F9. Employee Discipline Policy—TVA Code III Employee Discipline.

CONTACT PERSON FOR MORE INFORMATION: Alan Carmichael, Manager of Public Affairs, or a member of his staff can respond to requests for information about this meeting. Call (615) 632–8000, Knoxville, Tennessee. Information is also available at TVA's Washington Office (202) 479–4412.

Dated: June 14, 1989.

Edward S. Christenbury,

General Counsel and Secretary.

[FR Doc. 89–14542 Filed 6–15–89; 10:07 am]

BILLING CODE 8120-01-M

Corrections

Federal Register
Vol. 54, No. 116
Monday, June 19, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Federal Grain Inspection Service

7 CFR Part 810

United States Standards for Wheat

Correction

In proposed rule document 89-13397 beginning on page 24176 in the issue of Tuesday, June 6, 1989, make the following corrections:

§ 10.2202 [Corrected]

1. On page 24177, in the third column, in § 810.2202 (a)(6)(ii), in the fourth line, "white club wheat" should read "other soft white wheats".

2. On the same page, in the same column, in § 810.2202 (a)(6)(iii), in the third line, "other soft white wheats" should read "white club wheat".

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

[OPP-34002; FRL 3575-9]

Pesticides Required To Be Reregistered; List B

Correction

In notice document 89-12572 beginning on page 22706 in the issue of Thursday, May 25, 1989, make the following correction:

On page 22706, in the first column, under **FOR FURTHER INFORMATION CONTACT**, in the third line, "(H7500SC)" should read "(H7508C)".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 89-AGL-9]

Proposed Alteration of VOR Federal Airway; Illinois

Correction

In proposed rule document 89-12430 beginning on page 22447 in the issue of Wednesday, May 24, 1989, make the following correction:

On page 22447, in the third column, in the document heading, the docket number was incorrect and should read as set forth above.

BILLING CODE 1505-01-D

federal register

Monday
June 19, 1989

Part II

Department of Transportation

Research and Special Programs Administration

49 CFR Parts 171 and 175

Detailed Hazardous Materials Incident Reports; Final Rule

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171 and 175

[Docket No. HM-36B; Amdt. Nos. 171-101, 175-43]

RIN 2137-AA51

Detailed Hazardous Materials Incident Reports

AGENCY: Research and Special Programs Administration (RSPA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: These amendments implement several changes to RSPA's system for collecting information on incidents involving the transportation of hazardous materials. Briefly, these amendments:

1. Revise the hazardous materials incident report form—DOT F 5800.1—to provide more meaningful and comprehensive incident data, especially in terms of incident causation and consequence;

2. Require carriers to maintain a copy of the incident report forms submitted to RSPA for a period of two years;

3. Require an incident report form to be submitted to RSPA within 30 days of the date of the incident (the current reporting requirement is 15 days);

4. Expand the present requirement that RSPA be notified of certain events including evacuations, closure of major transportation arteries or facilities, unscheduled events involving aircraft transporting hazardous materials, and fires associated with shipments of radioactive materials.

5. Clarify the present requirement that RSPA be notified of certain events involving radioactive materials and etiological agents.

6. Require all carriers involved in a hazardous materials incident to provide assistance to an authorized representative of the Department of Transportation (DOT) in any subsequent investigations or special studies which DOT might undertake in connection with the incident.

EFFECTIVE DATE: January 1, 1990. The current (DOT F. 5800.1) form may be continued in use until the effective date of this rule. However, compliance with the regulations as amended is authorized immediately.

FOR FURTHER INFORMATION CONTACT: Joseph S. Nalevanko, (202) 366-4484, Policy Development and Information Systems Division, or Marilyn E. Morris, (202) 366-4488, Standards Division, Office of Hazardous Materials Transportation, 400 7th Street SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION: On March 16, 1984, RSPA published an advance notice of proposed rulemaking (ANPRM) in the **Federal Register** (49 FR 10048) which proposed to change the hazardous materials incident reporting requirements. On March 27, 1987, RSPA published a notice of proposed rulemaking (NPRM) in the **Federal Register** (52 FR 9996) inviting comments on several specific proposed changes to its system of collecting information on incidents involving the transportation of hazardous materials. These changes are intended to enhance the value of the incident report form (DOT F 5800.1) as a means for the DOT to evaluate the effectiveness of its regulatory program, and to determine the need for regulatory changes to address new or emerging hazardous materials transportation safety problems. It is also intended to facilitate and enhance the ease of completing the hazardous materials incident report form for those who are required to submit this form to DOT.

In response to the NPRM, RSPA received written comments from two government agencies and 13 members of the public. All comments have been considered in preparing this final rule. Significant changes in this final rule from the proposals published in the NPRM are discussed in detail below. Information contained in the Supplementary Information section of the ANPRM and NPRM is hereby incorporated in this final rule by reference, except as it may be superseded herein. The public reporting burden for this collection of information is estimated to average one hour per response, including the time for reviewing instructions and existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: Information Systems Manager, Office of Hazardous Materials Transportation, DHM-63, Research and Special Programs Administration, U.S. Department of Transportation, 400 7th Street SW., Washington, DC 20590; and to the Office of Management and Budget (OMB), Paperwork Reduction Project (2137-0039), Washington, DC 20503.

Summary of Changes From NPRM

In response to the comments received and reviewed by RSPA, the final rule reflects several changes to the proposals contained in the NPRM.

Section 171.15 Immediate Notice of Certain Hazardous Materials Incidents

The NPRM had proposed to amend § 171.15 (and § 175.45 concerning incidents involving aircraft) to include three additional criteria for the immediate (i.e., telephonic) notification of the Department of certain types of hazardous materials incidents.

The first of the criteria pertains to incidents involving the evacuation of one or more properties adjacent to the property on which the incident occurs. One commenter found the language of this proposed reporting requirement to be ambiguous. This commenter stated that an "airport is usually a contiguous property of many square miles and would presumably, therefore, not require the notification if evacuated," i.e., if people in one area of an airport were evacuated to another area of the airport, the notification presumably would not be required. In response to this comment, paragraph (a)(6) of § 171.15 has been reworded to eliminate references to adjacent properties. The language of the proposed rule implied incorrectly that the Department need not be immediately notified of incidents where, for example, the general public in one area of an airport were evacuated to another area of the airport, or even of instances in which people are evacuated from an airport to property or properties adjacent to the airport that, in turn, are not evacuated. This final rule clarifies that paragraph (a)(6) applies only to incidents resulting in evacuations of the general public that are the direct result of hazardous materials. The purpose of limiting the scope of this reporting requirement to evacuations of the general public is to preclude the reporting of events wherein the initial response of either emergency response or supervisory personnel is to clear an area until the presence and the nature of a hazardous material is identified and the scope of the public risk is more adequately defined. Several commenters suggested that this safety purpose could be more effectively accomplished by limiting the reporting requirement to evacuations lasting a certain length of time. RSPA agrees with these comments and has accordingly modified the reporting requirement to accommodate them. Incidents involving evacuations of the general public with a duration of less than one hour will not require the immediate notification of the Department. It should be noted that, as written, the final rule does not require the immediate notification of the Department if members of the general public are evacuated from an area on

the erroneous assumption that a hazardous material is present or involved, even if the duration of the evacuation exceeds one hour.

A number of commenters objected to the requirement that the Department be given immediate notification of incidents involving evacuations where there is no release or spill of a hazardous material. The basis for this objection is summarized by one commenter who noted that:

> * * * local officials often order evacuations when no threat of physical injury or property damage exists. Evacuations are frequently ordered out of an abundance of caution. For example, an evacuation is usually ordered when a train derails containing hazardous materials, even if no hazardous material is released as a result of the derailment. The decision to evacuate, while understandable from the perspective of local officials, is not sufficiently related to safety issues to require carriers to satisfy the notification requirement contained in the proposed rule, § 171.15(a)(6).

RSPA does not agree with this line of reasoning. The Department's need to be immediately informed of certain types of evacuations does not depend on whether, in hindsight, a particular decision to evacuate an area was disproportionate to the actual risks involved in an incident. As pointed out in the Department's Emergency Response Guidebook (Guidebook for Initial Response to Hazard Materials Incidents, DOT P 5800.4), an "evacuation is, by itself, a process of significant risk for the persons being evacuated." The risk associated with a hazardous materials incident is directly related to the probability of the release or spill of the material and the number of people exposed to the release or spill. When a tank car or a cargo tank truck overturns, the probability of a release of the hazardous material is certainly greater than otherwise, and the risk associated with such events can be reduced if the number of people exposed to the potential release of the material is also reduced (i.e., by means of an evacuation). Finally, RSPA finds no merit in the argument that evacuations are never warranted unless there has been an actual release of a hazardous material. A tank car carrying a flammable gas can for a time be engulfed by fire and still not leak; but certainly an evacuation would be appropriate in such a situation. Therefore, RSPA cannot accept the suggestion that the reporting requirement for evacuations be limited only to instances in which there has been an actual release of the hazardous material.

The NPRM proposed to amend § 171.15 to require the immediate notification of the Department for all incidents involving the closure or shutdown of one or more major transportation arteries or facilities for one hour or more. The phrase "major transportation arteries or facilities" includes, at the minimum, segments of interstate highways; bridges or tunnels providing access to interstate highways; airports where scheduled passenger operations are conducted; commercially navigable waterways; and railroad mainline track. Several commenters opposed this reporting criterion on the grounds that it is unduly broad and unnecessary from a safety standpoint, especially if no release or spill of a hazardous materials occurs. RSPA believes that there are significant safety concerns involved in decisions to shut down or close major transportation arteries and facilities that are the direct result of hazardous materials. Some of the more obvious safety concerns involved with the shut down or closure of major transportation arteries and facilities are: The prevention of the general public from entering the area affected by the incident; diversions and delays in the routing of other hazardous materials; and the fact that incidents that result in the shut down of major transportation arteries or facilities are, by their very nature, more severe and entail greater public safety concerns than incidents that do not result in such disruptions. These safety concerns are not definable solely in terms of whether or not there has been a release of hazardous materials. Even for incidents involving fatalities or injuries it is not necessarily the case that such incidents entail the involuntary release of the hazardous material from its container. People have been killed or injured while cleaning tanks that contained hazardous materials or by opening domes or manholes of cargo tanks and tank cars containing hazardous materials. These are incidents that may not entail the unintentional release of the hazardous material.

One commenter objected to the reporting criterion on the grounds that it would require "a rail carrier to immediately report practically every derailment because a rail line is often closed for more than an hour when a train derails." This objection is apparently based on a misreading of § 171.15(a). While it is true that derailments almost always result in rail lines being closed for more than an hour solely because of the safety concerns and mechanical problems involved with clearing the track, it is not always the case that rail lines are closed "as the direct result of hazardous materials". If a rail line is closed as the direct result of hazardous materials for less than an hour, then carriers are not required to immediately notify the Department even if hazardous materials are present, unless other reporting criteria require such notification.

The NPRM had proposed to amend § 171.15 to require the immediate notification of the Department for all incidents involving deviation of an aircraft from its planned course or its scheduled landing. The only comment received on this reporting criterion pointed out that the criterion should also pertain to flights that are terminated before take-off (i.e., a turnaround) due to hazardous materials, and to certain other events, such as flights declaring an emergency due to hazardous materials, even though a flight did not deviate from its planned route, or entail an unscheduled landing. RSPA agrees, and has changed this reporting requirement to pertain to all incidents in which as a direct result of hazardous materials, the operational flight pattern or routine of an aircraft is altered.

In reviewing the comments received in response to the proposed changes to § 171.15 (and § 175.45), RSPA believes the distinction should be clarified between incidents in which something happens as a direct result of hazardous materials (e.g., a death caused by exposure to a hazardous materials) and two other types of incidents. These are incidents in which either something happens to the hazardous material itself such as its being spilled or something occurs in the presence of the hazardous material such as the occurrence of a fire.

Concerning the occurrence of fires and the presence of radioactive materials, § 171.15(a)(4) as presently worded requires the immediate notification of the Department for "each incident * * * in which as a direct result of hazardous materials: * * * fire, breakage, spillage, or suspected radioactive contamination occurs involving shipment of radioactive material." In the case of fires this reporting requirement can be incorrectly interpreted as applying only to instances in which a hazardous material (which may not be a radioactive material) has caused a fire, i.e., the fire is a direct result of a hazardous material. The Department must be immediately notified regardless of whether or not the fire, or breakage, or spillage, or suspected radioactive contamination is the direct result of a hazardous material. In light of these considerations, which also apply to incidents involving etiologic agents, § 171.15 has been

reworded to clarify its intended scope and coverage.

Section 171.16 Detailed Hazardous Materials Incident Reports

The NPRM proposed to revise the hazardous materials incident report form—DOT F 5800.1—to provide more meaningful and comprehensive data on incidents, especially in terms of causation and consequence factors. In general, the proposed revision of the report form was designed to retain as many features as possible of the current report form, not only because many of the data fields on the current report form are essential, but also because of the wide experience and familiarity the industry has with this form. The improvement in the analytic usefulness of the form was accomplished by carefully and more logically reorganiziang data fields and by providing a much broader array of choices to be marked as factors that best describe the nature of the incident. In the past, this type of information was largely provided by carriers who submitted lengthy narrative descriptions of the incident. RSPA believes that this change to the report form will significantly facilitate the completion of the form, provide a more systematic description of the incident, and decrease the time and effort involved in entering the information into RSPA's computerized incident data base. With one exception, all commenters favored a revision of the current incident report form.

A number of commenters suggested that several new data fields be added to the report form and that other proposed and existing data fields be clarified. These suggestions have been carefully evaluated and, where appropriate, have been incorporated into the report form (exhibit #1) and discussed in the guidance document for preparing the form (exhibit #2). For example, the new report form now requires those submitting the form to check the appropriate block that best describes the land use and the type of community at the site of the incident. On the other hand, the proposed data field pertaining to the estimated ambient temperature at the time of the incident has been deleted from the report form. RSPA believes that such estimates are not likely to be very accurate and will be duplicated by information requested elsewhere on the report form (e.g., instances of package failures due to heat or freezing).

