to deter this result, leading to unnecessary costs, and are accordingly rejected.

3. The comment was made that the fraudulent claim standards applied to Contractors in § 308.6 be applied to claims by Contracting Officers under § 308.14. The provisions of § 308.6, together with §§ 308.16 and 308.37(b), implement section 5 of the Act, and deal with "baseless claims" which are "submitted merely as a negotiating tactic" with no "legitimate argument for recovery" and which, if paid, "would constitute a windfall to the contractor" (S. Rep. No. 95–1118, 95th Cong., 2d Sess. 20 (1978)). Claims by the Contracting Officer would not have this result, and the requested change is not consistent with the Act.

4. The finality provisions of §§ 308.15 and 308.23 were criticized. These correctly track the language of sections 6(b), 8(g)(2), and 10(b) of the Act and accordingly were not changed.

5. It was suggested that the words "TVA may reply" in §§ 308.24(c) could be read to permit delay. The word "may" is used to show that a reply by TVA is permissive, not mandatory. Use of the word "shall," which would have the opposite result, is rejected.

6. It was suggested that the definition of "amount in dispute" in §§ 308.35 and 308.36 is not consistent with the Act's purpose of giving the Contractor the sole right to elect the small claims or accelerated hearing procedures. We believe this misreads the Act. In our view, the Act intended that all related claims be heard together regardless of their source and that, if the "amount in dispute" was as specified in the Act, the Contractor, but not TVA, could waive the full hearing otherwise provided. TVA has no right, under the cited provisions, to force the Contractor to elect these special procedures, or to deny that right.

7. In the absence of a short and plain English equivalent of the technical term "letters rogatory" in § 308.52, the suggestion that the term not be used is rejected. The term is well understood in legal practice, and means a formal written communication by a tribunal of one country, before which an action is pending, sent to a court or judge of a foreign country, requesting that the testimony of a witness who resides within the jurisdiction of the foreign tribunal be formally taken in the foreign country under the direction of the foreign court, and be transmitted to the first tribunal for use in the pending action.

Accordingly, 18 CFR Part 308 is adopted as set forth below.

By order of the Board of Directors of the Tennessee Valley Authority.

Dated: May 10, 1979.

Leon E. Ring,

General Manager.

PART 308—CONTRACT DISPUTES

Subpart A—General Matters

Sec.
308.1 Purpose and organization.
308.2 Definitions.
308.3 Exclusions.
308.4 Coverage of certain excluded Contractors.
308.5 Interest.
308.6 Fraudulent claims.
308.7 Effective date.

Subpart B—Contracting Officers

308.11 Contractor's request for relief.
308.12 Submission and decision of Contractor's claim.
308.13 Time limits for decisions.
308.14 Requests for relief by TVA.
308.15 Finality of decisions.
308.16 Decisions involving fraudulent claims.
308.17 Failure to render timely decision.

Subpart C—Board of Contract Appeals

308.21 Jurisdiction and organization.
308.22 Representation.
308.23 Finality of decisions.
308.24 Undue delay in Contracting Officer's decision.
308.25 Stay of appeal for Contracting Officer's decision.
308.26 Appeals.
308.27 Appeal files.

Subpart D—Prehearing and Hearing Procedures

308.31 Filing and service.
308.32 Prehearing procedures.
308.33 Hearings.
308.34 Record on appeal.
308.35 Small claims procedure.
308.36 Accelerated appeal procedure.
308.37 Decisions.
308.38 Reconsideration.
308.39 Briefs and motions.

Subpart E—Subpoenas

308.51 Form.
308.52 Issuance.
308.53 Service.
308.54 Requests to quash or modify.
308.55 Penalties.

Authority: Tennessee Valley Authority Act of 1933, as amended, 16 U.S.C. § 831–831dd; Contract Disputes Act of 1978, 92 Stat. 2383–2391.

Subpart A—General Matters

§ 308.1 Purpose and organization.

