

SIGNIFICANT EPA REGULATIONS UNDER CONSIDERATION—Continued

| NAME AND DESCRIPTION OF REGULATION | PROPOSAL DATE IN FEDERAL REGISTER | FINAL DATE IN FEDERAL REGISTER | CONTACT PERSON AND ADDRESS |
|---|-----------------------------------|--------------------------------|---|
| WATER—Continued | | | |
| No. 1446 <i>Revision of Hazardous Substances Discharge Regulations.</i> CWA 311, 40 CFR 117. As a result of amendments of Section 311, parts 117 and 119 will be withdrawn and part 118 revised, principally to clarify which dischargers will be subject to the provisions of Section 311. | February 16, 1979 | July 1979 | Ken Mackenthun (WH-585). Environmental Protection Agency, Washington, D.C. 20460, 202-755-0100. |
| No. 1447 <i>Oil Spill Liability.</i> CWA 311(q), 40 CFR 118. This rule establishes maximum limits of liability for fixed non-transportation-related facilities faced with cleanup liabilities under Section 311. | September 1979 | June 1980 | Joseph Lewis (WH-585). Environmental Protection Agency, Washington, D.C. 20460, 202-245-0581. |
| No. 1448 <i>Marine Sanitation Devices.</i> CWA 312, 40 CFR 140. These rules establish secondary treatment or equivalent requirements for commercial vessels navigating the Great Lakes. | Late 1980 | | Jonathan Amson (WH-585). Environmental Protection Agency, Washington, D.C. 20460, 202-245-3036. |
| No. 1449 <i>Drinking Water Intake Zone Exemptions.</i> CWA 312, 40 CFR 140. This regulation establishes the procedures and criteria for defining water intake zones. The regulation will prohibit discharges from vessels in waters so defined. | July 1979 | December 1979 | Do. |
| No. 1450. <i>Clean Lakes.</i> CWA 314, 40 CFR 35. These rules establish procedures to administer State grants for restoring lakes. | July 1979 | August 1979 | Robert Johnson (WH-585). Environmental Protection Agency, Washington, D.C. 20460, 202-472-3400. |
| No. 1451 <i>Hazardous Substances Pollution Prevention for Facilities Subject to Permitting Requirements.</i> CWA 402, 40 CFR 151. This regulation sets forth requirements for the Spill Prevention Control and Countermeasure Plans of nontransportation-related facilities which handle hazardous substances and are subject to NPDES permits. | September 1, 1978 | November 1979 | Thomas J. Charlton (WH-548). Environmental Protection Agency, Washington, D.C. 20460, 202-245-3045. |
| No. 1454 <i>Ocean Discharge Criteria.</i> CWA 403(c), 40 CFR 231. They are intended to help prevent environmental degradation of the territorial seas, the contiguous zone, and the oceans. | December 1979 | | Tom O'Farrell (WH-551). Environmental Protection Agency, Washington, D.C. 20460, 202-426-8976. |
| No. 1455 <i>Guidelines To Protect the Aquatic Environment, Including Wetlands, From the Discharge of Dredged or Fill Material.</i> CWA 404(b)(1), 40 CFR 230. These guidelines must be considered in the preparation of individual and general permit applications, in the preparation of Environmental Impact Statements (EIS's) for Federal activities specifically authorized by the Congress, and in the preparation of Best Management Practices (BMP's) under the State 208(4)(B) program. Failure to comply with these guidelines justifies denial of permit and return of State permit programs to the Corps of Engineers. September 5, 1975, interim-final guidelines are being revised and expanded by this effort. | June 1979 | | John Crowder (WH-585). Environmental Protection Agency, Washington, D.C. 20460, 202-472-3400. |
| No. 1459. <i>Sewage Sludge Disposal.</i> CWA 405 and RCRA 4004, 40 CFR 258. These regulations are to assure that municipal sludge is managed in a manner that will protect public health and the environment and that valuable resources are conserved through beneficial utilization where practicable. | July 1979 | August 1980 | Bruce Weddle (WH-564). Environmental Protection Agency, Washington, D.C. 20460, 202-755-9120. |
| The following five regulations will be incorporated into the National Pollution Discharge Elimination System (NPDES) Permits Program regulations 40 CFR 121 to 125 in June 1979. | | | |
| No. 1403 <i>Extension of Pollution Control Deadlines for Publicly-Owned Treatment Works and Other Point Sources Planning to Discharge to Those Publicly-Owned Treatment Works.</i> CWA 301(j), 40 CFR 124. This regulation establishes criteria which EPA and NPDES States will use in reviewing requests for 301(j) extensions from the July 1, 1977, treatment requirements. | May 16, 1978, interim final | | Ed Kramer (EN-336). Environmental Protection Agency, Washington, D.C. 20460, 202-755-0750. |
| No. 1404 <i>Requirements for Application for 301(c) and (g) Variances.</i> CWA 301(j)(1)(B), 40 CFR 125. These regulations require dischargers desiring 301(c) and (g) variances to fill initial applications by September 25, 1978, or 270 days after promulgation of BAT limitations, whichever is later. | September 13, 1978, interim final | | Do. |
| No. 1444 <i>Criteria and Standards for Imposing Best Management Practices for Ancillary Industrial Activities.</i> CWA 304(e) This regulation will indicate how "best management practices" for on-site industrial activities may be imposed in NPDES permits to prevent release of toxic and hazardous pollutants to surface waters. | September 1, 1978 | | Do. |
| No. 1452 <i>NPDES Program.</i> CWA 402. This regulation revises, updates, clarifies, and reorganizes existing NPDES regulations. | August 21, 1978 | June 7, 1979 | Do. |
| No. 1453 <i>Second Round Permits.</i> CWA 402, 40 CFR 124. This regulation establishes the use of short-term permits as the preferred mechanism to assure compliance with NRDC Consent Decree. | May 23, 1978 | December 9, 1979 | Do. |
| JOINT PROGRAMS | | | |
| No.1140 <i>Consolidated Rules of Practice Governing the Assessment of Civil Penalties.</i> TSCA 16, FIFRA 14, RCRA 3008, MPRSA 105, CAA 211, 40 CFR 22. This regulation provides a common set of procedural rules for several programs in order to reduce paperwork, inconsistency, and burden on regulated persons. | August 4, 1978, interim final | October 1979 | Terrell Hunt (EN-342). Environmental Protection Agency, Washington, D.C. 20460, 202-755-0970. |

1979 Federal Register

Friday
June 8, 1979

Part VI

Department of Energy

Industrial Energy Conservation Program
Including Proposed Voluntary Recovered
Materials Utilization Targets; Proposed
Rule and Announcement of Public
Hearings

DEPARTMENT OF ENERGY

[10 CFR Part 445]

[Docket No. CAS-RM-79-301]

Industrial Energy Conservation Program Including Proposed Voluntary Recovered Materials Utilization Targets; Proposed Rulemaking and Public Hearings**AGENCY:** Department of Energy.**ACTION:** Proposed rule.

SUMMARY: The Department of Energy (DOE) is proposing regulations for the operation of its Industrial Energy Conservation Program (program). The program was established by the Energy Policy and Conservation Act (EPCA). The Federal Energy Administration and its successor, DOE, implemented the program through a series of notices published in the *Federal Register*. With the enactment of amendments to the EPCA in the National Energy Conservation Policy Act (NECPA), DOE is proposing to issue comprehensive regulations which will codify all aspects of the program, including criteria and procedures for the identification of certain manufacturing corporations for reporting purposes, the various reporting requirements of the program, and criteria and procedures for exemptions from reporting directly to DOE. DOE is including in the proposed program rule the final industrial energy efficiency improvement targets which were established by FEA as required by the EPCA. The proposed comprehensive regulations are intended to allow DOE to carry out more effectively its responsibilities for the program.

DOE also is proposing, as part of the comprehensive regulations, targets for the increased utilization of recovered materials (targets) for four industries, as required by the NECPA. The industries are metals and metal products, paper and allied products, textile mill products, and rubber. Information on public access to the support documents for the proposed targets is provided. Extensive public review and comment on this aspect of the proposed program rule are encouraged.

DATES: Written comments must be received by 4:30 p.m., e.d.t., August 7, 1979. A public hearing on all aspects of the proposed rule, other than the proposed targets, will be held on July 31. Four public hearings will be held on the proposed targets. Requests to speak at any hearing must be received by 4:30 p.m., e.d.t., July 13, 1979. The dates of the four hearings on targets are as follows:

Hearing on proposed targets for:

| | |
|------------------------------------|-------------------------------|
| 1. Textile mill products | Hearing date July 23, 1979 |
| 2. Metals and metal products | July 24, 1979 |
| 3. Paper and allied products | July 25, 1979 |
| 4. Rubber | July 26, 1979 |

ADDRESSES: Send written comments, requests to speak at the hearings, and written statements to: Margaret Sibley, Docket No. CAS-RM-79-301, Office of Conservation and Solar Applications, U.S. Department of Energy, 20 Massachusetts Avenue, NW., Washington, D.C. 20585. The public hearings will be held at 9:30 a.m., e.d.t., each appointed day in Room 3000A, 12th & Pennsylvania Avenue, NW., Washington, D.C. 20461.

FOR FURTHER INFORMATION CONTACT:

Lewis S. Newman, Office of Industrial Programs, U.S. Department of Energy, 20 Massachusetts Avenue, NW., Washington, D.C. 20585, (202) 376-4803, 376-4804, 376-4805

Pamela M. Pelcovits, Office of General Counsel, U.S. Department of Energy, 20 Massachusetts Avenue, NW., Washington, D.C. 20585, (202) 376-9469.

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I. Background.**A. Introduction**

On November 9, 1978, President Carter signed the National Energy Conservation Policy Act (Pub. L. 95-619) (NECPA). Section 441 of the NECPA redesignated sections 371-376 of the Energy Policy and Conservation Act (42 U.S.C. 6341-6346) (EPCA) as Part E of Title III. Sections 461 and 601 of the NECPA further amended sections 371-376 of the EPCA, pursuant to which the Federal Energy Administration (FEA) and, pursuant to the Department of Energy Organization Act (Pub. L. 95-91)

(DOE Act), its successor, the Department of Energy (DOE), had implemented the Industrial Energy Conservation Program (program). This Background section describes voluntary industrial energy conservation initiatives, the program as developed in response to the EPCA, the changes in the program mandated by the recent enactment of the NECPA, and other matters relevant to the development of this proposed program rule.

B. Voluntary Industrial Energy Conservation Initiatives.

Since 1974, FEA and other federal agencies have encouraged industrial energy efficiency reporting as a means of promoting energy conservation by industry. The effort began prior to the enactment of the EPCA with a joint FEA and Department of Commerce (DOC) program, in cooperation with several energy intensive industries. Sections 301 and 308 of the DOE Act (42 U.S.C. 7151, 7157), in part, transferred authority for administering such voluntary initiatives to DOE. At present, 50 trade organizations report to DOE either as a part of the EPCA program or through this voluntary effort.

The information supplied by this voluntary cooperation is intended to provide both DOE and industry with an awareness of the opportunities for energy conservation and an indication of industry's conservation progress, and to assist in removing further constraints to conservation.

C. The Program under the EPCA

In enacting the EPCA in December 1975, Congress directed the FEA, in section 372 of Part D of Title III, to establish a program "(1) to promote increased energy efficiency by American industry, and (2) to establish voluntary energy efficiency improvement targets for at least the ten most energy-consuming major energy-consuming industries." In response, FEA issued requirements for the program through a series of notices published in the *Federal Register*.

FEA identified and ranked 20 two-digit Standard Industrial Classification (SIC) codes in the manufacturing division as the major energy-consuming industries in the United States in accordance with the provisions of section 373 of the EPCA (41 FR 7992, February 23, 1976; 41 FR 12766, March 26, 1976). Subsequently, FEA requested information from certain corporations on energy consumption in calendar year 1975 (41 FR 36838, September 1, 1976; 41 FR 47285, October 28, 1976; 42 FR 62422, December 12, 1977) and used this

information to identify, pursuant to section 373, the 50 most energy-consuming corporations in each of the ten most energy-consuming industries for which industrial energy efficiency improvement targets (efficiency targets) were to be established (41 FR 54977, December 16, 1976). The efficiency targets were established as required by section 374(a) (41 FR 48169, November 2, 1976; 42 FR 29642, June 9, 1977) for the following SIC codes: food and kindred products (SIC 20), textile mill products (SIC 22), paper and allied products (SIC 26), chemicals and allied products (SIC 28), petroleum and coal products (SIC 29), stone, clay and glass products (SIC 32), primary metals (SIC 33), fabricated metals (SIC 34), machinery, except electrical (SIC 35), and transportation equipment (SIC 37).

As part of the implementation of the requirement of section 375 that the 50 most energy-consuming corporations in each of the ten industries report on improving energy efficiency, FEA developed and issued Form FEA U524-P-O (42 FR 22581, May 4, 1977; 42 FR 32831, June 28, 1977) for use by those corporations reporting directly to DOE.

Section 375 also provided that a corporation would be exempt from reporting directly to DOE if " * * * such corporation is in an industry which has an adequate voluntary reporting program (as defined by section 376 (g))." Section 376(g) further stated the following requirements for the exemption of a corporation through participation in an "adequate voluntary program".

(1) The Administrator shall exempt a corporation from the requirements of section 375(a) if such corporation is in an industry which has an adequate voluntary reporting program, as determined by the Administrator annually after notice and opportunity for interested persons to comment. An industry's voluntary reporting program shall be determined to be adequate only if—

(A) each corporation within such industry which is identified under section 373 fully participates in such program;

(B) all information deemed necessary by the Administrator for purposes of evaluating the progress made by such industry in achieving the industry energy efficiency improvement target set forth under section 374 is provided to the Administrator; and

(C) reports made to a trade association or other person, in connection with such program, are retained for a reasonable period of time and are available to the Administrator.

(2) If the Administrator determines that an industry's voluntary reporting program is not adequate solely on the basis that any corporation within such industry is not fully participating in such program, he shall exempt from the requirements of section

375(a) only those corporations which fully participate in such program.

The criteria for such indirect reporting were an important element of the program, and FEA developed criteria for exemption based on its determination that the existing voluntary reporting initiatives offered the most appropriate method of implementing the requirements of section 376(g). FEA proposed the criteria for indirect reporting for public comment (41 FR 38819, September 13, 1976). Following a review of 80 comments received in response, final criteria were published (41 FR 51866, November 24, 1976). Pursuant to the criteria, FEA exempted certain corporations from the direct reporting requirement (42 FR 15731, March 23, 1977; 42 FR 23538, May 9, 1977).

Accordingly, many corporations were exempt from direct reporting based on their participation in the existing reporting programs which were determined by FEA to be "adequate" for purposes of section 376(g). Since the direct and indirect reporting requirements were somewhat different, inconsistencies between the direct and indirect reports arose in the program.

With the publication of the direct reporting form and the exemption of corporations from the direct reporting requirement, the procedures for monitoring industrial energy efficiency improvements, as required by the EPCA, were complete. Identified corporations submitted semiannual reports to FEA, and then DOE, on progress in improving energy efficiency, either on Form FEA U524-P-O or through the reports of adequate voluntary reporting programs. DOE submitted to Congress an annual report in June 1978, based on data received from identified corporations covering energy consumption in 1976 and the first half of 1977. The preface to the Annual Report states, in part:

"The Department of Energy (DOE) will continue to work to improve the industrial energy efficiency data to ensure that the reported information enables DOE, to the greatest extent possible under EPCA, to measure progress toward meeting the energy efficiency improvement targets. This will include revisions in reporting requirements, and increased follow-up and verification, to improve the quality of the data received from industry and to minimize potential inaccuracies in charting progress."

In Chapter III, "Program Improvement Elements," of the Annual Report—Volume I, DOE outlined certain areas for possible program improvements, including reporting and progress measurement.

Identified corporations have continued to submit the semiannual reports on energy consumption through 1978, and DOE will submit an annual report to Congress in 1979 based on this additional data. Monitoring of and reporting on industrial energy efficiency improvement after 1978 will be accomplished through the procedures proposed in these regulations.

