East Office, c/o American Embassy, Brussels, Belgium.

(e) In accordance with FAR §§ 21.197 and 21.199, flight is permitted to a base where the maintenance required by this AD may be accomplished.

Note.—Aerospatiale Telex Services 01.13 and 01.16 and French AD's 86-35-28(B) and 86-57-44(B) pertain to this subject.

This amendment becomes effective December 18, 1986, as to all persons except those persons to whom it was made immediately effective by priority letter AD 86-19-15 issued September 24, 1986, which contained this amendment.

Issued in Fort Worth, Texas, on November 17, 1986.

Don P. Watson,

Acting Director, Southwest Region.

[FR Doc. 86-26850 Filed 11-28-86; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 86-AGL-27]

Alteration of Various Control Zones and Transition Areas Within the Great Lakes Region

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The nature of this action is to alter the published descriptions for certain control zones and transition areas within the Great Lakes Region.

This amendment to Part 71 of the Federal Aviation Regulations modifies the published descriptions for Mitchell, SD; Menominee, MI; Manistee, MI; and, Madison, WI by changing the acronyms VOR to VOR/DME or VOR to VORTAC.

EFFECTIVE DATE: 0901 UTC, February 12, 1987.

FOR FURTHER INFORMATION CONTACT: Edward R. Heaps, Air Traffic Division, Airspace Branch, AGL-520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (312) 694-7360.

SUPPLEMENTARY INFORMATION: This amendment to Part 71 of the Federal Aviation Regulations modifies the published descriptions for Mitchell, SD; Menominee, MI; Manistee, MI; and, Madison, WI by changing the acronyms VOR to VOR/DME or VOR to VORTAC.

There will be no changes to the existing designated airspace area or designated altitudes for the associated control zones or transition area.

I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary because this action is a minor amendment in which the public would not be particularly interested. Sections 71.171 and 71.181 of Part 71 of the Federal Aviation Regulations were republished in Handbook 7400.6B dated January 2, 1986.

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

List of Subjects in 14 CFR Part 71

Aviation safety, Control zones, Transition areas.

Adoption of the Amendment

PART 71—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended as follows:

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; E.O. 10854; 49 U.S.C. 106(g) (Rev. Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.171 [Amended]

2. In all instances where the acronym VOR appears; remove and replace with VOR/DME for the Mitchell, SD; Menominee, MI; and, Manistee, MI control zones and/or transition areas listed below. Where the acronym VOR appears remove and replace with VORTAC for the Madison, Wisconsin, control zone.

3. Section 71.171 is amended as follows:

Madison, WI—[Amended]

Mitchell, SD—[Amended]

Menominee, MI—[Amended]

and

§ 71.181 [Amended]

4. Section 71.181 is amended as follows:

Mitchell, SD—[Amended]

Menominee, MI—[Amended]

Manistee, MI—[Amended]

Issued in Des Plaines, Illinois, on November 18, 1986.

Peter H. Salmon,

Acting Manager, Air Traffic Division.

[FR Doc. 86-26853 Filed 11-28-86; 8:45 am]

BILLING CODE 4910-13-M

Office of the Secretary

14 CFR Parts 323 and 399

[Docket No. 43403; 323, Amdt. 9 and 399, Amdt. 91]

Certificate Duration in Limited-Entry Markets; Requirements for Carriers Leaving Limited-Entry Markets During a Selection Case; Procedures and Criteria for Selecting Carriers for Limited-Entry Markets

AGENCY: Department of Transportation.

ACTION: Final rule and policy statement.

SUMMARY: The Department of Transportation is making final the proposals set forth in Notice No. 85-12, with two modifications. Thus, as proposed in the NPRM, all certificates awarded to U.S. air carriers on limited-entry international routes will be issued for five-year periods. These certificates will be issued under the "experimental" provisions of section 401(d)(8) of the Federal Aviation Act. This action will establish by rule what has been the practice for the past five years and will not affect existing permanent certificates.

The Department also will require any air carrier operating under an exemption in a limited-entry market which is the subject of a carrier selection proceeding to file a notice with the Department at least 90 days before it terminates service in that market. This will prevent or minimize service gaps in those international markets where the exemption carrier loses the selection case and might otherwise leave the market before the selected carrier enters. We changed the wording of this provision slightly to clarify its effect.

With one exception the Department will adopt the carrier-selection criteria used by the Civil Aeronautics Board (Board), as well as its practice of varying the weight accorded each criterion depending on each case's particular circumstances. Instead of according an incumbent's application a positive weight if it has performed well, as the NPRM proposed to do, there will

be a rebuttable presumption favoring renewal of the incumbent's authority.

DATE: This regulation is effective December 8, 1986.

FOR FURTHER INFORMATION CONTACT: Peter M. Bloch, Office of the Assistant General Counsel for International Law (202) 366–9183, or Robert Goldner, Office of the Assistant Secretary for Policy and International Affairs, Proceedings Division (202) 366–4826.

SUPPLEMENTARY INFORMATION:

Executive Order 12291, Regulatory Flexibility Act, and Paperwork Reduction Act of 1980

This action has been reviewed under Executive Order 12291, and it has been determined that this is not a major rule. It will not result in an annual effect on the economy of $100 million or more. There will be no increase in production costs or prices for consumers, individual industries, Federal, State or local governments, agencies, or geographic regions. Furthermore, this rule will not adversely affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, a regulatory impact analysis is not required.

These regulations primarily review and adopt former CAB practices on carrier selection and certification. The new notice requirement will impose little additional cost to the carriers; the situation addressed occurs very infrequently and the amount of time that a carrier would be held in a market would be minimal. Consequently, it is very unlikely that this rule will impose an economic hardship on any carrier. This regulation is significant under the Department's Regulatory Policies and Procedures, dated February 26, 1979, because it involves important Departmental policies and is of unusual public interest. Because its economic impact should be minimal, however, a full regulatory evaluation is not required.

I certify that this rule will not have a significant economic impact on a substantial number of small entities. Most international air transportation is provided by large air carriers and, as noted above, there will be little economic impact on any carrier.

This regulation does not significantly affect the environment. An environmental impact statement is not required under the National Environmental Policy Act of 1969.

The collection of information requirements in this notice have been submitted to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act of 1980. A notice will be published in the **Federal Register** when those requirements are approved by OMB. The notice will incorporate the OMB approval numbers into the regulations.

I. Certificate Duration

The aviation relationship between the United States and a foreign country govern whether the air routes between the United States and that country are open to any number of U.S. carriers or are restricted to a specified number. In open-entry routes, there are no governmentally established limits on the number of U.S. carriers that may operate. In limited-entry routes, which are the subject of this rulemaking, the aviation relationship typically permits only one or two U.S. carriers to operate.

Before the passage of the Airline Deregulation Act of 1978, Pub. L. 95–504 (ADA), carriers were generally awarded permanent certificates for international routes. However, in certain limited-entry markets, including most of the transatlantic markets, carriers received temporary certificates; the Board chose not to grant much permanent transatlantic authority because it wanted to retain the ability to respond to changes in market conditions or the international situation. *See, Transatlantic Route Proceeding,* Order 78–1–118.

Before the ADA, certificates for scheduled authority could be awarded only under sections 401 (d)(1) and (d)(2) of the Federal Aviation Act, governing permanent and temporary certificates, respectively. A carrier would be issued a certificate if the proposed transportation was found to be required by the public convenience and necessity.[1]

The ADA gave the Board a significant new option for limited-entry routes. It added a new section 401(d)(8) to the Federal Aviation Act. The provision empowered the Board—and now empowers the Department—to grant an experimental certificate under sections 401 (d)(1) or (d)(2) upon determining that a test period is desirable, either to see if projected results will materialize and remain over time or to evaluate or assess the effects of new services.

