

Interested persons were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No objections were received as a result of the Notice of Proposed Rulemaking.

Accordingly, Subpart G, § 71.181 of the Federal Aviation Regulations (14 CFR 71.181) as republished on January 2, 1981 (46 FR 540), is amended effective 0901 G.m.t. November 26, 1981, by adding the following new transition area:

Seward, Nebraska

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of the Seward Municipal Airport, Seward, Nebraska (latitude 40°51'46"N, longitude 97°06'32"W), and 3 miles either side of the 344° bearing of the Seward NDB (latitude 40°51'36"N, longitude 97°06'18"W) extending from 6.5 miles to 8.5 miles northwest of the NDB; excluding that airspace overlying the Lincoln, Nebraska, transition area.

(Sec. 307(a), Federal Aviation Act of 1958 as amended (49 U.S.C. 1348); sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c)); § 11.69 of the Federal Aviation Regulations (14 CFR 11.69))

Note.—The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal; and (4) will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Issued in Kansas City, Missouri on September 23, 1981.

James O. Robinson.

Acting Director, Central Region.

[FR Doc. 81-28991 Filed 10-2-81; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 91

[Docket No. 22050; SFAR No. 44-2; SFAR No. 44-1]

Special Federal Aviation Regulation; Air Traffic Control System Interim Operations Plan

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment to Special Federal Aviation Regulation (SFAR) No.

44-1 establishes certain procedures for the operation of the National Air Traffic Control System, including procedures to be utilized in reducing carrier operations, as necessary, to provide for the safe and efficient operation of the air traffic system in a situation of reduced air traffic control capacity. The Administrator has determined that a situation still exists which requires reduced air traffic control capacity and that the continuation of the current special air traffic control provisions established under SFAR No. 44-1, as modified by this amendment, is necessary to provide for the efficient and safe movement of air traffic. This amendment makes adjustments to the air traffic procedures established by SFAR 44-1 to correct imbalance in the system which have developed since issuance of SFAR 44-1 and to provide the FAA with flexibility in making adjustments to the schedules of certain air traffic facilities.

EFFECTIVE DATES: September 29, 1981.

Comments are invited on this Interim Operations Plan so long as it remains in force or until June 1, 1982, whichever date is later.

ADDRESSES: Send comments on the rule in duplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn.: Rules Docket (AGC-204), Docket No. 22050, 800 Independence Avenue, SW., Washington, D.C. 20591.

Comments may be examined in the Rules Docket, weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT:

Harvey Safeer, Office of Aviation Policy and Plans (Telephone: (202) 426-3331), or

John R. Ryan, Operations Division, Air Traffic Service (Telephone: (202) 426-8310), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, D.C. 20591.

SUPPLEMENTARY INFORMATION:

Comments Invited

Although this amendment is in the form of an emergency final rule which concerns immediate flight safety throughout the United States, and, thus, is not preceded by notice and public procedure, comments are invited on this Interim Operations Plan which will remain in effect until further notice. The need for immediate regulatory response and background material is stated at 46 FR 39606, *et seq.* Comments on the rule should be submitted to the address indicated above. Comments are specifically invited on any aspects of the operation of the Air Traffic Control

system under this amendment that suggest a need to modify the regulation, or which should be considered should the occasion arise in the future to operate the Air Traffic Control system under emergency conditions. Comments received will be reviewed on a continuing basis and this amendment and the Interim Operations Plan may be changed in the light of comments received. Commenters wishing the FAA to acknowledge receipt of their comments in response to this rule must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 22050." The postcard will be date/time stamped and returned to the commenter.

Air Traffic Control System Interim Operations

The actions of certain members of the Professional Air Traffic Controllers Organization (PATCO) have significantly reduced the number of air traffic controllers who are available to operate the Air Traffic Control (ATC) system. This has resulted in the need to reduce the level of services that the FAA provides at various ATC facilities.

This has been accomplished by the operation of the ATC system under normal air traffic control procedures with the aid of "flow control" measures that result in a reduction of user demands on the system (SFAR No. 44 (46 FR 39606; August 3, 1981) and SFAR No. 44-1 (46 FR 44424; September 4, 1981 and 46 FR 44740; September 8, 1981)).

This amendment outlines the schedule and approval cycle which the FAA plans to utilize until further notice. These changes are being made as a result of a review of operations under the Interim Operations Plan. Comments made during a public hearing on September 24, 1981, were considered. The plan outlined herein is designed to benefit all concerned—passengers, air carriers, other system users and the FAA, and should result in a more equitable system of obtaining operational authority. More lead time in confirmation of requested flight operations will permit all carriers greater efficiency in equipment and crew scheduling. Improved reliability in flight authorization will also allow FAA to assure that individual carriers are conforming to operation limits set forth under the Interim Operations Plan.

Many members of the public and industry have urged the FAA to develop a plan which will be in effect for a finite period of time to allow air carriers to plan schedules, make decisions

involving staffing and equipment and which would allow the public to make plans. Many commenters have argued that from a scheduling standpoint, stability is the most important factor to be considered. The most important consideration in amending the existing procedures is that this revised plan while providing flexibility in establishing schedules, will provide a constant schedule over a calendar period. This degree of stability is absolutely critical as we approach the more difficult winter weather.

This procedure utilizes the air carriers' schedules submitted to the Official Airline Guide (OAG) for allocating the reduced flight operations at airports irrespective of IFR or VFR operations. Use of the OAG eliminates the need for duplicate information to be submitted to the FAA and provides the industry and the public with a usable schedule. Since use of OAG has worked well, it will continue to be used. The procedures have permitted the safe and efficient operation of the ATC system based upon the air traffic work force available at each ATC facility within the system. The reduction in user demand necessary because of the reduced work force has been accomplished while allowing the air carriers the maximum possible control over their operations. In addition, it permits adjustments to the system to provide for many of the seasonal and other changes in air carrier schedules that routinely occur. The procedures also permit normal flight planning and fuel conservation techniques by users. They further provide some flexibility to accommodate new or additional services that may occur at an airport as air carrier operations and the ATC work force at that airport change. In addition, the Plan provides ATC service to meet as many other aviation needs as can be accommodated with the available work force.

Accordingly, the Administrator has determined that the National Air Traffic Control system should continue to operate under the Interim Operations Plan, as modified by this amendment, until further notice. While the agency will closely monitor the operation of these procedures and will make changes if necessary, to provide for system stability, the procedures contained in this amendment will not be significantly modified until it is determined that these reduced levels are no longer necessary. The airports at which schedule reductions will be needed after December 1, 1981, will be determined after submission of proposed schedules for that period. For that reason the

SFAR no longer lists airports. Schedule reductions may also be imposed at airports other than those listed in SFAR No. 44-1 if any changes in the current status of an airport cannot be safely and efficiently handled by the controller work force at the ATC facilities involved. If conditions change substantially at any airport, the FAA will attempt to make that information available.

Strict adherence to operations limits contained in this amendment and related NOTAM's is essential to a continuation of a safe and efficient airspace. The Administrator will take whatever action is necessary to ensure adherence with the operations limits.

As a first step in ensuring compliance with SFAR 44-1 operations limits, the Associate Administrator for Policy and International Aviation, API-1, will review all schedule authorizations. API-1 will issue and receive all direct communications between the air carriers and the FAA regarding schedules and authorizations. All requests should be sent to the Associate Administrator for Policy and International Aviation, API-1, 800 Independence Avenue, S.W., Washington, D.C. 20591; Telephone No.: (202) 426-3030; Telex No.: 892562 FAA WSH (for API-1) and ARINC No.: DCAYAXD (for API-1). Except for emergencies, all of these requests must be submitted in writing. Emergency ferry, pilot training, and mechanical repair checkout flight requests can be submitted directly, orally or in writing to the FAA Central Flow Control Facility, FAA Headquarters, Washington, D.C. 20591.

For the schedule period October 25 to November 30, 1981, air carriers requesting flights in addition to daily limits submitted to the OAG for that period, must submit a written request to the Associate Administrator for Policy and International Aviation by September 26. No other submission must be made for this scheduling period. FAA expects the number of such requests made of this type will be reasonable and limited. The FAA Headquarters task force will analyze these proposals with respect to system capacity and by October 1, 1981, API-1 will notify each carrier requesting additional authority of the percentage of its proposed October-November schedule arrivals which must be adjusted or deleted. Air carriers may then request rescheduling of deleted flights to nonpeak hours. Such requests must be submitted in writing to API-1 by October 5. API-1 will then notify air carriers of their final approved October 25 to November 30 schedule about

October 8. An OAG supplement reflecting this guidance will be published on or about November 1.

The number of daily operations an air carrier may submit to OAG for its schedule at an airport after November 30, 1981, shall not exceed the number of operations for that airport submitted by that air carrier on or before July 24 to the OAG for the September 1-15 period, for the day of September 1, 1981. The schedules submitted at each airport shall not exceed the September 1 limitation and should reflect the full schedule the air carrier intends to operate.

The requests should include nonscheduled flights such as charters and training and ferry operations to the extent they are known. Scheduled cargo and charter flights will be treated the same as scheduled flights by air carriers. Other nonscheduled operations will be provided for at a time as close to the departure as possible, subject to ATC capacity. Submission of information on nonscheduled operations will assist in the FAA's analysis of future demands on the system.

Schedules for flights to be operated after November 30 will be approved for 1-month periods beginning on the first day and ending on the last day of the month. For the initial period (beginning December 1981) incumbent air carrier shall provide the OAG with a proposed schedule by September 29, 1981. Incumbents requesting flights above the number of daily flights as shown in the schedule submitted to OAG on or before July 24 for the September 1-15 period, for the day of September 1, 1981, and air carriers requesting flights at airports which they did not serve prior to the September 1-15 schedule submission, and new entrants requesting flights must separately identify and submit their requests in writing to API-1 by September 29. Again, FAA expects the number of such requests of this type to be reasonable and limited. The OAG will provide ATCCC Jacksonville with a computer tape data base of proposed December flights about October 5. The FAA Headquarters Interim Operations Plan task force will analyze the OAG submission with respect to system capacity to determine what level of additional service can be allowed at each airport. If additional capacity is available, then approval for the operations will be given. If capacity is not available to handle all flights requested, all carriers, including new entrants who filed, but not operating, for Civil Aeronautics Board (CAB) authority on or after August 3, 1981, will receive consideration based upon the order in

which the request is received. New entrants that had an application for operating authority on file with the CAB prior to August 3, 1981, will receive special consideration for access. Every effort will be made to give new entrants who have filed with the CAB on or after August 3 some authorization to operate although they may likely receive a lesser number of operations than requested—less desirable arrival times or operations at alternate airports. In connection with comments that the September 1 date will be a problem for "seasonal" operations by air carriers (particularly those serving north-south routes), it must be noted that currently operations at most of the airports involved in such service are under capacity and the air traffic system should be able to accommodate "seasonal" adjustments. By October 9, API-1 will notify each carrier of the percentage of proposed December schedule operations which must be adjusted or deleted. Air carriers may then request rescheduling of deleted flights to nonpeak hours. Such requests must be submitted in writing to API-1 by October 14. API-1 will then notify carriers of their final approved December schedule about October 20. Carriers should then provide OAG with their final approved schedule.