D. The NECPA Amendments to the Program

In enacting the NECPA, Congress mandated several changes and additions to the program as established by the EPCA. These are described in this section.

1. *Corporate Identification.* Section 601 of the NECPA, among other things, amended the EPCA by striking a portion of section 373, redesignating the remaining part of that section as 373(a), and adding a new subsection (b). Section 373(b) requires DOE to identify, within ninety days of the enactment of the subsection, "each corporation which consumes at least one trillion British thermal units (Btu's) of energy per year and which is within a major energy-consuming industry identified under subsection (a)." This amendment expands the universe of corporations to be identified in each major energy-consuming industry from the fifty most energy-consuming corporations to all corporations which consume at least one trillion Btu's.

To implement this requirement, DOE, in a January 8, 1979 Federal Register notice (44 FR 1770), corrected by a January 19, 1979 notice (44 FR 4008), required all corporations which consumed at least one trillion Btu's of energy in calendar year 1977 in any of the 20 major energy-consuming industries identified by DOE to file a certified statement to that effect with DOE. The deadline for filing such a report with DOE was January 29, 1979. Based on the reports filed in response to this requirement, DOE identified corporations in Federal Register notices issued February 7, 1979 (44 FR 9045, February 12, 1979) and May 9, 1979 (44 FR 28750, May 16, 1979).

2. *Industrial Energy Efficiency Reporting.* Section 601 of the NECPA amended section 375 of the EPCA, which contains the requirements for mandatory reporting by identified corporations on progress in improving energy efficiency.

a. *Corporate Reporting.* The amendment to section 375(a) removes the language limiting reporting to identified corporations in the ten industries for which industrial energy

efficiency improvement targets had been established. While section 375(a) still requires reports to include information with which DOE can measure progress of industry in achieving the efficiency targets, it now also requires each corporation identified under section 373 to report on progress in improving its energy efficiency.

b. *Plant Reporting.* Sections 375(b) and (c) now require that the corporate reports made pursuant to section 375(a) include data aggregated to SIC codes from plant reporting forms, which each plant of an identified corporation shall periodically file with its corporate headquarters. Further, DOE is to prepare, publish, and make available forms for use in complying with the reporting requirements of section 375.

c. *Comment on Exemption Criteria.* While section 601 of the NECPA made significant changes to the reporting requirements of the program, no changes were made to the provisions for exemptions from the direct reporting requirements, as set forth in sections 375(a) and 376(g). However, in the Conference Report to the NECPA (Senate Report 95-1294), the section-by-section explanation of section 601 (amending sections 372, 373, and 375 of the EPCA) concludes as follows:

"Finally, the conferees agreed not to change the language of the voluntary reporting exemption. However, it was agreed that the Secretary had not sufficiently defined 'adequate voluntary reporting program' within the guidelines provided in Sec. 376(g), and that the Secretary should set more explicit criteria for the determination of whether a voluntary program is adequate."

DOE had previously identified the exemption criteria as a potential area for improvement in its 1978 annual report. The exemption criteria and procedures proposed today result from DOE's own evaluation of the program, the statement in the Conference Report, and the views expressed in the workshops described below.

3. *Recovered Materials Targets and Reporting.* Section 461 of the NECPA adds a new section 374A to the EPCA. This new section requires DOE, within a year after the enactment of the NECPA, to establish targets for the increased utilization of energy-saving recovered materials (recovered materials targets) for each of four industries—metals and metal products, paper and allied products, textile mill products, and rubber. The term "energy-saving recovered materials" (recovered materials) is defined in section 374A(a) as "aluminum, copper, lead, zinc, iron, steel paper and allied paper products, textiles and rubber, recovered from solid

waste, as defined in the Solid Waste Disposal Act."

Pursuant to section 374A(b), the recovered materials targets are to be: (1) Based on the best available information and (2) established at levels which represent the maximum feasible increase in the utilization of recovered materials which each such industry can achieve progressively by January 1, 1987. The technological and economic ability of each industry to increase its utilization of recovered materials must be considered, and DOE is also required to consider "all actions taken or which before such date could be taken by each such industry, or by Federal, State or local governments to increase that industry's utilization of energy-saving recovered materials."

Section 374A(e) requires each corporation in the four industries listed above which is "a major energy consumer (within the meaning of section 373)" to report to DOE on its use of recovered materials. The initial submission is to report on the volume of recovered materials which the corporation is using in each of its manufacturing operations in the United States and its plans, if any, to increase the utilization of such materials in those operations in each of the next ten years. Each appropriate corporation must also report annually on the progress it has made to increase its use of recovered materials.

In the February 12 and May 16 identification notices, DOE notified corporations identified under section 373 within four major energy-consuming industries—textile mill products (SIC 22), paper and allied products (SIC 26), rubber and miscellaneous plastics (SIC 30) and primary metals (SIC 33)—of these reporting requirements. DOE has issued Form CS-153 for preparing the initial report described above. Annual reporting on the use of recovered materials will be implemented through the procedures of this proposed program rule.

Pursuant to section 374A(f), DOE must also include information on the recovered materials aspects of the program in its annual report to Congress and the President under section 375(e).

4. *Conforming Amendments.* In addition to the substantive additions and modifications to the program discussed above, sections 461 and 601 of the NECPA contain several other provisions. These include a definition of "plant" for purposes of plant reporting under section 375 and a revised definition of "United States." The amendments to section 376 include: In subsection (b), extending the legal

authorities available to DOE in obtaining data for implementing section 374A on the use of recovered materials; in subsection (c), requiring an opportunity for public comment before establishing the recovered materials targets; and in subsection (f), stating that "no liability shall attach and no civil or criminal penalties may be imposed for any failure to meet * * * any (recovered materials) target."

E. *Public Workshops on the Program.* Because of its interest in improving the administration and effectiveness of the program, DOE held public workshops between November 6, 1978 and February 23, 1979 at six major cities across the country, to obtain the views of the participants in the existing program, and the public in general, on industrial energy conservation reporting. The workshops were announced to the public in the *Federal Register* (43 FR 48682, October 19, 1978). Each workshop provided an opportunity to: (1) Focus the attention and expertise of the participants on improving the present reporting system to make it more useful to DOE and the industrial participants, while providing reliable and useful information on industrial energy conservation and (2) solicit viewpoints and suggestions regarding other approaches which might be developed for promoting and monitoring industrial energy conservation. DOE is preparing a report on the workshops which will be made available to the public. The points of view expressed and suggestions received at the workshops have been helpful in developing the program rule proposed today.

II. Discussion of Proposed Program Rule

A. *Introduction.* After considering its experience in administering the program, the requirements of NECPA, and the suggestions received through the workshops, DOE is proposing comprehensive regulations for the administration of the program. These regulations were developed by the Office of Industrial Programs, under the Assistant Secretary for Conservation and Solar Applications, which has the responsibility for management of the program. A major purpose of this program rule is to provide the necessary framework for the collection and reporting to DOE of data on industrial energy efficiency improvement and recovered materials utilization. DOE will use this data to prepare and submit reports to the President and the Congress on the progress being made in improving industrial energy efficiency and increasing recovered materials utilization.

The program set out in the proposed regulations will follow the approximate annual timetable indicated below. This allows for corporate reporting on manufacturing activities for the same year on which the identification of a corporation is based. DOE would implement this schedule beginning in January, 1980 for reports on calendar year 1979 energy efficiency improvement and recovered materials utilization.

January 1

Federal Register notice reminding corporations of the requirement, under Subpart B, to file information on energy consumption during the previous year.

February 28

Deadline for receipt by DOE of information for identification.

March 15—

Federal Register notice of identified corporations, with a reminder to those corporations which desire exemptions from reporting directly to DOE, and sponsors which desire to have their reporting programs determined adequate, to submit the requests required by Subpart D.

April 15—

Deadline for receipt by DOE of requests for exemption and for determination of adequacy, under Subpart D.

May 1—

Federal Register notice proposing for comment: (1) The sponsors which have adequate reporting programs and (2) the corporations exempt from reporting directly to DOE.

June 1—

Deadline for comments on May 1 Federal Register notice.

June 15—

Federal Register notice of final determination of: (1) Sponsors with adequate reporting programs and (2) corporations exempt from reporting directly to DOE.

July 15—

Deadline for receipt by DOE of reports from corporations and sponsors on energy efficiency improvement and, if appropriate, recovered materials utilization during the previous year, as required under Subpart C.

DOE is preparing and will issue for public comment the various reporting forms required by the NECPA and referred to in Subpart C of the proposed

program rule. The proposed program rule also includes, in Subpart E, the energy efficiency improvement targets, as required by the EPCA and established by FEA, and the proposed recovered materials utilization targets, as required by the NECPA.

Comments are requested on the proposed program rule as it implements the objectives of the program, including: (1) Improved energy efficiency and increased utilization of recovered materials by U.S. manufacturing industry; (2) removal of constraints to improved industrial energy efficiency and appropriate utilization of recovered materials; and (3) accurate and useful reporting of energy efficiency improvement and recovered materials utilization. The following paragraphs explain the major provisions of this proposed rule and highlight other areas in which DOE is particularly interested in receiving public comment.

B. General Provisions.—1. Definitions. Some of the terms defined in § 445.2 such as "control," "commercial quality production" and "manufacturing" have previously been used by FEA and DOE in the implementation of the program under the EPCA. Other terms such as "energy type" and "manufacturing operation" are new. As required by section 371(5) of the EPCA, DOE is proposing a definition of "plant" for purposes of plant reporting. DOE's determination with respect to "major energy-consuming industries" is discussed below. DOE is interested in any comments on the validity and clarity of the definitions provided and on the need for any other definitions.

2. Handling of Information Submitted Under the Program. Section 376(e) of the EPCA states that DOE may not disclose information obtained under the program "which is a trade secret or other matter described in section 552(b)(4) of Title 5, United States Code, disclosure of which may cause significant competitive damage; except to committees of Congress upon request of such committees." In addition, section 375(c) now requires that plant report forms which are to be filed at corporate headquarters will be available to DOE for verification, but shall not be released to the public.

In the implementation of the program under the EPCA, FEA provided that, at least five days prior to disclosing any information which it determined was not information described in 5 U.S.C. 552(b)(4), it would notify the provider of the information for which a claim of confidentiality had been made.

The most common basis for the release of information is a request under

the provisions of the Freedom of Information Act (FOIA) 5 U.S.C. 552, Pub. L. 89-487, as amended by Pub. L. 93-502, 88 Stat. 1561, and Pub. L. 94-409, 90 Stat. 1241. DOE has recently issued its own regulations implementing the requirements of the FOIA, 10 CFR Part 1004 (44 FR 1909, January 8, 1979). These regulations, in 10 CFR 1004.11, provide for notifying the person providing information, who has claimed that information is privileged or confidential under 5 U.S.C. 552(b)(4), of a determination to release such information at least seven days before the proposed release, and contain other requirements for the handling of proprietary information. DOE is proposing in § 445.4(a) that the handling of information submitted under the program will generally be governed by DOE's own FOIA regulations, which would provide seven days' notice before release, in response to an FOIA request, of information claimed by the corporation to be confidential.

As further permitted by DOE's FOIA regulations, 10 CFR 1004.11(a), DOE is proposing in § 445.4(c) to require corporations which submit information to DOE under the program to make any claims of confidentiality at the time of submitting the information. This will ensure that DOE can review such claims in a timely manner consistent with the needs of the program.

In addition to responding to requests under the FOIA, FEA and DOE in the past have published information received under the program. This includes the publication in the Federal Register of identified corporations and of corporations exempt from reporting directly to DOE. DOE is proposing in § 445.4(d) to provide at least seven days' notice prior to releasing information for which a claim of confidentiality has been made.

3. Major Energy-Consuming Industries.—a. Identification of Major Energy-Consuming Industries. Section 371(4) of the EPCA defines major energy-consuming industry as " * * * a two-digit classification, within the manufacturing division of economic activity set forth in the Standard Industrial Classification (SIC) Manual by a code number, which the * * * (Secretary) * * * determines is suited to the purposes of this part." As described above, FEA previously identified and ranked twenty major energy-consuming industries, but only required reporting by corporations in the ten industries for which industrial energy efficiency improvement targets were established. DOE is hereby proposing, in § 445.5(a), the 20 two-digit

SIC manufacturing classifications as the major energy-consuming industries. Each of those industries contains one or more corporations which consumed at least one trillion Btu's in 1977.

DOE recognizes, however, that the number of identified corporations in several industries is very small and that designating these industries as "major energy-consuming industries" might result in monitoring of industry progress in improving energy efficiency based on a relatively small percentage of an industry. DOE is, therefore, interested in comments on its proposal to include all of the twenty manufacturing industries as major energy-consuming industries, since all identified corporations in these industries are subject to the reporting requirements of the program.

b. *Major Energy-Consuming Industries for Recovered Materials Reporting.* The enumeration in section 374A(b) of the EPCA of the four industries for which recovered materials targets are to be established is not explicitly related to the SIC classification system. However, in section 374A(e) of the EPCA, each identified corporation which is within one of the four industries for recovered materials purposes is required to report on its use of recovered materials. DOE is, therefore, proposing in § 445.5(b) that the identified corporations in the following major energy-consuming industries be required to report pursuant to section 374A(e):

| Industry | SIC code |
|--|----------|
| Textile mill products..... | 22 |
| Paper and allied products..... | 26 |
| Rubber and miscellaneous plastics..... | 30 |
| Primary metal industries..... | 33 |

DOE is interested in comments on its use of two-digit SIC codes for purposes of reporting on the use of recovered materials. For example, DOE is concerned if the use of two-digit SIC codes could result in reporting by corporations which could not possibly use any of the recovered materials listed in section 374A(a). Comments on this section should also consider DOE's determinations concerning industry boundaries and other matters in the proposed recovered materials targets, as discussed in section II.F.

C. Identification of Corporations

1. *Annual Identification.* As part of its one-time identification of corporations required to report on improving energy efficiency, FEA provided procedures for (1) requesting modification of the identification of a corporation on the grounds of technical or clerical error; (2)

appealing the denial of such a modification request and appealing on any other grounds to FEA's Office of Exceptions and Appeals; and (3) requesting modification of a corporation's participation in the program based on a showing of "changed circumstances" by application to the Office of Exceptions and Appeals.

FEA's and DOE's experience in administering the program has been that an identification process which led to the processing of a large number of applications for modifications and appeals, particularly on the grounds of "changed circumstances," was administratively cumbersome and detrimental to the purposes of the program. Accordingly, DOE is proposing in Subpart B of Part 445 procedures for the annual identification of those corporations which consumed at least one trillion Btu's in any major energy-consuming industry in a calendar year. Using the same year's energy consumption both for the identification of corporations and for reporting is intended to streamline program management. At the same time, it will ensure that the corporations which are required to report are those that consumed at least one trillion Btu's during the reporting period.

Section 445.12(a) requires that any corporation which consumes at least one trillion Btu's in a major energy-consuming industry during a given year must file a statement to that effect with DOE after the close of the year. To minimize the burden of this information filing requirement, § 445.12(b) requires no action from identified corporations which continue to consume a trillion or more Btu's annually. However, DOE is proposing in § 445.12(c) that an identified corporation which consumes less than one trillion Btu's in a given year must file a statement to that effect with DOE.

2. *Energy to be Included for Identification Purposes.* Section 445.13 specifies what energy is to be included and excluded for identification purposes. For example, feedstocks, as defined in § 445.2, are to be included, while waste used as fuel is to be excluded. DOE believes that the inclusion of feedstocks in determining energy consumption is appropriate for identification purposes regardless of whether the reporting aspects of the program require the submission of information on feedstocks. What is to be included for reporting purposes will be addressed by DOE when it proposes the reporting forms. Comments are invited here with respect to the energy to be

included and excluded for identification purposes.

