(19) "Image receptor" means any device, such as a fluorescent screen or radiographic film, which transforms incident x-ray photons either into a visible image or into another form which can be made into a visible image by further transformations. In those cases where means are provided to preselect portions of the image receptor, the term "image receptor" shall mean the preselected portion of the device.

* * * * *

2. In § 1020.31 by revising paragraph (e)(2), and by adding new paragraphs (e)(3), (4), (5), and (6) and (g)(5), to read as follows:

**§ 1020.31 Radiographic equipment.**

* * * * *

(e) * * *

(2) *Positive beam limitation (PBL).* The requirements of this paragraph shall apply to stationary, general-purpose radiographic systems which contain a tube housing assembly, an x-ray control, and, for those systems so equipped, a table, all certified in accordance with § 1020.30(c). Means shall be provided for PBL such that x-ray production is prevented when:

(i) Either the length or width of the x-ray field in the plane of the image receptor differs from the corresponding image receptor dimension by more than 3 percent of the SID; or

(ii) The sum of the length and width differences as stated in paragraph (e)(2)(i) of this section without regard to sign exceeds 4 percent of the SID.

(3) *Conditions for positive beam limitation.* PBL shall be provided whenever all the following conditions are met:

(i) The image receptor is inserted into a permanently mounted cassette holder;

(ii) The image receptor length and width are each less than 50 centimeters;

(iii) The x-ray beam axis is within ±3 degrees of vertical and the SID is 90 centimeters to 130 centimeters inclusive; or the x-ray beam axis is within ±3 degrees of horizontal and the SID is 90 centimeters to 205 centimeters inclusive;

(iv) The x-ray beam axis is perpendicular to the plane of the image receptor to within ±3 degrees; and

(v) Neither tomographic nor stereoscopic radiography is being performed.

(4) *Measuring compliance.* Compliance with the requirements of paragraph (e)(2) of this section shall be determined when the equipment indicates that the beam axis is perpendicular to the plane of the image receptor and the provisions of paragraph (e)(3) of this section are met. Compliance shall be determined no sooner than 5 seconds after insertion of the image receptor.

(5) *Operator initiated undersizing.* The PBL system shall be capable of operation, at the discretion of the operator, such that the size of the field may be made smaller than the size of the image receptor through stepless adjustment of the field size. The minimum field size at an SID of 100 centimeters shall be equal to or less than 5 by 5 centimeters. Return to PBL function as described in paragraph (e)(2) of this section shall occur automatically upon any change of image receptor size or SID.

(6) *Override of positive beam limitation.* A capability may be provided for overriding PBL in case of system failure and for servicing the system. This override may be for all SID's and image receptor sizes. A key shall be required for any override capability that is accessible to the operator. It may not be possible to remove the key while the PBL is overridden. Each such key switch or key shall be clearly and durably labeled as follows:

**For X-Ray Field Limitation System Failure**

The override capability is considered accessible to the operator if it is referenced in the operator's manual or in other material intended for the operator or if its location is such that the operator would consider it part of the operational controls.

* * * * *

(g) * * *

(5) A capability may be provided for overriding the automatic x-ray field size adjustment in case of system failure. If it is so provided, a signal visible at the fluoroscopist's position shall indicate whenever the automatic x-ray field size adjustment override is engaged. Each such system failure override switch shall be clearly labeled as follows:

**For X-Ray Field Limitation System Failure**

* * * * *

3. In § 1020.32 by adding paragraph (b)(3), to read as follows:

**§ 1020.32 Fluoroscopic equipment.**

* * * * *

(b) * * *

(3) If the fluoroscopic X-ray field size is adjusted automatically as the SID or image receptor size is changed, a capability may be provided for overriding the automatic adjustment in case of system failure. If it is so provided, a signal visible at the fluoroscopist's position shall indicate whenever the automatic field adjustment is overridden. Each such system failure override switch shall be clearly labeled as follows:

**For X-Ray Field Limitation System Failure**

* * * * *

*Effective date.* This regulation shall become effective on December 1, 1983.

(Sec. 358, 82 Stat. 1177–1179 (42 U.S.C. 263f))

Dated: October 14, 1982.

Mark Novitch,

*Acting Commissioner of Food and Drugs.*

[FR Doc. 82-30181 Filed 11-4-82; 8:45 am]

BILLING CODE 4160-01-M

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### Office of Assistant Secretary for Housing—Federal Housing Commissioner

### 24 CFR Part 3280

[Docket No. R-82-1017]

### Manufactured Home Construction and Safety Standards

*Correction*

In FR Doc. 82-29865, beginning at page 49383, in the issue of Monday, November 1, 1982, make the following corrections:

1. On page 49386, last column, first paragraph, first line,"(l)(2)(i)" should read "(i)"

2. On page 49387, middle column, third full paragraph, designated as amendment "9.", the second line,"(l)(2)(ii), (l)(2)(iii) and (l)(2)(iv)" should read "(e)(2)(ii), (e)(2)(iii) and (e)(2)(iv)" by changing the "l's" to "e's".

BILLING CODE 1505-01-M

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 51

[T.D. 7844]

### Crude Oil Windfall Profit Tax Act of 1980; Excise Tax Regulations

**AGENCY:** Internal Revenue Service, Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document provides final excise tax regulations relating to the windfall profit tax on domestic crude oil imposed by title I of the Crude Oil Windfall Profit Tax Act of 1980. It contains most of the final regulations on

the windfall profit tax, many of which relate to administrative aspects of the tax.

**DATES:** These regulations are generally effective with respect to all crude oil removed (or deemed removed) from the premises after February 29, 1980. For exceptions to this effective date, see the discussion below of the effective dates of the amendments.

**FOR FURTHER INFORMATION CONTACT:** Douglas W. Charnas of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, D.C. 20224 (Attention: CC:LR:T) (202-566-3297).

**SUPPLEMENTARY INFORMATION:**

**Background**

On April 4, 1980, the **Federal Register** published temporary and proposed regulations (45 FR 23384, 23400) under sections 4986, 4987, 4988, 4989, 4991, 4992, 4993, 4994, 4995, 4996, 4997, 6050C, 6076, and 6402 of the Internal Revenue Code of 1954. The temporary regulations were required to implement various sections of the Crude Oil Windfall Profit Tax Act of 1980. Certain amendments to the temporary regulations and further proposed regulations have since been published.

This document provides final regulations pursuant to the notices of proposed rulemaking published on April 4, 1980 (45 FR 23384, 23400), relating to the implementation of the windfall profit tax; April 25, 1980 (45 FR 27929, 27953), relating to withholding and depositing windfall profit tax where the producer is an integrated oil company; September 24, 1980 (45 FR 63263, 63297), relating to the interim rule for determining base prices for tier 2 and tier 3 oil; November 5, 1980 (45 FR 73467, 73512), relating to tax deposits and refunds based on the net income limitation; December 11, 1980 (45 FR 81561, 81606), relating to the definition of the term "producer"; January 19, 1981 (46 FR 4873, 4950), relating to various administrative provisions; and February 23, 1981 (46 FR 13509, 13525), relating to the qualified disburser election. This document amends § 51.4988-1 which was finalized by Treasury Decision 7790, published on October 27, 1981 (46 FR 52334). This document also reflects amendments made to the temporary regulations by Treasury Decision 7811, published on March 3, 1982 (47 FR 8995), relating to exempt royalty oil.

This document does not provide final regulations on such other subjects as front-end tertiary oil or tier 2 and tier 3 base prices. Final regulations on these subjects will be published in the future. Furthermore, numerous comments received on the above-cited proposed regulations addressed many issues not dealt with explicitly in these final regulations. Various issues are under study for possible future amendments to these regulations including newly discovered oil, condensate, exempt stripper well oil, property, net profits interests, and exempt royalty owner oil. The fact that a particular issue has not been addressed in these regulations should not be construed as foreclosing the issuance of amended regulations providing further guidance on those issues.

The rules contained in these final regulations will apply to all entities, large and small, engaged in the production or purchase of domestic crude oil and related activities. The amendments add no rules that duplicate, overlap, or conflict with any other known Federal rules applicable for the same purposes.

**Explanation of Provisions**

*Withholding in Absence of Data on Operator's Certificate*

The temporary and proposed windfall profit tax regulations provided withholding rules which are to be followed when an operator's certificate is either absent or data is omitted from it or believed to be incorrect. Various commentators have suggested that these withholding rules are unnecessarily strict. These commentators have suggested that the regulations be amended to permit the purchaser to withhold an amount based on all the information available to the purchaser in order to have the alternative withholding requirement more closely approximate the actual tax due.

These withholding rules were established for two reasons. First, they assure that the failure to certify will never justify underwithholding. Second, the rules protect the purchaser from claims by the producer that too much tax is being withheld based upon information available to the purchaser. The reasons for establishing these withholding rules continue to justify these rules. Therefore, the suggested rule has not been included in the amendments to the regulations.

*Heavy Oil*

Several commentators on the proposed regulations suggested that the definition of "heavy oil" as oil with a gravity of 16 degrees API or less be revised to include any oil with a gravity of less than 17 degrees API (*e.g.*, 16.9 degrees). This suggestion has not been accepted. Section 4991(e)(3) defines the term "heavy oil" as crude oil having "a weighted average of 16 degrees API or less (corrected to 60 degrees Fahrenheit)." However, the Senate Finance Committee report (S. Rep. No. 96-394, 96th Cong., 1st Sess. 51 (1979)) makes it clear that Congress intended to treat as heavy oil only that oil deregulated by Executive Order 12153 (Exec. Order No. 12153, 3 CFR Part 424 (1980); 44 FR 48949 (1979)). The Executive order applied only to crude oil with a weighted average of 16.0 degrees API or less. The conference report for the Windfall Profit Tax Act of 1980 (H.R. Rep. No. 96-817, 96th Cong., 2d Sess. 102 (1980)) states that the conference was adopting the Senate 16.0 definition. Thus, the definition of "heavy oil" in the temporary and proposed regulations does not include (and was not intended to include) crude oil with a weighted average gravity of more than 16.0 degrees API. The final regulations have been revised to provide explicitly that "heavy oil" must have a weighted average gravity of 16.0 degrees API or less (corrected to 60 degrees Fahrenheit).

*Independent Producer Oil*

Independent producers commenting on the proposed regulations also requested several clarifications of the rules contained in § 51.4992-1, relating to the lower rates of tax applicable to "independent producer oil." In response to these comments, § 51.4992-1 makes clear (1) that the independent producer amount is to be allocated between tiers 1 and 2 in proportion to the producer's "qualified production" for the quarter, (2) that the term "qualified overriding royalty" includes an overriding royalty that could be converted into an operating interest at the option of the holder of the override, and (3) that an independent producer need only maintain records sufficient to establish to the satisfaction of the district director that a property has not been held by a disqualified transferor.

Section 150.4992-1(d)(3)(i) of the temporary regulations provides that qualified production generally does not include production attributable to an interest acquired after December 31, 1979. However, § 150.4992-1(d)(3)(ii) provides that this rule does not apply if the producer acquiring the property establishes to the satisfaction of the district director that at no time after December 31, 1979, has the interest in the acquired property been held by a person who was a disqualified transferor for any quarter ending after September 30, 1979, and ending before the date such person transferred the interest. The term "disqualified transferor" means with respect to any quarter, any person who (1) had qualified production from such quarter which exceeded such person's independent producer amount for such quarter or (2) was not an independent producer.

Several commentators pointed out that there are situations where a partnership with many partners transfers an interest in property to an independent producer. Under the temporary regulations this transfer does not escape the general prohibition or transferred properties if one partner in the partnership is a disqualified transferor even if the partner has a minimal interest in the partnership. The commentators suggested that a *de minimis* rule be provided. In response to these comments, § 51.4992-1(d)(3)(ii) does not treat a transfer of an interest in property as having been from a disqualified transferor if less than two percent of the interest in the partnership is held by partners who are disqualified transferors.

*Tier Determinations for Powerhouse Fuel*

Section 150.4996-1(d)(2) provides that oil used to power a production process or production equipment will not be considered removed from the premises if it is transported from one tract or parcel of land to a contiguous tract or parcel of land, provided that 100 percent of the operating mineral interest (as defined in § 1.614-2(b)) in both tracts or parcels of land is held by the same persons. That section also provides that in the case of oil produced from a property from which more than one tier of oil is produced the oil used to power a production process or production equipment will be deemed of the higher or highest tier designation to the extent of production in such tier and thereafter to the next lower tier. The effect of this rule is generally to treat as not removed from the premises the crude oil resulting in the least amount of windfall profit tax liability.

Several commentators suggested that the crude oil should be allocated among the categories of crude oil produced from the property. In response to these comments, § 51.4996-1(d)(2) amends the rule in the temporary regulations and provides that, in the case of oil produced from a property from which more than one category of oil is produced, the crude oil that is injected or used to power a production process or production equipment shall be allocated among such categories in proportion to the production from that property in each such category that was removed from the premises during the immediately preceding calendar quarter. For these purposes, the categories of oil are tier 1 oil, tier 2 oil, newly discovered oil, tier 3 oil other than newly discovered oil, and exempt oil.

*Independent Refiner*

Section 150.4996-1(h) defines the term "independent refiner." Several commentators have stated that the temporary regulations are unclear on whether a taxpayer must be directly engaged in the refining of crude oil in order to qualify as an independent refiner. Section 51.4996-1(h) makes clear that the term "independent refiner" does not include any taxpayer who is not directly engaged in the refining of crude oil even if such taxpayer is related to a person directly engaged in the refining of crude oil. However, § 51-4996-1(h) provides that a taxpayer not directly engaged in refining will be treated as directly engaged in refining if an amount equal to 95 percent or more of the crude oil purchased during the calendar quarter of which such taxpayer is the first purchaser is refined by a refiner who is a member of a controlled group of corporations of which the taxpayer is a member, provided that the refiner is an independent refiner and that such taxpayer is not a producer of crude oil and is not a retailer or refiner under section 613A(d) (2) or (4). Section 51.4996-1(h) also provides that a purchaser is to be treated as directly engaged in refining if it is clear that the 95 percent rule would have been met but for an act of God, a strike, a severe mechanical breakdown, an injunction, or a restraining order.

*Annual Cutoff of Withholding Adjustments*

Several commentators on the proposed regulations raised problems with the end of year reporting and withholding adjustment cut-off rules. Under the temporary and proposed regulations, the purchaser or other withholding agent is required to furnish Form 6248 to each producer at the end of each calendar year, and corrections of errors in withholding are not permitted after the form is furnished. Form 6248 is then used by the producer to determine whether the producer is entitled to a refund or is required to pay a balance due.

The commentators stated that, in many cases, Form 6248 will not be entirely accurate when furnished on the required date of March 31 due to errors not yet ascertained on that date. Consequently, numerous corrected Forms 6248 may be required giving rise to corrected claims for refund or windfall profit tax returns. Therefore, several commentators suggested that the withholding agent be permitted to continue to make withholding adjustments for a full year following the year in which the oil giving rise to the withholding error was removed. However, the producer is required annually to pay any balance due if there has been underwithholding of windfall profit tax liability and is entitled to file a claim for credit or refund if there has been overwithholding. The continuation of withholding adjustments after Form 6248 has been furnished would create the likelihood of a double payment by the producer if the adjustment increases withholding or a double refund if the adjustment decreases withholding. In order to avoid this result, the producer's entitlement to a refund claim or obligation to pay a balance due would have to be extended until after the expiration of the withholding adjustment period. The continuation of withholding adjustments suggestion has not been accepted due to the lengthy delay in refunds or payments that would follow.

*Disbursers Who Receive Oil Payments They Consider Underwithheld or Forms 6248 They Consider Inaccurate*

Many persons disbursing funds from the sale of taxable crude oil of which the disburser is not the purchaser have commented that they are not certain what they should do in a situation where they consider the amount of windfall profit tax withheld on the payments they received to be more or less than the amount that should have been withheld. The withholding rules have been amended to provide that in cases where the disburser is of the opinion that there is an underwithholding or overwithholding, the disburser must, within 5 days, notify the person from whom it received payment that it disagrees with the amount of tax withheld. The reporting requirements of the regulations have also been amended to require the disburser in those cases where it disagrees with the amount of withholding to send a statement to the persons it makes payments to setting forth sufficient information to briefly explain the difference of opinion between the person from whom the disburser received payment and the disburser on the amount withheld.

The final regulations provide guidance in cases where an intermediate disburser receives a Form 6248 that is the basis for Forms 6248 that it will be furnishing to others and filing with the Service and the intermediate disburser believes that the form contains an error.

In such cases the intermediate disburser must notify the person furnishing it with the form that it believes the form contains an error. If the person furnishing the intermediate disburser with the Form 6248 agrees that it contains an error, the error can be corrected on a new Form 6248 issued to the intermediate disburser. If the person furnishing the intermediate disburser with the Form 6248 does not agree that there is an error, the intermediate disburser must furnish and file the Forms 6248 based on the information contained in the Form 6248 furnished it. However, the instructions to Form 6248 may require that the difference of opinion be indicated on the form.

*Multiple Forms 6248 to One Producer*

In many cases the disburser makes payments to the same producer for crude oil sold from more than one property (such as where the disburser is also a purchaser of oil from another property). The regulations have been amended to provide that in these cases the information for all the properties may be incorporated into one Form 6248. If the disburser prefers to furnish separate forms, it may do so but if the forms are not all furnished at the same time, the producer must be informed.

*Detailed Statements*

Numerous producers commented that the annual information furnished them on Form 6248 is insufficient to permit accurate computations of windfall profit tax liability, particularly when the producer must allocate the independent producer amount between tiers 1 and 2 or take the net income limitation into account. Under the proposed regulations, the detailed statement required by paragraph (d) of § 51.4997–2 to be furnished upon request was intended to supplement the information required by paragraph (c) (relating to Form 6248), thus providing the producer with the information necessary for a full and correct computation of the tax. The final regulations amend paragraph (d) to clarify that the requested information must be furnished in sufficient detail to permit those computations.

A few producers suggested that the regulations require the detailed information to be furnished in all cases and not just upon the request of the producer. This suggestion has not been adopted because it could impose a significant and unnecessary reporting burden due to the fact that not all producers need the detailed information.

*Corrected Forms 6248*

The final regulations also revise the procedures to be followed when the person furnishing Form 6248 discovers that the form was in error. Under the new rules, a corrected Form 6248 must be furnished no later than July 31 of the year following the year to which the correction relates if any error ascertained through June 30 in windfall profit tax liability, tax withheld, or amount under or overwithheld equals $100 or more. All corrections of $1 or more must be reflected in a corrected Form 6248 furnished at the time that the next year's Form 6248 is furnished. The new rules should substantially reduce the number of corrected Forms 6248 that would otherwise be required because only large errors must be corrected more frequently than annually.

*Miscellaneous Changes*

Section 51.4997–2 deletes the requirement that the purchaser or other withholding agent inform an exempt producer each month of the reason for the absence of withholding and by deleting the requirement that the producer be provided additional information relating to withholding adjustments in the annual statement. Section 51.6050C–1 specifies that an operator need not recertify the same information to a producer, unless requested to do so. Furthermore, a new § 51.6081–1 is added to authorize district directors and directors of service centers to grant extensions of time for filing windfall profit tax returns.

Integrated oil company commentators requested a change in the rule of § 51.4995–3 (d)(2). That rule provided that a qualified disburser undertaking the distribution responsibilities of an integrated oil company after December 31, 1980, must deposit tax in accordance with the deposit schedules applicable to integrated oil companies. It was requested that this rule not be applied when the integrated oil company transfers its entire interest in the property. The final regulations make the requested change.

The final regulations also amend the deposit rules applicable to integrated oil companies by permitting estimated tax deposits to be based on liability for the third preceding month, rather than the second preceding month as required in the proposed rules.

The final regulations also make a number of clarifying changes in various sections.

The effectiveness of these regulations will be evaluated on the basis of comments and information received from offices within the Treasury Department and Internal Revenue Service, other governmental agencies, and the public.

*Effective Dates of Amendments; Effect on Temporary Regulations*

These regulations are effective with respect to all crude oil removed (or deemed removed) from the premises after February 29, 1980, except as provided below:

(i) Paragraph (a)(10 of § 51.4993–2 (relating to the certification by a petroleum engineer of certain facts) is effective for certifications submitted after December 6, 1982.

(ii) Sections 51.4995–1, 51.4995–2, 51.4995–3, 51.4995–4, and 51.4995–5 (relating to requirements for withholding and depositing tax) are effective for payments made after December 6, 1982.

(iii) Paragraphs (c) and (d)(1) of § 51.4996–1 (relating to the definitions of operator and removal from the premises, respectively) are effective with respect to crude oil removed from the premises (as defined in § 150.4996–1(d), title 26, chapter I of the Code of Federal Regulations) on or after January 1, 1981, and so much of paragraph (g) of § 51.4996–1 (relating to the definition of integrated oil company) as precedes subparagraph (1) is effective with respect to crude oil removed after December 6, 1982. For the text of those paragraphs as in effect prior to those dates, see T.D. 7690, 45 FR 23384 (April 4, 1980).

(iv) Sections 51.4997–2 and 51.6050C–1 (relating to certain information statements and returns) are effective for information and statements furnished or filed after December 6, 1982.

In general, these regulations supersede the Temporary Excise Tax Regulations Under the Crude Oil Windfall Profit Tax Act of 1980, title 26, chapter I, part 150 of the Code of Federal Regulations. However, these regulations do not supersede the temporary regulations issued under sections 150.4989–1 (c), 150.4991–1(a), 150.4993–1, 150.4994–1, 150.4995–2(b)(2), 150.4996–1(b)(3), 150.4996–1(i), 150.4997–2(b), and 150.4997–2(d)(1). In addition, the temporary regulations shall continue in effect for those periods prior to the effective dates of these regulations.

**Executive Order 12291**

The Commissioner of Internal Revenue has determined that these final rules are not major rules as defined in Executive Order 12291 and the Treasury-OMB agreement dated April 28, 1982, implementing that order. Accordingly, a Regulatory Impact Analysis is not required. Most of the economic impact that these rules will have on both small entities and the economy in general is due to requirements imposed by the statute.

**Drafting Information**

The principal author of these regulations is Douglas W. Charnas of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

**List of Subjects in 26 CFR §§ 51.4986-1-51.6402-1**

Crude Oil Windfall Profit Tax Act of 1980.

**Adoption of Amendments to the Regulations**

## PART 51—[AMENDED]

Accordingly, the proposed addition of and amendments to 26 CFR Part 51 are hereby adopted as set out below:

**Paragraph 1.** The following new sections are inserted immediately before § 51.4988-1:

### § 51.0 Introduction.

Each section of the regulations in this part is designated by a number composed of the part number followed by a decimal point [51.], the section of the Internal Revenue Code of 1954 to which it relates, a hyphen [-], and a number identifying the section. By use of these designations, the reader can associate sections of the regulations with provisions of the Code. For example, § 51.4986-1 pertains to section 4986 of the Code. For additional rules relating to the windfall profit tax, see part 150 of this chapter (Temporary Excise Tax Regulations Under the Crude Oil Windfall Profit Tax Act of 1980).

### § 51.4986-1 Imposition of tax.

Section 4986 imposes an excise tax on the windfall profit from taxable crude oil removed from the premises on or after March 1, 1980, and before the end of the phaseout period. See §§ 51.4988-1, 51.4991-1, and 51.4996-1 for the definitions of "windfall profit," "taxable crude oil," and "removed from the premises," respectively. See section 4990 (c) for the definition of "phaseout period." The tax imposed by section 4986 is to be paid by the producer of the crude oil. However, see section 4995 and the regulations thereunder relating to the requirement of withholding by the purchaser of the crude oil or another person electing to withhold. See § 51.4996-1 for the definitions of "purchaser" and "producer."

### § 51.4987-1 Amount of tax.

Section 4987 establishes that the amount of tax imposed by section 4986 with respect to any barrel of taxable crude oil is the applicable percentage of the windfall profit on that barrel. The applicable percentage for tier 1 oil and tier 2 oil which is not independent producer oil is 70 in the case of tier 1 and 60 in the case of tier 2. The applicable percentage for independent producer oil is 50 for tier 1 and 30 for tier 2. The applicable percentage for tier 3 oil other than newly discovered oil is 30. The applicable percentage for newly discovered oil is 30 for taxable periods beginning in 1980 or 1981, 27½ for taxable periods beginning in 1982, 25 for taxable periods beginning in 1983, 22½ for taxable periods beginning in 1984, 20 for taxable periods beginning in 1985, and 15 for taxable periods beginning in 1986 or thereafter. In the case of a fraction of a barrel, the tax is the same fraction of the amount of the tax imposed on the whole barrel.

**Par. 2.** Section 51.4988-1 is added to read as follows:

### § 51.4988-1 Windfall profit; removal price.

(a) *Windfall profit.* For purposes of this part and chapter 45 of the Code, the term "windfall profit" means the excess of the removal price of the barrel of crude oil over the sum of—

(1) The adjusted base price of the barrel, and

(2) The amount of the severance tax adjustment with respect to the barrel provided by section 4996(c) and § 51.4996-2.

However, the amount of windfall profit is subject to the net income limitation set forth in § 51.4988-2.

(b) *Removal price.*—(1) *In general.* The "removal price" generally is the amount for which the barrel is sold to the purchaser (including any adjustments to the sales price made after sale). However, in the case of a sale between related persons (within the meaning of section 103(b)(6)(C)), the removal price shall not be less than the constructive sales price for purposes of determining gross income from the property under section 613.

Also, if crude oil is removed (or deemed removed) from the premises before it is sold the removal price shall be equal to the amount that results (or would result) from application of the constructive sales price principles under section 613 for purposes of determining gross income from the property regardless of whether gross income from the property is actually increased by reason of that oil). See § 51.4996-1 for rules relating to removal (and deemed removal) from the premises.

(2) *Alaskan oil from Sadlerochit reservoir.* In the case of Alaskan oil from the Sadlerochit reservoir ("Sadlerochit oil"), the removal price of such crude oil removed during any calendar month shall be the average of the producer's removal prices for such month.

(3) *District director's authority.* In determining the removal price of crude oil from a property in the case of any transaction, a district director may adjust the removal price to reflect clearly the fair market value of the crude oil removed.

**Par. 3.** The following new sections are inserted immediately after § 51.4988-2:

### § 51.4989-1 Adjusted base price.

(a) *Adjusted base price defined.* For purposes of this part and charter 45 of the Code, the "adjusted base price" is the base price for the barrel of crude oil plus the amount equal to the base price multiplied by the inflation adjustment for the calendar quarter in which the crude oil is removed from the premises, rounded to the nearest cent. The inflation adjustment, which is determined under a formula set out in section 4989(b), is greater for tier 3 oil than it is for tier 1 oil or tier 2 oil. Inflation adjustments will be published periodically by the Internal Revenue Service. For a special adjustment to the base price for Sadlerochit oil, see section 4996(d).

(b) *Base price for tier 1 oil.* The base price for tier 1 oil is the ceiling price which would have applied to the crude oil under the March 1979 energy regulations (see § 51.4996-1(f)) if it had been produced and sold in May 1979 as upper tier oil, reduced by 21 cents. For purposes of this determination, the grade and quality of current tier 1 oil shall be presumed to be the same as that of the crude oil produced from the property in May 1979.

(c) *Base prices for tier 2 and tier 3 oil.* [Reserved]

(d) *Variations in grade or quality of oil.* For purposes of paragraphs (b) and (c) of this section, if the production from a property in May or December 1979 varied in grade or quality during the month, the per barrel weighted average grade and quality for the month shall be used. If there was no production in May or December 1979, the grade and quality of the crude oil produced in the first month of production after such month shall be used. Once the base price is determined, it is not to be adjusted for later changes in grade or quality.

**§ 51.4991-1 Taxable crude oil; tiers of oil.**

(a) *Taxable crude oil.* [Reserved].

(b) *Tiers of oil.* Section 4991 defines the tiers of taxable crude oil. Tier 1 oil is any taxable crude oil other than tier 2 oil and tier 3 oil. Tier 2 oil is any crude oil which is produced from a stripper well property within the meaning of the June 1979 energy regulations (see § 51.4996-1(f)) and any crude oil from an economic interest in a National Petroleum Reserve held by the United States. However, the term "tier 2 oil" does not include tier 3 oil. Tier 3 oil is newly discovered oil, heavy oil, and incremental tertiary oil. The term "newly discovered oil" has the meaning given to that term by the June 1979 energy regulations. The term "heavy oil" means all crude oil which is produced from a property if crude oil produced and sold from that property during either—

(1) The last month before July 1979 in which crude oil was produced and sold from that property, or

(2) The taxable period, had a weighted average gravity of 16.0 degrees API or less (corrected to 60 degrees Fahrenheit). For the definition of incremental tertiary oil, see § 51.4993-1.

**§51.4992-1 Independent producer oil.**

(a) *General rule.* "Independent producer oil" is that portion of an independent producer's qualified production for a calendar quarter which does not exceed such person's independent producer amount for the quarter.

(b) *Independent producer defined.* An "independent producer," with respect to any calendar quarter, is any person other than a person to whom subsection (c) of section 613A does not apply by reason of paragraph (2) (relating to certain retailers) or paragraph (4) (relating to certain refiners) of section 613A (d) (applying subsection (d) (2) or (4) on the basis of the calendar quarter rather than an annual basis). See § 51.4996-1(g).

(c) *Independent producer amount.* A person's independent producer amount for any quarter is the product of 1,000 barrels multiplied by the number of days in the quarter. If a person's qualified production for any quarter exceeds that person's independent producer amount for the quarter, the independent producer amount is to be allocated between tiers 1 and 2 in proportion to the person's qualified production of crude oil for the quarter in each such tier, and is to be allocated within any tier on the basis of the removal prices for such person's qualified production in that tier removed during that quarter, beginning with the highest of those prices.

(d) *Qualified production of crude oil defined.*—(1) *In general.* An independent producer's qualified production of crude oil for any quarter is the number of barrels of taxable crude oil of which such person is the producer which is removed during that quarter, which is tier 1 oil or tier 2 oil, and which is attributable to the independent producer's working interest in a property.

(2) *Working interest defined.* The term "working interest" means an operating mineral interest (within the meaning of section 614(d)) which was in existence as an operating mineral interest on January 1, 1980, or which is an operating mineral interest derived from a qualified overriding royalty interest after that date. A "qualified overriding royalty interest" is an overriding royalty interest in existence as such an interest on January 1, 1980, but only if on or before February 20, 1980, there was in existence a binding contract under which such interest was to be converted (or, at the option of the owner of such interest, could be converted) into an operating mineral interest.

(3) *Production from transferred property.*—(i) *In general.* Except as otherwise provided in this subparagraph, in the case of a transfer (as defined in § 51.4996-3 (b)) on or after January 1, 1980, of an interest in any property, the qualified production of the transferee shall not include any production attributable to such interest.

(ii) *Small producer transfer exemption.*—(A) *In general.* Subdivision (i) shall not apply to any transfer of an interest in property if the transferee maintains records sufficient to establish to the satisfaction of the district director that at no time after December 31, 1979, has the interest (or any part thereof) in the property been held by a person who was a disqualified transferor (other than as a mere agent for a person not a disqualified transferor or members of a partnership who in the aggregate have less than a two percent share of the interest) for any quarter ending after September 30, 1979, and ending before the date such person transferred the interest.

(B) *Disqualified transferor.* The term "disqualified transferor" means, with respect to any quarter, any person who either had qualified production for such quarter which exceeded such person's independent producer amount for such quarter or was not an independent producer for such quarter.

(C) *Special rules.* For purposes of this paragraph, an interest in property held by a partnership at any time shall be treated as owned proportionately by the partners of such partnership at such time. An interest in property held by any trust or estate shall be treated as owned both by such trust or estate and proportionately by its beneficiaries. See § 51.4996-1(b)(2) for certain general rules relating to partnerships, trusts, and estates. Chapter 45 and this part shall be treated as having been in effect for periods after September 30, 1979, for purposes of making any determination under subdivision (ii)(B).

(iii) *Other exceptions.* Subdivision (i) shall not apply in the case of—

(A) A transfer of an interest in property at death,

(B) A change of beneficiaries of a trust which qualifies under clause (iii) of section 613A(c)(9)(B) (determined without regard to the exception at the end of such clause), and

(C) Any transfer so long as the transferor and transferee are required by section 4992(e) to share the 1,000 barrel amount referred to in paragraph (c) of this section.

The preceding sentence shall apply in the case of any interest in property only if the production from that interest was qualified production for the transferor.

(e) *Allocation within related group.*—(1) *In general.* Section 4992(e) contains rules for the allocation of the 1,000 barrel per day amount among all persons who are members of the same related group.

(2) *Special rules.* [Reserved]

**§ 51.4993-1 Incremental tertiary oil. [Reserved]**

**§ 51.4993-2 Self-certification of tertiary recovery projects.**

(a) *Certification of petroleum engineer.* In order to qualify under section 4993(c)(2)(D)(i), relating to the self-certification of a qualified tertiary recovery project, the operator shall submit a certification (attached to Form 6458), signed under penalties of perjury by a petroleum engineer (who has been duly registered or certified in accordance with applicable state law, if any), to the Internal Revenue Service Center, Austin, Texas. The certification shall contain the following:

(1) A statement that the project involves a tertiary recovery method (as defined in section 4993(d)(1)) that is expected to result in more than an insignificant increase in the ultimate recovery of crude oil, together with a description of the process used and the increase in the amount of crude oil to be recovered by reason of the application of the method,

(2) A description of the implementation and operation of the project sufficient to establish that its implementation and operation are in accordance with sound engineering principles.

(3) An identification of the area from which the ultimate recovery of crude oil is expected to be increased as a result of the implementation and operation of the project, and, if that area is less than the entire property, a precise delineation of the portion of the property that is expected to yield the increase in the ultimate recovery of crude oil,

(4) The date on which the tertiary injectant was, or is expected to be, initially introduced into the reservoir,

(5) An explanation of the number and frequency of injections to be made and the expected duration of the project,

(6) If the project involves a single injection, an estimate of the period of time during which the injectant will continue to increase the recovery of crude oil,

(7) Data on crude oil reserve estimates covering the project area with and without the tertiary recovery process,

(8) The past production history and estimates of future production,

(9) The number of wells in the project area and the number of both producing and injection wells expected to be drilled,

(10) The projected date of completion of the injection and producing wells expected to be drilled,

(11) Projected future income and expenses, and

(12) The operator's employer identification number.

The petroleum engineer's certification may be submitted at any time. However, for purposes of section 4993 (d) (2) (B), relating to the "project beginning date", a petroleum engineer shall not be considered as having certified a project until the certification is received by such Internal Revenue Service Center. If the certification is sent to such Service Center by mail, it shall be considered received when posted by United States mail, properly addressed, and with sufficient postage.

(b) *Change in application of any tertiary recovery method.* If the actual application of any tertiary recovery method differs in any manner (including timing differences) from the application of the tertiary method upon which the certification submitted by the operator pursuant to §§ 51.4993–2 or 51–4993–3 was based, the operator shall promptly send a written statement to that effect to such Internal Revenue Service Center setting forth the reasons for the difference. However, such statement is not required to be sent before December 6, 1982.

(c) *Termination of injection.* If any project certified under paragraph (a) of this section involves the continuous or repetitious injection of liquids, gases, or other matter and if the injection is terminated, the operator shall promptly send a written statement (attached to Form 6458) to that effect to such Internal Revenue Service Center setting forth the date that the injection was terminated.

(d) *Significant expansion.* If a project is significantly expanded, the expansion shall be treated as a separate project requiring separate certification.

**§ 51.4993–3 Jurisdictional agency certification of tertiary recovery projects.**

(a) *Initial certification.* In order to qualify under section 4993 (c) (2) (D) (ii), relating to the approval of tertiary recovery projects by a jurisdictional agency, the operator shall submit the certification (attached to Form 6458) to the Internal Revenue Service Center, Austin Texas. The certification shall state that the appropriate jurisdictional agency has approved the project as having met the requirements set forth in section 4993 (c) (2) (A), (B), and (C), and the operator shall attach the approving document or a certified copy thereof. The certification of the jurisdictional agency's approval may be submitted at any time. However, for purposes of section 4993 (d) (2) (B) (ii), relating to the "project beginning date", a jurisdictional agency shall not be considered as having approved a project until the certification is received by the Service Center. If the certification is sent to the Service Center by mail, it shall be considered received when posted by United States mail, properly addressed, and with sufficient postage.

(b) *Revocation of certification.* If the agency revokes the approval, it shall immediately notify the operator and the Service Center of the revocation setting forth the date of the revocation and stating whether the revocation has retroactive effect (and, if so, to what date the revocation is retroactive), and the operator shall send a copy of the revocation (attached to Form 6458) to such Service Center within 10 days after receiving it.

(c) *Termination of injection.* If any project certified under paragraph (a) of this section involves the continuous or repetitious injection of liquids, gases, or other matter and if the injection is terminated, the operator shall promptly send a written statement (attached to Form 6458) to that effect to the certifying agency and such Internal Revenue Service Center setting forth the date that the injection was terminated. However, such statement is not required to be sent before December 6, 1982.

