having flood prone areas. (Section 202(a) of the Flood Disaster Protection Act of 1973 (Pub. L. 93-234), as amended.) This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column.

The Director finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified. Each community receives a 6-month, 90-day, and 30-day notification addressed to the Chief Executive Officer that the community will be suspended unless the required flood plain management measures are met prior to the effective suspension date. For the same reasons, this final rule may take effect within less than 30 days.

Pursuant to the provision of 5 U.S.C. 605(b), the Associate Director of State and Local Programs and Support, to whom authority has been delegated by the Director, Federal Emergency Management Agency, hereby certifies that this rule if promulgated will not have a significant economic impact on a substantial number of small entities. As stated in Section 2 of the Flood Disaster Protection Act of 1973, the establishment of local flood plain management together with the availability of flood insurance decreases the economic impact of future flood losses to both the particular community and the nation as a whole. This rule in and of itself does not have a significant economic impact. Any economic impact results from the community's decision not to (adopt) (enforce) adequate flood plain management, thus placing itself in noncompliance of the Federal standards required for community participation. In each entry, a complete chronology of effective dates appears for each listed community.

List of Subjects in 44 CFR Part 64

Flood insurance, Flood plains.

Section 64.6 is amended by adding in alphabetical sequence new entries to the table.

§ 64.6 List of eligible communities.

State and county	Location	Community No.	Effective dates of sale of flood insurance in community	Special flood hazard area identified	Date certain Federal assistance no longer available in special flood hazard area
Region II					
New Jersey: Monmouth.	Sea Bright, borough of	345317B	Dec. 11, 1970, emergency; Oct. 8, 1971, regular; Nov. 16, 1983, suspended.	Oct. 14, 1971, July 1, 1974, Apr. 23, 1976	Nov. 16, 1983.
New York: Bronx, Kings, Richmond, Queens.	New York City, city of	360497	Apr. 8, 1975, emergency; Nov. 16, 1983, regular; Nov. 16, 1983, suspency;.	June 28, 1974, June 11, 1976	Do.
Region IV					
Florida:					
Manitee	Palmetto, city of	120159C	Apr. 25, 1975, emergency; Sept. 2, 1981, regency; Nov. 16, 1983, suspended..	July 19, 1974, Feb. 20, 1976, Sept. 2, 1981.	Do.
Taylor	Unincorporated areas	120302B	Jan. 31, 1975, emergency; Nov. 16, 1983, regular; Nov. 16, 1983. suspended.	Jan. 10, 1975, Jan. 13, 1978	Do.
Georgia: Bryan	Unincorporated areas	130016A	July 15, 1975, emergency; Nov. 16, 1983, regular; Nov. 16, 1983, suspended.	July 30, 1975	Do.
Mississippi:					
Hancock	Bay St. Louis, city of	285251B	June 30, 1970, emergency; Sept. 11, 1970, regular; Nov. 16, 1983, suspended.	July 1, 1970, July 1, 1974, Oct. 31, 1975.	Do.
Harrison	Gulfport, city of	285253	May 29, 1970, emergency; Sept. 11, 1970, regular; Nov. 16, 1983, suspended..	Feb. 20, 1978	Do.
Hancock	Unincorporated areas	285254	June 30, 1970, emergency; Sept. 9, 1970, regular; Nov. 16, 1983, suspended.	Apr. 3, 1978	Do.
Hancock	Waveland, city of	285292	June 30, 1970, emergency; Sept. 11, 1970, regular; Nov. 16, 1983, suspended.	Apr. 16, 1976	Do.
Region V					
Illinois:					
DeKalb	Kingston, village of	170185B	June 16, 1975, emergency; Nov. 16, 1983, regular; Nov. 16, 1983, suspended.	March 8, 1974, June 11, 1976	Do.
Peoria	Kingston Mines, village of	170758B	Aug. 7, 1975, emergency; November 16, 1983, regular; Nov. 15, 1983, suspended.	December 28, 1973, December 26, 1975.	Do.
Michigan:					
Saginaw	Saginaw, city of	260169B	Feb. 26, 1975, emergency; Nov. 16, 1983, regular; Nov. 16, 1983, suspended.	June 21, 1974, October 10, 1975	Do.
Oakland	Sylvan Lake, city of	260701B	Mar. 8, 1977, emergency; Nov. 16, 1983, regular; Nov. 16, 1983, suspended.	July 14, 1978	Do.
Ohio:					
Monroe	Clarington, village of	390405B	July 7, 1975, emergency; Nov. 16, 1983, regular; Nov. 16, 1983, suspended.	Sept. 6, 1974, May 21, 1976	Nov. 2, 1983.
Jefferson	Rayland, village of	390301B	Mar. 11, 1975, emergency; Nov. 16, 1983, regular; Nov. 16, 1983, suspended.	March 22, 1974, May 28, 1976	Do.
Region IX					
Arizona: Coconino	Unincorporated areas	040019B	Feb. 18, 1975, emergency; Nov. 16, 1983, regular; Nov. 16, 1983, suspended.	Jan. 24, 1975, May 30, 1978	Do.
Region X					
Washington: Snohomish.	Unincorporated areas	530171B	Sept. 3, 1974, emergency; Nov. 16, 1983, regular; Nov. 16, 1983, suspended.	March 8, 1974, May 28, 1976	Do.

(National Flood Insurance Act of 1968 (title XIII of the Housing and Urban Development Act of 1968); effective Jan. 28, 1969 (33 FR 17804, Nov. 28, 1968), as amended, 42 U.S.C. 4001-4128; Executive Order 12127, 44 FR 19367; and delegation of authority to the Associate Director, State and Local Programs and Support)

Issued: November 8, 1983.

Dave McLoughlin,

Deputy Associate Director, State and Local Programs and Support.

[FR Doc. 83-30735 Filed 11-14-83; 8:45 am]

BILLING CODE 6718-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Child Support Enforcement

45 CFR Part 302

Child Support Enforcement Program; Collection of Support for Certain Adults

AGENCY: Office of Child Support Enforcement (OCSE), HHS.

ACTION: Final rule.

SUMMARY: Section 2332 of Pub. L. 97–35, the Omnibus Budget Reconciliation Act of 1981, provides that, at its option, a State may collect and enforce support obligations from an absent parent both for the children and for the spouse or former spouse who is receiving aid under title IV–A of the Social Security Act (the Act) and with whom the children are living. A State may not attempt to establish a spousal support obligation and may collect spousal support only if the existing support obligation includes both child and spousal support. If a State chooses to collect spousal support, it may use all available collection mechanisms and enforcement remedies to collect and enforce child support. Section 171(a)(1) of Pub. L. 97–248, the Tax Equity and Fiscal Responsibility Act of 1982, allows States to collect spousal support in non-AFDC cases. We published a final rule with comment period in the **Federal Register** on December 23, 1982 (47 FR 57277–57282) to implement section 2332 of Pub. L. 97–35 and section 171(a)(1) of Pub. L. 97–248. The purpose of this document is to correct two technical errors in the final rule, to address several other technical errors that do not require revisions to the final rule, and, if necessary, to consider comments received on that rule. However, since the only comment received was favorable, it is not necessary to consider comments in this document.

DATES: This document is effective November 15, 1983.

FOR FURTHER INFORMATION CONTACT: Marianne Rufty (301) 443–5350.

SUPPLEMENTARY INFORMATION:

Statutory Provisions

Prior to the enactment of Pub. L. 97–35 and Pub. L. 97–248, the Social Security Act (the Act) only allowed States to collect and enforce child support obligations. When there was a single support order which represented an obligation for both spousal and child support, the IV–D agency was not authorized to collect, distribute or enforce the spousal support obligation under the IV–D State plan, even though spousal support must be assigned to the State under section 402(a)(26)(A) of the Act as a condition of receipt of aid under title IV–A of the Act. This situation created enormous difficulties in determining how to account for and distribute the collections which were made in these situations.

Section 2332 of Pub. L. 97–35, effective on October 1, 1981, amended sections 451, 452, 453, 454, 457 and 460 of the Act to allow States the option of collecting and enforcing certain spousal support. Section 171(a)(1) of Pub. L. 97–248, effective on August 13, 1981, amended section 454(6)(A) of the Act to allow States to collect and enforce certain spousal support in non-AFDC cases.

Regulatory Provisions

The final rule, published on December 23, 1982, implemented the statutory requirements by adding or deleting language to Parts 301 through 305 of the existing regulations to extend collection and enforcement provisions to include spousal support. In effect, we simply deleted the word "child" wherever it appeared before the word "support" to indicate that the regulatory provision applies to any support collected or enforced. However, in certain circumstances, this approach was not possible and alternative language was used for clarity. We also made a few minor changes to correct inconsistencies or to make the regulations easier to read.

Technical Corrections to Final Rule

This document corrects two technical errors in Part 302 of the final rule which was published in the **Federal Register** on December 23, 1982 and addresses several other technical errors that do not require revisions to the final rule. One error is the result of amending the final regulations by adding a parenthetical expression that was both unnecessary and incorrect. The remaining errors are the result of publication of three other OCSE final regulations preceding publication of this final rule which moved and redesignated a specific section, added a new section and, in two cases, removed the word "child" from the existing regulations. Therefore, certain references to sections in the December 23 final rule were either incorrect or redundant.

Under Part 302 of the final rule, we amended 45 CFR 302.15(a)(1)(iii) by adding the parenthetical expression "(including separate identification of the number of cases in which spousal support is collected)." Section 452(a)(10)(C) of the Act does not require the Secretary to report on the amounts of spousal support collected but rather to identify the number of child support cases in which spousal support is involved. Existing regulations at 45 CFR 302.15(a)(2) already meet the reporting requirements contained in section 452(a)(10)(C) of the Act. Therefore, this document amends the final rule by deleting the incorrect parenthetical expression at 45 CFR 302.15(a)(1)(iii). The OCSE–3, the form States use to comply with the requirements of 45 CFR 302.15(a)(2), was correctly revised to include a line item that separately identifies the number of cases in which spousal support is involved. (The OMB approval number is 0960–0154).

We also amended 45 CFR 302.52(d) by removing the word "child" where it appeared in that section. Final regulations, published in the **Federal Register** on August 27, 1982, entitled Incentive Payments to States and Political Subdivisions (47 FR 37886–37889), moved and redesignated § 302.52 as § 303.52. At that time, the word "child" was deleted from the newly designated § 303.52 thereby making our reference to this section in the December 23 final rule incorrect. We are not, however, correcting this error in this document because the above mentioned regulation has already done so.

In addition, we amended 45 CFR 302.31(a) (1) and (2) to clarify the language and removed the word "child" from that section. Final regulations on the Treatment of Assigned Support Payments Received Directly and Retained by AFDC Applicants or Recipients, published in the **Federal Register** on October 5, 1982 (47 FR 43953–43957), added a new § 302.31(a)(3). The new § 302.31(a)(3) was inadvertently omitted from the final rule published December 23. This document adds § 302.31(a)(3), as published on October 5th, to the final rule.

Under Part 304 of the final rule, we amended 45 CFR 304.21(a)(2) by removing the word "child" where it appeared in that section. Final regulations on Federal Financial Participation in the Costs of Cooperative Agreements with Courts and Law Enforcement Officials (47 FR 53014–53018), published in the **Federal Register** on November 24, 1982, deleted the word "child" from that section. Therefore, there was no need to include reference to that section in the December 23rd final rule. We are not, however, correcting this error in this document since the above mentioned regulation has already done so.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96–511) the information collection requirements contained in this regulation and reported on the revised OCSE–3 have been approved by the Office of Management and Budget (OMB). The OMB approval number is 0960–0154.

Regulatory Impact Analysis

No significant costs will result from implementation of the final rule which was published in the Federal Register on December 23, 1982. We estimated that the effect of that rule will result in collections of $5 million each year from 1982 through 1986. Therefore, the Secretary determined that the final rule was not a major rule as described by Executive Order 12291. The Secretary has also determined that this document, which merely corrects two technical errors in the final rule, is not a major rule as described by Executive Order 12291. In addition, the Secretary certifies that for the reasons stated above, neither the final rule nor this document will have significant economic impact on a substantial number or small entities and, therefore, neither requires a regulatory flexibility analysis as provided in Pub. L. 96–354, the Regulatory Flexibility Act of 1980.

List of Subjects in 45 CFR Part 302

Child welfare, Grant programs—social programs.

The final regulations with comment period published in the Federal Register on December 23, 1982 (47 FR 57277–57282) are amended as follows:

§ 302.15 [Amended]

A. 45 CFR 302.15(a)(1)(iii) is amended by removing the parenthetical expression.

B. 45 CFR 302.31 is amended by adding paragraph (a)(3) to read as follows:

§ 302.31 Establishing paternity and securing support.

* * * * *

(a) * * *

(3) When assigned support payments are received and retained by an AFDC recipient, to proceed as follows:

(i) In States that implement the IV–A State plan requirements to count retained support payments as income under 45 CFR 233.20(a)(3)(v), the IV–D agency shall notify the IV–A agency whenever it discovers that directly received payments are being, or have been, retained; or

(ii) In States that do not implement the IV–A State plan requirements to count retained support payments as income to meet need, the IV–D agency shall recover the retained support payments. This recovery by the IV–D agency shall be carried out in accordance with the standards for program operations provided in § 303.80 of this chapter.

(Sec. 1102, Social Security Act (42 U.S.C. 1302); sec. 451, 452, 453, 454, 457, and 460, Social Security Act (43 U.S.C. 651, 652, 653, 654, 657, and 660))

(Catalog of Federal Domestic Assistance program No. 13.679, Child Support Enforcement Program)

Dated: July 18, 1983.

John A. Svahn,

Director, Office of Child Support Enforcement.

Approved: November 1, 1983.

Margaret M. Heckler,

Secretary.

[FR Doc. 83-30529 Filed 11-14-83; 8:45 am]

BILLING CODE 4190-11-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 17 and 97

[FCC 81-4]

Changes in Procedures for Approval of Proposed Antenna Structures in the Amateur Radio Service; Announcement of Effective Date and Correction

AGENCY: Federal Communications Commission.

ACTION: Final Rule; announcement of effective date and correction.

SUMMARY: The effective date of rules amending this document sets Parts 17 and 97 to change procedures for approval of proposed antenna structures in the Amateur Radio Service (2–5–81; 46 FR 10915). The rule amendments were adopted by the Commission on January 8, 1981, but their effective date has been held in abeyance pending clearance of reporting requirements by the General Accounting Office. The amendments are necessary to permit amateur radio operators to file a single form to obtain approval of proposed antenna structures, instead of the two forms (610 and 714) currently required. The effect of this action is a simplification of the antenna approval process for both amateur radio licensees and the Commission.

The antenna approval form number is 854.

DATE: The effective date of the rules changes is January 3, 1984.

ADDRESS: Federal Communications Commission, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Maurice J. DePont, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554, (202) 632–4964.

In § 17.4(h), where there is a blank space following the word Form, insert the number 854. In § 97.45(a), where there is a blank space following the word Form, insert the number 854.

William J. Tricarico,

Secretary, Federal Communications Commission.