Many commenters took exception to the proposed requirement that copies of other required reports be submitted to RSPA along with the incident report form. RSPA agrees and has deleted the requirement accordingly. This action, however, does not affect the current requirement in § 171.16(a)(1) that a copy of the hazardous waste manifest be attached to the incident report form when the incident involves a hazardous waste; nor does it affect the current requirement in § 175.45(c) that, for incidents involving aircraft, a separate copy of the incident report form be sent to the FAA Civil Aviation Security Office nearest the incident.

The NPRM proposed to require that photographs be taken of the damage to packaging and accompany all report forms for all incidents resulting in a fatality or an injury requiring hospitalization caused by the release of a hazardous material from bulk packaging such as portable tanks, cargo tanks, rail tank cars (see § 171.8 for a precise definition of "bulk packaging"). Two commenters opposed this requirement. The American Trucking Association, Inc. (ATA) urged that photographs of incidents be furnished at the option of the carrier; the National Tank Truck Carriers Inc., (NTTC) believed that the proposed requirement that carriers assist the Department in any investigation or special studies relating to an incident (see discussion on § 171.21, *infra.*) would provide a better means for obtaining information on how a package failed than that provided by a photograph.

In light of these comments, RSPA has decided to retain the present language on the current incident report form that photographs and diagrams of the particulars of an incident should be, but are not required to be, submitted for clarification along with the report form itself.

Several commenters urged that RSPA give consideration to incorporating into Part 171 of 49 CFR, a specific set of instructions for completing Form 5800.1, in a manner similar to 49 CFR 394.20, which provides instructions for the preparation of the Motor Carrier Accident Report form MCS–50T. This suggestion has not been accepted. Currently, RSPA publishes a detailed, seven-page document entitled "Guidelines for Preparing Hazardous Materials Incident Reports." This guide is intended to assist carriers in accurately completing the hazardous materials incident report, Form 5800.1, and is available to the public upon request to the RSPA. In conjunction with this rulemaking, the guide has been extensively revised and expanded (see exhibit #2). RSPA's experience has shown that possible future revisions, clarifications and additional instructional assistance in completing the incident report form are more easily accommodated and accomplished through a guidelines document than by incorporating such material into the body of the regulations. However, an informational note has been added at the end of § 171.16 to advise interested persons as to the availability of the guidelines free of charge upon request to RSPA.

The NPRM proposed that the current 15-day period for submitting incident report forms be increased to 30 days in order to provide more time to gather data and complete the report form as accurately as possible. Generally, commenters were either silent about this proposal or were in support of it. One commenter, however, urged RSPA to clarify the requirement that the information to be submitted within 30 days of the date of the incident be the best information available within 30 days. RSPA has not accepted this comment. Information that can reasonably be expected to be available within 30 days is, by definition, the best information available. No useful purpose is served by creating an implied distinction between the best information available and information that is less than the best. It is true that better information on the consequences of an incident, especially in terms of health effects or the estimated dollar amount of damage, may become available after 30 days. But RSPA has not proposed a requirement that carriers monitor the consequences of an incident beyond 30 days and subsequently submit this information to RSPA even though carriers on their own initiative may wish, and are encouraged, to do so.

This final rule also reflects two further revisions to § 171.16. The phrase "as a direct result of hazardous materials" has been deleted from § 171.16(a) as no longer applicable in view of the need to distinguish between incidents and consequences which are the "direct result of hazardous materials" and incidents involving the mere presence of hazardous materials. Section 171.16(a)(2) has been changed to reflect the fact that Part H of the current report (Form F 5800.1) has become section VIII in the revised report form.

The comments relating to the proposed change to § 171.16 concerning the requirement that carriers maintain a copy of each incident report for a period of two years are reviewed in the discussion under § 171.21 below, because this record retention requirement is related to the requirements of that section.

Section 171.21 Assistance in Investigations and Special Studies

As proposed in the NPRM, paragraph (a) of § 171.21 would require that hazardous materials carriers make all records and information pertaining to any incident available, upon request, to an authorized representative of the Department of Transportation. Further, under this paragraph, a carrier of hazardous materials is required to give an authorized representative or special agent of the Department all reasonable assistance in the investigation of any incident. One commenter expressed concern about the interpretation of the phrase "reasonable assistance," pointing out that it is possible that a carrier's understanding of this phrase could differ from that of the representative or agent of the Department. In order to avoid such differences of opinion, the commenter suggested that paragraph (a) of § 171.21 be limited to the requirement that carriers make any existing records available to authorized representatives of the Department. RSPA has not accepted this comment. The language of § 171.21 is virtually identical to the language of § 394.15 of the Federal Motor Carrier Safety Regulations (49 CFR Parts 390–397). Section 394.15 has been in force for a number of years, and the Federal Highway Administration (FHWA) reports that the interpretation of the term "reasonable assistance" has not been a source of contention between the FHWA and motor carriers subject to its jurisdiction. Moreover, the requirement establishes a "reasonableness" test which has wide currency and broad judicial acceptance concerning matters that cannot be specified in advance.

As proposed in the NPRM, under paragraph (b)(1) of § 171.21, carriers would be required to respond with 15 days, or within such other time as specified by the Department, to inquiries by the Department in connection with any Department studies of hazardous material incidents. A number of commenters urged that this paragraph be changed to permit a 30-day or longer response period. These commenters point to the possibility that a carrier might be unable to respond to such an inquiry within 15 days, especially if the inquiry involved a large number of documents. RSPA believes that the proposed 15 day limitation could be too restrictive, and a 30 day period has been adopted in the final rule.

Since the incident report forms will be of significant importance in any investigations or special studies conducted by the Department under § 171.21, the NPRM had proposed to revise § 171.16 to require all carriers to maintain a copy at their principal places of business of each incident report form submitted to the Department for a period of two years. The American Trucking Association (ATA) was joined by another commenter in taking strong exception to this proposed requirement on the grounds that this imposes an unreasonable paperwork burden on carriers, that the absence of such a requirement in the current regulations has created no apparent problem, that the retention of the incident report form by the carrier serves no useful purpose to the carrier or to the Department, and that the requirement results in the duplication of information. RSPA disagrees with these comments for several reasons.

First, regarding the paperwork burden on carriers, in general, given that failure to comply with the hazardous materials incident reporting requirements can result in a civil penalty, it is doubtful that prudent carriers would not keep copies of the reports they submit to the Department in their own files. Moreover, 49 CFR 394.13 requires motor carriers to maintain "* * * a copy of each report that the carrier has filed pursuant to § 394.9, with a state agency, or with an insurer, with respect to any reportable accident entered in the accident register." Some of these accident reports will also entail hazardous materials incidents that are required to be kept by motor carriers under § 394.13(c) for a period of three years. It should also be noted that the Federal Railroad Administration (FRA) requires each railroad to maintain a duplicate of each form it submits to the FRA under 49 CFR 225.21 for at least two years.

Second, § 171.16 requires that the hazardous materials incident report form be provided to the Department in duplicate. The incremental paperwork burden of a carrier's preparing the incident report form in triplicate, with one copy for the carrier's own records, is minimal.

Third, hazardous materials incident report forms can be and have been used as evidence in court. RSPA does not believe that carriers can or would be content with the idea that RSPA be the sole possessor of such records. This disposes of the claim that the retention of the incident report form by the carrier is of no use to the carrier, even apart from the insight and benefit a carrier can derive from studying its own record of hazardous materials incidents.

Fourth, the contention that the absence of a record retention requirement in the current regulations has created no apparent problems is beside the point; it is precisely to prevent future problems, especially in terms of the enforceability of § 171.21, that is the principal reason for the record retention requirement. Without such a requirement, the investigations and special studies envisioned in § 171.21 would be very difficult, if not impossible, to implement. This requirement will also aid in the verification of the accuracy of the reports submitted to RSPA, thus demonstrating that the requirement is not only useful, but necessary.

Finally, while the requirement does result in a duplication of information, this duplication has the result of increasing the availability and accessibility of information. It does not duplicate efforts to obtain information.

As proposed in the NPRM, a copy of each incident report was to be retained at the carrier's principal place of business. However, as pointed out by the ATA, under 49 CFR 394.13, motor carriers may maintain their accident registers at regional or terminal offices, upon written request to, and with the approval of, Director, Regional Motor Carrier Safety, FHWA. At the urging of the ATA, RSPA has modified the requirement that a copy of the incident report form be retained at the carrier's principal place of business to include "other places as authorized and approved in writing by an agency of the Department of Transportation."

Additional Public Comments

In response to the NPRM, RSPA also received a number of comments on issues which, although they concern RSPA's Hazardous Materials Information System (HMIS), were either fully discussed and resolved in the preamble to the NPRM or were not the subject of any particular proposed amendments in the NPRM. Although it is not obligated to respond to such comments, RSPA believes that the acknowledgment and a short discussion of these comments are worthwhile.

The Air Transport Association of America commented that the NPRM included no proposal to exempt air carriers from the current requirement under paragraphs (c) and (d) of § 171.16 to report a hazardous material incident involving a consumer commodity; a battery, electric storage, wet, filled with acid or alkali; or paint and paint-related material when shipped in packagings of five gallons or less. This commenter could find no justification that supports the "continued requirements to report incidents that occur aboard aircraft which under all other circumstances

DOT clearly believes to be trivial." In response to these comments, RSPA notes that the exception provided by paragraphs (c) and (d) of § 171.16 does not apply to incidents involving the transportation of hazardous waste. Also, RSPA believes that there is a fundamental difference in the risk of transporting hazardous materials aboard aircraft versus other modes of transportation. A simple, but non-trivial, instance of this difference is illustrated by the fact that, generally, unlike a truck driver, a pilot cannot simply stop his vehicle to determine what is causing the smoke or fumes emitting from the cargo hold. Moreover, the rapidity with which pressure and temperature changes can occur aboard aircraft is vastly different from what can occur aboard vehicles and vessels in surface transportation.

The Association of American Railroads (AAR), in connection with the requirement in § 171.15 that carriers report certain hazardous materials incidents by telephone at the earliest possible moment, noted that:

> * * * for certain incidents two phone calls have to be made, to RSPA (49 CFR 171.15) and the National Response Center (40 CFR 300.37), and the Federal Railroad Administration and the National Transportation Safety Board (49 CFR 225.9 and 840.3). FRA and NTSB have coordinated their requirements so that only one phone call has to be made to satisfy their requirements, although their actual notification requirements are independent of each other. Similarly, RSPA and EPA have coordinated their requirements so that only one phone call has to be made to satisfy their requirements, although their requirements are also independent of each other. We see no reason why RSPA, NTSB, FRA, and NRC cannot develop one set of notification requirements for transportation incidents.

These comments are well taken, and RSPA, as time and response permit, will explore the feasibility of a "one call" notification system under § 171.15 which would simplify the carrier notification requirements.

The National Tank Truck Carriers, Inc. (NTTC) has commented on two issues that were discussed in the preamble of the NPRM. The first issue pertains to the requirement in § 171.15(a) to report all unintentional releases of hazardous materials, regardless of the amount of the material released. The NTTC believes the RSPA should establish "a minimum product loss amount threshold to trigger" this reporting requirement. RSPA does not agree. Essentially, as explained in the preamble to the NPRM, such a reporting requirement would severely diminish the usefulness of the hazardous materials incident reporting system. The second issue raised by the NTTC pertains to the question of who is responsible for reporting incidents occurring during loading/unloading operations that are directed by or under the control of shippers or consignees. It is the carrier who is required to report each incident that occurs during the course of transportation (including loading, unloading, and storage incidental thereto), regardless of who is in control of the loading/unloading operations. However, the reporting requirement does not apply if the carrier is not physically present at the site of the incident (and not required to be) and has no knowledge of the incident ("knowledge" is defined in 49 CFR 107.299).

The ATA commented that the incident report form—DOT F 5800.1—provides information that is of value to DOT as well as to carriers, shippers, and container manufacturers, and urged RSPA to make this information more available to the public in terms of increased published reports and analyses based on the incident reports it receives. Currently, RSPA publishes an annual report on hazardous materials transportation which, among other things, provides summary statistics on hazardous materials transportation incidents. RSPA will also soon be publishing a separate document devoted entirely to the presentation of statistics on hazardous materials transportation incidents.

Administrative Notices

a. *Paperwork Reduction Act.* The information collection requirements contained in this rule were submitted for approval to OMB under provision of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35). The information collection requirements in the final rule were approved by OMB and assigned control number —.

b. *Executive Order 12291.* RSPA has determined that this rulemaking: (1) Is not a "major rule" under Executive Order 12291; (2) is "significant" under DOT's regulatory policies and procedures (44 FR 11034); (3) will not affect not-for-profit enterprises or small governmental jurisdictions; and (4) does not require an environmental impact statement under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*). A regulatory evaluation is available for review in the docket.

c. *Regulatory Flexibility Act.* The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires a review of certain rules proposed after January 1, 1981 for their effects on small businesses, organizations, and governmental bodies. I certify that this regulation will not have a significant economic impact on a substantial number of small entities.

d. *Executive Order 12612.* This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the final rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

e. A regulatory information number (RIN) is assigned to each regulatory action listed in the Unified Regulatory Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Regulatory Agenda.

List of Subjects

49 CFR Part 171

Hazardous materials transportation, General information, Regulations, and Definitions.

49 CFR Part 175

Hazardous materials transportation, Carriage by aircraft.

In consideration of the foregoing, 49 CFR Part 171 and Part 175 are amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

1. The authority citation for Part 171 continues to read as follows:

Authority: 49 U.S.C. 1802, 1803, 1804, 1808; 49 CFR Part 1, unless otherwise noted.