A section 401(d)(8) experimental certificate may be revoked if the carrier fails to provide the innovative or low-priced air transportation it was selected to provide. This supplements provisions already in section 401(g) for deleting or suspending certificate authority if the public convenience and necessity so require and for revoking a certificate for violating the Act or the Board's—and now the Department's—rules or orders. Section 401(g) was amended by the International Air Transportation Competition Act (IATCA) to add section 401(g)(3), permitting suspension or revocation of an incumbent's authority without a hearing for failure to provide regularly scheduled service to the point at issue for 90 days.

After the ADA, although the Board continued to award permanent authority under subsection 401(d)(1) for open-entry markets, it began to grant three-year temporary, experimental certificates in limited-entry markets. *See Spokane-Vancouver Route Proceeding,* Order 80–3–170. At that time, the Board anticipated deciding *de novo* what carriers should serve the routes when these certificates expired. It would not entertain replacement applications before an incumbent had a reasonable opportunity to inaugurate service and establish itself in the market.

In late 1981, beginning with the *New Gateways to Brazil Case,* Order 81–11–137, the Board began granting five-year experimental certificates for limited-entry routes. The Board was concerned that three years might not be enough time for a carrier to establish itself on a route and realize a return on its investment. The Board continued to award five-year experimental certificates for the balance of its existence.

On September 3, 1982, Congress extended for two years the terms of all temporary certificates issued under section 401(d)(8), as well as those of certificates awarded in the *Transatlantic Route Proceeding* and the *California/Southwest—Western Mexico Route Proceeding.*[2] Finally, in anticipation of the Board's sunset, the Department asked the Board to extend the expiration dates of most international route certificates scheduled to expire between January 1, 1985, and January 15, 1986. The Board responded by issuing Order 84–8–107, served August 27, 1984, directing all interested persons to show cause why

[1] The ADA changed "required by" to "consistent with" for domestic route authority; the International Air Transportation Competition Act of 1979, Pub. L. 96–192 (IATCA) applied the new language to international route authority.

[2] Airport and Airway Improvement Act of 1982, section 531, Pub. L. 97–248, 96 Stat. 671, 701 (1982) (Title V, Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat. 324).

these certificates should not be extended for 12 to 14 months. Order 84-8-107's tentative conclusions were finalized by Order 85-1-1. By this action, the Board sought to facilitate the orderly transfer of its carrier selection function to the Department and to allow us to establish our own procedures for carrier selection before beginning to process applications.

During the three years preceding the issuance of our NPRM, the issue of certificate duration had been examined on three separate occasions. First, in July 1982, the Civil Aeronautics Board issued an Advance Notice of Proposed Rulemaking (PSDR-78, Docket 40832) on the duration of experimental certificates awarded to U.S. carriers for limited-designation international markets.[3] The Board asked for comments on whether it should continue to award five-year temporary, experimental certificates; whether there should be a rebuttable presumption of renewal for temporary certificates; whether the Board should issue indefinite experimental certificates and adopt an effective "bumping" mechanism; what criteria should be used to develop either a rebuttable presumption or a replacement mechanism; and whether any changes the Board might adopt should be made retroactive to existing certificates. The Board took no further action after receiving comments to this ANPRM.

Certificate duration was also the subject of hearings held on May 31, 1984, by the Aviation Subcommittee of the House Committee on Public Works and Transportation. Legislation had been proposed to convert all temporary certificates to certificates of indefinite duration which could be altered or revoked only if required by the public convenience and necessity. This legislation was not enacted.

In May of 1985, while the NPRM was being prepared, the Subcommittee on Aviation of the Senate Committee on Commerce, Science and Transportation held hearings to consider legislation which would convert all temporary certificates to permanent certificates.

The views expressed in each of these instances were carefully considered in reaching the tentative conclusions set forth in the NPRM. Comments on the tentative conclusions set forth in the NPRM were filed by American Airlines, Calgary Transportation Authority, Dallas/Ft. Worth Parties, Delta Air Lines, Eastern Air Lines, City of Houston and the Houston Chamber of Commerce, Kansas City, Missouri, Northwest Airlines, Pan American World Airways, Peoples Express Airlines, the Regional Airline Association, Transamerica Airlines, Trans World Airlines, United Air Lines, and USAir.

[3] The Board noted a letter it had received from Senators Kassebaum and Cannon suggesting that all temporary certificates be converted to indefinite certificates.

Summary of Comments

1. *Comments supporting indefinite experimental certificates.* The proponents of indefinite experimental certificates repeat a number of the arguments advanced in the earlier proceedings and which were summarized in the NPRM: they argue that indefinite certificates would encourage carriers to expend the resources necessary to develop their routes properly. Without the burden of renewal proceedings and the attendant risk to their authority, some claim it would be easier to attract capital, recoup their high start-up costs, gain footholds in their markets, and thereby succeed over the long term. These commenters further argue that renewal proceedings, even when an incumbent has performed satisfactorily, consume much valuable time and money while accomplishing no affirmative good. Although routes generally have not been lost in these proceedings, these routes have been costly to defend. Proponents also argue that these expenses are not only "grossly" excessive, but that they put U.S. carriers at a disadvantage *vis-a-vis* their foreign flag competitors (since the latter enjoy permanent authority), when in fact it is the policy of the ADA to strengthen the competitive position of U.S. carriers. Renewal procedures are characterized as simply reviving pervasive regulatory procedures, which are inconsistent with the ADA's policy of placing maximum reliance on market forces.

Proponents further argue that temporary certificates result in an unfair anomaly: one carrier may hold permanent authority in the same market that another carrier holds temporary authority. The latter has the burden and expense of having to defend its authority periodically, while the former does not.

Proponents claim that indefinite experimental certificates would not prevent the government from replacing an incumbent that was performing unsatisfactorily—the Federal Aviation Act makes ample provision for revocation of route authority and for suspension of fares.

This last point notwithstanding, one proponent of indefinite experimental certificates did make suggestions for a bumping mechanism to replace ineffective incumbents. It stated that DOT should establish a standard to define what is "consistent with the public convenience and necessity". Under this proposal, the challenger would be required to show that its service proposal was better than the existing service in the market and that the incumbent's service was no longer consistent with the public convenience and necessity. The proposal further contemplates that full hearing procedures under section 401(g) should be employed only upon a *prima facie* showing that the incumbent was not performing adequately.

Another commenter argued that if DOT was not prepared to adopt indefinite certificates as the rule, it should at least use a case-by-case approach, awarding either indefinite certificates or 10-year certificates where an incumbent has, over a period of decades, provided uninterrupted service with competitive fares at the maximum allowed capacity level.

Exception also is taken to our statement in the NPRM that temporary certificates keep incumbents responsive to market needs; it is argued that existing competitive forces such as intergateway, intragateway (whether by a foreign or second U.S. carrier) and destination competition are already doing this. Further, as many limited-entry routes are heavily encumbered by restrictions imposed by foreign governments, there is little that pressure from renewal proceedings can accomplish; competition can only really be improved through liberalizing restrictive bilateral regimes.

One proponent alleges that DOT is trying to avoid the minimum due process requirements of section 401(g) by asserting that 401(d)(8) requires less process than 401(g). This proponent states that, to the contrary, a 401(d)(8) temporary certificate can only be amended or revoked using 401(g) procedures.

Some proponents argue that neither the language nor the legislative history of section 401(d)(8) indicate that it should be used for all routes all of the time. Rather, it was intended to be used for test periods to evaluate new and innovative services. In any event, it should not be used for renewals because the test period will already have expired and it will be known whether or not the experiment was a success.