Thus, 42 days will be available to complete fleet and crew preparations for December.

For the January and subsequent monthly schedules, the hourly scheduled operation at each airport submitted to OAG by an air carrier shall not exceed the hourly operations authorized by API-1 for the preceding month. Air carriers may provide a list of requested changes or additions to the prior month's approved schedule 70 days before the start of the schedule period. New entrants with flights authorized by the FAA in December or thereafter, should follow the same procedure as an incumbent, except that their requests should not exceed their initial entry level authorized by API-1.

The FAA Interim Operations Plan task force will analyze the requests with respect to system capacity and API-1 will notify each carrier of the adjustments required. Air carriers will be given an opportunity to reschedule deleted flights in nonpeak hours. API-1 will then notify carriers of their approved schedule for the month no later than 45 days prior to the schedule period.

It is important to note that the number of changes submitted must be limited; requests for more than a limited number of changes will not receive

consideration due to time and manpower constraints.

Notices of cancellations of approved flights shall be sent to API-1.

A new air carrier that had an application for operating authority on file with the CAB prior to August 3, 1981, will receive approval for some operations. Other new entrants may be authorized to operate at the designated airports only if the then current capacity permits. Comments are specifically invited on the issue of how to provide service for new entrants.

Unscheduled flights by air carriers such as charters, training, extra sections, etc., into a designated airport must, to the extent possible, be submitted to API. General aviation and military operations will continue to be accommodated through the flow control procedures that result in a reduction in user demands on the system, when needed, and will be processed basically on a first-come first-serve basis. International flights will continue to be processed in accordance with the current procedures established for international flights.

This amendment does not change the present authority of the Director of Air Traffic Service to restrict, prohibit or permit VFR and/or IFR operations at any airport, TCA or other terminal and enroute airspace; to give priority at any airport to flights that are military necessities, medical emergency flights, Presidential flights, and flights transporting critical FAA employees; and to implement flow control management procedures, including reduction of flight operations, at any airport or within enroute airspace. Under the current conditions in the ATC system, the FAA's Air Traffic Control Command Center has the ability to maintain an efficient flow of air traffic within a framework of predetermined levels of system capacity. Therefore, it does not appear that it will be necessary to activate the more restrictive National Air Traffic Control Contingency Plan (Phase III). However, the Director of Air Traffic Service continues to be authorized to activate that Contingency Plan if conditions develop that require its use in order to provide for the safe and efficient movement of air traffic.

The basic rules and orders necessary for operation under the Interim Operations Plan will continue to be disseminated, in accordance with § 91.100 of the Federal Aviation Regulations, by Notices to Airmen (NOTAM).

The continued operation of the National Air Traffic Control System in a safe and efficient manner requires the

immediate adoption of this regulation in the public interest. Therefore, I find that further notice and public procedure thereon are impracticable and contrary to the public interest. I further find that good cause exists for making this regulation effective in less than 30 days after its publication in the Federal Register.

Adoption of the Rule

Accordingly, the Interim Operations Plan contained in Special Federal Aviation Regulation No. 44-1 is amended to read as follows, effective September 29, 1981:

Special Federal Aviation Regulation No. 44-2

1. Each person shall, before conducting any operation under the Federal Aviation Regulations (14 CFR Chapter I), familiarize himself with all Notices to Airmen issued under § 91.100; when activated, with the provisions of the National Air Traffic Control Contingency Plan (FAA Order 7110.86), available for inspection at operating air traffic facilities and regional air traffic division offices; and with all other available information concerning that operation.

2. Notwithstanding any provision of the Federal Aviation Regulations to the contrary, no person may operate an aircraft in the airspace under the jurisdiction of the United States—

(a) Contrary to any restriction, prohibition, procedure or other action specified in this Special Federal Aviation Regulation or specified by the Director of Air Traffic Service pursuant to paragraph 3 of this regulation and announced in a Notice to Airmen pursuant to § 91.100 of the Federal Aviation Regulations, or

(b) If the National Air Traffic Control Contingency Plan is activated pursuant to paragraph 5 of this regulation, except in accordance with the pertinent provisions of the Contingency Plan (FAA Order 7110.86, dated February 27, 1981, as amended by Errata Change issued March 10, 1981, Errata Change No. 2 issued March 18, 1981, and Errata Change No. 3 issued June 19, 1981).

3. As conditions warrant or until activation of the National Air Traffic Control Contingency Plan (Phase III), the Director of Air Traffic Service is authorized to—

(a) Restrict, prohibit or permit VFR and/or IFR operations at any airport, Terminal Control Area or other terminal and enroute airspace (subject to any restrictions and limitations imposed under paragraph 4 of this regulation);

(b) Give priority at any airport to flights that are military necessities, medical emergency flights, Presidential flights, and flights transporting critical Federal Aviation Administration employees; and

(c) Implement at any airport or within enroute airspace flow control management procedures, including reduction of flight operations. Reduction of flight operations shall to the extent feasible be made pro rata among and between air carrier, commercial operator, military and general aviation operations.

4. As conditions warrant or until activation of the National Air Traffic Control Contingency Plan (Phase III), the Associate Administrator for Policy and International Affairs is authorized to implement reductions in air carrier schedules in accordance with the Appendix to this regulation as air traffic capacity requires if operations at an airport cannot be safely and efficiently handled by the controller work force at the air traffic control facilities involved; and limit the number of daily and hourly operations of an air carrier at any airport based on that air carrier's submittal to the Official Airline Guide.

5. If the actions taken in accordance with paragraph 3 and 4 of this regulation do not provide for the orderly movement of air traffic, the Director of Air Traffic Service may activate the National Air Traffic Control Contingency Plan (Phase III).

6. Upon activation of the National Air Traffic Control Contingency Plan (Phase III) and notwithstanding any provision of the Federal Aviation Regulations to the contrary, the Director of Air Traffic Service is authorized to suspend or modify any airspace designation (or chart).

7. All restrictions, prohibitions, and procedures established, and other actions taken by the Director of Air Traffic Service under this regulation with respect to the operation of the Air Traffic Control system will be announced in Notices to Airmen issued pursuant to § 91.100 of the Federal Aviation Regulations.

8. The Director of Air Traffic Service may delegate his authority under this regulation to the extent he considers necessary for the safe and efficient operation of the National Air Traffic Control System.

Appendix.—Reduction Schedule for Designated Airports

1. For operations during the month of December, 1981.—

(a) Each air carrier shall submit a schedule (including nonscheduled flights such as charters and training and ferry

operations to the extent they are known) to the Official Airline Guide (OAG) by September 29, 1981. The number of daily arrival operations an air carrier may submit to the OAG at each airport shall not exceed the daily operations at that airport, submitted to the OAG on or before July 24 by the air carrier for the schedule period September 1–15, 1981, for the day of September 1, 1981.

(b) Each air carrier seeking authority for flights in excess of its September 1 levels, new entrants, and requests by an air carrier to initiate service must be separately identified and submitted in writing to the Associate Administrator for Policy and International Aviation, API-1, 800 Independence Avenue S.W., Washington, D.C. 20591; Telephone No.: (202) 426-3030; Telex No.: 892562 FAA WSH (for API-1) and ARINC No. DCAYAXD (for API-1) by September 29, 1981. If additional capacity is available, then authority for these operations will be given. If capacity is not available for all such requests, then priority consideration will be given to new entrants that had an application for operating authority on file with the CAB and not operating before August 3, 1981. All other carriers, including new entrants filing for CAB authority on or after August 3, 1981, will receive authority based upon the order in which the request was received by API-1. API-1 will notify each air carrier of the percentage of proposed operations which must be adjusted or deleted. Air carriers then may request rescheduling of deleted flights to nonpeak hours by October 9, 1981. Such requests must be submitted in writing to API-1. API-1 will then notify carriers of their final approved schedule.

2. For operations after December 31, 1981.—

(a) Each air carrier shall submit a schedule (including nonscheduled flights such as charters and training and ferry operations to the extent they are known) to the OAG at least 70 days before the start of the schedule period. The number of hourly arrival operations an air carrier may submit to the OAG at each airport shall not exceed the hourly operations at that airport submitted to the OAG by the air carrier for the previous month.

(b) Each air carrier seeking authority for flights in excess of the number flown in the previous scheduling month, new entrants, and requests by an air carrier to initiate service must be separately identified and submitted in writing to API-1. If additional capacity is available, then authority for these operations will be given. If capacity is not available for all such requests, then priority consideration will be given to

new entrants that had an application for operating authority on file with the CAB and not operating before August 3, 1981. All other carriers, including new entrants filing for CAB authority on or after August 3, 1981, will receive authority based upon the order in which the request was received by API-1. API-1 will notify each carrier of the percentage of proposed previous month's schedule arrivals which must be adjusted or deleted. Air carriers may then request rescheduling of deleted flights to nonpeak hours. Such requests must be submitted in writing to API-1 by the time period contained in the API notification. API-1 will then notify air carriers of their final approved monthly schedule.

3. Emergency ferry, pilot training, and mechanical repair checkout flight requests may be obtained from the FAA Central Flow Control Facility.

4. No person shall operate an air carrier flight unless approval for the operation has been received prior to the flight by API-1 as part of the particular air carrier's approved schedule or under paragraph 1 or 2 of this appendix, or in accordance with paragraph 3 of this appendix.

5. The Director of Air Traffic Service is authorized to—

(a) Make revisions and additions to the operations schedule established by an air carrier pursuant to paragraph 1 of this appendix to the extent the controller work force at the air traffic control facilities involved can accommodate those changes.

(b) Establish schedule reductions for any hour not specified in paragraph 1 of this appendix (nonpeak-operation hours) if excessive flights are rescheduled for any of those hours.