2. In § 171.15, paragraph (a) is revised to read as follows:

§ 171.15 Immediate notice of certain hazardous materials incidents.

(a) At the earliest practicable moment, each carrier who transports hazardous materials (including hazardous wastes) shall give notice in accordance with paragraph (b) of this section after each incident that occurs during the course of transportation (including loading, unloading and temporary storage) in which—

(1) As a direct result of hazardous materials—

(i) A person is killed; or

(ii) A person receives injuries requiring his or her hospitalization; or

(iii) Estimated carrier or other property damage exceeds $50,000; or

(iv) An evacuation of the general public occurs lasting one or more hours; or

(v) One or more major transportation arteries or facilities are closed or shut down for one hour or more; or

(vi) The operational flight pattern or routine of an aircraft is altered; or

(2) Fire, breakage, spillage, or suspected radioactive contamination occurs involving shipment of radioactive material (see also §§ 174.45, 175.45, 176.48, and 177.807 of this subchapter); or

(3) Fire, breakage, spillage, or suspected contamination occurs involving shipment of etiologic agents; or

(4) A situation exists of such a nature (e.g., a continuing danger to life exists at the scene of the incident) that, in the judgment of the carrier, it should be reported to the Department even though it does not meet the criteria of paragraph (a) (1), (2) or (3) of this section.

* * * * *

3. In § 171.16, paragraphs (a) and (b) are revised, and a "Note" is added at the end of the section to read as follows:

§ 171.16 Detailed hazardous materials incident reports.

(a) Each carrier who transports hazardous materials shall report in writing, in duplicate, on DOT Form F 5800.1 (Rev. 6/89) to the Department within 30 days of the date of discovery, each incident that occurs during the course of transportation (including loading, unloading, and temporary storage) in which any of the circumstances set forth in § 171.15(a) occurs or there has been an unintentional release of hazardous materials from a package (including a tank) or any quantity of hazardous waste has been discharged during transportation. If a report pertains to a hazardous waste discharge:

(1) A copy of the hazardous waste manifest for the waste must be attached to the report; and

(2) An estimate of the quantity of the waste removed from the scene, the name and address of the facility to which it was taken, and the manner of disposition of any removed waste must be entered in Section IX of the report form (Form F 5800.1) (Rev. 6/89).

(b) Each carrier making a report under this section shall send the report to the Information Systems Manager, DHM-63, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590; a copy of the report shall be retained, for a period of two years, at the carrier's principal place of business, or at other places as authorized and approved in writing by an agency of the Department of Transportation.

* * * * *

Note: A guideline document for assisting in the completion of DOT Form F 5800.1 (Rev. 6/89) may be obtained from the Office of Hazardous Materials Transportation, DHM-51, U.S. Department of Transportation, Washington, DC 20590.

4. In Part 171, a new § 171.21 is added to read as follows:

§ 171.21 Assistance in investigations and special studies.

(a) A carrier who is responsible for reporting an incident under the provisions of § 171.16 shall make all records and information pertaining to the incident available to an authorized representative or special agent of the Department of Transportation upon request. The carrier shall give an authorized representative or special agent of the Department of Transportation reasonable assistance in the investigation of the incident.

(b) If the Department of Transportation makes an inquiry to a carrier of hazardous materials in connection with a study of incidents, the carrier shall—

(1) Respond to the inquiry within 30 days after its receipt or within such other time as the inquiry may specify; and

(2) Provide full, true, and correct answers to any questions included in the inquiry.

5. The incident reporting form (DOT Form F. 5800.1) is revised to read as indicated in the attached exhibit #1. (The form will not appear in the Code of Federal Regulations.)

PART 175—CARRIAGE BY AIRCRAFT

6. The authority citation for Part 175 continues to read as follows:

Authority: 49 U.S.C. 1803, 1804, 1807, 1808; 49 CFR Part 1, unless otherwise noted.

7. In § 175.45, paragraph (a), the introductory text of paragraph (b) and the first sentence of paragraph (c) are revised to read as follows:

§ 175.45 Reporting hazardous materials incidents.

(a) Each operator who transports hazardous materials shall report to the nearest FAA Civil Aviation Security Office by telephone at the earliest practicable moment after each incident that occurs during the course of transportation (including loading, unloading or temporary storage) in which—

(1) As direct result of hazardous materials—

(i) A person is killed; or

(ii) A person receives injuries requiring hospitalization; or

(iii) Estimated carrier or other property damage, exceeds $50,000; or

(iv) An evacuation of the general public occurs lasting one or more hours; or

(v) One or more major transportation arteries or facilities are closed or shutdown for two hours or more; or

(vi) The operational flight pattern or routine of an aircraft is altered; or

(2) Fire, breakage, or spillage or suspected radioactive contamination occurs involving shipment of radioactive materials (see § 175.700(b)); or

(3) Fire, breakage, spillage, or suspected contamination occurs involving shipment of etiologic agents (in addition to the report required by paragraph (a) of this section, a report on an incident involving etiologic agents should be telephoned directly to the Director, Center for Disease Control, U.S. Public Health, Atlanta, Georgia, area code 404-633-5313); or

(4) A situation exists of such a nature (e.g., a continuing danger to life exists at the scene of the incident) that, in the judgment of the carrier, it should be reported to the Department even though it does not meet the criteria of paragraph (a) (1), (2) or (3) of this section.

(b) If the operator conforms to the provisions of this section, the carrier requirements of § 171.15, except § 171.15(c), of this subchapter shall be deemed to have been satisfied. The following information shall be furnished in each report.

* * * * *

(c) Each operator who transports hazardous materials shall report in writing, in duplicate, on DOT Form F 5800.1 (Rev. 6/89) within 30 days of the date of discovery, each incident that occurs during the course of transportation (including loading, unloading or storage incidental thereto) in which any of the circumstances set forth in paragraph (a) of this section occurs or there has been unintentional release of hazardous materials from a package. * * *

* * * * *

Issued in Washington, DC on May 23, 1989, under the authority delegated in 49 CFR Part 1.

Travis P. Dungan,

Administrator, Research and Special Programs Administration.

Exhibit 1

BILLING CODE 4910-60-M

DEPARTMENT OF TRANSPORTATION
HAZARDOUS MATERIALS INCIDENT REPORT

REQUIREMENTS: The regulations requiring reporting of hazardous materials incidents are contained in the Code of Federal Regulations (CFR), Title 49 Parts 100 to 179 (governing the transport of hazardous materials by rail, air, water and highway). Failure to comply with the reporting requirements contained therein can result in a civil penalty.

A Guide for Preparing the Hazardous Materials Incident Report is available from the Information Systems Manager, Office of Hazardous Materials Transportation, DHM-63, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590.

PUBLIC REPORTING BURDEN FOR THIS COLLECTION OF INFORMATION IS ESTIMATED TO AVERAGE 1 HOUR PER RESPONSE, INCLUDING THE TIME FOR REVIEWING INSTRUCTIONS, SEARCHING EXISTING DATA SOURCES, GATHERING AND MAINTAINING THE DATA NEEDED, AND COMPLETING AND REVIEWING THE COLLECTION OF INFORMATION. SEND COMMENTS REGARDING THIS BURDEN ESTIMATE OR ANY OTHER ASPECT OF THIS COLLECTION OF INFORMATION, INCLUDING SUGGESTIONS FOR REDUCING THIS BURDEN, TO INFORMATION SYSTEMS MANAGER, OFFICE OF HAZARDOUS MATERIALS TRANSPORTATION, DMH-63, RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, WASHINGTON, DC 20590; AND TO THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, WASHINGTON, DC 20503.

TEAR HERE

DEPARTMENT OF TRANSPORTATION
HAZARDOUS MATERIALS INCIDENT REPORT

Form Approved OMB No. 2137-0039

INSTRUCTIONS: Submit this report in duplicate to the Information Systems Manager, Office of Hazardous Materials Transportation, DHM-63, Research and Special Programs Administration, U.S. Department of Transportation, Washington, D.C. 20590. If space provided for any item is inadequate, complete that item under Section IX, keying to the entry number being completed. Copies of this form, in limited quantities, may be obtained from the Information Systems Manager, Office of Hazardous Materials Transportation. Additional copies in this prescribed format may be reproduced and used, if on the same size and kind of paper.

I. MODE, DATE, AND LOCATION OF INCIDENT

1. MODE OF TRANSPORATION: ☐ AIR ☐ HIGHWAY ☐ RAIL ☐ WATER OTHER _____

2. DATE AND TIME OF INCIDENT (Use Military Time: e.g. 8:30am = 0830; noon = 1200, 5pm = 1800, midnight = 2400). Date: ___/___/___ TIME _____

3. LOCATION OF INCIDENT (Include airport name in ROUTE/STREET if incident occurs at an airport.)
CITY _____ STATE _____
COUNTY _____ ROUTE/STREET _____

II. DESCRIPTION OF CARRIER, COMPANY, OR INDIVIDUAL REPORTING

4. FULL NAME	5. ADDRESS (Principal place of business)

6. LIST YOUR OMC MOTOR CARRIER CENSUS NUMBER, REPORTING RAILROAD ALPHABETIC CODE, MERCHANT VESSEL NAME AND ID NUMBER OR OTHER REPORTING CODE OR NUMBER

III. SHIPMENT INFORMATION (From Shipping Paper or Packaging)

7. SHIPPER NAME AND ADDRESS (Principal place of business)	8. CONSIGNEE NAME AND ADDRESS (Principal place of business)
9. ORIGIN ADDRESS (if different from Shipper address)	10. DESTINATION ADDRESS (if different from Consignee address)

11. SHIPPING PAPER/WAYBILL IDENTIFICATION NO.

IV. HAZARDOUS MATERIAL(S) SPILLED (NOTE: REFERENCE 49 CFR SECTION 172.101.)

12. PROPER SHIPPING NAME	13. CHEMICAL/TRADE NAME	14. HAZARD CLASS	15. IDENTIFICATION NUMBER (e.g. UN 2764, NA 2020)

16. IS MATERIAL A HAZARDOUS SUBSTANCE? ☐ YES ☐ NO | 17. WAS THE RQ MET? ☐ YES ☐ NO

V. CONSEQUENCES OF INCIDENT, DUE TO THE HAZARDOUS MATERIAL

18. ESTIMATED QUANTITY HAZARDOUS MATERIAL RELEASED (Include units of measurement)	19. FATALITIES	20. HOSPITALIZED INJURIES	21. NON-HOSPITALIZED INJURIES
22. NUMBER OF PEOPLE EVACUATED			

23. ESTIMATED DOLLAR AMOUNT OF LOSS AND/OR PROPERTY DAMAGE, INCLUDING COST OF DECONTAMINATION OR CLEANUP (Round off in dollars)

A. PRODUCT LOSS	B. CARRIER DAMAGE	C. PUBLIC/PRIVATE PROPERTY DAMAGE	D. DECONTAMINATION/ CLEANUP	E. OTHER

24. CONSEQUENCES ASSOCIATED WITH THE INCIDENT: ☐ VAPOR (GAS) DISPERSION ☐ MATERIAL ENTERED WATERWAY/SEWER
☐ SPILLAGE ☐ FIRE ☐ EXPLOSION ☐ ENVIRONMENTAL DAMAGE NONE OTHER

VI. TRANSPORT ENVIRONMENT

25. INDICATE TYPE(S) OF VEHICLE(S) INVOLVED: ☐ CARGO TANK ☐ VAN TRUCK/TRAILER FLAT BED TRUCK/TRAILER
☐ TANK CAR ☐ RAIL CAR ☐ TOFC/COFC ☐ AIRCRAFT ☐ BARGE SHIP OTHER:

26. TRANSPORTATION PHASE DURING WHICH INCIDENT OCCURRED OR WAS DISCOVERED: ☐ EN ROUTE BETWEEN ORIGIN/DESTINATION ☐ LOADING ☐ UNLOADING TEMPORARY STORAGE/TERMINAL

27. LAND USE AT INCIDENT SITE: ☐ INDUSTRIAL ☐ COMMERCIAL RESIDENTIAL AGRICULTURAL UNDEVELOPED

28. COMMUNITY TYPE AT SITE: ☐ URBAN ☐ SUBURBAN RURAL

29. WAS THE SPILL THE RESULT OF A VEHICLE ACCIDENT/DERAILMENT? ☐ YES NO
IF YES AND APPLICABLE, ANSWER PARTS A THRU C.

A. ESTIMATED SPEED	B. HIGHWAY TYPE: ☐ DIVIDED/LIMITED ACCESS ☐ UNDIVIDED	C. TOTAL NUMBER OF LANES: ONE THREE TWO FOUR OR MORE	SPACE FOR DOT USE ONLY

FORM DOT F 5800.1 (Rev. 6/89) THIS FORM MAY BE REPRODUCED

TEAR HERE

VII. PACKAGING INFORMATION: If the package is overpacked (consists of several packages, e.g. glass jars within a fiberboard box), begin with Column A for information on the innermost package.