Another proponent states that requiring renewal proceedings could cause incumbents to incur serious losses because, as renewal time approaches, they might offer fares and frequency levels which do not reflect the amount of traffic in the market, but which are solely designed to maximize their chances of obtaining a renewal of their certificate authority. Such a situation could undermine a carrier's long term ability to continue to serve that market.

2. *Comments supporting temporary experimental certificates.* Commenters supporting the award of temporary experimental certificates contend that the public interest is best served by an approach to limited-entry route allocation that simulates free market competition to as great a degree as possible. Proponents claim that the threat of losing authority for the route in a renewal proceeding works to keep an incumbent's fare and service offerings competitive in much the same way that the threat of potential entry works in domestic markets. As a corollary, the certainty of renewal proceedings also preserves opportunities for potential new entrants, many of whom may not have been in existence when temporary authority for any particular market was first granted.

Claiming that the Civil Aeronautics Board never revoked a permanent certificate in a section 401(g) proceeding, some proponents of temporary experimental certificates do not believe that the traditional replacement procedures can effectively ensure that incumbent carriers remain continually responsive to the changing needs of the limited-entry markets which they serve. They also maintain that changing to a policy of awarding indefinite experimental certificates would create tremendous barriers to entry in limited-designation markets, an undesirable result because new carrier entry has, in past instances, greatly stimulated price and service innovations. They further argue that temporary certificates make it easier to replace a carrier that is no longer the best choice for the route due to subsequent events, for example, a significant change in its domestic route structure.

Proponents argue that rather than discouraging or hindering the investment of resources necessary to develop limited-designation markets, temporary certificates provide a greater developmental incentive than indefinite or permanent certificates, because carriers with temporary authority know that they will have to perform well to retain the authority. Proponents also argue that renewal proceedings are not necessarily costly, burdensome, protracted, or complicated. Simplified, non-oral, show-cause proceedings can be used in the majority of cases.

Also in support of temporary certificates, proponents argue that incumbents' reduction of fares and expansion of service as expiration and renewal approach is an advantage, not a liability. It shows that the intended simulation of competitive market forces is actually succeeding. Finally, they assert that there is no convincing evidence that temporary certificates limit U.S. carriers' ability to compete with foreign flag airlines.

Two carriers, although primarily supporting indefinite certificates, suggested procedures for handling the renewal of temporary experimental certificates which they believe would reduce the impact and cost of renewal proceedings on incumbents. One recommends that all temporary certificates carry a common expiry date, and that the Department issue a show cause order 18 months before that expiry date. If a challenger did not file within three weeks, the routes would be automatically renewed. Routes for which a meritorious challenge was received would be set down for an expedited hearing. A second proposal would renew these certificates automatically if the incumbent had fulfilled its fare/service obligations and no other carrier had applied for the route.

Most proponents of temporary experimental certificates favor a strong rebuttable presumption of renewal: the incumbent's authority should be renewed unless its performance has been significantly inferior to what another willing operator might realistically be expected to provide. In one carrier's view, once a carrier has performed well under a temporary certificate, the rationale behind experimental certificates will have been served—*i.e.*, its actual performance will have matched its proposal. Such merit having been demonstrated once, there would be no need to test that carrier further.

DOT Decision on Certificate Duration

After thoroughly reviewing the comments received in response to our NPRM, we have decided to finalize our proposal to continue the practice of awarding five-year temporary experimental certificates under section 401(d)(8) of the Act for limited-entry routes. We believe that this option strikes the best balance between an incumbent's need for sufficient time to develop its market and recoup its investment, on the one hand, and the public interest in the incumbent's continued responsiveness to the market's needs, on the other. It also preserves opportunities for new entrants that otherwise would probably not exist, and it gives the Department the greatest flexibility available under the Act to respond to changed circumstances, when necessary. Finally, we consider it highly unlikely that this option will result in protracted or costly renewal proceedings when the incumbent is performing satisfactorily.

We believe that the award of temporary certificates represents the best means to ensure that incumbents remain responsive to the needs of a particular market, absent the preferable opportunity to award authority on a multiple-permissive basis. A renewal proceeding acts as both a carrot and a stick: it encourages carriers to adhere to their fare and service proposals; it discourages complacency and exploitation of monopoly power.

In light of the data at hand, we also find no evidence to suggest that five years is an insufficient period of time for a carrier to develop a route and realize a reasonable return on its investment. Despite our specific request in the NPRM, no carrier provided documentation of either its development costs for any route or the time that it takes to recover those costs. The use of temporary certificates does not appear to have kept carriers from vigorously competing for route authority, and we have not yet seen any evidence that carriers have failed to expend the resources necessary to develop new routes. While opponents argue that fixed-term certificates reduce a carrier's incentive to develop a market, it is at least as logical that five-year experimental certificates would increase development incentives by raising the spectre that the route will otherwise be lost.

Another critical advantage we see in awarding five-year temporary experimental certificates is that new entrants will then have recurring opportunities to compete for limited-entry routes. We believe that, as a practical matter, carriers desiring to acquire new or additional international route authority would have much more limited opportunities for entry if permanent certificates became the norm. Given the realities of entry restrictions in many major foreign markets, temporary certificates represent the most viable substitute for unencumbered competitive forces, and our decision to continue to issue them is consistent, in this regard, with the pro-competitive policies of both the ADA and IATCA.

The five year term for limited-entry certificates also affords the Department an opportunity to periodically appraise each market's changing needs. This flexibility would be sacrificed were we to issue indefinite experimental certificates under section 401(d)(8) or permanent certificates under section

401(d)(1). With permanent certificates, the Department could replace an operating incumbent only under section 401(g)(1), which allows the Department to delete or suspend certificate authority only if such action is required by the public convenience and necessity.[4]

We would also lose flexibility if we were to begin awarding experimental certificates of indefinite duration under section 401(d)(8). In addition to the section 401(g) standard described above, section 401(d)(8) empowers us to revoke the certificate of a carrier that has not performed according to its original proposal. While this would give us some additional flexibility compared to permanent certificate authority, it does not ensure that the needs of a particular market will be reviewed on a regular basis. We believe that the public interest is better served by ensuring that each market's evolving needs will be reevaluated periodically.

As for the claimed disadvantages to five-year certificates, we think that the carriers' fears of unnecessary, protracted, and costly renewal proceedings are overstated. We anticipate handling uncontested renewal applications through expedited paper proceedings. Even when an incumbent is challenged, oral evidentiary hearings need not necessarily follow; the Department is free in renewal cases to conduct paper proceedings under the simplified procedures of section 401(p) when circumstances warrant and there are no material facts in dispute. Also, in a proceeding heard by an Administrative Law Judge, the judge may dispense with a hearing if he or she believes that the written record is sufficient to support a decision.

One opponent of temporary certificates has raised the spectre of hearings costing as much as the *Transatlantic Route Proceeding*. That proceeding was costly even by pre-deregulation standards and today, with statutory deadlines for the processing of cases, the chances of such an expensive case occurring are virtually nil.

It is important to keep in mind the fact that most limited-entry route authority is not challenged on renewal. Of all the transatlantic route authority at issue before the Department, only two routes have been the subject of competing applications, Houston-London and Chicago-London. This fact alone should quell the fears of those carriers who believe that renewal proceedings will be a never-ending series of contested cases.

[4] It also allows certificate revocation as a punitive measure for violations of the Act or Department rules or orders.