**§ 51.4993–4 Internal Revenue Service rulings relating to qualified tertiary recovery projects.**

(a) *In general.* Either the operator of a property or any producer of crude oil from that property may request a ruling from the Internal Revenue Service as to whether any tertiary recovery project involving that property is a "qualified tertiary recovery project" within the meaning of section 4993 (c). If a producer submits the request, the producer shall notify the operator in writing that the request was submitted.

(b) *Manner of requesting ruling.* The request for a ruling described in paragraph (a) of this section shall be made by submitting the request to the Commissioner of Internal Revenue, Attention: Assistant Commissioner (Technical), Washington, D.C. 20224. In addition to meeting the requirements of § 601.201(e) of this chapter (Statement of Procedural Rules), the request shall contain the following (or, in the case of subparagraph (5), (6), or (7), if unavailable, a statement of the reason for the unavailability):

(1) A statement as to whether a jurisdictional agency has approved the project, and if so, a copy of the approving document and a copy of the material upon which the approval was based together with any certification submitted to a Service Center and identification of such Service Center,

(2) A statement from the operator of the property as to whether the operator has previously submitted a request for a ruling on that project and as to whether any producer has notified the operator that a request has been submitted, as well as the date and name of the person who made a request,

(3) A description of the location of the project.

(4) The type of tertiary recovery process instituted,

(5) Data on crude oil reserve estimates covering the project area with and without the tertiary recovery process,

(6) The past production history and estimates of future production,

(7) The characteristics of the formation such as the name, depth, lithology, thickness, porosity, permeability, and reservoir pressure and temperature history,

(8) A description of any secondary or tertiary process previously used, or in use, in the project area,

(9) A full and complete description of the tertiary process stating how it will be developed from the pilot flood through full development, and

(10) A complete description of the geological and engineering factors taken into consideration, together with sufficient data to support the conclusion that the project meets the requirements of section 4993(c) for a "qualified tertiary recovery project."

(c) *Special rule for projects for which a certification of approval by a jurisdictional agency has been submitted.* If, pursuant to section 4993 (c)(2)(D)(ii) and § 51.4993-3, the operator of the property has submitted a certification of approval by a jurisdictional agency, the ruling described in paragraph (a) of this section will be issued within 180 days of the date that a request for the ruling, meeting the requirements of paragraph (b) of this section and § 601.201(e) of this chapter (Statement of Procedural Rules) is received by the Office of the Assistant Commissioner (Technical). However, if the request for a ruling is not complete as to the information required in paragraph (b) (1) through (10) of this section, the Office of the Assistant Commissioner (Technical) may send written notice to the person making the request specifying the further information that must be submitted. The 180-day period shall not include any days after the date of the mailing of the written notice and before the date on which the additional information is received.

**§ 51.4994-1 Exemptions. [Reserved]**

**§ 51.4994-2 Front-end oil. [Reserved]**

**§ 51.4995-1 Requirement of withholding.**

(a) *General rule; when required.*—(1) *In general.* Except as otherwise provided in this section, the purchaser (as defined in § 51.4996-1(a)) of domestic crude oil shall deduct and withhold tax from amounts payable by that purchaser for the crude oil. However, the preceding sentence shall not apply if—

(i) The crude oil is removed from the premises (as defined in § 51.4996-1(d)) before it is sold, or

(ii) The manufacture or conversion of crude oil into refined products begins before the crude oil is removed from the premises, or

(iii) The producer of the crude oil is an integrated oil company (as defined in § 51.4996-1(g)) that has furnished a certificate to the purchaser pursuant to paragraph (c)(2) of § 51.4995-2, or

(iv) The purchaser has received a qualified disburser's certificate pursuant to § 51.4995-5 with respect to that oil and the certificate is still in effect, or

(v) The United States (or any agency or instrumentality thereof) is the producer of the crude oil as holder of a royalty or net profits interest and the crude oil is sold to the purchaser directly by the Department of the Interior, or

(vi) The purchaser has received a Federal royalty certificate from an operator or lessee pursuant to paragraph (c)(3) of § 51.4995-2, or

(vii) The United States (or any agency or instrumentality thereof) is the producer of the crude oil as holder of a royalty or net profits interest and the crude oil is produced from a naval petroleum reserve. See 10 U.S.C. 7420(a)(2) for the definition of naval petroleum reserves.

The amount of tax to be deducted and withheld shall be determined in accordance with the rules of paragraphs (b) and (c) of this section. For purposes of the tax imposed by section 4986, the producer shall be treated as having paid on the last day of the first February after the calendar year in which the crude oil is removed from the premises the amount deducted and withheld with respect to such crude oil by the purchaser under this section.

(2) *Special rule for crude oil removed before sale.* If the purchaser of crude oil would be required to deduct and withhold tax from amounts payable for the crude oil but for the fact that the crude oil was removed from the premises before sale, and if the purchaser can determine the amount of tax imposed by section 4986 with respect to the crude oil, the purchaser may elect to withhold. If the purchaser elects to withhold, the purchaser shall be deemed to be required to withhold under paragraph (a)(1) of this section. The election shall be made by furnishing to the operator of the property from which the crude oil was produced and to each person to whom the purchaser makes payment for the crude oil a document that informs the recipient that the tax is being withheld. The election document shall be furnished within 5 days of receipt of the first crude oil to which it applies. Unless the election document specifies otherwise, the election shall remain effective until 30 days after the purchaser furnishes each recipient of the election document (or a successor in interest) a document informing the recipient that the tax will not be withheld. See §§ 51.4995-4 and 51.4995-5 for the elections pursuant to which an operator or qualified disburser is treated as the purchaser. See § 51.4995-3 for the depositary rules applicable to crude oil removed during each month (semimonthly period in the case of certain integrated oil companies).

(b) *Amount to be deducted and withheld.*—(1) *Operator's certification.* If the purchaser has received the certification required to be furnished by the operator pursuant to section 6050C and § 51.6050C-1, and if the purchaser has no reason to believe that any information contained in that certification that affects the computation of the windfall profit tax is not correct, the amount of tax to be deducted and withheld under paragraph (a) of this section is the amount of tax imposed by section 4986 based on the information provided in the operator's certification. However, in determining the amount to be deducted and withheld, section 4988(b) (relating to the net income limitation on windfall profit) shall not apply.

(2) *Absence of complete and current operator's certification.* This subparagraph applies if the purchaser has not received the certification required to be furnished by the operator pursuant to section 6050C and § 51.6050C-1, or if the certification does not contain all the information necessary for the purchaser to compute the amount to be withheld under paragraph (b)(1) of this section, or if the purchaser has reason to believe that any information contained in that certification that affects the tax computation is not correct (including information that was correct when provided but that has become incorrect.) In such a case, the amount of tax to be deducted and withheld under paragraph (a) of this section is the amount of tax imposed by section 4986 (without regard to the net income limitation provided in section 4988(b)) based on the information, if any, provided in the operator's certification that the purchaser has no reason to believe is not correct, and on the substitution of the following assumptions for any item of information that is absent from the certification or that the purchaser has reason to believe is not correct:

(i) If the item that is absent or that the purchaser has reason to believe is not correct is the tax tier of the crude oil, the crude oil shall be assumed to be in tier 1 subject to the 70 percent rate of tax (except as provided in (b)(3)(ii));

(ii) If the item is the adjusted base price, the adjusted base price shall be assumed to be—

(A) In the case of tier 1 oil, $11.01 plus the amount equal to $11.01 multiplied by the inflation adjustment provided under section 4989(b)(1) for the calendar quarter in which the crude oil was removed,

(B) In the case of tier 2 oil, $12.34 (the amount equal to $11.22 multiplied by 1.1) plus the amount equal to $12.34 multiplied by the inflation adjustment provided under section 4989(b)(1) for the calendar quarter in which the crude oil was removed, and

(C) In the case of tier 3 oil, $13.46 (the amount equal to $11.22 multiplied by 1.2) plus the amount equal to $13.46 multiplied by the inflation adjustment provided under section 4989(b)(2) for the calendar quarter in which the crude oil was removed;

(iii) If the item is the severance tax adjustment provided by section 4996(c), the severance tax adjustment shall be assumed to be inapplicable unless the amount of that adjustment is known by the purchaser.

(3) *Producer's certification.* If, pursuant to § 51.4995–2, the purchaser has received a certification that a producer's share of production from a property qualifies as "exempt oil" or "independent producer oil," and if the purchaser has no reason to believe, at the time of any payment for such share of production, that any statement in the certification bearing on such qualification is not correct, the purchaser—

(i) Shall not withhold tax from amounts payable for the share of production that has been certified as exempt oil (the provisions of paragraph (b) (1) and (2) of this section notwithstanding), and

(ii) In determining the amount to be withheld under paragraph (b)(1) of this section from amounts payable for the share of production that has been certified as independent producer oil, shall apply the rates provided in section 4987(b)(2) and, in determining the amount to be withheld under paragraph (b)(2) of this section, shall substitute 50 percent for 70 percent.

If a payment by a purchaser is made to an operator, partnership, or other disburser, rather than directly to the producer of the crude oil, the amount of exempt oil and independent producer oil shall be determined on the basis of information provided to the purchaser by the operator, partnership, or disburser pursuant to paragraph (e) of § 51.4995–2.

(c) *Withholding adjustments.*—(1) *General rule.* (i) A purchaser who ascertains that the amount of tax withheld from any payment for crude oil was more or less than the amount of tax imposed by section 4986 (computed without regard to the net income limitation) with respect to that crude oil shall make adjustments in the amount to be withheld from subsequent payments to the same person as provided in this paragraph. For purposes of this paragraph, a purchaser has ascertained that the amount withheld was more or less than the tax imposed when the purchaser has sufficient information to be able to determine the amount of tax imposed by section 4986 (computed without regard to the net income limitation) with respect to that crude oil. Thus, adjustments are generally required when the purchaser made an incorrect calculation with respect to a prior payment, when the purchaser has withheld in accordance with the rules of paragraph (b)(2) because of the absence of an effective operator's certification and the purchaser later receives an effective certification, when an earlier certification is corrected, or when the purchaser has withheld tax from a producer at the generally applicable rates and the purchaser subsequently receives a retroactively effective independent producer's certificate. Every adjustment under this paragraph shall be reflected on the return used in reporting windfall profit tax withholding (Form 720). See the instructions for Form 6047. If the entire adjustment would be reported in the return for the same taxable period as the withholding giving rise to the adjustment, the return for that period shall reflect only the amount withheld as adjusted. Otherwise, every return on which an overpayment or underpayment is adjusted pursuant to this paragraph must include such statements and other information as may be required by the instructions to the return.

(ii) Except as otherwise provided in this paragraph, the purchaser must make a full adjustment by underwithholding or overwithholding in subsequent payments to the same person (whether or not from the same property) so that the total amount withheld is equal to the tax imposed by section 4986 (computed without regard to the net income limitation). The full adjustment must be made, if possible, in the next payment. If it is not possible to complete the adjustment in the next payment, the purchaser shall adjust by underwithholding or overwithholding to the fullest extent possible in each subsequent payment until the adjustment is completed. However, no adjustment is to be made in the amount withheld from payments made afer the statement required by § 51.4997–2(c) (relating to yearly statement of windfall profit tax liability) is furnished. Furthermore, no adjustment is required to be made in the amount withheld from payments made for crude oil removed in a subsequent calendar year, although the purchaser may make such an adjustment if the adjustment is reflected in the statement required by § 51.4997–2(c) for the year in which the error occurred. If the error is one of underwithholding that is not fully adjusted under this paragraph (*e.g.*, where the relationship between the producer and the purchaser has terminated), the producer is required to file a return at the end of the year in accordance with § 51.4997–1 unless the producer's entire liability for tax under section 4986 has been satisfied by reason of overwithholding by another purchaser. If the error is one of overwithholding that is not fully adjusted under this paragraph, the rules of § 51.6402–1 with respect to claims for credit or refund are applicable to the producer.

(iii) If the purchaser is required to make an adjustment by overwithholding under this paragraph because the purchaser withheld less than the amount required to be withheld from an earlier payment, the overwithholding under this paragraph shall not be treated as an amount withheld or required to be withheld for purposes of § 51.4995–3 (relating to depositary requirements) to the extent that the excess of the amount originally required to be withheld over the amount actually withheld has been deposited by the purchaser (and reported if the underwithholding occurred in an earlier taxable period).

(2) *Special rules.* (i) No amount shall be deducted or withheld from any payment in excess of the windfall profit with respect to the crude oil giving rise to that payment.

(ii) If, pursuant to section 4995(a)(3)(D), the producer and purchaser agree to additional withholding, any amount withheld pursuant to the agreement shall be treated as an amount required to be withheld.

(iii) If, under the rules of this paragraph, the purchaser would otherwise be required (or permitted) to make an adjustment by underwithholding in subsequent payments, the purchaser may (at the purchaser's option) adjust the overwithholding (in full or in part) by making a payment to the producer or the producer's agent in the amount of the overwithheld tax (or a portion thereof). For purposes of § 51.4995–3 (relating to depositary requirements), any amount paid pursuant to the preceding sentence shall be treated as a reduction in the amount required to be deposited under § 51.4995–3 with respect to oil removed from the premises during the month immediately preceding the month of payment (during the semi-monthly period of the payment in the case of an integrated oil company making deposits under paragraph (a) of § 51.4995–3). However, any adjustment by payment under this subdivision shall not exceed the amount that would reduce to zero the amount otherwise required to be deposited under § 51.4995–3 for the depository period referred to in the preceding sentence.

(3) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

*Example (1).* A, a purchaser of crude oil, has been withholding in accordance with the special rules of paragraph (b)(2) because the operator of the property from which A purchases crude oil has not provided A with the certification required by § 51.6050C–1. Subsequently, the operator does provide A with the certification, and A, withholding under the rules of paragraph (b)(1), ascertains that the amount withheld earlier exceeds the amount of tax imposed by section 4986 based upon the information provided by the operator. Although A withheld properly in accordance with the information available during the earlier period, the amount withheld is subject to the adjustment rules of this paragraph.

*Example (2).* Purchaser B, in the third calendar quarter of the year, ascertains that too little tax was withheld from payments for crude oil purchased in the preceding calendar quarter with respect to producer C. B must attempt to fully adjust the underwithholding by increasing the amount withheld from subsequent payments made to C (up to the full amount of windfall profit). If the adjustment has not been completed when B makes the final payment for crude oil removed during the calendar year, B is permitted, but not required, to continue the adjustments in payments for crude oil removed after the close of the calendar year so long as the annual information statement and return required by § 51.4997–2(c) reflects the adjustment. B is required to inform C of C's liability for any amount remaining unadjusted and to provide that information to the Internal Revenue Service in accordance with the rules of § 51.4997–2.

*Example (3).* D, the producer of exempt oil, failed to provide purchaser E with an exemption certificate in time to avoid the withholding of tax from a payment made by E to D. Under paragraph (c)(2)(iii), E has the option of adjusting the overwithholding by making a payment to D.

(d) *Extent of purchaser's liability.* Every purchaser required to deduct and withhold tax under this section is liable for the tax required to be withheld, whether or not it is actually withheld by the purchaser. However, in no event shall the purchaser's liability for the tax required to be withheld exceed the producer's liability for the tax imposed by section 4986 (including the application of the net income limitation provided in section 4988(b) if all the data necessary for computing that limitation are available) with respect to crude oil sold to that purchaser, and the purchaser's liability shall abate to the extent that the purchaser establishes that the producer's liability for the tax has been paid (including payments by the producer or by the purchaser through adjustments in amounts later withheld). See paragraph (c) relating to adjustments in withholding. The producer from whom the correct amount was not withheld shall be liable to any purchaser for the amount of the producer's tax liability paid by the purchaser pursuant to this paragraph. The purchaser is relieved of liability to any other person for the amount of any tax withheld pursuant to this section and paid to the Internal Revenue Service or deposited with a duly designated depository of the United States. See § 51.4995–3 relating to depository requirements.

### § 51.4995–2 Producer's certificate.

(a) *In general.* A producer of "exempt Indian oil" (as defined in section 4994(d)) or "exempt royalty oil" (as defined in section 4994(f)), or the holder of any interest in crude oil that is a "qualified governmental interest" (as defined in section 4994(a)) or is a "qualified charitable interest" (as defined in section 4994(b)), generally may execute an exemption certificate with respect to such oil. In the case of "exempt Indian oil" produced from lands administered by the Bureau of Indian Affairs, the certificates may be furnished and filed by the Commissioner of Indian Affairs or his delegate on behalf of the producer. Generally, a producer of "independent producer oil" (as defined in section 4992) may execute a certificate with respect to such oil. Any certificate executed pursuant to this paragraph shall be furnished to the purchaser of the crude oil or, if the producer receives payment for the crude oil through the operator of the property from which the crude oil is produced, a partnership, or other disburser of the sales proceeds, to such operator, partnership, or disburser. The producer need submit only one certificate for each property to each person from whom the producer receives payment. However, see paragraph (d) of this section relating to revocations of certificates. Every integrated oil company shall follow the rules of paragraph (c)(2) of this section (relating to mandatory and optional withholding exemption certificates). Any certificate provided under this section must set forth the facts that establish entitlement to the exemption or lower rates claimed. The certificate (or any revocation of a certificate) shall identify the producer by name, address, and employer identification number (or, if none, social security number) and shall be signed by the producer (under the penalties of perjury except in the case of a revocation). Form 6458 is provided for this purpose. For the requirement that the operator of a property, partnership, or other disburser who has received such a certificate furnish a copy of the certificate, or certify as to its contents, to the person making payment for oil, see paragraph (e) of this section. For the certification requirement of operators or lessees selling certain crude oil from a Federal lease, see paragraph (c)(3) of this section. For the effect of the furnishing of certificates, see § 51.4995–1(b)(3) (relating to the withholding requirements). For the criminal penalty applicable to the furnishing of a false statement, see section 7206.

(b) *Exemption certificate.*—(1) *In general.* For purposes of this section, an exemption certificate is a written statement certifying that the producer's crude oil is exempt from the tax imposed by section 4986 because the crude oil constitutes exempt Indian oil or exempt royalty oil or the oil is from a qualified governmental interest or a qualified charitable interest. Any producer who furnishes an exemption certificate (other than an exempt royalty owner's certificate) to an operator, purchaser, partnership, or other disburser shall also file an exemption certificate with the Internal Revenue Service Center, Austin, Texas. Only one such certificate need be filed even though the producer may furnish certificates to more than one operator, purchaser, partnership, or other disburser.

(2) *Exempt royalty owner's certificate.* [Reserved]

(c) *Other producer's certificates.*—(1) *Independent producer's certificate.* An independent producer's certificate is a written statement certifying that the producer holds a working interest (as defined in section 4992(d)(2)) in a certain property and that the entire amount of tier 1 and tier 2 crude oil production attributable to that interest is qualified production of crude oil as defined in section 4992(d). No certificate may be furnished with respect to crude oil if it is reasonable to believe that the number of barrels attributable to the interest to be certified taken together with all other crude oil with respect to which an independent producer's certificate has been furnished by the producer to any operator, purchaser, partnership, or other disburser, will exceed the producer's independent producer amount (see section 4992 (c) and (e)). Producers who are members of a related group (within the meaning of section 4992(e)(2)) shall set forth in the certificate the members of the related group identified by employer identification number (or, if none, social security account number), and shall file one such certificate with the Internal Revenue Service Center, Austin, Texas. Only one such certificate need be filed even though the producer may furnish certificates to more than one operator, purchaser, partnership, or other disburser. The certificate shall be filed by the 30th day following the day that the producer first furnishes such a certificate to any operator, purchaser, partnership, or other disburser. Independent producers who are not members of a related group need not file the independent producer certificate with the Internal Revenue Service.

(2) *Integrated oil company's certificate.*—(i) *Mandatory certificates.* Every integrated oil company that is a producer of crude oil from a property of which that company is the operator (or would be the operator in the absence of a designation under § 51.4996–1(c)) shall furnish the statement described in paragraph (c)(2)(iii) of this section to each purchaser of crude oil from that property no later than the date by which the first statement by the operator to the purchaser under § 51.6050C–1 is required to be furnished.

(ii) *Optional certificate.* Any integrated oil company that is a producer of crude oil from a property of which that company is not the operator may, at its option, furnish such a statement with respect to such crude oil to the purchaser of the crude oil or, if the producer receives payment for the crude oil through the operator of the property from which the crude oil is produced, a partnership, or other disburser of the sales proceeds, to such operator, partnership, or disburser.

(iii) *Contents of certificate.* The certificate furnished pursuant to this subparagraph shall state that the producer is an integrated oil company (as defined in § 51.4996–1 (g)), that the producer will deposit its own windfall profit tax liability, and that the producer's share of production is not to be withheld upon under § 51.4995–1.

(iv) *Date certificate becomes effective.* Any certificate furnished pursuant to this subparagraph shall apply to all payments for crude oil of which the integrated oil company is the producer made by or for the purchaser after the date on which the purchaser received the certificate.

(3) *Federal royalty certificate.*—(i) *Certificate required.* If the United States (or any agency or instrumentality thereof) is the producer of crude oil that is sold to the purchaser by the lessee or operator for the Department of the Interior, the lessee or operator shall furnish the statement described in paragraph (c)(3)(ii) of this section to each purchaser of such crude oil no later than the date by which the first statement by the operator to the purchaser under § 51.6050C–1 is required to be furnished. The statement described in paragraph (c)(3)(ii) need not be furnished if the United States, acting through the Department of the Interior, sells its production directly to the purchaser.

(ii) *Contents of certificate.* The certificate furnished pursuant to this subparagraph shall state that the United States (or any agency or instrumentality thereof) is the producer of the crude oil (or a specified portion of the oil), that the crude oil is sold for the Department of the Interior, and that the United States' share of production is not to be withheld upon under § 51.4995–1.

(d) *Revocation of certificate.* If the producer has furnished a certificate with respect to crude oil, and the producer subsequently ascertains that the crude oil is not, has ceased to be, or on a certain date will cease to be eligible for certification under the rules of paragraphs (a) through (c) of this section, the producer shall furnish notice within 10 days of the ascertainment to the person to whom the certificate was furnished that the certificate is revoked immediately or as of the appropriate date.

(e) *Operators, partnerships, and other disbursers.* If payment for a producer's crude oil is to be made by the purchaser through one or more operators, partnerships, or other disbursers rather than to each producer individually, the information contained in any certifications permitted by this section shall be aggregated in a certification by the operator, partnership, or disburser to the person from whom payment is received, unless such operator, partnership, or disburser has undertaken the withholding obligation of the purchaser pursuant to §§ 51.4995–4 or 51.4995–5. Each certification shall state the percentage of the crude oil that is certified as exempt from tax or subject to a lower rate of tax. The certification may certify crude oil as exempt from tax or subject to a lower rate of tax only to the extent that the operator, partnership, or disburser has received certifications from the producers (or another operator, partnership, or disburser). Any operator, partnership, or disburser furnishing a certification shall retain in its records, for so long as material in the administration of any internal revenue law, each certification (or a reproduction thereof) that was used as the basis for the certification furnished by the operator, partnership, or disburser under this section.

(f) *Substitution of operator or qualified disburser for purchaser.* If, pursuant to §§ 51.4995–4 or 51.4995–5, the operator of a property or a qualified disburser elects to be responsible for the obligations otherwise imposed upon the purchaser, the purchaser shall forward to the responsible person, at the time of the election, any exemption certificate or any notice of revocation previously received by the purchaser. The purchaser shall immediately forward to the responsible person any exemption certificate or any notice of revocation received after the election. The operator or qualified disburser shall treat any exemption certificate or any notice of revocation forwarded by a purchaser as an exemption certificate or notice of revocation from the producer.

**§ 51.4995–3 Depositary requirements.**

(a) *Deposits by integrated oil companies other than independent refiners.*—(1) *In general.* Every integrated oil company (as defined in § 51.4996–1 (g)) other than an independent refiner (as defined in § 51.4996–1(h)) that is either liable as a producer for the tax imposed by section 4986 (unless such tax is required by § 51.4995–1 to be deducted and withheld by the purchaser) or is required as a purchaser to deduct and withhold tax pursuant to § 51.4995–1 shall make deposits with respect to semimonthly periods (as defined in paragraph (a)(3)(i) of this section). The amount to be deposited for each semimonthly period is the amount of tax imposed by section 4986 (computed with regard to the net income limitation provided in section 4988(b), if applicable) on the removal in that semimonthly period of crude oil that is not subject to withholding under § 51.4995–1 for which the company is liable as a producer, plus the amount required to be withheld by the company as a purchaser pursuant to § 51.4995–1 from payments that have been or will be made for crude oil removed from the premises during that semimonthly period. However, if the amount withheld by the company as a purchaser from any payment is more than the amount required to be withheld, the amount to be deposited shall be the amount withheld. The deposits shall be made on or before the depositary date (as defined in paragraph (a)(3)(ii) of this section) for the semimonthly period in which the crude oil is removed. These depositary requirements will be considered to have been met for a semimonthly period with respect to estimated deposits, including deposits based upon the producer's estimate of the effect of the net income limitation provided in section 4988(b), only if—

(i)(A) The company's deposit for such semimonthly period is not less than 90 percent of the total amount otherwise required by this section to be deposited by it for such period, and (B) if such period occurs in a month other than the last month in a taxable period, it deposits any underpayment for such month by the 9th day of the second month following such month ; or

(ii)(A) Its deposit for each semimonthly period in the month is not less than 45 percent of the total amount otherwise required by this section to be deposited by it for the month, and (B) if such month is other than the last month in a taxable period, it deposits any underpayment for such month by the 9th day of the second month following such month; or

(iii)(A) Its deposit for each semimonthly period in the month is not less than 50 percent of the total amount required by this section to be deposited by it for the third preceding calendar month (determined without regard to subdivisions (i) through (iv) of this subparagraph), and (B) if such month is other than the last month in a calendar quarter, it deposits any underpayment for such month by the 9th day of the second month following such month; or

(iv)(A) The requirements of (i)(A), (ii)(A), or (iii)(A) are satisfied for the first semimonthly period of a calendar month, and (B) the company's deposit for the second semimonthly period of that calendar month is, when added to the deposit for the first semimonthly period, not less than 90 percent of the total amount otherwise required by this section to be deposited by it for that month, and (C) if such period occurs in a month other than the last month in a calendar quarter, the company deposits any underpayment for such month by the 9th day of the second month following such month.

However, subdivisions (ii) and (iii) of this subparagraph shall not apply to any company that normally incurs in the first semimonthly period in each month more than 75 percent of its total liability for deposit for the month (determined without regard to subdivisions (i) through (iv)).

(2) *Special requirement.* If the aggregate amount of deposit liability for a taxable period (determined without regard to subdivisions (i) through (iv) of paragraph (a)(1) of this section) exceeds the total amount deposited by the company pursuant to paragraph (a)(1) of this section for such taxable period, then the company shall, on or before the last day of the second month following the close of the taxable period, deposit an amount equal to the amount by which the deposit liability exceeds the total deposits made pursuant to paragraph (a)(1) of this section for the taxable period.

(3) *Definitions.* For purposes of this part—

(i) *Semimonthly period.* A "semimonthly period" means the first 15 days of a calendar month or the portion of a calendar month following the 15th day of such month.

(ii) *Depositary date.* The depositary date for deposits for semimonthly periods is the 9th day of the semimonthly period following the semimonthly period in which the crude oil was removed.

(b) *Independent refiners purchasing oil pursuant to a delayed payment contract.* Purchasers that are independent refiners (as defined in § 51.4996–1(h)) shall make deposits for each calendar month in accordance with the rules of paragraph (c) of this section except in the case of crude oil purchased under a contract therefor under which no payment is required to be made by the purchaser before the 46th day after the close of the month in which the crude oil is purchased. In the case of crude oil purchased under such a contract, the deposits shall be made for each calendar month not later than the last day of the second month which begins after the month in which the crude oil was removed. The amount to be deposited for each month is the amount required to be withheld pursuant to § 51.4995–1 from payments that have been or will be made for crude oil removed during that month. However, if the amount withheld by the purchaser from any payment is more than the amount required to be withheld, the amount to be deposited shall be the amount withheld.

(c) *Deposits by other purchasers.* Except as provided in paragraph (a) or (b) of this section, purchasers shall make deposits for each calendar month not later than 45 days after the close of that month. The amount to be deposited for each month is the amount required to be withheld pursuant to § 51.4995–1 from payments that have been or will be made for crude oil removed from the premises during that month. However, if the amount withheld by the purchaser from any payment is more than the amount required to be withheld, the amount to be deposited shall be the amount withheld.

(d) *Special rules for electing operators and qualified disbursers.*—(1) *Electors who are also producers.* Except as otherwise provided in §§ 51.4995–4 or 51.4995–5, any operator or qualified disburser who makes the election provided by §§ 51.4995–4 or 51.4995–5 and who is the producer of crude oil subject to the election shall deposit with respect to that crude oil by treating the crude oil as not subject to withholding. However, if section 4995(a)(7)(A)(ii) applies to amounts withheld by the operator electing under § 150.4995–4, that section shall also apply to amounts deposited by the operator under the preceding sentence.

(2) *Special rules for qualified disbursers.* The rules of this subparagraph apply to every qualified disburser making the election provided by § 51.4995–5 regardless of whether that qualified disburser is an operator entitled to make (or who has previously made) the election provided by § 51.4995–4. Except as otherwise provided in this subparagraph, a qualified disburser shall deposit both the amount required to be deposited as a purchaser and the liability of the qualified disburser as a producer (if any) in accordance with the rules of paragraph (a) of this section if the qualified disburser is an integrated oil company (other than an independent refiner) and in accordance with the rules of paragraphs (c) and (f) of this section in any other case. If, on December 31, 1980, an integrated oil company (other than an independent refiner) was a disburser (as defined in § 51.4996–1(j)) with respect to a property, any qualified disburser subsequently undertaking any portion of the distribution responsibility of the integrated oil company shall deposit all amounts attributable to that property in accordance with the rules of paragraph (a) of this section. However, the preceding sentence shall not apply if, on December 31, 1980, the integrated oil company was also a producer of crude oil from that property and the integrated oil company transfers the distribution responsibility contemporaneously with the transfer of its entire interest in the property to a person other than a related person (as defined in section 613A(d)(3)).

(e) *Payments by producers to correct underwithholding.* If the amount of tax withheld from a producer for a calendar year is less than the total liability of the producer for the tax imposed by section 4986 with respect to crude oil removed during the calendar year and subject to withholding under § 51.4995–1, the producer shall remit the difference with a timely return filed under § 51.4997–1 or shall, on or before the last day for filing a return under § 51.4997–1, deposit such difference.

(f) *Deposits by producers of tax due on crude oil not subject to* *withholding.*—(1) *In general.* Except as provided in paragraph (a) (relating to certain integrated oil companies), every producer shall deposit for each calendar month the tax imposed by section 4986 (computed with regard to the net income limitation provided in section 4988(b), if applicable) on the removal in that month of crude oil that is not subject to withholding under § 51.4995–1. The deposits shall be made not later than 45 days after the close of the month in which the crude oil was removed (or deemed removed under § 51.4996–1(d)) from the premises. These deposit requirements will be considered to have been met for a month with respect to estimated deposits, including deposits based upon the producer's estimate of the effect of the net income limitation provided in section 4988(b), only if—

(i)(A) The producer's aggregate deposit liability under this subparagraph (1) for the three months of a taxable period is less than $100 and (B) the producer deposits the amount of tax owed on or before the last day for filing the return required by § 51.4997–1 for that taxable period or remits the tax owed with that return; or

(ii)(A) The producer's deposit for the month is not less than 90 percent of the total amount otherwise required by this section to be deposited by it for the month, and (B) the producer complies with the requirements of subparagraph (2) of this paragraph; or

(iii)(A) The producer's deposit for each month of the taxable period is not less than 30 percent of the total amount otherwise required by this section to be deposited by it for the three months of the taxable period, and (B) the producer complies with the requirements of subparagraph (2) of this paragraph; or

(iv)(A) The producer's deposit for the month is not less than 100 percent of the amount required by this section to be deposited by it for the third preceding month (determined without regard to subdivisions (i) through (iv)), and (B) the producer complies with the requirements of subparagraph (2) of this paragraph.

However, subdivisions (iii) and (iv) of this subparagraph shall not apply to any producer that normally incurs in the first month in each taxable period more than 45 percent of its total liability for deposit for the taxable period (determined without regard to subdivision (ii) through (iv)).

(2) *Special requirement.* If the total liability for the tax imposed by section 4986 on the removal of crude oil that is not subject to withholding for a taxable period exceeds the total amount deposited by the producer pursuant to subparagraph (1) of this paragraph for such taxable period, then the producer shall deposit the difference not later than the last day of the second month following the close of the taxable period.

(g) *Special rules applicable to overdeposits.*—(1) *Purchasers who are not also depositing tax as a producer.* If, for any taxable period, a purchaser is not also depositing tax as a producer, the excess (if any) of the purchaser's deposits for a semimonthly period (calendar month in the case of purchasers depositing under paragraph (b) or (c) of this section) with respect to the removal of crude oil in that semimonthly period (or month) over the amount required to be deposited shall be applied in order of time to each of the purchaser's succeeding semimonthly periods (or months) in the same taxable period, to the extent that the amount by which the purchaser's deposit liability for that period (or month) exceeds the deposit for such subsequent period (or month), until such excess is exhausted.

(2) *Treatment of deposits by a producer in excess of liability.*—(i) *In general.* The rules of this subparagraph apply to producers required to deposit tax under paragraph (a) or (f) of this section, including producers who are also depositing as a purchaser. Any overdeposit of tax shall be applied in order of time to each of the producer's succeeding semimonthly periods (calendar months in the case of producers depositing under paragraph (f) of this section) to the extent that the amount by which the total deposit liability (as a producer and purchaser) for that period (or month), exceeds the deposit for subsequent period (or month), until such excess is exhausted. For this purpose an overdeposit is—

(A) The excess of the sum of—

(*1*) A producer's deposits for a semimonthly period (or month) with respect to the tax imposed by section 4986 on the removal in that semimonthly period (or month) of crude oil that is not subject to withholding under § 51.4995–1, plus

(*2*) The amount deposited as a purchaser for crude oil removed during that period (or month)

(B) Over the sum of—

(*1*) The tax imposed by section 4986 (computed with regard to the net income limitation) on the removal of crude oil that is not subject to withholding, plus

(*2*) The amount required to be deposited as a purchaser for that period (or month). The preceding sentences shall not apply to any amount for which the producer files a claim for credit against a liability for a tax imposed by chapter 1 or a claim for refund pursuant to § 51.6402–1. Furthermore, except to the extent otherwise provided in forms and instructions, no amount shall be applied to a deposit for a subsequent semimonthly period (or month) that occurs in a taxable period beginning in a different taxable year (for Federal income tax purposes).

(ii) *Examples.* The rules of this paragraph and their relationship to the rules of § 51.6402–1 may be illustrated by the following examples:

*Example (1).* A, whose taxable year (for Federal income tax purposes) ends September 30, is the producer of crude oil from property X. For each taxable period (calendar quarter) within his taxable year ending September 30, 1981, A's windfall profit tax liability, determined without taking the net income limitation into account, is $1,000. The purchaser of A's crude oil is not required to withhold any windfall profit tax, and for the last taxable period of 1980 A has deposited $1,000. At the beginning of the first taxable period of 1981, A determines that the net income limitation will reduce the windfall profit tax with respect to the crude oil removed from property X during the taxable year ending September 30, 1981, by approximately 10 percent. Therefore, A concludes that the tax paid for the preceding taxable period (calendar quarter) exceeds his liability for tax for that period, although the exact amount of the excess cannot be determined until the taxable year ends. Under § 51.6402–1 A may not claim a refund for the amount of any such excess until the taxable year ends on September 30, 1981. However, paragraphs (a) and (f) of § 51.4995–3 do not require deposit of more than the tax imposed by section 4986. Therefore, A may estimate the effect of the net income limitation in determining the amount of windfall profit tax to be deposited for each taxable period. Furthermore, the amount by which the tax deposited by A for a preceding deposit period exceeds the actual liability for that period is treated as deposited for the next period. Accordingly, A deposits a total of $800 for the first taxable period of 1981 and $900 for each of the next two taxable periods. Thus, at the end of the four taxable periods ending within A's taxable year, A has made the following deposits:

October–December 1980, $1,000
January–March 1981, $800
April–June 1981, $900
July–September 1981, $900.

After September 30, 1981, A computes his net income limitation for property X and determines that his actual tax liability was $850 for each taxable period. A has satisfied the deposit requirements and is entitled to file a claim for credit or refund of $200.