The regulations in this part implement the Contract Disputes Act of 1978 as it relates to TVA. This part consists of 5 subparts. Subpart A deals with matters applicable throughout the part, incuding definitions. Subpart B deals with Contracting Officers' decisions. Subpart C deals with general matters concerning the TVA Board of Contract Appeals. Subpart D deals with hearing and prehearing procedures, including discovery. Subpart E deals with subpoenas.

§ 308.2 Definitions.

For the purposes of this part, unless otherwise provided:

(a) The term "Act" means the Contract Disputes Act of 1978, 92 Stat. 2383–91.

(b) The term "Board" means the TVA Board of Contract Appeals.

(c) The term "claim" means a written demand by a Contractor, in compliance with this paragraph, for a decision by a Contracting Officer under a disputes clause. A claim must:

(1) State the amount of monetary relief, or the kind of nonmonetary relief, sought, and identify the contract provision relied upon;

(2) Include sufficient supporting data to permit the Contracting Officer to decide the claim, or provide appropriate reference to previously submitted data;

(3) If monetary relief totalling more than $50,000 is involved, include a signed certification by the Contractor that the claim is made in good faith, that the supporting data are accurate and complete to the best of the Contractor's knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the Contractor believes TVA is liable;

(4) Be signed by the Contractor, or on its behalf if the Contractor is other than an individual. If signed on a Contractor's behalf, the claim must include evidence of the authority of the individual so signing it, and of the individual signing any certification required by this paragraph, unless such authority appears in the contract or contract file.

The Contracting Officer has no authority to waive any of the requirements of this paragraph.

(d) The term "contract" means an agreement in writing entered into by TVA for:

(1) The procurement of property, other than real property in being;

(2) The procurement of nonpersonal services;

(3) The procurement of construction, alteration, repair or maintenance of real property; or

(4) The disposal of personal property. The term "contract" does not include any TVA contract for the sale of fertilizer or electric power, or any TVA contract related to the conduct or operation of the electric power system.

(e) The term "Contracting Officer" means TVA's Director of Purchasing, or duly authorized representative acting within the limits of the representative's authority. The TVA Purchasing Agent who administers a contract for TVA is designated as the duly authorized representative of the Director of Purchasing to act as Contracting Officer for all purposes in the administration of the contract (including, without limitation, decision of claims under the disputes clause). Such a designation continues until it is revoked or modified by written notice to the Contractor and the Purchasing Agent from TVA's Director of Purchasing.

(f) The term "Contractor" means a party to a TVA contract which contains a disputes clause. The term "Contractor" does not include TVA.

(g) The term "disputes clause" means a clause in a TVA contract requiring that a contract dispute be resolved through a TVA-conducted administrative process. It does not include, for example, arbitration provisions, or provisions specifying an independent third party to decide certain kinds of matters or special mechanisms to establish prices or price adjustments in contracts.

(h) The term "Hearing Officer" means a member of the Board who has been designated to hear and determine a particular matter pending before the Board.

(i) The term "TVA" means the Tennessee Valley Authority.

(j) A term defined in a contract subject to this part shall have the meaning given it in the contract.

§ 308.3 Exclusions.

(a) This part does not apply to any TVA contract which does not contain a disputes clause.

(b) Except as otherwise specifically provided, this part does not apply to any TVA contract entered into prior to March 1, 1979, or to any dispute relating to such a contract.

§ 308.4 Coverage of certain excluded Contractors.

(a) A Contractor whose contract is excluded from this part under § 308.3(b) may elect to proceed under this part and the Act with respect to any dispute pending before a Contracting Officer on March 1, 1979, or initiated thereafter. If the disputes clause in the contract is not an "all disputes" clause (*see Patton Wrecking & Dem. Co.* v. *Tennessee Valley Authority*, 465 F.2d 1073 (5th Cir. 1972)), a Contractor's election under this section shall cause the provisions of the first two sentences of section 6(a) of the Act to apply to the contract, and such an election shall be irrevocable.