In our NPRM we expressed the tentative view that we should not automatically apply a rebuttable presumption in favor of the incumbent carrier. Instead, where a carrier seeking renewal of existing authority had performed satisfactorily during the term of its certificate, we proposed to consider its incumbency in that market as a positive decisional factor in the renewal proceeding. In those cases where it was determined that there were significant deficiencies in an incumbent's performance, it was our tentative position that we would not assess a negative weight to that factor—but would instead review all applications on a de novo basis.

Based upon the comments that discussed this issue, together with the experience we have gained in conducting carrier selection cases during the past 18 months, we have now decided to apply a rebuttable presumption in favor of renewal of existing certificate authority. Therefore, in cases where an incumbent carrier seeks to renew an international certificate in a limited-designation market, and where that carrier has performed well, taking into account all relevant factors (including fare and/or capacity restrictions in the market that have been imposed by foreign governments or bilateral agreements), there will be a presumption that the incumbent carrier will be the best applicant to provide service during the next five years. We will begin the use of this presumption with all route renewal cases instituted after the publication of this Final Rule and Policy Statement in the **Federal Register**. This presumption may be rebutted only upon a showing by a competitor that it will provide substantially superior service in the future so as to warrant its selection. As a general matter, there will be no rebuttable presumption for incumbents which have substantially deviated from their fare and service proposals without adequate justification. We recognize that markets do change over time and that a carrier's deviation from its proposal may be justified, e.g., by changed economic circumstances in the market or governmental constraints.

The specific criteria for determining the quality of an incumbent's service will, necessarily, vary according to the particular facts of each case. Individual markets differ significantly from each other, and traffic on any particular route is susceptible to substantial fluctuation over time. Therefore, it would not be practical to attempt to codify here the universe of factors that might be considered in evaluating an incumbent's record of service in an international market.

We believe that a presumption favoring incumbent carriers is justified as a matter of public policy wherever carriers have demonstrated, through actual performance, both their ability and willingness to offer good service. We are persuaded that a policy of merely considering prior good performance as a positive decisional factor, as we initially proposed, does not afford sufficient weight to the degree to which an incumbent's positive performance in a market lends credibility to its renewal proposal. The incumbent has, for several years, had to deal with the challenges posed by the market and has developed a track record in responding to the prevailing conditions and needs of the market. As past performance is usually the best evidence of a carrier's capabilities, we believe that an incumbent's favorable track record should be sufficient to outweigh a competing proposal that promises to offer equal or even marginally superior public benefits, but which is untested by actual experience in the market. Only where a competing applicant has demonstrated that it will offer substantially superior service might the Department determine that the benefits of that proposal outweigh the actual record of an incumbent that has served the market well.

Because each market is unique, we have chosen not to establish a fixed, general definition of "substantially superior service" in a given case. Instead, we intend to develop our standards over time as we review the cases that come before us. Nevertheless, we see merit in providing some broad guidelines. Thus, as an example, it is likely that we would consider a proposal of daily service in a market receiving three weekly flights to be substantially superior (assuming that we believe daily service to be economically and bilaterally feasible). Similarly, it is likely that we would consider a roundtrip APEX fare of $500 (assuming there is no foreign government policy known to us which would preclude this fare) to be substantially superior to an incumbent's $800 roundtrip APEX fare. However, it is not likely that we would consider incremental increases in services, *i.e.*, from 3 to 4 flights per week or incremental reductions in fares, *i.e.*, from $800 to $750, to represent substantially superior service. We emphasize that these are mere illustrations. We fully expect that each case will turn on its own facts.

We recognize that in those instances where a contested renewal application is set for oral evidentiary hearing, the parties and the Government incur costs in terms of both time and money. Generally, we believe that those costs are outweighed by the benefits inherent in allowing other carriers to demonstrate that they would offer service that is substantially superior to that provided by the incumbent carrier. However, we cannot justify imposing the costs of the renewal process where only marginally superior service would be offered by the selection of a different carrier. Therefore, we will only consider replacing incumbents that are performing well in a market where a competing applicant will offer service that is substantially superior in quality.

This approach improves the credibility of the renewal process and our ability to rely on that process to authorize U.S. carrier service in limited-designation markets. This approach also provides the incentives necessary to encourage incumbent carriers to remain continuously responsive to the changing character of international markets. At the same time, it will ensure that opportunities for new entry remain available in those situations where the incumbent has failed to provide quality service, or where a competing applicant has shown that it will offer travellers in the market service that is substantially superior to that which the incumbent carrier has been providing.

Indefinite Experimental Certificates

The critical disadvantage we perceive in indefinite certificates is that our ability to replace incumbents that are no longer best serving the public interest could be curtailed, because the legal standard for removing an operating incumbent is higher than for declining to renew an incumbent's temporary authority. Furthermore, incumbents would be freed from the simulated potential competition that fixed-term certificates now provide, and opportunities for new entrants would be more limited. (Even if many international routes are open to unlimited entry, still, many of the more lucrative routes are not.) Finally, notwithstanding the higher standard for removal of an incumbent, incumbents would be vulnerable to challenge and removal at any time, thereby creating far more potential instability and uncertainty than exist with five-year certificates.[5] This in turn would require far more regulatory oversight than the current approach does. Thus, while indefinite experimental certificates might obviate the need for some automatic renewal proceedings, we believe, on balance, that the public interest would be best served through a regular review of an incumbent carrier's performance in a limited-entry market.

One commenter has suggested that implementation of this rule would deny incumbents of the various due process requirements of section 401(g). We do not agree with this interpretation of the Act. The award of temporary certificates is specifically provided for in section 401(d)(2). A temporary certificate by its very definition means that the entitlement ceases at the end of the term. Therefore, there is no interest which is being terminated if we chose a carrier other than the incumbent in a renewal proceeding.

We also disagree with the commenters that argued that temporary experimental certificates can only be used for an initial test period. Section 401(d)(8) provides, in part, that such certificates can be used if it is determined "that a test period is desirable in order to determine if projected services . . . fares . . . or other projected results will in fact materialize and remain for a sustained period of time." The Department will be making its decision in carrier selection cases based on the applicants' proposals and, to that extent, each time that a carrier's proposal is selected, there is a new need to have a test period to determine whether its fares and services will be realized for a sustained period.

We agree with the commenters that say that competition can best be created in limited-entry markets by altering restrictive bilateral regimes and effectively making them open markets. While we will continue our efforts to achieve that goal, the reality is that restrictive regimes exist and unfortunately will likely continue to exist in the future. We must therefore find alternative means of introducing or simulating competition in these markets, and the use of temporary experimental certificates, as described above, best meets this need.

Five-Year Temporary Experimental Certificates Converting to Indefinite or Permanent Certificates Upon Renewal

This option has all the disadvantages of indefinite experimental certificates after the incumbent's first five years: Upon renewal, it would remove all the performance incentives provided by temporary certificates. As we have already stated, we believe that continuing to simulate the threat of potential competition in limited-entry routes serves the public interest far better. Also, as with indefinite experimental certificates, we think that the carriers' interest in having route security and avoiding the costs of renewal proceedings are outweighed by the public's interest in ensuring a periodic review of service in limited-entry markets. A further disadvantage of this option is that, once the certificate becomes indefinite, absent a finding that the public convenience and necessity so required, that authority cannot be deleted even for fully unjustified and unexplained failure to adhere to fare and service proposals.

II. Withdrawal From a Route by a Carrier With Exemption Authority Before the Replacement Carrier's Entry

The Department also solicited comments on a proposed rule to minimize service gaps in limited-entry international routes. A number of carrier selection cases involve markets in which no U.S. carrier is providing service. Often, one of the applicants will be authorized to serve the route by a *pendente lite* exemption. If the exempted carrier is not subsequently selected for certificate authority, it may decide to leave the market before the newly authorized carrier is in a position to inaugurate service. If it is the only U.S. carrier in the market, the disruption in service to the communities involved can be significant.