[FR Doc. 83-30716 Filed 11-14-83; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Parts 1 and 90

[PR Docket 79–191; RM–3380; PR Docket 79–334; RM–3691; PR Docket 79–107 and 81–703; FCC 83–474]

Release of Spectrum in the 806–821 and 851–866 MHz Bands and Adoption of Rules and Regulations Which Govern Their Use

AGENCY: Federal Communications Commission.

ACTION: Final rules.

SUMMARY: The Commission has adopted a Memorandum Opinion and Order which amends certain rules previously adopted in the Second Report and Order of this proceeding. Its decisions in this Memorandum Opinion and Order are the result of petitions for reconsideration of its previous actions. By this Memorandum Opinion and Order the Commission clarifies and to some extent modifies its channel loading standards for trunked private land mobile 800 MHz systems; affirms the permissibility of paging on 800 MHz channels were it will not impair two way operations; allows extended radio system implementation schedules in the Business Radio Service; clarifies the comparative criteria to be applied when more applications are received than can be accommodated on available frequencies in the SMRS category; affirms the removal of entry restrictions on radio equipment manufacturers in the offering of SMRS service; affirms its decision to terminate the proceeding looking into multiple licensing at 800 MHz (PR Docket 79–107); and affirms trunked SMRS application processing procedures employed by the Commission.

EFFECTIVE DATE: December 8, 1983.

ADDRESS: Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Joseph Levin, Private Radio Bureau, Rules Branch (202) 634-2443.

List of Subjects in 47 CFR Part 90

Private land mobile radio services, Radio.

Memorandum Opinion and Order; Proceeding Terminated

In the matter of amendment of Part 90 of the Commission's Rules to release spectrum in the 806-821/851-866 MHz bands and to adopt rules and regulations which govern their use (PR Docket No. 79-191, RM-3380); amendment of Part 90 of the Commission's Rules to facilitate authorization of wide-area mobile radio communications systems, (PR Docket No. 79-334; RM 3691); an inquiry concerning the multiple licensing of 800 MHz radio systems ("community repeaters"), (PR Docket No. 79-107); amendment of § 90.385(c) of the Commission's Rules to allow transmission of non-voice signals at 800 MHz.[1] (PR Docket No. 81-703).

Adopted: October 19, 1983.

Released: November 1, 1983.

By the Commission: Commissioner Quello absent.

Background

1. On July 22, 1982, the Commission adopted a *Second Report and Order* in this proceeding which released the remaining 250 private land mobile channels in the 806-821 MHz and 851-866 MHz bands,[2] and established new rules to govern private land mobile radio operations on these channels. This proceeding ended a process that began in 1970 for allocating spectrum and adopting a regulatory structure to govern private land mobile radio operations at 800 MHz. The *Second Report and Order* established uniform rules for future operation in these bands, as well as certain interim rules to cover grandfathered systems authorized under previous rules. The *Second Report and Order* also consolidated four related dockets which dealt with 800 MHz private land mobile radio.

2. Stated broadly, the *Second Report and Order*: (1) Apportioned the remaining 800 MHz private land mobile radio spectrum among four user categories established by eligibility affinity;[3] (2) opened channels to both trunked and conventional technology;[4] (3) established uniform loading standards for all conventional systems and for all trunked systems;[5] (4) increased the number of mobile stations required to assure channel exclusivity; (5) reduced the time within which certain channel loading benchmarks must be reached in areas where there are waiting lists for frequencies; (6) required frequency selection by applicants, except in the case of Specialized Mobile Radio System (SMRS) licensees;[6] (7) eliminated a number of technical restrictions which reduced licensees' operational flexibility; and (8) removed the restriction on manufacturers' entry into the SMRS marketplace as licensees of systems.

Reconsideration

3. Several parties have requested either reconsideration and reversal, or clarification of various aspects of the *Second Report and Order*.[7] Broadly stated, the issues which they ask us again to consider include: the appropriate number of transmitters necessary to achieve channel loading in any given locale or radio service; our authority to authorize oneway paging on 800 MHz two-way systems; whether Business Radio Service eligibles should also be allowed extended system implementation schedules when certain predefined conditions are met; the status of remote or satellite stations in wide-area radio systems operated by public service agencies in situations in which the geographic area needed to be covered exceeds the protected area which the rules provide; the comparative criteria which the Commission will apply in cases in which applications are received for more frequencies than are available; the authorization of trunked SMRS licenses to RF equipment manufacturers; the termination of PR Docket 79-107; and the application processing procedures applicable to trunked SMR systems.

Summary

4. By this *Memorandum Opinion and Order* the Commission clarifies and to some extent modifies its channel loading standards for trunked private land mobile 800 MHz systems; affirms the permissibility of paging on 800 MHz channels where it will not impair two way operations; allows extended radio system implementation schedules in the Business Radio Service; clarifies the comparative criteria to be applied when more applications are received than can be accommodated on available frequencies in the SMRS category; affirms the removal of entry restrictions on radio equipment manufacturers in the offering of SMRS service; affirms its decision to terminate the proceeding looking into multiple licensing at 800 MHz (PR Docket 79-107); and affirms trunked SMRS application processing procedures employed by the Commission.

Loading and Loading Related Issues

A. Discussion

5. Two petitioners, LMCC and Motorola, request we reconsider several of our decisions regarding channel loading and measuring the use of the 800 MHz channels. LMCC addresses this matter in the context of the status to be afforded satellite or remote base stations operating as part of wide-area trunked systems. It requests that these satellite or remote base stations be given primary status, rather than the secondary status currently prescribed in the rules. LMCC argues that the critical nature of communications on wide-area systems makes the application of secondary status to any portion of the system "unacceptable and not in the public interest," in that these types of

[1] The titles of the various proceedings that have been consolidated into this proceeding have been shortened.

[2] Six hundred channels were made available for private land mobile use in the *Second Report and Order* in Docket No. 18262. Three hundred channels were released in 1974 and another fifty in 1978. *See generally, First Report and Order and Second Notice of Inquiry*, Docket No. 18262, 35 FR 8644 (June 4, 1970); *Second Report and Order*, Docket No. 18262, 46 FCC 2d 752 (1974), *reconsidered, Memorandum Opinion and Order*, Docket No. 18262, 51 FCC 2d 945 (1975); *Order*, FCC 78-854, (1978) on reconsideration: *NARUC v. FCC, 525 F. 2d 630 (D.C. Cir. 1976), cert. denied, 425 U.S. 992 (1976).*

[3] Public Safety/Special Emergency Radio Services; Industrial/Land Transportation Radio Services; Business Radio Service; SMRS private carrier licensees.

[4] A trunked system is one in which two or more channels are linked with a computer contoller in order to assign the first available channel to a user. A conventional system operates on one or more channels, but unlike a trunked system, each user must manually search for a vacant channel.

[5] Loading standard describes the number of mobile transmitting stations which must be placed in operation on a given frequency pair (i.e. "channel") or group of frequencies.

[6] An SMRS or specialized mobile radio system is a private carrier system in which the licensee of the base station transmitter is authorized by the Commission to operate as a commercial provider of communications service to persons eligible under Part 90 of the Commission's rules. See *NARUC v. FCC*, 525 F. 2d 630 (D.C. Cir. 1976), cert. denied, 425 U.S. 992 (1976). *See also* Communications Amendments Act of 1982, section 120, Pub. L. 97-259, 96 Stat 1087, September 13, 1982, codified at 47 U.S.C. 332.

[7] The petitioners are (1) the Associated Public-Safety Communications Officers (APCO); (2) the E. F. Johnson Company (Johnson); (3) the Land Mobile Communications Council (LMCC); (4) Motorola, Inc. (Motorola); (5) the National Association of Business and Educational Radio, Inc. (NABER); and (6) the Telocator Network of America (Telocator). In addition, the National Mobile Radio Association (NMRA) filed an appeal of the proceeding in PR Docket 79-191 in the United States Court of Appeals for the District of Columbia Circuit, No. 82-2065, September 16, 1982.

systems generally have public service responsibilities.[8]

6. Motorola raised several other issues related to loading. First, it supports the position taken by LMCC on the subject of wide area systems for public service agencies. Second, Motorola suggests that the 70 mobiles per channel loading standard for conventional systems is too high, and that, as a general proposition, the loading requirements in major market areas should be different than those for smaller market areas.[9] Motorola believes that such distinctions should be stated explicitly in the rules. Motorola is also concerned that the Commission may permit the use of "air-time" instead of mobile station transmitter counts as a measure of channel occupancy, which would encourage private radio system licensees to interconnect their radio systems with telephone service to originate and receive calls in their mobile units. Motorola suggests that the consequences of permitting "air-time" to be used as a measure of channel occupancy would be to encourage lengthier conversations over the radio system by allowing licensees to substitute channel occupancy for loading and thus to reduce the number of mobile stations they must place on these frequencies. This, Motorola believes, would diminish the efficient use of this spectrum. Motorola requests we affirm that we are not contemplating air-time as the measure of channel occupancy.

B. Decision

Wide Area Systems

7. The Commission has considered the various points raised by the petitioners regarding loading. With regard to the subject of wide area systems for public safety and public utility licensees, we conclude there is merit to allowing satellite stations to have primary status. We do not reach this conclusion easily, however, because in some respects it will diminish our ability to maximize the number of licensees who can use this spectrum. On the other hand, we must assure that communications systems which promote public safety can be implemented in ways which, in fact, permit them to be useful and serve the entire population for which they have responsibility. As is stated in the Conference Report accompanying the Communications Amendments Act of 1982, "The Commission should be ever vigilant to promote the private land mobile spectrum needs of police departments and other public agencies which need to use such radio services to fulfill adequately their obligations to protect the American public." [10] After weighing this matter, we are amending our rules to grant, on a "first-in" basis, primary status to satellite stations operating in wide area trunked 800 MHz systems authorized to public safety agencies and public utility companies. This action, we believe, recognizes the possible needs of these licensees to serve larger geographic areas than can be reached by a single central base station, as well as their need to have the certainty of knowing, for planning purposes, that all the stations which comprise the system will be able to operate with primary status.[11]

Conventional System Loading

8. Turning to Motorola's requests, we have had a good deal of experience in the years since we first authorized conventional 800 MHz systems in various approaches to conventional system loading. Previous rules varied both by radio service and geographic area so that there were different loading levels between, for example, an urban police department and a rural police department, as well as between an urban police department and other urban industrial users. There were also different loading levels for eligibles within 75 miles of the top 25 urban markets and for those beyond. There were other variations also defined by the number of licensees authorized for a channel. In our *Second Report and Order*, we considered the complexity of these various rules, as well as the entire issue of appropriate loading levels for various types of conventional systems. We concluded that in the Business Radio Service the loading should come down, in the public safety services it should go up, and that the level required of industrial users was about right, on an average, for all conventional system licensees. We thus adopted a uniform conventional channel loading standard of 70 mobile transmitters per channel, which was supported by the Land Mobile Communications Council speaking for the preponderance of the land mobile licensees.

9. Motorola asks us to reconsider this decision and lower the number of mobile station transmitters which will secure a conventional channel for a licensee(s) on an exclusive basis.[12] It argues the quality of service is too low (i.e. the time which licensees must wait for an unused channel is too long) if 70 mobiles is the minimum level for conventional channel exclusivity. We have reconsidered this point and find nothing new in Motorola's submission which persuades us to change our earlier decision. We recognize that there is no perfect figure for conventional channel loading, and that the particular circumstances surrounding the operation of individual stations could require an optimal loading level higher or lower than the figure we have chosen. However, 70 mobile transmitters appears to us to be a reasonable figure which has the general support of the user community and has worked reasonably well from an administrative perspective. We see little benefit to changing it, with the attendant disruption entailed, for yet another figure which is no more precise than the existing one. Motorola, moreover, has

[8] A wide area system is a system which seeks to protect a larger geographic area than the circle with a 20 mile radius generally contemplated by the rules. An example would be a police department or power company whose obligations include serving outlying areas. The wide area system typically can operate in two ways: (1) The satellite base stations can operate on different frequencies than the primary or central base station; or (2) the satellite station can operate on some or all of the same frequencies assigned to the central base station. At issue before us is the narrow question of the status of these satellite base stations when licensees of trunked systems seek to "re-use" at secondary locations the same channels used at the primary base station. Since primary base station frequencies are generally assigned for re-use at 70 mile intervals, if a wide area licensee's satellite stations have primary status, then it necessitates spacing more than 70 miles from the primary site before another licensee can re-use the frequencies. 47 CFR 90.366(h) now provides: "Wide area systems may be authorized . . . upon an appropriate showing of need. If the licensee wishes to operate remote or satellite stations on some or all of its authorized trunked frequencies, these systems will be authorized only on a secondary, non-interference basis to co-channel licensees."

[9] In the *Second Report and Order* a uniform conventional channel loading standard of 70 mobile station transmitters per channel was established on a nationwide basis, with no differential based on population density. However, enforcement of this loading standard for purposes of retaining channel exclusivity only is triggered when no spectrum is available for assignment. Cf. 47 CFR 90.633(a) which provides: "Conventional systems of communication will be authorized on the basis of a minimum loading criteria of 70 mobile stations for each channel authorized."

[10] Conference Report No. 97-765, 97th Cong., 2d Sess., August 18, 1982, p. 52, reprinted in 1982 U.S. Code Cong. & Ad. News 2261, 2296.

[11] Notwithstanding our decision to accord the satellite stations in wide area trunked systems of public service agencies primary status when they reuse frequencies, we are not requiring that the satellite station be treated as primary stations for mobile loading purposes. Thus, we will continue to count the total number of base stations frequencies and the total number of mobile stations in a given system to determine if our loading standards have been met. Cf. 47 CFR 90.366(h) and 47 CFR 90.631(e).

[12] 47 CFR 90.633(b) provides: "A channel will not be assigned to additional licensees when it is loaded to 70 mobile stations. Where a licensee does not load a channel to 70 mobiles the channel will be available for assignment to other licensees. All authorizations for conventional systems are issued subject to this potential channel sharing condition."

not demonstrated that there is a better figure. Rather it only asserts our present figure is too high. In light of the apparent general satisfaction with our existing figure, and the lack of demonstrable evidence that another is superior, we decline to modify our present channel loading figure of 70 mobile stations per conventional channel.