(c) Approve new or additional service into a designated airport. A new air carrier that had its application for an operating certificate on file with the CAB prior to August 3, 1981, will receive approval for some operations. Adjustments to other air carrier operations schedules may be made by the Director of Air Traffic Service to accommodate new air carriers. Other new entrants may be authorized to operate at the designated airports only if the then current capacity permits.

(Secs. 307 (a) and (c), 313(a), and 601(a), Federal Aviation Act of 1958, as amended (49 U.S.C. 1348 (a) and (c), 1354(a), and 1421(a)); Sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c))

Note.—The FAA has determined that this rule is an emergency regulation under the provisions of Section 8 of Executive Order 12291 and the Department's Regulatory Policies and Procedures (44 FR 11034;

February 26, 1979). It is impracticable for the FAA to follow the procedures of Executive Order 12291 applicable to regulations not issued in response to emergency situations because the safety and efficiency of the national air transportation system require immediate implementation of the rule. Voluntary compliance with this regulation is expected. If this action is subsequently determined to involve a significant regulation, a final regulatory evaluation or analysis will be prepared and placed in the regulatory docket (otherwise, an evaluation is not required). A copy of it, when filed, may be obtained by contacting the persons identified under the caption "FOR FURTHER INFORMATION CONTACT."

This is a final rule of the Administrator issued in accordance with the Federal Aviation Act of 1958, as amended. Thus, in accordance with § 1006 of the Act (49 U.S.C. 1486), it is subject to review only by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia.

Issued in Washington, D.C., on September 29, 1981.

J. Lynn Helms,
Administrator.

[FR Doc. 81-29894 Filed 10-3-81; 8:45 am]

BILLING CODE 4910-13-M

FEDERAL TRADE COMMISSION

16 CFR Parts 1 and 3

Rules Governing Recovery of Awards Under the Equal Access to Justice Act

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: These rules implement the Equal Access to Justice Act ("Act") and are promulgated under the authority of Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 (5 U.S.C. 504(c)(1)) and 5 U.S.C. 553(b). The Act takes effect October 1, 1981, and provides attorney fees and other expenses to eligible parties who prevail over the federal government in certain administrative and court proceedings. These rules reflect the Commission's adoption of the model rules developed by the Administrative Conference of the United States with modifications intended to harmonize the model rules with standard Commission procedure.

EFFECTIVE DATE: October 1, 1981.

FOR FURTHER INFORMATION CONTACT: Jerold D. Cummins, Deputy Assistant General Counsel, (202) 523-1928, or Kay Kiner James, Staff Attorney, (202) 523-3431, Federal Trade Commission, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: The Act becomes effective on October 1, 1981,

and will apply to adjudicative proceedings pending on that day. The Act directs agencies to establish uniform procedures for the award of fees in their administrative proceedings, after consultation with the Chairman of the Administrative Conference. To aid agencies in this process, the Administrative Conference published and requested public comment on draft model regulations for federal agency implementation of the Act (46 FR 15895, March 10, 1981). Based on comments received, the Administrative Conference revised the model rules and the Chairman issued final model regulations (46 FR 32900, June 25, 1981).

ACUS' primary purpose in issuing the model rules was to promote uniformity of procedures among the agencies in implementing the Act. The Commission supports that objective and its own rules are designed to adopt the procedures established by the model rules. The Commission's rules contain some changes from the model rules which were adopted to harmonize the model rules with established Commission adjudicative procedure and terminology.

Commission Modification of the Model Rules

These rules will appear as Subpart I under Part 3 of the Commission's rules of practice (16 CFR Ch. I). The section designations used in the Administrative Conference's model rules have been replaced with the proper designations for the position of these rules in the FTC rules of practice. The Commission made the following changes in the model rules:

1. Some sections of the model rules were deleted because they covered types or forms of proceedings which the Commission does not conduct.
2. Several model rule sections were changed, as suggested by the Chairman of the Administrative Conference, by referring to other sections of the Commission's rules of practice which covered the described procedures or proceedings.
3. To avoid the need for future amendments of the rule, the Commission chose to modify the section on allowable fees to state that expert witnesses could not be compensated at a rate exceeding the highest rate which the Commission currently pays expert witnesses for similar services. The model rules had specified the now current rate of \$24.09 per hour.
4. Finally, the Commission made a change in the wording of two sections which specify when an applicant may receive an award after "prevailing" on less than the entire proceeding (3.81(e), 3.82(d)). Under the model rules an applicant could receive an award if it

prevailed on a "significant and discrete substantive portion of the proceeding." The Commission rules provide that the applicant must have prevailed on a "substantive issue in the proceeding that is sufficiently significant and discrete to merit treatment as a separate unit." Both the language in the model rules and the Commission's language are meant to carry out Congress' intent in defining "prevailing," as that intent was expressed in the legislative history of the Act. H. Rep. 96-1434, Conference Report on H.R. 5612, Sept. 30, 1980, at 21-22. However, the Commission believes that its phrasing explicates the congressional intent more precisely.

The Commission amends its Rules of Practice as follows:

PART 1—GENERAL PROCEDURES

Subpart C—Rules and Rulemaking

1. Section 1.21 is revised to read as follows:

§ 1.21 Scope of the rules in this subpart.

The rules in this subpart apply to and govern procedures for the promulgation of rules, including quantity limit rules, rules authorized under the Wool Products Labeling Act of 1939, the Fur Products Labeling Act, the Textile Fiber Products Identification Act, 5 U.S.C. 504(b)(1)(A)(i) of the Equal Access to Justice Act, see § 3.81(g), and rules under the Fair Packaging and Labeling Act except to the extent that objections to orders relating to the issuance, amendment, or repeal of rules under the latter Act are required by statute to be determined on the record after opportunity for an agency hearing. The rules in this subpart do not apply to the promulgation of industry guides, general statements of policy, or rules of agency organization, procedure, or practice, or rules governed by the procedures of Subpart B of this part.

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

2. Subpart I is added to Part 3 of the Rules of Practice as follows:

Subpart I—Recovery of Awards Under the Equal Access to Justice Act in Commission Proceedings

Sec.

- 3.81 General provisions.
- 3.82 Information required from applicants.
- 3.83 Procedures for considering applicants.

Authority: Sec. (a)(1), Pub. L. 96-481, 94 Stat. 2325 (5 U.S.C. 504(c)(1) and 5 U.S.C. 553(b)).

Subpart I—Recovery of Awards Under the Equal Access to Justice Act in Commission Proceedings

§ 3.81 General provisions.

(a) *Purpose of these rules.* The Equal Access to Justice Act, 5 U.S.C. 504 (called "the Act" in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to adjudicative proceedings under this Part 3 of the Rules of Practice. An eligible party may receive an award when it prevails in the adjudicative proceeding, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards, how to apply for awards, and the procedures and standards that the Commission will use to make them.

(b) *When the Act applies.* The Act applies to any adjudicative proceeding pending before the Commission at any time between October 1, 1981, and September 30, 1984. This includes proceedings begun before October 1, 1981, if final Commission action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were initiated or when final Commission action occurs.

(c) *Proceedings covered.* (1) The Act applies to all adjudicative proceedings under this Part 3 of the rules of practice as defined in Rule 3.2, except hearings relating to the promulgation, amendment, or repeal of rules under the Fair Packaging and Labeling Act.

(d) *Eligibility of applicants.* (1) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adjudicative proceeding in which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

(2) The types of eligible applicants are as follows:

(i) An individual with a net worth of not more than \$1 million;

(ii) The sole owner of an unincorporated business who has a net worth of not more than \$5 million, including both personal and business interests, and not more than 500 employees;

(iii) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (25 U.S.C. 501(c)(3)) with not more than 500 employees;

(iv) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C.

1141j(a)) with not more than 500 employees; and

(v) Any other partnership, corporation, association, or public or private organization with a net worth of not more than \$5 million and not more than 500 employees.

(3) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(4) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(5) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(6) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the Administrative Law Judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the Administrative Law Judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(7) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

(e) *Standards for awards.* (1) A prevailing applicant may receive an award for fees and expenses incurred in connection with an entire proceeding, or on a substantive portion of the proceeding that is sufficiently significant and discrete to merit treatment as a separate unit unless the position of the agency over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on complaint counsel, which may avoid an award by

showing that its position had a reasonable basis in law and fact.

(2) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

(f) *Allowable fees and expenses.* (1) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(2) No award for the fee of an attorney or agent under these rules may exceed \$75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which the Commission paid expert witnesses for similar services at the time the fees were incurred. The appropriate rate may be obtained from the Office of the Executive Director. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(3) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Administrative Law Judge shall consider the following:

(i) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(ii) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(iii) The time actually spent in the representation of the applicant;

(iv) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(v) Such other factors as may bear on the value of the services provided.

(4) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

(g) *Rulemaking on maximum rates for attorney fees.* If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), this agency may, upon its own initiative or on petition of any interested person

or group, adopt regulations providing that attorney fees may be awarded at a rate higher than \$75 per hour in some or all of the types of proceedings covered by this part. Rulemaking under this provision will be in accordance with Rules of Practice Part 1, Subpart C of this chapter.

§ 3.82 Information required from applicants.

(a) *Contents of application.* An application for an award of fees and expenses under the Act shall contain the following:

(1) Identity of the applicant and the proceeding for which the award is sought;

(2) A showing that the applicant has prevailed;

(3) Identification of the Commission position(s) that applicant alleges was (were) not substantially justified;

(4) A brief description of the type and purpose of the organization or business (unless the applicant is an individual);

(5) A statement of how the applicant meets the criteria of § 3.81(d);

(6) The amount of fees and expenses sought;

(7) Any other matters the applicant wishes the Commission to consider in determining whether and in what amount an award should be made;

(8) A written verification under oath or under penalty or perjury that the information provided is true and correct accompanied by the signature of the applicant or an authorized officer or attorney.

(b) *Net worth exhibit.* (1) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the application and any affiliates (as defined in § 3.81(d)(6)) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Administrative Law Judge may require an applicant to file additional information to determine its eligibility for an award.

(2) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the Administrative Law Judge in a sealed envelope labeled "Confidential Financial Information,"

accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b) (1)-(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on complaint counsel but need not be served on any other party to the proceeding. If the Administrative Law Judge finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with Rule 4.11.

(c) *Documentation of fees and expenses.* The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The Administrative Law Judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

(d) *When an application may be filed.* (1) An application may be filed whenever the applicant has prevailed in the entire proceeding or on a substantive portion of the proceeding that is sufficiently significant and discrete to merit treatment as a separate unit, but in no case later than 30 days after the Commission's final disposition of the proceeding.