The proposed rule would require any carrier providing service under a *pendente lite* exemption on a route that is at issue in a carrier selection proceeding to notify the Department at least 90 days before it ceases to serve that route. The rule would allow the exempted carrier to terminate service earlier if the replacement carrier initiates service before the 90-day period expires. At present all carriers have an exemption under 14 CFR 323.8 relieving them of their section 401(j) obligation to file notices when terminating, reducing or suspending service in foreign air transportation.[6] This rulemaking will

[5] Although a five-year temporary experimental certificate is subject to challenge at any time, challengers are more likely to make such a bid in the context of a renewal proceeding because the evidentiary burden that they must meet is lower in a renewal case than in a mid-term challenge.

[6] Although the Board issued an NPRM in 1982 (47 FR 35433) to limit this exemption by requiring an air carrier to give notice when it intends to terminate or suspend service to a foreign point, the Board terminated that rulemaking at the end of 1984 (50 FR 481), on the grounds that such notice was not necessary and discouraged carrier flexibility. The rule we are now adopting is far more narrow than the one rejected in 1984 and is directed at those few situations where there is a greater likelihood that a service disruption could occur.

scale back that exemption only to the extent necessary to address this problem.

Comments Supporting the Proposed Notice Requirement

Several commenters supported the proposal, considering it necessary to avoid unexpected service disruptions to the traveling public. One proponent, citing two instances in the past two years where exemption carriers abruptly left a market after losing carrier selection cases, states that the proposal addresses the most serious part of the problem and represents a minimal interference. Another stated that it is a narrowly-drawn rule applicable only in those situations where the exemption carrier has little incentive to remain. Another respondent supports the proposed rule, but states that it should be extended to all U.S. carriers serving limited-entry and open international markets where the carrier is the only U.S. carrier offering nonstop service on the route. It argues that the unexpected termination of service in these markets has the same potential to disrupt air services as it does in markets involved in a carrier selection case. One carrier suggests that DOT impose the notice requirement on a case-by-case basis, thus allowing each market to be judged on the need for and adequacy of notice. Finally, one respondent supported the proposal, but pointed out that the language of the regulation was somewhat ambiguous and could be interpreted as covering essential air service carrier selection cases.

Commenters Opposing the Proposed Notice Requirement

One respondent takes the view that imposing such a rule may constitute a taking of property without due process, unless the government agrees to subsidize the carrier for losses during the hold-in period. Another respondent stated that the effect of the rule would be to discourage carriers from seeking exemption authority during the pendency of a certificate case. It states that the newly certificated carrier should be required to enter the market quickly, rather than placing a burden on the losing carrier to remain.

DOT Decision on the Notice Requirement

We have decided to implement the proposed rule with the suggested clarification to indicate that it only applies to international carrier selection cases.

Conditioning an exemption to require the carrier to remain in the market temporarily does not constitute an unlawful taking of property: each carrier accepting authority will be on notice that the benefit is accompanied by the risk that it may be held in the market temporarily. If it is unwilling to accept the risk, it need not accept the authority. The number of situations where the exemption carrier loses a certification case, is losing money on the route, *and* cannot work out an acceptable transition with the successful carrier, are few. Consequently, we believe that few carriers are likely to be dissuaded from seeking exemptions as a result of the adoption of this rule.

We will not expand the scope of this rule as was suggested by some commenters. The limited exception we have created to our existing exemption from notice filing requirements will address the situation where it is most likely to be needed and, in our view, strikes a proper balance between the needs of the carriers and the communities involved. To do more would represent too great an intrusion into the freedom of carriers to enter and exit markets.

As a final matter, we reject the suggestion that we impose notice requirements on a case-by-case basis. In most instances it would be impossible to tell at the time the exemption is granted whether notice might be required. In fact, to impose a notice requirement in an individual case might create the erroneous impression that the exemption carrier was not expected to win the certification case. This might inhibit an exemption carrier from beginning service.

As noted in the NPRM, gaps in service may still occur under this rule, *e.g.*, if the replacement carrier needs more than 90 days to initiate service. Nevertheless, we believe that benefits afforded by further expanding the notice requirement are outweighed by the burdens it would impose on exemption carriers. Our solution represents a compromise between that concern and the public interest in minimizing service disruptions.

III. Carrier Selection Criteria

The Department also solicited comments on its intention to adopt the carrier selection criteria that had historically been developed by the CAB, as well as its practice of varying the weight accorded each criterion from case to case, depending on the particular circumstances of each proceeding. All of the commenters addressing the subject endorsed the existing selection criteria and the case-by-case approach to their application. A few commenters felt that certain criteria should be given greater weight or that a new criterion should be considered. One commenter argues that, in light of the Act's directive to strengthen the competitive position of U.S. carriers and the government's desire to improve the over-all U.S. balance of trade, a carrier's ability to attract traffic away from foreign carriers should be considered. In particular, it argues, DOT should focus more on support traffic behind the foreign gateway.

Another commenter states that DOT should give greater positive weight to incumbency where the incumbent has provided uninterrupted service in a market for many years and has invested substantial assets in an effort to develop the market. The same commenter said that DOT should not rule out consideration of a foreign government's possible response to fare or service proposals. It noted that where the foreign government's attitudes are restrictive and well known, a decision not to consider foreign government reaction could allow a challenger proposing unobtainable service or fares to win out over an incumbent presenting a realistic proposal. Another commenter suggests that DOT should give priority to establishing new gateways, particularly in the interior of the U.S., and in choosing gateways should consider which would most increase intergateway competition.

Another commenter stated that the views of civic parties should be given more attention and weight. The commenter also seeks clarification of our statement that we will not consider domestic hub dominance except in cases of excessive market power. Although not a subject for which comments had been requested, many commenters stressed their opposition to the use of lotteries and auctions, while no commenters supported either of these approaches.

DOT Policy on Selection Criteria and Their Application

The Department will retain, with the exception of its treatment of incumbency, the selection criteria as discussed and described in the NPRM. The major elements of consideration in carrier selection cases heard by the Department will include the factors listed below.

1. Market Structure

Market structure encompasses the impact that a route award will have on the overall level of competition in a particular market. In order to evaluate this issue, the Department looks at potential intergateway competition—the competitive effect of the proposed service on flights offered to the same destination at possible alternative gateways. We also examine the degree to which each applicant might increase competition with existing services at the same gateway. Occasionally in vacation and resort markets, where traffic is highly discretionary, there may also be competition between different destinations.

2. Route Integration

The route integration criterion entails an assessment of each applicant's ability to flow traffic over the primary route to and from points behind the U.S. gateway or beyond the foreign gateway. This ability has figured significantly in carrier selection because it bears on both the economic viability of a carrier's proposal and the benefits it might bring passengers outside of the primary market.

3. Fare and Service Proposals

Carriers' fare and service proposals, to the extent they are credible, provide basic evidence as to the public benefits to be gained by selecting a particular applicant. Such public benefits include low or innovative fares, high frequency or capacity and a variety of service options. How the applicants' proposals compare with one another can bear directly on which carrier will be able to provide the greatest public benefits.