Trunked System Loading

10. In the process of reviewing the loading standards issue in response to Motorola's petition, we have also re-examined the trunked system loading standards established in the *Second Report and Order* in this proceeding. Based on this analysis, and our experience in administering the new rules adopted in this proceeding, we are persuaded that some modification in the trunked loading standards is necessary if trunked systems are to flourish at 800 MHz. As is set forth in great detail in our proceeding in Docket No. 18262, *supra* n. 2, one of our major objectives for 800 MHz was the introduction of channel trunking technology. To this end we established rules to allow licensees to build their own communications systems or to avail themselves of the services of private radio communications providers (*i.e.*, the licensees of SMR systems).[13] Unfortunately, our early experience was that applicants, particularly commerical provider applicants, requested far more spectrum than they could put to use in the immediate future. This resulted in there being no spectrum available for new applicants, particularly new SMRS applicants, and no spectrum available in many areas of the country for existing licensees who wanted to expand already operating trunked systems. To remedy this, in our *Second Report and Order* in Docket 79-191, we limited the number of channels SMRS applicants proposing commercial communications service to others could request to five channels at a time. We also adopted rules to facilitate our recovery of channels from licensees who were holding, but not loading, channels. We are mindful, however, that the effect of this approach, particularly in the private carrier area, is to make the operation of ten, fifteen and twenty channel trunked systems more difficult. This is counterproductive to the greatest efficiencies from trunking, which occur in the largest systems. The policy was necessitated, however, by our need to balance a few licensees with unloaded larger trunked systems against a marketplace in which a large number of smaller trunked systems compete in the offering of radio communications service to small businesses and other eligibles. We concluded greater competition in the offering of service was more desirable. We continue to believe this conclusion was correct.[14]

11. Simultaneously with our decision to limit SMRS applicants to five channels at a time, we adopted rules which required trunked licensees to load their channels to specified levels in specified periods of time with mobile transmitters, or face the loss of channels.[15] We are aware that there is a severe economic penalty paid for failure to meet the channel loading standards for trunked systems because channels are lost when the standards are not met. Thus, system capacity is reduced to the economic detriment of the base station licensee and to the injury of the mobile station licensees operating on the systems in the case of an SMRS. If licensees have made significant strides in loading their channels and have fallen somewhat, but not significantly, short of the required channel loading goal, we think some leeway should be provided. The balance, however, is difficult. On the one hand we desire more efficient radio systems, and the larger the number of channels a trunked system has, the more mobiles it can accommodate *vis-a-vis* a conventional system. On the other hand, to allow licensees who have ten, fifteen, and twenty trunked channel assignments to keep the excess over five, when they have not even loaded the five and when other applicants are waiting, does not serve the public interest because the effect of this is to prevent other competitors from coming in to serve the small business user market. *See P&R Temmer*, FCC 83-171 (released May 16, 1983) and *AAT Electronics Corp.*, FCC 83-170 (released May 16, 1983). The measure of channel usage we employ in our rules is the number of transmitters authorized for use on the channels. In counting these transmitters, however, we count only mobile and portable stations, not control stations. But, a control station is an "immobile" mobile station.[16] The control station communicates on the system's channels in precisely the same way a mobile station does. Moreover, the number of control stations licensed to a user is small in proportion to the number of mobiles, in most circumstances, so that the effect of counting control stations as well as mobile stations for purposes of meeting our trunked channel loading standard will be to ease slightly the loading standard. Therefore, we have decided that control stations will be counted to determine the loading level of trunked systems only. This, we envision, should have the benefit of permitting otherwise almost loaded trunked systems to reach the standard through counting their control stations for channel loading purposes. It will thus permit preserving intact the basic five channel grant in circumstances where there has been substantial compliance with our mobile loading rules. Although we recognize that this change will, in effect, reduce the trunked system loading standard in the short run, since we have removed all restrictions as to the number of mobile transmitters which may operate on a trunked system, and since there is an economic incentive for SMRS licensees to enhance profits by maximizing system loading, we expect this will not result in lower loading levels for trunked systems in the long run.

12. We are not, however, adopting the same approach for conventional system loading. These systems do not suffer an absolute loss of channels when they fail to meet the loading standards, and we find no reason to modify their loading levels downward by including control stations in their loading count. These systems are not as efficient in the numbers of mobiles they can handle on a given amount of spectrum as trunked systems and they do not, from the Commission's perspective, maximize spectrum use in the way trunked systems do. We believe 70 mobile stations is an appropriate number of mobile stations to operate on a conventional base station channel (See paragraphs 8 and 9 above). Moreover, as noted in our *Second Report and Order*, in some instances we lowered the loading levels for conventional systems. Further reduction in loading levels by the counting of control stations is not warranted and is unnecessary to any regulatory purpose. In the absence of

[13] See Docket No. 18262 and *NARUC* v. *FCC*, *supra*, for the history of the creation of private carrier systems.

[14] Moreover, as the marketplace settles, we expect that larger trunked systems will come into existence through buy-outs, mergers, etc.

[15] 47 CFR 90.631(b) provides: "Each applicant for a trunked system shall certify that a minimum of 60 mobiles for each channel authorized will be placed in operation within 3 years of intial license grant, and that a minimum of 80 mobiles for each channel authorized will be placed in operation within 5 years of initial license grant. If at the end of three years or five years a trunked system is not loaded to the prescribed levels and a waiting list exists in the system's geographic area authorization for channels not loaded to 100 mobile stations cancels automatically. All authorizations are subject to this condition."

[16] 47 CFR 90.7 defines a control station as: "An Operational Fixed Station, the transmissions of which are used to control automatically the emissions or operation of another radio station at a specified location."

this, we will continue our existing approach for conventional systems loading.

13. In further considering the principles to govern loading of trunked systems, we also have decided to modify two other rules. First, we will allow licensees of existing systems to apply for admission to the waiting list for the 200 trunked channels governed by Subpart M when their systems are 70% loaded. Our present policy requires licensees to be 90% loaded before they apply for additional channels. Many have contended that in light of the waiting time for additional channel authorization, this imposes a long period of poor quality service for their subscribers. They contend, if they could at least get on the waiting list sooner, it would be beneficial. We agree. We caution, however, no channels will be authorized to persons on the waiting lists unless already authorized channels meet our loading requirements. If they have not loaded, applications will be dismissed at the time they reach the top of the list.

14. Second, we are modifying our rules to permit a licensee to obtain additional trunked channels in a market area when its existing system is loaded to 80% of the loading standard of 100 transmitters per channel. We believe that the current requirement that trunked systems be loaded to 90% before additional channels are authorized unnecessarily imposes a reduced service quality on system users. This is especially true as the loading standard is approached on a five channel trunked system since the efficiency of trunked systems increases with the number of channels. Because a trunked system licensee must load its system to 80% of the loading standard in order to retain channel exclusivity, it is reasonable to authorize additional channels for these systems when the loading standard is satisfied.

Urban/Rural Distinction

15. With regard to the urban/rural loading distinction which Motorola requests, we clearly took cognizance of this matter by adopting rules relating to channel exclusivity which were activated only by the lack of spectrum in a particular geographic area.[17] Thus, there is no penalty attached to a licensee's failure to meet our loading levels nor is there any bar to a licensee being authorized additional channels even though the 70 mobile transmitter per channel standard is not met, until the time arrives when there is no spectrum available for other applicants who seek to implement radio systems. At that point, if a licensee has not loaded a channel to the level of mobile transmitters required by the rules for channel exclusivity (i.e. 70), other licensees will be "loaded on top of the system", that is, other licensees will be authorized radio transmitters on the same channel. Since channel sharing is common in the private land mobile services in the bands below 800 MHz,[18] this is not an uncommon occurrence to the land mobile community and, in most circumstances, works little or no unmanageable harm on licensees. Also, since land mobile spectrum shortages generally occur in urban areas, in most rural areas there is little likelihood that all available spectrum will be exhausted. Therefore our rules do permit, in effect, lower channel loading levels for typical rural users. However, in our estimation, the true test of the need to meet the loading standard is not keyed to locale, but rather to the radio operating environment in the locale. Thus, in rural areas where there is high spectrum demand, we believe the loading levels should be the same as it is in urban areas where there is high spectrum demand. We, therefore, affirm our existing rules and decline to adopt different loading levels based on urban/rural distinctions.

Air Time As a Measure of Channel Occupancy

16. The issue of how the Commission should measure and assure that licensees are making efficient and effective use of the radio frequencies for which they have been authorized is one of the most difficult and recurring questions we have faced throughout this proceeding. No one disputes that there should be some established measure of efficient and effective spectrum use. There is little or no unanimity, however, on what constitutes such use. As a general proposition, public safety users maintain that a channel is being efficiently and effectively used when it is immediately available on a clear channel basis when an emergency arises. Others maintain that a channel is efficiently and effectively used when it is occupied by a signal a large percentage of the time. Still others contend not only that the channel must be occupied, but that it must be occupied by a technology which maximizes the number of mobile stations which can operate on the channel. A variety of other tests and refinements have also been considered. In 1974, we adopted as the test the number of mobile transmitters which are authorized on a channel. We then required that applicants who sought channels on an exclusive basis would have to load their channels with a specified number of mobile transmitters in a specified period of time or they would forfeit channels.

17. Air time, or the establishment of a standard which would permit licensees to demonstrate through the measurement of actual use of the channels that the spectrum was being used efficiently independent of the number of transmitters authorized on a channel, is another possible alternative measure of spectrum utilization. However, if air time were to be allowed as a substitute for station loading as the measure of efficient spectrum use in these services at 800 MHz, it would require, as a prerequisite, the development of standards for computing what measure(s) of air time would constitute "efficient use". Moreover, while some commenters supported such an approach, there was little or no serious discussion of whether there should be uniform standards, or standards by various services, nor what these standards should be and how they might be developed. Lacking data on most of these points, we declined in our *Second Report and Order* either to adopt an air time approach or to embark on further rule making in this regard. Instead, we decided to retain our existing approach which we felt was just as valid a measure of efficient spectrum use, and which was much easier to administer. We reiterate that view on reconsideration.[19]

Paging/Technical Flexibility

A. Discussion

18. Three petitioners, Motorola, NABER, and Telocator request reconsideration of the Commission's decision to allow the 800 MHz private land mobile two-way channels to be used for paging. Both Motorola and NABER request that we expand our approach to extend eligibility to transmit pages to multiple licensed

[17] At paragraph 86 of our *Second Report and Order* we stated: "This mobile loading minimum will apply in all areas of the country (i.e., there is no distinction between the top 25 urban areas and other locations) and it will apply to all conventional radio systems, regardless of the category of eligibility of the licensee. However, in areas where waiting lists for conventional channels do not develop, a licensee may be assigned additional channels upon an appropriate showing of need even though an already licensed channel is not loaded to 70 mobile units."

[18] See 47 CFR 90.173.

[19] Motorola requested that the Commission affirm its authority to cancel licenses automatically in the event systems are not constructed or loaded as prescribed in the rules. This matter has already been addressed in *P&R Temmer* and *AAT Electronics Corp., supra.*

systems commonly referred to as "community repeaters." [20] Telocator, on the other hand, argues that the issue of paging was outside the scope of the *Further Notice of Proposed Rule Making* in this proceeding.[21] Therefore, Telocator suggests that by changing the rules to permit paging, the Commission has violated the Administrative Procedure Act.

19. Motorola, in its petition, argues that the option to use paging should be extended to all types of shared systems, and not restricted to SMR systems and licensees of exclusive channels. The Motorola petition goes on to point out that licensees may have a legitimate need to page as well as engage in two-way communication, and should not be forced to employ separate systems for each type of communication. Paging, Motorola asserts, should be permitted on shared channels on a co-equal basis to two-way communication. Motorola, while preferring unrestricted paging authorization, concedes that reasons may exist to require prior consent of all licensees of a multiple licensed transmitter prior to allowing paging.

20. NABER argues that the Commission did not explain why a distinction was drawn between paging on an SMRS system and paging on a community repeater. NABER would extend paging eligibility to licensees of community repeaters on a secondary basis to two-way communication. NABER suggests that the secondary status would make paging use compatible with the primary two-way use.

21. Telocator's petition argues that the Commission failed to provide "fair and adequate notice" that it was considering expansion of paging privileges from licensees of exclusive channels to SMR systems and, therefore, violated the rule making procedures required by the Administrative Procedure Act. Telocator suggests that expansion of eligibility to page in these bands constituted a major transformation of permissible transmission modes, and should have been addressed explicitly in the *Further Notice of Proposed Rule Making* in this proceeding.

B. Decision

22. The Telocator petition argues that modification of our 800 MHz rules to allow paging on SMR systems constitutes a major change in our rules, and therefore is subject to the notice and comment procedures established in the Administrative Procedure Act. The Commission agrees that this change is subject to notice and comment procedures, and we are satisfied that the requirements of the APA have been fully satisfied. In paragraph 73 of the *Further Notice of Proposed Rule Making* in Docket 79-191, we stated specifically that "we believe it would be advantageous to allow flexibility in choosing the type of emission mode to be used and the amount of bandwidth to be occupied." In paragraph 78 of the same document we indicated our intention as follows: "We propose to eliminate all restrictions on non-voice and other specialized operations." This increased technical flexibility was proposed in Docket 79-191 for channels assigned for the exclusive use of a single licensee, SMR systems, and shared systems in which all licensees agree to the intended use of the channels. Since paging is clearly a non-voice or specialized operation, there is no question that adequate notice was provided in this proceeding of our intention to permit any type of emission mode or specialized operation which the licensee(s) found feasible. We proposed this capability extend to single licensee systems, SMR systems, and shared systems in which all licensees agree to any particular use of the channel, including paging. We therefore reject Telocator's assertion that we have not complied with the requirements of the APA, and conclude that our stated intention to eliminate all restrictions on non-voice and other specialized operations on these frequencies encompassed paging, and satisfied the prior notice and comment requirements of the APA.

23. Turning now to the arguments made by Motorola and NABER to extend paging to shared channels, we find them persuasive. Moreover, NABER's request that we accord such operations secondary status by requiring the prior consent of all those licensed for the channel allays our concerns about interference. Therefore, we are relaxing these restrictions on technical flexibility imposed in the *Second Report and Order*, and are extending full technical flexibility, including the option for paging, to shared systems in which all licensees agree to the intended use of the channel. This action, we believe, serves the public interest by maximizing the use which licensees can make of the spectrum authorized to them, consistent with our regulatory objectives.

Extended Implementation

A. Discussion

24. Three petitioners, LMCC, Motorola and NABER, request that the Commission reconsider the eligibility requirements for extended implementation schedules.[22] The rules adopted in the *Second Report and Order* allow extended implementation schedules of up to three years only in the Public Safety/Special Emergency and Industry/Land Transportation pools. No such provision was made for eligibles in the Business Radio Service. All three petitioners argue that eligibles in the Business Radio Service also should have the flexibility to elect an extended implementation schedule, since they too face similar problems in implementing large complex communications systems.

25. LMCC proposes that the rules be modified to indicate that although extended implementation schedules are not normally available in the Business Radio Service, it would be allowed in circumstances in which the criteria which apply in the Public Safety/Special Emergency and Industrial/Land Transportation pools are met. Motorola proposes two alternative changes: (1) Eliminate the exclusion of Business Radio Service eligibles, but require a more stringent showing than is required in the other two service pools which permit extended implementation; or (2) retain the exclusion, but acknowledge that legitimate needs for extended implementation may exist within the Business category and that these needs may be accommodated through the waiver process. NABER supports the rule change as proposed by LMCC. However, NABER requests that Business category applicants for extended implementation schedules be required to demonstrate that they are not eligible in the Industrial/Land Transportation category.