ITEM		A	B	C
30. TYPE OF PACKAGING, INCLUDING INNER RECEPTACLES (e.g. Steel drum, tank car)				
31. CAPACITY OR WEIGHT PER UNIT PACKAGE (e.g. 55 gallons, 65 lbs.)				
32. NUMBER OF PACKAGES OF SAME TYPE WHICH FAILED IN IDENTICAL MANNER				
33. NUMBER OF PACKAGES OF SAME TYPE IN SHIPMENT				
34. PACKAGE SPECIFICATION IDENTIFICATION (e.g. DOT 17E, DOT 105A100, UN 1A1 or none)				
35. ANY OTHER PACKAGING MARKINGS (e.g. STC, 18/16-55-68, Y1.4/150/87)				
36. NAME AND ADDRESS, SYMBOL OR REGISTRATION NUMBER OF PACKAGING MANUFACTURER				
37. SERIAL NUMBER OF CYLINDERS, PORTABLE TANKS, CARGO TANKS, TANK CARS				
38. TYPE OF LABELING OR PLACARDING APPLIED				
39. IF RECONDITIONED OR REQUALIFIED	A. REGISTRATION NUMBER OR SYMBOL			
	B. DATE OF LAST TEST OR INSPECTION			
40. EXEMPTION/APPROVAL/COMPETENT AUTHORITY NUMBER, IF APPLICABLE (e.g. DOT E1012)				

VIII. DESCRIPTION OF PACKAGING FAILURE: Check all applicable boxes for the package(s) identified above.

41. ACTION CONTRIBUTING TO PACKAGING FAILURE

	A	B	C		A	B	C	
a.	☐	☐	☐	TRANSPORT VEHICLE COLLISION	j.	☐	☐	☐ CORROSION
b.	☐	☐	☐	TRANSPORT VEHICLE OVERTURN	k.	☐	☐	☐ METAL FATIGUE
c.	☐	☐	☐	OVERLOADING/OVERFILLING	l.	☐	☐	☐ FRICTION/RUBBING
d.	☐	☐	☐	LOOSE FITTINGS, VALVES	m.	☐	☐	☐ FIRE/HEAT
e.	☐	☐	☐	DEFECTIVE FITTINGS, VALVES	n.	☐	☐	☐ FREEZING
f.	☐	☐	☐	DROPPED	o.	☐	☐	☐ VENTING
g.	☐	☐	☐	STRUCK/RAMMED	p.	☐	☐	☐ VANDALISM
h.	☐	☐	☐	IMPROPER LOADING	q.	☐	☐	☐ INCOMPATIBLE MATERIALS
i.	☐	☐	☐	IMPROPER BLOCKING	r.	☐	☐	☐ OTHER_____

42. OBJECT CAUSING FAILURE

	A	B	C	
a.	☐	☐	☐	OTHER FREIGHT
b.	☐	☐	☐	FORKLIFT
c.	☐	☐	☐	NAIL/PROTRUSION
d.	☐	☐	☐	OTHER TRANSPORT VEHICLE
e.	☐	☐	☐	WATER/OTHER LIQUID
f.	☐	☐	☐	GROUND/FLOOR/ROADWAY
g.	☐	☐	☐	ROADSIDE OBSTACLE
h.	☐	☐	☐	NONE
i.	☐	☐	☐	OTHER _____

43. HOW PACKAGE(S) FAILED

	A	B	C	
a.	☐	☐	☐	PUNCTURED
b.	☐	☐	☐	CRACKED
c.	☐	☐	☐	BURST/INTERNAL PRESSURE
d.	☐	☐	☐	RIPPED
e.	☐	☐	☐	CRUSHED
f.	☐	☐	☐	RUBBED/ABRADED
g.	☐	☐	☐	RUPTURED
h.	☐	☐	☐	OTHER_____

44. PACKAGE AREA THAT FAILED

	A	B	C	
a.	☐	☐	☐	END, FORWARD
b.	☐	☐	☐	END, REAR
c.	☐	☐	☐	SIDE, RIGHT
d.	☐	☐	☐	SIDE, LEFT
e.	☐	☐	☐	TOP
f.	☐	☐	☐	BOTTOM
g.	☐	☐	☐	CENTER
h.	☐	☐	☐	OTHER_____

45. WHAT FAILED ON PACKAGE(S)

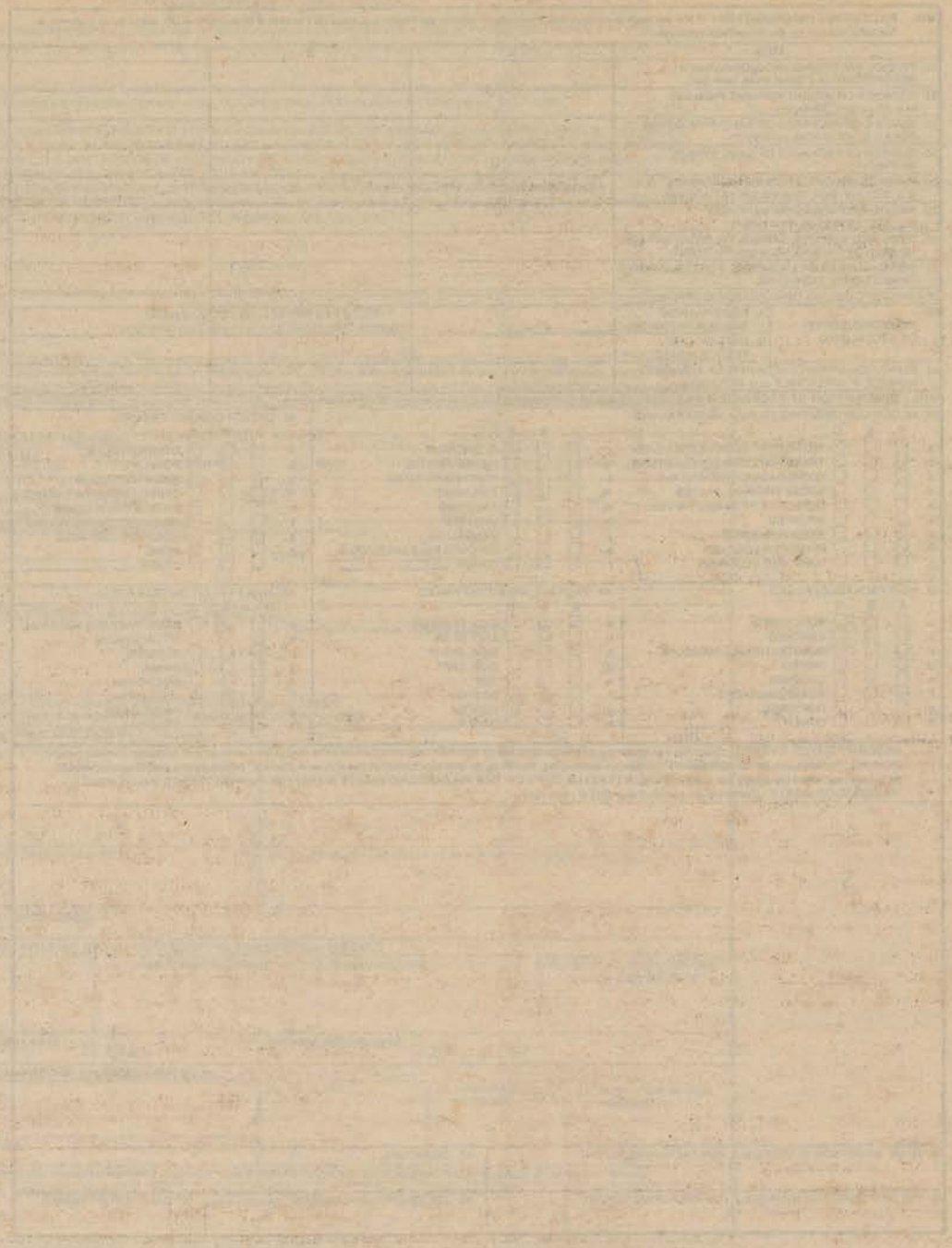
	A	B	C	
a.	☐	☐	☐	BASIC PACKAGE MATERIAL
b.	☐	☐	☐	FITTING/VALVE
c.	☐	☐	☐	CLOSURE
d.	☐	☐	☐	CHIME
e.	☐	☐	☐	WELD/SEAM
f.	☐	☐	☐	HOSE/PIPING
g.	☐	☐	☐	INNER LINER
h.	☐	☐	☐	OTHER _____

IX. DESCRIPTION OF EVENTS: Describe the sequence of events that led to incident, action taken at time discovered, and action taken to prevent future incidents. Include any recommendations to improve packaging, handling, or transportation of hazardous materials. Photographs and diagrams should be submitted when necessary for clarification. ATTACH A COPY OF THE HAZARDOUS WASTE MANIFEST FOR INCIDENTS INVOLVING HAZARDOUS WASTE. Continue on additional sheets if necessary.

46. NAME OF PERSON RESPONSIBLE FOR PREPARING REPORT	47. SIGNATURE	
48. TITLE OF PERSON RESPONSIBLE FOR PREPARING REPORT	49. TELEPHONE NUMBER (Area Code)	50. DATE REPORT SIGNED

[FR Doc. 89-14399 Filed 6-16-89; 8:45 am]

BILLING CODE 4910-60-M



federal register

Monday
June 19, 1989

Part III

Office of Management and Budget

Privacy Act of 1974; Final Guidance Interpreting the Provisions of Public Law 100–503, Computer Matching and Privacy Act of 1988; Notices

OFFICE OF MANAGEMENT AND BUDGET

Privacy Act of 1974; Final Guidance Interpreting the Provisions of Public Law 100-503, the Computer Matching and Privacy Protection Act of 1988

AGENCY: Office of Management and Budget.

ACTION: Issuance of final guidance.

SUMMARY: These Guidelines implement the provisions of Pub. L. 100-503, the Computer Matching and Privacy Protection Act of 1988. This Act amends the Privacy Act of 1974 to establish procedural safeguards affecting agencies' use of Privacy Act records in performing certain types of computerized matching programs. The Act requires agencies to conclude written agreements specifying the terms under which matches are to be done. It also provides due process rights for record subjects to prevent agencies from taking adverse actions unless they have independently verified the results of a match and given the subject 30 days advance notice. Oversight is accomplished in a variety of ways: by having agencies (a) publish matching agreements, (b) report matching programs to OMB and Congress; and (c) establish internal boards to approve their matching activity. The Act becomes effective on July 19, 1989.

EFFECTIVE DATE: These Guidelines are effective June 19, 1989.

FOR FURTHER INFORMATION CONTACT: Robert N. Veeder, Office of Management and Budget, Office of Information and Regulatory Affairs, Information Policy Branch, Telephone (202) 395-4814.

SUPPLEMENTARY INFORMATION: Pub. L. 100-503, the Computer Matching and Privacy Protection Act of 1988 was enacted on October 18, 1988. It will become effective on July 19, 1989. The Act requires OMB to issue guidance on interpreting and implementing its provisions no later than the eighth month after enactment, or June 19, 1989.

On April 19, 1989, OMB published for public comment proposed interpretive guidance. The notice especially invited comment on the applicability of the Act to two examples of matching activity:

- The entering of information received orally into an automated data base for the purpose of determining eligibility for a Federal benefit;
- The automation by a Federal agency of data from a Federal non-automated system of records.

The proposal also solicited examples of routine administrative matches using Federal personnel or payroll records that should be excluded from the Act's coverage, and matches for which Data Integrity Boards should waive the Act's benefit/cost requirement.

At the expiration of the comment period, OMB had received comments from 42 respondents. These fell into five categories:

- The Congress (2)
- Federal agencies (24)
- State agencies (14)
- Public Interest Groups (1)
- Public Employee Unions (1)

In addition to providing comments on the specific areas requested, most commentators also chose to comment more broadly on the guidance.

Although the following guidance is published in final form, OMB realizes that the implementation of this complex Act will undoubtedly require the issuance of additional and clarifying guidance and intends to monitor the agencies implementation closely to that end.

Section By Section Analysis

Section 5a(1)(a)—Matching Program Definition

Caution Against Eluding the Act's Requirements

Several commentators advised OMB to explicitly warn agencies, both Federal and State, against engaging in sophistry or subterfuge, to avoid the reach of the Act. They pointed out, for example, that a Federal agency might combine two disparate systems of records containing payroll and personnel records of Federal employees into a single system and match data sets within the new system. This activity would not be covered, although a match between the two separate systems would have been. In other cases, agencies might convert automated records to paper records to perform a manual match, albeit one of more limited scope. OMB thinks these recommendations are pertinent and has added cautionary advice to the matching program definition section to caution agencies not to engage in activities intended to frustrate the normal application of the Act.

Distinction Between Federal to Federal and Federal to Non-federal Matches

OMB, in making a literal interpretation of the statutory definition of a matching program, distinguished between Federal-to-Federal and Federal-to-non-Federal matches. In the former case, the necessary components were that there were two or more automated systems of records and that the comparison of records in these systems was done via a computer. This is essentially the classic definition of a matching program that OMB put forth in guidance issued in 1979 and revised in 1982. It is the definition that the General Accounting Office has asserted in its study of the costs and benefits of conducting matching programs: Computer Matching: Assessing its Costs and Benefits, GAO/PEMD-87-2, November 1986.

In defining the Federal/non-Federal match, however, OMB read the statute as applying to both automated and non-automated records so long as the comparison was done via computer. Several commentators objected to placing a heavier administrative burden on State and local agencies engaged in matching with Federal agencies than on Federal agencies matching with each other. One commentator suggested that the OMB reading was in error and that the modifier "automated" could properly and reasonably be read as modifying all of the data bases involved.

Other commentators pointed out that the clear intent of the Act was to deal with situations where large numbers of individuals were subjected to automated scrutiny with potentially adverse consequences, and that in actual practice, that meant automated comparisons of automated data bases. Certainly the Privacy Act itself contains an expression of Congressional concern on precisely this point: that use of computers could "greatly magnify the harm" to an individual.

After careful consideration of these arguments, OMB has revised the definition to clarify that in both Federal-to-Federal and Federal-to-nonFederal matching programs what is involved is the automated comparison of two or more automated record sets, whether systems of records or non-Federal records. In taking this position, OMB is extremely concerned that agencies not adopt data exchange practices that deliberately avoid the reach of the Act where compliance would otherwise be required. The guidance has been revised to cite this concern and give examples of such improper practices.