4. Incumbency

We have decided to apply a rebuttable presumption in favor of renewal of existing certificate authority. In cases where an incumbent carrier seeks to renew an international certificate in a limited-designation market, and where that carrier has performed well, taking into account all relevant factors (including fare and/or capacity restrictions in the market that have been imposed by foreign governments or bilateral agreements), there will be a presumption that the incumbent carrier will be the best applicant to provide service during the next five years. This presumption may be rebutted only upon a showing by a competitor that it will provide substantially superior service in the future. As a general matter, there will be no rebuttable presumption for incumbents which have substantially deviated from their fare and service proposals without adequate justification. We recognize that markets do change over time and that a carrier's deviation from its proposal may be justified, e.g., by changed economic circumstances in the market or governmental constraints.

This standard together with our rationale for adopting it are discussed in detail in the section setting forth our decision on certificate duration.

5. Ability To Enter a Market Quickly

Occasionally, in those cases where it is considered essential that service be inaugurated or resumed expeditiously, the ability of a carrier to enter the market quickly may be a factor to be considered in the selection process.

A fully detailed discussion of these criteria, along with a description of their historical development, can be found in the NPRM. While these criteria represent the major decisional elements in most selection cases, there may be other factors which the Department will wish to consider, depending on the particular circumstances of each proceeding.

6. Other Criteria Raised by Commenters

While most of the comments endorsed the criteria discussed in the NPRM, several raised issues dealing with specific selection criteria and the relative weight they should be afforded. One issue that was raised concerned the weight to be afforded arguments in a selection case concerning the reaction of foreign governments to the selection of a particular applicant, and the likelihood that the foreign government will accept the level of fares and frequencies that had been proposed. These questions are generally considered at the time that a particular case is instituted, and parties are advised at that time whether fares, frequency levels, projected capacity, or any other factors should be tailored to reflect our aviation relations with another country and/or whether such factors will be given less decisional weight for reasons of foreign aviation policy. Parties are free to consider the degree to which an applicant's fare or service proposal is realistic in light of the historic willingness of foreign governments to accept initiatives in these areas. On the other hand, we do not want to encourage parties in carrier selection cases to engage in speculative debates concerning the likelihood that future negotiations will yield changes in a foreign government's historic practices and attitudes regarding such issues as fare or capacity levels.

A second issue raised by the comments is whether the level of hub dominance resulting from the award of an international route should be considered in the selection process. Our view is that hub concentration is primarily an issue that the domestic market should address, and that our ability to respond to it through a single case dealing solely with international route authority is extremely limited. As a result, we can envision few circumstances where the degree of market share at a particular hub is so great as to make it of decisional consequence in the allocation of an international route. This is not to say that it does not play a role in other aspects of our analysis, such as market structure. We simply do not see it as an independent criterion in the ordinary case.

Another commenter stated that DOT should give greater weight to an applicant's ability to obtain support traffic behind the foreign gateway, as well its potential to divert traffic from the foreignflag service. The Board considered, and the Department will continue to consider, the support traffic which applicants can generate behind foreign points, insofar as it affects the viability of the proposed service by enlarging the revenue base of the carrier providing the primary market service. Furthermore, we are confident that our efforts to select the U.S. carrier that will be the most efficient and effective competitor will in fact have the effect of diverting traffic from foreign carrier competitors.

One commenter suggested that we should give priority to establishing new and interior gateways, and increasing the level of intergateway competition. New gateways are usually created as a result of bilateral negotiations, and not as part of the carrier selection process. However, we recognize that there are instances where we must select gateways from among competing proposals. In such cases, one of the criteria which has traditionally been afforded great weight has been the promotion of intergateway competition. This has resulted in the creation of new gateways in areas of the country which were previously unserved or underserved.

As a final matter, we note that the views of civic parties have historically been afforded substantial weight in decisions involving the selection of both carriers and gateways, and the Department fully intends to continue this policy in future selection cases.

List of Subjects in 14 CFR Parts 323 and 399

Administrative practice and procedure, Advertising, Air carriers, Antitrust, Archives and records, Consumer protection, Essential air service, Freight forwarders, Grant programs—transportation, Hawaii, Motor carriers, Puerto Rico, Railroads, Reporting and recordkeeping requirements, Travel agents, Virgin Islands.

Issued in Washington, DC on November 18, 1986.

Elizabeth Hanford Dole,

Secretary of Transportation.

In consideration of the foregoing, the Department of Transportation amends Parts 323 and 399 of its Regulations (14 CFR Parts 323 and 399) as follows:

PART 323—[AMENDED]

1. The authority citation for Part 323 is revised to read as follows:

Authority: 49 U.S.C. 1324, 1371, 1381 and 1389.

2. By amending the table of contents of Part 323 to add a new § 323.19 to read as follows:

Sec.

* * * * *

323.19 Withdrawal notice by exemption carriers in certain limited-entry markets.

3. By adding a new § 323.19 to read as follows:

§ 323.19 Withdrawal notice by exemption carriers in certain limited-entry markets.

As a condition on the exemption, an air carrier operating under exemption authority in an international market which is the subject of a carrier selection proceeding shall file a notice with the Department at least ninety days before it terminates service in that market. Once such a notice has been filed, the carrier may not terminate service in that market during the notice period unless the air carrier chosen in the selection proceeding enters the market and the Department grants the operating carrier permission to do so. The Department may allow earlier termination for good cause when in the public interest.

PART 399—[AMENDED]

4. The authority citation for Part 399 is revised to read as set forth below. All authorities shown for specific sections in Part 399 are removed.

Authority: 49 U.S.C. 1301, 1302, 1305, 1324, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1381, 1382, 1384, 1386, 1461, 1481, 1482, 1502 and 1504, unless otherwise noted.

5. By amending the table of contents of Part 399 to include a new Subpart K to read as follows:

Subpart K—Policies Relating to Certificate Duration

Sec.

399.120 Duration of certificates in limited-entry markets.

6. A new § 399.120 Subpart K is added to read as follows:

Subpart K—Policies Relating to Certificate Duration

§ 399.120 Duration of certificates in limited-entry markets.

All certificate authority that the Department grants to U.S. air carriers in carrier selection proceedings will be awarded in the form of experimental certificates of five years' duration pursuant to section 401(d)(8) of the Federal Aviation Act. This provision does not alter or amend permanent certificates issued prior to January 1, 1985.

[FR Doc. 86-26758 Filed 11-28-86; 8:45 am]

BILLING CODE 4910-62-M

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 24

[T.D. 86-205]

Ad Valorem User Fee; Amendments

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations.

SUMMARY: This document amends the Customs Regulations to implement a provision of the Omnibus Budget Reconciliation Act of 1986 which authorizes the Customs Service to assess a merchandise processing user fee on formal entries of imported merchandise. This ad valorem user fee, which is to be based on the appraised Customs value of the merchandise, does not apply to articles provided for in schedule 8 of the tariff schedules or to products of least developed developing countries, eligible countries under the Caribbean Basin Economic Recovery Act, or U.S. insular possessions. The proceeds of the user fees are to be deposited in a dedicated account of the Treasury and, subject to authorization and appropriation, are to be used to offset Customs appropriations for the salaries and expenses of Customs incurred in conducting commercial operations. The amendments are being made on an interim basis due to the limited period of time available to initiate these changes before the law becomes effective. However, any written comments received will be considered before a final rule is issued.

DATES: Interim regulations effective on December 1, 1986. Written comments must be received by January 30, 1987.

ADDRESS: Written comments (preferably in triplicate) should be submitted to and may be inspected at the Regulations Control Branch, Customs Services Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT:

Operational Aspects: Thomas Banner, Commercial Compliance Division, (202-566-4136).

Legal Aspects: Arthur I. Rettinger, Office of the Chief Counsel, (202-566-2482).