B. Decision

26. At the time the "slow growth" rules were adopted in this proceeding, it was not apparent that applicants in the Business Radio Service would require the flexibility to elect extended implementation schedules. Moreover, during the comment period no one asked for slow growth capability for Business Radio Service systems. Consequently, when we adopted our *Second Report and Order*, this option was not made available to eligibles in the Business Radio Service. However, we are persuaded by the three petitioners on

[20] For a discussion of multiple licensing see *Report and Order*, Docket No. 18921, 47 FR 19527 (May 5, 1982); *on reconsideration, Memorandum Opinion and Order*, Docket No. 18921, 48 FR 28617 (June 9, 1983).

[21] *Further Notice of Proposed Rule Making*, PR Docket No. 79-191, 46 FR 37827 (July 23, 1981).

[22] 47 CFR 90.366(g) and 90.629.

this issue that the current rules may be unduly restrictive with respect to applicants whose sole eligibility is in the Business Radio Service. They indicate that some applicants may have requirements for extended implementation periods and that the rules should be modified to meet those requirements. Furthermore, subsequent to the adoption of the *Second Report and Order* in this proceeding, a Business Radio Service eligible, IBM, sought and obtained a waiver of the current restriction against extended implementation schedules in the Business category.[33]

27. Therefore, in further considering this point, we are modifying the rules to permit extended implementation schedules by eligibles in the Business Radio Service. Business eligibles will be subject to the same showings as eligibles in the Public Safety/Special Emergency and Industrial/Land Transportation categories. We are also adopting the restriction suggested by NABER which would require applicants for extended implementation schedules in the Business category to demonstrate either that they are not eligible in the Industrial/Land Transportation category, or that no frequencies are available in the Industrial/Land Transportation category. This is equitable, we believe, in view of the fact that Business Radio Service eligibles often have no options but the Business category frequencies, while Industrial/Land Transportation Radio Service eligibles may have several options.

Comparative Criteria

A. Discussion

28. Three petitioners, APCO, Motorola, and NABER request that the comparative criteria discussed in paragraph 208 of the *Second Report and Order* in this proceeding be modified.[34]

29. APCO suggests that the Communications Amendments Act of 1982 compels the Commission to establish criteria which would take into consideration the degree to which a particular proposed radio system was necessary for the safety of life and property. APCO requests that the comparative criteria be expanded to encompass public safety considerations, or that eligibility in the Special Emergency Radio Services be restricted to governmental entities.

30. Motorola makes two suggestions regarding the comparative criteria. First, it requsts that the Commission specifically identify the types of evidence sought to support the third criterion. Second, Motorola would add a criterion which addresses the quality of service. It proposes, as a suggestion, that a dispatch-only service be preferred over a competing service which is interconnected with the telephone network.

31. NABER suggests that the criteria are too general to narrow the number of competing applications. In its petition, NABER indicates that it is its impression that the criteria are intended to apply exclusively to trunked systems. Also, the second and third criteria, which appear to favor existing system operators over new applicants, are not justified adequately in NABER's view. NABER also points out that the Commission is silent regarding the means to be used to measure the third criterion. Finally, NABER is concerned that the criteria do not appear to be applicable to the three non-SMRS service categories. No specific recommended changes are included in the NABER petition.

B. Decision

32. When the *Second Report and Order* in this proceeding was adopted, it was anticipated that only in the SMRS category would more applications be received initially for channels than were available. The three criteria were drafted essentially for use in selecting among applicants within the SMRS category. The applications which were filed pursuant to the *Second Report and Order* in fact bear out the Commission's projections. There were no categories in any geographic area of the country in which the number of applicants exceeded the number of available frequencies, except in the SMRS category. In light of this, APCO's petition on this point is moot, and we will not promulgate comparative criteria for categories other than the SMRS category at this time. If at a later date frequency shortages arise in other categories, we will promulgate the comparative criteria to govern the selection process in those categories.

33. With regard to the SMRS category, we agree with Motorola and NABER that the third comparative criterion enumerated in our *Second Report and Order* may be difficult to quantify. In addition, the use of this criterion could result in some applicants making inflated promises to gain a comparative advantage. We do not want the comparative criteria to create incentives for applicants to speculate or make overly optimistic representations to the Commission. Consequently, we have decided to eliminate the third criterion as a factor in selecting among applicants for channels in the SMRS category.

34. The two remaining criteria: (1) the efficiency of the proposed system; and (2) whether the application would expand a fully loaded trunked system, are both predicated on the Commission's desire to foster more efficient use of the spectrum. The higher efficiency of trunked systems relative to conventional systems is a well established fact. A review of the various theoretical trunking formulas indicates that any increase in the number of channels in a trunked system results in a corresponding increase in the communications capacity per channel of that system. However, it has occurred to us that there may be some confusion in applying the first criterion. Our intent in the *Second Report and Order* was to award a comparative advantage for trunked operation. Therefore, we are modifying the first criterion to read as follows: whether the proposed system is conventional or trunked.

35. Motorola's suggestion to add a criterion which would prefer a non-interconnected system over an interconnected system has been considered. However, the Commission is not persuaded that it would be in the public interest to restrict user choices by preferring non-interconnected systems over interconnected systems. To the contrary, this entire proceeding has been predicated on a regulatory philosophy which seeks to maximize the communications choices and options available to private land mobile licensees in meeting their communications needs in recognition of the fact that thereby the totality of public service is enhanced through more efficient operation. Motorola's suggestion would appear to be contrary to this philosophy, and we reject it.

36. The two comparative criteria will be given equal weight in evaluating the qualifications of applicants in the SMRS category and awarding comparative points during expedited hearing proceedings in these cases. One point will be awarded to each applicant proposing to operate a trunked system. Applicants proposing to expand existing loaded trunked systems also will be awarded one point. Therefore, each applicant will receive two, one, or no comparative points based on the above criteria. No fractional points will be awarded to any applicant. Applications

[33] *Order*, FCC 83-104, adopted March 10, 1983.

[34] The three criteria were (1) the efficiency of the proposed system including whether it is conventional or trunked; (2) whether the application would expand a fully loaded trunked system, with larger trunked systems being favored; and (3) whether an applicant would exceed the loading requirements by either loading faster or accommodating more mobile units than specified in the Rules.

will be ranked based on the number of comparative points awarded, and grants will be made first to those applications with the most comparative points. If sufficient channels are not available in a geographic area to grant all SMRS applications with the same number of comparative points, grants among this tied group will be made in accordance with the Commission's random selection procedures described in the *Second Report and Order* in General Docket No. 81-768, 48 FR 27182 (June 13, 1983).

Equipment Manufacturer SMR Ownership

A. Discussion

37. Two petitioners seek reconsideration of the Commission's decision to eliminate the restriction regarding licensing of trunked SMR systems to RF equipment manufacturers. Johnson and Telocator request that the Commission reinstate the previous rules which restricted RF equipment manufacturers to ownership of only one trunked SMR system in the country. In addition, NMRA has indicated its opposition to the Commission's action on this issue in a Petition for Review to the U.S. Court of Appeals for the District of Columbia.[25]

38. Johnson and Telecator argue that contrary to the Commission's assertion that manufacturer entry into the trunked SMR market will be procompetitive, such entry will be anti-competitive. Johnson cites the dominant position of Motorola in the land mobile market as evidence that Motorola has market power and could use such power to eliminate competing trunked SMR systems. Telocator refers to the comments in PR Docket 79-107 [26] as evidence of the market power and anti-competitive conduct of Motorola, and claims that the Commission cannot simply dismiss these filings as unsubstantiated allegations, but must investigate these claims to determine their validity before dismissing them. Telocator goes on to suggest that equipment manufacturers be required to create a separate subsidiary for their trunked SMR operations, if the Commission decides to affirm its decision to permit their entry into this market.

39. NMRA, in its appeal, has argued that the Commission removed the restriction on manufacturer ownership without a record to support such an action. Furthermore, it asserts that manufacturers may offer communication service at prices which are below cost, in order to encourage sales of mobile radio equipment. This cross subsidization, NMRA claims, will result in the economic destruction of many SMRS operators, and the emergency of an SMRS industry dominated by RF equipment manufacturers.

B. Decision

40. The Commission has carefully considered the information presented on reconsideration of this issue and is affirming its decision to eliminate the restriction on RF equipment manufacturer ownership of trunked SMR systems. Johnson asserts that because Motorola has market power in the land mobile market, Motorola will necessarily use this power in an anticompetitive manner. As we clearly stated in the *Second Report and Order* in this proceeding, we believe that the tangible public interest benefits of relaxing the restrictions outweigh the speculative anti-competitive risks.[27] Furthermore, we feel that existing antitrust laws provide adequate protection against any possible anti-competitive activity on the part of equipment manufacturers.

41. In examining this matter we have reviewed case law pertaining to competition in the communications field. While the subject matter before us involves private carriers, and while the considerations between private and common carriers differ, we think some useful guidance regarding our statutory obligations can be gleaned. Thus, while decisions of the Supreme Court and the Court of Appeals for the District of Columbia Circuit establish that the Commission may not authorize competitive duplication of communications facilities on the mere assumption that competition is, as a general proposition, a good thing,[28] it is equally clear that the Commission may lawfully allow, and indeed encourage, entry of multiple licensees offering overlapping services, if it has reviewed that characteristics of the particular communications filed involved and rationally concluded that competition in that field is reasonably feasible and predictably would further the public interest in larger, more economical, and more effective communications service.[29] The test which the courts have established is first that the Commission must be able reasonably to forecast that new entry will not so severely impair the economic base of existing licensees that the industry would experience an incidence of failure so high as to impair the overall provision of service [30] and, that injection of new providers will probably result in better, cheaper, or more innovative communications offerings.[31] These forecasts must have some ascertainable foundation in the record; at the same time, however, conclusions on the future conduct of licensees, the anticipated reaction of investors, the expected course of technological development, and other assumptions about the functioning of tomorrow's communications market are unavoidable exercises in prediction.[32] Recognizing this, the Courts have held that the Commission has satisfied its statutory obligations if:

> The agency's decisional memoranda reveal that it identified all relevant issues, gave them thoughtful consideration duly attentive to comments received, and formulated a judgment which rationally accommodates the facts capable of ascertainment and the policies slated for effectuation.[33]

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[25] *National Mobile Radio Association* v. *Federal Communications Commission*, Petition for Review, U.S. Court of Appeals for the District of Columbia, No. 82-2095, September 17, 1982; *NMRA* v. *FCC*, Application for Stay Pending Review, U.S. Court of Appeals for the District of Columbia, No. 83-2095, October 6, 1982; *NMRA* v. *FCC*, Applicaltion for Reinstatement and Consideration of National Mobile Radio Association's Application for Stay Pending Review, U.S. Court of Appeals for the District of Columbia, No. 82-2095, November 17, 1982.

[26] *Notice of Inquiry*, PR Docket 79-107, FCC 79-283 (May 12, 1979).

[27] *Second Report and Order*, PR Docket 79-191, 90 FCC 2d 1281 (1982), 47 Fed. Reg. 41002 (September 16, 1982), paragraphs 128-129.

[28] See *FCC* v. *RCA Communications*, 346 U.S. 86, 73 S. Ct. 998, 97 L.Ed. 1470 (1953); *Hawaiian Tel. Co.* v. *FCC* 162 U.S. App. D.C. 229, 498 F.2d 771 (1974); *U.S.* V. *FCC, 652 F.2d 72 (1980); See also FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 60 S. Ct. 693, 84 L.Ed. 869 (1940); *WLVA, Inc.* v. *FCC*, 148 U.S. App. D.C. 262, 459 F.2d 1286 (1972); *Carroll Broadcasting Co.* v. *FCC*, 103 U.S. App. D.C. 346, 258 F.2d 440 (1958).

[29] See *FCC* v. *RCA Communications*, *supra*, 346 U.S. at 96-97, 73 S. Ct. at 1004-1005, 97 L.Ed. at 1478-1479; *Western Union Tel. Co.* v. *FCC*, 214 U.S. App. D.C. 308, 325-326, 665 F.2d 1126, 1143-1144 (1981); *RCA Communications* v. *FCC*, 99 U.S. App. D.C., 163, 258 F.2d 24 (1956) (proceedings on remand), *cert. denied*, 352 U.S. 1004, 77 S. Ct. 563, 1 L.Ed. 2d 549 (1957).

[30] *Carroll Broadcasting, Co.* v. *FCC*, 103 U.S. App. D.C. 346, 349, 258 F.2d 440, 443 ("economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts its spells diminution or destruction of service"). *Accord*, *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. at 476 60 S. Ct., at 698, 84 L.Ed. at 874-875; *WLVA, Inc.* v. *FCC*, 148 U.S. App. D.C. at 273, 459 F.2d at 1297; *Telocator Network of America* v. *FCC*, 691 F.2d 525 (1982).

[31] See *FCC* v. *RCA Communications*, *supra*, 346 U.S. at 97, 73 S. Ct. at 1005, 97 L.Ed. at 1479 ("the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it").

[32] *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594-596 (1981); *FCC* v. *RCA Communications*, *supra*, 346 U.S. at 96-97, 73 S. Ct. at 1005, 97 L.Ed. at 1478-1479.

[33] *Telocator Network of America* v. *FCC*, *supra*, 691 F.2d at 545.

42. In our *Second Report and Order*, we explained the original rationale for the restriction on manufacturers' entry and the limited intended duration of this restriction. We stated how circumstances has changed and what policy objectives we felt the change in the rule would accomplish. We also noted the lack of consensus in the comments. However, after analying all of the evidence before us, we concluded that allowing equipment manufacturers to compete on an equal basis with all other SMRS entrepreneurs would enhance competition in the offering of private land mobile communications, thus benefiting all users and the public at large; would enhance spectrum utilization; would result in enhanced operation efficiency and better service; and could result in the offering of private carrier service in market areas in which trunked technology is not currently available.[34]

43. Notwithstanding the positions taken in the petitions for reconsideration, we conclude we have satisfied the standards established by the Congress and the courts. For the reasons discussed in the *Second Report and Order* we affirm our conclusion that conclusion that competition in the SMRS area will further the public interest in larger, more economical and more effective communications service by resulting most probably in better, cheaper and more innovative service offerings. In reaching this conclusion based on the record before us, both then and now, we do not find any substantiation of the allegation that these new entrants will so severely impair the economic base of existing carriers that the industry would experience an incidence of failure so high as to impair provision of service to those persons which existing private carriers are authorized to serve.

44. Telocator argues that we have not done enough. In effect, it would require us conclusively to disprove its allegations of harm to existing SMRS's. Telocator has misperceived our duty, however. As the Court of Appeals noted in *Telocator* v. *FCC, supra:*

> We have no doubt that some or all of these arguments raised concerns that would have been quite relevant if accompanied by supporting statistics or other documentation. Having chosen not to substantiate its claims, however, Telocator cannot here complain that the Commission continued to stand on facts and figures in its possession. To be sure, an agency has some affirmative obligation to ensure that is has materials sufficient to enable an informed and reasonable decision. But, however broad the scope of this inquisitorial duty may be, it clearly does not extend to ferreting out evidence within the grasp of a commenting party merely on that party's claim that such evidence exists and controverts materials already before the agency.[35]

45. By expanding the number of available frequencies, as well as the entities that could provide service, we significantly enlarged the opportunity for marketing private land mobile communications. We concluded that this new entry carried the potential for operations of higher caliber and lower cost, as well as the impetus for technological advancement. The courts have consistently held that such expectations, when rooted in the agency's informed assessment of the trends and needs of the industry, can form valid and reasonable bases for adoption of an open entry policy, even though they are necessary predictions incapable of absolute proof.[36] In reaching these decisions we identified in our *Second Report and Order* the relevant issues, gave them thoughtful consideration and formulated our judgment on them based on the public interest policies we sought to effectuate. On reconsideration, no additional facts have been brought to our attention that cause us to alter our previous conclusions. We therefore reject Telocator's and NMRA's assertions.