(2) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(3) For purposes of this rule, final disposition means the later of (i) the date on which the initial decision of the Administrative Law Judge becomes the decision of the Commission pursuant to

§ 3.51(a); (ii) issuance of an order disposing of any petitions for reconsideration of the Commission's final order in the proceeding; (iii) if no petition for reconsideration is filed, the last date on which such petition could have been filed pursuant to § 3.55; or (iv) issuance of a final order or any other final resolution of a proceeding, such as a consent agreement, settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

§ 3.83 Procedures for considering applicants.

(a) *Filing and service of documents.* Any application for an award or other pleading or document related to an application shall be filed and served on all parties as specified in §§ 4.2 and 4.4(b), except as provided in § 3.82(b)(2) for confidential financial information.

(b) *Answer to application.* (1) Within 30 days after service of an application, complaint counsel may file an answer to the application. Unless complaint counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b)(2) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(2) If complaint counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the Administrative Law Judge upon request by complaint counsel and the applicant.

(3) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of complaint counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, complaint counsel shall include with the answer either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(c) *Reply.* Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(d) *Comments by other parties.* Any party to a proceeding other than the applicant and complaint counsel may file comments on an application within 30 days after it is served on an

answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the Administrative Law Judge determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

(e) *Settlement.* The applicant and complaint counsel may agree on a proposed settlement of the award before final action on the application. A proposed award settlement entered into in connection with a consent agreement covering the underlying proceeding will be considered in accordance with § 3.25. The Commission may request findings of fact or recommendations on the award settlement from the Administrative Law Judge. A proposed award settlement entered into after the underlying proceeding has been concluded will be considered and may be approved or disapproved by the Administrative Law Judge subject to Commission review under paragraph (h) of this section. If a prevailing party and complaint counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

(f) *Further proceedings.* (1) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or complaint counsel, or on his or her own initiative, the Administrative Law Judge may order further proceedings, such as an informal conference, oral argument, additional written submissions or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

(2) A request that the Administrative Law Judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

(g) *Decision.* The Administrative Law Judge shall issue an initial decision on the application within 30 days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly

protracted the proceedings, or whether special circumstances make an award unjust.

(h) *Agency review.* Either the applicant or complaint counsel may seek review of the initial decision on the fee application, or the Commission may decide to review the decision on its own initiative, in accordance with § 3.53. If neither the applicant nor complaint counsel seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the Commission 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Commission. If review is taken, the Commission will issue a final decision on the application or remand the application to the Administrative Law Judge for further proceedings.

(i) *Judicial review.* Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 503(c)(2).

(j) *Payment of award.* An applicant seeking payment of an award shall submit to the Secretary of the Commission a copy of the Commission's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. Subject to the funding provisions of the Act, the agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adjudicative proceeding has been sought by the applicant or any other party to the proceeding.

By direction of the Commission dated September 29, 1981.

Carol M. Thomas,
Secretary.

Certificate of no Effect Under the Regulatory Flexibility Act

This is to certify that the Commission has concluded that the rules adopted here today will not have a significant economic impact on a substantial number of small entities, within the meaning of The Regulatory Flexibility Act (Pub. L. 96-354, September 19, 1980, 94 Stat. 1164).

While the Equal Access to Justice Act was intended by Congress to have a beneficial economic impact on small entities, the rules which the Commission has adopted at the Act's direction merely implement the provisions of the Act and do not themselves impose significant economic burdens or benefits.

By direction of the Commission dated September 29, 1981.

David A. Clanton,
Acting Chairman.

[FR Doc. 81-28895 Filed 10-1-81; 11:25 am]
BILLING CODE 6750-01-M

16 CFR Part 13

[Docket No. 8934]

Exxon Corp., et al.; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Dismissal order.

SUMMARY: This order, among other things, dismisses without prejudice the Commission's July 18, 1973, complaint charging eight major oil companies with maintaining and reinforcing a noncompetitive market structure in the refining of crude oil into petroleum products. Upon agreement between complaint counsel and respondents that the matter cannot be resolved in the foreseeable future, the Commission concluded that pending proceedings were not in the public interest. The order also vacates the ALJ's January 5, 1977, Protective Order, as modified by the ALJ's Orders of April and June 5, 1979; and bars the Commission from disclosing documents and information protected by these orders to any unauthorized party, or pursuant to an FOIA request. Upon dismissal of the complaint, the agency is additionally required to place respondents' documents, received pursuant to discovery in Docket 8934, in the physical possession of a designated custodian to be accorded the protections provided by Section 21 of the FTCA.

DATES: Complaint issued July 18, 1973. Final order issued September 16, 1981.¹

FOR FURTHER INFORMATION CONTACT: FTC/CS-4, Ronald B. Rowe, Washington, D.C. 20580, (202) 724-1441.

SUPPLEMENTARY INFORMATION: In the matter of Exxon Corporation, et al., a corporation.

The Order is as follows:

I
On April 24, 1981, the Commission issued an order requesting that the parties brief four specific issues relevant to the status of this case.² The order also

¹ Copies of the Complaint, Final Order and Separate Statement of Commissioner Pertschuk filed with the original document.

² The parties were requested to: (1) provide a proposed schedule setting forth dates for the conclusion of all additional discovery, the filing of

Continued

stayed all proceedings in this matter pending further order by the Commission.

On June 23, 1981, complaint counsel and respondents simultaneously filed initial memoranda in response to the Commission's April 24, 1981, Order. Responsive pleadings were subsequently filed by complaint counsel on July 9, 1981, and by respondents on July 23, 1981.

II

On July 18, 1973, the Commission issued the complaint in this matter pursuant to Section 5, of the Federal Trade Commission Act (15 U.S.C. 45).

On October 31, 1980, complaint counsel filed their "First Statement of Issues, Factual Contentions and Proof," pursuant to a March 12, 1980, Order by Administrative Law Judge James P. Timony. In the interim, the Commission denied motions by respondents to withdraw this matter from adjudication pending the filing of complaint counsel's pleading. See June 30, 1980, Order. After reviewing complaint counsel's statement, ALJ Timony concluded in a January 23, 1981, Order that " * * * no issues have been eliminated from the Pretrial Discovery Statement of February 22, 1974, and the Order Stating Issues of January 9, 1976." Thereafter, on February 2, 1981, respondent Texaco Inc. moved that the Commission dismiss this proceeding in light of ALJ Timony's January 23, 1981, Order.

The Commission's April 24, 1981, Order specifically raised its concern that the issues of fact and law in this case did not appear to have been sufficiently narrowed to accomplish a timely and meaningful resolution of this matter. None of the memoranda filed by the parties pursuant to this Order, however, has presented any evidence to assuage the Commission's initial concerns regarding the status of this matter. Complaint counsel's "best case" model contemplates the filing by each party of three additional Statements of Contentions and Proof over the next thirty-three months and a potential target of approximately three years before trial would commence.

(Complaint Counsel's Response at 26-31.) Moreover, complaint counsel state that any further narrowing of the issues at this time would be "arbitrar[y]" and

all pretrial motions, the filing of all pretrial briefs, and the commencement and conclusion of trial; (2) discuss any procedures by which these proceedings may be expedited and/or resolved, in whole or in part; (3) discuss the extent to which the allegations of liability can be further narrowed or consolidated, in whole or in part; and (4) discuss whether there are any other factors bearing on the public interest which the Commission should now address in connection with the status of these proceedings.

"irresponsible." (Complaint Counsel's Response at 39.) Finally, complaint counsel predict that " * * * it [is] unlikely that continuation of the *Exxon* case can accomplish 'a timely and meaningful resolution' of the violations described in Complaint Counsel's First Statement. Complaint counsel therefore recommend that this matter be dismissed, without prejudice * * *." (Complaint Counsel's Response at 6.)

Respondents, while specifically declining to address the first three requests of the Commission's April 24, 1981, Order, assert that the proceeding is not in the public interest and therefore should be terminated. (Respondents' Joint Submission at 1-4.) Respondents state that " * * * only a fraction of the discovery that will be necessary to prepare this case for trial has been completed" (Respondents' Joint Submission at 40) and that a "realistic assessment suggests that the case is far closer to its beginning than to its end." (Respondents' Joint Submission at 39.) Respondents conclude that "Docket 8934 should be dismissed." (Respondents' Joint Submission at 49.)

Thus, both complaint counsel and respondents agree that completion of discovery is at least several years away, that this matter cannot be resolved in the foreseeable future and that the complaint should be dismissed. In addition, the parties have agreed that the ALJ's January 5, 1977, Protective Order, as modified by the ALJ's Orders of April 23 and June 5, 1979, be vacated. This order requires that the documents, obtained during discovery and designated as confidential, be returned at the conclusion of the proceeding.³

³ In an Agreement Between the Parties, filed with the Commission on June 23, 1981, respondents waive the ALJ's January 5, 1977, Protective Order, as modified, provided that the Commission dismisses the complaint and that the Commission's order of dismissal contains the following assurances of confidentiality: (1) except as permitted or authorized by the FTC Act, as amended, the Commission shall not disclose documents received from respondents, or information contained therein, to any person who is not an employee of the Commission; (2) the Commission shall not disclose the documents or information pursuant to any request under the Freedom of Information Act; and (3) upon dismissal of the complaint, the Commission shall designate a custodian who will maintain physical possession of the documents, all of which shall be treated as if they had been designated confidential by respondents at the time of submission and as if they had been duly subpoenaed subject to applicable provisions of the FTC Improvements Act, and the documents shall be protected as provided by Section 21 of the FTC Act and the Commission's implementing Rules of Practice. The agreement also states that respondents do not waive "any restriction imposed by law on the Commission's use or disclosure of [the] * * * documents or information, * * * the right to seek the return of any or all of such documents, or the right to seek additional protection

III

The Commission has considered the briefs of the parties, submitted in response to its April 24, 1981, Order, together with other filings in this proceeding, submitted or referred to by the parties, specifically including Complaint Counsel's First Statement of Issues, Factual Contentions and Proof, dated October 31, 1980, and the Counterstatements of Respondents, dated March 30, 1981, and has concluded that further proceedings in Docket No. 8934 are not in the public interest. While the length or complexity of litigation does not, in itself, constitute a basis for dismissal, the circumstances of this proceeding, including the limited progress of the litigation, call for this result. This case has been in pre-trial for eight years and unless the issues are substantially narrowed it may be well over three years before trial commences. While the Commission has the authority to remove this matter from adjudication and narrow the issues on its own initiative, such action would be impracticable under the circumstances. Therefore, without reaching the merits of this case, we believe the proper course for the Commission is to dismiss the pending proceedings and to preserve the option of addressing any anticompetitive problems in this industry in more focused proceedings. Accordingly, it is ordered that this matter be dismissed, without prejudice.