(b) A Contractor makes an election under paragraph (a) of this section by giving written notice to the Contracting Officer stating that the Contractor elects to proceed with the dispute under the Act. For disputes pending on March 1, 1979, the notice shall be actually received by the Contracting Officer within 30 days after the Contractor receives the Contracting Officer's decision. For disputes initiated thereafter, the notice shall be included in the document first requesting a decision by the Contracting Officer.

§ 308.5 Interest.

TVA shall pay a Contractor interest on the amount found to be due on a claim:

(a) From the date payment is due under the contract or the Contracting Officer receives the claim, whichever is later, until TVA makes payment;

(b) At the rate payable pursuant to section 12 of the Act on the date from

which interest runs pursuant to paragraph (a) of this section.

§ 308.6 Fraudulent claims.

(a) If a Contractor is unable to support any part of a claim and it is determined that such inability is attributable to the Contractor's misrepresentation of fact or fraud, the Contractor shall be liable to TVA, as set out in section 5 of the Act, for:

(1) An amount equal to the unsupported part of the claim; plus

(2) All TVA's costs attributable to reviewing that part of the claim.

(b) The term "misrepresentation of fact" has the meaning given it in section 2(7) of the Act.

(c) Prior to TVA's filing suit for amounts due under this section, TVA shall provide the Contractor with a copy of any opinion under § 308.16 or § 308.37(b), and shall request the Contractor to pay voluntarily the amount TVA asserts is due to it.

(d) A determination by TVA that fraud or misrepresentation of the fact has been committed is not subject to decision under a disputes clause.

(e) The provisions of this section are in addition to whatever penalties or remedies may otherwise be provided by law.

§ 308.7 Effective date.

Subject to § 308.3(a), this part applies to any TVA contract having an effective date on or after March 1, 1979.

Subpart B—Contracting Officers

§ 308.11 Contractor's request for relief.

Any request for relief which a Contractor believes is due under a contract shall be submitted to the Contracting Officer in writing, in accordance with the terms of the contract, including applicable time limits.

§ 308.12 Submission and decision of Contractor's claim.

(a) If Contractor and TVA are unable to resolve Contractor's request for relief by agreement within a reasonable time, Contractor may submit a claim to the Contracting Officer.

(b) The Contracting Officer shall issue a decision to the Contractor on a submitted claim in conformity with the contract's disputes clause. Specific findings of fact are not required, but may be made. Such findings are not binding in any subsequent proceeding except as provided in § 308.15. The decision shall:

(1) Be in writing;

(2) State the reasons for the decision reached;

(3) Include information about the Contractor's rights of appeal under sections 7 and 10 of the Act (including time limits); and

(4) Notify the Contractor, as appropriate, of the special procedures available under §§ 308.35 and 308.36 at the Contractor's election. A copy of the provisions of this part shall be furnished with the decision.

§ 308.13 Time limits for decisions.

(a) If a submitted claim involves $50,000 or less, the Contracting Officer shall issue the decision within 60 days from actual receipt of the claim. If a submitted claim involves more than $50,000, the Contracting Officer within 60 days from actual receipt shall either issue a decision or notify the Contractor of the date by which a decision shall be rendered, which shall be within a reasonable time. The Contracting Officer shall not be deemed to be in "actual receipt" of a claim until the claim meets all requirements of § 308.2(c).

(b) The Contracting Officer shall issue a decision within any time limits set by an order under § 308.24. If a Hearing Officer grants a stay of an appeal pursuant to § 308.25, the Contracting Officer shall issue a decision within any time limits specified by the stay order, or within a reasonable time after receipt of the stay, if it sets no time limits.

(c) As used in this subpart, the reasonableness of a time period depends on the amount or kind of relief involved and complexity of the issues raised, the adequacy of the Contractor's supporting data, contractual requirements for auditing of Contractor's cost or other data, and other relevant factors.