*Example (2).* Assume the same facts as in example (1), except that A overestimates the effect of the net income limitation and deposits a total of $600 for the first taxable period of 1981 and $800 for each of the next two taxable periods. After September 30, 1981, A's deposits are as follows:

October–December 1980, $1,000
January–March 1981, $600
April–June 1981, $800

July-September 1981, $800.

$150 of the deposits for October, November, and December 1980 is treated as carried over to and deposited in the next taxable period, bringing the total deposit required for Jan-Mar 1981 to $700 (the amount equal to the $850 actual liability less $150 carried from the preceding period). However, due to the overestimation of the effect of the net income limitation, A has not deposited the total liability for that period or the next two taxable periods. Therefore, A is liable for $200 in undeposited tax (the amount equal to $3,400 total liability less $3,200 total deposits) plus interest and penalties (unless A's error was due to reasonable cause).

(iii) *Reporting requirements.* For the requirement that the producer file quarterly and annual statements if windfall profit tax deposits have been based on an application of the net income limitation provided in section 4988(b), see § 51.4997-1.

(h) *Government depositaries.* Deposits required by this section shall be made with a Federal Reserve bank or, at the depositor's election, with an authorized financial institution. See paragraph (i)(2) of this section.

(i) *Depositary forms.*—(1) *In general.* A person may make one, or more than one, remittance of the amount required to be deposited. However, a deposit for one taxable period shall be made separately from any deposit for another taxable period.

(2) *Tax deposit forms.* Each remittance of amounts required to be deposited by this section shall be accompanied by an FTD (Federal Tax Deposit, Excise Taxes) Form (Form 504). Such form shall be prepared in accordance with the instructions applicable thereto. The remittance, together with FTD Form 504, shall be forwarded to a financial institution authorized as a depositary for Federal taxes in accordance with 31 CFR 214 or, at the election of the person remitting the tax, to a Federal Reserve Bank. For procedures governing the deposit of Federal taxes at a Federal Reserve bank see 31 CFR 214.7. The timeliness of the deposit is determined by the date stamped on the Federal Tax Deposit form by the Federal Reserve bank or the authorized financial institution or, if section 7502(e) applies, by the date the deposit is treated as received under section 7502(e). Each person making deposits pursuant to this section shall report on the return for the period with respect to which such deposits are made information regarding such deposits in accordance with the instructions applicable to such return.

(3) *Procurement of prescribed forms.* Copies of the applicable deposit forms will so far as possible be furnished to purchasers and producers. Such a person will not be excused from making a deposit, however, by the fact that no form has been furnished to it. A person not supplied with the proper form should make application therefor in ample time to make the required deposits within the time prescribed. A person may secure the forms or additional forms by applying therefor and supplying its name, identification number, address, and the taxable period to which the deposits will relate. Copies of FTD Form 504 may be secured by application to a director of an Internal Revenue Service Center.

**§ 51.4995-4 Election of purchaser and operator to have operator withhold, deposit tax, etc.**

(a) *General rule.* Pursuant to section 4995(a)(7)(B), it has been determined that the substitution of the operator for the purchaser will make the administration of the windfall profit tax more practicable only when the operator is otherwise required by § 51.4995-3 to make deposits as a purchaser of crude oil produced from a different crude oil reservoir. Consequently, an election pursuant to section 4995(a)(7) shall be valid only when made under those circumstances. Where an election is allowed, the operator of the property and a purchaser of crude oil produced from that property may make a joint election under this section with respect to crude oil produced from the entire property or any portion thereof. While the election is in effect, and to the extent of the crude oil subject to the election, the operator shall be treated as the purchaser for purposes of chapter 45 (or related provisions of subtitle F of the Code) and this part and, accordingly, is subject to all of the requirements imposed thereby upon the purchaser (except to the extent that a qualified disburser's election under § 51.4995-5 relieves the operator of those requirements). The purchaser shall not be held responsible for failing to meet those requirements. The operator shall promptly notify all producers of crude oil from that property (or portion) that a joint election has been made and that all information otherwise required to be sent to the purchaser should be sent to the operator. If the operator makes payment for crude oil produced from the property to a partnership rather than directly to the producers, the notice shall be sent to the partnership. The operator and the purchaser must agree to transfer to the operator responsibility for meeting all the requirements otherwise imposed upon the purchaser in order for the agreement to constitute an effective election. If an election has been made under this section, the operator generally may treat as not subject to withholding amounts received for its own production from the property with respect to which the election has been made. However, in the case of an operator that is a partnership, a partner shall not be treated as not subject to withholding for amounts received for its own production from the property unless the partner is treated as not subject to withholding without regard to this section.

(b) *Method of making election; termination of election.* The joint election shall be made by the execution of a document, signed and dated by both the purchaser and operator, that states that both parties have agreed that the operator of the property shall be responsible for all the requirements otherwise imposed upon the purchaser by chapter 45 (or related provisions of subtitle F) of the Code or by this part. The purchaser and operator shall, within 10 days of the execution of the document, each forward a copy of the document to the Internal Revenue Service Center, Austin, Texas. The election shall remain in effect from the date of its execution (or later effective date specified in the election document) until either of the parties executes a document, signed, dated, and delivered to the other party, that declares that the joint election is to be terminated. The termination shall not take effect for at least 60 days after the execution of the termination document unless both the operator and the purchaser agree on an earlier effective date. The party executing the termination document shall promptly notify all producers of crud oil from that property of the termination and the resulting changes in responsibilities and shall, within 10 days of executing the termination document, forward a copy to the Internal Revenue Service Center, Austin, Texas. The party receiving the termination document shall, within 10 days of receipt, forward a copy to the Internal Revenue Service Center, Austin, Texas. Both the purchaser and operator shall retain in their records, for so long as they may be material in the administration of any internal revenue law, a copy of the joint election and any subsequent termination.

(c) *Status of operator who is also a producer.* If an election is made by the purchaser and the operator to have the operator treated as the purchaser and the operator is also a producer of crude oil from the property subject to the election, the operator, except as otherwise provided in this section, shall comply with all the requirements of this part that are imposed upon a producer whose crude oil is not subject to withholding (see, *e.g.*, § 51.4995–3 (a) and (f) relating to the deposit schedules for producers not subject to withholding; see also, § 51.4995–3(d) relating to special deposit rules for certain operators and electing qualified disbursers).

**§ 51.4995–5 Election of qualified disburser to withhold, deposit tax, etc.**

(a) *In general.* Any "qualified disburser," as defined in paragraph (b) of this section, may make an election under this section to act as the withholding agent with respect to the crude oil the sales proceeds of which are distributed by that qualified disburser. An electing qualified disburser generally may treat as not subject to withholding amounts received for its own production from the property with respect to which it elects to act as a qualified disburser. However, in the case of a partnership that is an electing qualified disburser, a partner shall not be treated as not subject to withholding for amounts received for its own production from the property unless the partner is treated as not subject to withholding without regard to this section. While the election is in effect, and to the extent of the crude oil subject to the election, the qualified disburser shall be treated as the purchaser for purposes of chapter 45 (and related provisions of subtitle F of the Code) and this part (other than this section), and, accordingly, is subject to all of the requirements imposed thereby upon the purchaser. The qualified disburser shall promptly notify the operator of the property and every payee of any portion of its disbursements that the election has been made and that all information otherwise required to be sent to the purchaser should be sent to the qualified disburser.

(b) *Qualified disburser defined.* The term "qualified disburser" means—

(1) A disburser (as defined in § 51.4996–1(j)) who distributes an amount equal to or greater than 10 percent of the entire gross proceeds from the sale of crude oil from a property (or a portion of a property if that portion constituted a separate property prior to a unitization or aggregation), exclusive of that person's own share of the proceeds (if any), or

(2) A disburser that is an integrated oil company required to make semimonthly deposits pursuant to § 51.4995–3(a), or

(3) A federally registered partnership as defined in section 6501(o)(4).

(c) *Method of making election; termination of election.* The election shall be made by furnishing to the purchaser a signed and dated document that states facts that would establish that the person making the election is a "qualified disburser" and makes clear that the person has assumed complete responsibility for meeting all the requirements otherwise imposed upon the purchaser by chapter 45 (or related provisions of subtitle F) of the Code or by this part (other than this section) with respect to the crude oil the sales proceeds of which are distributed by the qualified disburser and for treating as not subject to withholding amounts received for its own production. The election document shall set forth the elector's identifying number (employer identification number or, if none, social security account number), the property or properties subject to the election, including the lease name, location, and identifying number, if any, and such other information as may be required by Form 6458 (Certification and Election Form) or its instructions. If the election is made with respect to more than one property, the election document shall identify each property. Generally, the election shall become effective with respect to crude oil removed after the last of the month in which the election document is received by the purchaser (or a later effective date specified in the election document). However, the election may be made retroactively effective with respect to all crude oil removed after December 31, 1980, if the purchaser and qualified disburser so agree in writing, and if the election is made no later than May 31, 1981. The election shall remain in effect until 60 days after the qualified disburser furnishes the purchaser a signed and dated document that contains all of the data required to be in the election document and that declares that the election is terminated (or a later date specified in the termination document), unless the purchaser agrees in writing to an earlier termination date. The qualified disburser shall promptly notify the operator and all affected producers of the termination and the resulting changes in responsibilities and shall, within 10 days of furnishing the termination document to the purchaser, forward a copy to the Internal Revenue Service Center, Austin, Texas. Both the purchaser and qualified disburser shall retain in their records, for so long as they may be material in the administration of any internal revenue law, a copy of the election document and any subsequent termination document. If a qualified disburser making the election provided by this section receives payment of the sales proceeds of the crude oil from an intermediate disburser rather than directly from the purchaser, and document required by this section to be furnished to the purchaser shall be furnished to such other disburser. Any person receiving such a document shall furnish a copy to the person from whom that person receives payment and, if any portion of the payments received by that person remains subject to withholding, shall specify the share of production to which the document relates.

(d) *Obligation of purchaser to file copy of election document with the Internal Revenue Service.* Within 10 days of receipt of an election document under this section, the purchaser shall forward a copy to the Internal Revenue Service Center, Austin, Texas.

(e) *Status of electing qualified disburser who is also a producer.* Except as otherwise provided in this section, an electing qualified disburser who is also a producer of crude oil from the property subject to the election shall comply with all the requirements of this part that are imposed upon a producer whose crude oil is not subject to withholding (see, *e.g.*, § 51.4995–3 (a) and (f) relating to the deposit schedules for producers not subject to withholding; see also, § 51.4995–3(d) relating to special deposit rules for certain operators and electing qualified disbursers).

(f) *Authority of district director to terminate election, require bond, etc.* If the district director for the district in which the principal place of business of the qualified disburser is located determines that the election under this section of any qualified disburser is not in the best interest of the Government in the effective collection and administration of the windfall profit tax, the district director may terminate the election or may permit the election to continue upon compliance with reasonable conditions, such as the posting of a bond. In the case of a termination the district director shall promptly notify the purchaser or other affected disbursers of the change in responsibilities.

(g) *Examples.* The provisions of this section may be illustrated by the following examples:

*Example (1).* P purchases crude oil from a lease operated by O. P pays 100 percent of the sales proceeds to O who retains 50 percent (the amount attributable to O's share of production) and distributes the remaining 50 percent to all the other producers in accordance with their percentage share of production. Since O is a qualified disburser, O may elect under this section to undertake all the windfall profit tax responsibilities otherwise imposed upon P. If O does elect, O furnishes P the election document and P withholds no windfall profit tax from payments to O. P must submit a copy of the election document to the Internal Revenue Service.

*Example (2).* Assume the same facts as in example (1) except that one of the producers receiving payment from O is a federally registered partnership. The partnership and O are both qualified disbursers entitled to make the election provided by this section. If the partnership and O both make the election, O must not withhold tax from payments to the partnership and must furnish a copy of the partnership's election document to P together with O's election document. If the partnership makes the election but O does not, O must furnish a copy of the partnership's election document to P and must specify the share of production held by the partnership. P should withhold tax from payments made to O except for the portion of the payment that is attributable to the partnership's share of production. The partnership would withhold tax from payments made to its partners. P must submit to the Internal Revenue Service a copy of any election document received by P.

*Example (3).* Assume the same facts as in example (1). Assume further that O pays A, a producer that is not an integrated oil company, 20 percent of the entire sales proceeds, and that A retains 75 percent of the 20 percent payment from O and distributes the remaining 25 percent to producer B. A is not a qualified disburser because A distributes only 5 percent of the entire proceeds of sale and is neither an integrated oil company required to make semimonthly deposits pursuant to § 51.4995-3(a) nor a federally registered partnership.

*Example (4).* Assume the same facts as in example (1) except that P directly pays producer C, who has a 20 percent share of production and that the remaining 80 percent is paid to O who retains the 50 percent share attributable to O's share of production and distributes the remaining 30 percent to the other producers. O is a qualified disburser who may make the election provided by this section with respect to the sales proceeds received by O. C, who retains the entire proceeds received from P, is not a qualified disburser. P must not withhold upon the payment to O but must withhold upon the payment to C in accordance with the rules of § 51.4995-1.

*Example (5).* Assume the same facts as in example (1) except that O, after retaining the 50 percent share of the sales proceeds attributable to O's production, distributes the remaining proceeds to producer A. Assume further that A retains 20 percent of the 50 percent payment from O and distributes the remaining 80 percent to other producers. O and A are both qualified disbursers because O distributes 50 percent of the entire sales proceeds and A distributes 40 percent. If both O and A make the election provided by this section, O does not withhold tax from the payments to A and deposits tax with respect to O's own production as a producer whose crude oil is not subject to withholding.

**§ 51.4996-1 Definitions.**

For purposes of this part and chapter 45 of the Code—

(a) *Purchaser.* The term "purchaser" includes only the first person (as defined in section 7701 (a)(1)) purchasing production of domestic crude oil.

(b) *Producer.*— (1) *In general.* Except as otherwise provided in this paragraph, the term "producer" means the holder of the economic interest with respect to the crude oil in place in the ground. For this purpose, the term "economic interest" has the same meaning as it has for purposes of subtitle A of the Code. For example, the owner of a production payment shall be treated as the producer only to the extent that the production payment is treated as an economic interest by section 636 (taking into account the effective date of that section).

(2) *Partnerships, trusts, and estates.* In the case of a partnership, the partnership's economic interest in the crude oil shall be allocated among the partners on the basis of each partner's proportionate share of the partnership's income from the crude oil, and the partner to whom the crude oil is allocated shall be treated as the producer of the crude oil. In the case of a trust or estate, the entity is the producer rather than the beneficiaries (see § 51.4994-1 for the treatment of trusts and estates for purposes of determining the applicability of an exemption from the windfall profit tax).

(3) *Net profits interest.* [Reserved]

(c) *Operator.* The term "operator" means the person who bears more of the responsibility for the management and operation of crude oil production from the property than any other person. In the case of a business entity (including a partnership) the operator is the entity and not its employee or owner (or general partner). However, under section 4996(a)(2)(B), another person may be designated as the operator, for purposes of chapter 45 of the Code by persons holding 50 percent or more of the total shares of production attributable to operating mineral interests in the property. Such a designation must be made in writing and signed by all persons participating in the designation. A copy of the designation document shall be furnished to the Internal Revenue Service Center, Austin, Texas, within 30 days of its effective date.

(d) *Removed from the premises; deemed removed.*—(1) *In general.* Except as otherwise provided in this paragraph, crude oil is removed from the premises when it is physically transported off the premises. If the manufacture or conversion of crude oil into refined products begins before it is considered to have been removed from the premises, the crude oil shall without exception be treated as removed from the premises on the date the manufacture or conversion begins. Additionally, crude oil (other than crude oil described in subparagraph (2) or crude oil that has been manufactured or converted) that is used on the premises shall be treated as removed from the premises on the date of such use. The term "premises" has the same meaning as it has for purposes of determining gross income from the property under section 613 (*i.e.,* immediate vicinity of the well). See § 1.613-3(a).

(2) *Certain use not considered removal.* Crude oil that is produced and then, without leaving the premises and without manufacture or conversion, injected into any well on the premises or used on the premises to power a production process such as a tertiary injection process or a water flood, or production equipment such as an artificial lift device, is not deemed removed from the premises.

(3) *Certain transportation not considered removal.* (i) This subparagraph (3)(i) applies to the transportation of crude oil away from the premises to another part of the same tract or parcel of land, or from one tract or parcel of land to a contiguous tract or parcel of land (or to a tract or parcel that is in a group of contiguous tracts or parcels that is contiguous to a producing tract or parcel). Such transportation shall not be considered removal from the premises provided (A) that the crude oil has not been manufactured or converted, (B) that on a tract or parcel of land described in the preceding sentence the crude oil either is used to power a production process or production equipment or is injected into a well, and (C) that the same person or group of persons holds 100 percent of the operating mineral interests (as defined in § 1.614-2(b)) in each of the tracts or parcels of land. If the crude oil not deemed removed pursuant to this subparagraph (3)(i) is produced from a property from which more than one category of crude oil is produced, the crude oil that is injected or used to power a production process or production equipment shall be allocated among such categories in proportion to the production from that property in each such category that was removed from the premises during the immediately preceding quarter. For purposes of the preceding sentence, the categories of crude oil are tier 1 oil, tier 2 oil, newly discovered oil, tier 3 oil other than newly discovered oil, and exempt oil.

(ii) Crude oil shall not be considered removed from the premises when, prior to sale, it is transported a short distance from the premises to a storage facility where the crude oil is to be held until sale. In that case, the crude oil shall be considered to be removed from the premises when it is removed from the storage facility.

(4) *"Wash" and "frac" oil.* If oil that has been removed or deemed removed pursuant to this paragraph is injected through a well into a reservoir (*e.g.*, "wash" or "frac" oil), the first crude oil produced from the same reservoir through that well after injection (up to an amount equal to the amount injected) shall be deemed not removed, provided the operator certifies the information required by paragraph (b)(7) of § 51.6050C-1. The provisions of this subparagraph do not apply to oil for which a deduction is allowable under section 193.

(e) *Taxable period.* The term "taxable period" means March 1980 and each calendar quarter beginning after March 1980.

(f) *Energy regulations.* The term "energy regulations" means regulations prescribed under section 4(a) of the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. 753(a)) (crude oil price control regulations). References to the energy regulations shall refer to those regulations as in effect on April 2, 1980, unless the reference is to the March or June 1979 regulations. See section 4996(b)(8).

(g) *Integrated oil company.* Except as provided in paragraph (g)(4) of this section, the term "integrated oil company" means a taxpayer that is a "retailer" or "refiner" or a taxpayer who has made the election provided in paragraph (g)(3) of this section.

(1) *Retailer.* The term "retailer" means any taxpayer described in section 613A(d)(2) applying that section on a quarterly basis, *i.e.*, one who directly, or through a related person, sells crude oil or natural gas (excluding bulk sales to commercial or industrial users) or any product derived from crude oil or natural gas—

(i) Through any retail outlet operated by the taxpayer or a related person, or

(ii) To any person—

(A) Obligated under an agreement or contract with the taxpayer or related person to use a trademark, trade name, of service mark or name owned by such taxpayer or related person, in marketing or distributing crude oil or natural gas or any product derived from crude oil or natural gas, or

(B) Given authority, pursuant to an agreement or contract with the person or related person, to occupy any retail outlet owned, leased, or in any way controlled by the taxpayer or related person.

However, notwithstanding the preceding sentence, this subparagraph shall not apply in any case where the combined gross receipts from the sale of such crude oil, natural gas, or any product derived therefrom, for the taxable period of all retail outlets taken into account for purposes of this subparagraph do not exceed $1,250,000. For purposes of this subparagraph, sales of crude oil, natural gas, or any product derived from crude oil or natural gas shall not include sales made of such items outside the United States, if no domestic production of the person or a related person is exportd during the taxable period or immediately preceding taxable period.

(2) *Refiner.* The term "refiner" means any taxpayer described in section 613A(d)(4) applying that section on a quarterly basis, *i.e.*, one who is engaged in the refining of crude oil or is related to a person so engaged, provided that on any day during the taxable period the refinery runs of the person and any related person exceed 50,000 barrels.

(3) *Election to be treated as an integrated oil company.* Any taxpayer who was an integrated oil company during any taxable period of the current or preceding calendar year may elect, for purposes of administering the windfall profit tax, to be treated as an integrated oil company for some or all of the taxable periods in the current year during which the taxpayer would not otherwise be considered to be an integrated oil company. The election shall be made by filing a document with the Internal Revenue Service Center, Austin, Texas. The document shall state that the election is made and shall set forth the facts that entitle the taxpayer to make the election. The election shall be considered to take effect with the first taxable period beginning after the election document is received by the Internal Revenue Service Center and to remain in effect for all taxable periods until revoked, unless the election document specifies a different effective period. The election may be revoked at any time by filing with the Internal Revenue Service Center, Austin, Texas a document that states that the election is revoked. The revocation shall be effective with the first taxable period beginning after the revocation document is received by the Internal Revenue Service Center unless a later effective date is specified in the revocation document. If an election or revocation document is sent to the service center by mail, it shall be considered received when posted by United States mail, properly addressed, and with sufficient postage.

(4) *Special rule.* For purposes of § 51.4995-3 (relating to depositary requirements) if for any taxable period a taxpayer is an integrated oil company solely because that taxpayer is related to a person who is an independent refiner (as defined in paragraph (h) of this section), such taxpayer shall not be considered an integrated oil company for that taxable period.

For purposes of this paragraph, the term "related person" has the same meaning as in section 613A(d) (2) and (4).

(h) *Independent refginer.* The term "independent refiner" means any taxpayer who is engaged in the refining of crude oil, and who

(1) Obtained, directly or indirectly, in the second preceding calendar quarter, more than 70 percent of his refinery input of domestic crude oil (or 70 percent of his refinery input of domestic and imported crude oil) from producers who do not control, are not controlled by, and are not under common control with such refiner, and

(2) Marketed or distributed in such quarter and continues to market or distribute a substantial volume of gasoline refined by him through branded independent marketers or nonbranded independent marketers. The term "branded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products pursuant to—

(i) An agreement or contract with a refiner (or a person who controls, is controlled by, or is under common control with such refiner) to use a trademark, trade name, service mark, or other identifying symbol or name owned by such refiner (or any such person), or

(ii) An agreement or contract under which any such person engaged in the marketing or distributing of refined petroleum products is granted authority to occupy premises owned, leased, or in any way controlled by a refiner (or person who controls, is controlled by, or is under common control with such refiner),

but who is not affiliated with, controlled by, or under common control with, any refiner (other than by means of a supply contract, or an agreement or contract described in subparagraph (1) (i) or (ii)) and who does not control such refiner. The term "nonbranded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products, but who is not a refiner, is not a person who controls, is controlled by, is under common control with, or is affiliated with a refiner (other than by means of a supply contract), and is not a branded independent marketer. For purposes of this paragraph, the term "independent refiner" does not include any taxpayer who is not directly engaged in the refining of crude oil even if such taxpayer is related to a person directly engaged in the refining of crude oil. However, for purposes of the preceding sentence, a taxpayer not directly engaged in refining will be treated as directly engaged in refining if an amount equal to 95 percent or more of the crude oil purchased during the calendar quarter of which such taxpayer is the first purchaser is refined (or will be refined) by a refiner (or refiners) who is a member of a controlled group of corporations (within the meaning of section 1563(a)) of which such taxpayer is a member, provided that the refiner (or refiners) is an independent refiner without regard to this sentence and further provided that such taxpayer is not a producer of crude oil and is not a person described in paragraph (2) or (4) of section 613A(d). If a taxpayer would be treated as directly engaged in the refining of crude oil under the rule of the preceding sentence but for the fact that an amount less than 95 percent of such crude oil purchased is refined (or will be refined) by a refiner within the same controlled group of corporations as the taxpayer, the taxpayer nevertheless will be treated as directly engaged in the refining of crude oil if it is established by clear and convincing evidence that an amount equal to 95 percent or more of such crude oil purchased would have been refined by a refiner (or refiners) within the same controlled group of corporations but for an act of God, a strike, a severe mechanical breakdown, an injunction, or a restraining order.

(i) *Property.* [Reserved]

(j) *Disburser.* The term "disburser" means a person receiving payments from the sale of crude oil who is responsible for distributing some or all of the payment to one or more producers of the oil (either directly or through intermediate disbursers). In the case of a partnership distributing proceeds from the sale of crude oil to its partners, the partnership and not the partner (or partners) responsible for distributing the proceeds is considered the disburser.

(k) *Domestic.* The term "domestic," when used with respect to crude oil, refers to any crude oil (including crude oil derived from natural gas production) produced in the United States or in a possession of the United States.

(l) *Crude oil.* [Reserved]

(m) *Other.* See section 4996 (b) and (d) for definitions of "barrel," "United States," "possession of the United States," "Indian tribe," and "Alaskan oil from Sadlerochit reservoir."

**§ 51.4996-2 Severance tax adjustment.**

(a) *In general.* The severance tax adjustment with respect to any barrel of crude oil is the amount by which any severance tax imposed with respect to that barrel exceeds the severance tax which would have been imposed if the barrel had been valued at its adjusted base price.

(b) *Severance tax defined.* For purposes of this section, the term "severance tax" means any tax imposed by a State (not including a political subdivision of a State) with respect to the extraction of crude oil that is determined on the basis of the gross value of the extracted crude oil. The term "severance tax" does not include a tax levied on the value of reserves in the ground or a tax levied on the basis of net proceeds from production. Furthermore, a tax on the removal of crude oil from the ground levied as a fixed fee per barrel is not a severance tax because the amount of that tax is not determined by reference to the gross value of the extracted crude oil.

(c) *Limitations.*—(1) *15 percent limitation.* A severance tax shall not be taken into account to the extent that the total rate thereof exceeds 15 percent.

(2) *Increases after March 31, 1979.* The amount of a State's severance tax taken into account under paragraph (a) of this section shall not exceed the amount which would have been imposed under that State's severance tax, as in effect on March 31, 1979, unless that excess is attributable to an increase in the rate of the severance tax (or to the imposition of a severance tax) which applies equally to all portions of the gross value of each barrel of crude oil subject to that tax. For purposes of this subparagraph, the conversion of a tax levied at a fixed fee per barrel into a tax based on the gross value of crude oil removed constitutes an initial imposition of a severance tax.

**§ 51.4996-3 Special rules for post-1978 transfers of property.**

(a) *In general.* The rules of this section apply for all purposes of this part and chapter 45 of the Code, including the application of the June 1979 energy regulations for purposes of this part and chapter 45 of the Code.

(b) *Classification of crude oil from property transferred after 1978.* If a portion of a property (as defined in paragraph (i) of §51.4996-1) is transferred after December 31, 1978, any crude oil produced from any portion of the property constitutes crude oil from a stripper well property, newly discovered oil, or heavy oil only if such crude oil would be so classified if there had not been a transfer. The term "transfer" means any sale, exchange, lease, sublease, gift, bequest, devise, or other disposition (including a distribution by an estate, or a contribution to or distribution by a corporation, partnership, or trust, whether or not a taxable event) of rights (including rights less than fee simple) with respect to the property. Thus, for example, a change in the identity of the holder of a lease, mineral rights, royalty rights, or fee simple ownership rights with respect to a portion of the property is a transfer, even if such change is the result of corporate reorganization, gift, devise, or inheritance.

**§ 51.4997-1 Returns and recordkeeping.**

(a) *Returns.* Returns with respect to windfall profit taxes imposed by section 4986 shall be made as provided in this section.

(1) *Quarterly return.* A return for each taxable period (on Form 720, with Form 6047 attached thereto, in accordance with the instructions on those forms) shall be made by the following:

(i) Each purchaser of crude oil required to deduct and withhold tax pursuant to § 51.4995-1;

(ii) Each operator of a property or qualified disburser who, having made an election pursuant to §§ 51.4995-4 or 51.4995-5, is required to deduct and withhold tax; and

(iii) Each producer of crude oil the tax with respect to which is excepted from the withholding requirement by a subparagraph of § 51.4995-1 (a).

(2) *Annual return.* A return for each calendar year shall be made by each producer of crude oil whose liability for tax with respect to crude oil that was removed during the four taxable periods of the calendar year exceeds the amount of tax withheld with respect to that crude oil.

Every producer taking the net income limitation provided by section 4988 (b) into account in making windfall profit tax deposits shall file quarterly and annual statements in accordance with forms and instructions provided for that purpose. See § 51.6076-1 for the rules relating to the time for filing the returns required by this section and § 51.6081-1 for extensions of time for filing returns.

(b) *Recordkeeping requirements.* Each taxpayer liable for tax under section 4986, each producer or purchaser of domestic crude oil, each operator of a property from which domestic crude oil was produced, each disburser, and each partnership or other person receiving information on behalf of or providing information to producers under this part shall keep records of all documents, material, and information necessary to the determination of the windfall profit tax or that affect his, her, or its administrative obligations under the Crude Oil Windfall Profit Tax Act of 1980 or the regulations in this part, including material furnished to other persons, as well as information received from other persons. The records shall be kept at all times available for inspection by authorized internal revenue officers or employees, and shall be retained so long as the contents thereof may become material in the administration of any internal revenue law.

**§ 51.4997-2 Certain information to be furnished by purchaser and others.**

(a) *In general*—(1) *Purchasers.* If the rules for collection and deposit of tax under §§ 51.4995-1 and 51.4995-3 apply to a purchaser with respect to any crude oil (or would apply to the purchaser in the absence of an exemption certificate given pursuant to § 51.4995-1 (b)(3)), such purchaser shall furnish statements in accordance with paragraphs (b), (c), (d), and (e) of this section to each producer of the crude oil, except that, if payment for the crude oil is made to the operator of the property from which the crude oil is produced, a partnership, or other disburser (whether or not a "qualified disburser," as defined in § 51.4995-5) rather than to each producer individually, the statements shall be furnished to the operator, partnership, or other disburser, as the case may be. Such purchaser shall also file the information return required by paragraph (c) of this section with the Internal Revenue Service (in the case of yearly statements on Form 6248).

(2) *Operators, partnerships, disbursers*—(i) *In general.* Except as otherwise provided in this subparagraph, any person who is to be furnished a statement pursuant to paragraph (a)(1) with respect to crude oil of which such person is not the producer (referred to hereinafter in this section as the "intermediary") shall, within 15 days of receipt of any statement furnished pursuant to paragraph (a)(1), furnish to each producer, operator, partnership, or disburser to whom such person makes payment for the crude oil a statement containing information relating to the share of crude oil attributable to that producer, operator, partnership, or disburser. However, the rule of the preceding sentence shall apply to the statement required by paragraph (b) of this section (relating to monthly statements of tax withheld) to be furnished by a partnership to a partner only if the partner to receive the statement has requested that it be furnished. The statement furnished by the intermediary to the producer, operator, partnership, or disburser shall be based upon the information contained in the statement received by the intermediary pursuant to paragraph (a)(1) or this subparagraph. Such statement shall not contain any information contrary to the information contained in the statement received by the intermediary pursuant to paragraph (a)(1) or this subparagraph. In the case of a partnership furnishing the statement required by paragraph (c) (Form 6248) or an annual statement required by paragraph (d) directly to any of its partners who are producers, the statement shall be furnished by the date that is the later of—

(A) 15 days following receipt of such a statement by the partnership, or

(B) The first April 30 following the end of the year to which the statement relates.

Any person furnishing the statement required by paragraph (c) (Form 6248) shall file a copy with the Internal Revenue Service as an information return. If a person required to furnish a statement under this paragraph makes payment to the same producer, operator, partnership, or disburser for crude oil removed from more than one property, the information for each property may be aggregated into one statement (and one information return) furnished under this paragraph. If at the time a person furnishes a yearly statement required by paragraph (c) (Form 6248) to a producer, operator, partnership, or disburser such person expects to provide the same producer, operator, partnership, or disburser with another return with an additional or amended statement for the same year, the statement shall inform the recipient of that fact. If an intermediary is required by this subparagaraph to furnish and file Form 6248 and the intermediary has not been furnished the Form 6248 pursuant to paragraph (a)(1) of this subparagraph on which to base its own Form 6248 by the first April 30 following the end of the year to which the Form 6248 relates, the intermediary shall, within 15 days (*i.e.*, by May 15), furnish to each producer, operator, partnership, or disburser to whom the intermediary makes payments for crude oil for which the Form 6248 was not received, a statement setting forth the amount of payments that the intermediary made to the recipient of the statement during the immediately preceding calendar year, the name, address, and employer identification number (or, if none, social security number) of the person required by paragraph (a)(1) or this subparagraph to furnish Form 6248 to the intermediary, the fact that the person required to furnish Form 6248 to the intermediary has not yet done so, and such other information as may be required by Form 6248 or its instructions. The intermediary shall file with the Internal Revenue Service a copy of each statement furnished pursuant to the preceding sentence by the time the intermediary must furnish such statement (*i.e.*, May 15).

(ii) *Notification of error.*—(A) *Underwithholding.* If an intermediary is of the opinion that there has been an underwithholding or overwithholding of windfall profit tax on a payment received, the intermediary shall, within 5 days of forming the opinion that withholding was inaccurate, notify the person from whom the intermediary received payments of the amount considered to be underwithheld or overwithheld. In addition, the intermediary shall, at the time the intermediary makes payment of an amount considered to be inaccurately withheld upon to any producer, operator, partnership, or disburser, furnish to each such payee a statement setting forth sufficient information to briefly explain the reason for the difference, if known, between the purchaser and the intermediary on the amount withheld.

(B) *Incorrect yearly statement.* If an intermediary is of the opinion that the yearly statement (Form 6248) it received pursuant to paragraph (a)(1) or this subparagraph is incorrect, the intermediary shall, within 15 days of forming that opinion, notify the person furnishing the statement of the intermediary's opinion. If an intermediary notifies the person furnishing the statement that it considers the statement furnished to be in error, the intermediary shall furnish the yearly statement required by paragraph (a)(2)(i) of this section on the date that is the earlier of—

(*1*) 30 days after the intermediary notifies the person furnishing the statement to the intermediary that the intermediary considers it to be in error, or

(*2*) 10 days after notification from such person that such person disagrees with the intermediary's opinion that there is an error.

The statement furnished by the intermediary shall be based upon the information contained in the statement furnished to the intermediary pursuant to paragraph (a)(1) or this subparagraph including any modification made to that statement by the person furnishing the statement after receiving a notification from the intermediary pursuant to this subdivision. However, the intermediary shall indicate on the statement the difference of opinion if Form 6248 or its instructions so require.

(3) *Identifying numbers.* Every person with respect to whom the annual information return prescribed by paragraph (c) of this section (Form 6248) is required to be made by another person and every person who is required to be shown as a member of a related group on another person's independent producer certificate pursuant to § 51.4995-2(c)(1) shall furnish to such other person the person's employer identification number, or if an employer identification number has not been assigned, the person's social security account number.

(b) *Monthly statement.* [Reserved]

(c) *Yearly statement of windfall profit tax liability.*—(1) *In general.* For each calendar year, the purchaser shall furnish statements and shall file information returns with the Internal Revenue Service. A separate statement shall be furnished to and a separate information return shall be filed for each producer, operator, partnership, or disburser to whom the purchaser made payments for crude oil purchased during the calendar year. If the purchaser made payments to the same producer, operator, partnership, or disburser for crude oil purchased from more than one property, the information for each property may be aggregated into one statement and one information return. Furthermore, that statement and return may be combined with any statement and return required by paragraph (a)(2). If at the time such a statement is furnished to a person the purchaser expects to provide that person with another statement with additional information for the same year, the purchaser shall inform the recipient of that fact. Each statement and information return shall contain the information with respect to oil for which that person received payment required by the form (Form 6248) or its instructions. If the purchaser did not withhold tax from payments to that person because of the receipt of an exemption certificate, the yearly statement and information return shall identify the applicable exemption and set forth the number of barrels that would have been in each tax tier if the oil had been taxable crude oil.

(2) *Producers not subject to withholding.* Every producer of crude oil not subject to withholding under § 51.4995-1, other than a producer who has certified pursuant to § 51.4995-2 that its share of production is "exempt oil," shall file the information return with respect to that crude oil that would otherwise have been required to be filed by the purchaser.

(3) *Prescribed form.* The statement and information return required by this paragraph shall be furnished and filed on Form 6248. The statement shall be furnished in duplicate. The information return shall be filed in the place and in the manner provided in the instructions to Form 6248. The Internal Revenue Service may prescribe procedures permitting the filing of the information return required by this paragraph on magnetic tape (or other approved media) instead of paper returns.

(4) *Time for furnishing yearly statement of windfall profit tax liability and filing yearly information returns.* Each yearly statement required to be furnished by a purchaser under this paragraph for any calendar year shall be furnished on or before March 31 of the year immediately following the calendar year to which the statement applies, and each yearly information return required to be filed by a purchaser shall be filed on or before April 30 of that year. Each yearly statement required to be filed by an intermediary shall be filed within 30 days of the date the intermediary is required to furnish such statement.