46. Finally, we find no reason to adopt Telocator's suggestion that manufacturers be required to establish a separate subsidiary to operate trunked SMR systems. The Commission is reluctant to impose such a burden on manufacturers without a solid record to support such an action. Since there is no record to support such a requirement, and since Telocator provides no compelling arguments to support its suggestion, we reject it.

Termination of PR Docket 79–107

A. Discussion

47. Telocator, in its petition, argues that the Commission erred in closing PR Docket 79–107 (*Notice of Inquiry* regarding the licensing of community repeaters in the 800 MHz band) in the *Second Report and Order* in this proceeding. Telocator suggests that the Commission may not dismiss the comments submitted in that *Inquiry* without first investigating their validity.

B. Decision

48. As discussed above under the Equipment Manufacturer SMR Ownership issue, the Commission is not obligated to consider unsubstantiated allegations in its deliberations. Although Telocator asserts that there is substantial evidence related to entry barriers, bottlenecks, and anti-competitive practices by industry participants, it has provided no specific evidence of the alleged practices either in this proceeding or in its comments in PR Docket 79–107. The Commission examined and reviewed the information in PR Docket 79–107 and was not persuaded that any substantive evidence existed which demonstrated that the facts were as alleged or that the public interest would be disserved by terminating that proceeding. The Commission could not accept the general information and allegations contained in the comments to PR Docket 79–107 as evidence of actual or potential wrong doings. Although we stand ready to accept substantiated complaints which may be brought to our attention, none have been forthcoming. Therefore, we are affirming here our decision to terminate the proceeding in PR Docket 79–107.

Trunked SMR System Application Processing Procedures

A. Discussion

49. In its *Petition for Review* to the U.S. Court of Appeals, NMRA raises the issue of Commission treatment of applicants on waiting lists for trunked frequencies, an issue that was not raised by any petitioners on reconsideration. In order to present a complete discussion of the issues, NMRA's point will be considered below.

50. NMRA contends that the *Second Report and Order*, by creating a new rule subpart to govern the 250 channel pairs released in PR Docket 79–191, unfairly disadvantaged entities with applications pending for trunked SMR systems.[37] NMRA also contends that all channels for trunked SMR systems should be regulated in the same way. Therefore, NMRA would put all applicants for trunked SMR systems into a single queue for processing. NMRA's rationale is that the entire 600 channel allocation should be considered as a whole, rather than in the bifurcated approach taken by the Commission. NMRA argues that with the exception of RF equipment manufacturers, all those

[34] In fact, subsequent to our *Second Report and Order*, applications from RF equipment manufacturers were received and several trunked system licenses have already been granted to manufacturers in market areas in which trunked technology was not previously available.

[35] *Id.* at 546.

[36] *Id.* at 545.

[37] See *NMR* v. *FCC*, Application for Stay Pending Review, U.S. Court of Appeals for the District of Columbia, No. 82–2095, October 6, 1982, p.23.

who want to operate a trunked SMR system either are already licensed or are on a waiting list.[38] Consequently, if the Commission had not eliminated the restriction on manufacturer licensing, there would have been no need to deviate from the traditional first-come, first-served approach to application processing.

B. Decision

51. The Commission has carefully considered the arguments raised by NMRA and is affirming its decision to implement a bifurcated regulatory structure for 800 MHz. In essence, NMRA takes the position that the Commission lacks the power to alter its regulatory policies in light of changing circumstances. We reject such a circumscription of our authority. In our *Second Report and Order* in Docket No. 18262 which made the original spectrum allocation, we noted our intention to revisit the rules we were adopting and to adjust them if warranted.[39] Furthermore, the courts have long affirmed the Commission's power to adopt, at any time, new rules determined to be necessary for the orderly conduct of its business. The Commission is not inflexibly bound to regulations which it adopted in the past if it determines that public interest considerations warrant a change in the rules.[40] The Commission does not agree with NMRA that, with the exception of manufacturers, all those who wanted to operate trunked SMR systems have already been licensed or have applied for licenses. The land mobile industry has undergone many changes. It is clear from the extensive list of applicants for new SMRS channels in the major metropolitan areas that, contrary to NMRA's assertion, there are many applicants, in addition to manufacturers, who either have not been licensed or have not previously applied for authorizations to operate trunked SMR systems in particular geographic areas. Furthermore, the Commission carefully considered applicants on waiting lists in developing its modified regulatory structure for trunked SMR systems. The conflicting goals of dealing equitably with those applicants on waiting lists as well as potential applicants for the new channels were balanced. Under the approach adopted in the *Second Report and Order*, previous applicants for trunked SMR systems could retain their places in line for channels from the original 200 channel trunked allocation, and could apply for a grant from the 80 new channels released for SMR systems. New applicants could apply for old channels, and join queues behind prior applicants, or they could apply for new channels. We are convinced that this bifurcated approach provided the most equitable solution possible to the problem of balancing the interests of old and new applicants for trunked SMR systems against our regulatory objectives for 800 MHz.

Miscellaneous Matters

52. In accordance with our decisions upon reconsideration, we are amending, as indicated in the attached Appendix, rule §§ 90.366(h), 90.631(e), and 90.633(f) to permit primary status for remote or satellite stations in wide-area systems; §§ 90.366(a), 90.366(c) and 90.627(b)(2) to change certain trunked system loading requirements; § 90.366(g) and § 90.629 to permit extended implementation schedules in the Business Radio Service; and § 90.645(h), to extend paging capability to shared systems.

53. Additionally, we are amending several other rules to conform them to changes made as a result of non-rulemaking events. These are amendment of: § 90.611(c) and § 90.621(a) permitting conventional SMRS system applicants to utilize frequency coordinating committees;[41] and § 90.619(a)(1) and (b)(6) to reflect changes necessitated by existing 800 MHz agreements with Mexico and Canada. Finally, we are taking this opportunity to make several minor editorial changes, such as correcting typographical errors, inserting current form numbers, and clarifying ambiguous language, in our rules. With respect to these amendments, we find that good cause exists for dispensing with the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553. Because these changes involve minor, noncontroversial amendments, public notice and comment is unnecessary. The following list tabulates the changes (as listed by paragraph number in the Appendix).

APPENDIX

Paragraph No.	Rule section	Change
1	1.925(h)	Clarification.
2	90.155(a)	Editorial.
3	90.354	Editorial.
4	90.356(a)	Editorial.
5	90.362	Editorial.
6	90.364(b)(2)	Clarification.
7	90.366(a)	Rule change.
	(c)	Rule change.
	(d)	Clarification.
	(e)	Clarification.
	(f)	Clarification.
	(g)	Rule change.
	(h)	Rule change.
8	90.376(a)	Clarification.
	(1)	Editorial.
9	90.492	Editorial.
10	90.605	Editorial.
11	90.611(c)	Clarification.
12	90.613	Editorial.
13	90.615	Editorial.
14	90.619(a)	Editorial.
	(a)(1)	Rule change.
	(b)(6)	Rule change.
15	90.621(a)	Clarification.
	(a)(1)(iv)	Editorial.
16	90.623(b)	Editorial.
	(c)	Editorial.
	(d)	Clarification.
17	90.627(a)	Editorial.
	(b)(2)	Rule change.
18	90.629 1st sent	Rule change.
	(b)	Clarification.
	(c)	Rule change.
19	90.631(a)	Editorial.
	(d)	Clarification.
	(e)	Rule change.
20	90.633(e)	Clarification.
	(f)	Rule change.
21	90.637(a)	Clarification.
	(1)	Editorial.
22	90.645(g)	Clarification.
	(h)	Rule change.

54. In summary, the Commission is affirming all aspects of the *Second Report and Order* in this proceeding, except for the following changes. First, eligibility to obtain Commission approval of extended system implementation schedules has been broadened to include the Business Radio Service. Second, paging will be permitted on multiple licensed systems, in those cases in which all system licensees agree to such transmissions on their assigned channel. Third, the comparative criteria to be used in cases in which applications are received for more SMRS category frequencies than are available are modified. Fourth, loading requirements for trunked systems have been modified to count control stations, and to permit trunked system licensees to obtain additional channels when their existing systems are loaded to 80% of the loading standard. Finally, several rules have been corrected to eliminate confusing and/or contradictory language and to clarify certain rules where necessary.

55. Accordingly, it is ordered That, effective December 8, 1983, Part 90 of the Commission's Rules is amended as shown in the Appendix, pursuant to the authority contained in Sections 4(i) and

[38] *NMRA* v. *FCC, op. cit.*, p.25.

[39] *Second Report and Order*, Docket No. 18262, *supra*, at para. 108.

[40] See *e.g. U.S.* v. *Storer Broadcasting Company*, 351 U.S. 192, 100 L. Ed. 1081, 76 S. Ct. 763 (1975). *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 63 S. Ct. 997, 87 L. Ed. 1344 (1942).

[41] When the *Second Report and Order* was adopted, no entity was willing to serve as a frequency coordinator for conventional SMRS base stations. As a result, the option of using the services of a frequency coordinator was not explicitly included for SMRS eligibles. Subsequently, NABER offered its services and was recognized as the coordinator for conventional SMRS base stations in Public Notice No. 3950, May 3, 1983. Consequently, we are modifying our rules to include specifically the frequency coordination option for conventional SMRS base station applicants.

303 of the Communications Act of 1934, as amended. It is further ordered that the petitions for reconsideration and clarification in this proceeding are granted to the extent indicated herein and in all other respects are denied, and that this proceeding is terminated.

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendix

Parts 1 and 90 of 47 CFR are amended as follows:

PART 1—[AMENDED]

1. § 1.925 is amended by revising (h) to read as follows:

§ 1.925 Application for special temporary authorization, temporary permit, temporary operating authority, or interim amateur permit.

* * * * *

(h) An applicant for a radio station license under Part 90, Subpart M, of this chapter to utilize an already existing SMRS facility or to utilize an already licensed transmitter may operate the radio station for a period of up to 180 days, under a temporary permit evidenced by a properly executed certification of FCC Form 577 after the mailing of a formal application for station license, provided that the antenna(s) employed by the control station(s) is (are) a maximum of twenty feet above a man-made structure (other than an antenna tower) to which it (they) is (are) affixed.

PART 90—[AMENDED]

2. § 90.155(a) is revised to read:

§ 90.155 Time in which station must be placed in operation.

(a) All stations authorized under this part, except as provided in paragraph (b) and in §§ 90.366 (d) and (g), 90.629 and 90.631(c), must be placed in operation within 8 months from the date of grant or the authorization cancels automatically and must be returned to the Commission.

* * * * *

3. § 90.354 is revised to read

§ 90.354 Forms to be used.

Applications for trunked radio facilities shall be submitted on FCC Forms 574 and 574–A, and such applications shall be filed with the Federal Communications Commission, Gettysburg, PA. 17325.

4. § 90.356(a) introductory text is revised to read:

§ 90.356 Supplemental information to be furnished by applicants for facilities under this subpart.

(a) Applicants proposing to provide trunked systems of communication to eligibles under this part on a commercial basis must, in addition to the information required by FCC Forms 574 and 574–A, furnish the following data and material:

* * * * *

5. In § 90.362, paragraph (a) is amended by revising the frequencies in Block 8 of Table 1 footnote 3 of Table 2 is revised, and paragraph (b) is revised in its entirety.

§ 90.362 Selection and assignment of frequencies.

(a) * * *

TABLE 1—Channelization for Trunked Systems

Block No.	Channel No.	Mobile frequency/base frequency (MHz)
	* * *	* *
8	28–68–108–148–188 ...	820.3125/865.3125 819.3125/864.3125 818.3125/863.3125 817.3125/862.3125 816.3125/861.3125
	* * *	* *

Table 2—Chicago Plan.[2] [3]

* * * * *

[3] Stations located beyond the 70 mile distance authorized on or before August 16, 1982 to use these frequencies may continue to do so. Stations beyond the 70 mile distance authorized after August 16, 1982 shall employ frequencies listed in Table 1 subject to the provisions of § 90.621 (b) or (c) as applicable.

* * * * *

(b) Stations authorized by the Commission to operate in the 816–821 and 861–866 MHz band will be afforded protection solely on the basis of the mileage separation criteria set out below. Only co-channel interference between base station operations will be taken into consideration. Adjacent channel and other types of possible interference will not be taken into account.

* * * * *

6. § 90.364(b)(2) is revised to read:

§ 90.364 Limitation on the number of frequency pairs assignable for trunked systems and on the number of trunked systems.

* * * * *

(b) * * *

(2) That the licensee's existing trunked system(s) authorized on or before October 16, 1982 is loaded to 80% of its authorized capacity or 80 mobile units if authorized after October 16, 1982.

7. § 90.366 (a), (c), (d), (e), (f), (g) introductory text, (g)(1)(i), and (h) are revised to read:

§ 90.366 Trunked system loading requirements.

(a) Loading requirements for trunked systems authorized on or before October 16, 1982 are shown in Table 1. Trunked systems authorized after October 16, 1982, will be authorized on the basis of a minimum loading criterion of 100 mobile units per channel.

TABLE 1.—Loading Requirements for Trunked Systems

Service group [1]	Mobile radio units [2]		
	5-channel systems	10-channel systems	20-channel systems
Police and fire group	300	750	1,500
Business radio group [3]	500	1,000	2,000
Motor carrier group (urban and interurban passenger motor carriers only)	800	1,600	2,500
Other services group [3]	400	800	1,600
Mixed service group	500	1,000	2,000

[1] No provision is made for use of trunked systems by persons eligible in the taxicab radio service, since this mode of communication is not compatible with normal transmissions requirements of taxicab companies.

[2] For loading trunked systems of communication, mobile radio units shall include vehicular and portable mobile units and control stations.

[3] When the primary activity of the licensee is the operation of urban or interurban passenger motor carriers, the loading requirements shall be as shown for the motor carrier group.

* * * * *

(c) If no more frequencies are available for assignment in the system's geographic area, a licensee may apply for admission to the waiting list when the system reaches 70% of its specified capacity.

(d) Licensees of trunked facilities must complete construction within one year of initial grant; Provided, however, that a licensee of a trunked facility assigned more than the minimum five-channel group and authorized prior to August 1, 1982, may elect to construct the facility in stages. In this event, the licensee shall complete construction of the basic five-channel group of the authorized facility within one year. At the end of two years the licensee must demonstrate, notwithstanding the provisions of subparagraph (b), that the basic five channel group is loaded to 70 percent with mobile stations which operate over the entire complement of authorized channels. Construction of the next stage cannot begin until the licensee demonstrates a minimum of 70 percent of the loading required for the first stage. If at the end of two years a licensee who elected to construct in stages has not loaded the first five-channel group to 70 percent, and all trunked channels are assigned in the system's geographic area, authorization for channels in excess of five cancels automatically. If at the end of five years the 5-channel system is not loaded to 70 percent of the prescribed level for this period of time and all trunked channels

are assigned in the system's geographic area, authorization for channels not loaded to 100 mobile stations cancels automatically. All licenses are subject to this condition. A licensee may only modify the election to build or not build a system in stages within the first year of authorization. If the election is changed there will be no extensions of time to complete construction.