§ 308.14 Request for relief by TVA.

When TVA believes it is due relief under a contract, the Contracting Officer shall make a request for relief against the Contractor, and shall attempt to resolve the request by agreement. If agreement cannot be reached within a reasonable time, the Contracting Officer shall issue a decision which complies with the requirements of § 308.12(b).

§ 308.15 Finality of decisions.

A decision by a Contracting Officer under the disputes clause of a contract subject to this part is final and conclusive and not subject to review by any forum, tribunal, or Government agency unless an appeal or suit is timely commenced under this part or section 10(a) (2) and (3) of the Act.

§ 308.16 Decisions involving fraudulent claims.

If a Contracting Officer denies any part of a Contractor's claim for lack of support, and the Contracting Officer is of the opinion that the Contractor's inability to support that part of the claim is within § 308.6 and section 5 of the Act, the Contracting Officer's decision shall not state that opinion, but, contemporaneously with the decision, the Contracting Officer shall separately notify TVA's General Counsel of that opinion and the reasons therefor.

§ 308.17 Failure to render timely decision.

Any failure by Contracting Officer to issue a decision on a submitted claim within the period required or permitted by § 308.13, will be deemed to be a decision by the Contracting Officer denying the claim and will authorize the commencement of an appeal on the claim under this part, or a suit on the claim as provided in section 10(a)(2) of the Act. If no appeal or suit pursuant to this section has been commenced at the time the Contracting Officer issues a decision, the right to sue or appeal and the time limits therefor shall be determined as otherwise provided in this part and the Act, and this section shall not authorize an appeal or suit from the decision.

Subpart C—Board of Contract Appeals

§ 308.21 Jurisdiction and organization.

(a) The Board shall consider and determine timely appeals filed by Contractors from decisions of TVA Contracting Officers pursuant to a disputes clause.

(b) The Board shall consist of an indeterminate number of members, who shall serve on a part-time basis. The members of the Board shall all be attorneys at law duly licensed by any state, commonwealth, territory, or the District of Columbia. One of the members of the Board shall be designated as "Chairman" pursuant to section 8(b)(2) of the Act.

(c) Each appeal or other matter before the Board shall normally be assigned to a single Hearing Officer, to be designated by the Chairman. The Chairman may act as a Hearing Officer, and shall notify the Contractor and TVA of the name and mailing address of the person designated as Hearing Officer.

(d) If a member to whom an appeal has been assigned cannot perform in a timely manner the duties of Hearing Officer, because of unavailability or incapacity which would in the Chairman's judgment affect the expeditious and timely resolution of the

appeal, or for any other reason deemed sufficient by the Chairman, the Chairman may take any action deemed appropriate to effectuate the disposition of the appeal and the rights of the parties under this part. The kind of action taken, and the manner thereof, shall be within the discretion of the Chairman, and may include, but is not limited to, action on pending motions, discovery, issuance of or ruling on objections to subpoenas, and reassignment of an appeal in whole or in part.

§ 308.22 Representation.

(a) In any appeal to the Board, a Contractor may be represented by an attorney at law duly licensed by any state, commonwealth, territory, or the District of Columbia. A Contractor not an individual and not wishing to appear by an attorney may be represented by any member, partner, or officer duly authorized to act on Contractor's behalf, or if an individual, may appear personally.

(b) TVA shall be represented by attorneys from its Office of General Counsel.

§ 308.23 Finality of decisions.

A decision by a Hearing Officer on an appeal shall be the decision of the Board and shall be final, subject only to amendment under § 308.37(c), reconsideration under § 308.38 or appeal pursuant to sections 8(g)(2) and 10(b) of the Act.

§ 308.24 Undue delay in Contracting Officer's decision.

(a) If there is an undue delay by a Contracting Officer in issuing a decision on a claim, the Contractor may request the Chairman to direct the Contracting Officer to issue a decision within a specified period of time.