3. *Additional Provisions.* The requirements for the content of a report on energy consumption filed pursuant to § 445.12 (a) or (c) are proposed in § 445.14. The procedures for the identification by DOE of corporations for reporting purposes are proposed in § 445.15. DOE is providing in § 445.16 procedures for modification requests based on clerical or technical error and is providing in § 445.6 procedures for appeals from DOE's response to these requests. However, DOE believes that the annual identification procedures should substantially reduce the volume of requests for modifications and appeals.

D. Reporting Requirements

In Subpart C of Part 445, DOE is proposing the reporting requirements of the program. Reporting on energy efficiency by each plant of an identified corporation to its corporate headquarters is proposed in § 445.21. Reporting by identified corporations on energy efficiency and, where appropriate, the use of recovered materials, is proposed in § 445.22. The corporate reports are to be submitted either directly to DOE or, if the corporation is exempt from reporting directly to DOE pursuant to the provisions of Subpart D of Part 445, to the sponsor of the adequate reporting program in which the corporation participates. Reporting by sponsors of adequate reporting programs is proposed in § 445.23.

These requirements are proposed to implement the changes in the program mandated by the NECPA, as well as to improve the consistency of the data from those corporations which report through sponsors with the data from corporations which report directly to DOE.

1. *Information to be Reported.* In response to the need to ensure the receipt by DOE of data which can be meaningfully aggregated, DOE is proposing in § 445.22c(2) and § 445.23 that the information obtained from corporations reporting through sponsors must be exactly the same, except aggregated, as that obtained from corporations reporting directly to DOE. This is a significant program modification, and comments are specifically invited on this point. The actual information to be reported will be contained in the report forms to be proposed by DOE.

Sponsors may include in a report information submitted by non-identified corporations. However, information

from such corporations must be aggregated separately from information submitted by identified corporations. DOE continues to encourage all non-identified corporations to participate in voluntary programs which promote energy efficiency.

2. Annual Reporting. DOE is proposing an annual submission, by July 15 of each year, of reports either directly from identified corporations or from sponsors. This timing is consistent with the proposed annual identification process and will serve to reduce the administrative burden of reporting. The reporting period will be the entire calendar year for which each corporation covered by the report is an identified corporation. DOE believes that nearly all corporations can report on a calendar year basis without significant modification to their internal procedures. Sponsors and corporations may require reporting more frequently from corporations and plants, respectively, for their own management purposes.

3. Reporting Formats and Forms. DOE proposes that plant reports, corporate reports to sponsors and sponsor reports may all be submitted on forms to be published and supplied by DOE or on alternative forms if these forms provide identical information. DOE feels that some flexibility in format is desirable to meet the needs of both DOE and the industrial participants in the program.

DOE recognizes the existence of programs by many corporations and sponsors to collect and aggregate data which can provide, in a similar but not identical format, the information required to be provided to DOE. Hence, DOE is proposing not to require the exclusive use of DOE reporting forms but to allow use of forms which provide identical information and which are completely cross-referenced to all the items on the DOE forms. DOE is proposing, however, that those corporations which report directly be required to report using a DOE form. DOE is not proposing the flexibility of using alternative forms for direct corporate reporting because there is no precedent in the program for such use and because DOE believes that the increased burden to DOE to process such alternative forms is not justified. DOE is interested in comments on its proposal for allowing the use of forms other than the DOE forms for reporting.

The DOE reporting forms mentioned above are being developed and will be proposed in the near future for public comment, as required by section 376(c) of the EPCA. It is DOE's intent to have the final forms available before

requiring any corporation to submit a request for exemption or any sponsor of a reporting program to submit a request for a determination that its reporting program is adequate.

4. Data Retention. DOE is proposing in § 445.26 data retention requirements for all identified corporations and sponsors of adequate reporting programs. The retention of plant reporting forms is required by section 375(c) of the EPCA, and the retention of corporate reports to sponsors is required by section 376(g).

DOE is proposing in § 445.26(b) that all exempt corporations must retain the corporate reports filed with sponsors for at least five years. Copies of such reports may also be retained by the sponsors. All reports which are retained must be made available to DOE upon request. This will provide DOE with the opportunity for efficient verification.

E. Exemption Criteria and Procedures

1. Criteria. In order to eliminate inconsistencies between direct corporate reports and sponsor reports, and to take into account the program changes required by the NECPA, DOE is proposing in Subpart D revised criteria and procedures for the annual exemption of identified corporations from reporting directly to DOE. The proposed criteria are intended to ensure that the information obtained from identified corporations through the reports of sponsors is identical to the information obtained from identified corporations which report directly to DOE. DOE believes that corporations and sponsors are supportive of the need for consistency in the data supplied to DOE.

DOE is proposing in § 445.32 the criteria for the exemption of corporations. In order to be exempted, a corporation must file a timely and complete request to be exempt, must participate in a reporting program which is adequate and, if previously exempted, must have met the reporting requirements for an exempt corporation. DOE is proposing in § 445.33 the criteria for the adequacy of a reporting program. In order for its reporting program to be determined adequate, a sponsor must file a timely and complete request to be a sponsor of an adequate reporting program and, if previously determined to be adequate, must have met the reporting requirements for an adequate reporting program and have provided each exempt corporation participating in its program with (1) specific written guidance for preparing and submitting corporate reports and (2) a copy of the report which the sponsor filed with

DOE. DOE wishes to receive comments on its proposed criteria.

2. Procedures for Requesting Corporate Exemption and Adequacy of a Reporting Program. In order to seek an exemption, an identified corporation is required to submit a request to DOE under § 445.34. This request must identify the sponsor to which the corporation intends to report and must include a copy of any report form, other than the appropriate DOE form, it will submit to the sponsor. Any alternative form must be appropriately indexed. The corporation must also submit a statement that it will meet the requirements for reporting by exempt corporations and the applicable data retention requirements. DOE is proposing in paragraph (c) of this section that corporations exempted from direct reporting for one year need not refile to be exempt for the next year, if all information contained in its previous request remains the same.

As proposed in § 445.35, in order to seek to have its reporting program determined to be adequate, a sponsor must submit a request which includes: A list of each major energy-consuming industry which is covered by its reporting program and any report form, other than the appropriate DOE form, which it intends to submit to DOE. Any alternative report form must be appropriately indexed. The request must state whether the sponsor will retain copies of corporate reports and will make such copies available to DOE, pursuant to § 445.26(b), and include additional statements that the sponsor will: (1) Meet the sponsor reporting requirements and the applicable data retention requirements, (2) provide each identified corporation which participates in the program with a copy of the sponsor's report to DOE under § 445.23, and (3) provide written guidance for preparing and submitting a corporate report to the sponsor. DOE proposes in § 445.35(c) that a sponsor with an adequate reporting program in one year can file in the next year a certification that its program is unchanged, instead of the complete request required by § 445.35(a) and (b).

DOE is interested in comments on the appropriateness of these requirements and suggestions for any additional criteria or procedures which could be useful in improving adequate reporting programs.

3. Determination by DOE. DOE is proposing in § 445.37 the procedures for determining the corporations and sponsors which meet the criteria in § 445.32 and § 445.33. In the case of a first-time request for exemption or

determination of adequacy, DOE will accept a timely and complete request, including certification that all criteria will be met, as meeting the criteria. Annually, DOE will publish its proposal to exempt corporations and to determine the adequate reporting programs in the Federal Register for public comment, as required by section 376(g) of the EPCA. After considering public comment, DOE will exempt corporations and determine the adequate reporting programs and will publish a list of exempt corporations and adequate reporting programs in the Federal Register.

4. *Timeliness of Reports by Exempt Corporations and Sponsors.* DOE is proposing in § 445.38 that, if a sponsor does not report to DOE by the deadline provided in § 445.25, all exempt corporations intending to report through that sponsor will be required to report directly to DOE. This section also proposes that, if a sponsor determines that an exempt corporation has failed to file its report, the sponsor should report to DOE based on the reports received from the other exempt corporations which participate in the program. Any exempt corporation which does not file a report with a sponsor will be required to report directly to DOE. DOE believes that these provisions are necessary to enable it to prepare a complete and timely annual report.

F. *Voluntary Energy Efficiency and Recovered Materials Targets*

1. *Industrial Energy Efficiency Improvement Targets.* DOE has included in § 445.42 the ten energy efficiency improvement targets, in order to set forth all parts of the program in the Code of Federal Regulations. As required by section 376(c) of the EPCA, these targets were proposed for public comment (41 FR 48169, November 2, 1976). The final targets were published in the Federal Register (42 FR 29642, June 9, 1977), together with a statement of the basis and justification for each of the targets.

2. *Recovered Materials Utilization Targets—*a. *Legislative Requirements.* DOE is proposing for comment in § 445.44 recovered materials utilization targets (targets) for each of the following industries—metals and metal products, paper and allied products, textile mill products and rubber. DOE is required to set such targets within one year of the enactment of the NECPA, i.e., by November 1979. Section 376(c) of the EPCA requires DOE to afford interested persons an opportunity to submit written and oral data, views and arguments prior to establishing the final targets.

Pursuant to Section 374A of the EPCA, the targets must be based on the best available information. In establishing the targets, DOE is required to consider the technological and economic ability of each of the four industries progressively to increase its use of recovered materials by the target year, as well as actions taken or which could be taken before the target year by the industries, Federal, State or local governments to increase the use of recovered materials. DOE has implemented these requirements in developing the targets.

In developing the proposed targets, DOE has consulted with the Environmental Protection Agency and with representatives from each of the industries for which targets are proposed.

The targets must be established at levels which represent the maximum feasible increase in the use of recovered materials that the appropriate industry can achieve progressively by January 1, 1987. Numerically, each proposed target represents, for an appropriate "subdivision" of an industry, a level expressed as a percentage of recovered materials from prompt industrial and obsolete scrap which can be used per unit of production (input or output) in manufacturing operations by the target year of 1987. The corresponding percentage of recovered materials used per unit of production in the latest year for which data are available (1976, 1977 or 1978) is also provided. The difference between the two numbers indicates the maximum feasible increase, if any, in the utilization of recovered materials between the reference year and the target year.

b. *Target Methodology.* In developing the targets for each of the four industries, DOE followed, in general, the methodology described below. The detailed analyses and assumptions varied, however, reflecting differences among the industries in structure, economics, previous history of recovered materials use and other factors, and reflecting the special characteristics of each recovered material as it is supplied to, processed in and, where appropriate, marketed by an industry.

The description of the general methodology in this preamble provides a basis for an understanding of how the levels were determined for the proposed targets. The use of this methodology in the development of each target, along with the particular set of basic assumptions, relationships and supporting rationale for each proposed target, is contained in the target support

documents, which are available as stated in section III. Reference to these documents is necessary for a complete understanding of the establishment of the proposed targets.

i. *Selection of Appropriate Industry Subdivisions.* Each of the four industries was analyzed to determine how it should be subdivided to allow for the reasonable analysis of technological and economic ability to utilize recovered materials. In general, the result was to subdivide each industry according to process technologies, recovered materials input and/or product types. Factors such as the following were considered in selecting subdivisions: (a) Historical and current levels of use of recovered materials, (b) sales volumes of industry subdivisions, (c) energy consumption levels, and (d) potential for use of recovered materials. Once the appropriate subdivisions were selected, the subdivisions were reviewed to determine which should receive relatively more attention.

ii. *Selection of Sources of Recovered Materials.* Potential sources of recovered materials for each subdivision in each industry were then identified. Factors taken into account in selecting such sources included: (a) Quality of waste, (b) quantity of waste, and (c) dispersion of waste. Under this methodology, potential sources of recovered materials were deemed to include any waste containing one or more substances listed in the legislative definition of recovered materials. In general, sources of waste were categorized as obsolete scrap, prompt industrial scrap and self-generated scrap. Wastes generated outside the United States were considered to be potential sources of recovered materials.

iii. *Analysis of Technological Ability.* Determinations were made of present and future technological limits on the ability of each industry subdivision to use recovered materials from each potential source. These limits could be dictated by one or a number of different considerations including, for example, types of processes employed in the industry and minimum product quality standards. In establishing these technological limits on the use of recovered materials, attempts were made to discover proven and potential processes and equipment which could, if further utilized, affect the use of recovered materials. Once the technological limits were established for each industry subdivision, the ability of waste sources to provide sufficient recovered materials was assessed. If there was a limited supply of potential recovered materials, then the

technological limit was adjusted accordingly.

iv. Analysis of Economic Ability. Economic ability analyses were keyed to the technological limitations on the use of recovered materials. For example, economic criteria, such as industry growth rates and the availability of capital, were studied to determine the prospects for investment in equipment, processes and/or plants capable of increased recovered materials utilization. Other important factors considered include the projected cost of supply of recovered materials and the impact on these of alternative uses of recoverable wastes. For example, waste paper may be burned or waste rubber may be used in asphalt. Such alternative uses may affect the availability and price of recovered materials. As it is not possible to analyze all actions which could affect the target levels, major and potentially significant actions were specified and analyzed relative to each industry.

c. Significance of Recovered Materials Utilization Targets. DOE is proposing to establish recovered materials targets for each of the four industries by setting targets for industry subdivisions. Section 374A(a) does not require an aggregate target for each of four industries and DOE believes, because of the substantial differences among subdivisions, that the aggregation of these targets into a single target for a given industry would not be useful.

The proposed targets, as required by the EPCA, are intended as the best projection of maximum attainable utilization of recovered materials in the target year that is both economically and technologically feasible. Since these targets are not required to be established on the basis of minimum national energy use, a higher target may be consistent with a reduction in total energy consumption, but not necessarily with the requirement to reflect economic feasibility. On the other hand, a lower target might be associated with reduced energy consumption, if more recovered materials were to be burned for fuel rather than recycled to replace virgin materials. The support documentation addresses these relationships.

Three targets are proposed to be set at levels which reflect, between the reference year and the target year, a decrease per unit of production in the utilization of recovered materials. While this result may be contrary to an expectation that each target would show a percentage increase, the technological and economic feasibility analyses in the

support documents set forth the reasons for decreased levels.

While the reporting of information on the use of recovered materials is required from certain corporations under the program, the targets themselves are not directed at individual corporations. Rather they are voluntary industry targets, and no sanctions attach for failure to meet them.

Each of the targets was derived by taking into account the various factors, assumptions and requirements mentioned above and their relationship to each other. The target-support documentation sets forth the extremely complex framework and analysis which determined the proposed target levels. To the extent that the documentation has oversimplified the actual process, made unwarranted assumptions or has other shortcomings, comments are requested.

Under § 445.45, any target established by DOE may be modified if DOE determines that the target cannot reasonably be attained or that it should require greater use of recovered materials.

d. Significant Issues. The attention of the public is particularly directed to the following issues, each of which is important in the establishment of the proposed recovered materials targets.

i. Use of Waste as a Fuel. DOE considered whether to include the direct combustion of waste for its energy content as utilization of a recovered material for purposes of the targets. DOE determined that it should not and, therefore, such use of waste is not included in the proposed targets. Whenever it is technically possible and environmentally acceptable, the use of waste as a fuel through direct combustion is encouraged by DOE. It is expected, however, that such use will be accounted for and reflected in energy efficiency improvement reporting.

ii. Definition of Industry Boundaries. DOE has made several determinations regarding the use of the Standard Industrial Classification (SIC) system to bound the four industries described in section 374A. For example, more than one two-digit SIC industry produces metals and metal products, including primary metals (SIC 33) and fabricated metal products (SIC 34). DOE has determined that only SIC 33 should be used for target-setting purposes, because SIC 34 has virtually no capability to utilize recovered materials. DOE has determined to exclude the plastic component of SIC 30, rubber and miscellaneous plastics, from the targets in the rubber industry, since plastic is

not a recovered material for purposes of the program. DOE also determined that tire retreading and repair operations, classified as SIC 7534, which utilize substantial amounts of recovered rubber, should be included in the targets for the rubber industry. DOE recognizes that reporting on progress to reach the targets for the rubber industry will not contribute to monitoring progress toward the target for retreading, since SIC 7534 is not within a major energy-consuming industry as proposed in § 445.5(a). Comments are requested on the inclusion and exclusion of various industry components in setting the proposed targets.

iii. Intermediate Targets. DOE is interested in any comments on whether meaningful targets for increased use of recovered materials can or should be established for years before 1987.

iv. Types of Waste Included. Section 374A of EPCA, as amended, lists the recovered materials covered by the program. For purposes of the analytic effort required to set the targets, it is important to characterize properly by type the sources of these recovered materials. For analytic convenience and the different potential contribution to increased utilization each could make, any recovered material may be categorized as either self-generated, prompt industrial or obsolete scrap. The public is invited to comment on the definitions of prompt industrial and obsolete scrap as they appear in § 445.2 of the proposed rule. For purposes of target-setting, self-generated scrap was defined to mean recovered materials generated by a manufacturing operation and used as input to the same manufacturing operation. Examples include metal drosses and off-specification products returned to the manufacturing operation. Comments are requested on this definition, as it applies to target-setting.