(e) If at the end of a license term, a trunked system is not loaded to 70% and all frequencies are assigned in the system's geographic area, authorization for channels not loaded to 100 mobile stations cancels automatically. All licenses are subject to this condition.

(f) If a station is not placed in permanent operation within one year, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission.

(g) For applications in the Public Safety, Land Transportation and Industrial Services (except for the Radiolocation Service), a period of up to three (3) years may be authorized for placing a station in operation in accordance with the following:

(1) * * *

(i) The proposed system will serve a large fleet (i.e., 200 or more mobile units) and will involve a multi-year cycle for its planning, approval, funding, purchase and construction; or,

* * * * *

(h) Wide area systems may be authorized to persons eligible for licensing under Subparts B, C, D, or E of this part upon an appropriate showing of need. Remote or satellite stations of wide area systems in the Police, Fire, Local Government, Highway Maintenance, Forestry-Conservation, Special Emergency, Telephone Maintenance and Power Radio Services will be authorized on a primary basis if such stations are the first to be authorized in their area of operation on the frequency or group of frequencies. Remote or satellite stations of wide area systems in all other services will be authorized only on a secondary, non-interference basis to co-channel licensees. To determine system loading, the total number of mobile units and control stations operating in the wide-area system shall be counted with respect to the total number of base station frequencies assigned to the system.

* * * * *

8. § 90.376 (a) introductory text and (a)(1) are revised to read:

§ 90.376 Restrictions on operational-fixed stations.

(a) Except for control stations, operational fixed operations will not be authorized in the 816–821 and 851–866 bands. This does not preclude secondary fixed tone signalling and alarm operations authorized in § 90.235.

(1) Control stations associated with one or more mobile relay stations will be authorized only on the assigned frequency of the associated mobile station. Use of a mobile service frequency by a control station of a mobile relay system is subject to the condition that harmful interference shall not be caused to stations of licensees authorized to use the frequency for mobile service communications.

* * * * *

9. § 90.492 is revised to read:

§ 90.492 One-way paging operations in the 806–821 and 851–866 MHz bands.

Paging operations are permitted in the 806–821 and 851–866 MHz bands only in accordance with §§ 90.378 and 90.645 (e) and (h)

10. § 90.605 is revised to read:

§ 90.605 Forms to be used.

Applications for conventional and trunked radio facilities shall be submitted on FCC Forms 574 and 574–A and such applications shall be filed with the Federal Communications Commission, Gettysburg, PA. 17325.

11. § 90.611 (c) is revised to read:

§ 90.611 Processing of applications.

* * * * *

(c) Each application will then be reviewed to determine whether it can be granted. Frequencies must be specified by applicants in the Public Safety/Special Emergency, Industrial/Land Transportation and Business categories, and by SMRS applicants for conventional channels pursuant to the provisions of § 90.621. SMRS applicants for trunked frequencies may select their frequencies pursuant to § 90.621 or request the Commission to select frequencies.

* * * * *

§ 90.613 [Amended]

12. In § 90.613, Table of Channel Designations, change channel 355 from 814.7825 MHz to 814.8625 MHz.

13. § 90.615 is amended by revising the heading to read as follows:

§ 90.615 Frequencies available for conventional systems in the 806–809.750/851–854.750 MHz bands.

* * * * *

14. § 90.619 (a) introductory text, Table 1 of (a)(1), and (b)(6) are revised to read as follows:

§ 90.619 Frequencies available for use in the U.S./Mexico and U.S/Canada border areas.

(a) U.S./Mexico border area. The channels listed in Tables 1–4 are offset 12.5 kHz lower in frequency than those specified in § 90.613. The Channel 201 mobile frequency will be 811.000 MHz, followed by Channel 202 at 811.025 MHz and proceeding with uniform 25 kHz channeling to Channel 400 at 815.975 MHz. Base station frequencies will be 45 MHz higher in frequency. These channels are available for assignment for conventional or trunked systems only in areas 68.4 miles (110 km) or less from the U.S./Mexico border. Stations located on Mt. Lemmon, serving the Tucson, AZ area, shall only be authorized offset frequencies.

(1) * * *

TABLE 1—U.S./MEXICO BORDER AREA—PUBLIC SAFETY CATEGORY—55 Channels

Offset group No.	Offset channel Nos.
201[1]	241-281-321-361
202	202-242-282-322-362
203	203-243-283-323-362
204	204-244-284-324-364
205	205-245-285-325-365
206	206-246-286-326-366
207	207-247-287-327-367
208	208-248-288-328-368
209	209-249-289-329-369
210	210-250-290-330-370
211	211-251-291-331-371

[1] Offset group 201 is available for conventional system use only. Offset channel 201 is not available for use in the U.S./Mexico border area.

* * * * *

(b) * * *

(6) Two Canadian television stations provide service in British Columbia in the band 806–890 MHz in accordance with the U.S./Canadian Television Agreement of 1952. They are:

Enderby, B.C.	Channel 72	818–824 MHz
Radium/Hot Springs, B.C.	Channel 77	848–854 MHz

* * * * *

15. § 90.621 (a) introductory text, (a)(1)(i) and (iv) are revised to read:

§ 90.621 Selection and assignment of frequencies.

(a) Applicants eligible in the Public Safety/Special Emergency, Industrial/Land Transportation and Business Categories, and applicants eligible in the SMRS Category requesting conventional frequencies, must specify the frequencies on which the proposed system will operate pursuant to a field study or a recommendation by the appropriate frequency coordinating entity. SMRS applicants requesting trunked frequencies may specify on the basis of a field study the frequencies

desired or may request the Commission to select and assign frequencies for the system.

(1) * * *

(i) All mobile, control, and base station frequencies must be chosen from those listed in §§ 90.613, 90.617 and 90.619.

* * * * *

(iv) The maximum number of frequencies which will be assigned to an SMRS applicant at any one time is five (5) frequency pairs.

* * * * *

16. § 90.623 is amended by revising paragraphs (b) and (c)(2) and adding paragraph (d) to read:

§ 90.623 Limitation on the number of frequencies assignable for conventional systems.

* * * * *

(b) Where an applicant proposes to operate a conventional radio system to provide facilities for the use of a single person or entity eligible under Subparts B, C, D, or E of this part, the applicant may be assigned only the number of frequency pairs justified on the basis of the requirements of the proposed single user of the system.

(c) * * *

(2) The licensee's existing frequency pair(s) is loaded to prescribed levels.

* * * * *

(d) No licensee will be authorized frequencies for a conventional system if that licensee is operating an unloaded trunked system or has an application pending for a trunked system to serve multiple subscribers within 40 miles of the requested conventional system.

17. § 90.627 (a) and (b)(2) are revised to read:

§ 90.627 Limitation on the number of frequency pairs that may be assignable for trunked systems and on the number of trunked systems.

(a) The maximum number of frequency pairs that may be assigned at any one time for the operation of a trunked radio system is twenty. There is no minimum number of frequency pairs that may be assigned for the operation of a trunked radio system. The maximum number of frequency pairs that may be assigned at any one time for the operation of an SMR trunked system is five. There is no minimum number of frequencies that may be assigned for the operation of an SMR trunked system.

(b) * * *

(2) That the licensee's existing trunked system is loaded to at least 80% of its authorized capacity.

18. In § 90.629, the introductory text to the section and paragraph (b) are revised, and a new paragraph (c) is added to read as follows:

§ 90.629 Extended implementation schedules.

For applicants in the Public Safety/Special Emergency, Industrial/Land Transportation and Business Categories requesting either trunked or conventional frequencies, a period of up to three (3) years may be authorized for placing a station in operation in accordance with the following:

* * * * *

(b) Authorizations under this Section are conditioned upon the licensee's compliance with the implementation schedule. If the licensee fails to meet the schedule, and all channels are assigned in the system's geographic area, authorization for trunked channels not loaded to 100 mobile stations cancels automatically. Conventional channels not loaded to 70 mobile units may be subject to shared use by the addition of other licensees. The licensee must submit a report to the Commission's Private Radio Bureau, Gettysburg, PA 17325 annually, showing the extent to which the authorized system has been implemented. A copy of the report must be submitted to the licensee's frequency advisory committee.

(c) Applicants eligible in the Industrial/Land Transportation Category requesting authorizations under this Section may request frequencies in the Business Category only if the application contains a statement that no frequencies in the Industrial/Land Transportation Category are available for assignment in their geographic area.

19. § 90.631 (a), (d), and (e) are revised to read:

§ 90.631 Trunked system loading requirements.

(a) Trunked systems will be authorized on the basis of a minimum loading criterion of 100 mobile stations per channel.

* * * * *

(d) If a station is not placed in permanent operation within one year, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission.

(e) Wide area systems may be authorized to persons eligible for licensing under Subparts B, C, D, or E of this part upon an appropriate showing of need. Remote or satellite stations of wide area systems in the Police, Fire, Local Government, Highway Maintenance, Forestry-Conservation, Special Emergency, Telephone Maintenance and Power Radio Services may be authorized on a primary basis if such stations are the first to be authorized in their area of operation on the frequency or group of frequencies. Remote or satellite stations of wide area systems in all other services will be authorized only on a secondary, non-interference basis to cochannel licensees. To determine system loading, the total number of mobile units and control stations operating in the wide-area system shall be counted with respect to the total number of base station frequencies assigned to the system.

* * * * *

20. § 90.633(e) is revised to read:

§ 90.633 Conventional systems loading requirements:

* * * * *

(e) A licensee may apply for additional frequency pairs if its authorized conventional channel(s) is occupied to 70 mobiles. Applications may be considered for additional channels in areas where spectrum is still available and not applied for, even if the already authorized channel(s) is not loaded to 70 mobile units, upon an appropriate demonstration of need.

* * * * *

21. § 90.637 (a) introductory text and (a)(1) are revised to read:

§ 90.637 Restrictions on operational fixed stations.

(a) Except for control stations, operational fixed operations will not be authorized in the 816–821 and 861–866 MHz bands. This does not preclude secondary fixed tone signalling and alarm operations authorized in § 90.235.

(1) Control stations associated with one or more mobile relay stations will be authorized only on the assigned frequency of the associated mobile station. Use of a mobile service frequency by a control station of a mobile relay system is subject to the condition that harmful interference shall not be caused to stations of licensees authorized to use the frequency for mobile service communication.

* * * * *

22. In § 90.645 paragraph (g) is revised and paragraph (h) is added to read:

§ 90.645 Permissible operations.

* * * * *

(g) Up to five (5) contiguous channels as listed in §§ 90.615, 90.617, and 90.619 may be authorized after justification for systems requiring more than the normal single channel bandwidth. If necessary, licensees may trade channels amongst themselves in order to obtain contiguous frequencies. Notification of such proposed exchanges shall be made to the appropriate frequency coordinator(s) and to the Commission for approval.

(h) Paging operations may be utilized on multiple licensed facilities (community repeaters) only when all licensees of the facility agree to such use.

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Proposed Rules

Federal Register
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Tuesday, November 15, 1983

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.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-20357; File No. S7-1000]

Applicability of Broker-Dealer Registration to Banks

AGENCY: Securities and Exchange Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is soliciting public comment on a proposed rule that would specify bank securities activities that must be performed through broker-dealers registered under the Securities Exchange Act of 1934 (the "Act"). This action is prompted by investor protection and other regulatory concerns raised by the recent expansion of bank securities activities. The activities that would be required to be performed through a registered broker-dealer are: (i) The public solicitation of brokerage business; (ii) receipt of transaction-related compensation for providing brokerage services for trust, managing agency, or other accounts to which the bank provides advice; or (iii) dealing in or underwriting securities other than exempted or municipal securities. Banks engaging in those activities would be required to register under the Act. However, if such activities were conducted by a subsidiary or affiliate of a bank, the bank itself would not need to register as a broker-dealer. The Commission is seeking views from members of the public and the bank regulatory agencies about the proposal and its implementation, including how long the transition period should be before a rule becomes effective. The Commission plans to consult closely with the bank regulators about how to best to implement the proposal.

DATE: Comments should be submitted on or before December 30, 1983.

ADDRESSES: Interested persons should submit three copies of their views to George A. Fitzsimmons, Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and should refer to File No. S7-1000. All submissions will be available for public inspection at the Commission's Public Reference Section, 450 Fifth Street NW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Colleen Curran Harvey, Office of Chief Counsel, Division of Market Regulation, (202) 272-2417, or Karen Buck Burgess, Office of Chief Counsel, Division of Market Regulation, (202) 272-2848.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission is soliciting comment on proposed Rule 3b-9 which provides that, for purposes of the "broker" and "dealer" definitions in Sections 3(a) (4) and (5) of the Act, the term "bank" does not include a bank that engages in certain securities activities.[1] Sections 3(a) (4) and (5) provide that the terms "broker" and "dealer" do not include a "bank." Under the proposed rule, a bank could not rely on this exclusion from the definitions of "broker" and "dealer" when it (i) publicly solicits brokerage business, (ii) receives transaction-related compensation for providing brokerage services for trust, managing agency, or other accounts to which the bank provides advice, or (iii) deals in or underwrites (on either a firm commitment or best efforts basis) securities other than exempted or municipal securities.[2] The Commission is proposing Rule 3b-9 in order to assure adequate investor protection, reasonably complete and effective regulation of the securities markets, and the maintenance of fair and orderly markets. The proposed rule would require that the activities listed above be performed through a broker-dealer registered with the Commission and subject to the same rules and regulations as all others who engage in such activities.

The Commission is not seeking to regulate the non-securities activities of banks. It is concerned only with the regulation of certain bank securities activities. While the Commission is not proposing to prescribe any particular structure, it believes the use by banks of separate securities affiliates or subsidiaries would minimize the impact on banks of broker-dealer registration pursuant to proposed Rule 3b-9. The separate affiliate or subsidiary rather than the bank could register as a broker-dealer.[3]

Proposed Rule 3b-9 is consistent with regulation by functional activities, rather than by industry classifications, as supported by Commission comments on legislation.[4] The Commission continues to support Congressional review of the financial regulatory system. However, pending Congressional action, the Commission remains responsible for administering the existing securities laws in a manner that will assure investor protection, reasonably complete and effective regulation of the securities markets, and the maintenance of fair and orderly markets.

In this regard, Section 15(a) of the Act requires all broker-dealers to register with the Commission unless an exemption is available. The terms "broker" and "dealer" are defined[5] to exclude a "bank" as defined in Section 3(a)(6).[6] However, all the Act's

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[1] This release does not express any views on the legality of particular bank securities activities under the Glass-Steagall Act or other banking laws. *See, e.g.*, 12 U.S.C. 24, 78, 377, and 378.