It is further ordered, that the Agreement Between the Parties, filed with the Commission on June 23, 1981, is approved by the Commission and that pursuant thereto, the ALJ's Protective Order of January 5, 1977, as modified by the ALJ's Orders of April 23 and June 5, 1979, is vacated. The documents and information covered by these orders will be treated as follows:

1. Except as permitted or authorized by the Federal Trade Commission Act, as amended by the Federal Trade Commission Improvements Act of 1980 (Pub. L. No. 96-252), and the Commission's implementing rules, the Commission shall not disclose documents in the possession of the Commission which were received from respondents, or information contained therein, to any person who is not an employee of the Commission. The Commission shall obtain suitable assurances from all employees afforded access to respondents' documents not to

for " * * * [the] documents, or information." The documents and information subject to the agreement are exempt from mandatory public disclosure under applicable statutes and case law. See 5 U.S.C. 552.

disclose such documents or the information contained therein, except as authorized.

2. The Commission shall not disclose the documents or information contained therein pursuant to any request under the Freedom of Information Act.

3. Upon dismissal of the complaint, the Commission shall designate a custodian pursuant to Section 21 of the Federal Trade Commission Act, as added by Section 13 of the Federal Trade Commission Improvements Act of 1980. The documents in the possession of the Commission which were received from respondents pursuant to discovery in Docket 8934 shall be placed in the physical possession of the custodian, and shall be treated as if they had been designated confidential by respondents at the time of submission and as if duly subpoenaed subject to provisions of the Improvements Act, and shall thereafter be protected as provided by Section 21 and pursuant to the regulations implementing the Act promulgated by the Commission.

By the Commission.

Carol M. Thomas,

Secretary.

[FR Doc. 81-20875 Filed 10-2-81; 9:45 am]

BILLING CODE 6750-01-M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 3, and 140

Withdrawal From Registration; Delegation of Authority

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: The Commodity Futures Trading Commission ("Commission") is establishing a procedure whereby any person who is registered with the Commission under the Commodity Exchange Act may seek to withdraw from registration prior to the scheduled expiration date of such registration. The withdrawal procedure is intended to relieve registrants who are exempt from registration, or who are not engaged in activities which require registration, from certain regulatory requirements that would otherwise be applicable to those persons as Commission registrants. A person who desires to withdraw from registration using this procedure must file a written request to that effect with the Commission. No Commission form will be developed for submitting withdrawal requests. A letter from the registrant containing the requisite information will suffice. Unless

postponed, conditioned, or denied by the Commission, withdrawal becomes effective 30 days after the receipt of such request. The Commission is delegating authority to specified members of its staff to review and to act upon withdrawal requests, and is making minor conforming changes to certain of its registration regulations.

EFFECTIVE DATES: October 5, 1981; except, effective July 1, 1982, § 1.10f is redesignated § 3.33 and § 1.9 is redesignated § 3.2.

FOR FURTHER INFORMATION CONTACT:

Robert P. Shiner, Assistant Director for Registration, or Suzanne W. Ryder, Esq., Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street NW, Washington, D.C. 20581. Telephone: (202) 254-9703 or 254-8955, respectively.

SUPPLEMENTARY INFORMATION:

A. Withdrawal From Registration

The Commission periodically receives requests from registrants for permission to withdraw their registrations in one or more capacities prior to the expiration dates set by the Commodity Exchange Act, as amended, ("Act") or the regulations thereunder.¹ The procedure the Commission is adopting in § 1.10f is intended to provide an expeditious process for withdrawal from registration for registrants for whom continued registration may be unnecessary.

The Commission has determined that in the absence of pending proceedings against a registrant or other public interest considerations, withdrawal from registration should be available to registrants who have ceased engaging in the activities for which they were initially registered or who, subsequent to being registered, have decided not to begin conducting the activities for which they had earlier sought registration. Similarly, the Commission believes that withdrawal from registration should be available where a registrant is either excluded from the persons or classes of persons for whom registration is

¹For example, Section 4(f)(1) of the Act provides, in general, that the registration of a futures commission merchant ("FCM") or floor broker expires on December 31 of the year for which it is issued. 7 U.S.C. 6(f)(1). Section 4n(2) of the Act generally provides that the registration of a commodity pool operator ("CPO") or a commodity trading advisor ("CTA") expires on June 30 of the year for which it is issued. 7 U.S.C. 6n(2). Effective July 1, 1982, the present requirement for the biennial renewal of registration of associated persons ("APs") will be eliminated, and by regulation, a registration period coextensive with, and conditioned upon, an AP's association with a "sponsoring" FCM will be established. 45 FR 80485, 80493 (December 5, 1980); 46 FR 24940, 24941 (May 4, 1981).

required by the Act² or is eligible for an exemption from registration.³ The Commission believes that a registrant who requests withdrawal and makes a proper showing of eligibility to withdraw should not be required to continue performing the various ongoing obligations imposed upon registrants by the Act and the regulations thereunder.⁴ These duties, which vary with the capacity in which a person is registered, may include financial, reporting, disclosure, and recordkeeping requirements, many of which have as their principal purposes the protection of customers and the commodity markets.⁵ Where, however, a registrant is not engaged in activities for which registration is required, or becomes excluded or exempt from a registration requirement during a registration period, continued compliance with many of these requirements may no longer be necessary to achieve these purposes.⁶

²For example, Section 2(a)(1) of the Act, 7 U.S.C. 2, specifically excludes from the definition of commodity trading advisor:

... (i) any bank or trust company, (ii) any newspaper reporter, newspaper columnist, newspaper editor, lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation including their employees, and (v) any contract market ... *Provided*, That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession.

Section 2(a)(1) also excludes from the definitions of CTA and CPO such persons who are not within the intent of the definitions of those terms as the Commission may specify by rule, regulation, or order.

³See, e.g., Section 4m of the Act, 7 U.S.C. 6m (exemption from registration for certain CTAs); Commission Rule 1.7, 17 CFR 1.7 (exemption from registration for certain FCMs); Commission Rule 4.13, 46 FR 26004, 26014-15 (May 8, 1981) (exemption from registration for certain CPOs); Commission Rule 4.14, 46 FR 26004, 26015 (May 8, 1981) (exemption from registration for certain CTAs).

⁴Similarly, permitting withdrawal from registration in appropriate cases will relieve the Commission's staff of the responsibility to process and review the information required to be submitted by registrants.

⁵See, e.g., Commission Rule 1.17, 17 CFR 1.17, as amended by 45 FR 79416, 79422-23 (December 1, 1980) (minimum financial requirements for FCMs); Commission Rule 1.12, 17 CFR 1.12, as amended by 45 FR 79416, 79422 (December 1, 1980) (filing of certain notices and reports when an FCM is within the "early warning system") and Commission Rule 1.10(b), 17 CFR 1.10(b) (filing of certain financial reports by FCMs); Commission Rule 4.21(a), 46 FR 26004, 26015-16 (May 8, 1981) (distribution of risk disclosure statement to prospective commodity pool participants); Commission Rules 4.23 and 4.32, 46 FR 26004, 26020 and 26023 (May 8, 1981) (recordkeeping requirements for CPOs and CTAs, respectively).

⁶A registrant's withdrawal from registration in any one capacity (e.g., as a commodity pool operator) does not, by itself, constitute the withdrawal of that person's registration in any other capacity (e.g., as a commodity trading advisor).

Continued

The Commission, therefore, is permitting registrants to submit a request to the Commission to withdraw from registration in any capacity in which they are then registered.

Rule 1.10f provides that a request for withdrawal must contain information which is intended to inform the Commission of the status of the registrant making the withdrawal request, to substantiate the registrant's eligibility to withdraw from registration, and to enumerate any outstanding claims of its customers.⁷

Withdrawal of a registration under § 1.10f will become effective 30 days after the receipt by the Registration Unit of the Commission's Division of Trading and Markets of a properly completed request.⁸ The purpose of the 30-day period is to give the Commission time to review the information provided by the registrant to determine if there is any reason why withdrawal should not be allowed.

Withdrawal from registration is, therefore, essentially a self-executing procedure. The Commission may, however, deny a request if withdrawal would be contrary to the requirements of the Act or of any rule, regulation or order thereunder or if withdrawal would not be in the public interest. Furthermore, § 1.10f(f)(1) makes a registrant ineligible to use this procedure if the Commission has begun proceedings to suspend or revoke that person's registration before the request for withdrawal is made. In addition, withdrawal will not be allowed where the Commission commences such a proceeding within the 30-day period or notifies the registrant that he is

Section 1.10f(g). (Of course, a person who wished to withdraw from registration in more than one capacity could combine its requests and would not have to file a separate request for each such capacity. See § 1.10f(a)).

Where, however, a person is presently exempt from registration in one capacity (e.g., as an associated person) because of his registration in some other capacity (e.g., as a floor broker), withdrawal from registration may necessitate registration in a capacity for which that person was formerly exempt.

Unless it otherwise specifies, the Commission intends this rule to apply to registration categories which may be established in the future. See, e.g., 46 FR 23469, 23485 (April 27, 1981) (proposed registration of dealer option grantors).

⁷ As used in § 1.10f, the term "customer" includes the customers of FCMs and the clients of CTAs, as well as the customers of any category of registrant which may be established in the future. Section 1.10f also refers to "commodity pool participants"—i.e., those persons who have a direct financial interest in a commodity pool. See § 4.10(c) 46 FR 26004, 26014 (May 8, 1981).

⁸ A request will be considered to be "received" when it is delivered to the address specified in the rule.

currently the subject of an investigation.⁹

Where the Commission determines that the information provided by the registrant is insufficient, the Commission may request that additional information be supplied to the Commission.¹⁰ In addition, the Commission may impose, or give notice of its intention to impose, terms and conditions upon a withdrawal becoming effective.¹¹

Withdrawal from registration under the procedures established herein would not, of course, relieve the registrant from liability for any violation of the Act or any rule, regulation or order thereunder, nor would it relieve former registrants of the necessity of maintaining books and records in accordance with Commission Rule 1.31.¹² The Commission wishes to further caution registrants who intend to avail themselves of the procedures established in § 1.10f that a request for withdrawal from registration cannot be rescinded after it is received by the Commission. If the Commission does not postpone, condition, deny or otherwise withhold withdrawal, such registrant will have withdrawn from registration on the 30th day after receipt by the Commission of its withdrawal request.