(b) A request under this section shall:

(1) Be in writing;

(2) State the date on which the claim was submitted to the Contracting Officer.

(3) State the date suggested for issuance of a decision by the Contracting Officer.

(c) TVA may reply to a motion under this section within 5 days after its receipt.

(d) The Chairman shall issue a written decision on the request. If granted, the decision shall specify the date by which the Contracting Officer's decision is to be rendered, and a copy shall be served on the Contracting Officer.

§ 308.25 Stay of appeal for Contracting Officer's decision.

If an appeal has been taken because of a Contracting Officer's failure to render a timely decision, as provided by § 308.17, the Hearing Officer, with or without a motion by a party, may stay proceedings on the appeal in order to obtain a decision on the matter appealed. Oral argument will not be heard on such a motion unless otherwise directed. The stay order will normally set a date certain by which the decision of the Contracting Officer will be rendered. Such date shall take into account the factors mentioned in § 308.13(c), the length of time the matter has already been pending before the Contracting Officer, and the need for prompt and expeditious action on appeals.

§ 308.26 Appeals.

(a) An appeal to the Board from a Contracting Officer's decision under § 308.12 shall be initiated within 90 days from the Contractor's receipt of the Contracting Officer's decision and in the manner set forth in the disputes clause.

(b) An appeal from the Contracting Officer's failure to render a timely decison shall be taken within the time period provided by § 308.17. The notice of appeal shall be in the form and filed in the manner specified in the disputes clause, but shall state that it is an appeal under § 308.17, and shall include a copy of the claim which was submitted for decision.

§ 308.27 Appeal files.

(a) Notices of appeal shall be filed as provided in the disputes clause, and shall be promptly transmitted by TVA to the Chairman.

(b) Following transmittal of the notice of appeal, TVA shall assemble and transmit to the Hearing Officer and the Contractor an appeal file consisting of:

(1) The Contracting Officer's decision, if any, from which the appeal is taken;

(2) The contract and pertinent amendments, specifications, plans, and drawings (a list of the documents submitted may be provided Contractor in lieu of copies);

(3) The claim;

(4) Any other matter pertinent to the appeal submitted to or considered by the Contracting Officer for reaching a decision.

(c) The appeal file shall be submitted within 30 days. Within 30 days after receipt of a copy, the Contractor may submit to the Hearing Officer and TVA's General Counsel any documents within the scope of paragraph (b) of this section which are not included in the appeal file but which the Contractor believes are pertinent to the appeal. Such documents are considered a part of the appeal file.

Subpart D—Prehearing and Hearing Procedures

§ 308.31 Filing and service.

(a) All documents required to be served shall be served on TVA and Contractor and filed with the Board, except subpoenas.

(b) A request under § 308.15 shall be directed to the General Manager, Tennessee Valley Authority, 400 Commerce Avenue, Knoxville, Tennessee 37902, and shall be transmitted to the Chairman.

(c) All other documents required to be filed shall be directed to the Hearing Officer assigned to the matter.

(d) Service on the opposing party may be made personally or by mail. The copy presented for filing shall bear an appropriate certificate or acknowledgment of service.

§ 308.32 Prehearing procedures.

(a) Unless otherwise provided in this part, prehearing procedures, including discovery, shall be conducted in accordance with Rules 6, 7(b), 16, 26, 28–37, 41, and 56 of the Federal Rules of Civil Procedure, except that the Hearing Officer may modify those Rules to meet the needs of the parties in a particular case.

(b) The term "court" as used in those Rules shall be deemed to mean "Hearing Officer"; the term "plaintiff" shall be deemed to mean "Contractor"; the term "defendant" shall be deemed to mean "TVA"; and the term "action" shall be deemed to mean the pending appeal.

(c) Discovery subpoenas are subject to Subpart E.

(d) The party giving notice of a deposition is responsible for securing a reporter.