State Agencies' Concerns

A number of State respondents asserted that matches between the Social Security Administration and State agencies in which SSA merely provided information with which to update a benefits file to reflect an across-the-board cost-of-living allowance change should not be considered a matching program under the Act. They asserted that the match, if one occurred, was really done at SSA, and disclosure to the States of COLA information did not involve a computerized comparison of two

independent record sources. OMB is sympathetic to the concerns of the States, but unpersuaded by this analysis. The record as maintained by the state agency is a State record, not a Federal record. The matching process involves comparing information provided by a Federal source to that record using a computer to perform the comparison. There are potentially adverse consequences for the record subject. Eligibility for a Federal benefit program is involved. Clearly, this is a Federal-to-non-Federal matching program contemplated by the Act.

It should be noted that States are free to update their files for across-the-board cost-of-living adjustments without matching with Federal records. Since the COLA percentages are known in advance, are uniform, and are automatic, States can compute these COLA's themselves. Actions taken based on benefit levels recomputed by the States without the involvement of a Federal system of records matching program would be subject to the laws and regulations governing such programs rather than the Matching Act.

An additional State concern relates to how to conduct the independent verification required by the Act for these kinds of matches. That is discussed below.

Entering of Information Received Orally

A final consideration in the definition of what constitutes a matching program for purposes of the Act is the response of the commentators to specific questions OMB raised in its proposed guidance. Specifically, we asked whether when a State benefits clerk takes information received orally from an applicant and enters it into an automated Federal Privacy Act system of records the provisions of the Matching Act come into play. A majority of respondents thought that to the extent that no record existed at the State level, such a query would not be covered. However, if the query produced a record that the State would ultimately maintain, it was covered. Since it is unlikely that a State would never memorialize such a query, this issue is perhaps more academic than real. In any case, the guidance has been amended to add this example.

Section 5a(1)(d)—Matching Purpose

Elements of Matching Purpose

Several commentators found OMB's discussion of the elements of the purpose section less clear than OMB intended. The section has been redrafted.

Ultimate Purpose

Two commentators took exception to OMB's assertion that peripheral consequences of a matching program, even if having an ultimate adverse result, could be discounted in determining whether a match was covered. They urged instead that OMB broadly construe the purpose section to take in the ultimate purpose of the match (by which OMB assumes they mean any ultimate consequence, whether intended or unintended). OMB is unpersuaded by this rationale. The thrust of the Act is to cover matching programs whose purpose is clear and deliberate and intended to accomplish one of three stated purposes: to determine eligibility for a Federal benefit, compliance with benefit program requirements, or to effect recovery of improper payments or delinquent debts from current or former beneficiaries. The more tenuous the nexus between the operation of the program and these purposes is the harder it is to find any applicability of the Act. Having said that, however, OMB remains concerned that agencies not avoid the reach of the Act by disguising the real purpose of their matching programs.

Section 5a(3)—Exclusions From the Matching Definition

Statistical Matches for Research Purposes

Two commentators criticized the inclusion of "pilot matches" in this excluded category. In the past, agencies have done pilot matches using a small data subset to determine whether it would be productive to perform a match of the entire dataset. Given the requirement in the Act for benefit/cost analysis, OMB thinks that pilot matches are a reasonable approach to determining whether to engage in a broader matching activity. OMB does not think that this kind of information gathering activity should be subject to the administrative requirements that attach to regular matches so long as the agency keeps these matches solely in a statistical information gathering channel. Nevertheless, OMB is sensitive to the concerns raised and has amended the guidance to require Data Integrity Board approval of all pilot matches. It is at this point that the Board can decide whether to conduct a matching program and comply with the Act's full requirements, or a pilot program. If a full matching program, the results of the match may be used to take adverse action. If a pilot program, they may not.

Law Enforcement Agency Exclusion

One agency recommended that the guidance specifically cite the Inspector General (IG) as a law enforcement agency. OMB failed to realize that commentators would be unaware that the Inspector General Act gave the Inspector criminal law enforcement responsibilities. While we are hesitant to include a comprehensive list of eligibles we have amended the guidance to cite that part of the IG office that performs criminal law enforcement activities as eligible for the exclusion.

Two commentators were concerned that the proposed guidance on the law enforcement exclusion was too brief. OMB has expanded the discussion in the final version to make it clear that that exception may only be taken by an agency or component that is designated by statute (either Federal or State) as having a criminal law enforcement responsibility as its primary purpose and that it may only claim the exclusion after the initiation of an investigation of a named person or persons in order to gather evidence.

Routine Administrative Matches Involving Federal Personnel Records

One commentator suggested that OMB define the word "predominantly" as used in the exclusion. OMB has included a definition of this word to mean that the data base either be established to contain records about Federal employees, or that the majority of records in the data base be about such employees.

Two commentators urged that OMB provide additional examples of what is covered by the exclusion. OMB has amended the guidance to reflect this consideration.

Section 5a(1)(c)—Federal Benefit Program

Former Beneficiaries

One commentator noted that the guidance was silent as to the Act's coverage of former beneficiaries and urged that OMB explicitly cite them. OMB agrees. The Act provides as one of its purposes the recouping of Federal benefits payments. Certainly this process could involve those who are no longer beneficiaries but remain in default. The guidance has been amended to include this category of beneficiaries.

Section 5a.b.c—Agency Responsibilities/Definitions

Expand Discussion of Agencies' Roles/ Responsibilities

Several commentators suggested that OMB expand the definition section to clarify the roles and responsibilities of the recipient, source, and Non-Federal agencies, especially in terms of which is responsible for publishing matching notices in the **Federal Register**. OMB agrees and has expanded this section.

Section 6a—Giving Prior Notice

Direct Notice Only

One commentator strongly urged OMB to state that the Act requires direct notice to the record subject, and that **Federal Register** constructive notice is insufficient to meet this requirement. OMB has considered this comment, and agrees that the section requires direct notice at the time of application. It does not, however, require direct notice at other times. Examination of the statutory wording shows that the Act calls merely for "notice" subsequent to the direct notice at the time of application. This is understandable, since the point at which it is most critical to provide notice is at the point when the individual has the option of providing or withholding information. Notice at this point permits the applicant to make an informed choice about participating. Moreover, for matching programs whose purpose is to locate individuals in order, for example, to recoup payments improperly granted, direct notice may well be impossible. OMB thinks that the guidance as written gives agencies the flexibility to deal with the many circumstances involved in conducting matching programs. However, OMB intends to monitor agencies' activities to ensure that constructive notice does not become an administratively convenient substitute for direct notice when direct notice is achievable without an unreasonable expenditure of resources.

Cite Section (e)(3) Requirement

Two commentators cited the Privacy Act's (e)(3) notice as one appropriate place for the matching notice and urged OMB to cite it as such in the guidance. OMB agrees and has done so.

Federal/State Responsibilities

One State agency asserted that the Federal agency should do the notice. OMB thinks that if a Federal form is involved in the application for a benefit, it is within the power of the Federal agency creating the form to provide the notice and it should do so. For periodic notice, however, Federal agencies may wish to accomplish this requirement through the State or local governmental benefit providers. OMB has included a discussion of this issue in the section on agency definitions and roles and responsibilities.

Section 6b—Constructing Matching Agreements

Existing Agreement Carryover

One commentator suggested that the guidance assert that existing agreements could suffice until the program was due for renewal and only at that time should they be revised to include the terms of the Matching Act. Similarly, a State commentator suggested that the existing State/Federal agreements should be sufficient. It is OMB's interpretation that the statute clearly requires that by the effective date of the Act, any matching programs conducted by an agency must have agreements approved by the Data Integrity Boards. The statute sets out the terms of those agreements. To the extent that existing agreements include these elements, they will suffice. If they do not, any missing elements must be agreed to by the participants.

Duplication and Redisclosure

Two commentators strongly urged OMB to expand the discussion of this section to substantially restrict any subsequent use of the matching data by the recipient agency. Both cited the "essential purpose" wording of the statute as being more restrictive than the "compatibility standard" that applies to routine use disclosures. OMB agrees and has expanded the discussion of this point in the guidance.

Section 6b—Publication Requirements

Inclusion of System(s) of Records

One commentator suggested that the matching notice identify the system or systems of records from which records will be matched. OMB agrees and has adopted this suggestion.

Section 6f—Independent Verification, Notice and Wait Period, Opportunity to Contest Adverse Finding

Combining the Independent Verification and Statutory Notice Requirements

Federal benefits program matching as well as the matching of Federal employee records occurs across a wide spectrum of purposes and consequences. It would be of dubious utility to apply the verification requirements equally to all matches and argue that a match that results in an adverse consequence of the loss of, for example, a tuition assistance payment should receive the same due process procedures as one that results in the loss of an AFDC payment or Food Stamp Program eligibility. This is not to say that agencies can ignore or minimize these requirements for matches that result in less severe consequences; but only that they should bring some degree of reasonableness to the process of verifying data.

Conservation of agency resources dictates that the procedures for affording due process be flexible and suited to the data being verified and the consequence to the individual of making a mistake. In some cases, if the source agency has established a high degree of confidence in the quality of its data and it can demonstrate that its quality control processes are rigorous, the recipient agency may choose to expend fewer resources in independently verifying the data than otherwise. Indeed, several commentators urged OMB to make it clear that in certain circumstances, the verification and notice and wait steps can be combined into one. OMB agrees and has amended the sections to permit this occurrence; but, to make it clear that agencies should think through carefully when to use this compression and not consider it a routine process. To ensure that this consideration takes place, OMB has amended the guidance to require that the Data Integrity Boards make a formal determination of when to compress these two due process steps. OMB will collect these decisions as part of the reporting process.

Time Period for Notice

One commentator suggested that because the waiting period provided by the Matching Act was 30 days (or more if program statues or regulations provided a longer period), the guidance should reflect this minimum period and not arbitrarily add transit time. On reflection, OMB agrees and has amended the section.

Coercing Record Subjects

One commentator expressed concern lest agencies attempt to coerce subjects into accepting the agencies adverse finding. The solution offered was to prohibit agencies from taking any action until the expiration of the 30 days notice and wait period. In order to forestall some speculative behavior on the part of the agency, this solution could put the government in the position of providing a benefit it knows improper to a recipient who has acknowledged his ineligibility. OMB has not adopted the suggestion but has included a caution to agencies against coercing individuals into agreeing with the finding.

Section 7a—Data Integrity Board Operation Location

Two commentators were unclear about whether State and local agencies were required to have such boards. OMB has amended the guidance to make it clear that the Data Integrity Board requirement applies only to Federal agencies. Another commentator suggested that having approval by both a source and a recipient Board was unnecessary. OMB disagrees. A significant purpose of the Act is to ensure that all parties to a matching program have enough information to make a reasoned decision about participating and that each understands the process whereby the data will be matched. One should note that there are civil remedies provisions in the Privacy Act as well as criminal penalties for wrongful acts. It is in the interest of all parties to ensure that the Privacy Act requirements are adequately met.

Operation

One commentator urged OMB to flatly prohibit delegation of approval of matching agreements. OMB agrees and has amended the guidance to make it clear that approvals (and denials) must be done by the Board itself. Another commentator suggested OMB establish a time limitation for Board determinations. OMB thinks this is a management matter best left to agency discretion but has added an instruction to agencies that they ensure expeditious consideration.

Review and Reports

One commentator recommended OMB expand the review and report requirements of the Data Integrity Boards. OMB agrees but is in the process of revising Circular No. A–130, Appendix I, to include these requirements. The commentator also suggested that OMB tell agencies to treat the annual review period as beginning on the effective date of the Act. OMB will include this suggestion in the revision.

Section 7c—Benefit Cost Requirement

Waivers of Requirement

One commentator recommended that OMB make it clear that the benefit-cost requirement be waived for matches done either pursuant to a statutory requirement or for a law enforcement purpose. OMB disagrees. The statute permits waiver for statutory matches, but only for the first year. The intent of the drafters was to recognize that the presumption the Act imposes of a favorable benefit-cost ratio was irrelevant in the face of a statutory mandate to match. Nevertheless, the Act requires a benefit-cost determination in subsequent years in order to provide information to Congress about required matches that are not achieving a cost-beneficial result. As to law enforcement matches, the statute already excludes a significant portion of such matches from all of the Act's requirements. Another commentator recommended that the requirement for all matches done to recoup payments be waived since the results, i.e., ultimate recoveries, are generally uncertain. This suggestion brings up an important point about conducting these assessments: there will be a range of data available to agencies in performing benefit-cost analysis, some of which will be helpful and some of which will be merely speculative. Where data in an agency's hands clearly indicates an unfavorable ratio, prudent management dictates abandoning the match. Where the reverse is true, agencies should conduct the match. Where the data is unclear, agencies should gather data to permit a better analysis. This may mean conducting a program on the basis of data that, while speculative, suggests that the result will be favorable, and then subjecting the results of the match to careful analysis to determine if that is the case. OMB expects that for the first year, benefit-cost analysis will be a less rigorous process than for subsequent years.

Two commentators suggested that waivers be granted only where the analysis was impossible to do or would be unhelpful. OMB has not adopted this suggestion finding this standard to be too subjective to provide a solid basis on which to waive the requirement. OMB will include as a reflection of Congressional intent, a statement that waivers should be granted sparingly if at all.

Benefit-Cost Checklist and Methodology

Two commentators urged that a checklist providing a step-by-step methodology for accomplishing benefit-cost analysis be appended to the guidance. OMB agrees that this should be done and is working on such a checklist but is doubtful that it will be ready in time to be added to the final guidance. Rather than delay publication past the statutory deadline, OMB will issue the checklist as soon as it is available in the same manner as it issues the guidance itself. OMB will also cite the GAO Report, Computer Matching: Assessing its Costs and Benefits, GAO/PEMD–87–2, November 1986, in the section.