B. Related Matters

Under Commission Rule 1.14,¹³ certain deficiencies, inaccuracies and changes in a registrant's application for registration and related materials must be reported to the Commission. In developing the withdrawal procedure set out above, the Commission has determined that a request for withdrawal from registration submitted under § 1.10f will satisfy a registrant's obligation to file under § 1.14 if its withdrawal becomes effective.¹⁴

In order to facilitate the processing of requests to withdraw from registration, the Commission has delegated its authority under § 1.10f to certain members of its staff. Under the delegation of authority contained in § 140.95(a), the Director of the Division of Trading and Markets and his designees are authorized to review, postpone, condition, deny, or otherwise

act upon requests for withdrawal from registration.

The Commission finds that Sections 1.10f and 140.95 are rules which pertain solely to agency organization, procedure, and practice. Moreover, § 1.10f relieves a restriction by permitting early termination of registrations. Neither § 1.10f nor § 140.95 impose any additional obligations upon Commission registrants, thus notice and opportunity for public comment are unnecessary under the Administrative Procedure Act.¹⁵ In addition to the new rules announced herein, the Commission is making certain conforming, non-substantive changes to Rules 1.7¹⁶ and 1.9.¹⁷ Prior notice of these changes is also unnecessary.

In adopting these rules, the Commission has taken into consideration the public interest to be protected by the antitrust laws and has endeavored to take the least anticompetitive means of achieving the regulatory objectives of the Commodity Exchange Act.

C. Regulatory Flexibility Act

The Commission has not published a prior general notice of proposed rulemaking because §§ 1.10f and 140.95 are procedural in nature. Sections 1.10f and 140.95, therefore, are not "rules" as that term is defined in Section 3(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1165 (5 U.S.C. 601(2)). Accordingly, the analysis or certification specified in that Act is not required.

D. Paperwork Reduction Act

Rule 1.10f has been submitted to the Office of Management and Budget ("OMB") for approval of its information collection provisions and for assignment of a control number pursuant to the Paperwork Reduction Act of 1980 ("PRA").¹⁸ Approval from OMB of § 1.10f has been obtained and OMB control number 3038-0008 has been assigned to § 1.10f.¹⁹

In consideration of the foregoing, and pursuant to the authority contained in the Commodity Exchange Act, and in

¹⁵ 5 U.S.C. 553(b).

¹⁶ 17 CFR 1.7.

¹⁷ 17 CFR 1.9.

¹⁸ Sections 3507(a) and 3507(f). Pub. L. No. 96-511, 94 Stat. 2812, 2819-20 and 2821 (44 U.S.C. 3507(a) and 3507(f)).

¹⁹ Sec. 3507(f) of the PRA, *supra* note 22, provides that no information collection request may be made without first obtaining from OMB a control number to be displayed upon such a request. As the information requested by the Commission in § 1.10f will be obtained without the use of a Commission form, OMB has informed the Commission that publication of the assigned control number constitutes compliance with this requirement of the PRA.

⁹ Sections 1.10f(f)(2)(i) and 1.10f(f)(2)(iii), respectively.

¹⁰ Section 1.10f(f)(2)(iv).

¹¹ Section 1.10f(f)(2)(ii).

¹² 17 CFR 1.31.

¹³ 17 CFR 1.14.

¹⁴ Effective July 1, 1982, § 1.14 will be superseded by Commission Rule 3.31. 45 FR 80485, 80496-97 (December 5, 1980) and 46 FR 24940, 24943 (May 4, 1981). The Commission will similarly regard a request for withdrawal from registration as satisfying the requirements of § 3.31.

particular Sections 2(a)(11) and 8a thereof, 7 U.S.C. 4a(j) and 12a, the Commission hereby amends Parts 1, 3, and 140 of Chapter I, Title 17 of the Code of Federal Regulations by revising § 1.7, § 1.9 (§ 1.9 subsequently to be redesignated § 3.2), adding §§ 1.10f (subsequently to be redesignated § 3.33) and 140.95, as follows:

PART I—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

1. By revising § 1.7 to read as follows:

§ 1.7 Registration required of futures commission merchants.

No person shall engage as futures commission merchant in the solicitation or acceptance of orders for the purchase or sale of any commodity for future delivery, on or subject to the rules of any contract market, unless the Commission has registered such person as a futures commission merchant under the Act and such registration has not expired, been withdrawn, and is not under suspension or revocation:

Provided, however, That a person trading solely for proprietary accounts within the meaning of § 1.3(y) shall not be required to register as a futures commission merchant; such a person trading solely for proprietary accounts as defined, shall otherwise be subject to all provisions of the Act and of the rules, regulations and orders thereunder.

2. By revising § 1.9, effective date of publication, to read as follows:

§ 1.9 Registration as one type of person not included in registration as any other type of person.

Registration as one type of person subject to regulation under the Act shall not include registration as any other type of person subject to regulation under the Act, except that a natural person who is registered as a futures commission merchant or as a floor broker (and such registration is not withdrawn, suspended or revoked) need not also register as an associated person.

§ 1.9 [Redesignated as § 3.2]

3. Effective on July 1, 1982, § 1.9 is redesignated as § 3.2.

4. By adding a new § 1.10f to read as follows:

§ 1.10f Withdrawal from registration.

(a) A registrant may request that its registration in one or more capacities be withdrawn prior to expiration in

accordance with the requirements of this section if:

(1) The registrant has ceased, or has not commenced, engaging in activities requiring registration in such capacity;

(2) The registrant is exempt from registration in such capacity; or

(3) The registrant is excluded from the persons or any class of persons required to be registered in such capacity:

Provided, That the Commission may consider separately each capacity for which withdrawal is requested in acting upon such a request.

(b) A request for withdrawal from registration under this section must be made by the sole proprietor if the registrant is a sole proprietorship, by a general partner if the registrant is a partnership, or by the president or chief executive officer if the registrant is a corporation, and must specify:

(1) The name of the registrant for which withdrawal is being requested;

(2) The registration capacities for which withdrawal is being requested;

(3) The name and relationship to the registrant of the individual making the request and, in the case of a corporation, a certified copy of a resolution of the board of directors authorizing such individual to make the withdrawal request;

(4) The name, address, and telephone number of the person who will have custody of the books and records of the registrant; the address where such books and records will be located; and a statement that such person is authorized to make them available in accordance with the requirements of § 1.31 of this chapter;

(5) The applicable basis under paragraph (a) of this section for requesting withdrawal for each capacity for which withdrawal is requested.

(6) If withdrawal is requested under paragraph (a)(2) or (a)(3) of this section, then, with respect to each capacity for which withdrawal is requested, the section of the Act, regulations, or other authority permitting the exemption or exclusion, and the circumstances which entitle the registrant to claim such exemption or exclusion.

(7) If a basis for withdrawal from registration under paragraph (a)(1) of this section is that the registrant has ceased engaging in activities requiring registration, then, with respect to each capacity for which the registrant has ceased such activities:

(i) That all customer agreements, if any, have been terminated;

(ii) That all customer positions, if any, have been transferred on behalf of

customers or closed;

(iii) That all customer cash balances, securities or other property, if any, have been transferred on behalf of customers or returned, and that there are no obligations to customers outstanding;

(iv) In the case of a commodity pool operator, that all interests in, and assets of, any commodity pool have been redeemed, distributed, or transferred, on behalf of the participants therein, and that there are no obligations to such participants outstanding; and

(v) The nature and extent of any pending customer or commodity pool participant claims against the registrant, and, to the best of the registrant's knowledge and belief, the nature and extent of any anticipated or threatened customer or commodity pool participant claims against the registrant.

(c) Where a futures commission merchant is requesting withdrawal from registration in that capacity and the basis for withdrawal under paragraph (a)(1) of this section is that it has ceased engaging in activities requiring registration, the request for withdrawal must be accompanied by a Form 1-FR which contains the information specified in § 1.10(d)(1) as of a date not more than 30 days prior to the date of the withdrawal request.

(d) A request for withdrawal from registration must be in writing and must contain a signed oath or affirmation that, to the best of the knowledge and belief of the signatory, the information contained in the request is accurate and complete.

(e) A request for withdrawal from registration must be sent to the Commodity Futures Trading Commission at its Washington, D.C. Office (Registration Unit, Division of Trading and Markets, 2033 K Street N.W., Washington, D.C. 20581).

(f) A request for withdrawal from registration will become effective on the thirtieth day after receipt at the address specified in paragraph (e) of this section unless:

(1) The request for withdrawal is received subsequent to the issuance by the Commission of an order instituting a proceeding to suspend or revoke such registration; or

(2) Prior to the effective date:

(i) The Commission institutes a proceeding to suspend or revoke such registration;

(ii) The Commission imposes, or gives notice that it intends to impose, terms or conditions upon such withdrawal from registration;

(iii) The registrant is notified that it is

currently the subject of an investigation to determine, among other things, whether such registrant has violated, is violating, or is about to violate the Act, rules, regulations or orders adopted thereunder;

(iv) The Commission requests from the registrant further information pertaining to its request for withdrawal from registration; or

(v) The Commission determines that it would be contrary to the requirements of the Act, or of any rule, regulation or order thereunder, or to the public interest to permit such withdrawal from registration.

(g) Withdrawal from registration in one capacity does not constitute withdrawal from registration in any other capacity.

(h) Withdrawal from registration does not constitute a release from liability for any violation of the Act or of any rule, regulation, or order thereunder.

§ 1.10f [Redesignated as § 3.33]

5. Effective on July 1, 1982, § 1.10f is redesignated as § 3.33.

PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

6. By adding a new § 140.95 to read as follows:

§ 140.95 Delegation of authority with respect to withdrawals from registration.

(a) The Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Trading and Markets and to such members of the Commission's staff acting under his direction as he may designate, the authority to review, postpone, condition, deny, or otherwise act upon a request for withdrawal from registration.

(b) The Director of the Division of Trading and Markets may submit any matter which has been delegated to him under paragraph (a) of this section to the Commission for its consideration.

(c) Nothing in this section shall prohibit the Commission, at its election, from exercising the authority delegated to the Director of the Division of Trading and Markets under paragraph (a) of this section.