Use of obsolete scrap in place of virgin raw material clearly reduces solid waste and conserves virgin material. It also generally conserves energy, and its inclusion as a type of recovered material was considered to be crucial. This category of scrap is expected to contribute most heavily to the potential for increased utilization between now and 1987.

Next in importance in terms of potential for increased utilization is prompt industrial scrap. It is currently being used to varying extents by the four specified industries. Its use in certain industries can be expected to increase significantly. It should be noted that more efficient fabricating methods lead to declining availability of this

category of scrap. For example, recent and projected improvements in can manufacturing are expected to reduce the amount of stamping waste which is returned to the supplier of the metal for remelting.

Self-generated scrap is the most complex category to analyze. However, DOE believes that virtually 100% of self-generated scrap is recovered in actual practice and that the potential for increased utilization is insignificant. Use of self-generated scrap was therefore not included in the development of the targets.

v. *Forest Residues.* In developing the targets for recovered materials utilization, DOE recognized that the paper and allied products industry recovers significant quantities of forest residue and other wood waste in its manufacturing operations. However, DOE believes that the definition of recovered materials in section 374A(a) of EPCA does not include such wastes. Accordingly, the targets proposed for the paper and allied products industry do not include increased use of forest residues and other wood wastes as sources of recovered materials. The use of wood waste is, however, addressed in the paper and allied products support documentation.

vi. *Data Used in Target Setting.* DOE believes it has used the best available data in setting the targets. Data sources are indexed in the support documents. DOE is interested in comments on the data it has used and on whether there is important information in either published or unpublished sources which was overlooked in the development of these documents. DOE is also interested in receiving comment on any actions which could be taken by Federal, State or local governments to increase the use of recovered materials in the four target industries.

As discussed above, DOE has recently required certain corporations to report on their current use of recovered materials and their plans, if any, to increase such use in the next ten years. DOE may use information from the reports in establishing final targets. If the additional information may materially affect the target values, DOE may make relevant data available to the public in order to allow comments on such data, if appropriate.

vii. *Target Universe and Reporting Universe.* The proposed targets represent levels of recovered materials utilization to be achieved by an industry subdivision and have been established from industry-wide data. DOE will measure progress toward such targets by an industry, based on data from

corporations required to report to DOE under section 374A(e) of the EPCA. While these corporations do not comprise the entire industry, the EPCA contemplates that the largest corporate energy usage in an industry should be monitored to measure industry-wide progress. DOE believes that establishing the recovered materials targets based solely on data from the reporting universe would be a very complex process and is not required by section 374A. DOE is, however, interested in any comments on this matter.

III. Access To Support Documents for the Proposed Recovered Materials Targets

Copies of the detailed studies upon which each of the proposed targets is based are available for inspection at the DOE Freedom of Information Office, Forrester Building, Independence Avenue and L'Enfant Plaza, S.W., Washington, D.C., between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, and at each DOE Regional Office as follows:

| Region | Address | Hours |
|-----------|--|--------------|
| I..... | Analex Bldg., DOE Library Causeway Street Boston, Mass. 02114. | 8:30 to 5 |
| II..... | Room 3206, 26 Federal Plaza New York, N.Y. 10007. | 8:30 to 5 |
| III..... | Room 1011, 1421 Cherry Street Philadelphia, Pa. 19102. | 8 to 4:30 |
| IV..... | 8th Floor, 1655 Peachtree St., NE Atlanta, Ga. 30309. | 8 to 4:30 |
| V..... | Room A-333, 175 West Jackson Blvd., Chicago, Ill. 60604. | 8 to 4:30 |
| VI..... | Room 280, 2626 West Mockingbird Lane, Dallas, Tex. 75235. | 8 to 4:30 |
| VII..... | 324 East 11th Street Kansas City, Mo. 64106. | 7:30 to 4 |
| VIII..... | Room 206, 1075 South Yukon St., Lakewood, Colo. 80226. | 7:30 to 4:30 |
| IX..... | Third Floor Reading Room, 111 Pine Street, San Francisco, Calif. 94111. | 7:30 to 3 |
| X..... | Room 1992, 915 Second Ave., Seat- tle, Wash. 98174. | 8 to 4 |

Copies of the studies will, wherever possible, be made available for duplication after regular business hours. Persons wishing to reserve a copy for this purpose shall contact DOE in advance.

IV. Opportunities for Public Comment

A. Written Comment Procedures

Interested persons are invited to participate in this rulemaking by submitting data, views, or arguments with respect to the proposal set forth in this notice to Margaret Sibley, Office of Conservation and Solar Applications, Department of Energy, Docket Number CAS-RM-79-301, 20 Massachusetts Avenue, NW., Washington, D.C. 20585.

Comments on all parts of the rule other than the recovered materials targets should be identified on the outside of the envelope and on documents with the designation "Industrial Energy Conservation Program." Comments on the recovered materials targets proposed in § 445.44 should be identified on the outside of the envelope and on documents with the designation "Proposed Recovered Materials Targets-Industry." Twenty-five copies should be submitted. All comments received by August 7, 1979, before 4:30 p.m. e.d.t., and all other relevant information, will be considered by DOE before final action is taken regarding the proposed rule.

Pursuant to the provisions of 10 CFR 1004.11 (44 FR 1908, January 8, 1979), any person submitting information which he or she believes to be confidential and which may be exempt by law from public disclosure should submit one complete copy, and twenty-five copies from which information claimed to be confidential has been deleted. In accordance with the procedures established at 10 CFR 1004.11, DOE shall make its own determination with regard to any claim that information submitted by exempt from public disclosure.

B. Public Hearings

DOE has determined to have one public hearing on all aspects of the proposed rule, other than the proposed recovered materials targets. This hearing will be held at 9:30 a.m., e.d.t., on July 31, 1979, in Room 3000A, 12th & Pennsylvania Avenue, NW., Washington, D.C. 20461.

DOE has determined that a public hearing will be held on the proposed recovered materials targets for each of the four industries for which such targets are to be established. Each of the four hearings will be held in Room 3000A, 12th & Pennsylvania Avenue, NW., Washington, D.C., on the following dates:

| Proposed targets for: | Date |
|------------------------------------|---------------|
| 1. Textile mill products | July 23, 1979 |
| 2. Metals and metal products | July 24, 1979 |
| 3. Paper and allied products | July 25, 1979 |
| 4. Rubber | July 26, 1979 |

Any person who has an interest in these proceedings or who is a representative of a group of persons that has an interest in these proceedings may make a written request for an opportunity to make an oral presentation. All such requests should be directed to DOE at the address given at the beginning of this preamble, and must be received before 4:30 p.m., e.d.t., July 13, 1979. A request may be hand delivered between the hours of 8:00 a.m.,

and 4:30 p.m., Monday through Friday. Requests should be marked, as for written comments, with the additional notation, "Request to Speak."

The person making the request should briefly describe the interest concerned, if appropriate, state why she or he is a proper representative of a group of persons that has such an interest, and give a concise summary of the proposed oral presentation and a phone number where he or she may be contacted. Each person selected to be heard will be notified by DOE before 4:30 p.m., e.d.t. local time, July 16, 1979. Each person selected to be heard must submit twenty-five copies of his or her statement to the address given for written comments before 4:30 p.m., e.d.t., July 20, 1979. In the event any person wishing to testify cannot provide twenty-five copies, alternate arrangements can be made in advance of the hearing by so indicating in the letter requesting an oral presentation or by calling Ms. Margaret Sibley at 202-376-1651.

C. Conduct of Hearings

DOE reserves the right to select the persons to be heard at the hearings, to schedule their respective presentations and to establish the procedures governing the conduct of the hearings. The length of each presentation may be limited, based on the number of persons requesting to be heard.

A DOE official will be designated to preside at each hearing. These will not be judicial or evidentiary type hearings. Questions may be asked of speakers only by those conducting a hearing, and there will be no cross-examination or persons presenting statements. Any decision made by DOE with respect to the subject matter of a hearing will be based on all information available to DOE. At the conclusion of all initial oral statements at each hearing, each person who has made an oral statement will be given the opportunity, if he or she so desires, to make a rebuttal statement. The rebuttal statements will be given in the order in which the initial statements were made and will be subject to time limitations.

Any interested person may submit questions to be asked, by those conducting a hearing, of any person making a statement. Questions should be received at the address given for written comments before 4:30 p.m., e.d.t., July 20, 1979. DOE will determine whether the question is relevant, and whether the time limitations permit it to be presented for answer.

Any person making an oral statement who wishes to ask a question at a

hearing may submit the question, in writing, to the presiding officer. The presiding officer will determine whether the question is relevant, and whether the time limitations permit it to be presented for answer.

Any further procedural rules needed for the proper conduct of each hearing will be announced by the presiding officer.

A transcript of each hearing will be made and the entire record of each hearing, including the transcript, will be retained by DOE and made available for inspection at the DOE Freedom of Information Office, Forrestal Building, Independence Avenue and L'Enfant Plaza, S.W., Washington, D.C. between the hours of 8:00 a.m., and 4:30 p.m., Monday through Friday. Any person may purchase a copy of a transcript from the reporter.

V. Environmental Review, Regulatory Review, Urban Impact Review, Consultation With Other Federal Agencies and Major Industries

A. Environmental Review

The National Environmental Policy Act of 1969 as amended, 42 U.S.C. 4321 *et seq.*, (NEPA) requires that Federal Agencies, to the fullest extent possible, execute their responsibilities in accordance with the policies set forth in the NEPA, and prepare a detailed statement concerning "major Federal actions significantly affecting the quality of the human environment." While reporting by an identified corporation is mandatory under the program, the achievement of the industrial energy efficiency improvement and recovered materials utilization targets is strictly voluntary. Therefore, while it is true that the goal of the program is to improve industrial energy efficiency and increase recovered materials utilization, which may reduce environmental residuals, any actual savings with resulting changes in environmental effects will occur solely as a result of, and in a manner determined by, private, rather than Federal, actions. The proposed rule is therefore not a "major Federal action significantly affecting the quality of the human environment" and does not require further environmental review.

As required by section 7(a)(1) of the Federal Energy Administration Act of 1974, as amended (15 U.S.C. 766), a copy of this proposed rulemaking was submitted to the Administrator of the Environmental Protection Agency for his comments concerning the impact of this proposal on the quality of the environment. The Administrator had no comments.

B. Regulatory Review

DOE has determined that this proposed rulemaking is significant, as that term is used in Executive Order 12044 "Improving Government Regulations" and amplified in DOE Order 2030 "Procedures for the Development and Analysis of Regulations, Standards, and Guidelines." This is considered a significant proposal because it proposes the recovered materials targets and the criteria and procedures for mandatory reporting on industrial energy efficiency and utilization of recovered materials which will result in improved reporting of such information by DOE to the Congress, the President, and the public.

DOE has further determined that the proposed rulemaking is not likely to have a major impact, as defined by Executive Order 12044 and amplified in DOE Order 2030, because it is not likely to impose a gross economic annual cost of \$100 million or more and is not likely to have any of the other impacts which are defined as major in DOE Order 2030. Accordingly no regulatory analysis will be performed.

As further required by DOE Order 2030, a draft regulatory evaluation plan has been prepared for the proposed rulemaking.

C. Urban Impact Analysis

The proposed rulemaking has been reviewed in accordance with OMB Circular A-116 to assess the impact on urban centers and communities. In accordance with DOE's finding that the proposed rulemaking is not likely to have a major impact, DOE has determined that no community and urban impact analysis of this proposed rulemaking is necessary, pursuant to section 3(a) of Circular A-116.

D. Consultation With Other Federal Agencies and Major Industries

Pursuant to section 372 of the EPCA, DOE has consulted with the Secretary of Commerce on this proposed rule. The Department of Commerce has expressed its interest in the rulemaking and may submit comments during the public comment period.

As required by section 374A(c), in developing the proposed targets for the increased utilization of recovered materials DOE has consulted with the Administrator of the Environmental Protection Agency and each of the major industries subject to the provisions of section 374A.

(Energy Policy and Conservation Act (Pub. L. 94-163) as amended by the National Energy Conservation Policy Act (Pub. L. 95-619);

Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended; E. O. 11790 (39 F.R. 238185); The Department of Energy Organization Act (Pub. L. 95-91); E.O. 12009 (42 FR 46267))

In consideration of the foregoing, the Department of Energy proposes establishing Part 445 of Chapter II of Title 10 of the Code of Federal Regulations, as set forth below.

Issued in Washington, D.C., June 1, 1979.
Maxine Savitz,
Deputy Assistant Secretary, Conservation and Solar Applications.

PART 445—INDUSTRIAL ENERGY CONSERVATION PROGRAM

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Authority: Secs. 5, 7, 13, Pub. L. 93-275, 88 Stat. 97 (15 U.S.C. 764, 766, 772); secs 371-376, Pub. L. 94-163, 89 Stat. 871 (42 U.S.C. 6341-6346), as amended by Pub. L. 95-619, 92 Stat. 3207; secs. 301, 308, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7151, 7158); E. O. 11790 (39 FR 23185); E. O. 12009 (42 FR 46267).

Subpart A—General Provisions

§ 445.1 Purpose and scope.

This part sets forth the regulations for the Industrial Energy Conservation Program established under Part I of Title III of the Act. It includes criteria and procedures for the identification of reporting corporations, reporting requirements, criteria and procedures for exemption from filing reports directly with DOE, voluntary industrial energy efficiency improvement targets and voluntary recovered materials utilization targets. The purpose of the program is to promote increased energy conservation by American industry and, as it relates to the use of recovered materials, to conserve valuable energy and scarce natural resources.

§ 445.2 Definitions.

For the purposes of this part—
"Act" means the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871), as amended by the National Energy Conservation Policy Act (Pub. L. 95-619, 92 Stat. 3207).

"Btu" means British thermal unit.

"Chief executive officer" means, within a corporation or a sponsor, the chief executive officer or other individual who is in charge of the corporation or sponsor.

"Commercial quality production" means the manufacture of products suitable for shipment and/or sale.

"Control" means the ability to direct or cause the direction of the management and policies of a corporation. Whether control is present involves a question of fact to be determined from such criteria as degree of ownership (especially of voting shares), contractual arrangements, and other means of influence, such as ability to appoint a majority of a corporation's board of directors, whether by sufficient stock ownership or other means.

"Corporation" means a person as defined in Section 3(2)(B) of the Act (any corporation, company, association, firm, partnership, society, trust, joint venture or joint stock company) and includes any person which controls, is controlled by, or is under common control with such person.

"DOE" means the Department of Energy.

"Energy efficiency" means the amount of energy consumed per unit of production.

"Energy type" means electricity, purchased steam, natural gas, bituminous coal, anthracite, coke, ethane, propane, LPG, natural gasoline, gasoline (including aviation), special naphtha, kerosene, distillate fuel oil (including diesel), still gas, petroleum coke, residual fuel oil, crude oil, and any other material consumed as a fuel in manufacturing.

"Exempt corporation" means an identified corporation which DOE determines, pursuant to § 445.37, is not required to report directly to DOE.

"Feedstock" means petroleum products, natural gas or coal used as a raw material which is processed to become a part of the chemical composition of a product other than an energy type.

"Identified corporation" means a corporation identified by DOE in accordance with § 445.15. A corporation is an identified corporation for the year in which it consumed, in accordance with § 445.13, at least one trillion Btu's.