(5) *Correction of errors in statements and returns.* (i) If a person required to furnish a yearly statement or file an information return under this paragraph or paragraph (a)(2) ascertains not later than June 30 of the year following the year to which the statement relates that the statement or return is not correct, such person shall correct the error by furnishing a corrected statement and filing a corrected return not later than the following July 31. However, the preceding sentence shall not apply (A) in the case of an intermediary for an error for which the intermediary is required by paragraph (a)(2)(ii) to give a notification of error, or (B) if the corrected statement or return would reflect a change of less than $100 in each of the following items: Windfall profit tax liability, windfall profit tax withheld, and amount of underwithheld or overwithheld tax.

(ii) If, at the time that a person is required to furnish an original yearly statement and file a return under this paragraph for any year, it has been ascertained that the statement of an earlier year was not correct and has not been corrected, such person shall furnish a corrected statement and file a corrected return by the time that the next original statement and return is required. However, the preceding sentence shall not apply (A) in the case of an intermediary for an error for which the intermediary is required by paragraph (a)(2)(ii) to give a notification of error, or (B) if the corrected statement or return would reflect a change of less than $1.00 in each of the following items: Windfall profit tax liability, windfall profit tax withheld, and amount of underwithheld or overwithheld tax.

(iii) The provisions of this subparagraph may be illustrated by the following examples:

*Example (1).* On March 31, 1983, A, a purchaser of crude oil, furnished B, a producer of crude oil, with a yearly statement (Form 6248) relating to crude oil that A purchased from B during 1982. On June 10, 1983, A ascertained that the yearly statement furnished to B understated B's windfall profit tax liability by $100. A must furnish to B and file with the Internal Revenue Service a corrected yearly statement by July 31, 1983.

*Example (2).* Assume the facts in example (1) except that A ascertained the error on July 1, 1983. A would be required to furnish and file the corrected yearly statement by March 31, 1984 (the time the next original yearly statement is required to be furnished and filed).

*Example (3).* Assume the facts in example (1) except that the yearly statement understated B's windfall profit tax liability by $99. A would be required to furnish and file the corrected yearly statement by March 31, 1984.

*Example (4).* On April 30, 1983, C, an intermediary, furnished D, a producer of crude oil, a yearly statement relating to 1982 for crude oil for which C made payments to D. On June 1, 1983, C ascertained that, based on the information contained in the yearly statement furnished to C on March 31, 1982, C had understated D's windfall profit tax liability by $50. On April 15, 1984, C received a yearly statement relating to payments made to C for crude oil removed in 1983. C is required to furnish to D a yearly statement relating to 1983 for payments made to D by April 30, 1984. C is also required to furnish to D by April 30, 1984, a correct yearly statement relating to 1982. C is also required to file with the Internal Revenue Service the correct yearly statement by May 30, 1984 (the date that is 30 days after the date C is required to furnish the corrected yearly statement).

(6) *Identifying numbers.* Any person required to make an information return with respect to any other person under this paragraph shall obtain from that other person that person's identifying number (employer identification number or, if none, social security account number) and shall include that number in the information return. Furthermore, any person required to make an information return that is based, in whole or in part, upon information received from another person shall include that other person's identifying number in the information return.

(d) *Detailed statement to be furnished upon request.*

(1) [Reserved].

(2) If the information request specifies that the information is requested for each taxable period, the information shall be provided for each taxable period not later than the last day of the second month following the end of the taxable period (or, if later, 90 days following receipt of the request). If the information request states that the person requesting the information has an income tax year (for Federal income tax purposes) that ends on a date other than the last day of a calendar quarter and states the date on which the taxable year ends, the information for the taxable period within which the taxable year (for Federal income tax purposes) ends shall be provided for each month in that period. In any other case, the requested information shall be provided for each calendar year not later than March 31 of the following calendar year (or, if later, 90 days following receipt of the request).

(e) *Suspended accounts.* If, due to the fact that the identity of the producer is not known or is in dispute, the sales proceeds of crude oil have been placed in escrow or otherwise held in suspense and have not been distributed to the producer at the time that the information return is required to be filed under paragraph (c), a return (Form 6248), clearly identified as relating to suspended funds, shall be filed for each such account. At the filer's option, some or all of the returns may be aggregated into a single return. Not later than 60 days after the sales proceeds have been released to the producer, an information return shall be filed with an identification of the producer, and the statements required by paragraphs (c) and (d) of this section for past periods shall be furnished to the producer.

(f) *Cross reference.* For the requirement that the operator or qualified disburser furnish the statements and file the returns required by this section in the event that the election has been made to have the operator or qualified disburser deduct and withhold tax, etc. see §§ 51.4995-4 and 51.4995-5.

**§ 51.6050C-1 Information furnished by operator for purposes of windfall profit tax.**

(a) *In general.* The operator of any property from which domestic crude oil is removed during a calendar month shall furnish a monthly statement, signed under the penalties of perjury if the statement is furnished to the purchaser, certifying the information specified in paragraph (b) of this section to:

(1) The purchaser of the crude oil, if the purchaser is required to withhold tax from payments for the crude oil pursuant to § 51.4995-1 (see paragraph (e) of this section for the requirement that the statement be furnished to a qualified disburser), or

(2) The producer, in any other case, except that if the producer of crude oil is a partner in a partnership, this statement may be furnished to the partnership if the producer and the partnership so agree. In that case, the partnership shall furnish the information to the producer with respect to that producer's share of the crude oil within 15 days of receipt.

(b) *Information to be certified.* In the case of crude oil that qualifies as exempt Alaskan oil (as defined in § 51.4994-1), the statement shall certify that the crude oil is exempt Alaskan oil. In all statements not certifying an exemption for Alaskan oil, the following information is to be certified in the statement required under paragraph (a) of this section:

(1) The tier, for purposes of the tax imposed by section 4986, of the crude oil removed during the month and, if the crude oil is tier 3 oil, whether the crude oil constitutes newly discovered oil, heavy oil, or incremental tertiary oil;

(2) The amount of the crude oil removed and, if the crude oil removed includes crude oil of different tiers or categories, the amount of crude oil removed of each tier or category;

(3) The adjusted base price (within the meaning of section 4989) for each tier of crude oil removed;

(4) The severance tax adjustment, if any, provided under section 4996(c) with respect to each tier of crude oil removed;

(5) The TAPS adjustment, if any, provided under section 4996(d), and the average removal price for the month, in the case of crude oil from the Sadlerochit Reservoir;

(6) The property from which the crude oil was removed; and

(7) If oil that has been removed or deemed removed is injected into a well (*e.g.,* "wash" or "frac" oil)—

(i) The quantity of crude oil produced that is deemed not removed under § 51.4996-1(d)(4) (assuming the operator makes the certification required by this paragraph), and

(ii) That the operator will maintain records sufficient to establish that such quantity of crude oil is deemed not removed under that section (*e.g.,* documentation of the purchase, injection, recovery, and removal or sale of the "wash" or "frac" oil).

However, in the case of a statement furnished to a purchaser, the statement need not certify any information that was certified in a previous statement furnished to that purchaser under this section provided that the omitted information has not changed since the previous certification and the purchaser has not requested recertification. When providing information to a purchaser, the operator shall provide the information with respect to crude oil sold to that purchaser removed during the month. In the case of a statement furnished to a producer or partnership, the operator shall provide the information with respect to that person's allocable share of all crude oil removed from the premises during the month (including any crude oil delivered in kind to that producer).

(c) *Time and manner of certifying information.* The operator shall furnish the statement required by paragraph (a) of this section to the purchaser or producer, as the case may be, no later than the fifteenth day of the month following the calendar month in which the crude oil was removed.

(d) *Agreement between operator and recipient of statement.* If the purchaser or producer agrees in a signed statement that the operator shall be relieved of the duty of furnishing to such purchaser or producer—

(1) The statement otherwise required under paragraph (a) of this section, or

(2) Some or all of the information required under paragraph (b) of this section,

the operator shall be relieved of such duty, provided that the purchaser or producer has the information necessary to comply with all of the requirements of this part without such statement or information. Such an agreement shall immediately cease to have effect when the operator, purchaser, or producer, by a written statement signed by an authorized person, notifies the other party that it is terminating the agreement.

(e) *Special rule.* If an election under § 51.4995-5 is in effect under which a qualified disburser assumes the obligations of the purchaser, the statement otherwise required by this section to be furnished to the purchaser shall be furnished to the qualified disburser.

(f) *Producer's certificate.* For the requirement that certain operators furnish producer certificates to purchasers, see § 51.4995-2(e).

(g) *Penalties.* See sections 6678, 7206, and 7241 (relating to civil and criminal penalties).

**§ 51.6076-1 Time for filing return of windfall profit tax.**

Each quarterly return required by paragraph (a)(1) of § 51.4997-1 shall be filed not later than the last day of the second month following the close of the taxable period. Each annual return required by paragraph (a)(2) of § 51.4997-1 shall be filed not later than May 31 of the first year following the close of the calendar year in which the crude oil giving rise to the underpayment was removed.

**§ 51.6081-1 Extension of time for filing returns.**

(a) District directors and directors of service centers are authorized to grant a reasonable extension of time for filing with the Internal Revenue Service any return, statement, or other document which relates to the tax imposed by chapter 45 and which is required under the provisions of chapter 45 or the regulations thereunder. However, except in the case of taxpayers who are abroad, such extensions of time shall not be granted for more than 3 months. An extension of time for filing a return shall not operate to extend the time for payment of the tax or any part thereof unless specified to the contrary in the extension. Any extension of time for filing a return shall not operate to extend the time for furnishing any information statement or other document with a person other than the Internal Revenue Service.

(b) The application for an extension of time for filing the return shall be addressed to the district director or director of the service center with whom the return is to be filed and must contain a full recital of the causes for the delay. It should be made before the expiration of the time within which the return otherwise must be filed, and failure to do so may indicate negligence and constitute sufficient cause for denial. It should, where possible, be made sufficiently early to permit consideration of the matter and reply before what otherwise would be the due date of the return.

(c) If an extension of time for filing the return is granted, a return shall be filed before the expiration of the period of extension.

**§ 51.6402-1 Credit or refund of overpayment of windfall profit tax.**

(a) *In general.* Any purchaser or producer who pays, or is deemed to have paid under section 4995(a)(4), more than the correct amount of the crude oil windfall profit tax imposed by chapter 45 for a taxable period may file a claim for refund of the overpayment or may claim credit for such overpayment, in the manner and subject to the conditions stated in this section and § 301.6402-2 of this chapter (Regulations on Procedure and Administration).

(b) *Overpayments by purchasers and by producers depositing tax.*—(1) *In general.* If, for any taxable period, a purchaser or a producer (or a person acting in both capacities) has paid more than the sum of the amount required to be deposited as a purchaser for crude oil removed during that taxable period plus the amount of tax imposed by section 4986 (computed without regard to the net income limitation on windfall profit provided in section 4988(b)) on the removal in that taxable period of crude oil that is not subject to withholding, the purchaser or producer may file a claim for refund of that overpayment on or after the date for filing the return of such tax for such taxable period under section 6076 or may claim credit for such overpayment against any liability for a tax imposed by chapter 1 or 45 in accordance with the forms and instructions provided for that purpose.

(2) *Producers; net income limitation.* Except as provided in paragraph (b)(1), if, for any taxable period, a producer has paid more than the amount of tax imposed by section 4986 (computed with regard to the net income limitation provided in section 4988(b)) on the removal in that taxable period of crude oil that is not subject to withholding, the producer may file a claim for credit or refund of that overpayment only after the end of the taxable year (for Federal income tax purposes) with respect to which the limitation is computed. At that time, the producer may claim a credit or refund of the overpayment as provided in paragraph (b)(1) of this section.

(3) *Purchasers unable to recover underwithholding through subsequent overwithholding.* A purchaser who withheld less than the amount required to be withheld from a payment under § 51.4995-1, who deposited the amount required to be withheld, and who has not corrected the underwithholding pursuant to § 51.4995-1(c) before the expiration of the adjustment period, may file a claim for refund of the excess of the amount deposited over the amount withheld if the amount claimed has been reported as underwithholding on the appropriate Form 6248 furnished and filed pursuant to § 51.4997-2(c) and if the purchaser establishes that the producer has paid in full the producer's liability under section 4986 for the calendar year of removal of the crude oil. Any claim for refund shall be filed on Form 843.

(c) *Overpayments attributable to amounts deducted and withheld.*—(1) *In general.* Under section 4995(a)(4), the producer of crude oil is treated as having paid any amount withheld on the last day of the first February after the calendar year in which the crude oil was removed from the premises. Therefore, if the sum of the producer's liability for the tax imposed by section 4986 (computed without regard to the net income limitation provided in section 4988(b)) on crude oil subject to withholding under § 51.4995-1 for all taxable periods of a calendar year is less than the amount deducted and withheld from the producer under § 51.4995-1 with respect to crude oil removed during the calendar year, an overpayment of tax exists after such last day of February. The producer may file a claim for refund of the overpayment or may claim credit for the overpayment against any liability for a tax imposed by chapter 1 or 45 in accordance with the forms and instructions provided for that purpose. The producer shall attach to the claim a copy of all Forms 6248 furnished to the producer pursuant to § 51.4997-2.

(2) *Net income limitation.* Except as provided in paragraph (c)(1), if the sum of the producer's liability for the tax imposed by section 4986 (computed with regard to the net income limitation provided in section 4988(b)) on crude oil subject to withholding under § 51.4995-1 for any taxable period is less than the sum of the amounts deducted and withheld from the producer under § 51.4995-1 with respect to crude oil removed in that taxable period, the excess may be claimed as a credit or refund only after the later of—

(i) The last day of the first February after the end of the taxable period, or

(ii) The last day of the taxable year (for Federal income tax purposes) with respect to which the limitation is computed.

Thereafter, the producer may file a claim for credit or refund of the overpayment as provided in paragraph (c)(1) of this section.

(d) *Producers who are partners in a partnership with a different taxable year.* If a producer is a partner in a partnership that has a different taxable year (for Federal income tax purposes) than that of the producer and if the net income limitation is taken into account with respect to properties held by the partnership, then the rules of paragraph (b)(2) and (c)(2) shall be applied by treating the partnership taxable year as the taxable year with respect to which the net income limitation is computed. Multiple claims for credit or refund may be filed by a partner who also produces taxable crude oil other than through the partnership.

(e) *Examples.* The rules of this section may be illustrated by the following examples:

*Example (1).* Under § 51.4995-1, the purchaser of crude oil from producer A is not required to deduct and withhold any tax from payments made to A. Consequently, A deposited a total of $1,100 for a certain taxable period. After the end of the taxable period, it is determined that the tax imposed by section 4986, computed without regard to the net income limitation, is $1,000. A estimates that, due to the net income limitation, the actual liability is only $900. Under paragraph (b)(1) of this section, A may file a claim for credit or refund of $100 (the amount by which the $1,100 deposit exceeds the $1,000 tax imposed by section 4986, computed without regard to the net income limitation). Under paragraph (b)(2) of this section, A may claim credit or refund of any overpayment due to the application of the net income limitation only after A's taxable year (for Federal income tax purposes) has ended. However, see § 51.4995-3 (g)(2) for rules relating to estimated tax deposits.

*Example (2).* Producer B's taxable year for income tax purposes is the calendar year. Due to the application of the net income limitation, the amount of windfall profit tax withheld from B exceeds B's liability for each of the four taxable periods of the calendar year. B may file a claim for credit or refund of the overwithheld tax after the last day of February following the end of the calendar year.

*Example (3).* Producer C's taxable year for income tax purposes ends on June 30. Due to the application of the net income limitation, C's windfall profit tax has been overwithheld for each of the four taxable periods within C's taxable year ending June 30, 1981. C may claim credit or refund after June 30, 1981, for the overpayment attributable to crude oil removed during the last two taxable periods of calendar year 1980 (July–September and October–December 1980), because by that time C has been deemed, under section 4995 (a)(4), to have paid the tax with respect to those taxable periods, and the taxable year in which the oil was removed has ended. However, C must wait until after February 28, 1982, to claim credit or refund for the overpayment attributable to crude oil removed during the first two taxable periods of calendar year 1981 (January–March and April–June 1981).

*Example (4).* Assume the same facts as in example (3), except that the purchaser of C's crude oil made an error and overwithheld tax during the last taxable period of calendar year 1980. The error was not ascertained until after June 30, 1981, and thus remained unadjusted when the purchaser furnished C the annual information statement under § 51.4997-2. After February 28, 1981, C may file a claim for credit or refund of the amount overwithheld due to the withholding error. However, C may not claim a credit or refund for the overpayment due to the withholding error. However, C may not claim a credit or refund for the overpayment due to the application of the net income limitation until the dates specified in example (3).

*Example (5).* Assume the same facts as in example (3), except that C's taxable year ends on August 31, and the overpayment due to the net income limitation relates to C's taxable year ending August 31, 1981. C may claim a credit or refund after August 31, 1981, for the overpayment attributable to crude oil removed after August 31, 1980, and before January 1, 1981. After February 28, 1982, C may claim credit or refund for the overpayment attributable to crude oil removed from January 1, 1981, through August 31, 1981. That claim may only reflect overpayments due to the application of the net income limitation for crude oil removed through August 1981 because the last month of the third taxable period of 1981 (September 1981) is in C's next income tax year.

*Example (6).* Under § 51.4995-1, the purchaser of crude oil from producer D is not required to deduct and withhold any tax from payments made to D. D holds a working interest in an oil property and is also a partner in a partnership that holds interests in other properties. D's taxable year for Federal income tax purposes is the calendar year, but the partnership's taxable year ends on June 30. For the four taxable periods of calendar year 1981 D has paid the tax imposed by section 4986, computed without regard to the net income limitation, on the removal of crude oil from both the partnership properties and the property held directly by D. After June 30, 1981, D may file a claim for credit or refund for the first two taxable periods of 1981 if the net income limitation reduces the tax due on the partnership properties. However, that claim may not reflect any reduction in tax due to the net income limitation on the property held directly by D. After D's taxable year ends on December 31, 1981, D may file a claim for credit or refund for any overpayment for the four taxable periods of calendar year 1981 due to the application of the net income limitation to that property. Finally, after June 30, 1982, D may file a claim for credit or refund for the last two taxable periods of 1981 if the net income limitation reduces the tax due on the partnership properties.

*Example (7).* Assume the same facts as in example (6), except that payments made to D are subject to withholding and that the amount withheld from payments to D for crude oil removed during 1981 is equal to the tax imposed by section 4986 computed without regard to the net income limitation. After February 28, 1982 (the date on which D is treated as having paid the withheld tax), D may file a claim for credit or refund for the four taxable periods of 1981 taking the net income limitation into account for all four taxable periods with respect to the property held directly by D and for the first two taxable periods with respect to the partnership properties. However, the claim for credit or refund may not take into account any reduction in tax due to the application of the net income limitation to partnership properties for the last two taxable periods of 1981. Only after the partnership year ends on June 30, 1982, may D file a claim for credit or refund taking that reduction into account.

(f) *Cross-reference.* For examples illustrating the interrelationship of § 51.4995-3 (relating to depositary requirements) and this section, see § 51.4995-3 (g)(2)(ii).

This Treasury decision is issued under the authority contained in sections 4992, 4993, 4995, 4996, 4997, 6050C, 6402, and 7805 of title 26 of the United States Code.

**Roscoe L. Egger, Jr.,**

*Commissioner of Internal Revenue.*

Approved: October 6, 1982.

**David G. Glickman,**

*Acting Assistant Secretary of the Treasury.*

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## DEPARTMENT OF LABOR

## Office of Pension and Welfare Benefit Programs

## 29 CFR Part 2510

## Definitions and Coverage Under Employee Retirement Income Security Act of 1974; Supplemental Payments

**AGENCY:** Office of Pension and Welfare Benefit Programs, Labor.

**ACTION:** Adoption of regulation.

**SUMMARY:** This document contains a final regulation providing guidance on the scope of the term "pension plan" under the Employee Retirement Income Security Act of 1974 (the Act), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the MPPAA). The regulation is intended to enable employers to provide for certain supplemental retirement income payments to former employees under a welfare plan rather than under a pension plan to help offset the effects of inflation on pension benefits. The regulation affects participants and beneficiaries of a single employer and multiemployer pension plans, as well as employers maintaining these plans.

**DATE:** The regulation applies to payments made on or after September 26, 1980, except that § 2510.3-2(g)(2) applies to payments after January 1, 1975.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Patricia Nitchie, Pension and Welfare Benefit Programs, U.S. Department of Labor, Washington, D.C., telephone (202) 523-8521. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:**

### A. Background

On January 27 and February 6 and 13, 1981, notice was published in the Federal Register (46 FR 8571, 11292 and 12214) that the Department of Labor (the Department) had under consideration a proposal to adopt a regulation, 29 CFR 2510.3-2 (g), under section 3(2)(B) of the Act. After consideration of all the public comments on the proposal, the

Department has decided to adopt the regulation, with certain modifications. Following is a discussion of the regulation as adopted, the changes from the proposed regulation, and the principal views expressed in the public comments.

### B. Summary of Statutory Provisions

In general, payments by employers to supplement the pension benefits of their retirees ("supplemental payments") fall within the definition of the terms "employee pension benefit plan" and "pension plan" set forth in section 3(2)(A) of the Act. Section 409 of the MPPAA amended the Act by adding section 3(2)(B), which, among other things, authorizes the Secretary of Labor to issue regulations treating certain supplemental payment arrangements as welfare plans rather than pension plans if the regulations are consistent with the standards and purposes of the Act. Section 3(2)(B)(ii) of the Act limits welfare plan treatment to arrangements under which the pension benefits of retirees and their beneficiaries are supplemented to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement. Section 3(2)(B) also provides that in the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of the Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

The Department has concluded, for the reasons discussed below, that the regulatory action it is taking is consistent with the standards and purposes of the Act. The possibility of a unique arrangement or payment having as its principal effect the evasion of the standards or purposes of the Act would depend on the facts and circumstances of the particular case. In that regard, the Department notes that it does not issue advisory opinions which involve issues inherently factual in nature (see Section 5 of ERISA Advisory Opinion Procedure 76-1, 41 FR 36281 (August 27, 1976)).

### C. Cost of Living Formula

Under the proposed regulation, for a supplemental payment to be considered to have been made under a welfare rather than pension benefit plan, it could not exceed an amount equal to the payee's monthly pension benefit multiplied by the sum of specific percentages for all retirement years, provided also that the amount did not exceed the percentage increase in the cost of living since retirement. The proposal's formula provided that the percentage for any year would equal the higher of 3 percent or one third of the percentage increase in the cost of living for that year. As explained in the preamble to the proposed regulation, the formula was intended to lessen the likelihood that too large a percentage of retiree's retirement income would consist of discretionary payments which are not afforded the protections of a pension plan under ERISA.

Many commentators urged the Department to revise the formula to permit supplemental payments under a welfare plan which would reflect all or a greater percentage of the cost of living increase since retirement. Other commentators took the position that the Department's rules should be expanded even further to permit limited amounts of supplemental payments to be made under a welfare plan even if these payments exceeded the retiree's cost-of-living increase since retirement.

The Department has concluded that retirees, on balance, would not be harmed by permitting their pension benefits to be supplemented by the full increase in their cost of living since retirement. Therefore, the formula in the final regulation permits the payment of supplements that reflect the full increase in the cost of living (based on the retiree's initial pension benefit). The regulation does not allow supplemental payments in excess of the increase in the cost of living, because the Department has concluded that this change would be inconsistent with section 3(2)(B) of the Act, which authorizes welfare plan treatment only for cost-of living increases after retirement.

Under the revised formula in the final regulation, a payment made under a supplemental payment welfare benefit plan with respect to any month may not exceed an amount equal to the product of: (a) The retiree's pension benefit amount, and (b) a percentage equal to the full percentage increase in the cost of living since the commencement of the retiree's pension benefits. This percentage increase is generally measured by comparing the consumer price index for the month in which the retiree's pension benefits commenced to the consumer price index for the month with respect to which the supplemental payment is made. In response to suggestions from some commentators, the formula of the final regulation uses monthly rather than annual consumer price index data. This method of computation permits supplemental payments to retirees for the first month after the month of retirement where there has been an increase in the cost-of-living for that succeeding month. Like the proposal, the final regulation provides that supplemental payments may be cumulated and paid in subsequent months.

### D. Payment Out of General Assets

Under the proposed regulation, supplemental payments were required to be made out of an employer's general assets in order to qualify for welfare plan treatment. Several commentators noted that this condition would, as a practical matter, prevent most employers participating in collectively bargained multiple employer pension plans from making supplemental payments under a welfare plan. The final regulation therefore provides that payments may be made out of a welfare plan trust established exclusively for the purpose of supplementing pension benefits, as well as out of an employer's general assets.

### E. Limitation on Obligation to Make Supplemental Payments

The proposed regulation provided that where an employer is obligated to make supplemental payments for more than twelve months at a time, the arrangement would not qualify for welfare plan treatment. Commentator objections to this condition fell into two main categories: First, the condition would prevent use of supplemental payment plans in connection with collectively bargained pension plans, which typically are tied to collective bargaining agreements having terms of three years. Second, employers in general might have difficulty assuring themselves that a supplemental payment arrangement does not give rise to a legal obligation to continue the arrangement for more than twelve months, which obligation would disqualify the arrangement from welfare plan treatment. This twelve-month condition was included in the proposed regulation because it was anticipated that setting such a condition would alert retirees to the fact that their supplemental payments were not part of their regular pension benefits which were afforded all of ERISA's protections, and thus the retirees would not expect the supplemental payments to continue as a permanent source of retirement income for them.

In light of the comments received, however, the Department has concluded that the costs to employers in terms of their loss of flexibility to make supplemental payments would outweigh the benefits of imposing this condition. To the extent that employers thus would be discouraged from making supplemental payments, retirees also would be disadvantaged insofar as they would suffer a loss of supplemental income which otherwise might have been given to them. Therefore the final regulation has no condition relating to the length of an employer's obligation to continue the supplemental payments.

### F. Two-Year Waiting Period

One of the conditions to welfare plan treatment under the proposed regulation was that supplemental payments to a retiree could not commence until two years after retirement. Several commentators expressed concern that this condition would have a particularly adverse effect upon retirees having small pensions. This two-year waiting period condition was included in the proposed regulation for the purpose of impressing upon retirees the distinction between pension plan payments received from their employers and payments made under a supplemental income arrangement. If there were no significant interlude between the time retirees received supplemental payments from their employers and the time they first received retirement payments from their pension plans, it was believed that retirees could become confused as to the source of these payments and could, in fact, believe that all the payments were pension plan payments which were afforded all of ERISA's protections and which could be expected to remain as a permanent source of their retirement income.

The two-year waiting period has been eliminated in the final regulation, however, because the Department has concluded that the benefits to retirees of receiving supplemental payments during their first two years of retirement are more important than the possibility that they would be affected adversely by their failure to distinguish between supplemental payments and benefits from their pension plans.

### G. Lump-Sum Distributions

Under the proposal, employers could not make supplemental payments under a welfare plan with respect to amounts paid to pension plan participants in the form of lump-sum distributions. Several commentators complained that there was no indication in the legislative history that Congress intended to exclude recipients of lump-sum distributions and requested that the rule be changed. Several also suggested methods for conversion.

The final regulation provides a method for supplementing pension benefits paid as a lump sum. In general, an unmarried participant may receive a welfare plan supplement that is calculated as if the participant received a straight life annuity, while a married participant may receive a welfare plan supplement that is computed as if the participant and spouse received a joint and survivor annuity.

### H. Treatment of Social Security Benefits

Another commentator urged that the final regulation treat Social Security benefits as benefits paid under a pension plan for purposes of applying the Department's cost of living formula. Because Social Security benefits are not paid by a pension plan, they are not "pension benefits" within the meaning of section 3(2)(B) of the Act. Therefore, the Department has not adopted this suggestion.

### I. Definition of "Pension Plan"

One commentator requested that the Department clarify the meaning of the term "pension plan" as used in the proposal. This definition is significant because under section 3(2)(B) of the Act only pension benefits may be supplemented under a welfare plan. In this regard, another commentator expressed the view that the term "pension plan" should be defined to include, among other things, Act section 3(36) excess benefit plans and Act sections 201(2), 301(a)(3), and 401(a)(1) unfunded deferred compensation plans for certain management or highly compensated employees. While the term "pension plan" has been clarified in the final regulation, pension plans described in sections 3(36), 201(2), 301(a)(3), and 401(a)(1) continue to be excluded from the definition. Employers already are free to increase the amounts of payments under these types of plans without having to comply with the requirements of parts 2 and 3 of Title I of the Act, even in the absence of a regulation under section 3(2)(B)(ii) of the Act.

### J. Safe Harbor for Arrangements Concerning Pre-1977 Retirees

In the preamble to the proposed regulation, the Department noted that it had taken the position in several advisory opinions that payments outside a pension plan for persons who retired prior to the end of 1976 ("pre-1977 retirees") do not constitute an employee benefit plan so long as certain criteria are met. The Department further explained that, as a result of the enactment of section 409 of the MPPAA, it was reexamining its prior positions with respect to the status of supplemental retirement income arrangements for pre-1977 retirees. The substance of those prior positions was incorporated in the proposed regulation as a temporary safe harbor from coverage under Title I of the Act for payments made before January 1, 1982 to pre-1977 retirees. Many commentators urged that the safe harbor of the proposal be made permanent because some employers with plans covering pre-1977 retirees had designed their supplemental payment arrangements to conform to the Department's prior interpretation. To conform to the proposed change would, according to the commentators, increase the administrative burden on these employers and might cause them to reduce the payment of these supplements to their retirees. The Department also has concluded that Congress, in enacting the MPPAA, did not intend to curtail existing arrangements, made in conformance with the Department's position, for the payment of supplemental cost-of-living increases to retirees but, rather, intended to expand the circumstances under which employers might make supplemental payments within the confines of ERISA. In view of these considerations, the Department has decided not to depart from its prior position concerning supplemental payments.

### K. Arrangements for Pre-Act Retirees

In the preamble to the proposal, the Department stated that, if the proposed regulation were adopted, both it and regulation section 29 CFR 2510.3–2(e) would be available with respect to arrangements for persons who separated from the service of an employer prior to September 2, 1974 ("pre-Act retirees"). In § 2510.3–2(e), the Department described circumstances under which "gratuitous" payments by former employers to pre-Act retirees would not be considered part of an employee benefit plan covered by Title I of the Act.

One commentator asked that the Department clarify which regulation would be controlling with respect to payments to pre-Act retirees. In this regard, the Department notes that § 2510.3–2(e) will continue to be available to employers with respect to pre-Act retirees, notwithstanding the adoption of a final rule which will be generally applicable with respect to all retirees. Therefore, if, for example, an employer maintains an arrangement providing for payments to pre-Act retirees which satisfies the conditions of either § 2510.3–2(e) or § 2510.3–2(g)(2), that arrangement would not have to meet the quantitative limitations set forth in § 2510.3–2(g)(1).

Another commentator urged the Department to amend § 2510.3-2(e) to delete the condition contained in § 2510.3–2(e)(3) that the gratuitous payments to pre-Act retirees must have commenced prior to September 2, 1974. Because the safe harbor contained in § 2510.3–2(g)(2) contains no analogous condition, and because the term "pre-1977 retiree" encompasses the term "pre-Act retiree," the Department notes that an arrangement involving a pre-Act retiree does not have to satisfy the condition of § 2510.3–2(e)(3) with respect to the commencement of payments in order not to be considered an employee benefit plan for purposes of Title I of the Act if it meets the conditions of § 2510.3–2(g)(2).

### L. Executive Order 12291 Statement

The Department has determined that the rule adopted herein is not a "major rule" within the meaning of section 1(b) of Executive Order 12291 (46 13193, February 19, 1981) because it is not likely to result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to complete with foreign-based enterprises in domestic or export markets. The regulation provides employers of all sizes and types with an alternative and voluntary way of supplementing pension benefits, and will impose no new burden or expense on them.

### M. Regulatory Flexibility Act Statement

In the notice of proposed rulemaking (January 27, and February 6, 1981, 46 FR 8571 and 11292), the Administrator, Pension and Welfare Benefit Programs, certified pursuant to section 605 of the Regulatory Flexibility Act, 5 U.S.C. 604 *et seq.*, that the proposed regulation would not, if adopted, have a significant impact on a substantial number of small entities. Accordingly, no regulatory flexibility analysis is required in connection with the adoption of this final regulation.

### N. Paperwork Reduction Act Statement

The regulation permits employers to treat supplemental retirement income payments to former employees as paid under an ERISA welfare rather than pension plan. Employers always have the option, of course, of making these payments under their existing pension plans or to make no supplemental payments to their retirees at all. For employers who choose to have their payments treated as an ERISA welfare plan, the regulation imposes no new paperwork requirements, other than the existing general requirements.

Employers, however, in addition to the above options, may also choose to make supplemental payments in accordance with the criteria established by the "safe harbor" of paragraph (g)(2) of the regulation with respect to pre-1977 retirees. In this case, employers must comply with an additional paperwork requirement, i.e., that the employer send to each retiree a notice, which specifies certain information, during any year in which a supplemental payment is made.

This "safe harbor" aspect of the regulation would result in the imposition of a maximum of 6,500 burden hours annually on employers who choose to comply with the provisions of the "safe harbor" in making supplemental payments to their retirees. This estimate is based on the assumptions that (1) basically only employers sponsoring large (i.e., covering 100 or more participants) defined benefit plans will grant cost-of-living increases to their retirees, and (2) one-half of employers with pre-1977 retirees will choose to comply with the safe harbor rules rather than the general conditions of the regulation.

Information collection requirements contained in this regulation § 2510.3–2(g)(2)) have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB control number 1210–0041.

### O. Drafting Information

The principal author of this final regulation is Mr. Rudy Nuissl of the Office of Fiduciary Standards, Pension and Welfare Benefit Programs. However, others in the Department participated in developing the final regulation, both on matters of substance and style.

### P. Statutory Authority

The regulation set forth herein is adopted under sections 3(2)(B) and 505 of the Act (29 U.S.C. 1002(2) and 1135). The regulation is made effective on publication, pursuant to 5 U.S.C. 553(d)(1), because it is a rule that recognizes an exemption or relieves a restriction.

### List of Subjects in 29 CFR Part 2510

Employee benefit plans, Employee Retirement Income Security Act, Pensions.

### Final Regulation

## PART 2510—[AMENDED]

In consideration of the matters set forth above, Chapter XXV of Title 29 of the Code of Federal Regulations is amended by adding the following paragraph (g) to § 2510.3–2:

**§ 2510.3-2 Employee pension benefit plan.**

* * * * *

(g) *Supplemental payment plans.*—(1) *General rule.* Generally, an arrangement by which a payment is made by an employer to supplement retirement income is a pension plan. Supplemental payments made on or after September 26, 1980, shall be treated as being made under a welfare plan rather than a pension plan for purposes of Title I of the Act if all of the following conditions are met:

(i) Payment is made for the purpose of supplementing the pension benefits of a participant or his or her beneficiary out of:

(A) the general assets of the employer, or

(B) A separate trust fund established and maintained solely for that purpose.

(ii) the amount payable under the supplemental payment plan to a participant or his or her beneficiary with respect to a month does not exceed the payee's supplemental payment factor ("SPF," as defined in paragraph (g)(3)(i) of this section) for that month, provided however that unpaid monthly amounts may be cumulated and paid in subsequent months to the participant or his or her beneficiary.

(iii) The payment is not made before the last day of the month with respect to which it is computed.

(2) *Safe harbor for arrangements concerning pre-1977 retirees.* (i) Notwithstanding paragraph (g)(1) of this section, effective January 1, 1975 an arrangement by which a payment is made by an employer to supplement the retirement income of a former employee who separated from the service of the employer prior to January 1, 1977 shall be deemed not to have been made under an employee benefit plan if all of the following conditions are met:

(A) The employer is not obligated to make the payment or similar payments for more than twelve months at a time.

(B) The payment is made out of the general assets of the employer.

(C) The former employee is notified in writing at least once each year in which a payment is made that the payments are not part of an employee benefit plan subject to the protections of the Act.

(D) The former employee is notified in writing at least once each year in which a payment is made of the extent of the employer's obligation, if any, to continue the payments.

(ii) A person who receives a payment on account of his or her relationship to a former employee who retired prior to January 1, 1977 is considered to be a former employee for purposes of this paragraph (g)(2).

(3) *Definitions and special rules.* For purposes of this paragraph (g)—

(i) The term "supplemental payment factor" (SPF) is, for any particular month, the product of: (A) The individual's pension benefit amount (as defined in paragraph (g)(3)(ii) of this section), and (B) the cost of living increase (as defined in paragraph (g)(3)(v) of this section for that month.

(ii)(A) The term "pension benefit amount" (PBA) means, with regard to a retiree, the amount of pension benefits payable, in the form of the annuity chosen by the retiree, for the first full month that he or she is in pay status under a pension plan (as defined in paragraph (g)(3)(iii) of this section) sponsored by his or her employer or under a multiemployer plan in which his or her employer participates. If the retiree has received a lump-sum distribution from the plan, the PBA for the retiree shall be determined as follows:

(*1*) If the plan provides an annuity option at the time of the distribution, the PBA shall be computed as if the distribution had been applied on that date to the purchase from the plan of a level straight annuity for the life of the participant if the participant was unmarried at the time of the distribution or a joint and survivor annuity if the participant was married at the time of distribution.