§ 308.33 Hearings

(a) TVA shall arrange for the verbatim reporting of evidentiary hearings before the Hearing Officer, and shall provide the Hearing Officer with the original transcript. The parties shall make their own arrangements with the reporter for copies.

(b) Admissibility of evidence shall generally be governed by the Federal Rules of Evidence, subject, however, to the Hearing Officer's discretion. As used in those Rules, the term "court" shall be deemed to mean "Hearing Officer."

(c) Conduct of hearings shall generally be governed by Rules 41–44, 44.1, and 46 of the Federal Rules of Civil Procedure, except that the Hearing Officer may

modify those Rules to meet the needs of the parties in a particular case. The terms "court," "plaintiff," "defendant," and "action" as used in those Rules shall be deemed to have the meaning given them in § 308.32.

(d) Hearings shall be as informal as may be reasonable and appropriate under the circumstances, and shall be held at a time and place to be specified by the Hearing Officer.

(e) Evidentiary subpoenas are subject to Subpart E of this part.

§ 308.34 Record on appeal.

Except as otherwise provided in this part, the appeal shall be decided on the basis of the record on appeal, which consists of the notice of appeal, the claim, any notice of election under § 308.35 or 308.36, orders entered during the proceeding, admissions, transcripts of hearings, hearing exhibits and stipulations on file, all other documents admitted in evidence, and all briefs submitted by the parties.

§ 308.35 Small claims procedure.

(a) The Contractor may elect to have the appeal processed under this section, if the amount in dispute is $10,000 or less. This amount shall be determined by totalling the amounts claimed by TVA and Contractor.

(b) Appeals under this section shall be decided, whenever possible, within 120 days after the Hearing Officer receives written notice that the Contractor has elected to proceed under this section. Such election may be made a part of the notice of appeal.

(c) An appeal under this section shall be determined on the basis of the record on appeal and those documents in the appeal file identified in § 308.27(b)(1), (2), and (3). Other documents may be considered in the determination of the appeal as may be stipulated to by the parties, or as the Hearing Officer may order on motion by a party. No evidentiary hearing shall be held unless the Hearing Officer directs testimony on a particular issue. Discovery and other prehearing procedures may be conducted under such time periods as the Hearing Officer may set to meet the 120-day period, and the Hearing Officer may reserve up to 30 days to prepare a decision. Upon request by either party, the Hearing Officer shall hear oral argument after the record is closed, and may direct oral argument on specified issues if the parties do not request it.

(d) The Hearing Officer's decision under this section will be short and contain only summary findings of fact and conclusions of law. The decision may, at the Hearing Officer's discretion, be rendered orally at the conclusion of any oral argument held. In such case, the Hearing Officer will promptly furnish the parties a typed copy of the decision, which shall constitute the final decision.

(e) Decisions under this section shall be final and conclusive except for fraud, and shall have no value as precedent for future appeals.

§ 308.36 Accelerated appeal procedure.

(a) The Contractor may elect to have the appeal processed under this section if the amount in dispute is $50,000 or less. The amount shall be determined by totalling the amounts claimed by TVA and Contractor.

(b) Appeals under this section shall be decided, whenever possible, within 180 days after the Hearing Officer receives written notice that the Contractor has elected to proceed under this section. Such election may be made a part of the notice of appeal.

(c) In cases under this section, the parties are encouraged to limit discovery and briefing, consistent with adequate presentation of their positions. The Hearing Officer may shorten applicable time periods in order to meet the 180-day period, and may reserve 30 days to prepare a decision.

(d) The Hearing Officer's decision under this section will be short and may contain only summary findings of fact and conclusions of law. The decision may, at the Hearing Officer's election, be rendered orally at the conclusion of the evidentiary hearing, following such oral argument as may be permitted. In such case, the Hearing Officer will promptly furnish the parties a typed copy of the decision, which shall constitute the final decision.