SUPPLEMENTARY INFORMATION:

Background

User Fees—History

Until recently, Customs had no general authority to collect fees for the processing of persons, aircraft, vehicles, vessels and merchandise arriving in or departing from the U.S. However, it has had authority under certain circumstances to charge fees, i.e., fees charged when providing preclearance of passengers and private aircraft when such services are of special benefit to particular persons. Customs also had been authorized to receive reimbursement from carriers for overtime services provided during non-business hours, and reimbursement from local authorities for services provided to certain small airports. Customs also has authority to assess fees on operators of bonded warehouses and foreign trade-zones and on the entry of vessels into ports. Further, Customs has authority to collect certain navigation fees specified in § 4.98, Customs Regulations (19 CFR 4.98).

The Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99-272) greatly extended Customs authority to assess fees. Section 13031 of Pub. L. 99-272 established a schedule of fees chargeable to users of various services provided by Customs in connection with the processing of persons, aircraft, vehicles, vessels and dutiable mail arriving in the U.S., as well as for the payment of an annual fee by customs brokers.

By T.D. 86-109, published in the **Federal Register** (51 FR 21152) on June 11, 1986, various parts of the Customs Regulations (19 CFR Chapter I), were amended on an interim basis to set forth the fees established by Pub. L. 99-272. The amendments were made on an interim basis due to the limited period of time available before the new law became effective. However, written comments were invited for consideration before final regulations are drafted. The numerous comments received have been analysed. However, by section 1893 of the Tax Reform Act of 1986 (Pub. L. 99-514), passed on October 22, 1986, several technical amendments were made to Pub. L. 99-272, and the effect of these legislative changes necessitates several changes to the interim regulations. The final regulations implementing these fees will appear as a separate document in the **Federal Register.** The document will describe the changes made as a result of the technical amendments and the comments.

Other amendments were made to Pub. L. 99-272 by the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99-509). Among these amendments is the establishment of an ad valorem user fee to be collected by Customs on formal entries of merchandise imported for consumption, or withdrawn from warehouse for consumption, beginning on December 1, 1986. This document sets forth interim regulations governing the ad valorem user fee.

Ad Valorem Fee

Section 8101 of Pub. L. 99-509 states that with certain exceptions, merchandise formally entered, or withdrawn from a warehouse, for consumption, is subject to an ad valorem fee based on the appraised customs value of the merchandise. The fee does not apply to informal entries of merchandise entered under the procedures set forth in § 143.21, Customs Regulations (19 CFR 143.21), and to merchandise which does not enter the commerce of the U.S. for consumption. The proceeds of the user fees are to be deposited in a dedicated account of the Treasury and, subject to authorization and appropriation, are to be used to offset Customs appropriations for the salaries and expenses of Customs incurred in conducting commercial operations.

Pursuant to section 8101, the fee that will be assessed is 0.22 percent ad valorem for merchandise formally entered, or withdrawn from a warehouse, for consumption, after November 30, 1986, and before October 1, 1987. After September 30, 1987, the fee will be 0.17 percent ad valorem or a lesser ad valorem rate determined by the Secretary of the Treasury as sufficient to provide the amount of revenue needed to conduct commercial operations for the upcoming fiscal year. The Secretary of the Treasury shall publish in the **Federal Register** the ad valorem rate for fiscal year 1988 by no later than the date that is 5 days after which funds are appropriated to Customs for salaries or expenses incurred in conducting commercial operations. The rate set shall apply for the processing of entries and withdrawals from warehouse for consumption made after the date that is 60 days after the date of such determination.

A slightly higher fee is assessed for the first 10 months of the ad valorem fee to ensure that there are adequate receipts to cover start-up costs and to cover any potential increases in the costs of Customs commercial operations. Unless reauthorized by Congress, fees are not to be charged after September 30, 1989.

Articles Not Subject to Fee

Pub. L. 99-509 provides that certain articles are to be exempt from the ad valorem fee. The exemptions are: (1) Articles provided for in schedule 8 of the Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202); (2) products of insular possessions of the U.S.; and (3) products of any country listed in General Headnote 3(e) (vi) or (vii), TSUS. General Headnote 3(e)(vi) lists least developed developing countries. General Headnote 3(e)(vii) lists beneficiary countries of the Caribbean Basin Economic Recovery Act (CBERA)(19 U.S.C. 2701 *et seq.*). The fee applies to all other articles, even if duty-free or eligible for tariff preference.

Other Specifics of Fee

The ad valorem fee is to be paid by the importer of record of the merchandise and shall be based on the value of the merchandise as determined under section 402, Tariff Act of 1930, (19 U.S.C. 1401a).

Charges imposed by the ad valorem user fee are considered to be charges or exactions within the meaning of section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514). As such, they are final and conclusive upon all persons unless a protest is filed in accordance with the procedures set forth in Part 174, Customs Regulations (19 CFR Part 174).

Comments

Customs realizes that this document does not answer all questions pertaining to collection of the ad valorem user fee. Because of the limited time available to draft these regulations before the statutory effective date, the regulations basically follow the statutory language of Pub. L. 99-509. Additional regulations and directives will be prepared and disseminated as soon as possible. Comments are requested on the conforming or clarifying regulatory changes needed as a result of the statute or these interim regulations.

Before adopting the interim regulations as a final rule, Customs will give consideration to any written comments (preferably in triplicate) timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, DC 20229.

Inapplicability of Notice and Delayed Effective Date Provisions

The statutory effective date for collection of the ad valorem user fee is December 1, 1986. In light of the limited deadline imposed upon Customs to implement these changes, it has been determined that, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure is impracticable. For the same reason, pursuant to 5 U.S.C. 553(d)(3), we are dispensing with a delayed effective date. However, before adopting final regulations, consideration will be given to all written comments timely submitted.

E.O. 12291 and Regulatory Flexibility Act

Because the amendments do not meet the criteria for a "major rule" within the meaning of section 1(b) of E.O. 12291, Customs has not prepared a regulatory impact analysis.

Because no notice of proposed rulemaking is required for these interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq .) do not apply.

Paperwork Reduction Act

No new recordkeeping or data collection burdens are imposed upon the public as a result of this amendment. Accordingly, it is not subject to the Paperwork Reduction Act of 1980, Pub. L. 96-511.

List of Subjects in 19 CFR Part 24

Accounting, Taxes.

Drafting Information

The principal author of this document was Harold M. Singer, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

Amendments to the Regulations

Part 24, Customs Regulations (19 CFR Part 24), is amended as set forth below:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority for Part 24, Customs Regulations, is amended by adding the following citation to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624, 31 U.S.C. 9701.

Section 24.23 also issued under Pub. L. 99-272, Pub. L. 99-509; * * *.

2. Part 24 is amended by adding a new § 24.23 to read as follows:

§ 24.23 Ad valorem fee.

(a) *Fee.* Except for those types listed in paragraph (b), merchandise formally entered or withdrawn from a warehouse, for consumption, is subject to the payment to Customs of an ad valorem fee of 0.22 percent from December 1, 1986, through September 30, 1987. For the fiscal year beginning October 1, 1987, the fee will be the lesser of 0.17 percent ad valorem or an ad valorem rate provided by the Secretary of the Treasury pursuant to section 8101(a) of the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99-509). The fee for the fiscal year beginning on October I, 1987, will be published in the **Federal Register**. The fee shall be based on the value of the merchandise as determined under section 402, Tariff Act of 1930 (19 U.S.C. 1401a).

(b) *Exemptions.* The following articles are not subject to the ad valorem fee:

(1) Articles provided for in schedule 8, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202).

(2) Products of insular possessions of the U.S.(General Headnote 3(a), TSUS).