(*2*) If the plan does not provide an annuity option at the time of the distribution, the PBA shall be computed as if the distribution had been applied on that date to the purchase from an insurance company qualified to do business in a State of a commercially available level straight annuity for the life of the participant if the participant was then single, or a joint and survivor annuity if the participant was then married, based upon the assumption that the participant and beneficiary are standard mortality risks.

(B) If the retiree has received from the plan a series of distributions which do not constitute a lump-sum distribution or an annuity, the PBA for the retiree shall be determined with respect to each distribution according to paragraph (g)(3)(ii)(A) above, or in accordance with a reasonably equivalent method.

(C) The term PBA, with regard to the beneficiary of a plan participant, means: (*1*) The amount of pension benefits, payable in the form of a survivor annuity to the beneficiary, for the first full month that he or she begins to receive the survivor annuity, reduced by: (*2*) Any increases which have been incorporated as part of the survivor annuity under the plan since the participant entered pay status or, if the participant died before the commencement of pension benefits, since the participant's date of death.

(D) Where a plan participant has commenced to receive his or her pension benefits in the form of a straight-life annuity, or another form of an annuity that does not continue after the participant's death in the form of a survivor annuity, no beneficiary of the participant will have a PBA.

(iii) The term "pension plan" means, for purposes of this paragraph (g), a pension plan as defined in section 3(2) of the Act, but not including a plan described in section 4(b), 201(2), or 301(a)(3) of the Act. The term also does not include an arrangement meeting all the conditions of paragraph (g)(1) or (g)(2) of this section or of an arrangement described in § 2510.3–2(e). In the case of a controlled group of corporations within the meaning of section 407(d)(5) of the Act, all pension plans sponsored by members of the group shall be considered to be one pension plan.

(iv) The term "employer" means, for purposes of paragraph (g) of this section, the former employer making the supplemental payment. In the case of a contolled group of corporations within the meaning of section 407(d)(7) of the Act, all members of the controlled group shall be considered to be one employer for purposes of this paragraph (g).

(v) The term "cost of living increase" (CLI) means, as to any month, a percentage equal to the following fraction:

$$\frac{a-b}{b}$$

where a= the CPIU for the month for which a payment is being computed, and b= the CPIU for the first full month the retiree was in pay status. Where the CLI is calculated for the beneficiary of a plan participant, "b" continues to be equal to the CPIU for the first full month the retiree was in pay status. If, however, the participant dies before the commencement of pension benefits, "b" is equal to the CPIU for the first full month the survivor is in pay status.

(vi) The term "CPIU" means the U.S. City Average All Items Consumer Price Index for all Urban Consumers, published by the U.S. Department of Labor, Bureau of Labor Statistics. Data concerning the CPIU for a particular period can be obtained from the U.S. Department of Labor, Bureau of Labor Statistics, Division of Consumer Prices and Price Indexes, Washington, D.C. 20212.

(vii) Where an employer does not pay to a retiree the full amount of the supplemental payments which would be permitted under paragraph (g)(1) of this section, any unpaid amounts may be cumulated and paid in subsequent months to either the retiree or the beneficiary of the retiree. The beneficiary need not be the recipient of a survivor annuity in order to be paid these cumulated supplemental payments.

(5) *Examples.* The following examples illustrate how this paragraph (g) works. As referred to in these examples, the CPIU's for July through November of 1980 are as follows:

July 1980: 247.8
August 1980: 249.4
September 1980: 251.7
October 1980: 253.9
November 1980: 256.2

*Example (1)(a).* E is an employer. R received monthly benefits of $600 under a straight-life annuity under E's defined benefit pension plan after R retired from E and entered pay status on July 1, 1980. The amount that E may pay to R as supplemental payments under a welfare rather than pension plan with respect to the months of July through September of 1980 is computed as follows:

SPF for July 1980

$$SPF=\frac{a-b}{b}\times PBA$$

$$=\frac{247.8-247.8}{247.8}\times \$600=\$0.00$$

SPF for August 1980

$$SPF=\frac{249.4-247.8}{247.8}\times \$600=\$3.87$$

SPF for September 1980

$$SPF=\frac{251.7-247.8}{247.8}\times \$600=\$9.44$$

| | |
|---|---|
| Total= | $0.00 |
| | 3.87 |
| | 9.44 |
| | $13.31 |

No supplemental payment may be made to R as a welfare plan payment with respect to July 1980, the month of retirement. The $3.87 that may be paid with respect to August 1980 may be paid at any time after August 31, 1980. The $9.44 that may be paid with respect to September 1980 may be paid at any time after September 30, 1980.

*Example (1)(b).* S is the beneficiary of R. Because R received pension benefits under a straight-life annuity, S will receive no survivor annuity from E after R's death. S thus will have no PBA after R's death and will not be eligible to receive any supplemental payments from E based on S's PBA. To the extent, however, that R did not receive supplemental payments from E to the maximum limit allowable under paragraph (g)(1), any amounts not paid to R may be cumulated and paid to S after R's death.

*Example (2)(a).* E is an employer. Q received monthly benefits of $500 in the form of a joint and survivor annuity under E's defined benefit pension plan since retirement from E on July 1, 1980. The amount that E may pay to Q as welfare rather than pension plan payments with respect to the months of July through September of 1980 is computed as follows:

SPF for July 1980

$$SPF=\frac{247.8-247.8}{247.8}\times\$500=\$0.00$$

SPF for August 1980

$$SPF=\frac{249.4-247.8}{247.8}\times\$500=\$3.23$$

SPF for September 1980

$$SPF=\frac{251.7-247.8}{247.8}\times\$500=\$7.87$$

| | |
|---|---|
| Total= | $0.00 |
| | 3.23 |
| | 7.87 |
| | $11.10 |

No supplemental payment may be made as a welfare plan payment with respect to July 1980, the month of retirement. The $3.23 that may be paid with respect to August 1980 may be paid at any time after August 31, 1980. The $7.87 that may be paid with respect to September 1980 may be paid at any time after September 30, 1980.

*Example (2)(b).* Q dies on October 15, 1980 without having received any supplemental payments from E. T is the beneficiary of Q. E pays T a survivor's annuity of $300 beginning in November of 1980. The amount payable to T as a survivor annuity under the plan has not been increased since Q began to receive pension benefits. Thus, T's PBA is $300. The amount that E may pay to T as welfare rather than pension plan payments with respect to the months of July through November 1980 is computed as follows:

SPF for July 1980=$0.00

SPF for August 1980=$3.23

SPF for September 1980=$7.87

SPF for October 1980

$$SPF=\frac{a-b}{b}\times PBA$$

$$=\frac{253.9-247.8}{247.8}\times\$500$$

$$=\$12.31$$

(Note that T's "b" is equal to Q's "b".)

SPF for November 1980

$$SPF=\frac{256.2-247.8}{247.8}\times\$300=\$10.17$$

Total that may be paid to T

The maximum E may pay T with respect to the months of July through November 1980 as welfare rather than pension plan payments is the sum of those months' SPFs, which is $33.58.

*Example (3).* Assume the same facts as in Example (1)(a), except that R elected to receive a lump-sum distribution rather than a straight-life annuity. If R is unmarried on July 1, 1980, R's PBA is $600 for the remainder of R's life. If R is married to S on July 1, 1980, the PBAs of R and S are based on the annuity that would have been paid under an election to receive a joint and survivor annuity. See paragraph (g)(3)(ii)(A)(*1*) of this section.

Signed at Washington, D.C., this 1st day of November 1982.

Jeffrey N. Clayton,

*Administrator, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.*

[FR Doc. 82-30403 Filed 11-4-82; 8:45 am]

BILLING CODE 4510-29-M

## DEPARTMENT OF COMMERCE

## Patent and Trademark Office

## 37 CFR Parts 1 and 2

## [Docket No. 21001-200]

## Court Review of Patent and Trademark Office Decisions; Correction

**AGENCY:** Patent and Trademark Office, Commerce.

**ACTION:** Final rule; Correction.

**SUMMARY:** The Patent and Trademark Office corrects an inadvertent error in a final rule published in the Federal Register on October 26, 1982 (47 FR 47380) which amended its rules of practice relating to court review of its decisions.

**FOR FURTHER INFORMATION CONTACT:** Joseph F. Nakamura by telephone at (703) 557-3525 or by mail marked to his attention and addressed to: Commissioner of Patents and Trademarks, Washington, D.C. 20231.

**SUPPLEMENTARY INFORMATION:** On October 26, 1982, the Patent and Trademark Office published a final rulemaking action revising paragraphs (a) and (c) of § 1.304 in Title 37, Code of Federal Regulations, to correct a reference in these paragraphs to the U.S. Court of Customs and Patent Appeals. The correction substitutes the name of the successor court, the U.S. Court of Appeals for the Federal Circuit. Through inadvertence, the text of paragraph (a) which was published on October 26, 1982, was the text which had been superseded on October 1, 1982, pursuant to an earlier final rulemaking action published in the **Federal Register** on July 30, 1982 (47 FR 33086). In the earlier final rulemaking action, paragraph (a), but not (c), of § 1.304 had been revised to correct the name of the court. Accordingly, the revision of paragraph (a) of § 1.304 in the later rulemaking action published on October 26, 1982, in the **Federal Register** (47 FR 47380) is being deleted.

Dated: October 29, 1982.

Donald J. Quigg,

*Acting Commissioner of Patents and Trademarks.*

The following correction is made in the **Federal Register** notice of final rulemaking published October 26, 1982 (47 FR 47380):

In paragraph No. 6 on page 47381, the language "paragraphs (a) and" in the introductory sentence is changed to read "paragraph" and the text of paragraph (a) of § 1.304 on pages 47381–47382 is removed.

[FR Doc. 82-30401 Filed 11-4-82; 8:45 am]

BILLING CODE 3510-16-M

## GENERAL SERVICES ADMINISTRATION

## 41 CFR Ch. 5

## Multiple Award Schedule Procurement

**AGENCY:** Office of Acquisition Policy, GSA.

**ACTION:** Notice of procurement policies.

**SUMMARY:** This notice sets forth certain policies and procedures that GSA will follow when contracting for products or services under the multiple award schedule (MAS) program. This issuance also contains guidance to GSA contracting personnel to be used in the MAS negotiation process. Additionally, this issuance contains the schedule of sales and marketing data reflecting the type of information to be obtained from firms in the solicitation phase of the negotiation process.

GSA is issuing this notice to inform all parties interested in and doing business with GSA under the MAS program of the positions taken on certain issues concerning MAS contracting. In addition to identifying changes to and clarifying its position on the draft MAS policies issued for comment on May 24, 1982, GSA believes that the positions adopted will result in a less costly Government procedure; reduce the paperwork burden on industry and Government; permit the timely award of MAS contracts; and continue the protection of the

Government's interests when contracting under this procurement program.

The implementation of the MAS policies set forth in this document will begin with solicitations issued on or after October 1, 1982.

**EFFECTIVE DATE:** This statement of policies is effective with solicitations issued on or after October 1, 1982.

**ADDRESS:** Mr. Allan W. Beres, Acting Assistant Administrator for Acquisition Policy, General Services Administration, 18th and F Sts., NW., Washington, D.C. 20405.

**FOR FURTHER INFORMATION CONTACT:** Mr. Edward J. McAndrew, Office of Policy Formulation, Office of Acquisition Policy, General Services Administration, 18th and F Sts., N.W., Washington, DC 20405 (202-566-1224).

**SUPPLEMENTARY INFORMATION:**

## Background

On May 24, 1982, GSA presented a draft set of MAS policies to industry associations and other interested parties. At that presentation, GSA requested comments on the proposed policies.

The draft policies issued for comment were based on the comments and concerns expressed by the Congress in previous hearings, in reports by the General Accounting Office, by firms and associations doing business under the MAS program, and by customer agencies that order from MAS contracts. In its request for comments, GSA asked interested parties when analyzing the draft policies to keep in mind the comments and concerns that had been expressed.

## Comments and Significant Changes in the Policies Set Forth in the Issuance

In response to its May 24, 1982, request for comments, GSA received more than 60 responses. These responses came principally from firms and industry associations that represent firms doing business with GSA under the MAS program. Other responses were received from internal GSA organizations, such as the Inspector General and regional and central office operating procurement elements and from other Government agencies.

With the close of the comment period, June 25, 1982, GSA began an exhaustive analysis of the comments received. Representatives from GSA's Office of Acquisition Policy, the Office of Information Resources Management, the Office of Personal Property, the Office of Inspector General, and the Office of General Counsel participated in developing the revisions adopted in the statement of policies that GSA has issued. In adopting the positions set forth in this issuance, GSA gave serious consideration to the comments expressed by the various, and often competing, interests associated with the MAS program. Because the MAS program primarily involves the purchase of commercial products and services, GSA has aligned the policies with commercial practice to the extent practical given the need for such policies to be consistent with Federal procurement regulations. GSA has tried to make the revised policies cost effective and fair to all parties.

The comments that were received by GSA, for the most part, addressed certain aspects of the draft MAS policies. These issues and the GSA position contained in the revised policies are:

a. *Most Favored Customer.* The most favored customer concept was defined in the draft as including original equipment manufacturer (OEM) and dealer/distributor prices/discounts as the Government's negotiation objective. Comments received from business and industry opposed this concept. In the revised policies, GSA excludes consideration of the OEM and dealer/distributor discount in setting its negotiation objective where an offeror substantiates claims that dealers perform the normal dealer functions for the contractor under the MAS contract or where an offeror claims that the item sold to OEM's is different in physical and performance characteristics and is not the same or similar to the item offered the Government under the MAS contract.

b. *Sales and Marketing Data.* Comments received indicated that the amount of paperwork needed to respond to the data requests is exorbitant. In the revised polices, offerors will be able to certify to those products or services offered that meet the specified tests of commerciality. Sales data will not be required on every model or product offered that is certified as meeting the tests of commerciality. On a sampling basis, the Government will ask for sales data on a selected number of products certified as commercial. For items not certified as meeting the tests of commerciality, sales data is required. The procurement rules for requiring cost and pricing data are unchanged.

c. *Price Reductions Clause.* While some comments received suggested changes to the language in the revised clause and others indicated that the revised clause may still be subject to interpretation, for the most part, there was no opposition to the principal change in the revised clause from the clause presently used in MAS contracts. The revised clause is no longer activated any time that an MAS contractor reduces prices to any customer. Under the revised clause, the clause is activated when prices are changed so as to change the relationship between the Government and the customer or category of customer upon which the award was predicated. Along with narrowing the application of the price reductions clause, the exclusions for certain sales from the application of the revised clause are also changed. The clause in the revised policies is the same as the one contained in the May 24, 1982, draft except for deleting the exclusion for sales to State and local governments. The decision to delete the esclusion for sales to State and local governments was based on a careful analysis of the changes made to the clause. Considering the changes made, operation of the revised price reductions clause should not adversely affect State and local government procurement programs.

d. *Aggregate Discount.* The revised policies include seeking aggregate discounts on MAS contracts. Notwithstanding the position taken by most commentors that the Government should not seek such discounts because of the manner in which orders are placed against MAS contracts, the Government will strive to achieve as part of its negotiation objective an aggregate discount which recognizes not only the manner in which the Government orders but also the aggregate volume of sales expected under the MAS contract. The revised policies reflects latitude in whether such discounts are given when the order in placed or at the conclusion of the contract term.

e. *Maximum Order Limitation.* The revised policies contain the use of the maximum order limitation. This is a change from the draft, which stated that the Federal Supply Service (FSS) will terminate its regular practice of establishing a maximum order limitation in its schedules. Comments received supported the continued use of a maximum order limitation.

f. *Economic Price Adjustments.* The draft policies proposed to terminate the use of an economic price adjustment clause in FSS schedule contracts. The revised policies makes the use of such a clause in FSS schedule contracts optional. The contracting officer will determine whether such a clause should be included in the schedule contracts.

**Other Information**

Staff members of the appropriate congressional committees were briefed on the revised policies set forth in the issuance.

The revised policies have been given to the Office of Information Resource Management, the Office of Personal Property, and GSA regions for implementation. All GSA contracting people in the Central Office and regions involved with the MAS program were informed of the revised policies and provided a copy of the policy document at a joint meeting held on September 28 1982. In addition, the Office of Information Resources Management and the Office of Personal Property will hold other sessions, as needed, with their contracting personnel on the implementation of the policies. Similarly, audit personnel in the Office of Inspector General have been briefed on the revised policies. The purpose of these sessions is to have the revised policies implemented throughout GSA in a consistent manner. The policies were issued in accordance with 41 CFR 5-1.105(a)(5) and will be incorporated into GSA's formal regulations as soon as is practical.

While GSA is taking steps to implement these policies in the MAS procurement process, GSA's management is committed to continuing its efforts to improve the MAS program. In this regard, the implementation of these policies will be monitored to identify problem areas that may arise. Similarly, GSA is interested in receiving ideas or suggestions from interested parties on further improving the MAS process. After the revised policies have been implemented over a complete procurement cycle for the various products, GSA plans to take another look at the policies and to analyze any difficulties that were encountered in implementation and the suggestions received during the implementation phase which would lead to further improvements.

The complete text of the revised policies follows.

Dated: October 25, 1982.

**Ray Kline,**

*Deputy Administrator of General Services.*

**Index—Contract Pricing Arrangements**



**Contract Pricing Arrangements**

*I. Introduction*

This policy statement addresses issues concerning the establishment and maintenance of pricing arrangements on multiple award schedule (MAS) contracts for supplies and services. These issues are the most complex of all the issues associated with the MAS program. Continued interest by Congress, General Accounting Office, this Agency's management, and business and industry, made it apparent that a number of problems exist with respect to negotiating pricing arrangements in MAS contracts. Except where otherwise stated, this policy statement applies to the ADTS and FSS MAS contracts.

The contract pricing policies in this document are those which appear to us to require special attention. None of these policies contravene existing Federal Procurement Regulations nor do they obviate the requirements of existing regulations that are not covered in this document.

In providing supply support to our customer agencies, GSA is responsible for determining the method of support. GSA will continue to emphasize the reduction of the number of items on MAS contracts and to increase the use of competitive procurement methods in providing supply support for items currently in the MAS program. While striving toward this goal, we will continue to use the MAS program, where appropriate, to support our customer agencies.

When GSA provides supply support through the MAS program, it acts as the contracting agent for all Government organizations authorized to use the MAS contracts. Our customer agencies, when they purchase items from the schedules, should be able to buy those items at prices that are better than they could obtain from any other source under similar circumstances. In its role as the contracting agent, GSA will attempt to obtain the best pricing arrangement, i.e., discount(s) from commercial price lists, giving full consideration to the Government's large volume of purchases, in the negotiation process.

*II. MAS Contract Pricing Arrangements*

The Government's goal when negotiating MAS contract pricing arrangements is to obtain a discount from a firm's established catalog or commercial price list which is equal to or greater than the discount given to that firm's most favored customer. The most favored customer (MFC) discount is equal to the best discount given by a firm to any entity with which that firm conducts business, other than the original equipment manufacturers (OEM), or participating dealers, and distributor's discount.

Consideration may be given to awarding an MAS contract where the Government's discount is not equal to or greater than a firm's MFC discount. This recognizes that there are situations where the Government's terms and conditions may be different from those given the firm's most favored customer. Offerors may cite factors that they claim make the Government different from other customers with which they do business. In these situations, it is the offeror who must provide information identifying such factors, the valuation of the factors identified and the method used for developing the valuation. Contracting officers shall obtain information necessary to judge whether these factors and their valuation are reasonable.

Offerors and contracting officers should understand that there is no guarantee that every offeror who submits an offer will receive a contract. In the event that the Government's negotiation objective cannot be met, the contracting officer must exercise judgment in deciding whether to reject an offer. In exercising this judgment, the contracting officer must weigh the effect that the rejection of the offer will have on meeting the Government's needs.

GSA will not award an MAS contract to a firm that does not give the Government a price equal to the best price given or available to its large volume end user customers with comparable terms and conditions except where the Government's overall volume of purchases does not warrant the best price given to end user customers.

In all MAS contracts, the contracting officer is required to make an affirmative determination that the prices offered to the Government are fair and reasonable (FPR 1-3.807-2).

*III. Discount Schedule and Marketing Data*

All MAS solicitations will require offerors to submit information on sales, discounts and marketing practices. The required information will be used to determine whether products or services offered meet the tests of commerciality and will be used by the Government in the evaluation of the offeror's proposal and the price reasonableness determination. The offeror will certify to the completeness, accuracy and currency of the data at the conclusion of negotiations. Failure to submit the required sales, discount and marketing data will result in no award. If the data is not found to be complete, current and accurate subsequent to award, the defective pricing clause will be activated and consideration will be given to cancelling the MAS contract if still in effect.

Before a catalog price exemption to the need for submission of cost or pricing data can be granted for products or service offered on MAS solicitations, the tests of commerciality must be met. (FPR 1-3.807-1). FPR 1-3.807-2(d) references ASPM No. 1 which contains the quantified criteria (located in ASPM No. 1, Chapter 8) for these tests and shall be used as the basis for the catalog price exemption.

Offerors will be able to certify to those products or services meeting these tests of commerciality in the discount schedule and marketing data sheets. Information will only be required on a representative sample of the best selling items. Data will be required on all other items offered under the solicitation that are not certified as commercial in accordance with the aforementioned criteria. Cost or pricing data shall be required where sales of a product or service to the general public do not exceed 35 precent of total sales of that product or service; or, where the price cannot be considered "based on" established catalog or market prices of commercial items sold in substantial quantities to the general public in accordance with FPR 1-3.807-1(b)(2)(iii).

Even though an item qualifies for an exemption from the submission of cost or pricing data, price analysis must be performed to determine the reasonableness of price and the need for further negotiations (FPR1-3.807-1(b)(2)(iv)).

*IV. OEMs and Dealer/Distributor Discounts and Marketing Data*

Information on OEM and dealer/distributor discount or pricing arrangememts will be obtained where the same or similar product or service is offered to the Government under the MAS contract.

Where an offeror markets through dealers or distributors, the contracting officer shall require the offeror to provide sufficient information on the functions or services performed and whether these functions or services will be performed under the MAS contract.

Where an offeror sells to OEMs and claims that there is considerable difference in physical or performance characteristics of the products or services sold to OEMs and the products or services offered to the Government, the offeror must provide sufficient information to substantiate such a claim in lieu of OEM discount or pricing data. Where the contracting officer determines that the offeror's claim is not substantiated, the offeror is required to furnish OEM discount or pricing information.

The contracting officer will use the OEM and dealer/distributor data in the price analysis that result in the Government's negotiation position.

*V. Quantity and Aggregate Discounts*

In establishing negotiation objectives and in the negotiation process, emphasis will be placed on obtaining discounts based on the aggregate volume of sales for an MAS contract. Negotiation objectives will be established to obtain volume discounts in line with the discounts available to the offeror's other customers. In developing negotiation objectives based on the aggregate volume of sales, consideration may be given to taking discounts on aggregate volume of sales at the conclusion of the contract period, although it is preferred that discounts be obtained when orders are placed.

*VI. Maximum Order Limitation (MOL)*

All MAS contracts will contain an MOL. The level at which the MOL is established will depend upon the Government's discount arrangement under the schedule and the estimate of sales volume above which suppliers are likely to quote lower prices in other types of contracts. The contracting officer will establish the MOL level for the contract at the conclusion of negotiations.

*VII. Price Reductions*

All MAS contracts will contain the price reductions clause contained in this document. The price reductions clause is intended to maintain the relationship that was established at the time of award between the Government and the offeror's customer or category of customer upon which the MAS contract was predicated. Any changes in pricing practices by the contractor resulting in a less advantageous relationship between the Government and the customer or category of customer upon which the MAS contracts was predicated shall result in a price reduction to the Government to the extent necessary to retain the original relationship.

The following price reductions clause will be used in all MAS contracts:

**Price Reduction Clause [1]**

a. *General.* This price reductions clause is intended to ensure that throughout the term of the contract, the Government shall maintain its relative price/discount [and /or term and condition] advantage in relation to the Contractor's commercial customer(s) price/discount upon which this contract award was predicated. The customer or category of customers upon which the contract award is predicated will be identified at the conclusion of negotiations.

b. *Pricing Reductions to Customers Other than the Federal Agencies.* (1) Prior to the award of contract, the contracting officer and the offeror shall reach an agreement as to the price relationship between the Government and the offeror's identified customer or category of customers upon which the contract award is predicated. This relationship shall be maintained throughout the contract period. Any change in the contractor's commercial pricing arrangements for the identified customer or category of customers which disturbs this relationship will constitute a price reduction.

(2) The contractor shall report all price reductions made during the contract period to the contracting officer along with an explanation of the conditions under which the reductions were made. Those reductions which do not disturb the Government's price position relative to the contractor's identified customer or category of customers will not be subject to the provisions of this clause. However, the information will be used in conjunction with the negotiations for the following contract period.

(3) If, after the date of the conclusion of negotiations, the contractor (i) reduces the prices contained in the commercial catalog, pricelist, schedule, or other documents (or grants any more favorable terms and conditions) offered by the contractor and used by the Government to establish the prices with the contract; or (ii) reduces the prices through special discounts to the identified customer or category of customers upon which the award was predicated so as to disturb the relationship of the Government to that identified customer or category of customers, a price reduction shall apply to this contract for the remainder of the contract period, or until further reduced, or, in the case of temporary price

[1] **Note:**—Language in brackets apply to ADP/Communications/Teleprocessing Solicitations/Contracts Only.

reductions, for the duration of any temporary price reduction period.

(4) This clause will not apply to contractor's firm fixed price Definite Quantity contracts with specified delivery in excess of the Maximum Order Limitation specified in the contract.

(5) The contracting officer may exempt from the application of this clause any sale at a price below the contract price if caused by an error in quotation or billing, provided adequate documentation is furnished by the contractor immediately following the discovery of the error.

c. *Price Reductions to Federal Agencies.* (This paragraph does not apply to Non-Schedule ADP/Communications/Teleprocessing Services contracts entered into with Federal Agencies.)

Except for temporary "Government-only" price reductions described below, if, after the effective date of this contract, the contractor reduces the price of any contract item to any Federal agency and the sale falls within the contract maximum order limitation, an equivalent price reduction shall apply to all subsequent sales of the contract item to Federal agencies for the duration of the contract period or until the price is further reduced. The contractor may offer to the contracting officer a temporary "Government-only" price reduction which has a duration of 30 calendar days or more, except during the last month of the contract period when any such offer must be for the remainder of the contract period.

d. *Effective Dates and Notifications.* (This paragraph does not apply to Non-Schedule ADP/Communications/Teleprocessing Contracts entered into with Federal Agencies.)

(1) Any price reduction pursuant to b. above, shall be effective for the Government at the same time as the price reduction to the other customer. Any price reduction pursuant to c. above, shall be effective at the time of initial purchase in the Federal Agency (Government) at the reduced price, except in the case of a temporary "Government-only" price reduction which shall be effective at the time of acceptance by the contracting officer. The contractor shall invoice at such reduced price and indicate thereon that the price reduction is pursuant to this Price Reduction Clause until such time as this contract is modified.

(2) The contractor shall notify the contracting officer in writing of any price reduction as soon as possible but not later than 10 calendar days after the effective date. Failure to give timely notice shall require that such price reduction (including temporary price reductions) apply to the contract for the duration of the contract period, or until the price is further reduced, and may constitute a basis for termination of the contract as provided in the Default Clause of the contract.

e. *Contractor's Statement of Price Reduction.* (This paragraph does not apply to Non-Schedule ADP/Communications/Teleprocessing Contracts entered into with Federal Agencies.)

The contractor shall furnish within 10 calendar days after the end of the contract period a statement certifying either (1) that there was no applicable reduction; or (2) that any price reduction was reported to the contracting officer. For each reported price reduction, the contractor shall show the date when the contracting officer was so notified.

*VIII. Economic Price Adjustments*

An economic price adjustment (EPA) clause will be used in FSS MAS contracts where uncertainty exists as to the stability of market prices during the term of the contract. The contracting officer will determine whether items under the MAS contract are subject to unforeseen price fluctuations, thus warranting the use of an EPA clause. The contracting officer's determination on the use of an EPA clause will be made in the negotiation process.

**Multiple Award Schedule (MAS) Pricing Guide**

*I. Discount Schedule and Marketing Data*

A. *Requirement for Offeror To Submit Pricing Data.* FPR 1-3.101(c) provides that proposals shall be supported by statements and analyses or other evidence of reasonable prices and by such information concerning other vital matters as is deemed necessary by the contracting officer. Each MAS solicitation will include Discount Schedule and Marketing Data sheets to be completed for each Special Item Number (SIN) and submitted as a part of the offerors proposal. When this form is completed in its entirety, along with pricing data from current or prior contracts and preaward audits, it should provide the necessary data, in most cases, to enable the contracting officer to complete the price analysis and develop the negotiation objective.

B. *Initial Review of Offerors Proposal.* As soon as possible after receipt of proposals, the contracting officer should review in detail the offeror's submission in response to the Discount Schedule and Market Data Sheets. If the offer has failed to respond to specific data elements or if the response is not adequate, the contracting officer should immediately request that the offeror correct any deficiencies in the data submission. In this regard, a specific date for the receipt of the required data should be established with the offeror. Also, it is important that the data be received well in advance of schedule negotiations to permit adequate time for a price analysis by the contracting officer.

C. *Timeliness of the Procurement Action.* The process, to the extent practical, should begin early enough to allow for award of MAS contracts by the beginning of the proposed schedule period.

*II. Prenegotiations*

A. *Establishing the Negotiation Objective.* In preparing for negotiations, the contracting officer will establish specific negotiation objectives based upon a properly prepared price analysis. This price analysis will serve as the basis for the negotiation objectives including the rationale for the objectives established. The elements of the price analysis are listed in Section IV of this pricing guide.

B. *Negotiation Objective.* In establishing negotiation objectives, contracting officers must remain cognizant of the Government's goal in negotiating MAS contracts, namely, to obtain discounts equal to or better than an offeror's discounts to its favored customer. The most favored customer discount is defined as the largest discount, other than the OEM or dealer/distributor discount given to any entity with which the offeror does business. There are factors, such as, terms and conditions, warranties and FOB point, that may make the Government different from a firm's other customers. Through proper analysis and documentation, the contracting officer may recognize such differences. However, in recognizing these differences, the contracting officer must also consider the volume purchased by the Government under the MAS contract.

C. *Documentation of the Price Analysis and Negotiation Objective.* The contract file will contain the written price analysis report in support of the Government's negotiation position.

The supporting documentation will necessarily vary depending upon the complexity and estimated dollar volume of the contract. The price analysis and negotiation objective will be a part of the price negotiation memorandum (See section V of this pricing guide). The supporting documentation required at this point in the procurement process will normally include:

1. General description of the procurement.

2. Adequacy of data submitted by the offeror.

3. The elements of pricing analyzed preparatory to establishing the negotiation objective. (See section IV of this pricing guide).

4. The negotiation objectives and the supporting rationale.

5. Major differences between the offeror's proposal and the negotiation objectives.

6. The offeror's documentation and rationale if less than the MFC discount is offered. This will also include the contracting officer's evaluation of that data.

D. *Approval of Negotiation Objectives.* The negotiation objectives should be approved by the chief of the purchasing office or designee.

*III. Catalog Item Verification*

A. *Definition of Established Catalog Price.* FPR 1–3.807–1(b)(2) states that for an item to qualify as a catalog price, the price must be, or be based on, (A) an established catalog price, (B) of commercial items, (C) sold in substantial quantities, (D) to the general public. The criteria contained in the following paragraphs should be applied in determining whether an item falls within the scope of this definition.

B. *Established Catalog Price (FPR 1–3.807–1(b)(2)(ii)(A)).* This is a price that is included in a catalog, price list, schedule or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers and states prices at which sales are currently or were last made to a significant number of buyers who constitute the general public. The following questions will help you determine if there is an established catalog price.

1. Is there a printed catalog, price list, published price or other formal document showing prices and applicable discounts, if any.

2. Can audit validate from seller's records that the price offered is a regular catalog price with appropriate discounts?

3. If the answer to either (1) or (2) above is not "yes" the proposal does not meet the test of a catalog priced item.

C. *Commercial Item (FPR 1–3.807–1(b)(2)(ii)(B)).* This is an item (the term includes both supplies and services) of a class or kind that is regularly used for other than Government purposes and is sold or traded in the course of normal business operations. The following questions will help you determine if the item is a commercial item.

1. Is the item or service identical to that described in the catalog?

2. Is the item or service so similar it can be priced by reference to catalog prices?

3. Is the item or service so similar that differences can be identified and priced as add-ons or deducts from catalog prices by price analysis or other known prices?

4. If the answer to either (1), (2) or (3) above is not "yes," the proposal does not meet the test of a catalog item.

D. *General Public (FPR 1–3.807–1(b)(2)(ii)(D)).* An item is sold "to the general public" if it is sold to other than affiliates of the seller and to nongovernment entities. Items sold to affiliates of the seller and sales for end use by the government are not sales to the general public. The following questions will help you determine if an item is sold to the general public.

1. Does the seller's data show sales over the appropriate past period as between Government and non-Government entities?

2. Is there general knowledge of large public sales of products regularly stocked by dealers or regularly traded in the marketplace?

3. Can audit validate from the seller's records that sales have been made to non-Government entities?

4. If you did not answer "yes" to any of the preceding checklist items, the proposal does not meet the test of a catalog item.

E. *Substantial Quantities (FPR 1–3.807–1(b)(2)(ii)(C)).* Supplies are sold in substantial quantities when the facts or circumstances are sufficient to support a reasonable conclusion that the quantities regularly sold are sufficient to constitute a real commercial market for the item. This test is usually in terms of total quantities sold, but it also should include the number of times the item has been sold and how many times a given price or price structure has been accepted by buyers free to choose. Nominal quantities, like models, specimens, samples and prototype of experimental units do not meet this requirement. Services sold in substantial quantities are those that are customarily provided by the company, with personnel regularly employed and with equipment regularly maintained solely or principally to provide such services. In order to provide more detailed guidance to contracting officers, and to ensure that the policy is carried out in a more uniform manner among all contractors, GSA has adopted the ASPM No. 1 criteria as set forth in Chapter 8A. Also, the sales data requested in section VII of the Discount Schedule and Marketing Data is set forth in a format to facilitate your analysis of this requirement. The following questions will help you determine if the items have been sold in substantial quantities:

1. Are reported sales to non-Government entities at least 55% of total sales and those at catalog price less applicable discounts at least 75% of this amount? When the answer to this question is "yes" the item meets the "substantial quantity" test.

2. Are reported sales to non-Government entities at least 35% of total sales and those at catalog price less applicable discounts at least 55% of this amount? When the answer to this question is "yes" the test of substantial may be deemed to have been met when (i) the criteria in B, C, and D above are met, (ii) the nature of the item or total quantities sold clearly supports such a conclusion even though the Government is the major user, and (iii) approval of the chief or deputy chief of the Procurement Office is obtained.

3. Can audit verify from the seller's records that commercial sales meet the test of (1) and (2) above?

4. Are reported sales to non-Government entities less than 35% of total sales to all customers (Government and non-Government)? If the answer is "yes," the item does not meet the test of substantial quantities. Therefore, if the item is to be included in the MAS, cost or pricing data must be obtained and evaluated in accordance with FPR 1–3.807.

F. *Catalog Price Exemption.* A catalog price exemption to the need for submission of cost or pricing data can be granted for products or services offered on MAS solicitations when the requirements set forth in paragraphs A through E above have been met.

The Discount Schedule and Marketing Data Sheets provides in section VII for the information to determine commerciality. This section permits offerors to certify to the commerciality of items offered under the solicitation. Along with this certification, offerors are required to submit sales information on a representative sample of the best selling items under the SIN. The contracting officer will establish the representative sample size in the solicitation. For items that the offeror cannot certify as commercial, sales information will be required for each item offered under the solicitation. The information provided will be used in determining whether an item should be exempt from the cost and pricing data requirement.

*IV. Price Analysis*

A. *Requirement for Price Analysis.* FPR 1-3.807-2(a) states that some form of price or cost analysis should be made in connection with every negotiated procurement action. FPR 1-3.807-1(b)(2)(iv) states that even though an item qualifies for exemption from the requirements for submission of certified cost or pricing data, price analysis must be performed to determine the reasonableness of the price and the need for further negotiation.

B. *Preparation for Negotiations.* Preparation for negotiations after receipt of the offer begins with a properly prepared price analysis report. The price analysis should provide the basis for establishing the specific negotiation objectives and the reasons why these objectives were established.