Other Comments

Disclosures for Matching

Several commentators urged OMB to discuss the ways in which records could be disclosed for a matching program. One in particular wanted to know if there was an exception in section (b) of the Privacy Act for matching disclosures. OMB has added a discussion of the procedural requirements to the matching agreements section. It notes that agencies must find an exception to the written consent rule in section (b) or obtain the written consent of the record subject to the disclosure; there is no specific exception for a matching program.

Denial of an IG Proposal

One commentator urged that the guidance make it clear that disapproval of an Inspector General proposed match could take place only because of a defect in the matching agreement. OMB agrees that the proper role of the Board is not to engage in management decisions about the utility of conducting matching programs, but to ensure that such programs are carried out in strict compliance with the terms of the Privacy Act, as amended by Pub. L. 100–503, and "all relevant statutes, regulations and guidelines." Nevertheless, it is the responsibility of the Board to ensure that each of the terms of the agreements are complied with. That determination may require them to go beneath the written agreement to examine the matching process itself. For example, if the agreement indicates that matching subjects have been given individualized notice at the time of the application on the application form itself, the Board may wish to examine the form to see if this notice is adequate.

Training

One commentator suggested that OMB set up training in the Act's provisions. OMB agrees and is working on a training program that will address this suggestion.

Office of Management and Budget Guidelines on the Conduct of Matching Programs

1. *Purpose:* These Guidelines augment and should be used with the "Office of Management and Budget (OMB) Guidelines on the Administration of the Privacy Act of 1974," issued on July 1, 1975, and supplemented on November 21, 1975, and Appendix I to OMB Circular No. A–130, published on December 24, 1985 (see 50 FR 52738).

They are intended to help agencies relate the procedural requirements of the Privacy Act (as amended by Pub. L. 100–503, the Computer Matching and Privacy Protection Act of 1988—hereinafter referred to as the Computer Matching Act), with the operational requirements of automated matching programs. These are policy guidelines applicable to the extent permitted by law. They do not authorize activities that are not permitted by law; nor do they prohibit activities expressly required to be performed by law. Complying with these Guidelines, nonetheless, does not relieve a Federal agency of the obligation to comply with the provisions of the Privacy Act, including any provisions not cited in these Guidelines.

2. *Authority:* Section 6 of Pub. L. 100–503, The Computer Matching and Privacy Protection Act of 1988, requires OMB to issue implementation guidance on the Amendments.

3. *Scope:* These guidelines apply primarily to all Federal agencies subject to the Privacy Act of 1974. For this purpose, the Privacy Act relies upon the definition in the Freedom of Information Act (FOIA) 5 U.S.C. 552 at (e): "any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency." For the purposes of these guidelines, components of departments, e.g., the Health Care Financing Administration of the Department of Health and Human Services, are not considered individual agencies.

Note that the definition incorporates the "agency" definition used in the Administrative Procedure Act (5 U.S.C. 551 at (1)) which also contains a series of categories that are not covered, including State and local governments.

The Computer Matching Act amendment, however, brings State and local governments within the ambit of the Privacy Act when they are engaging in certain types of matching activities; but only in conjunction with a Federal agency that is itself subject to the Privacy Act, and only when a Federal system of records is involved in the match.

In general, a State or local agency or agent thereof, that is either: (1) Providing records to a Federal agency for use in a matching program covered by the Act; or (2) receiving records from a Federal agency's system of records for use in a matching program covered by the Act, must comply with certain of the Act's provisions. What State and local governments must do to meet the requirements of the Act is explained in paragraph 9 below.

4. *Effective Date:* These guidelines are effective on June 19, 1989.

5. *Definitions:* The Computer Matching Act is an amendment of the Privacy Act of 1974 and the provisions of the former should be read within the context of the latter, and all the terms originally defined in the Privacy Act of 1974 apply.

It is especially important to note that the Computer Matching Act does not extend Privacy Act coverage to those not originally included. Thus, the subjects of Federal systems of records covered by the Computer Matching Act are "individuals," i.e., U.S. citizens and aliens lawfully admitted for permanent residence.

Two definitions that are especially relevent to matching programs are:

—"*Record*" which the Privacy Act defines as an item of information about an individual, including his or her name or some other identifier; and,

—"*System of Records*" which is a collection of such "records" from which an agency retrieves information by reference to an individual identifier.

In addition, the Computer Matching Act provides the following new terms:

a. *Matching Program.* At its simplest, a matching program is the comparison of records using a computer. The records must themselves exist in automated form in order to perform the match. Manual comparisons of, for example, printouts of two automated data bases, are not included within this definition. Note, however, participating agencies should not create data sharing methods merely to avoid the reach of the Act where the Act's application would otherwise be reasonable and proper. A matching program covers not only the actual computerized comparison, but the investigative followup and ultimate action, if any.

The Computer Matching Act covers two kinds of matching programs: (1) Matches involving Federal benefits programs and, (2) matches using records from Federal personnel or payroll systems of records.

(1) *Federal Benefits Matches.* The Act defines a Federal benefits matching program as:

> "any computerized comparison of two or more automated systems of records or a system of records with non-Federal records, by applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs * * * [i.e., any program administered or funded by the Federal government, or by any agent or State on behalf of the Federal government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals], * * * for the purpose of establishing or verifying the eligibility of or continuing compliance with statutory and regulatory requirements, or [for the purpose of] recouping payments or delinquent debts under such Federal benefit programs." (See 5 U.S.C. 552a(a)(8) and (12).]

The elements of this definition are discussed below:

(a) *Computerized Comparison of Data.* The record comparison must be a computerized comparison involving records from:

—Two or more automated systems of records (i.e., systems of records maintained by Federal agencies that are subject to the Privacy Act); or,

—A Federal agency's automated system of records and automated records maintained by a non-Federal (i.e., State or local government) agency or agent thereof. To be covered, matches of these records must be computerized. Some examples of computerized matches include the following:

A State benefits clerk accesses an automated Federal system of records and enters data received from an applicant and maintained in automated form by the State. The clerk matches this information with the Federal information, makes an eligibility determination and updates the State data base.

A State benefits clerk enters data about applicants for a Federal benefit program into an automated data base. At the end of the week, the State agency sends current applicant tapes to the Federal benefits agency which matches them against its own automated system of records and reports the results to the State.

A Federal agency operating a benefits program sends a tape of defaulters to the Office of Personnel Management to match against an OPM automated system of records containing information about Federal retirees in order to locate defaulters.

(b) *Categories of Subjects Covered.* The Computer Matching Act provisons cover only the following categories of record subjects:

—Applicants for Federal benefit programs (i.e., individuals initially applying for benefits);

—Program beneficiaries (i.e., individual program participants who are currently receiving or formerly received benefits);

—Providers of services to support such programs (i.e., those who are not the primary beneficiaries of Federal benefits programs, but may derive income from them—health care providers, for example).

(c) *Types of Programs Covered.* Only Federal benefit programs providing cash or in-kind assistance to individuals are covered by this definition. State programs are not covered. Federal programs not involving cash or in-kind assistance are not covered. Programs using records about subjects who are not individuals as defined by section (a)(2) of the Privacy Act—U.S. citizens or aliens lawfully admitted for permanent residence—are not covered.

(d) *Matching Purpose.* The match must have as its purpose one or more of the following:

—Establishing or verifying initial or continuing eligibility for Federal benefit programs; or
—Verifying compliance with the requirements—either statutory or regulatory—of such programs; or
—Recouping payments or delinquent debts under such Federal benefit programs.

It should be noted that the four elements, (i.e., computerized comparison, categories of subjects, Federal benefit program, and matching purpose) all must be present before a matching program is covered under the provisions of the Computer Matching Act. Thus, for example, if the Department of Education matched a student loan recipient data base with a Veterans Administration (VA) education benefit recipient data base for the purpose of ensuring that both agencies were maintaining the most current and accurate home address information, that would not be covered since the "matching purpose" is not one of the three enumerated above. If, however, the purpose of the match were to identify recipients who were receiving benefits in excess of those to which they were entitled, the match would be covered.

Moreover, elements that are peripheral to the match, even if within the definitions above will not raise a match to the Act's coverage. For example, the Federal Parent Locator Service conducts matches to locate absentee parents who are not paying child support. Such matches may result in the identified spouse being ordered to commence payments, and some of those payments may go to recoup payments made from a Federal benefit program such as Aid to Families with Dependent Children. Because the recoupment is not the primary purpose of the match, but only an incidental consequence, such matches would not be covered.

(2) *Federal Personnel or Payroll Records Matches.* The Computer Matching Act also includes matches comparing records from automated Federal personnel or payroll systems of records, or such records and automated records of State and local governments. Again, it should be noted that the comparison must be done by using a computer; manual comparisons are not covered. Matches in this category must be done for other than "routine administrative purposes" as defined in paragraph 5a(3)(e) below. In some instances, a covered match may take place within a single agency. For example, an agency may wish to determine whether any of its own personnel are participating in a benefit program administered by the agency, and are not in compliance with the program's eligibility requirements. This internal match will certainly result in an adverse action if ineligibility is discovered. Therefore, it is covered by the requirements of the Computer Matching Act. Again, agencies should not attempt to avoid the reach of the Act by, for example, improperly combining dissimilar systems into a single system, matching data within the system to make an eligibility determination, and arguing that the match is not covered because only one system of records is involved.

(3) *Exclusions from the Definition of a Matching Program.* The following are not included under the definition of matching programs. Agencies operating such programs are not required to comply with the provisions of the Computer Matching Act, although they may be required to comply with any other applicable provisions of the Privacy Act.

(a) *Statistical Matches Whose Purpose is Solely to Produce Aggregate Data Stripped of Personal Identifiers.* This does not mean that the data bases used in the match must be stripped prior to the match, but only that the results of the match must not contain individually identifiable data. Implicit in this exception is that this kind of match is not done to take action against specific individuals; although, it is possible that the statistical inferences drawn from the data may have consequences for the subjects of the match as members of a class or group. For example, a continuing matching program that shows one geographical area consistently experiencing a higher default rate than others may result in more rigorous scrutiny of applicants from that area, but would not be a covered matching program.

(b) *Statistical Matches Whose Purpose is in Support of Any Research or Statistical Project.* The results of these matches need not be stripped of identifiers, but they must not be used to make decisions that affect the rights, benefits or privileges of specific individuals. Again, it should be noted that this provision is not intended to prohibit using any data developed in these matches to make decisions about a Federal benefit program in general that may ultimately affect beneficiaries.

(c) *Pilot Matches.* This exclusion could also cover so-called "pilot matches," i.e., small scale matches whose purpose is to gather benefit/cost data on which to premise a decision about engaging in a full-fledged matching program. Because of concern about possible misuse of these matching programs to avoid full compliance with the Matching act, OMB will require that pilot matches must be approved by the agency Data Integrity Boards. It is at this point that the agency can decide whether to conduct a statistical data gathering match without consequences to the subjects or a full-fledged program where results will be used to take specific action against record subjects.

(d) *Law Enforcement Investigative Matches Whose Purpose is to Gather Evidence Against a Named Person or Persons in an Existing Investigation.* Certain matches performed in support of civil or criminal law enforcement activities that otherwise would be covered because they seek to establish or verify Federal benefit eligibility or use Federal personnel or payroll records, are excluded from coverage by this section. To be eligible for exclusion, the match must be done by an agency or component whose principal statutory function involves the enforcement of criminal laws, i.e., an agency that is eligible to exempt certain of its record systems under section (j)(2) of the Privacy Act such as the Federal Bureau of Investigation, the Drug Enforcement Agency, or components of agencies' Office of Inspectors General.

The match must flow from an investigation already underway which focuses on a named person or named persons; "fishing expeditions" in which the subjects are identified generically as "program beneficiaries," are not eligible for this exclusion (note that the investigation may be into either criminal or civil law violations). The use of the phrase "person or persons" in this context broadens the exclusion to include subjects that are other than "individuals" as defined by the Privacy Act. Thus, for example a business entity could be the named subject of the

investigation, while the records matched could be those of customers or clients. This does not mean however, that the rights afforded by the Privacy Act are extended by this section to other than "individuals."

Finally, the match must be for the purpose of gathering evidence against the named person or persons.

(e) *Tax Administration Matches.* There are four specific categories exclusions for matches using "tax information." While that term is not defined in the Computer Matching Act, the Report accompanying the House version of the Act, H.R. 4699, cites "tax returns" and "tax return information" as the tax information that is covered by the exclusion. Those terms are defined in Section 6103 of Title 26 U.S.C. at (b)(1)–(b)(3). It is clear from these sections that the information covered is under the control of the Internal Revenue Service (IRS) of the Department of the Treasury since the definitions speak of information that is "filed with the Secretary" or "received by, prepared by, furnished to, or collected by the Secretary." Moreover, Section 6103(a) prohibits Federal, State and local governmental employees from disclosing tax information except as authorized by the Internal Revenue Code. This is not to say that all information in the possession of the IRS is covered by the exclusion; only tax information. Thus, for example, personnel records relating to the management of the IRS workforce would not be covered.

The exclusion covers the following:

—Matches done pursuant to Section 6103(d) of the Tax Code. These matches involve disclosures of taxpayer return information to State tax officials. For matches covered by this exclusion, neither the Federal disclosing entity nor the State recipient need comply with the provisions of the Computer Matching Act.

—Matches done for the purposes of "tax administration" as that term is defined in Section 6103(b)(4) of the Internal Revenue Code: "The term 'tax administration' means the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party; and the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions; and includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes or conventions." While this definition is very broad and covers a great deal of discretionary activities on the part of IRS management, it is not intended to exempt all IRS activities from the Act's coverage; only those that truly relate to administration of the nation's tax system (as opposed to management of the IRS workforce, for example). Thus, the exclusion will permit the IRS to continue to match tax returns with interest and dividend statements, for example. It should be noted that the Bureau of Alcohol, Firearms, and Tobacco of the Treasury Department also has collection and enforcement authority under the Internal Revenue Code, and tax administration is, therefore, a part of that agency's responsibilities as well.