[2] Banks that deal in muncipal securities are already subject to registration under Section 15B(a) of the Act. Proposed Rule 3b-9 does not affect the regulatory scheme applicable to bank municipal securities dealers. Section 15(a) of the Act, of course, exempts from the broker-dealer registration requirement any broker-dealer that effects transactions only in exempted securities. Proposed Rule 3b-9 would not alter that exemption.

[3] Pursuant to existing staff no-action positions, a bank also may not be required to register a separate broker-dealer if it enters into a so-called "networking" arrangement with a registered broker-dealer under which the broker-dealer contracts to perform securities activities in a segregated area of the bank in a manner fully subject to the securities laws, provided that adequate measures are taken to make clear that the broker-dealer and not the bank is offering the service and that the Commission and self-regulatory organizations are permitted to inspect the area where the services are offered. *Cf.*, Letter dated July 8, 1982, from Jeffrey L. Steele, Associate Director, Division of Market Regulation, to Savings Association Investment Securities, Inc. (now known as INVEST, a service of ISFA Corporation).

[4] *Securities Activities of Depository Institutions: Hearings on S. 1720 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 2d Sess. 25 (1982) (Statement of John S.R. Shad, Chairman, Securities and Exchange Commission).

[5] *See* Sections 3(a)(4) and (5) of the Act.

[6] Section 3(a)(6) of the Act reads as follows:

The term "bank" means (A) a banking institution organized under the laws of the United States, (B) a member bank of the Federal Reserve System, (C)

Continued

definitions are preceded by the phrase "unless the context otherwise requires."[7] In addition, under Section 3(b) of the Act, the Commission has authority to define terms.[8] Proposed Rule 3b–9 defines activities that the Commission believes to be outside the bank exclusion.

Bank brokerage activities and related promotional practices have recently changed significantly from the accommodation functions contemplated by the Congress when it enacted the bank exclusion. Current bank securities activities also differ significantly from those reviewed by the Commission in its 1977 study of bank securities activities.[9] Today, so-called "discount brokerage" is aggressively promoted by many banks. In exchange for promotional and order-handling services, the banks receive a portion of the customer's commission paid to the entity that executes the securites transactions. These activities and transaction-related fees substantially change the nature of the brokerage services offered by banks.[10] Rather than merely providing accommodation services to existing customers, services are provided that are functionally indistinguishable from those offered by registered broker-dealers.

One of the Act's purposes is to provide reasonably complete and effective regulation of the securities markets.[11] The Commission believes that, in enacting the bank exclusion, the Congress did not contemplate that banks would publicly solicit brokerage business, receive transaction-related compensation for providing brokerage services for trust, managing agency or other accounts to which the bank provides advice, or deal in or underwrite (on either a best efforts or firm commitment basis) securities other than exempted securities or municipal securities. There is no persuasive evidence that Congress intended to permit banks to engage in those types of securities activities without being subject to the broker-dealer regulatory requirements imposed on others who engage in such activities.[12] The promotional and other activities covered by proposed Rule 3b–9 far transcend the limited bank securities role that was the basis of Congressional action in 1934. Proposed Rule 3b–9 rests on the premise that banks choosing to engage in securities activities of the type described in the proposed rules do not fall within the exclusion from the definitions of "broker" and "dealer" and must conduct those activities pursuant to broker-dealer regulatory requirements.[13]

The Commission is soliciting comment on the appropriate scope of proposed Rule 3b–9 from the Federal bank regulators, with which the Commission expects to consult closely, and general public commentators. It solicits comment on whether activities should be added or deleted from the list of activities covered by the rule. It seeks comment on whether to exclude from the rule banks that engage only in small numbers of transactions or that limit their activities to referral of bank customers to registered broker-dealers.[14] The Commission also solicits comment on whether banks engaging in limited securities activities should be subject to registration but exempted from certain of the requirements applicable to broker-dealers. In addition, the Commission seeks comment on how long a transition period it should provide before making a rule effective.

The first activity described in the proposed rule is the public solicitation of brokerage business.[15] Under the public solicitation standard, a bank that promotes the availability of internalized brokerage services to non-bank customers would be subject to broker-dealer registration. Banks would continue to be able to perform order-handling activities as an accommodation for their existing bank customers without registering as broker-dealers, but would not be permitted to make general solicitations of those services. The Commission solicits comment on the appropriate scope of public solicitation, including the extent to which banks should be permitted to market accommodation services to their customers.

The second activity described in the proposed rule is the receipt of transaction-related compensation for providing brokerage services for trust, managing agency, or other accounts to which the bank provides advice.[16] The

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any other banking institution, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising a fiduciary power similar to those permitted to national banks under section 11[k] of the Federal Reserve Act, as amended, and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this title, and (D) a receiver, a conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

[7] *See generally, Marine Bank v. Weaver*, 102 S.Ct. 1220 (1982).

[8] Section 3(b) of the Act, in relevant part, provides:

The Commission . . . shall have the power by rules and regulations to define technical, trade, accounting, and other terms used in this [Act], consitently with the provisions and purposes of this [Act].

[9] Securities and Exchange Commission, *Reports on Banks Securities Activities* (1977) (the "Bank Study"). The Bank Study noted that the brokerage activities of banks differed from the activities of broker-dealers in several important respects, such as the informal nature of the services rendered, the general absence of advertisting for customer transaction services, and the general absence of commissions based on the size of transactions.

[10] *Cf. Investment Company Institute v. Camp*, 401 U.S. 617 (1971), in which the Supreme Court held that the union of three activites: providing investment advice by acting as managing agent, pooling investments, and buying and selling securities for customers, each of which was separately permissible, gave birth to something "of a different character."

[11] Section 2 of the Act.

[12] Although the legislative history of the bank exclusion in the Act is not extensive, the hearings on the predecessor bills of the Act contain references to the limited nature of bank securities activities permitted at that time. *See* Congressional testimony of Thomas G. Corcoran, a principal drafter of the Act, regarding the limited nature of bank securities activities. *Hearings on H.R. 7852 and H.R. 8720 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 85–86, 686–687 (1934) and *Hearings on Stock Exchange Practices before the Senate Committee on Banking and Currency*, Pts. 15–17, 73d Cong., 1st Sess. 6470–6471 (1934).

[13] In *Marine Bank v. Weaver*, 102 S.Ct. 1220 (1982), the Supreme Court decided that the introductory langauge in Section 3(a) of the Act (*i.e.*, "unless the context otherwise requires") mandates an analysis of the context of a securities transaction in order to determine whether a certificate of deposit falls within the definition of a "security" under the antifraud provisions of the federal securities laws. A similar approach was used by Justice Brennan in analyzing the exclusion for insurance in the federal securities laws in his concurring opinion in *Securities and Exchange Commission v. Variable Annuity Life Insurance Company of America*, 359 U.S. 65 (1959). Justice Brennan concluded that the scope of exclusions in the federal securities laws must be examined in view of the regulatory purposes of the federal securities laws.

[14] Staff no-action letters have generally concluded that persons that receive transaction-related compensation are required to register as broker-dealers, even if their activities are limited to referrals to registered broker-dealers.

[15] The Commission expresses no opinion as to the legality, under the banking laws, of such activities. *See Securities Industry Association v. Board of Governors of the Federal Reserve System*, No. 83–4019 (2d Cir. July 15, 1983), *petition for cert. filed*, (Oct. 13, 1983).

[16] The Commission understands that banks do not provide investment advice in connection with accommodation services. If a bank did provide investment advice in connection with accommodation services and received transaction-related compensation, the bank would be required to register as a broker-dealer. The Commission expresses no opinion as to the legality, under the banking laws, of such an arrangement. *Compare Investment Company Institute v. Camp*, 401 U.S. 617 (1971) with *Decision of the Comptroller of the Currency Concerning an Application by American National Bank of Austin, Texas To Establish an Operating Subsidiary To Provide Investment Advice* (Sept. 2, 1983).

Commission solicits comment on the appropriateness of that provision of the rule.

The final activity described, on which the Commission also seeks comment, is underwriting or dealing in securities other than exempted or municipal securities.[17]

The proposed rule is consistent with past Commission statements. In 1974, the Commission stated that the statutory definitions of broker, dealer and bank were not to be construed in an inflexible or rigid manner. Rather, the definitions may be "modified, altered or even inapplicable if the context otherwise requires."[18] In the 1977 Bank Study, the Commission examined the bank securities activities that had evolved from 1934 to 1977 to determine whether any legislative change was needed. The Commission did not recommend such action at that time, but it cautioned that this conclusion might be affected by the expansion of bank securities activities.[19] The Commission now believes that, consistent with the purposes of the Act, banks engaging in the expanded securities activities described in proposed Rule 3b–9 should be required to do so in compliance with the broker-dealer regulatory requirements.

Summary of Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis in accordance with 5 U.S.C. § 603 regarding proposed Rule 3b–9. The Analysis notes that the objective of requiring a bank that engages in certain securities activities to do so through a registered broker-dealer is to effect the purposes of the Act, including the protection of investors and the maintenance of reasonably complete and effective regulation of the securities markets. The Analysis states that the proposed rule would require compliance with the regulatory requirements imposed on registered broker-dealers, including financial responsibility, recordkeeping and reporting rules. The Analysis notes that the Commission is specifically seeking comment on whether there should be any exemptions from any of these compliance requirements or from the proposed rule itself.

A copy of the Initial Regulatory Flexibility Analysis may be obtained by contacting Colleen Curran Harvey, Division of Market Regulation, Securities and Exchange Commission, Washington, D.C. 20549 ((202) 272–2417).

List of Subjects in 17 CFR Part 240

Bank, Reporting and recordkeeping requirements, Securities.

Statutory Basis

Proposed Rule 3b–9 would be adopted under the Act, 15 U.S.C. 78a *et seq.*, and particularly Sections 2, 3, 15 and 23(a) [15 U.S.C. 78b, 78c, 78*o* and 78w(a)].

Text of the Proposed Amendment

On the basis of the above discussion and analysis, the Commission is proposing to amend Part 240 of Chapter II of Title 17 of the Code of Federal Regulations by adding § 240.3b–9 as follows.

§ 240.3b–9 Definition of "bank" for purposes of Sections 3(a) (4) and (5) of the Act.

The term "bank" as used in the definitions of "broker" and "dealer" in Sections 3(a) (4) and (5) of the Act does not include a bank that does any of the following:

(a) Publicly solicits brokerage business;

(b) Receives transaction-related compensation for providing brokerage services for trust, managing agency, or other accounts to which the bank provides advice; or

(c) Deals in or underwrites securites other than exempted or municipal securities.

By the Commission.

George A. Fitzsimmons,

Secretary.

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BILLING CODE 8010-01-M

[17] The Commission expresses no opinion as to the legality, under the banking laws, of such underwriting or dealing. *Cf. A. G. Becker v. Board of Governors of the Federal Reserve System*, 519 F. Supp. 602 (D.D.C. 1981), *rev'd*, 693 F. 2d 136 (D.C. Cir.), *aff'd mem.*, 694 F. 2d 280 (D.C. Cir. 1982) (*en banc*), *cert. granted sub. nom. Securities Industry Association v. Board of Governors*, No. 82–1766, U.S.L.W. (U.S. Oct. 3, 1983). As indicated in n. 2 *supra*, bank municipal securities dealers are already subject to registration under Section 15B(a) of the Act. Proposed Rule 3b–9 is not intended to alter the regulatory scheme for bank municipal securities dealers.

[18] *See* Securities Act Release No. 5491 (April 30, 1974), in which the Commission announced an inquiry into bank-sponsored investment services.

[19] "The Commission will continue to devote attention to the development of these bank securities activities, since evolution or expansion of current bank practices, as well as changes in the securities markets and the emergence of a national market system, may affect the conclusions expressed herein." *Final Report on Banks Securities Activities*, Securities and Exchange Commission, at 43, 1977.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 161

[Docket No. 83N–0357]

Quick-Frozen Fillets of Cod and Haddock; Advance Notice of Proposed Rulemaking on the Possible Establishment of a Standard

AGENCY: Food and Drug Administration.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Food and Drug Administration (FDA) is offering to interested persons an opportunity to review the "Recommended International Standard for Quick-Frozen Fillets of Cod and Haddock" (Codex Standard No. CAC/RS 50–1971) and to comment on the desirability of and need for a U.S. standard for this food. The Codex standard was submitted to the United States for consideration of acceptance by the Food and Agriculture Organization/World Health Organization's Codex Alimentarius Commission. If the comments received do not support the need for a U.S. standard for this food, FDA will not propose a standard.

DATE: Comments by January 15, 1984.

ADDRESS: Written comments, data, or other information to the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Eugene T. McGarrahan, Bureau of Foods (HFF–215), Food and Drug Administration, 200 C St. SW., Washington, DC 20204; 202–245–1155.

SUPPLEMENTARY INFORMATION: The Food and Agriculture Organization (FAO) and the World Health Organization (WHO) jointly sponsor the Codex Alimentarius Commission, which conducts a program for developing worldwide food standards. Under the FAO/WHO program, a large number of food standards have been developed and submitted to governments for acceptance, including a Codex standard for quick-frozen fillets of cod and haddock.

As a member of the Codex Alimentarius Commission, the United States is under treaty obligation to consider all Codex standards for acceptance. The rules of procedure of the Codex Alimentarius Commission state that a Codex standard may be accepted by a participating country in one of three ways: full acceptance,

target acceptance, or acceptance with specified deviations. A commitment to accept at a designated future date constitutes target acceptance. A country's acceptance of a Codex standard signifies that, except as provided for by specified deviations, a product that complies with the Codex standard may be distributed freely within the accepting country. A participating country which concludes that it will accept a Codex standard is requested to inform the Codex Alimentarius Commission of this fact and the reasons therefor, the manner in which similar foods marketed in the country differ from the Codex standard, and whether the country will permit products complying with the Codex standard to move freely in that country's commerce.

For the United States to accept some or all of the provisions of a Codex standard for any food to which the Federal Food, Drug, and Cosmetic Act (the act) applies, it is necessary either to establish a U.S. standard under authority of section 401 of the act (21 U.S.C. 341), or to revise an existing standard to incorporate the provisions within the U.S. standard. At present, there are no U.S. standards for quick-frozen fillets of cod and haddock.

Under the procedure prescribed in 21 CFR 130.6(b)(3), FDA is providing an opportunity for review and informal comment on: (1) The desirability of and need for a U.S. standard for quick-frozen fillets of cod and haddock; (2) the specific provisions of the Codex standard; (3) additional or different requirements that should be in the U.S. standard, if established; and (4) any other pertinent points.

FDA advises that if the comments received do not support the need for a U.S. standard for this food, no U.S. standard will be proposed. If this decision is reached, the Codex Alimentarius Commission will be informed that an imported food that complies with the requirements of the Codex standard may move freely in interstate commerce in this country providing it complies with applicable U.S. laws and regulations.