C. *Price Analysis Techniques.* Most of the data needed to perform the price analysis will be submitted by the offerors as required by the Discount Schedule and Marketing Data Sheets and the historical files on existing or prior contracts. Questions on the proposal that arise during the price analysis effort will be addressed to the offeror. The price analysis may include the following elements, as appropriate:

1. Discount arrangements on the existing or prior year contract. Data from these sources can be accumulated prior to receipt of proposals. Information should include: estimated and actual sales volume; categories of customers and discount arrangements; the MAS discounts negotiated; and, any problems or significant events that were experienced during the negotiations affecting the Government's negotiation position. Price reduction information submitted in accordance with the price reductions clause shall also be included. This information is the data base from which to start the price analysis after proposals are received.

2. Offeror's commercial sales data. The sales data submitted in Part B, VII of the Discount Schedule and Marketing Data Sheets will be used to determine price reasonableness, the commerciality of products or services offered and the discount the Government should receive. As a general rule, the larger the percent of commercial sales to total sales, the more reliance the Government can place on prices being set in the marketplace. Because products or services available under schedules should be for the most part commercial items, it is essential that the commerciality of the products or services be established preparatory to negotiations. Where products or services do not clearly meet the tests of commerciality, contract negotiators are required to analyze whether these products or services are comparable to others which meet the tests of commerciality or there are other circumstances that can be used in judging why such items should be considered commercial. Additional information may be required from the offeror in assessing commerciality. Where products or services are not commercial, cost or pricing data is required.

3. The prices and discounts proposed by the offeror. The offeror's proposal should be reviewed to ascertain an understanding of the prices or discounts offered to the Government as compared with offeror's discounts to other entities and to determine if the sales data required is included in the proposal. The analysis of the proposal should determine the reasons for differences between the offered discounts, and other discount arrangements; whether there are special discount arrangements; or other concessions that the offeror makes which should be included in determining the Government's negotiation position.

4. Net price evaluation. Comparison of net prices may be utilized in the evaluation of offers under MAS contracts. Every effort should be made to include products with the lowest net price on the schedule even though there may be instances where the offeror offering the lowest net price may not offer the most favored customer pricing. In addition, you may compare the net prices offered by one offeror with net prices of similar items offered by other offerors to assist in the price reasonableness determination. This may be done on a sampling basis using the high dollar volume items listed on the Discount Schedule and Marketing Data Sheets.

5. Recommendations contained in preaward audits or from other pricing specialists or from other appropriate sources.

6. Trend analysis of price changes using appropriate indices such as the Producer Price Index, other similar market indicators, and price changes in similar produces offered by other companies.

7. The comparison of offered prices/discounts to local retail and discount house catalog prices.

8. The overall discount policy of the offeror. The Discount Schedule and Marketing Data sheets require that complete disclosure regarding discount policy and price reductions in any other form be made. This would include, but not limited to, such things as quantity discounts, end-of-year discounts, discounts for multiple quantities, free service or installation, training, bonus goods of any kind, trade-in allowances, rebates of any kind, F.O.B. point, payment terms, incentives, guaranteed prices. The price analysis should determine whether any such items are included in the offeror's proposal to the Government and the consideration that they should be given in establishing the Government's negotiation position.

9. That the offeror's price to the Government takes into account the volume of Government business anticipated for a fixed period, such as a fiscal year, rather than the size of the individual purchase order (FPR 1-3.807-12).

D. *OEM and Dealer/Distributor Discounts.* 1. An integral part of the price analysis is the consideration given to OEMs and dealers in the establishment of the Government's negotiation position. While the government's goal in negotiating schedule discounts is to obtain an offeror's most favored customer discount other than the OEM or dealer discount, it is none the less necessary for the Government to assure itself that these entities are performing OEM or dealer functions. Accordingly, appropriate information will be obtained from the offeror where an offeror sells to OEMs or dealers.

2. An offeror will be required to furnish information on its dealer/distributor pricing or discount arrangements regardless of whether these entities will participate under the schedule contract. Information will be obtained on the functions that the dealer/distributor performs and which of these functions will be performed under the schedule contract. Where a dealer performs a significant number of functions for the offeror, the Government's negotiation objective will be other than the offeror's dealer/distributor price or discount.

3. Where an offeror sells the same or similar products or services to an OEM that are offered to the Government under the MAS solicitation, the offeror will be required to furnish information on its OEM pricing or discount arrangements. Where an offeror sells to an OEM and claims that there is considerable difference between the item sold to the OEM and the item sold through the MAS contract, the offeror will be given the opportunity to demonstrate such differences. If the differences can be substantiated, the Government's negotiation position will be other than the offeror s OEM price or discount.

*V. Negotiations*

1. Negotiations can begin upon completion of a properly prepared price analysis and establishment of the Government's negotiation objectives.

2. During the negotiations, Government negotiators will address the following:

a. Aggregate discounts based on the estimated volume of sales under the schedule contract giving consideration to the Government's manner of ordering.

b. In FSS, the use of an economic price adjustment clause considering the uncertainty of prices for the contract term and the resultant improved discounts offered the Government by the offeror for this price protection. The use of the EPA clause is a matter for negotiation.

3. In the event that the Government's negotiation objective cannot be met, the contracting officer must exercise judgment in deciding whether to reject the offer. In exercising this judgment, the contracting officer must weigh the effect that the rejection of the offer will have on meeting the Government's needs. Whenever a decision is made to award an MAS contract where the Government's discount is not equal to or better than the MFC discount, the contracting officer will:

a. Ensure the analysis and reasons for this decision are fully documented and justified in the contract file.

b. Obtain approval for such a decision at a supervisory level higher than the contracting officer, regardless of the dollar value.

4. The Government will not award an MAS contract to a firm that does not give us a price equal to the best price given or available to its volume end user customers under similar circumstances except where the Government's overall volume of purchases for the contract period does not warrant the best price given to end user customers.

5. At the conclusion of negotiations, the contracting officer will decide on the level of the MOL in the contract. The level of the MOL depends on the Government's negotiated discount arrangement and the estimate of sales volume above which suppliers are likely to quote lower prices in other types of contracts.

6. In all MAS contract negotiations, the contracting officer is required to make an affirmative determination that the prices negotiated are fair and reasonable (FPR 1–3.807.2).

7. FPR 1–3.811 requires that a price negotiation memorandum (PNM) be prepared at the conclusion of each negotiation. The PNM is the document that brings together all the principal elements of the negotiation leading to the decision the price/discount is fair and reasonable. In support of that decision, the PNM should contain the significant considerations shaping the pricing/discount arrangement. These include:

a. A summary of the offer received (prices, terms, etc.), the Government's negotiation position (objectives) and the negotiation results. Any revised or adjusted offers and any reversed or adjusted Government negotiation objectives will be explained.

b. Names and titles (position) of the Government and contractor representatives who participated in the negotiations.

c. Reference to the price analysis report should be made or, where appropriate, actual incorporation of the price analysis. (Elements of the price analysis report are in Section II, paragraph C of this pricing guide).

d. Where cost of pricing data is required, the narrative should cover the products or services that require it, the source of the data, the analysis of the data and its use in negotiations. Where the requirement for cost or pricing data is waived, the determination and findings in support of such waiver will be appended to the PNM.

e. Where preaward audit or other pricing assistance is available, the PNM should identify the recommendations. Where the recommendations are not used, appropriate rationale will be included on why they were not used. Any alternate position will be documented and supported with factual data.

f. Any exceptions to the Government's terms and conditions will be documented as will any special or non-standard contract provision.

g. The PNM will document the initial negotiation objectives and actual negotiations including the offers and counter-offers made by the parties with supporting rationale for all Government positions.

h. The document will include the MOL level established with supporting rationale.

i. The document must clearly demonstrate and support that the price/discount negotiated is reasonable. It must document any decision to accept less than the best pricing arrangement granted to the most favored customer. The PNM should also identify the offeror's data used in the negotiation process.

j. The PNM should be signed and dated by the contracting officer as evidence that it is the official record of negotiations and it complies with GSA policies and procedures.

**Price Analysis Check Sheet**

| | Yes | No |
|---|---|---|
| 1. Did the offeror submit adequate data in response to the solicitation? | | |
| 2. If data submitted by offeror was not adequate, did you request that deficiencies be corrected? | | |
| 3. Did offeror than submit adequate data? | | |
| 4. Did you verify that the items meet the test of: | | |
| a. Established catalog price (FPR 1-3.807-1(b)-(2)(ii)(A))? | | |
| b. Commercial item (FPR 1-3.807-1 (b)(2)(ii)(B))? | | |
| c. General public (FPR 1-3.807-1 (b)(2)(ii)(D))? | | |
| d. Substantial quantities (FPR 1-3.807-1 (b)(2)(ii)(c) and ASPM No. 1, Chapter 8A)? | | |
| 5. Did you prepare a price analysis on the offerors proposal? | | |
| 6. Did you compare the offerors prices/discounts to existing or prior contracts and reconcile differences? | | |
| 7. Did you compare proposed price lists to prior lists and evaluate changes? | | |
| 8. Did the offeror propose the MFC discount to the Government? | | |
| 9. If MFC discount was not offered, did the offeror's proposal provida the required documentation in support thereof? | | |
| 10. If MFC discount was not offered, did you evaluate why and use it in developing the Government's negotiation position? | | |
| 11. On a sample basis, did you compare "net prices" on high dollar volume items to similar items offered or available from other sources? | | |
| 12. Are the prices negotiated at least equal to the best price that the offeror grants to its end user most favored customer? | | |
| 13. Does the PNM contain an affirmative determination that the prices negotiated are fair and reasonable and set forth the basis for such determination? | | |

Solicitation No. ———

**Discount Schedule and Marketing Data**

*Instructions to Offerors*

*Part A.* General Information, applies to each GSA Special Item Number (SIN) for which an offer is submitted. (If all information is the same, SINs may be combined.)

*Part B.* Separate discount and sales information, *must be completed for each Special Item Number* for which an offer is submitted. (If discount information is the same for all products under each SIN, SINs may be combined. However, separate sales information rerquired under Part B IV must be provided for each SIN.)

Information required by each space *must* be furnished. If not applicable, indicate by "N/A". Information furnished in Part B relating to discounts, allowances and sales information will be treated as "Confidential" by the Government except for final prices and discounts awarded by the Government. *Failure to provide current, accurate and complete information under Parts A and B may subject the offeror to liability for refunds pursuant to the price reductions or Defective Pricing Clauses.*

**Part A—General Information**

(Applicable to all special item numbers)

I. *Offeror's Marketing Category* (check applicable item)

(a)——Manufacturer selling direct—has no dealers.

(b)——Manufacturer selling direct to the Government even though he has dealers.

(c)——Manufacturer selling to the Government through dealers.

(d)——Dealer selling direct to the Government. (Dealer must submit manufacturer's price list).
(e)——Other (specify)————

II. *Identification of a Price List as the Basis for This Offer* (check and attach—copies of the price list)
(a)——Manufacturer's catalog/pricelist (indicate type)————
(b)——Dealer's catalog/pricelist
(c)——Retailer's catalog/pricelist
(d)——Other (specify)————

III. *Warranty:* (question (b) applies only to FSS solicitations)
(a) Submit your standard commercial warranty or specify where it may be found in your catalog or pricelist included with this offer.
(b) The warranty offered to GSA is more favorable——less favorable——or equal to——the commercial warranty? (check one). Describe and provide the value (expressed as a percentage of the catalog price) if more favorable or less favorable——%.

IV. *Installation and Instruction* (this section only applies to FSS)
(a) Are installation and instruction included in this effort? Yes—, No— (check one). If *Yes*, give details or indicate where the information may be found in your catalog or pricelist.
(b) Are installation and instruction provisions offered herein to the Government more favorable than those in commercial customers? Yes—, No— (check one). If *Yes*, describe and provide the value (expressed as a percentage)——%.

V. *Other Data:* (In FSS solicitations, answer "Yes" Or "No" for each question)
(a)——Do you maintain stock on hand of the items offered?
(b)——Do you display the Special Item Number(s) offered in showroom?
(c)——Do you provide any design and layout assistance related to this Special Item Number free of charge?
(d) If you are a dealer, will you arrange to have other dealers participate in the schedule contract should you receive a contract?
(e)——Will you administer all incoming orders, including requests for expediting and follow-up?

Solicitation No. ———

**Part B—Discount and Sales Information**

Name of Offeror ————
GSA Special Item Number ————

I. *Identification of Items Offered.* How many Model/type of catalog items do you offer under this GSA special Item Number ——— (enter number).

II. *Discounts.* The following concessions are offered to the Government for delivery FOB destination. In ADTS solicitations, list also concessions to the Government for delivery FOB origin.
(a) Discount offered on the above GSA Special Item Number is —— % from pricelist dated ———, *plus* prompt payment discount, as stated on the first page of this solicitation (additional details may be entered below or attached). If discounts vary, show discounts on pricelist.
(b) Aggregate or end of contract additional discounts. An additional discount of —— percent is offered to the Government which will be applied to the actual aggregate sales in excess of the following base figure under this contract:
1. For current MAS contractors, aggregate sales (annualized) to the Government for most recent 12 month period under similar contract(s) is $———, based on sales during the period ——— to ———.
2. For other offerors, projected aggregate sales under this contract is $———.
(c) Quantity Discounts. List below any quantity discounts included in this offer. (Question (2) below applies only to FSS).
(1) Can models/products be combined within special Item Number? Yes —— No ——. If yes, provide details.
(2) Can special Item Numbers be combined? Yes —— No ——. If yes, provide details.
(d) Other beneficial terms, discounts, or concessions included in this offer such as prompt renewal discounts, purchase option credits, etc. (List below and provide detail explanations.) (This section applies only to FSS solicitations).

III a. List below the best discount and/or concessions resulting in the lowest net price (regardless of quantity and terms and conditions) to other than authorized GSA contract users from *price list* for the same or similar products or services offered to the Government under this solicitation. (Show actual percentage and delivery terms)

| | Regular discounts (percent) | Quantity discounts (percent) | Aggregate discounts | Commissions to other than employees (percent) | Prompt payment | FOB point | Other |
|---|---|---|---|---|---|---|---|
| (1) To dealers/retailers | | | | | | | |
| (2) To distributors/wholesalers | | | | | | | |
| (3) To educational institutions | | | | | | | |
| (4) To state, county, city, and local governments | | | | | | | |
| (5) To original equipment manufacturers (OEM) | | | | | | | |
| (6) To others (specify): e.g., national accounts, sales agreements, etc. | | | | | | | |
| (7) If a dealer, indicate discount from manufacturer's price list | | | | | | | |

III.c. Do you have in effect, for any customer of any class within the MOL or outside of the MOL, other discounts and/or concessions including but not limited to the following, regardless of price list, which result in lower net prices than those offered the Government in this offer?
Yes——No——rebates of any kind, including year-end or end of contract discounts?
Yes——No——multiple quantity unit pricing plan?
Yes——No——cumulative discounts of any type which cover items being offered?
Yes——No——products (models)/services that may be combined for maximum discounts?
Yes——No——others (specify).
If answer to any of the above is "Yes", provide detail explanation including the value expressed as a percentage of the list price.

Special Item No. ———

IV. (a) Are any of the models/products offered herein sold by the offeror under a different trade name(s)? Yes ——, No ——. If "Yes," explain and provide applicable pricelists.
(b) To your knowledge, are there identical products offered herein contained in any other GSA Federal Supply Schedule contract? Yes ——, No ——. If "Yes", identify the product, schedule and contract.
(c) Summarize any significant changes in concessions offered herein as compared with those set forth in any current GSA contract.

V. *Allowances:* (This section only applies to FSS solicitations). Do you offer any of the following allowances to any customer which are not available to a GSA contract user under this contract? (Enter "yes" or "no" for each. If yes, explain.)
(a) —— Trade-in allowances?
(b) —— Return/Exchange goods policy?
(c) —— Reduced prices on samples, demonstrator models, reconditioned items or floor models?
(d) —— Do you give any allowances not mentioned above?

VI. *Sales Information* (This section only applies to FSS solicitations). Estimate the percentage of your sales made to the U.S. Government under Federal Supply Schedule Blanket Purchase Arrangements (check one of the following):
None ——. 25% or less ——. 25% to 49% ——. 50% to 74% ——. 75% or more ——.
List agencies below:
1. ————
2. ————
3. ————
4. ———— etc.

VII

Solicitation No. ——— Special Item No. ——— Offeror Name ———

A. This section requires (1) that sales information be provided to enable the contracting officer to determine that the items meet the test of commerciality in FPR 1-3.807-1 and ASPM No. 1, Chapter 8A; and, (2) that pricing data is furnished in sufficient detail to enable the contracting officer to perform a price analysis in accordance with FPR 1-3.807-1(b)(2)(iv).

B. The offeror certifies that, except for the individual models/types or catalog numbers cited in paragraph C below, all other models/types or catalog numbers offered in response to this solicitation meet the tests of commerciality in FPR 1-3.807-1 and ASPM No. 1, Chapter 8A. Of the individual models/types or catalog numbers so certified, sales information shall be provided in the table below for each of the —— models/types or catalog numbers with the largest dollar sales volume. The sales information provided is for the prior 12 months, from ——— to ——— for this special item number.

1. Total annual sales to the Government under this special item number $———.
2. Total annual sales (to all entities) under this special item number $———.

| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
|---|---|---|---|---|---|---|---|
| Model/type or catalog No. | Total annual sales to Fed. Govt. | Total annual sales to nongovernment customers at catalog price (less published discounts) | Total annual sales to nongovernment customers at other than catalog price | Total annual sales: Columns 2, 3, and 4 | Provide information below for largest discount granted to any nongovernment customer | List the largest discount at which the item was sold for comparable sales/quantities shown in column 2 to any nongovernment customer during the past year | Is the discount in block number 6 greater than your current offer under this solicitation? Yes——No——. If yes, provide complete documentation and rationale of the difference. Merely submitting copies of documents such as terms and conditions such as terms and conditions of commercial contracts, commercial warranties, etc., will not be adequate to justify the difference |
| | $—percent of column 5 | | $—percent of column 3 if more than 25 percent | | Quantity—Discount | Quantity—Discount | |

C. Sales information in the table below shall be provided for each individual model/type or catalog number in the above special item number that is not certified commercial when experienced annual government sales are $100,000 or more.

| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
|---|---|---|---|---|---|---|---|
| Model/type or catalog No. | Total annual sales to Fed. Govt. | Total annual sales to nongovernment customers at catalog price (less published discounts) | Total annual sales to nongovernment customers at other than catalog price | Total annual sales: Columns 2, 3, and 4 | Provide information below for largest discount granted to any nongovernment customer | List the largest discount at which the item was sold for comparable sales/quantities shown in column 2 to any nongovernment customer during the past year | Is the discount in block number 6 greater than your current offer under this solicitation? Yes——No——. If yes, provide complete documentation and rationale of the difference. Merely submitting copies of documents such as terms and conditions of commercial contracts, commercial warranties, etc., will not be adequate to justify the difference |
| | $—percent of column 5 | | $—percent of column 3 if more than 25% | | Quantity—Discount | Quantity—Discount | |

NOTES:

1. Federal Government sales include all sales to U.S. Government and its instrumentalities and for U.S. Government use, sales directly to U.S. Government prime contractors and to their subcontractors or suppliers at any tier, for use as an end item or as part of an end item, by the U.S. Government.
2. Nongovernment customer is defined as other than Government or affiliates (include sales to distributors, dealers, OEM, national accounts, educational institutions, state, etc.).
3. Discounts are reductions to catalog or market prices (published or unpublished) applicable to any customer, including OEMs, dealers, distributors, national accounts, states, etc.; and any other form of price reduction such as concessions, rebates, quantity discounts, allowances, services, warranties, installation, free parts, etc., which are granted to any customer.

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## 41 CFR Parts 1-3, 1-7 and 1-15

**[FPR Amdt. 225]**

## Revisions To Profit Policy and Cost of Money Cost Principle

**AGENCY:** General Services Administration.

**ACTION:** Final rule.

**SUMMARY:** This amendment codifies FPR Temporary Regulation 61, which deals with a facilities capital cost of money cost principle and policies for establishing profit or fee prenegotiation objectives. The amendment also adds policies for allowing cost imputed under the provisions of Cost Accounting Standard (CAS) 417, Cost Of Money As An Element Of The Cost Of Capital Assets Under Construction. The basis for the regulation is Office of Federal Procurement Policy Letter 80-7, dated December 9, 1980 (44 FR 82593, December 15, 1980), with regard to profit policy and facilities capital cost of money and Department of Defense initiatives regarding CAS 417. The intended effect is substantial uniformity among Government agency regulations.

**EFFECTIVE DATE:** November 29, 1982.

**FOR FURTHER INFORMATION CONTACT:** Philip G. Read, Director, Office of Federal Procurement Regulations, Office of Acquisition Policy (202-523-4755).

**SUPPLEMENTARY INFORMATION:** FPR Temporary Regulation 61 (46 FR 27645, May 21, 1981) is canceled and deleted from the appendix at the end of 41 CFR Chapter 1.

### List of Subjects

*41 CFR Part 1-3*

Government procurement, Types of contracts, Procurement by negotiation, Small purchases, Cost accounting standards.

*41 CFR Part 1-7*

Government procurement, Contract clauses.

*41 CFR Part 1-15*

Government procurement, Cost principles.

## PART 1-3—PROCUREMENT BY NEGOTIATION

The table of contents for Part 1-3 is amended to revise three entries, add three entries under Subpart 1-3.8, and add a new Subpart 1-3.13 with 17 new entries as follows:

* * * * *

### Subpart 1-3.8—Price Negotiation Policies and Technique



### Subpart 1-3.13—Cost of Money for Capital Employed on Facilities in Use and Capital Assets Under Construction



## Subpart 1-3.8—Price Negotiation Policies and Techniques

1. Section 1-3.808-1 is revised and the caption is revised to read as follows:

### § 1-3.808-1 Scope and applicability.

This section—

(a) Prescribes policies for establishing the profit or fee portion of the government prenegotiation objective;

(b) Applies to price negotiations, based on cost analysis, of contracts and contract modifications (including modifications to contracts awarded by formal advertising);

(c) Prescribes policies for agencies' development and use of a structured approach for determining the profit or fee prenegotiation objective; and

(d) Specifies (1) situations requiring contracting officers to analyze profit, and (2) considerations for that analysis.

2. Section 1-3.808-2 is revised and the caption is revised to read as follows:

### § 1-3.808-2 General.

(a) Profit or fee prenegotiation objectives do not necessarily represent net income to contractors. Rather, they represent the potential remuneration contractors *may* receive for contract performance. This remuneration and the Government's estimate of allowable costs to be incurred in contract performance together equal the Government's total prenegotiation objective. Just as actual costs may vary from estimated costs, the contractor's actual profit may vary from negotiated profit or fee, as a result of such factors as efficiency of performance, incurrence of costs the Government does not recognize as allowable, complexity of work, or contingencies.

(b) It is in the Government's interest to offer contractors opportunities for financial rewards sufficient to (1) stimulate efficient contract performance, (2) attract the best capabilities of qualified large and small business concerns to Government contracts, and (3) maintain a viable industrial base.

(c) Both the Government and contractors should be concerned with profit as a motivator of efficient and effective contract performance. Negotiations aimed merely at reducing prices by reducing profit, without proper recognition of the function of profit, are not in the Government's best interest. Negotiation of extremely low profits, use of historical averages, or automatic application of predetermined percentages to total estimated costs do not provide proper motivation for optimum contract performance. Therefore, agencies shall not (1) establish ceilings on profits or fees, (2) create administrative procedures that could be represented to contractors as de facto ceilings, or (3) otherwise unduly constrain the application of judgment in negotiating fair and reasonable prices (but see § 1-3.808-4(e)).

3. Section 1-3.808-3 is revised and the caption is revised to read as follows:

### § 1-3.808-3 Agency responsibilities.

(a) *Structured approach.* (1) Structured approaches for determining profit or fee prenegotiation objectives provide a discipline for ensuring that all relevant factors are considered (see § 1-3.808-6). The structured approach an agency adopts when required shall allow the tailoring of profit or fee on an individual contract to fit the particular circumstances of that contract. Agencies are encouraged to adopt a weighted-guidelines approach, but may prescribe another structured approach if it incorporates a logic and rationale similar to that of the weighted-guidelines method, an example of which may be found in the Defense Acquisition Regulation (32 CFR 3-808). Instead of independently establishing its own structured approach, an agency may adopt another agency's approach if that approach is consistent with, or is appropriately modified to be consistent with the policies set forth in the various subsections of § 1-3.808. Each agency's approach shall be conceptually sound, practicable to apply, and equitable to both the Government and its suppliers in the market environment from which the agency draws its supplies and services.

(2) Agencies that have awarded less than $50 million in noncompetitive contracts over $100,000 in any fiscal year after fiscal year 1979, need not adopt a structured approach, but may do so. However, any agency which makes noncompetitive contract awards over $100,000 totaling $50 million or more in any fiscal year after fiscal year 1979—

(i) Shall prescribe a structured approach for determining the profit or fee objective in those acquisitions that require cost analysis;

(ii) May prescribe specific exemptions for situations in which mandatory use of a structured approach would be clearly inappropriate; and

(iii) Shall exercise management oversight to ensure that the agency's approach is appropriately structured and applied.

(b) *Cost of money as an element of the cost of facilities capital.* (1) Cost Accounting Standard (CAS) 414 (Cost of Money as an Element of the Cost of Facilities Capital) provides a means for allocating to individual contracts an imputed cost of facilities capital employed, making it practical for the Government to differentiate among contracts with respect to the level of contractor-furnished facilities to be employed in contract performance. This imputed cost is an allowable cost under contracts subject to the cost principles for commercial organizations (see § 1-15.205-51).

(2) Agencies shall ensure that contractors are not compensated for facilities capital cost of money both as a direct or indirect cost and in profit or fee. Before the allowability of facilities capital cost of money, consideration for it was included in profits and fees. Therefore, profit and fee prenegotiation objectives shall be reduced if necessary to reflect this refinement in cost accounting practices. This reduction may be accomplished by means of offsets; that is, by (i) using a dollar-for-dollar offset in the Government's prenegotiation profit or fee objective, or (ii) incorporating a common offset factor

under an agency's structured approach. No offset is necessary when the profit rates applied to the profit analysis factors under an agency's structured approach already take into account the allowability of facilities capital cost of money.

(3) When a prospective contractor does not propose or identify facilities capital cost of money in a proposal for a contract under which this cost could be allowed, it is presumed that consideration for facilities capital to be employed in contract performance is included, but not identified, in the contractor's profit or fee objective. Accordingly, the contractor may not later claim this cost as allowable (see §§ 1-3.808-4(c) and 1-15.205(a)(2)(iii)).

(4) The policy on offsets set forth in paragraph (b)(2) of this section does not apply to the cost of money as an element of the cost of capital assets under construction (see §§ 1-15.205-51(b) and 1-3.1302-6).

4. Section 1-3.808-4 is added to read as follows:

### § 1-3.808-4 Contracting officer responsibilities.

(a) When the price negotiation is not based on cost analysis, contracting officers are not required to analyze profit.

(b) When the price negotiation is based on cost analysis, contracting officers in agencies that have a structured approach shall analyze profit, using their agency's structured approach except as specifically exempted under the agency's procedures. When not using a structured approach (because the agency does not have one or because a specific exemption applies), contracting officers shall comply with § 1-3.808-6 in developing profit or fee prenegotiation objectives.

(c) Contracting officers shall use the Government prenegotiation cost objective amounts as the basis for calculating the profit or fee prenegotiation objective. Before applying profit or fee factors, the contracting officer shall exclude any facilities capital cost of money included in the cost objective amounts. If the prospective contractor fails to identify or propose facilities capital cost of money in a proposal for a contract that will be subject to the cost principles for contracts with commercial organizations (see Subpart 1-15.2), facilities capital cost of money will not be an allowable cost in any resulting contract (see § 1-3.808-5 and 1-15.205-51(a)(2)(iii)).

(d) Contracting officers are not required to use an overall profit or fee objective higher than that proposed by the prospective contractor.

(e)(1) The contracting officer shall not negotiate a price or fee that exceeds the following statutory limitations imposed by 10 U.S.C. 2306(d) and 41 U.S.C. 254(b):

(i) For experimental, developmental, or research work performed under a cost-plus-fixed-fee contract, the fee shall not exceed 15 percent of the contract's estimated cost, excluding fee.

(ii) For architect-engineering services for public works or utilities, the contract price or the estimated cost and fee for production and delivery of designs, plans, drawings, and specifications shall not exceed 6 percent of the estimated cost of construction of the public work or utility, excluding fees.

(iii) For other cost-plus-fixed-fee contracts, the fee shall not exceed 10 percent of the contract's estimated cost, excluding fee.

(2) The limitations in paragraphs (e)(1)(i) and (iii) of this section shall apply also to the maximum fees on cost-plus-incentive-fee and cost-plus-award-fee contracts. However, the agency head or a designee may waive the maximum fee limitation for a specific cost-plus-incentive-fee or cost-plus-award-fee contract.

(3) The estimated costs on which the maximum fees are computed pursuant to the statutory limitations set forth in paragraph (e)(1) of this section shall include facilities capital cost of money when this cost is included in cost estimates.

(f) The contracting officer shall not require any prospective contractor to submit details of its profit or fee objective, but shall consider them if they are submitted voluntarily.

(g) If a change or modification calls for essentially the same type and mix of work as the basic contract or is of relatively small dollar value compared to the total contract value, the contracting officer may use the basic contract's profit or fee rate as the prenegotiation objective for that change or modification.

5. Section 1-3.808-5 is added to read as follows:

### § 1-3.808-5 Solicitation notice and contract clause.

(a) The contracting officer shall insert the notice set forth below in all solicitations that will result in contracts with reimbursable costs subject to the cost principles for contracts with commercial organizations (see Subpart 1-15.2):

**Facilities Capital Cost of Money**

Facilities capital cost of money (see FPR § 1-15.205-51(a)) will be an allowable cost under the contemplated contract, but only if the contractor specifically identifies or proposes it in the cost proposal for the contract and elects to claim this cost by checking the appropriate box below. If the contractor does not specifically identify or propose facilities capital cost of money and does not elect to claim this cost, the contract will include the Waiver of Facilities Capital Cost of Money clause.

☐ The prospective contractor has specifically identified or proposed facilities capital cost of money in its cost proposal and elects to claim this cost as an allowable cost under the contract.

☐ The prospective contractor has not specifically identified or proposed facilities capital cost of money in its proposal and elects not to claim it as an allowable cost under the contract.

(End of notice)

(b) The contracting officer shall insert the clause set forth below in contracts with reimbursable costs subject to the cost principles for commercial organizations in Subpart 1-15.2, when the contractor has not specifically identified or proposed facilities capital cost of money in its proposal and has elected not to claim it as an allowable cost under the contract (see election under paragraph (a) of this section):

**Waiver of Facilities Capital Cost of Money**

The Contractor is aware that facilities capital cost of money is an allowable cost but waives the right to claim it under this contract.

(End of clause)

6. Section 1-3.808-6 is added to read as follows:

### § 1-3.808-6 Profit analysis factors.

(a) *Common factors.* Unless it is clearly inappropriate or not applicable, each factor outlined in paragraphs (a)(1) through (6) of this section shall be considered by agencies in developing their structured approaches and by contracting officers in analyzing profit when not using a structured approach.

(1) *Contractor effort.* This factor measures the complexity of the work and the resources required of the prospective contractor for contract performance. Greater profit opportunity should be provided under contracts requiring a high degree of professional and managerial skill and to prospective contractors whose skills, facilities, and technical assets can be expected to lead to efficient and economical contract performance. The following factors (i) through (iv) shall be considered in determining contractor effort, but they may be modified in specific situations to accommodate differences in the categories used by prospective contractors for listing costs:

(i) *Material acquisition.* This subfactor measures the managerial and technical effort needed to obtain the required purchased parts and material, subcontracted items, and special tooling. Considerations include (A) the complexity of the items required, (B) the number of purchase orders and subcontracts to be awarded and administered, (C) whether established sources are available or new or second sources must be developed, and (D) whether material will be obtained through routine purchase orders or through complex subcontracts requiring detailed specifications. Profit consideration should correspond to the managerial and technical effort involved.

(ii) *Conversion direct labor.* This subfactor measures the contribution of direct engineering, manufacturing, and other labor to converting the raw materials, data, and subcontracted items into the contract items. Considerations include the diversity of engineering, scientific, and manufacturing labor skills required and the amount and quality of supervision and coordination needed to perform the contract task.

(iii) *Conversion-related indirect costs.* This subfactor measures how much the indirect costs contribute to contract performance. The labor elements in the allocable indirect cost should be given the profit consideration they would receive if treated as direct labor. The other elements of indirect costs should be evaluated to determine whether they (A) merit only limited profit consideration because of their routine nature, or (B) are elements that contribute significantly to the proposed contract.

(iv) *General management.* This subfactor measures the prospective contractor's other indirect costs and general and administrative (G&A) expense, their composition, and how much they contribute to contract performance. Considerations include (A) how labor in the overhead pools would be treated if it were direct labor, (B) whether elements within the pools are routine expenses or instead are elements that contribute significantly to the proposed contract, and (C) whether the elements require routine as opposed to unusual managerial effort and attention.

(2) *Contract cost risk.* (i) This factor measures the degree of cost responsibility and associated risk that the prospective contractor will assume (A) as a result of the contract type contemplated, and (B) considering the reliability of the cost estimate in relation to the complexity and duration of the contract task. Determination of contract type should be closely related to the risks involved in timely, cost-effective, and efficient performance. This factor should compensate contractors proportionately for assuming greater cost risks.

(ii) The contractor assumes the greatest cost risk in a closely priced firm fixed-price contract under which it agrees to perform a complex undertaking on time and at a predetermined price. Some firm fixed-price contracts may entail substantially less cost risk than others because, for example, the contract task is less complex or many of the contractor's costs are known at the time of price agreement, in which case the risk factor should be reduced accordingly. The contractor assumes the least cost risk in a cost-plus-fixed-fee level-of-effort contract, under which it is reimbursed those costs determined to be allocable and allowable, plus the fixed fee.

(iii) In evaluating assumption of cost risk, contracting officers shall, except in unusual circumstances, treat time and materials, labor-hour, and fixed-price level-of-effort contracts as cost-plus-fixed-fee contracts.

(3) *Federal socioeconomic programs.* This factor, which may be a negative or positive consideration, measures the degree of support given by the prospective contractor to Federal socioeconomic programs, such as those involving small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, handicapped sheltered workshops, labor surplus areas, and energy conservation. Greater profit opportunity should be provided under contracts with contractors adhering to the spirit and intent of these programs.

(4) *Capital investments.* This factor takes into account the contribution of contractor investments to efficient and economical contract performance. The following subfacters shall be considered in the analysis:

(i) *Facilities.* This subfactor, which may be either a negative or a positive consideration, includes consideration of the equipment's and facilities' (A) age, (B) undepreciated value, (C) cost-effectiveness, (D) general or special purpose, and (E) remaining life compared with the length of the contemplated program. Also to be considered are any undue reliance on Government-owned facilities and equipment, any contractor failure to provide the kinds or quantities of facilities required for efficient contract performance, and any special contract provisions that will affect the contractor's facilities capital investment risk. When applicable, the prospective contractor's computation of facilities capital cost of money for pricing purposes under CAS 414 (see §§ 1-15.205-51 and 1-3.1301) can help the contracting officer identify the level of facilities investment to be employed in contract performance.

(ii) *Operating capital.* This subfactor includes consideration of the level of the contractor's operating capital investment required for effective contract performance. This level will vary, depending on such circumstances as (A) the nature of the work and duration of the contract, (B) contract type and dollar magnitude, (C) the reimbursement or progress payment rate, (D) the contractor's financial management practices, and (E) the frequency of and time lag between billings and Government payments. These circumstances should be taken into account in determining what profit adjustment, if any, is appropriate under this subfactor.

(5) *Cost-control and other past accomplishments.* This factor, which may be a negative or positive consideration, allows additional profit opportunities to a prospective contractor that has previously demonstrated its ability to perform similar tasks effectively and economically. In addition, consideration should be given to (i) measures taken by the prospective contractor that result in productivity improvements, and (ii) other cost reduction accomplishments that will benefit the Government in follow-on contracts.

(6) *Independent development.* Under this factor, the contractor may be provided additional profit opportunities in recognition of independent development efforts relevant to the contract end item, including manufacturing or engineering processes, specialized or unique services, or other technologies. The contracting officer should consider the extent of the Government's contribution to the contractor's independent research and development program during the contractor fiscal years in which the applicable development was taking place.

(b) *Additional factors.* In order to foster achievement of program objectives, each agency may include additional factors in its structured approach or take them into account in the profit analysis of individual contract actions.

(c) *Nonprofit organizations.* The profit policy was designed for arriving at profit or fee objectives for other than nonprofit organizations. However, if appropriate adjustments are made to reflect differences between profit and nonprofit organizations, the profit analysis factors and the structured approaches developed by agencies may be used for arriving at fee objectives for nonprofit organizations.