§ 308.37 Decisions.

(a) The Hearing Officer's decision shall be in writing. Except as provided by § 308.35 or 308.36, the decision shall contain complete findings of fact and conclusions of law. The parties may be directed to submit proposed findings and conclusions. A decision against a Contractor on a claim shall include notice of the Contractor's rights under paragraphs (2) and (3) of section 10(a) of the Act.

(b) If the decision denies any part of a Contractor's claim for lack of support and the Hearing Officer is of the opinion that the Contractor's inability to support that part is within § 308.6 and section 5 of the Act, the decision shall not state that opinion, but contemporaneously with the decision the Hearing Officer shall separately notify TVA's General Counsel of that opinion and the reasons therefor.

(c) Not later than 10 days after receipt of the decision, a party may move to alter or amend the findings or make additional findings and amend the conclusions and decision accordingly. Such a motion may be combined with a motion under § 308.38. This time period cannot be extended.

§ 308.38 Reconsideration.

Motions for reconsideration shall be served not later than 10 days after issuance of the Hearing Officer's decision. This time period cannot be extended. Such a motion shall be heard and decided in the manner provided by Rule 59 of the Federal Rules of Civil Procedure for motions for new trial in actions tried without a jury.

§ 308.39 Briefs and motions.

(a) All motions shall be accompanied by a brief or memorandum setting forth supporting authorities. Briefs in opposition to a motion shall be served within 10 days after receipt of the motion, unless otherwise specified in this part, or by order of the Hearing Officer.

(b) The Hearing Officer shall set the schedule for service of prehearing and posthearing briefs on the merits.

(c) A motion to dismiss an appeal for lack of jurisdiction should be served seasonably, but may be served at any time. The issue of lack of jurisdiction may be raised by the Hearing Officer sua sponte, in which case the Hearing Officer shall set a briefing schedule on the issue in the document raising it to the parties.

(d) A motion for summary judgment may be made at any time after the appeal file has been transmitted under § 308.26.

Subpart E—Subpoenas

§ 308.51 Form.

(a) A subpoena shall state the name of the Board and the title of the appeal; shall command the person to whom it is directed to attend and give testimony at a deposition or hearing, as appropriate, and, if appropriate, to produce specified books, papers, documents, or tangible things at a time and place therein specified; and shall notify the person of the right to request that the subpoena be quashed or modified and of the penalties for contumacy or failure to obey.

§ 308.52 Issuance.

(a) A deposition subpoena shall not issue except upon the filing of a notice of deposition of the person to be

subpoenaed, which notice should normally be filed at least 15 days in advance of the scheduled deposition.

(b) A subpoena for the attendance of a witness at an evidentiary hearing shall not issue except upon the filing of a request for appearance at the hearing of the person to be subpoenaed, which request should normally be filed at least 30 days in advance of the scheduled hearing. The request should state:

(1) The name and address of the witness;

(2) The general scope of the witness' testimony;

(3) The books, records, papers, and other tangible things sought to be produced; and

(4) The general relevance of the matters sought to the case.

(c) Upon receipt of a notice of deposition or request for appearance at a hearing, the Hearing Officer shall fill in the name of the witness and sign and issue a subpoena otherwise in blank to the party seeking it, together with a duplicate for proof of service. The party requesting the subpoena shall fill in both copies before service.

(d) Letters rogatory may be issued by the Hearing Officer as provided in 28 U.S.C. 1781–1784.

§ 308.53 Service.

A subpoena may be served at any place, and may be served by any individual not a party who is at least 18 years of age, or as otherwise provided by law. Service may be made by an attorney or employee of a party. Service shall be made by personal delivery of the subpoena to the individual named therein, together with tender of the amounts required by 5 U.S.C. 503 or other applicable law. The individual making service shall file with the Board the duplicate subpoena, filled out as served, with the return of service filled in, signed and notarized.

§ 308.54 Requests to quash or modify.