"Major energy-consuming industry" is an industry listed in § 445.5(a).

"Manufacturing" means the mechanical or chemical transformation of materials or substances into new products, as described on page 57 of the Office of Management and Budget Standard Industrial Classification Manual (1972).

"Manufacturing operation" means the mechanical or chemical transformation of materials or substances into a product classified within SIC codes 22, 26, 30, or 33; which is measured in a single unit of production. Manufacturing operations include, but are not limited to, the production of iron, steel, aluminum, copper, lead, zinc, wood pulp, paper, spun textile goods, woven textile goods, felt textile goods, non-woven textile goods, tires and tire products, rubber footwear, and industrial rubber products.

"Obsolete scrap" means recovered materials created by the use and subsequent discard of a product. Examples are discarded tires, automobiles, and newspapers. This includes recovered materials from outside the United States which are used in manufacturing operations in the United States.

"Plant" means an economic unit of a corporation at a single physical location where manufacturing is performed.

"Product" means an item or grouping of items (separate parts of, or all of a product line) that is the production of a manufacturing corporation that is

classified within a major energy-consuming industry.

"Production" means the quantity of a corporation's product output, throughput, or activity.

"Program" means the Industrial Energy Conservation Program of DOE.

"Prompt industrial scrap" means recovered materials generated by an industrial process and used as input to a manufacturing operation other than the industrial process which generated it. An example is metal fabrication stamping waste which is used in manufacturing steel. This includes recovered materials from outside the United States which are used in manufacturing operations in the United States.

"Recovered materials" mean any of the following energy-saving recovered materials: Aluminum, copper, lead, zinc, iron, steel, paper and allied paper products, textiles, and rubber, recovered from solid waste.

"SIC" means the Standard Industrial Classification system described in the Office of Management and Budget Standard Industrial Classification Manual (1972).

"Solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities; but does not include, solid or dissolved materials in domestic sewage, or solid or dissolved materials in irrigation flows, or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

"Sponsor" means a trade association or other person which operates, or intends to operate, a reporting program which collects data from one or more corporations.

"United States" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

§ 445.3 Management of the program.

The Office of Industrial Programs, Office of the Assistant Secretary for Conservation and Solar Applications, Department of Energy, will implement and manage the program.

§ 445.4 Handling of information submitted under the program.

(a) Except as otherwise provided in this section, the handling of information submitted to DOE under this part will be governed by DOE's Freedom of Information regulations, 10 CFR Part 1004.

(b) DOE will not disclose any information obtained under this part which it determines is a trade secret or other matter described in 5 U.S.C. 552(b)(4), disclosure of which may cause significant competitive harm, except to committees of Congress upon request of such committees; and information from plant reporting forms made available to DOE for verification purposes under § 445.26(a) shall not be released to the public.

(c) A corporation which claims that information provided to DOE under this part is a trade secret or commercial or financial information that is privileged or confidential within the meaning of 5 U.S.C. 552(b)(4), and that disclosure of this information would cause significant corporate competitive damage, must so inform DOE by providing at the time of the submission of the information a detailed item-by-item explanation of whether the information is customarily treated as confidential by the corporation and the industry, and a detailed explanation of the anticipated competitive damage which would result from public disclosure.

(d) Prior to disclosing any information other than in response to a request made under 10 CFR Part 1004, DOE will grant any person who submitted information in accordance with paragraph (c) of this section an opportunity to comment on the proposed disclosure by providing at least seven days' notice of DOE's determination to disclose such information. For purposes of this paragraph, notice is deemed to be given when mailed to the person who provided the information.

(e) Any information submitted to DOE by a corporation under this part shall not be considered energy information, as defined by section 11(e)(1) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 796), for purposes of any verification examination authorized to be conducted by the Comptroller General under section 501 of the Act.

§ 445.5 Major energy-consuming industries.

(a) For purposes of this part, the following 2-digit SIC manufacturing industries are the major energy-consuming industries:

- (1) SIC 20—Food and kindred products;
- (2) SIC 21—Tobacco products;
- (3) SIC 22—Textile mill products;
- (4) SIC 23—Apparel and other textile products;
- (5) SIC 24—Lumber and wood products;
- (6) SIC 25—Furniture and fixtures;
- (7) SIC 26—Paper and allied products;
- (8) SIC 27—Printing and publishing;
- (9) SIC 28—Chemicals and allied products;
- (10) SIC 29—Petroleum and coal products;
- (11) SIC 30—Rubber and miscellaneous plastic products;
- (12) SIC 31—Leather and leather products;
- (13) SIC 32—Stone, clay and glass products;
- (14) SIC 33—Primary metal industries;
- (15) SIC 34—Fabricated metal products;
- (16) SIC 35—Machinery, except electrical;
- (17) SIC 36—Electric, electronic equipment;
- (18) SIC 37—Transportation equipment;
- (19) SIC 38—Instruments and related products; and
- (20) SIC 39—Miscellaneous manufacturing industries.

(b) The following major energy-consuming industries are the industries for which reporting on the use of recovered materials is required under § 445.22(b):

- (1) SIC 22 Textile mill products;
- (2) SIC 26 Paper and allied products;
- (3) SIC 30 Rubber and miscellaneous plastic products; and
- (4) SIC 33 Primary metal industries.

§ 445.6 Procedures for appeals.

Any appeal of a determination by DOE pursuant to any provision of this part shall be filed with the Office of Hearings and Appeals, U.S. Department of Energy, Washington, D.C. 20461, within 30 days of the date of that determination, pursuant to the procedures for such an appeal stated in 10 CFR Part 205, Subpart H. A person has not exhausted its administrative remedies until an appeal has been filed under that subpart, and an order granting or denying the appeal has been issued.

§ 445.7 General information-gathering authority.

In addition to the exercise of authority under Part E of Title III of the Act, DOE may exercise any authority available under any other provision of law to obtain such information with respect to

industrial energy efficiency and industrial recovered materials use which it determines is necessary or appropriate to the attainment of the objectives of the program. Nothing in this part shall limit the authority of DOE to require reports of energy information under any other law.

Subpart B—Identification of Corporations

§ 445.11 Scope.

This subpart contains the criteria and procedures for the annual identification of corporations.

§ 445.12 Requirement for corporations to file a report on energy consumption.

(a) Except as provided by paragraph (b) of this section, a corporation which consumed, as determined according to § 445.13, at least one trillion Btu's of energy in a calendar year within a major energy-consuming industry shall file a report on that energy consumption with DOE as provided in section § 445.14.

(b) Any corporation which was identified by DOE under § 445.15 within a major energy-consuming industry for a calendar year and which consumed, as determined according to § 445.13, at least one trillion Btu's of energy within the same major energy-consuming industry in the next calendar year, need not file a new report of its energy consumption in that industry.

(c) Any corporation which was identified by DOE under § 445.15 within a major energy-consuming industry for a calendar year and which consumed, as determined according to § 445.13, less than one trillion Btu's of energy within the same major energy-consuming industry in the next calendar year shall file a report on its energy consumption in that industry as provided by § 445.14. The failure of a corporation described in this paragraph to file a report may result in the continued identification of the corporation by DOE under § 445.15.

§ 445.13 Computation of energy consumption.

(a) For purposes of this subpart, energy consumed is the sum of the Btu contents of all energy types consumed by a corporation in a manufacturing industry within the United States and includes energy used for—

- (1) Direct manufacturing activities;
- (2) Thermal self-generation of electricity;
- (3) Heating, ventilating and air conditioning of manufacturing buildings and plant offices, as well as manufacturing services such as shops, cafeteria, other plant personnel services,

and plant chemical and analytical laboratories;

(4) In-plant transportation, such as lift trucks, conveyors, cranes, and railroads;

(5) Transportation to manufacturing facilities from mining operations owned by the manufacturer;

(6) Raw material storage;

(7) Services for finished product warehouses within a plant fence if directly related to manufacturing activities; and

(8) Feedstocks.

(b) For purposes of this subpart, energy consumed does not include (where such use is metered separately or can otherwise be identified)—

(1) All uses of electricity self-generated by thermal means;

(2) Services for corporate and divisional offices not contiguous to a plant;

(3) Services for basic research not contiguous to a plant;

(4) Services for regional distribution centers;

(5) Fuel for corporate aircraft, salesmen's cars and over-the-highway trucks;

(6) By-product fuels sold and shipped, or stored for sale;

(7) Facility start-up energy (to point of commercial quality production);

(8) Waste used as fuel;

(9) Transport of intermediate product to another producer for finishing within the same two-digit industry; and

(10) Fuels received for storage for later disposition.

(c) For purposes of this section, where energy is consumed in manufacturing in one major energy-consuming industry for purposes of manufacturing an end product in another major energy-consuming industry and such energy is not separately metered or cannot otherwise be identified, the energy is consumed in the major energy-consuming industry of the end product.

(d) To avoid double-counting in the case of thermally self-generated electricity, a corporation's electricity consumption shall be comprised only of purchased electricity and self-generated hydropower. For example, where a corporation consumes coal in the thermal generation of electricity for its own use, the Btu's of the coal, but not the Btu's of the electricity, shall be included.

(e) Where an energy type (except electricity) was purchased according to, or with knowledge of, its actual Btu content, and such Btu content can be documented, energy consumed must be determined by reference to the actual Btu content. Where the energy type was not purchased according to, or with

knowledge of, its actual Btu content and in the case of electricity, the following conversion factors (Btu's/energy unit) must be used:

- (1) Electricity—3,412/kwh.;
- (2) Natural gas—1,020/cu. ft.;
- (3) Bituminous coal—22,565,000/short ton;
- (4) Anthracite—25,400,000/short ton;
- (5) Coke—26,000,000/short ton;
- (6) Ethane—3,082,000/bbl.;
- (7) Propane—3,848,000/bbl.;
- (8) LPG—4,011,000/bbl.;
- (9) Natural gasoline—4,620,000/bbl.;
- (10) Gasoline (including aviation)—5,248,000/bbl.;
- (11) Special naphtha—5,248,000/bbl.;
- (12) Kerosene—5,670,000/bbl.;
- (13) Distillate fuel oil (including diesel)—5,825,000/bbl.;
- (14) Still gas—6,000,000/bbl.;
- (15) Petroleum coke—6,024,000/bbl.;
- (16) Residual fuel oil—6,287,000/bbl.;
- (17) Crude oil—5,800,000/bbl.; and
- (18) Other energy types (including purchased steam)—(to be determined by calorimetric measurement or engineering standard as appropriate for consuming corporation).

§ 445.14 Report on energy consumption.

(a) The reports required by § 445.12(a) and (c) must include the following information:

(1) The name, title, address and phone number of the individual responsible for reporting energy data for the corporation;

(2) The Internal Revenue Service "Employer Identification Number" (EIN) for the corporation; and

(3) The following statement, completed as appropriate:

(name of corporation)
consumed at least one trillion Btu's of energy in calendar year — in SIC(s) — [for only those corporations filing pursuant to § 445.12(c), substitute or add the completed phrase: (and) consumed less than one trillion Btu's of energy in calendar year — in SIC(s) —], as determined according to 10 CFR 445.13. I certify that all the information in this report is true and accurate to the best of my knowledge.

(Signature of Chief Executive Officer or officer designated by such officer)

Date of Submission

(b) Reports required by § 445.12 must be received by DOE by the February 28 following the close of the calendar year for which the corporation is required to report and must be sent to the following address: Office of Industrial Programs,

U.S. Department of Energy, room 5103, 20 Massachusetts Avenue, N.W., Washington, D.C. 20585. The deadline and address for submission of the report may be changed by DOE by the publication of a notice of the change in the *Federal Register*.

(c) Where a corporation controls, is controlled by or is under common control with another corporation, the corporation required to file the report is the corporation which controls.

(1) Where a corporation controls a joint venture, that corporation shall include the energy consumed by the joint venture in its energy consumption. Where more than one corporation controls a joint venture, each controlling corporation shall include in its energy consumption an equal percentage of the energy consumed by the joint venture during the calendar year for which the report is filed.

(2) Where a corporation is under common control, each controlling corporation shall include in its energy consumption an equal percentage of the energy consumed by the corporation under common control.

(3) A corporation shall supply to DOE, upon request, any material which DOE may require to verify control.

(d) All data used by a corporation in determining its energy consumption must be retained by the corporation for at least five years.

§ 445.15 Identification of corporations by DOE.

(a) Annually, after reviewing the information filed pursuant to § 445.12, and any other information on corporate energy consumption available to it, DOE will identify each corporation which consumed at least one trillion Btu's of energy within a major energy-consuming industry in the previous year, pursuant to the procedures set forth in paragraph (b) of this section.

(b) DOE will publish in the *Federal Register* a list identifying corporations. If this list must be supplemented, DOE may publish an updated list or may notify a corporation of its identification by certified mail.

§ 445.16 Request for modification.

(a) A corporation may file a request with DOE to modify its identification pursuant to § 445.15 on the grounds of clerical or technical error.

(b) Notwithstanding the provisions of § 445.6, the request must be filed with DOE within 30 days of the identification of the corporation, at the Office of Industrial Programs, U.S. Department of Energy, Room 5103, 20 Massachusetts Avenue, N.W., Washington, D.C. 20585.

and marked "Industrial Energy Conservation Program: Request for Modification." DOE may change the address for the submission of such requests by the publication of a notice of such change in the *Federal Register*.

(c) 10 CFR 205.131 and 205.134 provide the format for such a request.

(d) The request must adequately explain how the corporation erred in its report of energy consumption or how DOE erred in identifying the corporation.

(e) DOE shall respond to the request by granting or denying it within 20 days of the receipt of the request by the Office of Industrial Programs.

Subpart C—Reporting Requirements

§ 445.21 Plant reporting requirements.

(a) Each plant of an identified corporation shall report to the corporation at its headquarters in the United States on the progress the plant has made during the reporting period in improving its energy efficiency in each major energy-consuming industry within which the corporation is identified.

(b) The reports required under paragraph (a) of this section must be submitted on a plant reporting form which has been—

(1) Published and made available for this purpose by DOE, or

(2) Provided by the identified corporation, together with a complete index referencing each and every item on the DOE form to the appropriate identical item on the form submitted.

(c) The reports required under paragraph (a) of this section must be received by the identified corporation in a manner sufficiently timely to permit the data from such reports to be aggregated in the corporation's report required by § 445.22.

§ 445.22 Corporate reporting requirements.

(a) The chief executive officer (or officer designated by such officer) of each identified corporation shall report by the date specified in § 445.25 on the progress the corporation has made in improving its energy efficiency in each major energy-consuming industry within which the corporation is identified, including data aggregated from plant reports required under § 445.21.

(b) The chief executive officer (or officer designated by such officer) of each corporation identified within any of SIC(s) 20, 26, 30 or 33 also shall report by the date specified in § 445.25 on the progress the corporation has made to increase its utilization of recovered materials in each of these four industries

within which the corporation is identified.

(c) The information required under paragraphs (a) and (b) of this section must be submitted—

(1) To DOE, on a corporate reporting form which has been published and made available for this purpose by DOE; or

(2) For an exempt corporation, to a sponsor of an adequate reporting program on a corporate reporting form—

(i) Described in paragraph (c)(1) of this section; or

(ii) Previously supplied by the corporation to DOE in its submission under § 445.34, accompanied by a complete index referencing each and every item on the DOE form to the corresponding identical item on the form submitted and the certification required by the DOE form.

§ 445.23 Sponsor reporting requirements.

(a) The chief executive officer (or officer designated by such officer) of each sponsor of an adequate reporting program, as determined pursuant to § 445.37, shall report by the date specified in § 445.25 to DOE, as follows:

(1) For each major energy-consuming industry for which the sponsor has an adequate reporting program, on the progress the exempt corporations which participate in the adequate reporting program have made in improving their energy efficiency in that major energy-consuming industry; and

(2) For each of SIC(s) 20, 26, 30 and 33 for which the sponsor has an adequate reporting program, on the progress the exempt corporations which participate in the adequate reporting program and which are identified in such SIC code have made to increase their utilization of recovered materials.