Because of the large number of countries, often with diverse food regulations, that are associated with the development of Codex standards, certain provisions of the Codex standards may not be consistent with aspects of U.S. policy and regulations. Codex standards customarily include hygiene requirements, certain basic labeling requirements, such as declaration of the net quantity of contents, name of manufacturer, and country of origin, and other factors. These factors are not considered a part of U.S. food standards under section 401 of the act; rather, they are dealt with under the authority of other sections of the act.

The Codex standard for quick-frozen fillets of cod and haddock specifies analytical methods by which compliance with certain provisions is to be determined. As stated in 21 CFR 2.19, FDA's policy is to employ the methods in the latest edition of "Official Methods of Analysis of the Association of Official Analytical Chemists," when these are available, in preference to other methods. FDA will adhere to this policy in any U.S. standard proposed under this notice.

Under § 130.6(c) all persons who wish to submit comments are encouraged and requested to consult with different interested groups (consumers, industry, academic community, professional organizations, and others) in formulating their comments, and to include a statement of any meetings or discussions that have been held with other groups.

List of Subjects in 21 CFR Part 161

Fish, Food standards, Seafood.

The Codex standard under consideration is as follows:

Recommended International Standard for Quick-Frozen Fillets of Cod and Haddock

1. *Scope.* This standard shall apply to quick-frozen fillets of fish of the species as defined below and offered for direct consumption without further processing. It does not apply to the product indicated as intended for further processing or for other industrial purposes.

2. *Description.*

2.1 *Product Definition.* (a) Quick-Frozed Fillets of Cod and Haddock are obtained from fish of the following species:

Cod: Gadus morhua L. (synonym *Gadus callarias L.) Gadus ogac*, and *Gadus macrocephalus*

Haddock: Melanogrammus aeglefinus

(b) Fillets are slices of fish of irregular size and shape which are removed from the carcass by cuts made parallel to the backbone and sections of such fillets cut so as to facilitate packing.

2.2 *Process Definition.* The product shall be subjected to a freezing process and shall comply with the conditions laid down hereafter. The freezing process shall be carried out in appropriate equipment in such a way that the range of temperature of maximum crystallization is passed quickly. The quick freezing process shall not be regarded as complete unless and until the product temperature has reached –18°C (0°F) at the thermal centre after thermal stabilization. The product shall be maintained at a low temperature such as will maintain the quality during transportation, storage and distribution up to and including the time of final sale.

The recognized practice of repacking quick-frozen products under controlled conditions followed by the reapplication of the quick freezing process as defined is permitted.

2.3 *Presentation.* Fillets shall be presented as:

(a) Skin-on, unscaled;

(b) Skin-on, Scaled (scaled removed); or

(c) Skinless.

The fillets may be presented as boneless, provided that boning has been completed including the removal of pin bones.

3. *Essential Composition and Quality Factors.*

3.1 *Raw Material.* Quick-frozen Fillets of Cod and Haddock shall be prepared from sound fish of the designated species which are of a quality such as to be fit to be sold fresh for human consumption.

3.2 *Final Product.*

3.2.1 The fillets shall be free from foreign matter and all internal organs and shall be reasonably free from ragged edges, tears and flaps, fins, significantly discoloured flesh, blood clots, black membrane (belly wall), nematodes and where appropriate skin, scales and bones.

3.2.2 After cooking by steaming, baking or boiling as set out in subsections 7.1.2.1 to 7.1.2.3, the product shall have a flovour characterstic of the species and shall be free from any objectionable flavour and odour, and its texture shall be firm and not tough, soft or gelatinous.

3.2.3 The final product shall be reasonably free from undesirably small fillet pieces. A piece weighing less than 30 g is classed undesirably small. The maximum number of small fillet pieces permitted is one per pack weighing less than 250 g and no more than 4 per kg in packs of 250 g or more, except as provided for in subsection 6.1.1.

3.2.4 The final product shall be free from dehydration (freezerburn) which cannot easily be removed by scraping.

Note.—A recommended table of physical defects for optional use with consignments of the final product with an AQL of 6.5 is appended as Annex A.

4. *Food Additives.*

	Maximum level of use
Monophosphate, monosodium or monopotassium (Na or K orthophosphate) Diphosphate, tetrasodium or tetrapotassium (Na of K pyrophosphate) Triphosphate, pentasodium or pentapotassium or calcium (Na, K or Ca tripolyphosphates)	0.5% m/m of the final product expressed as P_2O_5, singly or in combination.
Polyphosphate, sodium (Na hexametaphosphate)	
Ascorbate, potassium or sodium	0.1% m/m of the final product, expressed as ascorbic acid.

5. *Hygiene.* It is recommended that the product covered by the provisions of this standard be prepared in accordance with the appropriate sections of the General Principles of Food Hygiene recommended by the Codex Alimintarius Commission (Ref. No. CAC/RCP 1–1969).

6. *Labelling.* In addition to Sections 1, 2, 4 and 6 of the General Standard for the Labelling of Prepackaged Foods (Ref. No. CAC/RS 1–1969) the following specific provisions apply:

6.1 *The Name of the Food.*

6.1.1 The name of the product as declared on the label shall be "cod fillets" or "fillets of cod"; "haddock fillets" or "fillets of haddock", as appropriate. The words "quick-frozen" shall also appear on the label except that the term "frozen" [1] may be applied in countries where this term is customarily used for describing the product processed in accordance with subsection 2.2 of the standard. Packs of fillets cut from blocks which may contain a number of small pieces in excess of the number permitted by subsection 3.2.3 may be labelled as fillets of cod or haddock provided that such labelling is customarily used in the country where the product is to be sold and provided that the product is identified to the consumer so that he will not be misled.

6.1.2 The label may, in addition, include reference to the presentation as skin-on or skinless and/or boneless, as appropriate. This shall be included if the omission of such labelling would mislead the consumer.

6.2. *List of Ingredients.* A complete list of ingredients shall be declared on the label in descending order of proportion. The provisions of subsection 3.2(b) and 3.2(c) of the General Standard for the Labelling of Prepackaged Foods (Ref. No. CAC/RS 1–1969) shall also apply.

6.3 *Net Contents.*

6.3.1 The net contents shall be declared by weight in either the metric system ("Système International" units) or avoirdupois or both systems of measurement as required by the country in which the food is sold.

6.3.2 Where products have been glazed the declaration of the net contents of the product shall be exclusive of the glaze.

6.4 *Name and Address.* The name and address of the manufacturer, packer, distributor, importer, exporter or vendor of the food shall be declared.

6.5 *Country of Origin*

6.5.1 The country of origin of the food shall be declared if its omission would mislead or deceive the consumer.

6.5.2 When the food undergoes processing in a second country which changes its nature, the country in which the processing is performed shall be considered to be the country of origin for the purposes of labelling.

6.6 *Lot Identification.* There may be an indication in code or in clear of the date of production, that is, the date the final product was packaged for final sale.

7. *Methods of Analysis, Sampling and Examination.* The methods of analysis, sampling and examination described hereunder are international referee methods.

7.1 *Thawing and Cooking Procedures.* CAC/RM 40–1971 (To be used prior to examination, as appropriate)

7.1.1 Thawing Procedure. The sample is thawed by enclosing it in a film type bag and immersing in an agitated water bath held at approximately 20°C (68°F). The complete thawing of the product is determined by gently squeezing the bag occasionally so as not to damage the texture of the fish, until no hard or ice crystals are felt.

7.1.2 Cooking Procedures.

7.1.2.1 Steaming. Steam the sample in a closed dish of 18 cm (7 inches) diameter over boiling water for 35 minutes if frozen, or for 18 minutes after thawing the product.

The dish should be covered and should be kept in a water bath at 60°C (140°F) during testing.

7.1.2.2 Baking. A baking pan, approximately 30×20×6 cm (12"×8"×2½") is lined with aluminium foil. The sample is placed in the pan and a cover is made by crimping an additional sheet of aluminium foil around the edges of the top of the pan. The pan is placed in an oven that has been preheated to 230°C (450°F), for 20 minutes or until cooking has been completed.

7.1.2.3 Boiling in Bag. Place the thawed sample into a boilable film-type pouch and seal. Immerse the pouch and its contents into boiling water and cook until the internal temperature of the fillet sample reaches 70°C (160°F), which requires about 20 minutes

7.2 *Determination of Net Contents of Products covered by Glaze.* CAC/RM 41–1971. As soon as a package is removed from low temperature storage open immediately and place the content under a gentle spray of cold water. Agitate carefully so that the product is not broken. Spray until all ice glaze that can be seen or felt is removed. Transfer the product to a circular No. 8 [2] sieve 20 cm (8 inches) in diameter for samples weighing less than 900 g (2 pounds) and 30 cm (12 inches) for those more than 900 g (2 pounds). Without shifting the product incline sieve at an angle of approximately 17–20° to facilitate drainage, and drain exactly 2 minutes (stop watch). Immediately transfer the product to a tared pan and weigh (Methods of Analysis of AOAC (1965) 18.001).

Annex A—Recommended Defect Table—Cod and Haddock

This table and the maximum allowable number of demerit points are based on an AQL of 6.5. The defect table is not to be applied to individual packs but to consignments in association with a suitable sampling plan.

Demerit points are awarded for *each* defect occurrence as listed below, e.g.

One bone 5mm or less = 2 points

Two bones 5mm or less = 4 points

1. *Bones:*	
(a) *Boneless Fillets:*	
5 mm or less in any dimension	2
Greater than 5 mm up to and including 30 mm in any dimension	4
Greater than 30 mm in any dimension	8
(b) *Fillets not designated as boneless:* Bones other than pin-bones greater than 10 mm in any dimension	4
2. *Discolourations:*	
Each significantly intense discoloration of the flesh over 3 cm^2 up to an including 10 cm^2	4
Over 10 cm^2, every additional complete 5 cm^2	2
3. *Blood Clots:* Each piece greater than 5 mm in any dimension	4
4. *Nematodes:* Each nematode with capsular diameter greater than 3 mm or each worm not encapsulated greater than 1 cm in length, or each worm which is objectionable by virtue of its dark colour	4
5. *Fins or Part Fin including both internal and external bones, other than the back Fins of butterfly (block) fillets:*	
(a) *Boneless Fillets:*	
Each fin or part fin 3 cm^2 or less	8
Over 3 cm^2, every additional complete 3 cm^2	4
(b) *Fillets not designated as boneless:*	
Each fin or part fin 3 cm^2 or less	4
Over 3 cm^2, every additional complete 3 cm^2	2
6. *Skin (Skinless Fillets):*	
Each piece greater than 3 cm^2 up to and including 10 cm^2	4
Over 10 cm^2, every additional complete 5 cm^2	2
7. *Black Membrane (Belly Wall):*	
Each piece greater than 5 cm^2 up to and including 10 cm^2	4
Over 10 cm^2, every additional complete 5 cm^2	2

NOTE.—A sample of one kg will be considered defective if the demerit points total more than 20.

[1] "Frozen": This term is used as an alternative to "quick-frozen" in some English speaking countries.

[2] Size of opening 2.38 mm: the nearest corresponding ISO sieve [Ref. ISO Recommendation R 565) is of 2.8 mm×2.8 mm opening.

Interested persons may, on or before January 16, 1984, submit to the Dockets Management Branch (address above) written comments regarding this proposal. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Executive Order 12291 does not apply to regulations issued in accordance with the formal rulemaking provisions of the Administrative Procedure Act (5 U.S.C. 556, 557). Food standards promulgated under 21 U.S.C. 341 and 371(e) fall under this exemption. However, any comments submitted in support of establishing a U.S. standard for this food should be supported by appropriate information and data regarding impact on small business consistent with the requirements of the Regulatory Flexibility Act (Pub. L. 96-354).

Dated: November 4, 1983.

Sanford A. Miller,

Director, Bureau of Foods.

[FR Doc. 83-30700 Filed 11-14-83; 8:45 am]

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

24 CFR Part 571

[Docket No. R-83-1128]

Community Development Block Grants for Indian Tribes and Alaskan Native Villages—Allocation of Funds

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the method for allocating funds to the HUD Field Offices responsible for the Community Development Block Grant (CDBG) Program for Indian Tribes and Alaskan Native Villages. Currently, a formula based entirely upon population is used. The proposed allocation formula would provide a base amount of funds to each Field Office, with the remaining funds to be distributed based on the following: eligible Indian population and extent of poverty, weighted twice; and extent of overcrowded housing, weighted once. This refinement of the allocation formula is made possible through the use of 1980 Census data that were not previously available.

DATE: Comments must be received by January 16, 1984.

ADDRESS: Interested persons are invited to submit comments regarding this rule to Rules Docket Clerk, Office of General Counsel, Room 10278, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410. Communications should refer to the above docket number and title. Copies of all written comments received will be available for public inspection and copying during regular business hours in the Office of the Rules Docket Clerk, at the address listed above.

FOR FURTHER INFORMATION CONTACT: Leroy Gonnella, Office of Program Policy Development, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410. Telephone number (202) 755-6092. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: The proposed rule would revise the formula for allocating funds to HUD field offices for Indian Tribes and Alaskan Native Villages under section 107 of the Housing and Community Development Act of 1974. This revision is made possible because of the recent availability of 1980 Census data for these grant recipients, and is intended to match better the funds available with the areas of demonstrated need for funding. Recent allocation formulas have relied either on eligible Indian population exclusively or on Indian population and previous Community Development Block Grant funding history, since there were no other accurate data reflecting need.

In deciding what allocation formula would best reflect funding need, the Department considered a variety of measures in various combinations: eligible Indian population, extent of poverty, extent of housing units lacking full plumbing facilities, extent of overcrowded housing, and unemployment. Two of these measures—extent of housing units lacking full plumbing facilities and unemployment—could not be used because the available data were inappropriate and obsolete, respectively. Lack of full plumbing is not in all cases a measure of inadequate housing, since there are places in Alaska where complete plumbing is not feasible. The source for unemployment statistics—the 1980 Census—is no longer timely, and other more recent sources as of this date are incomplete for Indian Tribes and Alaskan Native Villages.

The Department believes that eligible Indian population, extent of poverty, and extent of overcrowded housing best reflect funding need when weighted and used in combination. Population and extent of poverty would each be weighted twice in the formula in order to allocate funds principally to areas with the largest number of low- and moderate-income persons in accordance with the primary program objective. Extent of overcrowded housing is weighted once in the formula.

The formula would allow for a base amount of funding to be provided to each HUD Field Office to ensure that each Office receives sufficient funds to carry out a meaningful competition within the limits of the funds available. The rule also would make clear that funds that are specifically designated for certain purposes would not be subject to the proposed formula allocation. An example would be the funds earmarked for water and sewer activities in the Conference Report (H.R. Report No. 98-264) on the Department of Housing and Urban Development—Independent Agencies Appropriation Act, 1984 (Pub. L. 98-45). The Secretary would allocate these amounts on the basis of need or demand, using factors deemed appropriate by the Secretary, unless otherwise specified by law.

Definitions of "eligible Indian populations" and "extent of poverty" appear at present in § 571.4. A new definition, "extent of overcrowded housing", would be added at § 571.4(m) with this rulemaking.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection during regular business hours in the Office of the Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291 on Federal regulations issued on February 17, 1981. Analysis of the rule indicates that it does not (1) have an annual effect on the economy of $100 million or more; (2)