Issued in Washington, D.C. on July 27, 1981, by the Commission.

Jane K. Stuckey,

Secretary of the Commission.

[FR Doc. 81-28860 Filed 10-2-81; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1306

Transfer of Prescription Information for Schedules III, IV, and V Controlled Substances

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Final rule.

SUMMARY: This rule amends Part 1306 of Title 21 of the Code of Federal Regulations to permit the transfer of prescription information between two pharmacies for controlled substance prescriptions which are lawfully refillable. This action was initiated upon request from various pharmacy professionals and organizations including the National Association of Boards of Pharmacy, National Association of Chain Drug Stores, National Association of Retail Druggists, American Pharmaceutical Association and the American Society of Consultant Pharmacists. These various professional groups brought to DEA's attention that the duplication of prescriptions is a potential diversion problem and by allowing the transfer of prescription information, the number of duplicate prescriptions would be substantially reduced, resulting in a corresponding decrease in the number of prescriptions available for diversion or misuse.

It is anticipated that this rule would reduce the health care costs to patients by providing a mechanism for a patient to request the transfer of a prescription from one pharmacy to another thereby eliminating the need for a new prescription to be issued. This amendment would also serve to provide a means by which patients can transfer prescriptions to a more geographically convenient pharmacy as the need arises. It is deemed that this amendment would serve to benefit the general public in obtaining needed medication under certain circumstances and at the same time ensure adequate controls to prevent the diversion of controlled substances.

EFFECTIVE DATE: October 5, 1981.

FOR FURTHER INFORMATION CONTACT:

Mr. Ronald W. Buzzeo, Chief, Compliance Division, Office of Compliance and Regulatory Affairs, Drug Enforcement Administration, 1405 I Street, Northwest, Washington, D.C. 20537, telephone number (202) 633-1321.

SUPPLEMENTARY INFORMATION: On March 26, 1980, the Administrator of the Drug Enforcement Administration issued a Notice of Proposed Rulemaking (45 FR

21652, April 2, 1980) which would permit the transfer of prescription refill information for Schedules III, IV and V controlled substances between two pharmacies where acceptable under state law.

The Notice requested that responsive comments and objections be submitted to DEA on or before June 2, 1980.

This proposal has resulted in the submission of an unusually large number of comments, both for and against. A number of commentors indicate by the substance of their submission a lack of understanding of the proposed amendment and the type of drugs which are involved. For clarification purposes, it must be emphasized that this proposed amendment pertains to those substances or drugs which are controlled under the Controlled Substances Act of 1970 and specifically in Schedules III, IV and V. A majority of the commentors supported the proposed amendment and expressed the need for this regulation as a convenient means to aid patients in acquiring needed medications in generally three situations: (1) to obtain medication from a pharmacy closer to an individual's residence; (2) to take advantage of more competitive prices for medication at another pharmacy; and (3) to obtain medication while the patient is temporarily away from his/her permanent residence (i.e. medication has been lost, forgotten or if patient experiences an inadequate supply).

The American Pharmaceutical Association submitted written comment expressing support for the proposed amendment and stated that although they preferred transfers on a more liberal basis than proposed, they felt that the amendment is reasonable and would be in the interest of facilitating pharmaceutical service to patients in situations which may require a prescription transfer.

A number of commentors submitted objections to the proposed amendment stating several factors in support of their opposition. Three state authorities which include the Rhode Island Department of Health, the Commonwealth of Massachusetts Board of Registration of Pharmacy, and the State of Wisconsin Department of Regulation and Licensing, objected to the proposed amendment.

The objections set forth by these authorities included: (1) the regulation would be contrary to their state law in that copies of prescriptions or other evidence of an existing prescription would be considered invalid and not refillable; (2) it would place unnecessary burdens upon state regulatory and law

enforcement personnel to detect fraud or determine that the transfer was in good faith; and (3) there would be no guarantee that the proposed amendment would reduce the number of multiple prescriptions.

The DEA carefully considered the objections submitted by these state authorities. The DEA does not intend to burden the effectiveness of existing state regulations which have been established to monitor the prescribing and dispensing of controlled substances. In all cases, the more stringent law or regulation is applicable. Consequently, the DEA does not feel that the implementation of this proposed amendment would hinder or reduce the effectiveness of state regulations. The DEA feels that any additional burdens placed upon state regulatory or law enforcement personnel would be minimal and that the overall benefits of this proposal would far outweigh any negative aspects. Additionally, the DEA is confident that the number of multiple prescriptions now written by practitioners would be reduced when these same practitioners as well as pharmacists become knowledgeable to the fact that a new prescription need not be issued and that transfer procedures could be utilized.

Additional commentors in support of their objections to the proposed amendment feel that the amendment: (1) would not be in the best interest of good control or prudent medical practice; (2) would result in inaccurate information being transferred, thus producing prescription errors; and (3) the requirements would be confusing to the pharmacist. Understandably, the DEA is concerned with maintaining adequate controls both from the standpoint of proper dispensing of controlled substances and prudent medical practice. The DEA is of the opinion that since pharmaceutical professionals receive oral prescription orders from physicians on a routine basis there is no reason to believe that the transfer which is executed between two pharmacists would not be effected in a less than professional and prudent manner. The DEA feels that the possibilities of additional diversion are minimal. The controls established to effect the transfer and the one time transfer limitation would be sufficient to discourage diversion.

Two commentors submitted suggestions which DEA considered and accepted in part. These commentors suggested: (1) the transferring pharmacy should also record the DEA registration number of the pharmacy to which the prescription information was

transferred; (2) dates of all previous refills should be transmitted to and recorded by the transferee pharmacist; (3) requirements for the address of the pharmacy and the name of the pharmacist receiving the prescription information under paragraph (a)(1)(ii) be deleted; (4) the name of the pharmacist transferring the information as set forth in paragraph (a)(1)(iii) be deleted; (5) eliminating the requirements under paragraphs (b)(2) (ii) and (iii) requiring the original number of refills authorized and date of original dispensing to be recorded; and (6) eliminating the pharmacy's name and the name of transferor pharmacist as proposed under paragraphs (b)(2) (v) and (vi).

The DEA accepted suggestion (1) and suggestion (2) in part and has incorporated them into this final rule. Suggestions (3) through (6) were rejected as it was deemed that these requirements were necessary to maintain and ensure adequate controls over the transfer procedures particularly in instances of Federal or state investigative review. In furtherance of maintaining adequate controls and to reduce any additional enforcement burdens in monitoring these transfer procedures, the original section permitting the retransfer of prescription information as set forth in the proposal under § 1306.26(d) has been deleted from the Final Rule.

No further comments or objections were received, nor were there any requests for a hearing.

PART 1306—PRESCRIPTIONS

Therefore, pursuant to the authority vested in the Attorney General by 21 U.S.C. 821 and 871(b) as delegated by 28 CFR 0.100 to the Administrator of the Drug Enforcement Administration, the Acting Administrator hereby orders that Part 1306 of Title 21 of the Code of Federal Regulations be amended by adding a new section as follows:

§ 1306.26 Transfer between pharmacies of prescription information for schedules III, IV, and V controlled substances for refill purposes.

(a) The transfer of original prescription information for a controlled substance listed in Schedules III, IV or V for the purpose of refill dispensing is permissible between pharmacies on a one time basis subject to the following requirements:

(1) The transfer is communicated directly between two licensed pharmacists and the transferring pharmacist records the following information:

(i) Write the word "VOID" on the face of the invalidated prescription.

(ii) Record on the reverse of the invalidated prescription the name, address and DEA registration number of the pharmacy to which it was transferred and the name of the pharmacist receiving the prescription information.

(iii) Record the date of the transfer and the name of the pharmacist transferring the information.

(b) The pharmacist receiving the transferred prescription information shall reduce to writing the following:

(1) Write the word "transfer" on the face of the transferred prescription.

(2) Provide all information required to be on a prescription pursuant to 21 CFR 1306.05 and include:

(i) Date of issuance of original prescription;

(ii) Original number of refills authorized on original prescription;

(iii) Date of original dispensing;

(iv) Number of valid refills remaining and date of last refill;

(v) Pharmacy's name, address, DEA registration number and original prescription number from which the prescription information was transferred;

(vi) Name of transferor pharmacist.

(3) Both the original and transferred prescription must be maintained for a period of two years from the date of last refill.

(c) Pharmacies electronically accessing the same prescription record must satisfy all information requirements of a manual mode for prescription transferral.

(d) The procedure allowing the transfer of prescription information for refill purposes is permissible only if allowable under existing state or other applicable law.

Pursuant to sections 3(c)(3) and 3(e)(2)(B) of Executive Order 12291, the Director of the Office of Management and Budget has been consulted with respect to these proceedings.

Note.—This regulation will impact primarily upon pharmacies, most of which can be presumed to be "small entities" within the meaning given that term by the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, as indicated above, this action was initiated as a result of requests made by pharmacists and their professional and trade associations. It is anticipated that the additional recordkeeping requirements imposed by this regulation will be nominal and will be more than compensated for by the advantages to be realized by both the affected entities and the consuming public. Accordingly, the Acting Administrator certifies that this action will have no significant impact upon small entities.

Dated: September 11, 1981.

Francis M. Mullen, Jr.,
Acting Administrator, Drug Enforcement
Administration.

[FR Doc. 81-20819 Filed 10-2-81; 8:45 am]

BILLING CODE 4410-09-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 15A

(T.D. 7788)

Temporary Income Tax Regulations; Installment Sales; Amendments to T.D. 7768

AGENCY: Internal Revenue Service,
Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains amendments to § 15A.453-1 temporary regulations providing general rules relating to installment sales. The amendments change the effective dates of two provisions contained in the temporary regulations which were published in the *Federal Register* February 4, 1981. These amendments will affect all taxpayers who entered into wraparound mortgage transactions and all taxpayers who had selling expenses in an installment sale.

EFFECTIVE DATES: The wraparound mortgage provisions generally shall be effective for installment sales after March 4, 1981. If the seller is subject to a written binding obligation executed on or before March 4, 1981, the wraparound mortgage provisions shall be effective for installment sales after June 1, 1981. The selling expense provisions shall be effective for installment sales which take place in a taxable year which ends after October 19, 1980.

FOR FURTHER INFORMATION CONTACT: Phoebe A. Mix of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, D.C. 20224, 202-566-3297, not a toll-free call.