(b) The information required under paragraph (a) of this section must be submitted to DOE on a sponsor reporting form which has been—

(1) Published and made available for this purpose by DOE; or

(2) Previously supplied by the sponsor to DOE in its submission under § 445.35, accompanied by the certification required by the DOE form.

§ 445.24 Reporting period.

The reporting period for each report required by this subpart is the calendar year for which each corporation covered by the report is an identified corporation.

§ 445.25 Reporting date and address.

All reports submitted to DOE under this subpart must be received by DOE by the July 15 following the end of the

reporting period and must be sent to the address provided in the instructions to the appropriate DOE form. This deadline and address may be changed by DOE by a notice published in the Federal Register.

§ 445.26 Data retention.

(a) All data used by an identified corporation in preparing reports under § 445.22, including the reports submitted to the corporation under § 445.21, must be retained by the corporation for at least five years from the filing date and must be made available to DOE promptly upon request for verification.

(b) All reports submitted by an exempt corporation to a sponsor under § 445.22(c)(2) must be retained by the exempt corporation for at least five years from the filing date. Upon request for verification the reports must be made promptly available to DOE by the corporation, and by the sponsor if copies of the reports are retained by the sponsor.

(c) All data, other than reports described in paragraph (b), used in preparing reports submitted to DOE by a sponsor under § 445.23 must be retained by the sponsor for at least five years from the filing date and must be made available to DOE promptly upon request for verification.

Subpart D—Exemption Criteria and Procedures

§ 445.31 Scope.

This subpart contains the criteria and procedures for the exemption of identified corporations from the requirement of filing corporate reporting forms directly with DOE.

§ 445.32 Criteria for the exemption of corporations.

In order for an identified corporation to be exempt from filing the corporate report required by § 445.22 directly with DOE, pursuant to § 445.37, the corporation must—

(a) File a timely and complete request to be an exempt corporation, pursuant to § 445.34;

(b) Participate in an adequate reporting program; and

(c) If it was previously determined to be an exempt corporation, have met the requirements of § 445.22 (a), (b) and (c)(2) for the period it has been exempt.

§ 445.33 Criteria for adequate reporting programs.

In order for a reporting program of a sponsor to be determined an adequate reporting program for a major energy-consuming industry, pursuant to § 445.37, the sponsor must—

(a) File a timely and complete request to be a sponsor with an adequate reporting program, pursuant to § 445.35;

(b) If its program previously was determined to be adequate, have met the requirements of § 445.23 and have provided each identified corporation which participated in the reporting program with (1) specific written guidance for preparing and submitting the corporate report under § 445.22(c)(2) to the sponsor; and (2) a copy of the report which the sponsor filed with DOE under § 445.23.

§ 445.34 Request to be an exempt corporation.

(a) An identified corporation may seek an exemption by submitting a request to DOE describing its participation in an adequate reporting program.

(b) This request must include the following information:

(1) The name and address of the identified corporation;

(2) The name and telephone number of the person responsible for preparing the report required by § 445.22 on behalf of the corporation;

(3) The name, address, and telephone number of the sponsor in whose reporting program the corporation has arranged to participate, together with the enumeration of all major energy-consuming industries for which the corporation will submit reports to the sponsor;

(4) A statement that it will meet the requirements of § 445.22 (a), (b) and (c)(2) and § 445.26 (a) and (b);

(5) A statement of how the corporation will report to the sponsor, either—

(i) On the DOE corporate reporting form; or

(ii) On some other reporting form, designated by the corporation;

(6) If the corporation designates some other form, a copy of the form, together with a complete index referencing each and every item on the DOE form to the corresponding identical item on the form submitted; and

(7) A certification by the chief executive officer (or other officer designated by such officer) of the corporation as follows: "I certify that all information provided in this request is true and accurate to the best of my knowledge."

(c) Notwithstanding the provisions of paragraph (a) of this section, any corporation which was exempt under § 445.37 for a calendar year and for which all information required by paragraph (b) of this section is

unchanged, need not refile a request for the next year.

§ 445.35 Request to be a sponsor with an adequate reporting program.

(a) A sponsor may seek to have its reporting program determined to be adequate by submitting a request to DOE describing its reporting program.

(b) This request must include the following information:

(1) The name and address of the sponsor;

(2) The name and telephone number of the person responsible for preparing the report required by § 445.23 on behalf of the sponsor;

(3) A listing of each major energy-consuming industry covered by its reporting program;

(4) A statement that the sponsor will meet the requirements of § 445.23 and § 445.26(c);

(5) A statement of how the sponsor will submit the reports required by § 445.23 to DOE; either—

(i) On the DOE sponsor reporting form; or

(ii) On some other reporting form, designated by the sponsor;

(6) If the sponsor designates some other form, a copy of the form, together with an index referencing each and every item on the DOE form to the corresponding identical item on the form submitted;

(7) A statement that the sponsor will provide each identified corporation which participates in the reporting program with—

(i) Specific written guidance for preparing and submitting the corporate report under § 445.22(c)(2) to the sponsor; and

(ii) A copy of the report which the sponsor files with DOE under § 445.23;

(8) A statement of whether the sponsor will retain copies of corporate reports and, if so, a statement that it will meet the requirements of § 445.26(b); and

(9) A certification signed by the chief executive officer (or other officer designated by such officer) as follows: "I certify that all information provided in this request is true and accurate to the best of my knowledge."

(c) Notwithstanding the provision of paragraph (a) of this section, a sponsor which was determined to have an adequate reporting program for a calendar year and for which all information required by paragraph (b) of this section is unchanged, need not refile a request for the next year, provided its chief executive officer (or other officer designated by such officer) submits a certification that all items in the request

filed the previous year are still true and accurate to the best of his knowledge.

§ 445.36 Filing deadline and address.

The requests made pursuant to § 445.34 and § 445.35 must be received by DOE by the April 15 of each year and must be sent to the following address: Office of Industrial Programs, U.S. Department of Energy, Room 5103, 20 Massachusetts Avenue, N.W., Washington, D.C. 20585. DOE may change the deadline and address for submission of such requests by publishing a notice of such change in the Federal Register.

§ 445.37 Determination of exempt corporations and adequate reporting programs.

(a) Annually, in accordance with the criteria set forth in § 445.32 and § 445.33, DOE will exempt corporations and determine the adequacy of the reporting programs in which they participate, pursuant to the procedures set forth in paragraph (b) of this section.

(b) DOE will publish in the Federal Register for public comment its proposal to exempt corporations and to determine as adequate the reporting programs in which they participate. After considering comment from interested persons, DOE will exempt corporations and determine the adequacy of the reporting programs in which they participate by publishing a list of corporations and sponsors of programs in the Federal Register.

§ 445.38 Failure to report.

(a) If a sponsor with an adequate reporting program fails to submit the report required by § 445.23 by the deadline established in § 445.25, DOE may, by notice to the sponsor and to the corporations which participate in its program, revoke its determination that the sponsor has an adequate reporting program. Within 30 days after the notice is mailed, each such corporation must submit a corporate report directly to DOE as provided in § 445.22(c)(1).

(b) If a sponsor determines that an exempt corporation has failed to file its corporate report as required by § 445.22(c)(2), it should submit a report as required by § 445.23 only on those exempt corporations which filed the corporate report with the sponsor. If an exempt corporation does not file the report required by § 445.22 with a sponsor, it must file the report required by § 445.22 directly with DOE.

Subpart E—Voluntary Energy Efficiency Improvement Targets and Voluntary Recovered Materials Utilization Targets

§ 445.41 Purpose and scope.

(a) This subpart contains the energy efficiency improvement targets and the recovered materials utilization targets established by DOE pursuant to sections 374 and 374A of the Act.

(b) No liability shall attach to, and no civil or criminal penalties shall be imposed on, any corporation for any failure to meet any energy efficiency improvement target or any recovered materials utilization target contained in this subpart.

§ 445.42 Energy efficiency improvement targets.

(a) Each energy efficiency improvement target is a percentage figure which represents, for a major energy-consuming industry, the percentage reduction in energy consumed per unit of production which DOE has determined that such industry can achieve between calendar year 1972 and January 1, 1980, as established in 42 FR 29642, June 9, 1977, "Final Industrial Energy Efficiency Improvement Targets." Each target is set at a level which represents the maximum feasible improvement in energy efficiency that each industry can achieve.

(b) The energy efficiency improvement targets are set forth in Table I.

Table I

| Major energy-consuming industry | Target |
|---|--------|
| SIC Code: | |
| 20..... Food and kindred products..... | 12 |
| 22..... Textile mill products..... | 22 |
| 26..... Paper and allied products..... | 20 |
| 28..... Chemicals and allied products..... | 14 |
| 29..... Petroleum and coal products..... | 12 |
| 32..... Stone, clay and glass products..... | 16 |
| 33..... Primary metal industries..... | 9 |
| 34..... Fabricated metal products..... | 24 |
| 35..... Machinery except electrical..... | 15 |
| 37..... Transportation equipment..... | 16 |

§ 445.43 Modification of energy efficiency improvement targets.

Any energy efficiency improvement target in § 445.42 may be modified at any time if DOE—

(a) Determines that such target cannot reasonably be attained or could reasonably be made more stringent; and

(b) Publishes such determination in the Federal Register together with a statement of the basis and justification for the modification after providing an opportunity for public comment on any proposed modification.

§ 445.44 Recovered materials utilization targets.

(a) Recovered materials utilization targets are established for each of the following industries—textile mill products, paper and allied products, metals and metal products, and rubber.

(b) Each recovered materials utilization target is a percentage figure which represents, for each industry subdivision listed in paragraph (c) of this section, the amount of recovered materials from prompt industrial and obsolete scrap which DOE has determined can be used per unit of production by calendar year 1987. Each target is set at a level which represents the maximum feasible increase in the utilization of recovered materials which the industry can achieve progressively by January 1, 1987.

(c) The recovered materials utilization targets are set forth in Tables II, III, IV, and V.

Table II.—Textile Mill Products

| Industry subdivision | Recovered materials utilization target | Recovered materials utilization in reference year 1978 |
|---|--|--|
| Broad woven fabric mills, wool..... | 13 | 13 |
| Yarn mills, wool..... | 13 | 13 |
| Felt goods, except woven felt hats..... | 80 | 59 |
| Padding and upholstery filling..... | 93 | 93 |
| Non-woven fabrics..... | 15 | 17 |
| Cordage and twine..... | 22 | 22 |
| All other textile mill products subdivisions analyzed for establishing targets..... | 0 | 0 |

Table III.—Paper and Allied Products

| Industry subdivision | Recovered materials utilization target | Recovered materials utilization in reference year 1977 |
|---|--|--|
| Newsprint..... | 18 | 14 |
| Tissue..... | 38 | 28 |
| Printing and writing paper | 6 | 7 |
| Packaging and industrial converting papers..... | 4 | 4 |
| Paperboard..... | 37 | 33 |
| Construction paper and board..... | 31 | 33 |

Table IV.—Rubber

| Industry subdivision | Recovered materials utilization target | Recovered materials utilization in reference year 1977 |
|---------------------------------------|--|--|
| Tires and inner tubes..... | 5 | 2 |
| Industrial products..... | 5 | 3 |
| Rubber footwear..... | 15 | 0 |
| Tire retreading and repair shops..... | 12 | 9 |

Table V.—Metals and Metal Products

| Industry subdivision | Recovered materials utilization target | Recovered materials utilization in reference year 1976 |
|----------------------|--|--|
| Ferrous | 41 | 38 |
| Aluminum | 35 | 32 |
| Copper | 50 | 47 |
| Lead | 60 | 51 |
| Zinc | 36 | 33 |

§ 445.45 Modification of recovered materials utilization targets.

Any recovered materials utilization target in § 445.44 may be modified if DOE—

(a) Determines that such target cannot reasonably be attained, or that it should require greater use of recovered materials; and

(b) Publishes such determination in the **Federal Register** together with a basis and justification for the modification, after providing an opportunity for public comment on the proposed modification.

[FR Doc. 79-17683 Filed 6-4-79; 3:25 pm]

BILLING CODE 6450-01-M

Friday
June 8, 1979

**Securities
and
Exchange
Commission
Federal Register**

Part VII

**Securities and
Exchange
Commission**

**General Rules and Regulations, Securities
Act of 1933, and Forms Prescribed
Under the Securities Act of 1933; Small
Offering Exemption**

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 239

[Release No. 33-6075]

General Rules and Regulations, Securities Act of 1933, and Forms Prescribed Under the Securities Act of 1933; Small Offering Exemption

AGENCY: Securities and Exchange
Commission.

ACTION: Final rules.

SUMMARY: The Commission is adopting amendments to its small offering exemptive rule to permit the use of a preliminary offering circular between the date of filing of a notification relating to an underwritten public offering of securities in reliance upon this exemptive rule and the date on which the securities may be sold. As adopted, the rule permits the use prior to the date on which the securities may be sold of a preliminary offering circular in an offering which is to be sold by or through one or more underwriters who are broker-dealers registered under Section 15 of the Securities Exchange Act of 1934.

EFFECTIVE DATE: June 8, 1979.

FOR FURTHER INFORMATION CONTACT: Spencer I. Browne, Special Counsel, Ruth D. Appleton, Chief, Office of Tender Offers, Acquisitions and Small Issues, or Paul Belvin, Office of Small Business Policy, Division of Corporation Finance, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549 (202-376-2976) or (202-755-1290).

SUPPLEMENTARY INFORMATION: On November 16, 1978, the Commission proposed for comment an amendment to Regulation A (17 CFR 230.251-.264), a regulation adopted pursuant to Section 3(b) of the Securities Act of 1933 ("1933 Act") [15 U.S.C. 77a et seq., as amended by Pub. L. No. 94-29 (June 4, 1975)]. Securities Act Release No. 33-5997 (43 FR 55254) invited comments on the proposed amendment which would, generally, have made available the use of a preliminary offering circular between the date of filing a notification relating to a firm commitment public

offering of securities in reliance upon this exemptive rule and the date on which the securities could be sold. In addition, the use of the preliminary offering circular would have been restricted to those offerings where the aggregate price of the securities being offered for sale was equal to or in excess of \$500,000.

After careful consideration of the comments received on the proposed amendments, the Commission has decided to expand the availability of the use of a preliminary offering circular to all offerings which are to be sold by or through one or more underwriters who are broker-dealers registered under Section 15 of the Securities Exchange Act of 1934 ("1934 Act") and to delete the \$500,000 minimum aggregate offering requirement. The Commission is also adopting an amendment to the Consent And Certification By Underwriter required by Form 1-A (17 CFR 239.90).

This release contains a general discussion of the background and purpose of the amendments proposed in Securities Act Release No. 33-5997, the comments received¹ and the Commission's response to those comments.

Background and Purpose

The amendments to Regulation A adopted today represent another step in the Commission's ongoing initiatives to reduce the burdens of the federal securities acts on small businesses whenever possible consistent with the protection of investors. In 1978, the Commission held extensive hearings concerning the effects of its rules and regulations on the ability of small businesses to raise capital and the impact on small businesses of the disclosure requirements under the securities acts. In response to the comments received at these hearings, the Commission has recently adopted rule and form amendments designed to facilitate the small business capital formation process.²

¹ See comments collected at File No. S7-762.

² A summary of these amendments is set forth in Securities Act Release No. 33-6-49 (April 3, 1979) [44 FR 21562, April 10, 1979].

The proposal set forth in Release No. 33-5997 was a response to statements

from the investment banking community in testimony before the Commission in its hearings on small business capital formation that Regulation A was not suited for underwritten distributions of securities, particularly those on a firm commitment basis. As more fully explained in Release No. 33-5997, the inability of an underwriter to circulate a preliminary offering document prior to the date on which the securities could be sold adversely affected the feasibility of an underwriter making the distribution on a firm commitment basis. Thus, it was stated, an underwriter agreeing to effect the distribution on a firm commitment basis would insist that the underwriting compensation be increased. This increase would compensate the underwriter for his increased risk, because he could not ascertain potential investor interest in the offering prior to the time that sales could be made.