(3) Products of beneficiary countries of the Caribbean Basin Economic Recovery Act. (General Headnote 3(e)(vii), TSUS.)

(4) Products of least developed developing countries. (General Headnote 3(e)(vi), TSUS.)

(c) *Payment.* The fee shall be due and payable to Customs by the importer of record of the merchandise at the time of deposit of estimated duties.

Michael Schmitz,

Acting Commissioner of Customs.

Approved: November 25, 1986.

Michael H. Lane,

Acting Assistant Secretary of the Treasury.

[FR Doc. 86-26891 Filed 11-28-86; 8:45 am]

BILLING CODE 4820-02-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 177

[Docket No. 86F-0307]

Indirect Food Additives: Polymers

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of vinylidene fluoride-hexafluoropropene copolymer as an adjuvant in the production of olefin polymers intended to contact food. This action responds to a petition filed by Minnesota Mining & Manufacturing Co.

DATES: Effective December 1, 1986; objections by December 31, 1986. The Director of the Office of the Federal Register approves the incorporation by reference of certain publications at 21 CFR 177.1520, effective December 1, 1986.

ADDRESS: Written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Vir Anand, Center for Food Safety and Applied Nutrition (HFF-335), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-472-5690.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of August 19, 1986 (51 FR 29613), FDA announced that a petition (FAP 6B3902) had been filed by Minnesota Mining & Manufacturing Co., 3M Center, St. Paul, MN 55144, proposing that § 177.1520 *Olefin polymers* (21 CFR 177.1520) be amended to provide for the safe use of vinylidene fluoride-hexafluoropropene copolymer as an adjuvant (extrusion aid) in the production of olefin polymers intended to contact food.

FDA has evaluated data in the petition and other relevant material. The agency concludes that the proposed use of this food additive is safe, and that the regulations should be amended as set forth below.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition (address above) by appointment with the information contact person listed above. As provided in 21 CFR 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

The agency has carefully considered the potential environmental effects of this action and has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. This action was considered under FDA's final rule implementing the National Environmental Policy Act (21 CFR Part 25).

Any person who will be adversely affected by this regulation may at any time on or before December 31, 1986, file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 177

Food additives, Food packaging, Incorporation by reference.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director of the Center for Food Safety and Applied Nutrition, Part 177 is amended as follows:

PART 177—INDIRECT FOOD ADDITIVES: POLYMERS

1. The authority citation for 21 CFR Part 177 continues to read as follows:

Authority: Secs. 201(s), 409, 72 Stat. 1784–1788 as amended (21 U.S.C. 321(s), 348); 21 CFR 5.10 and 5.61.

2. Section 177.1520 is amended in paragraph (b) by alphabetically inserting a new item in the list of substances to read as follows:

§ 177.1520 Olefin polymers.

* * * * *

(b) * * *

Substances	Limitations
* * *	* *
Vinylidene fluoride-hexafluoropropene copolymer (CAS Reg. No. 9011-17-0) having a fluorine content of 65 to 66 percent and a Mooney viscosity of 28 to 38, as determined by a method entitled "Mooney Viscosity," which is incorporated by reference. Copies are available from the Division of Food and Color Additives, Center for Food Safety and Applied Nutrition (HFF-330), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, or may be examined at the Office of the Federal Register, 1100 L St. NW., Washington, DC 20408.	For use only as an extrusion aid in the production of extruded olefin polymers at levels not to exceed 0.1 percent by weight of the polymer. The finished polymers may be used only in contact with nonalcoholic foods under the conditions described in § 176.170(c) of this chapter, table 2, under conditions of use B through H.

* * * * *

Dated: November 5, 1986.

Richard J. Ronk,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 86-26478 Filed 11-28-86; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 4a

[T.D. 8108]

Temporary Income Tax Regulations Relating to Source of Income; Source of Interest and Dividends

AGENCY: Internal Revenue Service, Treasury.

ACTION: Removal of temporary regulations.

SUMMARY: This document removes Temporary Income Tax Regulations Relating to Source of Income published in the **Federal Register** on December 29, 1982 (47 FR 57919) concerning special rules for determining source of interest derived from resident alien individuals and domestic corporations and the source of dividends derived from domestic corporations.

DATES: The removal of the temporary regulations at § 4a.861-1 is effective December 31, 1986.

FOR FURTHER INFORMATION CONTACT: Richard Chewning of the Office of Associate Chief Counsel (International), within the Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224 (Attention: CC:LR:T) (202-566-6384, not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

This document removes Temporary Income Tax Regulations Relating to Source of Income (26 CFR Part 4a) at § 4a.861-1 (T.D. 7865) published in the **Federal Register** on December 29, 1982 (47 FR 57919). The temporary regulations are being removed because they have been mooted by amendment of section 881(b) by section 130(a) of the Tax Reform Act of 1984. Section 881(b), as amended, provides generally that passive income paid from U.S. sources to a corporation organized in Guam or the Virgin Islands will be subject to U.S. tax if 25% or more in value of the corporation's stock is owned by foreign persons and if less than 20% of the recipient corporation's income is from Guam or Virgin Islands sources (as the case may be).

The notice of proposed rulemaking (INTL-64-86) published in the **Federal Register** on December 29, 1982 (47 FR 57972) which pertains to this subject is being withdrawn.

Nonapplicability of Executive Order 12291

The Treasury Department has determined that removal of these temporary regulations is not subject to review under Executive Order 12291. Accordingly, a Regulatory Impact Analysis is not required.

Regulatory Flexibility Act

A general notice of proposed rulemaking is not required by 5 U.S.C. 553(b) for removal of temporary regulations. Accordingly, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply and no Regulatory Flexibility Analysis is required.

Drafting Information

The principal author of this removal of temporary Income Tax Regulations is Richard Chewning of the Office of Associate Chief Counsel (International), within the Office of Chief Counsel, Internal Revenue Service. Personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations.

List of Subjects in 26 CFR Part 4a

Income taxes, Sources of income.

Adoption of Amendments to the Regulations

The Temporary Income Tax Regulations Relating to Source of Income (26 CFR Part 4a) are amended as follows:

Paragraph 1. The authority citation for Part 4a continues to read in part:

Authority: 26 U.S.C. 7805.

PART 4a—TEMPORARY INCOME TAX REGULATIONS RELATING TO SOURCE OF INCOME

PART 4a—[REMOVED]

Par. 2. Part 4a is removed.

Approved:

Roscoe L. Egger, Jr.,

Commissioner of Internal Revenue.

J. Roger Mentz,

Assistant Secretary of the Treasury.

November 15, 1986.

[FR Doc. 86-26909 Filed 11-28-86; 8:45 am]

BILLING CODE 4830-01-M

Bureau of Alcohol, Tobacco and Firearms

27 CFR Parts 270, 275, 290, 295, and 296

[T.D. ATF-243]

Implementing the Consolidated Omnibus Budget Reconciliation Act of 1985 (Public Law 99-272)

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF), Treasury.

ACTION: Final rule (Treasury decision).

SUMMARY: This final rule implements Title XIII, Subtitle B of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99-272, 100 Stat. 311).

This document amends temporary regulations (T.D. ATF-232, 51 FR 28078) in 27 CFR Parts 270, 275, 290, 295, and 296 which provided for the taxation and regulation of chewing tobacco and snuff pursuant to Pub. L. 99-272. In addition, detailed rules for the grandfathering of existing manufacturers of chewing tobacco and snuff into the current regulatory framework for other tobacco products were provided.

EFFECTIVE DATE: December 31, 1986.

FOR FURTHER INFORMATION CONTACT: Nancy Cook or Clifford A. Mullen,