—Tax refund offset matches done pursuant to the Deficit Reduction Act of 1984 (DEFRA). That Act contains procedures for affording matching subjects due process that are analogous to those contained in these guidelines.

—Tax refund offset matches conducted pursuant to statutes other than the DEFRA provided OMB finds the due process provisions of those statutes "substantially similar" to those of the DEFRA. OMB will periodically revise these guidelines to add such programs as such statutes are enacted. Agencies should notify OMB promptly when they think an existing statute provides an exemption in this category.

(f) *Routine Administrative Matches Using Federal Personnel Records.* These are matches between a Federal agency and other Federal agencies or between a Federal agency and non-Federal agencies for administrative purposes that use data bases that contain records predominantly relating to Federal personnel. The term predominantly means that the percentage of records in the system that are about Federal employees must be greater than of any other category therein contained. In some cases, Federal employees will predominate because of absolute numbers; in others, because they represent the largest single category. The term "federal personnel" is defined by the Act as: "officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits)." It should be noted that by including individuals eligible for survivor benefits in the category, the Act covers individuals who may never have been employed by the Federal government.

Matches whose purpose is to take "any adverse financial, personnel, disciplinary or other adverse action against Federal personnel * * *" whose records are involved in the match, are not excluded from the Act's coverage.

Examples of matches that are excluded include an agency's disclosure of time and attendance information on all agency employees to the Department of the Treasury in order to prepare the agency's payroll; or disclosure of Department of Defense (DoD) Reserve Officer identifying information to a State in order to validate and update addresses of Reservists residing in the State; or disclosure of retiree annuity files from the DoD to the Department of Veterans Affairs in order to determine the percentage of total annuity each agency is responsible for paying.

Note that this exclusion does not bring under the Act's coverage matches that may ultimately result in an adverse action. It only requires that their purpose not be intended to result in an adverse action. Thus, in the DoD/State reservist match example, the consequence of the match may well be that a reservist is dropped from the program because no address can be found for him or her. This result, however negative, would not bring the match under the Act's coverage since its primary purpose was only to update an address listing.

(g) *Internal Agency Matches Using Only Records From the Agency's System of Records.* Internal agency matching is excluded on the same basis as Federal personnel record matching above: provided no adverse intent as to a Federal employee motivates the match. Section (b)(1) of the Privacy Act permits agencies to disseminate Privacy Act records to agency employees on an official need-to-know basis. This exclusionary provision does not disturb that principle, except where Federal personnel records are involved. Thus, for example, the Social Security Administration could match with the Health Care Financing Administration to detect and ultimately recoup overpayments for a specific Department of Health and Human Services program. That match would not be covered by the provisions of the Computer Matching Act.

Moreover, the mere presence of Federal employee records in the data bases being matched would not

necessarily bring the match under the Act's coverage. To be covered, the records would have to be predominantly those relating to Federal employees and the primary intent would have to be to take an adverse action of some kind against the Federal employees specifically. If the Department of Education matched its student loan defaulter file against its own employee data base in order to detect and take action against Education employees who have defaulted, that match would be covered by the Act. The same department matching its undergraduate student loan defaulter file against its medical school loan defaulter file in order to determine the incidence of repeat defaulters, would not be covered, even though some of those in the data base might be Federal employees.

(h) *Background Investigation and Foreign Counter-intelligence Matches.* Matches done in the course of performing a background check for security clearances of Federal personnel or Federal contractor personnel are not covered. Nor are matches done for the purpose of foreign counter-intelligence.

b. *Recipient Agency.* Recipient agencies are Federal agencies (or their contractors) that receive records from the Privacy Act systems of records of other Federal agencies or from State and local governments to be used in matching programs.

Responsibilities. Recipient agencies are responsible for publishing matching notices in the Federal Register pursuant to the requirements of the Matching Act described below. Where a recipient agency is not the actual beneficiary of the matching program, it may negotiate with the actual beneficiary agency for reimbursement of the costs incurred in publishing. A recipient agency that is the beneficiary of the program should take the lead in performing a benefit-cost analysis and share that analysis with source agencies to help their Data Integrity Boards make a determination about providing data for the match. Recipient agencies are also responsible for making the matching program report to OMB and the Congress discussed below.

c. *Source Agency.* A source agency is a Federal agency that discloses records from a system of records to another Federal agency to a State or local governmental agency to be used in a matching program. It is also a State or local governmental agency that discloses records to a Federal agency to be used in a matching program. The Computer Matching Act does not cover matching between non-Federal entities. A Federal source agency is required to have its own Data Integrity Board approve the agreement controlling the match; Non-Federal agencies are not required to have such boards. Source agencies are not responsible for publishing the notice of the match or reporting the match to OMB and Congress.

d. *Non-Federal Agency.* A non-Federal agency is a State or local governmental agency that receives records contained in a system of records from a Federal agency to be used in a matching program. State and local agencies are not responsible for publishing notices in the Federal Register or making reports to OMB and the Congress. Nor are they required to establish Data Integrity Boards to approve matching agreements. They should be prepared to provide to Federal source agencies data needed by those agencies to carry out their reporting and other responsibilties, e.g., benefit-cost analysis.

e. *Federal Benefit Program.* See paragraph 5a(1)(c) above.

6. *Conducting Matching Programs.* The following applies to Federal agencies. Requirements pertaining to non-Federal agencies are in paragraph 9 below.

Agencies undertaking matching programs covered by the Computer Matching Act will need to make sure that they comply with the following requirements:

a. *Comply with Privacy Act Systems of Records and Disclosure Provisions:* Federal agencies must ensure that they identify the systems of records involved in the matching programs and have published the necessary notices. Moreover, because the Matching Act does not itself authorize disclosures from systems of records for the purposes of conducting matching programs, agencies must justify any disclosures under section (b) of the Privacy Act. This means obtaining the written consent of the record subjects to the disclosure or relying on one of the 12 exceptions to the written consent rule. To rely on exception (b)(3), for a routine use, agencies must have published their intent to disclose in the Federal Register 30 days prior to any actual disclosure.

b. *Give Prior Notice to Record Subjects.* There are two ways in which record subjects can receive notice that their records may be matched:

—*By direct notice* when there is some form of contact between the government and the subject, e.g., information on the application form when they apply for a benefit or in a notice that arrives with a benefit that they receive;

—*By constructive notice*, e.g., publication of systems notices, routine use disclosures, and matching programs in the Federal Register.

For front-end eligibility verification programs whose purpose is to validate an applicant's initial eligibility for a benefit and later to determine continued eligibility, agencies should provide direct notice by amending the application form where necessary to enlarge the statement provided pursuant to section (e)(3) of the Privacy Act so that applicants are put on notice that the information they provide may be verified through a computer match. Agencies should also provide periodic notice whenever the application is renewed, or at the least, during the period the match is authorized to take place, in a notice accompanying the benefit. Providers of services should be given notice on the form on which they apply for reimbursement for services provided.

In some cases, constructive notice may have to suffice. For example, a Federal agency that discloses records to a State or local government in support of a non-Federal matching program is not obligated to provide direct notice to each of the record subjects; Federal Register publication in this instance is sufficient. Moreover, in some instances, it may not be possible to provide direct notice—in matches done to locate individuals, in emergency situations where health and safety reasons argue for a swift completion of the match; or in investigative matches where direct notice immediately prior to a match would provide the subject an opportunity to alter behavior.

In any case, notice to the record subject should be done well before a matching program commences. It should be part of the normal process of implementing a Federal benefits program.

c. *Matching Notices—Publication Requirements.* Agencies must publish notices of the establishment or alteration of matching programs in the Federal Register at least 30 days prior to conducting such programs. Only one notice is required and the recipient Federal agency in a match between Federal agencies or in a match in which a non-Federal agency discloses records to a Federal agency is responsible for publishing such notices. Where a State or local agency is the recipient of records from a Federal agency's system of records, the Federal source agency is responsible for publishing the notice. Such notices should contain the following information:

—Name of participating agency or agencies;
—Purpose of the match;
—Authority for conducting the matching program. (It should be noted that the Computer Matching Act provides no independent authority for carrying out any matching activity);
—Categories or records and individuals covered;
—Inclusive dates of the matching program;
—Address for receipt of public comments or inquiries.

Copies of proposed matching notices must accompany reports of proposed matches submitted pursuant to section (r) of the Privacy Act as amended. See OMB Circular No. A–130, Appendix I, as amended.

d. *Preparing and Executing Matching Agreements.* Agencies should allow sufficient lead time to ensure that matching agreements can be negotiated and signed in time to secure Data Integrity Board decisions. Federal agencies receiving records from or disclosing records to non-Federal agencies for use in matching programs are responsible for preparing the matching agreements and should solicit relevant data from non-Federal agencies where necessary. In cases where matching takes place entirely within an agency under the Federal personnel or payroll matching provisions, the agency may satisfy the matching agreement requirements by preparing a Memorandum of Understanding between the system of records managers involved, and presenting that to the Data Integrity Board for consideration.

Agreements must contain the following:

—*Purpose and Legal Authority.* Since the Computer Matching Act provides no independent authority for the operation of matching programs, agencies should cite a specific Federal or State statutory or regulatory basis for undertaking such programs.
—*Justification and Expected Results.* An explanation of why computer matching as opposed to some other administrative activity is being proposed and what the expected results will be.
—*Records Description.* An identification of the system of records or non-Federal records, the number of records, and what data elements will be included in the match. Projected starting and completion dates for the program should also be provided. Agencies should specifically identify the Federal system or systems of records involved.
—*Notice Procedures.* A description of the individual and general periodic notice procedures. See paragraph 6.a., above.
—*Verification Procedures.* A description of the methods the agency will use to independently verify the information obtained through the matching program. See paragraph 6.f., below.
—*Disposition of Matched Items.* A statement that information generated through the match, will be destroyed as soon as it has served the matching program's purpose and any legal retention requirements the agency establishes in conjunction with the National Archives and Records Administration or other cognizant authority.
—*Security Procedures.* A description of the administrative and technical safeguards to be used in protecting the information. They should be commensurated with the level of sensitivity of the data.
—*Records Usage, Duplication and Redisclosure Restrictions.* A description of any specific restrictions imposed by either the source agency or by statute or regulation on collateral uses of the records used in the matching program. The agreement should specify how long a recipient agency may keep records provided for a matching program, and when they will be returned to the source agency or destroyed. In general, recipient agencies should not subsequently disclose records obtained for a matching program and under the terms of a matching agreement for other purposes absent a specific statutory requirement or where the disclosure is essential to the conduct of a matching program. The essential standard is a strict test that is more restrictive than the "compatibility" standard the Privacy Act establishes for disclosures made pursuant to section (b)(3): "for a routine use." Thus, under the essential standard, the results of the match may be disclosed for follow-up and verification or for civil or criminal law enforcement investigation or prosecution if the match uncovers activity that warrants such a result. This is not to say that agencies may never use the results of a matching program to make other eligibility determinations. For example, in the case of State/SSA COLA adjustment matches, States may use the results of this match to adjust payment levels for other benefits programs. If they do so, however, the subsequent uses must be included as part of the overall matching program as to the matching agreements, **Federal Register** notice, and the reporting requirements. Moreover, the Act's due process requirements will apply to the subsequent adjustments as well.
—*Records Accuracy Assessments.* Any information relating to the quality of the records to be used in the matching program. Record accuracy is important from two standpoints. In the first case, the worse the quality of the data, the less likely a matching program will have a cost-beneficial result. In the second case, the Privacy Act requires Federal agencies to maintain records they maintain in systems of records to a standard of accuracy that will reasonably assure fairness in any determination made on the basis of the record. Thus an agency receiving records from another Federal agency or from a non-Federal agency needs to know information about the accuracy of such records in order to comply with the law. Moreover, the Privacy Act also requires agencies to take reasonable steps to ensure the accuracy of records that are disclosed to non-Federal recipients.
—*Comptroller General Access.* A statement that the Comptroller General may have access to all records of a recipient agency or non-Federal agency necessary to monitor or verify compliance with the agreement. It should be understood that this requirement permits the Comptroller General to inspect State and local records used in matching programs covered by these agreements.

e. *Securing Approval of Data Integrity Boards.* Before an agency may participate in a matching program, the agency's Data Integrity Board must have evaluated the proposed match and approved the terms of the matching agreement. Agencies should ensure that boards consider matching proposals presented to them expeditiously so as not to cause bureaucratic delays to necessary programs. (See paragraph 7.d. below, for appeals of Board disapprovals).

f. *Reports to OMB and Congress.* See OMB Circular No. A–130, Appendix I as amended.

g. *Providing Due Process to Matching Subjects.* The Computer Matching Act prescribes certain due process requirements that the subjects of matching programs must be afforded when matches uncover adverse information about them.

—*Verification of Adverse Information.* Agencies may not premise adverse action upon the raw results of a computer match. Any adverse

information so developed must be subjected to investigation and verification before action is taken. Federal benefits program matching as well as the matching of Federal employee records occurs across a wide spectrum of purposes and consequences. It would be of dubious utility to apply the verification requirements equally to all matches and argue that a match that results in an adverse consequence of the loss of, for example, a tuition assistance payment should receive the same due process procedures as one that results in the loss of an AFDC payment or Food Stamp Program eligibility. This is not to say that agencies can ignore or minimize these requirements for matches that result in less severe consequences; but only that they should bring some degree of reasonableness to the process of verifying data.

Conservation of agency resources dictates that the procedures for affording due process be flexible and suited to the data being verified and the consequence to the individual of making a mistake. In some cases, if the source agency has established a high degree of confidence in the quality of its data and it can demonstrate that its quality control processes are rigorous, the recipient agency may choose to expend fewer resources in independently verifying the data than otherwise. In such cases, it may be appropriate to combine the verification and notice requirements into a single step, especially if the record subject is the best source for verification. In certain circumstances, therefore, the verification and notice and wait steps can be combined into one. However, agencies should think through carefully when to use this compression and not consider it a routine process.