As proposed, the use of a preliminary offering circular in the form filed with a Regulation A notification on Form 1-A (17 CFR 239.90) would have been permitted if the following conditions were met:

1. The offering circular contained substantially the information required by Regulation A, or contained substantially that information except for certain data dependent upon the offering price.
2. The preliminary offering circular was clearly designated as such and bore a legend comparable to that required on the cover of a Preliminary Prospectus.
3. The aggregate offering price of the securities being offered pursuant to the Regulation A exemption was equal to or in excess of \$500,000.
4. The offering related solely to a firm commitment underwritten public offering of securities.
5. A definitive offering circular other than one designated as a "Preliminary Offering Circular" and which contained all of the information required by Form 1-A accompanied or preceded the confirmation of sale sent to each person who had been furnished the preliminary offering circular.

The amendment as proposed was based upon Rule 433 (17 CFR 230.433) which sets forth the terms and conditions governing the use of a

preliminary prospectus in connection with a registered public offering under the 1933 Act. The proposed amendment would, however, have differed from Rule 433 in two important respects: (1) the aggregate offering price of the securities being offered pursuant to the Regulation A exemption would have had to have been equal to or in excess of \$500,000; and (2) the offering would have had to relate solely to a firm commitment underwritten public offering of securities.

The Commission has given careful consideration to the 21 letters of comment on the proposed amendment, most of which addressed both of the above proposed restrictions. Based upon the Commission's review of these letters, its experience in administering Regulation A and statements by witnesses from the investment banking community testifying before the Commission in its hearings on small business capital formation, the Commission has adopted final amendments to Regulation A as discussed below.

Requirement of a Legend on the Outside Front Cover Page of the Preliminary Offering Circular

As proposed, the outside front cover page of a preliminary offering circular was to bear a legend, in ink of a color other than red and different from that used elsewhere in the offering circular, which would be similar to the legend required on a preliminary prospectus. The use of a color other than red ink was to distinguish a preliminary offering circular from a preliminary prospectus.

While only one commentator commented on the additional cost of such a requirement, the Commission has decided not to require that the legend be printed in ink of a color other than red or than otherwise used in the preliminary offering circular. The Commission notes that its experience in connection with offerings based upon Regulation A has indicated that a substantial number of such offering circulars are mimeographed and not printed. To require that the legend appear as originally proposed may have caused additional unnecessary expense. Accordingly, the Commission has concluded that the required legend may be printed in the same color ink as the other portions of the preliminary offering circular so long as it appears perpendicular to the text and runs along the left hand margin of the outside front cover page of the preliminary offering circular. In addition the legend must be in boldface type at least as large as the type used in the body of the prospectus.

\$500,000 Aggregate Offering Price

As set forth in the proposed amendment, the use of a preliminary offering circular would have been limited to offerings where the aggregate offering price of securities being offered pursuant to the Regulation A exemption was equal to or in excess of \$500,000. Release No. 33-5997 noted that this proposed requirement was intended to assure that the preliminary offering circular was of reasonably good quality.

Most commentators believed, however, that the quality of a preliminary offering circular is not determined by the size of an offering. In addition, it was felt that such a restriction could have the effect of denying the use of a preliminary offering circular in a substantial number of potential offerings in reliance upon Regulation A which may be less than \$500,000.

The Commission has considered the views of the commentators and has decided not to adopt the proposed eligibility standard based on the size of the offering. The Commission agrees that the size of an offering may not be substantially related to the quality of a preliminary offering circular, and therefore adoption of this standard would not appear warranted. The Commission also believes that the presence of an underwriter will tend to assure that the disclosures in the preliminary offering circular will be of reasonably good quality.

Requirement That the Offering Be Underwritten

While most of the commentators were in agreement that permitting the use of a preliminary offering circular in offerings to be made on a firm commitment basis would expand the use of offerings made in reliance upon Regulation A, a substantial majority believed that its use should be expanded to include public offerings underwritten on a best efforts basis. In support of their views, the commentators indicated that the reasons cited by the Commission as necessary to facilitate offerings made on a firm commitment basis are, with the exception of the underwriter's commitment to purchase the shares prior to the actual sale of securities, equally applicable to facilitating an offering made on a best efforts basis. In addition, many of the commentators were of the opinion that most offerings made in reliance upon Regulation A were underwritten by smaller regional underwriters. Because such underwriters may have only limited capital, they would in all likelihood

continue to underwrite offerings on a best efforts basis so as not to tie up all of their net capital on one offering. Thus, in order to extend the benefits of the use of a preliminary offering circular to a significant number of issuers, its use should be available to offerings underwritten on a best efforts as well as firm commitment basis.

The Commission has considered the statements of the commentators and has determined to expand the use of a preliminary offering circular to all underwritten public offerings of securities made in reliance upon Regulation A. This decision was based on the Commission's conclusion that the participation of an underwriter, on a firm commitment basis or otherwise, will tend to assure that the disclosures in the preliminary offering circular will be of reasonably good quality. Expanding the availability of the use of a preliminary offering circular to all Regulation A offerings which are to be sold by or through one or more underwriters who are broker-dealers registered under Section 15 of the 1934 Act reflects the Commission's view that underwriters should and will carefully review, prior to their distribution, the disclosures in preliminary offering circulars for completeness and accuracy.

Requirement for Redistribution of the Preliminary Offering Circular

A majority of the commentators, in urging the Commission to expand the availability of a preliminary offering circular to all underwritten offerings, also noted that, where the original preliminary offering circular is deficient, the staff has the ability to require redistribution of a revised preliminary offering circular to correct any inaccurate statements. In order to make it clear that redistribution may be required, the Commission, in adopting amendments to Regulation A, has revised proposed paragraph (i) of Rule 256 and has adopted an amendment to the Consent and Certification by Underwriter, which must be signed by each underwriter and filed as an exhibit to the Notification required to be filed pursuant to Rule 255(a). Where a preliminary offering circular will be distributed, paragraph (i) of Rule 256 and paragraph 3 of the Consent and Certification by Underwriter require that, if the preliminary offering circular is inaccurate or incomplete in any material respect, each person to whom the securities are to be sold shall be furnished a copy of either a revised preliminary or the final offering circular 48 hours prior to the mailing of confirmation of the sale or shall be sent

such offering circular under circumstances that it would normally be received by them 48 hours prior to their receipt of confirmation of the sale. The Commission is of the view that this requirement will give potential investors sufficient time to consider the effect of revised disclosures on their investment decision. While either a revised preliminary or the final offering circular may be furnished or sent, where a revised preliminary offering circular is used to meet this requirement the final offering circular as specified in Rule 256(i)(4) would have to be furnished or sent prior to or with confirmation of the sale. In order to assure that each person to whom the securities are to be sold receives the revised or final offering circular as specified, the amended Consent and Certification by Underwriter also requires that the underwriter keep an accurate and complete record of the name and address of each person who was furnished a preliminary offering circular.

Issuers and underwriters should also be aware that, where a preliminary offering circular which is inaccurate or inadequate in any material respect has been distributed, the staff may require as a condition to acceleration of the 10 day waiting period for sales contemplated by relevant rules that a revised preliminary or the final offering circular be accompanied by a memorandum specifying the changes from the original preliminary offering circular as well as requiring in particularly serious cases a "cooling-off" period prior to the date on which the securities may be sold. These practices are intended to parallel substantially similar practices available under the 1933 Act and are designed to draw particular attention to revised disclosures and to lessen the impact of prior misleading statements.³ The Commission does, however, recognize that, where required, redistribution may involve an additional cost which may be a substantial burden on smaller issuers. In order to avoid this cost, issuers may wish to delay distribution of the preliminary offering circular until comments, if any, have been received from the staff of the Regional Offices.⁴

The Commission emphasizes that the decision to adopt amendments expanding the availability of a preliminary offering circular is in the nature of an experiment. The Commission reminds issuers,

³ See Securities Act Release No. 4968 (April 14, 1969).

⁴ The average period of time currently required to review Regulation A notifications and issue comments has been 16 days.

underwriters, and their counsel that it will closely monitor the quality of disclosure in preliminary offering circulars and will not hesitate to utilize all of its enforcement remedies if the use of preliminary offering circulars is abused. These remedies include suspension of the Regulation A exemption prior to effectiveness of the offering based on disclosures in the preliminary offering circular.⁵ Underwriters in particular are reminded that participation in an offering in which the Regulation A exemption is later suspended serves as a bar under Rule 252(e)(2) from the underwriting of any other Regulation A offering for a period of five years.

Amendment of Paragraphs (a) and (d) of Rule 255

Prior to the adoption of this amendment, Regulation A did not permit (unless authorized by the Commission or its staff pursuant to delegated authority) the offer of a security during the 10-day waiting period between the filing of the Notification and the date on which the offering commenced. Since an offer of the security could not be made, a sale of the security was, by implication, likewise prohibited. However, where a preliminary offering circular is used prior to the expiration of the 10-day waiting period, as permitted by paragraph (i) of Rule 256, the offering of the security, defined in Section 2(3) of the 1933 Act, commences immediately upon the distribution of the preliminary offering circular. Since the purpose of this amendment is to facilitate underwritten offerings pursuant to Regulation A by allowing the distribution of an offering circular prior to the date on which the securities may be sold, in order to make clear that sales of the security continue to be prohibited during the 10-day waiting period provided in paragraphs (a) and (d) of Rule 255 and paragraph (f) of Rule 256, additional language has been added to paragraphs (a) and (d) of Rule 255 so as to specifically prohibit sales during that period unless otherwise authorized by the Commission or its staff pursuant to delegated authority.

Operation of the Amendments

The amendments as adopted today provide that a preliminary offering circular meeting the requirements of paragraph (i) of Rule 256 may be distributed as soon as the Notification, of which the preliminary offering

⁵ Pursuant to Rule 261(a)(3) the Commission has the authority to enter an order temporarily suspending the Regulation A exemption, if it has reason to believe that the offering is being made in violation of Section 17 of the 1933 Act.

circular is an exhibit, has been filed with the Commission as required by Rule 255(a).⁶ After distribution of the preliminary offering circular, oral offers of the security based on the preliminary offering circular can be made;⁷ however, a sale of the security is not permitted.⁸ If the issuer of the security is required to file reports pursuant to Section 13(a) or 15(d) of the 1934 Act and the preliminary offering circular is not inaccurate or inadequate in any material respect, a confirmation of the sale, accompanied or preceded by the final offering circular as provided in Rule 256(i)(4), could be sent to each purchaser of the security. However, where the issuer is not a "reporting company," the distribution of the preliminary offering circular would permit the mailing of confirmation of the sale which must also be accompanied by the final offering circular, as provided in Rule 256(i)(4), only to those persons who had received the preliminary offering circular 48 hours prior to their receipt of confirmation of the sale. It should be noted that in each instance, paragraph (i)(4) of Rule 256 requires that confirmation of the sale be accompanied or preceded by the final offering circular containing all of the information required by Schedule I or Form 1-A.⁹

If the preliminary offering circular as originally distributed was inaccurate or inadequate in any material respect, a revised preliminary or the final offering circular must be furnished to all persons to whom the securities are to be sold 48 hours prior to the mailing of any confirmation of the sale or sent to such persons under circumstances that it would normally be received by them 48 hours prior to their receipt of

⁶ As adopted, Rule 256(i)(1) requires: (1) that the preliminary offering circular contain substantially all of the information required by Schedule I of Form 1-A, except for the omission of certain specified information relating to the offering price and underwriters' compensation; and (2) where an issuer is not subject to the reporting provisions of the 1934 Act, the outside front cover page should include a bona fide estimate of the range of the maximum offering price and maximum number of shares or other units of securities to be offered or should include a bona fide estimate of the principal amount of debt securities to be offered.

⁷ The use of sales literature continues to be prohibited by paragraph (a)(1) of Rule 256 until the final offering circular is delivered in accordance with paragraphs (a)(2) or (i)(4) of Rule 256.

⁸ The distribution of the preliminary offering circular would satisfy the provisions of Rule 256(a)(1); however, paragraphs (a) and (d) of Rule 255 as amended prohibit the sale of the security during the 10-day waiting period provided therein, unless the Commission, and its staff pursuant to delegated authority, authorize, upon written request, sales of the securities prior to expiration of the 10-day waiting period.

⁹ Sales to persons who did not receive a preliminary offering circular could only be made pursuant to Rule 256(a)(2).

confirmation of the sale. The requirement that a revised preliminary or final offering circular must be furnished or sent 48 hours prior to the mailing of confirmation of the sale is intended to parallel current staff procedures with respect to requiring redistribution of an amended preliminary prospectus as a condition to acceleration of effectiveness of an offering under the 1933 Act.

Text of the Amendments

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. Paragraphs (a) and (d) of § 230.255 are amended as follows:

§ 230.255 Filing of notification on form 1-A.

(a) At least 10 days (Saturdays, Sundays and holidays excluded) prior to the date on which the initial offering or sale of any securities is to be made under this regulation, there shall be filed with the Regional Office of the Commission specified below four copies of a notification on Form 1-A. The Commission may, however, in its discretion, authorize the commencement of the offering or sale prior to the expiration of such 10 day period upon a written request for such authorization.

(d) Any amendment to the notification shall be signed in the same manner as the original notification. Four copies of such amendment shall be filed with the same Regional Office as the original notification at least 10 days prior to any offering or sale of the securities subsequent to the filing of such amendment, or such shorter period as the Commission, in its discretion, may authorize upon a written request for such authorization.

2. Paragraph (a) is amended and paragraph (i) added to § 230.256 as follows:

§ 230.256 Filing and use of the offering circular.

(a) Except as provided in paragraphs (c) or (i) of this section and in § 230.257 —

(i) An offering circular filed pursuant to paragraph (f) may be distributed prior to the expiration of the 10-day waiting periods for offerings provided for in § 230.255(a) and (d) and paragraph (f) of this section and such distribution may be accompanied or followed by oral offers related thereto, provided the conditions in subparagraphs (1) through

(4) are met. For the purposes of this section, any offering circular distributed prior to the expiration of the ten day waiting period is called a Preliminary Offering Circular. Such Preliminary Offering Circular may be used to meet the requirements of paragraph (a)(2) of § 230.256; Provided, That if a Preliminary Offering Circular is inaccurate or inadequate in any material respect, a revised Preliminary Offering Circular or an offering circular of the type referred to in subparagraph (4) shall be furnished to all persons to whom the securities are to be sold at least 48 hours prior to the mailing of any confirmation of sale to such persons, or shall be sent to such persons under such circumstances that it would normally be received by them 48 hours prior to their receipt of confirmation of the sale.

(1) Such Preliminary Offering Circular contains substantially the information required by this section to be included in an offering circular, or contains substantially that information except for the omission of information with respect to the offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices, or other matters dependent upon the offering price. For issuers not subject to the reporting provisions under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, the disclosure on the outside front cover page of the Preliminary Offering Circular should include a bona fide estimate of the range of the maximum offering price and maximum number of shares or other units of securities to be offered, or should include a bona fide estimate of the principal amount of debt securities to be offered.

(2) The outside front cover page of the Preliminary Offering Circular shall bear the caption "Preliminary Offering Circular," the date of its issuance, and the following statement which shall run along the left hand margin of the page and printed perpendicular to the text, in boldface type at least as large as that used generally in the body of such offering circular:

A notification pursuant to Regulation A relating to these securities has been filed with the Securities and Exchange Commission. Information contained in this Preliminary Offering Circular is subject to completion or amendment. These securities may not be sold nor may offers to buy be accepted prior to the time an offering circular which is not designated as a Preliminary Offering Circular is delivered. This Preliminary Offering Circular shall not constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sales of these securities in any state in which such

offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such state.

(3) The Preliminary Offering Circular relates to a proposed public offering of securities which is to be sold by or through one or more underwriters who are broker-dealers registered under Section 15 of the Securities Exchange Act of 1934, each of whom has furnished a signed Consent and Certification in the form prescribed as a condition to the use of such offering circular:

(4) An offering circular which contains all of the information specified in Schedule I of Form 1-A (17 CFR 239.90) and which is not designated as a Preliminary Offering Circular is furnished with or prior to delivery of the confirmation of sale to any person who has been furnished with a Preliminary Offering Circular pursuant to this paragraph.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

Section 239.90 is amended by revising paragraph (c) to Item 11.