Selling Expenses

Prior to the adoption of the temporary regulations published February 4, 1981 providing general rules for reporting installment obligations, the Internal Revenue Service's position had been that selling expenses were subtracted from the selling price when determining the gross profit ratio. The gross profit ratio is a fraction, the numerator of which is the gross profit (selling price less adjusted basis) and the denominator of which is the contract

price (selling price reduced by the portion of any qualifying indebtedness assumed, or taken subject to, which does not exceed the seller's basis). The temporary regulations published February 4, 1981 changed the treatment of selling expenses by providing that selling expenses are added to the seller's basis where determining the gross profit ratio. The effective date of those temporary regulations is generally October 19, 1980, the date the Installment Sales Revision Act was signed.

Before adoption of the Installment Sales Revision Act, a taxpayer could report an installment sale on the installment method only if no more than 30 percent of the selling price was received in the year of sale. The rule that selling expenses reduced the selling price often operated to disqualify a transaction from installment method reporting. The Installment Sales Revision Act removed the requirement that no more than 30 percent of the selling price be received in the year of sale retroactively for any installment sale in a taxable year that ends after October 19, 1980. Therefore, the new rule for the treatment of selling expenses is given the same effective date.

The temporary regulations issued February 4, 1981 explicitly stated the Service's longstanding position that "wrap-around" mortgages and similar transactions do not shield an underlying indebtedness from the rules relating to the assumption, or taking subject to, of an indebtedness encumbering a property. Those temporary regulations generally are effective for installment sales after October 19, 1980. Several people have requested that the effective date for wrap-around arrangements be changed because neither the Installment Sales Revision Act nor the legislative history indicated that this change would take place and because some case law appeared to support such arrangements even though the Service has had a longstanding position to the contrary. Therefore, this amendment to the temporary regulations issued February 4, 1981 provides that the rule relating to wrap-around mortgages is generally effective for installment sales entered into after March 4, 1981, unless the installment sale was completed before June 1, 1981 pursuant to a written obligation binding on the seller that was executed on or before March 4, 1981.

Although the position taken in the temporary regulations issued February 4, 1981 is consistent with the Service's longstanding position on wrap-around mortgages, it was decided to make the provisions of the temporary regulation

and their presumption of validity prospective only. This decision does not represent any change in the Service's position on wrap-around mortgages with respect to installment sales entered into prior to March 5, 1981 (or June 1, 1981, if a written obligation binding on the seller was executed before March 5, 1981).

Waiver of Procedural Requirements of Treasury Directive

The expeditious adoption of the provisions contained in this document is necessary because of the need for immediate guidance to taxpayers who are reporting casual installment sales on tax returns for 1980. For this reason Roscoe L. Egger, Jr., Commissioner of Internal Revenue, has determined that the provisions of paragraphs 8 through 14 of Treasury Directive, 43 FR 52120, must be waived.

Drafting Information

The principal author of this regulation is Phoebe A. Mix of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue and Treasury Department participated in developing the regulation, both on matters of substance and style.

Amendments to the regulations

Accordingly, the following amendments are made to T.D. 7768, 46 FR 10708, February 4, 1981 which provided temporary income tax regulations relating to installment method reporting for sales of real property and casual sales of personal property:

PART 15A—TEMPORARY INCOME TAX REGULATIONS UNDER THE INSTALLMENT SALES REVISION ACT

Paragraph 1. Paragraph (b)(1) (ii), (iii) and (v) and (3)(ii) and examples (1) and (5) of paragraph (b)(5) of § 15A.453-1 are revised to read as follows:

§ 15A.453-1 *Installment method reporting for sales of real property and casual sales of personal property.*

(b) *Installment sale defined*—(1) *In general.* * * *

(ii) *Selling price defined.* The term "selling price" means the gross selling price without reduction to reflect any existing mortgage or other encumbrance on the property (whether assumed or taken subject to by the buyer) and, for installment sales in taxable years ending after October 19, 1980, without reduction to reflect any selling expenses. Neither interest, whether stated or

unstated, nor original issue discount is considered to be a part of the selling price. See paragraph (c) of this section for rules describing installment method reporting of contingent payment sales.

(iii) *Contract price defined.* The term "contract price" means the total contract price equal to selling price reduced by that portion of any qualifying indebtedness (as defined in paragraph (b)(2)(iv) of this section), assumed or taken subject to by the buyer, which does not exceed the seller's basis in the property (adjusted, for installment sales in taxable years ending after October 19, 1980, to reflect commissions and other selling expenses as provided in paragraph (b)(2)(v) of this section). See paragraph (c) of this section for rules describing installment method reporting of contingent payment sales.

(v) *Gross profit defined.* The term "gross profit" means the selling price less the adjusted basis as defined in section 1011 and the regulations thereunder. For sales in taxable years ending after October 19, 1980, in the case of sales of real property by a person other than a dealer and casual sales of personal property, commissions and other selling expenses shall be added to basis for purposes of determining the proportion of payments which is gross profit attributable to the disposition. Such additions to basis will not be deemed to affect the taxpayer's holding period in the transferred property.

(3) *Payment—*

(ii) *Wrap-around mortgage.* This paragraph (b)(3)(ii) shall apply generally to any installment sale after March 4, 1981 unless the installment sale was completed before June 1, 1981 pursuant to a written obligation binding on the seller that was executed on or before March 4, 1981. A "wrap-around mortgage" means an agreement in which the buyer initially does not assume and purportedly does not take subject to part or all of the mortgage or other indebtedness encumbering the property ("wrapped indebtedness") and, instead, the buyer issues to the seller an installment obligation the principal amount of which reflects such wrapped indebtedness. Ordinarily, the seller will use payments received on the installment obligation to service the wrapped indebtedness. The wrapped indebtedness shall be deemed to have been taken subject to even though title to the property has not passed in the year of sale and even though the seller remains liable for payments on the

wrapped indebtedness. In the hands of the seller, the wrap-around installment obligation shall have a basis equal to the seller's basis in the property which was the subject of the installment sale, increased by the amount of gain recognized in the year of sale, and decreased by the amount of cash and the fair market value of other nonqualifying property received in the year of sale. For purposes of this paragraph (b)(3)(ii), the amount of any indebtedness assumed or taken subject to by the buyer (other than wrapped indebtedness) is to be treated as cash received by the seller in the year of sale. Therefore, except as otherwise required by section 483 or 1232, the gross profit ratio with respect to the wrap-around installment obligation is a fraction, the numerator of which is the face value of the obligation less the taxpayer's basis in the obligation and the denominator of which is the face value of the obligation.

(5) *Examples.* The following examples illustrate installment method reporting under this section:

Example (1). In 1980, A, a calendar year taxpayer, sells Blackacre, an unencumbered capital asset in A's hands, to B for \$100,000: \$10,000 down and the remainder payable in equal annual installments over the next 9 years, together with adequate stated interest. A's basis in Blackacre, exclusive of selling expenses, is \$38,000. Selling expenses paid by A are \$2,000. Therefore, the gross profit is \$60,000 (\$100,000 selling price—\$40,000 basis inclusive of selling expenses). The gross profit ratio is $\frac{3}{5}$ (gross profit of \$60,000 divided by \$100,000 contract price). Accordingly, \$6,000 ($\frac{3}{5}$ of \$10,000) of each \$10,000 payment received is gain attributable to the sale and \$4,000 (\$10,000—\$6,000) is recovery of basis. The interest received in addition to principal is ordinary income to A.

Example (5). In 1982, G sells to H Blackacre, which is encumbered by a first mortgage with a principal amount of \$500,000 and a second mortgage with a principal amount of \$400,000, for a selling price of \$2 million. G's basis in Blackacre is \$700,000. Under the agreement between G and H, passage of title is deferred and H does not assume and purportedly does not take subject to either mortgage in the year of sale. H pays G \$200,000 in cash and issues a wrap-around mortgage note with a principal amount of \$1,800,000 bearing adequate stated interest. H is deemed to have acquired Blackacre subject to the first and second mortgages (wrapped indebtedness) totalling \$900,000. The contract price is \$1,300,000 (selling price of \$2 million less \$700,000 mortgages within the seller's basis assumed or taken subject to). Gross profit is also \$1,300,000 (selling price of \$2 million less \$700,000 basis). Accordingly in the year of sale, the gross profit ratio is $\frac{1}{2}$ (\$1,300,000/\$2,600,000). Payment in the year of sale is \$400,000 (\$200,000 cash received plus \$200,000

mortgage in excess of basis (\$900,000—\$500,000)). Therefore, G recognizes \$400,000 gain in the year of sale (\$400,000 $\times$ $\frac{1}{2}$). In the hands of G the wrap-around installment obligation has a basis of \$900,000, equal to G's basis in Blackacre (\$700,000) increased by the gain recognized by G in the year of sale (\$400,000) reduced by the cash received by G in the year of sale (\$200,000). G's gross profit with respect to the note is \$900,000 (\$1,800,000 face amount less \$900,000 basis in the note) and G's contract price with respect to the note is its face amount of \$1,800,000. Therefore, the gross profit ratio with respect to the note is $\frac{1}{2}$ (\$900,000/\$1,800,000).

There is need for immediate guidance with respect to the provisions contained in this Treasury decision. For this reason, it would be impractical to first issue a notice of proposed rulemaking under subsection (b) of section 553 of Title 5 of the United States Code or subject to the effective date limitations of subsection (d) of that section.

(Sec. 453(j) and 7805 of the Internal Revenue Code of 1954 (94 Stat. 2247, 68A Stat. 917; 26 U.S.C. 453(j), 7805))

Roscoe L. Egger, Jr.,

Commissioner of Internal Revenue.

Approved: September 28, 1981.

John E. Chapoton,

Assistant Secretary of the Treasury.

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DEPARTMENT OF JUSTICE

Office of Legal Policy

28 CFR Part 24

[Order No. 958-81]

Implementation of the Equal Access to Justice Act in Department of Justice Administrative Proceedings

ACTION: Interim rule with request for public comment.

SUMMARY: The Department of Justice is publishing for public comment interim regulations to implement section 504 of title 5, United States Code, as amended by section 203(a)(1) of the Equal Access to Justice Act (Title 2 of Pub. L. 96-481, 94 Stat. 2325). This Act provides that in certain federal agency adversary adjudications pending between October 1, 1981 and September 30, 1984 the agency that conducts the proceeding shall award attorneys' fees and other expenses to qualified parties who prevail against the agency, unless (1) the position of the agency as a party to the proceeding was substantially justified, or (2) special circumstances make an award unjust, or (3) the prevailing party