The person served with a subpoena (or a party, if the person served is a party's employee) may request the Hearing Officer to quash or modify a subpoena. Such requests shall be made and determined in accordance with the time limits and principles of Rule 45(a), (b) and (d) of the Federal Rules of Civil Procedure.

§ 308.55 Penalties.

In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States District Court, the Board will apply to the court through the General Counsel of TVA for an order requiring the person to appear before the Hearing Officer, to produce evidence or give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

[FR Doc. 79-15867 Filed 5-21-79; 8:45 am]

BILLING CODE 8120-01-M

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Food and Drug Administration

21 CFR Part 1020

[Docket No. 75N-0071]

Diagnostic X-ray Systems and Their Major Components; Amendments to Performance Standard

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) amends the performance standard for diagnostic X-ray systems and their major components (1) to revise the statement of applicability with respect to cassette holders and add a definition for "cassette holder"; (2) to revise the definition for "leakage technique factors" and the conditions for measuring the leakage radiation from the diagnostic source assembly; (3) to clarify the requirements for spot-film X-ray field limitation; and (4) to require that certain types of fluoroscopic X-ray systems be provided with the means for stepless adjustment of the X-ray field size.

EFFECTIVE DATE: June 21, 1979.

FOR FURTHER INFORMATION CONTACT: Raymond F. Coakley, Jr., Bureau of Radiological Health (HFX-460), Food and Drug Administration, Department of Health, Education, and Welfare, 5600 Fishers Lane, Rockville, MD 20857, 301-443-3426.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of June 11, 1975 (40 FR 24909), FDA issued several proposed amendments to the diagnostic X-ray systems performance standard. As a result of comments received, proposed amendments concerning spot-film X-ray field limitation and stepless adjustment of the X-ray field size on image-intensified fluoroscopic systems were withdrawn from the final rule published in the **Federal Register** of February 25, 1977 (42 FR 10983) so that further evaluation of these proposals would not delay promulgation of the remaining amendments. In addition, one comment recommended that definitions be included in § 1020.30(b) (21 CFR 1020.30(b)) for "cassette holder" and "cassette tray" because these terms have been used frequently in implementing the standard without the terms being defined. Also, two comments expressed concern over the definition of the term "leakage technique factors" as it relates to beam-limiting devices used in mammography.

Based on these comments and further evaluations by the Bureau of Radiological Health (BRH), FDA proposed in the **Federal Register** of July 14, 1978 (43 FR 30303), further amendments to the diagnostic X-ray standard to deal with the provisions withdrawn from the February 25, 1977 final rule. Interested persons were given until September 12, 1978, to submit comments on the proposal.

One comment from an individual suggested that one requirement in addition to those proposed was needed. The comment urged that § 1020.31(g)(1) (21 CFR 1020.31(g)(1)) require that the X-ray field size be increased to the larger format only when the radiographic exposure swtich for the spot-film has been energized. This operation is in contrast to an increase to larger format occurring whenever the fluoroscopic switch is released. In other words, an expansion of the radiation field should be permitted only when the larger field is needed, rather than whenever the smaller fluoroscopic field is not needed. The comment argued that, in addition to reducing the radiation given the patient during the contraction of the field, this feature would presumably decrease wear on the automatic collimator. The comment stated that some units automatically adjust the collimation to the larger spot-film size every time the fluoroscopic switch is released and readjust to the smaller fluoroscopic size only when the fluoroscopic switch is energized.

The agency advises that the automatic operation suggested by the comment is required by the existing standard. Section 1020.31(g)(1) of the standard requires that the X-ray field size match the portion of the film selected by the spot-film device when the film is to be exposed. If the field before selection is larger than necessary, the field must be automatically reduced to a matching size. If, however, the field before selection is smaller than necessary, it can be increased to matching size only by operator intervention. The standard permits a system that allows the beam-limiting device to adjust automatically to the spot-film size selected by the