§ 239.90 [Amended]

Item 11. Exhibits

(No change from present Item 11 except to revise paragraph (c) to add undertaking number 3 to the Consent and Certification by Underwriter as follows:)

Consent and Certification by Underwriter

1. (No change)
2. (No change)
3. If a Preliminary Offering Circular will be distributed as permitted by Rule 256(i), the Consent and Certification by Underwriter shall include the following additional paragraph:

The undersigned hereby undertakes, in connection with any distribution of the Preliminary Offering Circular as permitted by Rule 256(i), (a) to keep an accurate and complete record of the name and address of each person furnished such Preliminary Offering Circular and (b) if such Preliminary Offering Circular is inaccurate or inadequate in any material respect, to furnish a revised Preliminary Offering Circular or an offering circular of the type referred to in Rule 256(i)(4) to all persons to whom the securities are to be sold at least 48 hours prior to the mailing of any confirmation of sale to such persons, or to send such a circular to such persons under circumstances that it would normally be received by them 48

hours prior to their receipt of confirmation of the sale.

* * * * *

Effective Date

This amendment to Regulation A is effective June 8, 1979. [Secs. 3(b), 19(a), 48 Stat. 75, 85; sec. 209, 48 Stat. 908; 59 Stat. 167, Pub. L. 91-565, 84 Stat. 1480; sec. 308(a)(1)(2)(3), 90 Stat. 56, 57; Pub. L. 95-283, sec. 18, 92 Stat. 275; Pub. L. 95-425, sec. 2, 92 Stat. 962; 15 U.S.C. 77c(b), 77s(a)].

Statutory Authority

This Amendment to Regulation A is adopted pursuant to Sections 3(b) and 19(a) of the Securities Act of 1933.

The Commission finds that any changes in the amended provisions from those published in Securities Act Release No. 33-5997 have already been generally subject to comment and are either technical in nature or less burdensome than previous proposals so that further notice and rulemaking procedures pursuant to the Administrative Procedure Act (5 U.S.C. 553) are not necessary.

By the Commission.

George A. Fitzsimmons,
Secretary.

June 1, 1979.

[FR Doc. 79-17779 Filed 6-7-79; 8:45 am]

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Register Federal

Friday
June 8, 1979

Part VIII

Federal Election Commission

Freedom of Information Act;
Implementation Procedures

FEDERAL ELECTION COMMISSION

11 CFR Part 4

Public Records and Freedom of Information Act

AGENCY: Federal Election Commission.

ACTION: Final rule.

SUMMARY: This notice contains the final Federal Election Commission regulations setting forth procedures to implement the Freedom of Information Act (5 USC § 552) and creates a new part, Part 4, to be added to 11 CFR, Chapter 1.

EFFECTIVE DATE: June 8, 1979.

FOR FURTHER INFORMATION CONTACT: Frederick S. Eiland, Public Information Officer, (202) 523-4065.

SUPPLEMENTARY INFORMATION: The proposed regulation was published on November 22, 1977, at 42 FR 59944. A comment period was specified and a single party commented. The Commission adopted one of the suggestions made by that commentator and revised proposed 11 CFR 4.5(a)(3) to reflect a two-prong test for determining whether information is specifically exempted from disclosure by statute.

In addition, the Commission made several other changes to the proposed regulations. With the exception of the change to 11 CFR 4.4(a)(4) which was revised to provide for the availability of transcripts made from tapes of Commission meetings, all changes were minor.

Only minor changes have been made from the proposed rule and comments were received from only one party. The Commission at present has no FOIA regulations in effect. There is therefore good cause to dispense with the 30 day waiting period before the regulations may become effective. Pursuant to 5 USC 553(d)(3), the regulations are made effective upon publication.

Dated: June 4, 1979.

Robert O. Tiernan,

Chairman, Federal Election Commission.

Chapter I of Title 11, Code of Federal Regulations, is amended by the addition of the following new part:

PART 4—PUBLIC RECORDS AND THE FREEDOM OF INFORMATION ACT

Sec.

- 4.1 Definitions.
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AUTHORITY: 5 U.S.C. 552

§ 4.1 Definitions.

As used in this part:

(a) "Commission" means the Federal Election Commission, established by the Federal Election Campaign Act of 1971, as amended.

(b) "Commissioner" means one of the six appointees confirmed by the Senate who is a voting member of the Commission.

(c) "Request" means to seek the release of records under 5 U.S.C. 552.

(d) "Requestor" is any person who submits a request to the Commission.

(e) "Act" means the Federal Election Campaign Act of 1971, as amended by the Federal Election Campaign Act Amendments of 1974, and 1976, and unless specifically excluded, includes Chapters 95 and 96 of the Internal Revenue Code of 1954 relating to public financing of Federal elections.

§ 4.2 Policy on disclosure of records.

(a) The Commission will make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the rights of persons contracting with the Commission with respect to trade secret and commercial or financial information entitled to confidential treatment, and the need for the Commission to promote free internal policy deliberations and to pursue its official activities without undue disruption.

(b) All Commission records shall be available to the public unless they are specifically exempt under this part.

(c) To carry out this policy, the Commission shall designate a Freedom of Information Act Officer.

§ 4.3 Scope.

(a) The regulations in this part implement the provisions of the Freedom of Information Act, 5 U.S.C. 552, with respect to the availability of records for inspection and copying.

(b) The regulations in this part do not apply to release of the following records:

(1) Reports of receipts and expenditures, designations of campaign depositories, statements of organization candidate designations of campaign committees; and the indexes compiled from the filings therein.

(2) Requests for advisory opinions, written comments submitted thereto and responses issued by the Commission;

(3) With respect to enforcement matters under the provisions of 2 U.S.C. 437g, the results of any conciliation

attempt, including any conciliation agreement entered into by the Commission; and any determination by the Commission that no violation of the Act has occurred.

(4) Copies of studies published pursuant to the Commission's duty to serve as a national clearinghouse on election law administration.

(c) Release of the records identified in subsection (b)(1)-(4) above (11 CFR 4.3(b)(1)-(4)) are governed by the provisions of 2 U.S.C. 438(a)(5), 437f(c), 437g(a)(6)(C) and 438(b) and are available to the public from the Office of Public Records located on the first floor at 1325 K Street, Northwest, Washington, D.C. This office is open Monday through Friday from 9:00 a.m. to 5:00 p.m. except legal holidays.

§ 4.4 Availability of records.

(a) In accordance with 5 U.S.C. 552 (a)(2) and (a)(3) the Commission shall make the following materials available for public inspection and copying:

(1) Statements of policy and interpretation which have been adopted by the Commission;

(2) Administrative staff manuals and instructions to staff that affect a member of the public;

(3) Opinions of Commissioners rendered in enforcement cases and General Counsel reports and 2 U.S.C. 437g investigatory materials in enforcement files 60 days after the Commission has voted to close a case and to take no further action; provided that no civil action under 2 U.S.C. 437g (a)(9) has been filed to compel the Commission to take further action. In the event that such civil action is filed, if the court sustains the Commission's action in closing the case, the materials will be made available thereupon. If the Court orders the Commission to take further action, the materials will be made available when the case is again closed;

(4) Letter requests for guidance and responses thereto;

(5) The minutes of Commission meetings and transcripts made from tapes of Commission meetings;

(6) Material routinely prepared for public distribution, e.g. campaign guidelines, FEC Record, press releases, speeches, notices to candidates and committees.

(7) Proposals submitted in response to a request for proposals formulated pursuant to the Federal Procurement Regulations. 41 CFR 1-1.001 *et seq.*

(8) Contracts for services and supplies entered into by the Commission.

(9) Statements and certifications (with respect to closing meetings) as required

by the Government in the Sunshine Act, 5 U.S.C. 552b.

(b) The Commission shall maintain and make available current indexes and supplements providing identifying information regarding any matter issued, adopted or promulgated after April 15, 1975 as required by 5 U.S.C. 552(a)(2)(c). These indexes and supplements shall be published and made available on at least a quarterly basis for public distribution unless the Commission determines by Notice in the Federal Register that publication would be unnecessary, impracticable, or not feasible due to budgetary considerations. Nevertheless, copies of any index or supplement shall be made available upon request at a cost not to exceed the direct cost of duplication.

(c) The Freedom of Information Act and the provisions of this part apply only to existing records; they do not require the creation of new records.

(d) If documents or files contain both disclosable and nondisclosable information, the nondisclosable information will be deleted and the disclosable information released unless the disclosable portions cannot be reasonably segregated from the other portions in a manner which will allow meaningful information to be disclosed.

(e) All records created in the process of implementing provisions of 5 U.S.C. 552 will be maintained by the Commission in accordance with the authority granted by General Records Schedule 14, approved by the National Archives and Records Service of the General Services Administration.

§ 4.5 Categories of exemptions.

(a) 5 U.S.C. 552(b) establishes nine categories of matters which are exempt from the mandatory disclosure requirements of 5 U.S.C. 552(a). No requests under 5 U.S.C. 552 shall be denied release unless the record contains, or its disclosure would reveal, matters that are:

(1) Specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order;

(2) Related solely to the internal personnel rules and practices of the Commission;

(3) Specifically exempted from disclosure by statute, provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to

particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person which are privileged or confidential. Such information includes confidential business information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount of source of income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, if the disclosure is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information. These procedures shall be used for submitting business information in confidence:

(i) A request for confidential treatment shall be addressed to the FOIA officer, Federal Election Commission, 1325 K Street, Northwest, Washington, D.C. 20463, and shall indicate clearly on the envelope that it is a request for confidential treatment.

(ii) With each submission of, or offer to submit, business information which a submitter desires to be treated as confidential under paragraph (a)(4) of this section, the submitter shall provide the following, which may be disclosed to the public: (A) A written description of the nature of the subject information, and a justification for the request for its confidential treatment, and (B) a certification in writing under oath that substantially identical information is not available to the public.

(iii) Approval or denial of requests shall be made only by the FOIA officer or his or her designees. A denial shall be in writing, shall specify the reason therefore, and shall advise the submitter of the right to appeal to the Commission.

(iv) For good cause shown, the Commission may grant an appeal from a denial by the FOIA Officer or his or her designee if the appeal is filed within fifteen (15) days after receipt of the denial. An appeal shall be addressed to the FOIA Officer, Federal Election Commission, 1325 K Street, Northwest, Washington, D.C. 20463 and shall clearly indicate that it is a confidential submission appeal. An appeal will be decided within twenty (20) days after its receipt (excluding Saturdays, Sundays and legal holidays) unless an extension,

stated in writing with the reasons therefore, has been provided the person making the appeal.

(v) Any business information submitted in confidence and determined to be entitled to confidential treatment shall be maintained in confidence by the Commission and not disclosed except as required by law. In the event that any business information submitted to the Commission is not entitled to confidential treatment, the submitter will be permitted to withdraw the tender unless it is the subject of a request under the Freedom of Information Act or of judicial discovery proceedings.

(vi) Since enforcement actions under 2 U.S.C. 437g are confidential by statute, the procedures outlined in § 4.5(a)(4) (i) thru (v) are not applicable.

(5) Inter-agency or intra-agency memoranda or letters which would not be available by law to a party in litigation with the Commission.

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel.

(b) Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.

(c) If a requested record is one of another government agency or deals with subject matter to which a government agency other than the Commission has exclusive or primary responsibility, the request for such a record shall be promptly referred by the Commission to that agency for disposition or guidance as to disposition.

(d) Nothing in this part authorizes withholding of information or limiting the availability of records to the public, except as specifically provided in this

part; nor is this part authority to withhold information from Congress.

§ 4.6 Discretionary release of exempt records.

The Commission may, in its discretion, release requested records despite the applicability of the exemptions in § 4.5(a), if it determines that it is in the public interest and that the rights of third parties would not be prejudiced.

§ 4.7 Requests for records.

(a) A request to inspect or copy Commission public records as described in § 4.3(b) may be made in person or by mail. The Public Records Office is open Monday through Friday between the hours of 9:00 a.m. and 5:00 p.m. and is located on the first floor, 1325 K Street, Northwest, Washington, D.C. 20463.

(b) Oral or written requests for copies of records not available in the Public Records Office shall be addressed to FOIA Officer, Federal Election Commission, 1325 K Street, Northwest, Washington, D.C. 20463. The request shall reasonably describe the records sought with sufficient specificity with respect to names, dates and subject matter to permit the records to be located. A requestor will be promptly advised if the records cannot be located on the basis of the description given and that further identifying information must be provided before the request can be satisfied.

(c) Records or copies thereof will normally be made available either immediately upon receipt of a request or within ten working days thereafter, or twenty working days in the case of an appeal, unless in unusual circumstances the time is extended. In the latter event, the requestor shall be notified of the reasons for the extension and the date on which a determination is expected to be made, but in no case shall the extended time exceed ten working days. An extension may be made if it is (1) necessary to locate records or transfer them from physically separate facilities; or (2) necessary to search for, collect, and appropriately examine a large quantity of separate and distinct records which are the subject of a single request; or (3) necessary for consultation with another agency which has a substantial interest in the determination of the request, or with two or more components of the Commission which have a substantial subject matter interest therein.

(d) Any person denied access to records by the Commission shall be notified immediately giving reasons therefore, and notified of the right of

such person to appeal such adverse determination to the Commission.

(e) The date of receipt of a request under this part shall be the date on which the FOIA Officer actually receives the request.

§ 4.8 Appeal of denial.

(a) Any person who has been notified pursuant to § 4.6(d) of this part that his/her request for inspection of a record or for a copy has been denied, or who has received no response within ten working days (or within such extended period as is permitted under § 4.7(c) of this part) after the request has been received by the Commission, may appeal the adverse determination or the failure to respond by requesting the Commission to direct that the record be made available.

(b) The appeal request shall be in writing, shall clearly and prominently state on the envelope or other cover and at the top of the first page "FOIA Appeal", and shall identify the record in the form in which it was originally requested.

(c) The appeal request should be delivered or addressed to the FOIA Officer, Federal Election Commission, 1325 K Street, Northwest, Washington, D.C. 20463.

(d) The requestor may state facts and cite legal or other authorities as he/she deems appropriate in support of the appeal request.

(e) For good cause shown, the Commission may disclose a record which is subject to one of the exemptions listed in § 4.5 of this part.

(f) The Commission will make a determination with respect to any appeal within twenty days (excluding Saturdays, Sundays and legal holidays) after receipt of the appeal (or within such extended period as is permitted under § 4.7(c) of this part). If on appeal, the denial of the request for a record or a copy is in whole or in part upheld, the Commission shall advise the requestor of the denial and shall notify him/her of the provisions for judicial review of that determination as set forth in 5 U.S.C. 552(a)(4).

(g) Because of the risk of misunderstanding inherent in oral communications, the Commission will not entertain any appeal from an alleged denial or failure to comply with an oral request. Any person who has orally requested a copy of a record that he/she believes to have been improperly denied should resubmit the request in writing as set forth in § 4.7.

§ 4.9 Fees.

(a) Fees will be charged for copies of records which are furnished a requestor under this part and for time spent in locating and reproducing them in accordance with the fee schedule below:

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| Record search time—1st ¼ hour free; Each additional ¼ hour..... | \$2.50 |
| Reproduction of documents, per page..... | .10 |
| Transcript of tape-recorded matter, per page..... | 3.00 |

(b) In the event fees for pending requests under this part from the same requestor exceed \$25.00, such records will not be searched for or made available, nor copies furnished, unless the requestor first pays or make acceptable arrangements to pay the total amount due, or if the fee is not precisely ascertainable, the approximate amount due upon the completion of the Commission's search and/or copying. In the event an advance payment hereunder shall differ from the actual fees due, an appropriate adjustment will be made at the time the copies are delivered or made available or a denial of same is notified.

(c) The Commission may reduce or waive payments of fees hereunder if such reduction or waiver would be in the public interest.

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