To ensure that this consideration take place, it will be the responsibility of the Data Integrity Boards to make a formal determination as to when it is appropriate to compress the verification and notice and wait periods into a single period. OMB intends to collect these decisions as part of the reporting process.

In many cases, the individual record subject is the best source for determining a finding's validity, and he or she should be contacted where practicable. In other cases, the payer of a benefit will have the most accurate record relating to payment and should be contacted for verification. Note that, in some cases, contacting the subject initially may permit him or her to conceal data relevant to a decision; and, in those cases, an agency may elect to examine other sources. Absolute confirmation is not required; a reasonable verification process that yields confirmatory data will privide the agency with a reasonable basis for taking action.

As to applicants for Federal benefits programs whose eligibility is being verified through a matching program, agencies may not make a final determination until they have completed the due process steps the Act requires. This does not mean, however, that they are required to place an applicant on the rolls pending a determination, but only that they may not make a final decision.

For matching subjects receiving benefits, however, agencies may not suspend or reduce payments until the due process steps have been completed.

—*Notice and Opportunity to Contest.* Agencies are required to notify matching subjects of adverse information uncovered and give them an opportunity to explain prior to making a final determination. Again, this does not mean that an applicant must be put on the rolls pending his or her explanation, but only that the agency may not make a final determination. Current benefits recipients, however, may not have those benefits suspended or reduced pending the expiration of this period.

Individuals may have 30 days to respond to a notice of adverse action, unless a statute or regulation grants a longer period. The period runs from the date of the notice until 30 calendar days later, including transit time.

If an individual contacts the agency within the notice period and indicates his or her acceptance of the validity of the adverse information, agencies may take immediate action to deny or terminate. However, agencies are cautioned against attempting to coerce a record subject into accepting the result. Agencies may also take action if the period expires without contact.

If the Federal benefit program involved in the match has its own due process requirements, those requirements may suffice for the purposes of the Computer Matching Act, provided they are at least as strong as that Act's provisions.

In any case, if an agency determines that there is likely to be a potentially significant effect on public health or safety, it may take appropriate action, notwithstanding these due process provisions.

7. *Establishing Data Integrity Boards:* The Computer Matching Act requires that each Federal agency that acts as either a source or recipient in a matching program, establish a Data Integrity Board to oversee the agency's participation. Non-Federal governmental entities are not required to have such boards. It should be noted that the fact that records about an agency's personnel are used in a matching program does not automatically trigger this requirement. Because, for example, the Office of Personnel Management (OPM) asserts government-wide ownership of the system of records containing the Federal employee Official Personnel Folder (OPF), disclosures from this system of records involve OPM, not the employing agency. There are many small agencies that will never directly disclose records from their own systems of records for matching purposes and they are thus not required to establish Data Integrity Boards.

a. *Location and Staffing.* While the Act specifies neither the organizational level at which the Boards are to be established, nor their makeup (with two exceptions), it is clear from the context of the Data Integrity Board section that Congress expected agencies to place the Boards at the top of the organization and staff them with senior personnel. It is the intent of these guidelines not to dictate a specific structure but to suggest ways of complying with this expection.

—*Location.* As to location, because the Boards are to serve a coordinating function, it would be inappropriate to locate them at other than the departmental level (or its agency equivalent). This is not to say that subordinate boards at component levels may not be useful to do the preliminary work necessary to provide a matching program proposal to the senior Board for approval. Indeed, in large agencies with many matching programs, this will likely be the rule. But, the approval should come from the top, and this argues for the placement suggested above.

—*Staffing.* The Act requires that the Board consist of senior agency officials designated by the agency head. The only two mandatory members are the Inspector General of the agency (if any) who may not serve as Chairman, and the senior official responsible for the implementation of the Privacy Act who has been designated pursuant to 44 U.S.C. 3506(b). OMB recommends that the agency Privacy Act Officer be designated as the Board's Secretary.

—*Operation.* While much of the work of the Board may be delegated to less senior members—for example, the compilation of reports, advising of program officials, and maintaining

and disseminating information about the accuracy and reliability of data used in matching—the approval of matching agreements may not be delegated.

The Board should meet often enough to ensure that agency matching programs are carried out efficiently, expeditiously and in conformance with the Privacy Act, as amended.

b. *Review Responsibilities.* Because matching agreements are key to the implementation of the Computer Matching Act, the Act makes their review the foremost responsibility of the Boards. Boards are responsible for approving or disapproving matching programs based upon their assessment of the adequacy of these agreements. They should ensure that their reasons for either approving or denying are well documented. Agency officials proposing matching programs should ensure that they provide the Data Integrity Board with all of the information relevant and necessary to permit it to make an informed decision, including, where appropriate, a benefit/cost analysis. Note that both the Federal source and recipient agencies must have the matching agreement ratified by their boards.

—*Review of Proposals to Conduct or Participate in Matching Programs.* The Board must review the matching agreements that support each proposed matching program and find them in conformance with the provisions of the Computer Matching Act as well as any other relevant statutes, regulations, or guidelines. Boards are specifically responsible for determining when to compress the due process steps of verification and notice and wait into a single step. A matching agreement should remain in force for only so long as necessary to accomplish the specific matching purpose; indeed, it automatically expires at the end of 18 months unless within 3 months prior to the actual expiration date, the Data Integrity Board finds that the program will be conducted without change and each party certifies that the program has been conducted in compliance with the matching agreement. Under this finding, the Board may extend the agreement for 1 additional year.

—*Annual Review.* The Act requires Data Integrity Boards to conduct an annual review of all matching programs in which the agency has participated as either a source or recipient agency. This review has two focuses: to determine whether the matches have been, or are being, conducted in accordance with the appropriate authorities and under the terms of the matching agreements; and, to assess the utility of the programs in terms of their costs and benefits. The Act suggests that this latter review as it pertains to recurring programs, should result in a basis for continuing participation in, or operation of, such programs. The Computer Matching Act also requires the Boards to review annually agency recordkeeping and disposal policies and practices for conformance with the Act's provisions. These reviews should take place within the context of the annual review referenced above. In addition, the Boards may review and report on matching activities not covered by the Computer Matching Act.

c. *Benefit/Cost Analysis.* The Computer Matching Act requires that a benefit/cost analysis be a part of an agency decision to conduct or participate in a matching program. The requirement occurs in two places: in matching agreements which must include a justification of the proposed match with a "specific estimate of any savings"; and, in the Data Integrity Board review process.

The intent of this requirement is not to create a presumption that when agencies balance individual rights and cost savings, the latter should inevitably prevail. Rather, it is to ensure that sound management practices are followed when agencies use records from Privacy Act systems of records in matching programs. Particularly in a time when competition for scarce resources is especially intense, it is not in the government's interests to engage in matching activities that drain agency resources that could be better spent elsewhere. Agencies should use the benefit/cost requirement as an opportunity to reexamine programs and weed out those that produce only marginal results.

While the Act appears to require a favorable benefit/cost ratio as an element of approval of a matching program, agencies should be cautious about applying this interpretation in too literal a fashion. For example, the first year in which a matching program is conducted may show a dramatic benefit/cost ratio. However, after it has been conducted on a regular basis (with attendant publicity), its deterrent effect may result in much less favorable ratios. Elimination of such a program, however, may well result in a return to the prematch benefit/cost ratio. The agency should consider not only the actual savings attributable to such a program, but the consequences of abandoning it.

For proposed matches without an operational history, benefit/cost analyses will of necessity be speculative. While they should be based upon the best data available, reasonable estimates are acceptable at this stage. Nevertheless, agencies should design their programs so as to ensure the collection of data that will permit more accurate assessments to be made. As more and more data become available, it should be possible to make more informed assumptions about the benefits and costs of matching. One source of information about conducting benefit-cost analysis as it relates to matching programs is the GAO Report, "Computer Matching, Assessing its Costs and Benefits," GAO/PEMD–87–2, November, 1986. Agencies may wish to consult this report as they develop methodologies for performing this analysis.

Because matching is done for a variety of reasons, not all matching programs are appropriate candidates for benefit/cost analysis. The Computer Matching Act tacitly recognizes this point by permitting Data Integrity Boards to waive the benefit/cost requirement if they determine in writing that such an analysis is not required. It should be noted, however, that the Congress expected that such waivers would be used sparingly. The Act itself supplies one such waiver: if a match is specifically required by statute, the initial review by the Board need not consider the benefits and costs of the match. Note that this exclusion does not extend to matches undertaken at the discretion of the agency. However, the Act goes on to require that when the matching agreement is renegotiated, a benefit/cost analysis covering the preceding matches must be done. Note that the Act does not require the showing of a favorable ratio for the match to be continued, only that an analysis be done. The intention is to provide Congress with information to help it evaluate the effectiveness of statutory matching requirements with a view to revising or eliminating them where appropriate.

Other examples of matches in which the establishment of a favorable benefit/cost ratio would be inappropriate are:

—A match of a system of records containing information about nurses employed at VA hospitals with records maintained by State nurse licensing boards to identify VA nurses with "impaired licenses", i.e., those who have had some disciplinary action taken against them.

—A match whose purpose is to identify and correct erroneous data, e.g.,

Project Clean Data which was run to correct and eliminate erroneous Social Security Numbers.
—Selective Service System matching to identify 18-year-olds for draft registration purposes.

d. *Appeals of Denials.* If a Board disapproves a matching agreement, the Computer Matching Act permits any party to the agreement to appeal that disapproval to the Director of the Office of Management and Budget. While this literally means that a recipient agency (whether Federal or non-Federal) could appeal the refusal of a source agency to approve an agreement, the actual results of such cross agency appeals, even if successful, are unlikely to result in the implementation of a matching program since the source agency may still properly refuse to disclose the necessary Privacy Act records. Nothing in the appeal process is intended to result in one agency being able to force another agency to participate unwillingly in a matching program.

Accordingly, OMB will only entertain appeals from senior agency officials who are parties to a proposed matching agreement that has been disapproved by the agency's own Data Integrity Board. By senior officials, OMB means the Inspector General of an agency or the head of an operating division carrying out the matching program.

The appeal should be forwarded to the Director, Office of Management and Budget, Washington, DC 20503 within 30 days following the Board's written disapproval. The following documentation should accompany the appeal:

—Copies of all of the documentation accompanying the initial matching agreement proposal;
—A copy of the Board's disapproval and reasons therefor;
—Evidence supporting the cost-effectiveness of the match;
—Any other information relevant to a decision, e.g., timing considerations, the public interest served by the match, etc.

The Director will promptly notify Congress of receipt of an appeal and of his or her decision. A decision to approve a matching agreement will not be effective until 30 days after it is so reported to Congress. The decision of the Director shall be based upon the information submitted.

OMB expects that this appeal process will be rarely used. One way to ensure its rarity is for agencies to present only well thoughtout and thoroughly documented proposals to the Boards for decisions.

e. *Information Maintenance and Dissemination Responsibilities.* The Act anticipates that the Data Integrity Boards will be an information resource on matching for the agency. Thus, while the full Board may actually convene only a few times each year to consider matching program proposals, the Act requires a continuing presence to carry out these additional functions. The Board, therefore, should designate a representative to answer questions on matching both from within the agency and from outside entities. This point of contact should be able to advise on what actions are needed to comply with the provisions of the Computer Matching Act, and to collect and disseminate information on the quality of the records used in matching programs.

8. *General Reporting Requirements:* The reporting requirements of the Data Integrity Boards will be contained in OMB Circular No. A–130, Appendix I. Matching reports are to be included in the general Privacy Act implementation reporting requirements outlined in that Circular.

9. *Specific Responsibilities of Non-Federal Agencies:* It is not the intent of this Act to affect, nor do its provisions reach, State and local governments using their own records for matching purposes. Nor does the Act reach State or local matching programs using records from Federal systems of records for purposes other than those defined in the Act as for a "matching program."

Thus, for example, a Federal agency could disclose information about beneficiaries of a Federal program to a State agency in order to permit the State to conduct a matching program to determine eligibility for a State public assistance program. So long as the purpose was to validate eligibility for the State as opposed to the Federal benefit program, the Computer Matching Act would not come into play.

If however, the Federal agency disclosed the names and income levels of its own Federal employees to a State under these circumstances, the matching requirements would have to be met since this match would be covered under the "Federal employee personnel and payroll" provisions.

Non-Federal agencies intending to participate in covered matching programs are required to do the following:

—Execute matching agreements prepared by a Federal agency or agencies invovled in the matching program;
—Provide data to Federal agencies on the costs and benefits of matching programs;
—Certify that they will not take adverse action against an individual as a result of any information developed in a matching program unless the information has been independently verified and until 30 days after the individual has been notified of the findings and given an opportunity to contest them.
—For renewals of matching programs, certify that the terms of the agreement have been followed.

10. *Sanctions:* The Computer Matching Act specifies that neither a Federal nor a non-Federal agency may disclose a record for use in a matching program if either has reason to believe the recipient is not meeting the terms of the matching agreement or the due process requirements of the Computer Matching Act. This provision does not create an affirmative duty on the part of a source agency to investigate a recipient agency's level of compliance. However, if a source agency receives information that would lead it to conclude that the recipient agency was not in compliance, it must consult with that agency before continuing to participate in the matching program.

Moreover, it should be noted that the civil remedies provisions of the Privacy Act are available to matching record subjects who can demonstrate that they have been harmed by an agency's violation of the Privacy Act or its own regulations. A successful litigant is entitled under the Privacy Act to receive at least $1,000 and reasonable attorney's fees. Given the large numbers of record subjects typically involved in a matching program, agencies should be especially diligent in guarding against actions that would create liabilities.

S. Jay Plager,

Administrator, Office of Information and Regulatory Affairs.

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