(1) For purposes of this paragraph, nonprofit organizations are defined as those entities organized and operated exclusively for charitable, scientific, or educational purposes, of which no part of the net earnings inure to the benefit of any private shareholder or individual, of which no substantial part of the activities is carrying on propaganda or otherwise attempting to influence legislation or participating in any political campaign on behalf of any candidate for public office, and which are exempt from Federal income taxation under Section 501 of the Internal Revenue Code.

(2) In developing appropriate adjustment factors for nonprofit organizations, the following items should be considered:

(i) Tax position benefits;

(ii) Granting of financing through letters of credit or other means;

(iii) Facility requirements of the nonprofit organizations; and

(iv) Any other pertinent factors which may work to either the advantage or disadvantage of the contactor in its position as a nonprofit organization.

Subpart 1-3.13 is added to read as follows:

## Subpart 1-3.13—Cost of Money for Capital Employed on Facilities in Use and Capital Assets Under Construction

### § 1-3.1300 Scope and applicability.

This subpart sets forth policies and procedures related to implementation of the "cost of money" cost principle set forth in § 1-15.205-51. This cost principle deals with costs provided for under Cost Accounting Standard 414, Cost of Money as an Element of the Cost of Facilities Capital and Cost Accounting Standard 417, Cost of Money as an Element of the Cost of Capital Assets Under Construction. Although these standards may not be specifically applicable to all contracts subject to the cost principles set forth in Subpart 1-15.2, they have been extended to all such contracts by § 1-15.205-51 and the provisions of this subpart (but see § 1-3.808-3(b)).

### § 1-3.1301 Cost of money for capital employed on facilities in use.

### § 1-3.1301-1 Policy.

(a) It is Government policy to recognize facilities capital cost of money for facilities in use as an allowable cost on negotiated contracts subject to Subpart 1-15.2 that are priced on the basis of cost analysis (see §§ 1-3.808-3(b) and 1-15.205-51(a)).

(b) This policy shall apply to new contracts and contract modifications adding new work awarded on or after June 15, 1981. It shall apply in the same manner to any tier subcontracts or modifications thereto, upon the subcontractor's request, *provided* the prime contract or modification was eligible as of the date of award for facilities capital cost of money in accordance with this paragraph.

### § 1-3.1301-2 Definitions, measurement, and allocation.

Cost Accounting Standard (CAS) No. 414, Cost of Money as an Element of the Cost of Facilities Capital, reprinted in § 1-3.1220-14, establishes criteria for the measurement and allocation of the cost of capital committed to facilities as an element of contract cost for historical cost determination purposes. Important features of the CAS are its definitions, techniques for application, and a prescribed Form CASB-CMF (Facilities Capital Cost of Money Factors Computation) with instructions. This § 1-3.1301 adopts the techniques of CAS 414 as the approved method of measurement and allocation of facilities capital cost of money to overhead pools at the business unit level, and adds only such supplementary procedures as are necessary to extend those techniques for contract forward pricing and administration purposes. Therefore, these procedures are intended to be completely compatible with, and an extension of, the definitions, criteria, and techniques of CAS 414. Contractors who computerize their financial data are encouraged to meet the requirements of both CAS 414 and this § 1-3.1301 from the same data bank and programs.

### § 1-3.1301-3 Estimating business unit facilities capital and cost of money.

The method of estimating the business unit facilities capital and cost of money uses the techniques of CAS 414. Cost of money factors (CMF) by overhead pools at the business unit are developed using Form CASB-CMF. Three elements are required to develop cost of money factors: business unit facilities capital data, overhead allocation base data, and the interest rate promulgated by the Secretary of the Treasury under Pub. L. 92-41. These elements are discussed in this section.

(a) *Business unit facilities capital data.* The net book value (acquisition cost less accumulated depreciation) is used for each cost accounting period. The net book value used is the total of (1) the net book value of facilities recorded on the accounting records of the business unit, (2) the capitalized value of leases (see §§ 1-15.205-34 and 1-15.205-50), and (3) the net book value of facilities at the corporate or group level that support depreciation charges allocated to the business unit in accordance with the provisions of CAS 403. Projections of facilities capital will be supported by budget plans and/or similar type documentation and the estimated depreciation will be the same as used in projected overhead rates. Projections will accommodate changes in the level of facilities net book value, e.g., facilities additions, deletions of facilities by sale, abandonment or other disposal, idle facilities (see § 1-15.205-12).

(b) *Overhead allocation bases.* The base data used to compute the CMF must be the same as that used to compute the proposed overhead rates. CMF's should be submitted and evaluated as part of the proposal.

(c) *Interest rate.* For purposes of projection, the most recent interest rate promulgated by the Secretary of the Treasury under Pub. L. 92-41 will be used as the cost of money rate in Column 1 of Form CASB-CMF. Where actual costs are used in definitization actions, the actual treasury rate(s) applicable to the period(s) of the incurred costs will be recognized by development of a composite rate.

(d) *Determination of final cost of money.* CMF's estimated in accordance with the above procedures are used to develop the facilities investment base used in forward pricing. Actual CMF's are required when it is necessary to determine final allowable costs for cost settlement and/or repricing in accordance with CAS 414 and § 1-15.205-51(a).

### § 1-3.1301-4 Contract facilities capital estimates.

(a) After the appropriate Forms CASB-CMF have been analyzed and CMF's have been developed, the contracting officer is in a position to estimate the facilities capital cost of money and capital employed for a contract proposal. Format 1301, Contract Facilities Capital and Cost of Money (see § 1-3.1301-8), has been provided for this purpose. An evaluated contract cost breakdown, reduced to the contracting officer's prenegotiation cost objective, must be available. The procedure is similar to applying overhead rates to appropriate overhead allocation bases to determine contract overhead costs.

(b) Format 1301, provides for listing overhead pools and direct-charging service centers (if used) in the same structure they appear on the contractor's cost proposal and Forms CASB–CMF. The structure and allocation base units-of-measure must be compatible on all three displays. The base for each overhead pool must be broken down by year to match each separate Form CASB–CMF. Appropriate contract overhead allocation base data are extracted by year from the evaluated cost breakdown or prenegotiation cost objective, and are listed against each separate Form CASB–CMF. Each allocation base is multiplied by its corresponding cost of money factor to get the facilities capital cost of money estimated to be incurred each year. The sum of these products represents the estimated contract facilities capital cost of money for the year's effort. Total contract facilities capital cost of money is the sum of the yearly amounts.

(c) Since the facilities capital cost of money factors reflect the applicable cost of money rate in Column 1 of Form CASB–CMF, the contract facilities capital employed can be determined by dividing the contract cost of money by the same rate. Format 1301 is designed to record and compute all the above in the most direct way possible, and the end result is the contract facilities capital cost of money and capital employed. The capital employed amount may be used to identify the level of facilities investment to be employed in contract performance (see § 1–3.808–6 (a)(4)(i)).

**§ 1–3.1301–5 Preaward facilities capital applications.**

Facilities capital cost of money and capital employed as determined in § 1–3.1301–4, are applied in establishing cost and price objectives as follows:

(a) *Cost of money.* (1) *Cost objective.* This special, imputed cost of money shall be used together with normal, booked costs, in establishing a cost objective or the target cost when structuring an incentive type contract. Target costs thus established at the outset, shall not be adjusted as actual cost of money rates become available for the periods during which contract performance takes place.

(2) *Profit objective.* Cost of money shall not be included as part of the cost base when measuring the contractor's effort in connection with establishing a prenegotiation profit objective. The cost base for this purpose shall be restricted to normal, booked costs (see § 1–3.808–4(c)).

(b) *Facilities capital employed.* The profit objective as it relates to the risk associated with facilities capital employed shall be assessed in accordance with the profit guidelines set forth in § 1–3.808–6(a)(4)(i).

**§ 1–3.1301–6 Postaward facilities capital applications.**

(a) *Interim billings based on costs incurred.* Contract facilities capital cost of money may be included in cost reimbursement and progress payment invoices. The amount that qualifies as cost incurred for purposes of the "Cost Reimbursement, Fee and Payment" or "Progress Payment" clause of the contract is the result of multiplying the incurred portions of the overhead pool allocation bases by the latest available cost of money factors. Like applied overhead at forecasted overhead rates, such computations are interim estimates subject to adjustment. As each year's data are finalized by computation of the actual cost of money factors under CAS 414 and § 1–15.205–51(a), the new factors should be used to calculate contract facilities capital cost of money for the next accounting period.

(b) *Final settlement.* Contract facilities capital cost of money for final cost determination or repricing is based on each year's cost of money factors determined under CAS 414 and supported by separate Forms CASB–CMF. Contract cost must be separately computed in a manner similar to yearly final overhead rates. Also like overhead costs, the final settlement will include an adjustment from interim to final contract cost of money. However, estimated or target cost will not be adjusted.

**§ 1–3.1301–7 Administrative procedures.**

(a) Contractor submission of Forms CASB–CMF will normally be initiated under the same circumstances as forward pricing rate agreements (see § 1–3.807–8), and evaluated as complementary documents and procedures. Separate forms are required for each prospective cost accounting period during which Government contract performance is anticipated. If the contractor does not annually negotiate forward pricing rate agreements, submissions may nevertheless be made annually or with individual contract pricing proposals, as agreed to by the contractor and the contracting officer. The contracting officer shall, with the assistance of the cognizant auditor, evaluate the cost of money factors, and retain approved factors with other negotiated forward pricing data and rates.

(b) The contracting officer will complete a Format 1301, Contract Facilities Capital and Cost of Money, after evaluating the contractor's cost proposal and determining the Government prenegotiation cost objective, but before determining the Government prenegotiation profit objective.

(c) A final Form CASB–CMF must be submitted by the contractor under CAS 414 as soon after the end of each cost accounting period as possible, for the purpose of final cost determinations and/or repricing. The submission should accompany the contractor's proposal for actual overhead costs and rates, and be evaluated as complementary documents and procedures.

**§ 1–3.1301–8 Format 1301, Contract Facilities Capital and Cost of Money.**

(a) Page 1 of Format 1301

BILLING CODE 6820–61–M

## CONTRACT FACILITIES CAPITAL AND COST OF MONEY

| | |
|---|---|
| CONTRACTOR:<br>BUSINESS UNIT:<br>ADDRESS: | RFP/CONTRACT NO.<br><br>PERFORMANCE PERIOD |

| 1. OVERHEAD POOLS | 2. COST ACCOUNTING PERIOD | 3. CONTRACT OVERHEAD ALLOCATION BASE | FACILITIES CAPITAL COST OF MONEY | |
|---|---|---|---|---|
| | | | 4. FACTORS | 5. AMOUNT |
| | | | | |

| | |
|---|---|
| 6. CONTRACT FACILITIES CAPITAL COST OF MONEY | |
| 7. FACILITIES CAPITAL COST OF MONEY RATE | ÷ |
| 8. CONTRACT FACILITIES CAPITAL EMPLOYED | |

BILLING CODE 6820-61-C

This format shall not be printed, reproduced, or stocked by agencies and shall be used only as a guide for individual preparation.

(b) Page 2 of Format 1301.

**Instructions for Format 1301 Contract Facilities Capital and Cost of Money**

Purpose. The purpose of this format is to compute the estimated facilities capital to be employed for a specific contract proposal. An intermediate step is to compute the estimated facilities capital cost of money, using the Facilities Capital Cost of Money Factors developed on Form(s) CASB-CMF. This procedure is intended to be fully compatible with Cost Accounting Standard 414 "Cost of Money as an Element of the Cost of Facilities Capital," and extend those criteria and techniques to prospective periods for forward pricing purposes. FPR § 1-3.1301 should be referred to for applicability and further explanation.

Identification. Identify the contractor, business unit and address. Identify the specific RFP or contract to which the computation pertains. Identify the estimated performance period of the contract.

Overhead pools (Col. 1). List all business unit overhead pools and direct-charging service/support centers whose costs will be allocated to this contract. The structure must be compatible with contractor's cost proposal and Form(s) CASB-CMF.

Cost accounting period (Col. 2). This column is used only for the "projected" method of estimating contract facilities capital employed and cost of money. Each Overhead Pool listed must be further broken down by each Cost Accounting Period impacted by the Performance Period of the contract. The yearly breakdown must also correspond to yearly overhead allocation bases in the contractor's cost proposal, and to separate Forms CASB—CMF for each year listed. If the "historical" method is used, the column should be ignored.

Contract overhead allocation base (Col 3.). For each Overhead Pool and Cost Accounting Period listed, record the same Contract Overhead Allocation Base amounts used to derive the pre-negotiation cost objective. Such amounts should be the same as those used for burdening contract overhead or applying service/support center use charges. The base units-of-measure must agree with those used on the Form(s) CASB-CMF.

Facilities capital cost of money factors (Col. 4). Carry forward the appropriate estimated Facilities Capital Cost of Money factors from the Form(s) CASB-CMF. Business units, overhead pools and cost accounting periods must agree.

Facilities capital cost of money amount (Col. 5). The product of each Contract Overhead Allocation Base (Col. 3) multiplied by its related Facilities Capital Cost of Money Factor (Col. 4).

Contract facilities capital cost of money (Line 6). The sum of Col. 5. This represents the contract's allocable share of the business unit's estimated cost of money for the cost accounting period(s) impacted by the contract performance period. Therefore it represents a portion of the total(s) of Col. 5 of Form CASB-CMF.

Facilities capital cost of money rate (Line 7). The same Cost of Money Rate used in Col. 1 of the Form(s) CASB-CMF. Only one rate will be used in the facilities capital estimating process regardless of the length of the contract performance period.

Contract facilities capital employed (Line 8). The quotient of Line 6 divided by Line 7. This represents the contract's allocable share of the business unit's estimated facilities value for the cost accounting period(s) impacted by the contract. Therefore it represents a portion of the total(s) of Col. 4 of Form CASB-CMF.

**§ 1-3.1302 Cost of money for capital employed on capital assets under construction.**

**§ 1-3.1302-1 Policy.**

(a) It is Government policy to recognize a contractor's investment in capital assets while these are being constructed, fabricated, or developed for the contractor's own use (see § 1-15.205-51(b)). This recognition is made through the allowance of an imputed cost of money amount which is (1) calculated in accordance with Cost Accounting Standard (CAS) 417, Cost of Money as an Element of the Cost of Capital Assets Under Construction (see § 1-3.1220-17), and the instructions in § 1-3.1302-3, (2) capitalized along with the other costs of the asset for which the investment is made, and (3) allocated to Government contracts in accordance with § 1-3.1302-4.

**§ 1-3.1302-2 Definitions.**

The following definitions have been taken or developed from CAS 417 which is reprinted in § 1-3.1220-17.

(a) *Intangible capital asset.* An asset that has no physical substance, more than minimal value, and is expected to be held by an enterprise for continued use or possession beyond the current accounting period for the benefit it yields.

(b) *Tangible capital asset.* An asset that has physical substance, more than minimal value, and is expected to be held by an enterprise for continued use or possession beyond the current accounting period for the service it yields.

(c) *Cost of money rate.* The cost of money rate is either the interest rate determined by the Secretary of the Treasury under Pub. L. 92-41 (85 Stat. 97), or the time-weighted average of such rates for each cost accounting period during which the asset is being constructed, fabricated, or developed. The time-weighted average interest rate is calculated by multiplying the various rates in effect during the months of construction by the number of month(s) each rate was in effect. The sum of the products is divided by the total number of months in which the rates were experienced.

(d) *Representative investment.* The representative investment is the calculated amount considered invested by the contractor in the project to construct, fabricate, or develop the asset during the cost accounting period. In calculating the representative investment, consideration must be given to the rate or expenditure pattern of the investment, i.e., if most of the investment was at the end of the cost accounting period, the representative investment calculation must reflect this fact.

(1) If the contractor experiences an irregular or uneven expenditure pattern in the construction, fabrication, or development of a capital asset, i.e., a majority of the construction costs were incurred toward the beginning, middle, or end of the cost accounting period, the contractor must either:

(i) Determine a representative investment amount for the cost accounting period by calculating the average of the month-end balances for that cost accounting period, or

(ii) Treat month-end balances as individual representative investment amounts.

(2) If the construction, fabrication, or development costs were incurred in a fairly uniform expenditure pattern throughout the construction period, the contractor may:

(i) Determine a representative investment amount for the cost accounting period by averaging the beginning and ending balances of the construction, fabrication, or development cost account for the cost accounting period; or

(ii) Treat month-end balances as individual representative investment amounts.

**§ 1-3.1303-3 Measurement.**

(a) The imputed cost of money for an asset under construction, fabrication, or development is calculated by applying a cost of money rate (see § 1-3.1302-2(c)), to the representative investment amount (see § 1-3.1302-2(d)).

(1) When a representative investment amount is determined for a cost accounting period in accordance with § 1-3.1302-2(d)(1)(i) or § 1-3.1302-2(d)(2)(i), the cost of money rate used shall be the time-weighted average rate.

(2) When a monthly representative investment amount (see § 1-3.1302-2(d)(1)(ii) or § 1-3.1302.2(d)(2)(ii)) is used, the cost of money rate shall be the rate in effect each month. (Note—Under this method, the cost of money calculation is made monthly and the

total for the cost accounting period is the sum of the monthly calculations.)

(b) The method chosen by a contractor for determining the representative investment amount may be different for each capital asset being constructed, fabricated, or developed as long as the method fits the expenditure pattern of the construction costs incurred.

(c) The imputed cost of money will be capitalized only once in any cost accounting period, either at the end of the period or at the end of the construction period, whichever comes first.

(d) When the construction of an asset takes more than one cost accounting period, the cost of money capitalized for the first cost accounting period will be included in determining the representative investment amount for any future cost accounting periods.

**§ 1-3.1302-4 Composition and allocation of costs.**

(a) The cost of money for a tangible capital asset determined in accordance with §§ 1-3.1302-2 and 1-3.1302-3 shall be capitalized along with the other construction, fabrication, or development costs of that asset for purposes of depreciation under § 1-15.205-9.

(b) The cost of money for an intangible capital asset determined in accordance with §§ 1-3.1302-2 and 1-3.1302-3 shall be capitalized along with other construction, fabrication, or development costs of that asset and amortized over appropriate cost accounting periods.

(c) Where CAS 414 cost of money is allocated to construction, fabrication, or development effort in accordance with § 1-3.1301, it will be recognized and considered an element of total construction costs and be included in all calculations of the asset's representative investment amount.

**§ 1-3.1302-5 Limitations.**

If substantially all activities necessary to get an asset ready for its intended use are discontinued, cost of money shall not be capitalized for the period of discontinuance, except when such discontinuance arises out of causes beyond the control and without the fault or negligence of the contractor.

**§ 1-3.1302-6 Preaward capital employed application.**

An offset to the profit objective as discussed in § 1-3.808-3(b) for CAS 414 cost of money is not required for CAS 417 cost of money.

## PART 1-7—CONTRACT CLAUSES

The table of contents for Part 1-7 is amended to add one entry under Subpart 1-7.2 and one entry under Subpart 1-7.4 as follows:

* * * * *

**Subpart 1-7.2—Cost-Reimbursement Type Supply Contract**

* * * * *



* * * * *

**Subpart 1-7.4—Cost-Reimbursement Type Research and Development**

* * * * *



### Subpart 1-7.2—Cost-Reimbursement Type Supply Contracts

Section 1-7.203-26 is added to read as follows:

**§ 1-7.203-26 Waiver of facilities capital cost of money.**

Insert the clause set forth in § 1-3.808-5(b) under the conditions prescribed therein.

### Subpart 1-7.4—Cost-Reimbursement Type Research and Development Contracts

Section 1-7.403-62 is added to read as follows:

**§ 1-7.403-62 Waiver of facilities capital cost of money.**

Insert the clause set forth in § 1-3.808-5(b) under the conditions prescribed therein.

## PART 1-15—CONTRACT COST PRINCIPLES AND PROCEDURES

The table of contents for Part 1-15 is amended to add the following entry under Subpart 1-15.2:



### Subpart 1-15.2—Contracts With Commercial Organizations

Section 1-15.205-51 is added to read as follows:

**§ 1-15.205-51 Cost of money.**

(a) *Facilities capital cost of money.* (1) Facilities capital cost of money (cost of capital committed to facilities) is an imputed cost determined by applying a cost of money rate to facilities capital employed in support of contract performance. A cost of money rate is derived from a common source and uniformly imputed to all contractors. Capital employed is determined without regard to whether its source is equity or borrowed capital. The resulting cost of money is an imputed cost and is not a form of interest on borrowings as discussed in § 1-15.205-17.

(2) Whether or not the contract is otherwise subject to the cost accounting standards (CAS), and except as specified in paragraph (a)(3) of this section, facilities capital cost of money is allowable only when:

(i) The contractor's capital investment and cost of money is measured, allocated to contracts, and costed in accordance with CAS 414 and § 1-3.1301,

(ii) The contractor maintains adequate records to demonstrate compliance with paragraph (a)(2)(i) of this section, and

(iii) The estimated facilities capital cost of money is specifically identified or proposed in cost proposals relating to the contract under which this cost is to be claimed.

(3) Facilities capital cost of money is not allowable in cost-sharing (see § 1-3.405-3) or in cost contracts (see § 1-3.405-2).

(4) Cost of money for facilities capital need not be entered on the company's books of account. However, a memorandum entry of the cost shall be made. All relevant schedules, cost data, and other data necessary to fully support the entry shall be maintained in a manner to permit audit and verification.

(5) Facilities capital cost of money that is (i) allowable under paragraph (a)(2) of this section and, (ii) calculated, allocated, and documented in accordance with this cost principle shall be an "incurred cost" for reimbursement purposes under applicable cost-reimbursement contracts and for progress payment purposes under fixed-price contracts.

(b) *Cost of money as an element of the cost of capital assets under construction.* (1) Cost of money as an element of the cost of capital assets under construction is an imputed cost determined by applying a cost of money rate to the investment in tangible and intangible capital assets while they are being constructed, fabricated, or developed for a contractor's own use. The source of the investment for capital assets being constructed, whether equity or borrowed capital, is not considered in this cost of money determination. The resulting cost of money is an imputed cost and is not a form of interest on borrowings as discussed in § 1-15.205-17.

(2) Cost of money computed on representative investments before the contractor's first fiscal year subsequent to December 15, 1980, is not allowable. Cost of money may be capitalized on assets under construction beginning with the contractor's first fiscal year after December 15, 1980. The amortization of cost of money will first be allowable for new awards made on or after the effective date of this cost principle change.

(3) Whether or not the contract is otherwise subject to the cost accounting standards, the cost of money for capital assets under construction, fabrication, or development is allowable only when:

(i) The cost of money is calculated, allocated to contracts, and costed in accordance with CAS 417 and § 1-3.1302,

(ii) The contractor maintains adequate records to demonstrate compliance with paragraph (b)(3)(i) of this section, and

(iii) The cost of money for tangible capital assets is included in the capitalized cost which provides the basis for allowable depreciation costs, or in the case of intangible capital assets, the cost of money is included in the cost of those assets for which amortization costs are allowable.

(4) Actual interest cost in lieu of the calculated imputed cost of money for capital assets under construction, fabrication, or development is unallowable.

(5) The cost of money for capital assets under construction need not be entered on the contractor's books of account. However, the contractor shall (i) make a memorandum entry of the cost, and (ii) maintain, in a manner that permits audit and verification, all relevant schedules, cost data, and other data necessary to support the entry.

(6) Cost of money that is allowable under paragraph (b) of this cost principle shall be an "incurred cost" for reimbursement purposes under applicable cost reimbursement contracts and for progress payment purposes under fixed price contracts.

(Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c))

Dated: October 14, 1982.

Ray Kline,

*Acting Administrator of General Services.*

[FR Doc. 82-29270 Filed 11-4-82; 8:45 am]

BILLING CODE 6820-61-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Public Health Service

### 42 CFR Parts 52 and 52h

### Extension of 42 CFR Parts 52 and 52h To Cover Projects for Research on Adolescent Pregnancy and Family Life

**AGENCY:** Public Health Service, HHS.

**ACTION:** Final rule.

**SUMMARY:** The rules below amend the general health research regulations of the Department, 42 CFR Parts 52 and 52h, to make them applicable to research grants funded under the recently enacted Title XX of the Public Health Service Act. Title XX provides for research into questions relating to adolescent premarital sexual relations and adolescent pregnancy and parenthood. The amendments do not expand the scope of the current regulations to include a new type of research project. Rather, they indicate that research in the areas described above, which could have been funded under certain statutory authorities Part 52 presently implements, may also be funded under the new research authority. Public comment is not being requested on the amendments since they are technical in nature and no substantive modification of Parts 52 and 52h is being made.

**EFFECTIVE DATE:** November 5, 1982.

**FOR FURTHER INFORMATION CONTACT:** Donald Underwood, Grants Management Officer, Office of Adolescent Pregnancy Programs, Department of Health and Human Services, Room 602, Reporters' Building, Washington, D.C. 20201, (202) 472-5588.

**SUPPLEMENTARY INFORMATION:** On August 13, 1981, the Public Health Service Act was amended by the addition of Title XX (42 U.S.C. 300z *et seq.*). Pub. L. 97-35, sec. 955(a). Section 2008 of the new title establishes a program for research into the "societal causes and consequences of various social phenomena associated with adolescent premarital sexual relations, contraceptive use, pregnancy, and child rearing." Sec. 2001(b)(4), incorporated into 2008(a)(1). In addition, the title authorizes "evaluative research to identify effective services which alleviate, eliminate, or resolve any negative consequences of adolescent premarital sexual relations and childbearing for the parents, the child and their families." Sec. 2001(b)(5), incorporated into sec. 2008(a)(1).

The Secretary is implementing the grant authority under this new statute by making applicable the procedures of 42 CFR Part 52. Those regulations, which govern grants under a number of health research authorities, are familiar to the research community generally. Thus, the decision to implement sec. 2008 through use of Part 52 will expedite the development of acceptable projects under the new authority. Part 52 also provides procedural requirements that are compatible with the research to be undertaken under sec. 2008. Thus, no practical purpose would be served by developing separate regulations for the new statute.

Section 2008 also contains a requirement that applications under that section undergo peer review. Sec. 2008(e)(1). The peer review system established is required by the statute to be, at a minimum, "substantially similar" to the system presently used by the National Institutes of Health (NIH). The Secretary is implementing the peer review requirement of sec. 2008 by making applicable the peer review requirements of Part 52h. This decision is obviously consistent with the decision to implement sec. 2008 generally through adoption of the Part 52 procedures. Moreover, it is also consistent with the requirement that the peer review system be substantially similar to that of NIH, since Part 52h is the peer review system used by NIH.

Because the public and the research community affected by the amendments below are already thoroughly familiar with the provisions of the substantive rules, and the addition of the additional statutory authorities to the rules in any event does not affect their substance, the Secretary has determined that public comment on the amendments is unnecessary. There have been prior opportunities for public comment when substantive changes have been made in the rules.

#### Impact and Regulatory Flexibility Analyses

E.O. 12291 requires a regulatory impact analysis for any rule that has an annual impact on the economy of $100 million or more or certain other effects. Since the appropriation for this program is anticipated not to exceed $3.3 million, the Secretary has determined that an impact analysis is not required. Moreover, he hereby certifies that a regulatory flexibility analysis is not required under the Regulatory Flexibility Act (5 U.S.C. Ch. 6), which requires reduction of impact and paperwork requirements where there will be a "significant economic impact on a substantial number of small entities." Because of the size of the anticipated appropriation it is not expected that a substantial number of grants will be funded.

**List of Subjects**

*42 CFR Part 52* [1]

Grant programs—health, Adolescent pregnancy, Adolescent parenting, Youth.

*42 CFR Part 52h*

Governmental contracts, Grant programs—health, Adolescent pregnancy, Adolescent parenting, Youth.

In consideration of the foregoing, Parts 52 and 52h of Title 42, Code of Federal Regulations are hereby amended, as set forth below.

Dated: September 3, 1982.

**Edward N. Brandt, Jr.,**
*Assistant Secretary for Health.*

Approved: October 19, 1982.

**Richard S. Schweiker,**
*Secretary.*

## PART 52—[AMENDED]

1. 42 CFR Part 52 is amended by adding the following citation of authority to the end of the Statement of Authority:

Sec. 955(a), Pub. L. 97-35, 95 Stat. 589 (42 U.S.C. 300z-7(a)(1)).

2. 42 CFR Part 52 is amended by adding a new subparagraph (9) to paragraph (a) of § 52.1, to read as follows:

**§ 52.1 To which programs do these regulations apply?**

(a) * * *

(9) Research on the causes, consequences and approaches to coping with adolescent sexual relations, contraceptive use, pregnancy and parenthood authorized by section 2008 of the Act.

* * * * *

## PART 52h—[AMENDED]

3. 42 CFR Part 52h is amended by adding the following citation authority to the Statement of Authority;

Sec. 955(a), Pub. L. 97-35, 95 Stat. 590 (42 U.S.C. 300-7(e)).

4. 42 CFR Part 52h is amended by adding a new paragraph (c) to § 52h.1, to read as follows:

**§ 52h.1 Applicability.**

* * * * *

(c) Applications for grants and contracts under sec. 2008 of the Act.

[FR Doc. 82-30521 Filed 11-4-82; 8:45 am]

**BILLING CODE 4160-17-M**

[1] The Public Health Service is providing this list in compliance with 1 CFR 18.20, which requires agencies to include a list of index terms for each CFR part affected by Rules and Proposed Rules documents published in the **Federal Register** beginning April 1, 1982.

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## INTERSTATE COMMERCE COMMISSION

### 49 CFR Parts 1039 and 1300

**[Ex Parte No. 387]**

### Railroad Transportation Contracts

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Final rules.

**SUMMARY:** The Staggers Rail Act of 1980 permitted rail carriers and purchasers of rail service to enter into contracts for rail service. These contracts must be filed with the Commission, with a summary of non-confidential information related to the contract provisions, and with the essential terms presented in tariff format for public inspection. The Commission is adopting rules to implement these provisions of the Rail Act providing for filing contract rates and for filing complaints related to these contracts.

**EFFECTIVE DATE:** January 4, 1983.

**ADDRESS:** Interstate Commerce Commission, Room 5340, Washington, DC 20423, Attention: Ex Parte No. 387.

**FOR FURTHER INFORMATION CONTACT:** Douglas Galloway, (202) 275-7278
or
Michael Sullivan, (202) 275-0826.

**SUPPLEMENTARY INFORMATION:** We instituted this proceeding by notice of interim rules 45 FR 73841 (November 5, 1980), in response to the Staggers Rail Act of 1980. The interim rules were stayed at 45 FR 85641, December 29, 1980 and a Notice was issued which adopted the interim rules as proposed rules at 45 FR 85641, December 29, 1980. The notice addressed the contract rates provisions, 49 U.S.C. 10713. We have, on this date, issued a final decision including the final rules for rail contract rates. Copies of the complete decision are available by contacting TS Infosystems at 289-4357 in the DC Metropolitan area or toll-free at 800-424-5403.

Section 10713 allows contracts between rail carriers and purchasers of rail transportation. This section: (1) Sets out the requirements for filing contracts; (2) limits the basis of and sets time limits for complaints against contracts; (3) assures the confidentiality of the contract except for its essential terms; (4) requires the rail carriers to maintain their common carrier obligations; and (5) removes the contract service from Commission jurisdiction after approval of the contract is effective.

In this decision, modifications from the proposed rules have been made to the definition of contracts and to the format and procedures for filing contracts. The standing of various parties to enter into contracts and file to complaints against the contract is also discussed. The most pronounced changes from our proposed rules affect what are the essential terms of the contract and thus what must be publicly disclosed in contract summaries. We have expanded the information to include origin and destination when the contract involves agricultural commodities (including forest products and paper). Contract summaries for non-agricultural commodities moving through ports will not include origin/destination information, but tariff mileage to the nearest 50 miles. On the other hand, we have eliminated the tariff mileage information to be disclosed for the remaining contracts while expanding the car-data reporting requirements, as a party's right to relief is limited to whether a carrier can fulfill its common carrier obligation.

The adopted rules under 49 CFR 1039 and 49 CFR 1300 are set forth in Appendix A. Appendix B contains our Regulatory Flexibility Act Analysis.

**List of Subjects**

*49 CFR Part 1039*

Agricultural commodities, Intermodal transportation, Railroads.

*49 CFR Part 1300*

Freight, Maritime carriers, Pipelines, Railroads.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

(49 U.S.C. 10713)

Decided: October 8, 1982.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons and Gradison. Chairman Taylor and Vice Chairman Gilliam concurred with separate expressions. Commissioners Simmons and Gradison dissented in part with separate expressions.

**Agatha L. Mergenovich,**
*Secretary.*

**Chairman Taylor** concurring:

I depart from the majority's approval of the regulations adopted here today only on the question of disclosure of full rather than base rates and charges in the contract summary (Section 1300.313(a)(6)).

While Congress intended to encourage agricultural, forest products, and paper shippers to contract, it recognized the difficulties such shippers might have in negotiations. The Commission was thus granted the power to find that a contract is unreasonably discriminatory or constitutes a destructive competitive practice. See Report of Committee on Conference on S. 1946, H.R. Rep. No. 1430, 96th Cong., 2nd Sess. 99 (1980).

Section 10713(b) leaves a certain amount of discretion as to what must be disclosed in a contract summary (i.e., it shall contain "such nonconfidential information as the Commission shall prescribe."). There is no discretion, however, as to the publication of essential contract terms. The second sentence of § 10713(b) provides that "(t)he Commission *shall assure* that the essential terms of the contract are available to the general public in tariff format." (Emphasis added.)

Congressional concerns for small businesses and the granting of powers to the Commission to find unreasonable discrimination or destructive competitive practices for shippers of agricultural commodities, forest products, and paper will be totally meaningless if all the applicable rates and charges are not set out in the contract summary. These *are* essential terms. Knowledge of only the base rates and charges, as defined in this decision, does not tell a shipper what it needs to know. Without this itemization, a complainant cannot determine whether a necessary factor for unreasonable discrimination—rate disparities—exists, or whether there are specific grounds to assert that the contract constitutes a destructive competitive practice.

Administratively, without disclosure of the exact rates and charges, we will be forced to develop a "blind procedure" whereby a complainant (1) will have to guess at the proposed contract rates, (2) proffer to enter into a similar type of contract (without knowing what the filed contract contained), and (3) then petition this Commission to see the actual contract rates and charges. Also, since the rates and charges will not be in the administrative record, there will not be the necessary substantial evidence which a reviewing court needs to uphold a ruling that the contract rates are not a destructive competitive practice or unreasonably discriminatory. Accordingly, rates and charges (including rates and charges for special features) are essential elements necessary to determine if unreasonable discrimination or a destructive competitive practice exists, and, therefore, such rates and charges should be fully disclosed.

**Vice Chairman Gilliam**, concurring:

The final rules do not require the full disclosure in contract summaries of all rates, charges, allowances, rebates, refunds, and any type of pricing or discount mechanism in connection with agricultural commodities (including forest products and paper) and commodities moving to or from ports. I believe that this position is compatible with the intent of the Staggers Act.

The contract rate provisions of the Staggers Act were designed to foster and promote contract ratemaking by railroads. It is also clear that only non-confidential information was to be required by the Commission in prescribing rules for contract summaries. Obviously, the most confidential provisions of any transportation contracts are the rate provisions agreed to by the parties. While I am sympathetic to the needs of affected shippers and ports in bringing discrimination complaints, I believe the overriding thrust of the Staggers Act is to protect the confidentiality of contract provisions and permit railroads a degree of confidentiality similar to that of other businesses throughout the country. To date, contract ratemaking has been very successful with approximately 2,500 contracts on file. Full disclosure of all rate provisions would, I believe, have a chilling effect on future railroad contract rate activity.

**Commissioner Simmons**, dissenting in part:

I concur in the rules promulgated here except in one respect: I would require the public summary of contracts involving ports to identify both the origin and destination of the contract movement, rather than merely the name of the port involved and the contract mileage. The rules adopted here otherwise properly balance the right of the public and of potential protestants to disclosure of a contract's "essential terms" against the right of contracting parties to confidentiality of competitive information.

The statute permits a port to challenge a contract for only one reason: "unreasonable discrimination". 49 U.S.C. 10713(d)(2)(A)(ii). The four elements to a case of unreasonable discrimination are (1) rate disparity; (2) potential competitive injury; (3) common control by the carrier(s) over the rates charged to both the preferred and disadvantaged ports; and (4) no differing transportation conditions that would justify the rate disparity. *H. Samuels, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 364 I.C.C. 280 (1980). Under the rules adopted by the majority, when a contract involving a port is filed a competing port will know from the contract summary the name of the port involved in the contract movement, the commodity, the names of participating carriers, rate information, and tariff mileage to the nearest 50 miles. From this data a port could, within the 18-day protest period, file a complaint showing a disparity in rates (Element No. 1) applicable on the same commodity by the same carriers (Element No. 2) over a similar distance, and could argue that this rate disparity would cause a competitive injury (Element No. 3). However, without knowing the origin or destination of the contract movement, a competing port has absolutely no basis for determining whether different transportation conditions apply to the contract movement and its own movement. Because no information is available to a port on a critical element of a discrimination case, the rules adopted by the majority effectively eliminate the port's statutory right to contest a proposed contract.

The burden of proof to show differing transportation conditions is, admittedly, on the contracting carriers and not on the port. *Harborlite Corp.* v. *Southern Pacific Transp. Co.*, 364 I.C.C. 585, 595 (1981). However, the port would have no time to rebut any arguments made by those carriers on differing transportation conditions. Nor would a port be able to anticipate those carriers' arguments by petitioning for additional information under section 1300.310(b)(1), for it could not as a practical matter draft a petition, obtain a Commission order, and receive the information before expiration of the 18-day complaint period.

To eliminate this unfairness to ports, I would require that the summaries in contracts involving ports disclose the origin and destination of the contract movements. This information is disclosed in agricultural contracts (also because such contracts can be challenged for discrimination) and would not release sensitive competitive information.

**Commissioner Gradison**, dissenting in part:

I voted to issue these final rules in the form of proposed rules inviting comments from carriers and shippers incorporating their experience to date with contract rates. The comments on which these rules are based are almost two years old and stale. They were prepared at a time when only a handful of contract rates were on file. In the ensuing months the number of contracts has increased a hundred fold and carriers' and shippers' experience with contracts has increased as dramatically. The Commission should have had the benefit of this invaluable experience before adopting final rules.

I encourage carriers and shippers to share their experience with us and provide comments or suggestions to the Commission on these rules so that we may make adjustments where needed.

## Appendix A

*Final Regulations*

1. In Part 1039 of Title 49 of the Code of Federal Regulations, the part heading is revised and §§ 1039.1–1039.4 are revised and §§ 1039.5–1039.6 are added to read as follows:

## PART 1039—CONTRACTS

Sec.


Authority: 49 U.S.C. 10713.

### § 1039.1 Definition of the term "contract."

(a) A contract subject to this section is a written agreement, including any amendment, entered into by one or more rail carriers with one or more purchasers of rail services, to provide specified services under specified rates, charges and conditions.

(b) A contract filed under this section shall:

(1) specify that the contract is made pursuant to 49 U.S.C. 10713, and

(2) be signed by duly authorized parties.

(c) The term "amendment" includes written contract modifications signed by the parties.

(d) An amendment is treated as a new contract. An amendment is lawful only if it is filed and approved in the same manner as a contract. To the extent terms affecting the lawfulness of the underlying contract are changed, remedies are revived and review is again available.

### § 1039.2 [Reserved]

### § 1039.3 Filing and approval.

(a) Rail carriers providing transportation subject to Subchapter I of Chapter 105 of Title 49, United States Code, shall file with the Commission an original and one copy of a contract entered into with one or more purchasers of rail service. The contract shall be accompanied by three copies of a summary of the nonconfidential elements of the contract in the format specified in 49 CFR 1300.300–1300.315. A contract and contract summary (and amendments and supplements) may be rejected for noncompliance with applicable statutes and regulations.

(b) *Grounds for review of contract.* Within 30 days of the filing date of a contract, the Commission may, on its own motion or on complaint, begin a proceeding to review it. Review can be based only on allegation of violations as described in paragraph (c) of this section.

(c) *Grounds for complaints.* A contract may be reviewed by the Commission on its own motion, or upon complaint, only on the following grounds:

(1) In the case of a contract other than a contract for the transportation of agricultural commodities (including forest products and paper), a complaint may be filed:

(i) By a shipper only on the grounds that the shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting carrier or carriers to meet common carrier obligations under 49 U.S.C. 11101; or

(ii) By a port only on the grounds that the port individually will be harmed because the proposed contract will result in unreasonable discrimination against that port.

(2) In the case of a contract for the transportation of agricultural commodities (including forest products and paper), in addition to the grounds for a complaint described in paragraph (e)(1) of this section, a complaint may be filed by a shipper on the grounds that the shipper individually will be harmed because:

(i) The rail carrier(s) unreasonably discriminated by refusing to enter into a contract with the shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue and the shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract was offered; or

(ii) The proposed contract constitutes a destructive competitive practice.

(3) "Unreasonable discrimination," as used in these rules, means, when applied to agricultural shippers, that the railroad has refused to enter into a contract with the shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that the shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; and, when applied to a port, has the same meaning as the term has under 49 U.S.C. 10741.

(4) The definitions for "agricultural commodities," "forest products," and "paper" will be decided on a case-by-case basis.

(d) *Filing and service of complaints.*

(1) A complaint shall be filed with the Commission's Suspension Board by the 18th day after the filing date of the contract.

(2) A reply shall be filed by the 23rd day after the filing of the contract.

(3) An original and 6 copies of each shall be filed with the Commission.

(4) A copy of the complaint shall be served on each railroad participating in the contract and replies shall be served on complainant. Complaints shall be served by hand, express mail, or other overnight delivery service.

(5) An appeal of a Commission decision will be made in accordance with 49 CFR 1100.200(c), subject to the following exception:

(i) An appeal must be made at least two work days prior to the contract approval date as set out in paragraph (f).

(e) *Commission decision upon review of contract.* Within 30 days after the date a proceeding is commenced to review a contract upon the grounds specified in subsection (c), the Commission shall decide whether the contract violates the provisions of 49 U.S.C. 10713. If the Commission finds that the contract violates the provision of 49 U.S.C. 10713, it will:

(1) Disapprove the contract; or

(2) In the case of agricultural contracts where the Commission finds unreasonable discrimination by a carrier in accordance with paragraph (c)(3) of this section, allow the carriers the option to:

(i) Provide rates and services substantially similar to the contract at issue, with such differences in terms and conditions as are justified by the evidence; or

(ii) Cancel the contract.

(f) *Aproval date of contract.* (1) If the Commission does not institute a proceeding to review the contract, it shall be approved on the 30th day after the filing of the contract. The contract shall be considered "expressly approved" by the Commission.

(2) If the Commission institutes a proceeding to review a contract, the contract is approved:

(i) On the date the Commission approves the contract if the date of approval is 30 or more days after the filing date of the contract;

(ii) On the 30th day after the filing date of the contract if the ICC denies the complaint against the contract prior to the 30th day after the filing date of the contract; or

(iii) On the 60th day after the filing date of a contract, if the Commission fails to disapprove the contract.

(g) *Limitation of rights of a rail carrier to enter into future contracts.* The Commission may limit the right of a rail carrier to enter into future contracts if the Commission determines that additional contracts would impair the ability of the rail carrier to fulfill its common carrier obligations under 49 U.S.C. 11101. The Commission will handle these determinations on a case-by-case basis and may investigate either on its own initiative or upon the filing of a verified complaint by a shipper which demonstrates that it individually had been or will be harmed by a carrier's inability to fulfill its common carrier obligations as a result of existing contracts.

### § 1039.4 Common carrier responsibility.

(a) The terms of a contract approved by the Commission determine completely the duties and service obligations of the parties to the contract with respect of the services provided under the contract. The contract does not affect the parties' responsibilities for any services which are not included in the contract.

(b) Service under a contract approved by the Commission is deemed a separate and distinct class of service and the equipment used to fulfill the contract shall not be subject to car service decisions under 49 U.S.C. 11123.

### § 1039.5 Enforcement.

(a) The exclusive remedy for an alleged breach of a contract approved by the Commission shall be an action in an appropriate State Court or United

States District Court, unless the parties otherwise agree in the contract.

(b) The Commission may not require a rail carrier to violate the terms of a contract that has been approved under 49 CFR 1039.3(f), except to the extent necessary to comply with 49 U.S.C. 11128.

**§ 1039.6 Limitation on agricultural equipment; and relief.**

(a) A rail carrier may enter into contracts for the transportation of agricultural commodities (including forest products and paper) that involve the use of carrier's owned or leased equipment not in excess of 40 percent of the total number of the carrier's owned or leased equipment, by major car type, except as provided in paragraph (b) of this section.

(b) In the case of a proposed contract between a class I carrier and a shipper originating an average of 1,000 cars or more per year during the prior 3-year period by major car type on a particular carrier, not more than 40 percent of carrier owned or leased equipment used on the average during the prior 3-year period may be used for the contract without prior authorization by the Commission.

(c) The Commission may grant relief from the limitations of paragraphs (a) and (b) of this section if:

(1) A rail carrier or other party requests such relief; or the Commission on its own initiative considers granting such relief; and

(2) The Commission determines that making additional equipment available does not impair the rail carrier's ability to meet its common carrier obligations under 49 U.S.C. 11101.

2. Part 1300 of Title 49 of the Code of Federal Regulations is amended by adding the following new §§ 1300.300 and 1300.310 through 1300.315 to read as follows:

## PART 1300—[AMENDED]

Sec.

* * * * *



Authority: 49 U.S.C. 10713.

**§ 1300.300 Special tariff rules for contracts entered into by one or more rail carriers with one or more purchasers of rail service—general provisions; definitions.**

(a) This section, and the ensuing sections, numbered between 1300.300 and 1300.399, govern the filing of contracts for railroad transportation services entered into by one or more rail carriers with one or more purchasers of rail service.

(b) Contracts for railroad transportation services and contract summaries shall be filed with the Commission in accordance with the Special Tariff Rules for Contracts prescribed in these sections.

(c) All contracts and amendments shall be of a size not less than 8 by 10½ inches nor greater than 8½ by 14 inches; all contract summaries and supplements shall be of a size not less than 8 by 10½ inches nor greater than 8½ by 11 inches; any amendment to a contract shall be the same size as the contract and any supplement to a summary shall be the same size as the summary; all shall be clear, legible, and on durable paper.

**§ 1300.310 Filing and availability of contract, contract amendments, contract summary and contract summary supplements.**

(a) A railroad or railroads entering into a contract for railroad transportation services with one or more purchasers of rail service shall file with the Commission the original and one copy of the contract and two copies of the contract summary with the Commission's Bureau of Traffic, Section of Rates.

(1) Contracts and contract summaries shall not be filed in the same packages with standard tariff filings.

(2) The confidential contract shall not be attached to the contract summary.

(3) The envelope or wrapper containing the contract and summary shall be marked "Confidential, Rail Contract."

(4) A contract and summary shall be accompanied by a transmittal letter identifying the submitted documents, and the name and telephone number of a contract person.

(b)(1) The contract filed under these rules will not be available for inspection by persons other than the parties to the contract and authorized Commission personnel, except by petition demonstrating a likelihood of succeeding on the merits of the complaint and that the matter complained of could not be proven without access to additional contract information. The Commission's action in any contract-disclosure matter, including a petition filed under this subparagraph, is subject to the limitations imposed by 5 U.S.C. 552(b) and the Trade Secrets Act, 18 U.S.C. 1905.

(2) A contract and its summary filed under § 10713 may be labeled "Nonconfidential." Such a designation will permit the general public to inspect the entire contract.

(c) The contract summary filed under these rules shall include the information specified in § 1300.313 of this part. The contract summary shall be made available for inspection by the general public.

(d) The contract summary filed under these rules shall not be required to be posted in any stations, but shall be made available from carriers participating in the contract upon reasonable request.

**§ 1300.311 Contract and contract summary title pages.**

(a) The title page of every contract and amendment shall contain only the following information:

(1) In the upper right corner, the contract number (see § 1300.312).

(2) In the center of the page, the issuing carrier's name, followed by the word "CONTRACT" in large print.

(3) Amendments to contracts shall also show, in the upper right corner, the amendment number (see § 1300.312).

(4) A solid one inch black border down the right side of the title page.

(5) Date of issue and date to be effective.

(b) The title page of every contract summary and supplement shall contain only the following information:

(1) In the upper right corner, the contract summary number (see § 1300.312).

(2) In the center of the page, the issuing carrier's name, followed by the words "CONTRACT SUMMARY" in large print.

(3) Date of issue and date to be effective.

(4) In the center lower portion, the issuing individual's name and address.

(5) Supplements to contract summaries shall also show, in the upper right corner, the supplement number (see § 1300.312).

**§ 1300.312 Contract and contract summary numbering system.**

(a) Each issuing carrier shall sequentially number the contract and contract summary it issues. The contract and contract summary identification number shall include the word "ICC", the industry standard alphabet code for the issuing railroad (limited to four letters), the letter "C", and the sequential number, with each separated by a hyphen. The following example: the 357th contract filed by the Milwaukee Road would have the following tariff identification number: "ICC-MILW-C-0357."

(b) Any amendment to a contract shall be reflected in a corresponding supplement to the contract summary. If the change in the contract is only in confidential matter, a statement to that effect will be made in the supplement.

(c) At the carrier's option, the carrier's tariff publishing officers may reserve blocks of numbers if tariffs are issued from different departments. An index to the blocks of reserved numbers shall be filed with the Commission.

(d) Contract amendments and contract summary supplements shall be sequentially numbered.

**§ 1300.313 Content of contract summary; format.**

(a) Contract summaries for agricultural commodities, forest products or paper shall contain the following terms in the order named.

(1) Name(s) of the participating carrier(s). A list, alphabetically arranged, of the corporate names of all carriers that are parties to the contract plus their addresses for service of complaints.

(2) The commodity or commodities to be transported under the contract.

(3) The origin station(s) and destination station(s), including the specific port(s) (if applicable).

(4) The duration of the contract.

(5) Rail car data by number of dedicated cars, or, at the carrier's option, car days:

(i) by major car type used to fulfill the contract or contract options:

(A) Available and owned by the carriers listed in paragraph (a)(1) of this section with average number of bad-order cars identified;

(B) Available and leased by the carriers listed in paragraph (a)(1) of this section, and average number of bad-order cars identified;

(C) (optional) on order (for ownership or lease) along with delivery dates; and

(D) In the event a complaint is filed involving common carrier obligation and carrier furnished cars, the carrier(s) shall immediately submit to the Commission and the complainant additional data on cars used to fulfill the challenged contract. Data shall include (by major car type used to fulfill the contract):

(*1*) total bad car orders;

(*2*) assigned car obligations; and

(*3*) free running cars.

(ii) In addition to paragraph (i) if agricultural commodities (including forest products and paper), a certified statement by the participating rail carrier/carriers:

(A) That the cumulative equipment total for all contracts does not exceed 40 percent of the capacity of the rail carrier's owned and leased cars by applicable major car type, and

(B) In the case of an agricultural shipper which originated an average 1,000 cars or more per year during the prior 3-year period by major car type, that the equipment used does not exceed 40 percent of the rail carrier's owned or leased cars used on the average by that shipper during the previous 3 years.

(iii) Rail car data need not be submitted if:

(A) The shipper furnishes the rail cars, unless the cars are leased from the carrier; or

(B) The contract is restricted to certain services which do not entail car supply.

(6) *Rates and charges.* Identification of base rates or charges, movement type (e.g. single car, multiple car, unit train), the minimum annual volume, and a summary of escalation provisions.

(7) *Special features.* Identification of existence (but not the terms or amount) of special features such as transit time commitments, guaranteed car supply, minimum percentage of traffic requirements, credit terms, discounts, etc.

(b) Contract summaries for other commodities or services not involving a port shall contain the information required in paragraphs (a)(1), (2), (4), (5) of this section. Paragraph (a)(7), *Special features,* shall be applicable to the extent that service requirements are placed in the contract.

(c) Contract summaries for other commodities or services involving a port shall contain the information required in paragraphs (a)(1), (2), (4), (5), (6), and (7) of this section. In addition, the port shall be named and the tariff mileage (rounded to the nearest 50 miles) shall be disclosed (or, at the contracting parties' option, the origin and destination shall be specified). The required information shall be disclosed for each movement involving multiple origins/destinations.

(d) *Format.* The contract summary and supplements shall enumerate and have each item completed. Where the item does not pertain to the contract or amendment, the term "Not applicable" ("NA") shall be used.

**§ 1300.314 Availability of contract summary.**

Copies of contract summaries shall be available from the Commission's Contract Advisory Service and Bureau of Traffic. Copies of contract summaries shall also be available from carriers participating in the contract.

**§ 1300.315 Statutory notice.**

All filed contracts (and amendments) and contract summaries (and supplements) shall provide 30-days notice to the public as required by 49 U.S.C. 10713(e).

**Appendix B [1]—Regulatory Flexibility Act Analysis**

In compliance with section 603(b) of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the following information is provided. (1) The rules are being promulgated to implement 49 U.S.C. 10713 which permits railroads and purchasers of transportation to contract. (2) The objectives of the rules are to establish standards and procedures for filing contracts and to establish criteria (a) for the information to be disclosed in the contract summary, (b) for filing complaints, and (c) for filing contracts. (3) The small entities affected by these rules include railroads, governmental bodies, small businesses which purchase rail transportation, and, possibly, small ports; no estimate of the number affected by these rules can be made. (4) Recordkeeping and accounting requirements remain unchanged; we foresee no additional professional skills needed to comply with these rules. (5) These rules do not duplicate, overlap or conflict with other Federal rules.

There are no significant alternatives which can be established to minimize any significant impact on small entities; most of the requirements are statutorily imposed. The remaining requirements (informational and filing) have been established by balancing the need to maintain confidentiality with the public interest in obtaining sufficient information necessary to bring a successful challenge to a contract.

The rail car informational requirements under 49 CFR § 1300.313 should not impose significant burdens on small entities. Because of the relatively insignificant amount of equipment owned by small rail carriers, the burdens of recordkeeping should be minimal for small entities, and, any burdens imposed on rail carriers must be balanced against the right of other small entities to information about the ability of carriers (large or small) to maintain their common carrier obligation.

As with any contract, specialized assistance from the legal and accounting professions may be required. Whether any assistance would be necessary will depend upon the nature of the contract. In any event, our rules (or lack thereof) will not affect the need for professional advice; such advice is inherent in the contract process itself.

As far as the necessity for professional assistance in instituting complaints against proposed contracts, such assistance should not be any greater than that for other tariff filings, except for the desire to have additional contract information disclosed under FOIA. We see no effective alternative

[1] Appendix B will not be shown in the CFR.

to our requirements for additional disclosure. And, while a small entity might need professional assistance in this aspect of filing a complaint, a small entity is also protected, should it desire to contract with a rail carrier, against having its entire contract disclosed.

The contract filing requirements closely parallel our tariff filing requirements and should not increase costs of filing when a contract is involved. Several of the technical filing requirements (such as address, mailing of the envelopes, etc.), while they may create a little more work, are designed to ensure that the contract remains confidential. One area where expenses may be reduced over our normal tariff publishing requirements is that the contract need not be printed; certain items can be preprinted and the remaining information for the specific contract can be typed.

It is important to note that what must be addressed here is not the benefits or detriments of the statute and the benefits of contracting as compared to shipping under published rates; rather, what must be addressed is our implementation of the statute. Some small entities, including many lumber dealers, believe that it is an imposition to require complaints about contracts to be filed 18 days after the contract is filed. Because of the time factors required for finding out about a filed contract and for preparing a complaint, there have been proposals to extend the time to file a complaint from 30 to 120 days from the contract filing date. While such proposals may have practical merit in some cases, the *statute* gives us jurisdiction for only 30 days. After that, we no longer have jurisdiction, and our statutory authority no longer applies. As a practical matter, we cannot analyze and decide whether to institute an investigation, allow an appeal and decide that appeal in less than 12 days. Thus, our 18-day requirement for filing complaints must remain intact.

We are satisfied that our implementation of § 10713 is fair, equitable, and practical for small entities.

[FR Doc. 82-30517 Filed 11-4-82; 8:45 am]

BILLING CODE 7035-01-M

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## 49 CFR Parts 1201, 1262, and 1263

[No. 38770]

## Railroad Map Specifications

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Final rule.

**SUMMARY:** The Interstate Commerce Commission is eliminating Part 1263, Map Specifications, from the Code of Federal Regulations and is transferring significantly reduced map specifications to the property account instructions in the Uniform System of Accounts for Railroads, Part 1201. Due to improved technology in map making, it is no longer necessary to require railroad companies to maintain the detailed records required in Part 1263. However, because the Commission has a need for Class I railroad property records in rate, abandonment, merger and purchase proceedings, these carriers will still be required to maintain certain basic map information.

**DATE:** This Rule is effective for the reporting year beginning January 1, 1982.

**ADDRESS:** Copies of this Rule may be purchased by contacting: TS Infosystems, Inc., Room 2227, 12th & Constitution Avenue, NW., Washington, D.C. 20423, (202) 289-4357—D.C. Metropolitan Area, (800) 424-5403—toll free for outside D.C. area.

**FOR FURTHER INFORMATION CONTACT:** Bryan Brown, Jr., (202) 275-7448.

**SUPPLEMENTARY INFORMATION:** The Commission is authorized by the Interstate Commerce Act (49 U.S.C. 10781) to establish the value of all property owned or used by railroad companies subject to Subchapter I of Chapter 105, Title 49, Transportation. Carriers providing rail service subject to the Commission's jurisdiction are required to cooperate with the Commission in the valuation of their property. In so doing, the Commission may require carriers to provide maps, profiles, contracts, engineering reports and other records to assist it in investigating, ascertaining, reporting and recording the value of rail property.

On March 19, 1982, the Commission published a Notice of Proposed Rulemaking (NPR) requesting comments on the proposed elimination of Part 1263, Map Specifications, from the Code of Federal Regulations (47 FR 11910). In that NPR the Commission noted that improved technology in the area of map making no longer necessitates the maintenance of detailed records as required in Part 1263. However, the Commission also considers it essential that certain basic map information be maintained by Class I line-haul railroad companies for accounting, audit and valuation purposes. Therefore, the Commission proposed to delete the detailed map requirements in Part 1263 for all railroads and incorporate certain basic map requirements for Class I railroads in the property account instructions of Part 1201.

### Review of Responses

There were two respondents to the NPR, Consolidated Rail Corporation (Conrail) and the Association of American Railroads (AAR). Conrail endorses the Commission's efforts to review the Code of Federal Regulations (CFR) and eliminate requirements for information not used regularly. However, Conrail believes the Commission did not achieve the desired result. Conrail believes that although the NPR would substantially reduce the written regulations, the essence is only to transfer the map requirements from one section of the CFR (Part 1263) to another section of the CFR (Part 1201). Conrail recognizes that maps are useful but does not consider them a part of basic accounting records. It is Conrail's opinion that maps should be a management prerogative, not a regulatory requirement. Therefore, Conrail recommends eliminating Part 1263 entirely and that no change be made to Part 1201.

The AAR supports the Commission's proposal. The AAR believes that the rule changes are a step in the right direction and reflect the Commission's commitment to review its regulations and eliminate those which impose unnecessary recordkeeping and reporting burdens. Therefore, the AAR supports this effort by the Commission to minimize detailed recordkeeping and reporting requirements.

### Discussion and Conclusion

The Commission concludes that a map specifications requirement is necessary to properly execute its responsibilities prescribed under the Interstate Commerce Act.

Although maps are not typically viewed as basic accounting records, they have proven to be an integral part of rail property records. Maps are used extensively by the Commission to identify and value rail property. Therefore, it is necessary to prescribe a uniform and consistent basis for identifying rail property.

The Commission's ability to make proper determinations of the extent and value of rail property is of primary importance in rate, abandonment, merger and purchase proceedings. Oftentimes these proceedings become quite complex and controversial with both parties submitting conflicting data. To properly analyze supporting evidence and render a fair and proper decision, the Commission must have the ability to independently determine the extent and value of carrier property. Rail maps have been and will continue to be a major part of this determination.

We do not agree with Conrail that this rule fails to achieve its intended purpose. This rule substantially reduces the regulatory burden associated with maintaining and filing property maps with the Commission. Further, this rule is consistent with Commission policy on reporting financial and statistical data.

This rule will eliminate the extensive map requirements in Part 1263. Class II and III railroads will be relieved from all map requirements. Class I railroads will be subject to a five-part map specification incorporated as Instruction 2–21, Map Specifications, in Part 1201. The revised map specification only requires Class I railroads to:

(1) Maintain a current map of its rail property

(2) Furnish copies of such maps to the Commission upon request

(3) Maintain sufficient detail to show right-of-way, track and other important facilities

(4) Provide appropriate indices and titles

(5) Comply with generally accepted map principles

We believe the revised map specifications will provide railroad management great latitude in developing and maintaining rail property maps and result in a minimal regulatory burden. In conclusion, we believe that the elimination of Part 1263 and the incorporation of the revised map specifications in Part 1201 is in the best interest of all parties.

### Regulatory Flexibility Act

Pursuant to 5 U.S.C. 605(b), the Secretary of the Commission has certified in the NPR that this rule will have a significant economic impact on a substantial number of small entities. In this proceeding, we do not add new reporting requirements; rather, we eliminate the existing burden on Class II and III railroad companies and reduce the reporting requirements for Class I railroad companies. Therefore, the effect of this revision will be a lessening of the expense and burden of recordkeeping.

This decision does not significantly affect the quality of the human environment or the conservation of energy resources.

### List of Subjects in 49 CFR Parts 1201, 1262 and 1263

Railroads, Reporting and recordkeeping requirements, Uniform System of Accounts.

Accordingly, we are amending 49 CFR Parts 1201 and 1262 and deleting 49 CFR Part 1263, as shown in the Appendix.

(49 U.S.C. 10321 and 5 U.S.C. 553)

Decided: October 12, 1982.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Commissioner Sterrett dissented in part with a separate expression. Commissioner Andre would propose to eliminate the map specifications in their entirety.

**Agatha L. Mergenovich,**

*Secretary.*

**Commissioner Sterrett,** dissenting in part:

We have received two comments from the public in this proceeding, and neither supports retention of map requirements. Thus the only basis offered for the remaining regulations is the Commission's own needs in "rate, abandonment, merger, and purchase proceedings." The parties to those proceedings, however, invariably submit adequate maps in their pleadings, and there is simply no need for the retention of any formal regulations in this area.

### Appendix

Title 49 CFR is amended as follows:

## PART 1201—[AMENDED]

1. 49 CFR Part 1201 shall be amended by adding instruction 2–21, *Map Specifications,* to the Instructions for Property accounts.

2–21 *Map Specifications.*

(a) Class I Railroad companies shall maintain current maps of its property and shall promptly record any changes that may take place.

(b) Class I companies shall furnish, on request, copies of maps showing its property as it exists on such date or dates as may be fixed by the Commission.

(c) Class I companies shall maintain planimetric maps that show right-of-way, track and other important facilities at a scale to show sufficient detail.

(d) Maps shall be indexed and titled to clearly indicate the specific area depicted.

(e) All maps shall be prepared in accordance with generally accepted mapping practices.

## PART 1262—[AMENDED]

### § 1262.7 [Amended]

2. 49 CFR 1262.7(c), is amended by revising the cross reference which follows the paragraph to read as follows:

**Cross Reference:** From map specifications, see Part 1201, Instruction 2–21 of this chapter.

## PART 1263—[REMOVED]

3. 49 CFR Part 1263 is removed.

[FR Doc. 82–30518 Filed 11–4–82; 8:45 am]

BILLING CODE 7035–01–M

# Proposed Rules

Federal Register
Vol. 47, No. 215
Friday, November 5, 1982

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

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### 7 CFR Part 225

### Summer Food Program for Children

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Department is proposing to amend the Summer Food Service Program regulations by adding the required notice concerning collection of social security account numbers on applications for free and reduced price meal benefits in order to clarify the notification procedures. The Department is proposing that the current regulations for the Summer Food Service Program remain unchanged in all other respects.

**DATE:** Comments must be received on or before December 6, 1982 to be assured of consideration in the final rulemaking.

**ADDRESS:** Comments should be sent to Jordan Benderly, Director, Child Care and Summer Programs Division, Food and Nutrition Service, USDA, Alexandria, Virginia 22302. All written submissions will be available for public viewing in Room 416, 3101 Park Center Drive, Alexandria, Virginia 22302, during regular business hours (8:30 a.m. to 5:00 p.m.) Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Mr. Benderly or Ms. Beverly Walstrom at the address listed above, or call (703) 756–3888.

**SUPPLEMENTARY INFORMATION:**

*Classification.* This proposed action has been reviewed under Executive Order 12291 and has been classified *not major* because it will not have an annual effect on the economy of $100 million, will not cause a major increase in cost or prices for Program participants, individual industries, Federal agencies, State or local government agencies or geographic regions, and will not have a significant economic impact on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or foreign markets.

This proposal has also been reviewed with regard to the requirements of Public Law 96–354, the Regulatory Flexibility Act. Pursuant to the review, Samuel J. Cornelius, Administrator of the Food and Nutrition Service, has certified that this proposed rule does not have a significant economic impact on a substantial number of small entities.

In accordance with the Paperwork Reduction Act of 1980, (44 U.S.C. 3507), the reporting and recordkeeping requirements that are included in this proposed rule will be submitted for approval to the Office of Management and Budget (OMB). They are not effective until OMB approval has been obtained.

### Background

The Summer Food Service Program (SFSP) is authorized by Section 13 of the National School Lunch Act. Comprehensive regulations for the SFSP were last published on February 16, 1982 (47 FR 6790).

Section 13(q) of the National School Lunch Act requires the Secretary of Agriculture to publish regulations necessary to implement the SFSP in proposed form by November 1 and final form by January 1. The Department is proposing not to alter the regulations published February 16, 1982, except in one respect. The one proposed change adds to the regulations the requirement that the social security account number disclosure notice be placed on applications for free and reduced price meal benefits distributed by camps and other programs which document site eligibility through collection of family size and income information.

Section 803 of Pub. L. 97–35 requires that parents or guardians who apply for free and reduced price meals must disclose the social security numbers of all adult household members as a condition of eligibility. The Department proposes to amend Section 225.21(d) to include a requirement that the application form contain a notice which informs people of the authority under which the social security numbers are collected, whether disclosure of the numbers is mandatory, and what uses will be made of the numbers. The proposed notice is similar to that used in the SFSP last summer but is more detailed. The proposed change also conforms the notice which the notice required in Part 245 of the regulations governing the delivery of free and reduced price meal benefits in the National School Lunch Program.

The Department has determined that no other changes are necessary for successful implementation of the 1983 SFSP. Therefore, in all other respects, the final SFSP regulations published on February 16, 1982, will remain unchanged for the 1983 SFSP.

### List of Subjects in 7 CFR Part 225

Food assistance programs, Grant programs—health, infants and children, Reporting requirements.

## PART 225—SUMMER FOOD SERVICE PROGRAM

Accordingly, Part 225 is proposed to be amended as follows:

(1) In § 225.21(d) add subparagraphs (1) and (2) as follows:

### § 225.21 Free meal policy.

* * * * *

(d) * * *

(1) The application shall also contain the following statement, "Sections 9 and 13 of the National School Lunch Act require that in order for your child to be eligible for Program meals, you must provide the social security numbers of all adult members of your household. Provision of these social security numbers is not mandatory, but failure to provide the numbers will result in a denial of the application for Program meals. This notice must be brought to the attention of all household members whose social security numbers are disclosed. The social security numbers may be used to identify household members in carrying out efforts to verify the correctness of information stated on the application. These verification efforts may be carried out through Program reviews, audits, and investigations, and may include contacting employers to determine income, contacting the State employment security office to determine the amount of benefits received and checking the documentation produced by household members to make sure that your child is eligible to receive Program benefits. These efforts may result in loss of benefits, administrative claims, or legal action if incorrect information is reported." State agencies

and institutions shall ensure that the notice complies with Section 7 of Pub. L. 93-579 (Privacy Act of 1974). If a State or local agency plans to use the social security numbers in a manner not described by this notice, the notice shall be altered to include a description of these uses; and

(2) The signature of the parent or guardian who has completed the application.

(Sec. 803, Pub. L. 97-35, 95 Stat. 521-535 (42 U.S.C. 1758))

Dated: November 2, 1982.

Robert E. Leard,

*Associate Administrator.*

[FR Doc. 82-30428 Filed 11-4-82; 8:45 am]

BILLING CODE 3410-30-M

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## Federal Crop Insurance Corporation

### 7 CFR Part 414

[Amdt. No. 1]

## Forage Seeding Crop Insurance Regulations

**AGENCY:** Federal Crop Insurance Corporation, USDA..

**ACTION:** Proposed rule.

**SUMMARY:** The Federal Crop Insurance Corporation (FCIC) proposes to amend the forage Seeding Crop Insurance Regulations (7 CFR Part 414), effective with the 1983 and succeeding crop years (1984 in New York), by amending the provisions of the policy to prescribe reductions in indemnity if the spring-seeded acreage is less than 75 percent of a normal stand and to add a further definition to reseeded acreage. In addition, FCIC proposes to make minor corrections to language and format by: (1) Deleting a subsection requiring a public notice of indemnities paid as that requirement is no longer a part of the Federal Crop Insurance Act; (2) substituting a multi-crop application for the present single-crop application to reduce paperwork; (3) prescribing the interest to be charged on unpaid premium balances; (4) amending the table of contents; (5) correcting the definition of the party responsible for securing the rights of the Corporation under provisions for subrogation; and, (6) redesignating Appendix B, listing all counties where Forage Seeding Crop Insurance is available, as Appendix A. This rule is promulgated under the authority contained in the Federal Crop Insurance Act, as amended, and its intended effect is to prescribe the reduction of indemnity for less than a normal stand, clarify the provisions of the regulations with regard to reseeding, reduce paperwork and time for the applicant through an improved application form, and to correct both the language and format of the regulations.

**DATE:** Written comments, data, and opinions on this rule must be submitted not later than January 4, 1983, to be sure of consideration.

**ADDRESS:** Written comments on this proposed rule should be sent to the Office of the Manager, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, D.C. 20250.

**FOR FURTHER INFORMATION CONTACT:** Peter F. Cole, Secretary, Federal Crop Insurance Corporation, U.S. Department of Agriculture, Washington, D.C. 20250, telephone (202) 447-3325.

The Impact Statement describing the options considered in developing this rule and the impact of implementing each option is available upon request from Peter F. Cole.

**SUPPLEMENTARY INFORMATION:** This action has been reviewed under USDA procedures established in Secretary's Memorandum No. 1512-1 (June 11, 1981).

Information collection requirements contained in the regulations to which this amendment applies (7 CFR Part 414) have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35, and have been assigned OMB Nos. 0563-0003 and 0563-0007.

Merritt W. Sprague, Manager, FCIC, has determined that (1) this action is not a major rule as defined by Executive Order No. 12291 (February 17, 1981), (2) this action does not increase the Federal paperwork burden for individuals, small businesses, and other persons, and (3) this action conforms to the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), and other applicable law.

The title and number of the Federal Assistance Program to which this amendment applies are: Title—Crop Insurance; Number 10.450.

This action will not have a significant impact specifically upon area and community development; therefore, review as established in OMB Circular A-95 was not used to assure that units of local government are informed of this action.

It has been determined that this action is exempt from the provisions of the Regulatory Flexibility Act; therefore, no Regulatory Impact Statement was prepared.

It has also been determined that this action constitutes a review as to the need, currency, clarity, and effectiveness of these regulations under the provisions of Secretary's Memorandum No. 1512-1 (June 11, 1981). A sunset review date will be established for these regulations as part of the final rule.

The principal changes involved in this rule are as follows:

1. The replacement of the present single-crop application form by a multi-crop application form designed to reduce paperwork and time on the part of the applicant.

2. The amendment of the interest provision to provide that unpaid premium balances will bear interest at the rate of 1½% simple interest per month or any part thereof starting on the first day of the month following the first premium billing date.

3. The addition of a provision which reduces the indemnity by 50% if spring-seeded acreage has less than 75 percent but more than 55% of a normal stand. Such acreage will not be insurable under the forage production policy, a companion policy to forage seeding, until it meets the definition of an "established stand" (at least 75 percent of a normal stand).

In addition to these changes, FCIC proposes to make minor changes to language and format to include correcting the table of contents, deleting a section no longer required by the Federal Crop Insurance Act, as amended, correcting the policy to indicate the party responsible for securing the rights of FCIC relative to subrogation, and redesignating Appendix B, listing counties where forage seeding crop insurance is available, as Appendix A.

All written submissions made pursuant to this rule will be available for public inspection in the Office of the Manager during regular business hours, Monday through Friday.

### List of Subjects in 7 CFR Part 414

Crop insurance, Forage seeding.

### Proposed Rule

Accordingly, pursuant to the authority contained in the Federal Crop Insurance Act, as amended (7 U.S.C. 1501 *et seq.*), the Federal Crop Insurance Corporation hereby proposes to amend the Forage Seeding Crop Insurance Regulations (7 CFR Part 414), appearing at 45 FR 49501-49515, July 25, 1980, effective with the 1983 and succeeding crop years (1984 and succeeding crop years in New York State), in the following instances:

## PART 414—[AMENDED]

1. The authority citation for 7 CFR Part 414 is revised to read as follows:

**Authority:** Secs. 506, 516, Pub. L. 75-430, 52 Stat. 72, as amended (7 U.S.C. 1506, 1516).