concentration at the beginning and of the end of the test.

(c) The concentration of the challenge agent inside the respirator shall be determined by one of the following methods:

(*1*) Average peak concentration

(*2*) Maximum peak concentration

(*3*) Integration by calculation of the area under the individual peak for each exercise except the grimace exercise. This includes computerized integration.

(x) Interpretation of test results. The fit factor established by the quantitative fit testing shall be the lowest of the three fit factor values calculated from the three required fit tests.

(xi) The test subject shall not be permitted to wear a half mask, quarter facepiece, or full facepiece respirator unless a minimum fit factor of 100 is obtained.

(xii) Filters used for quantitative fit testing shall be replaced at least weekly or whenever increased breathing resistance is encountered, or when the test agent has altered the integrity of the filter media. Organic vapor cartridges/canisters shall be replaced daily (when used) or sooner if there is any indication of breakthrough by a test agent.

II. Facepiece Seal Fit Checks—Recommended Procedures

A. *Positive pressure fit check.* Close off the exhalation valve and exhale gently into the facepiece. The face fit is considered satisfactory if a slight positive pressure can be built up inside the facepiece without any evidence of outward leakage of air at the seal. For most respirators this method of leak testing requires the wearer to first remove the exhalation valve cover before closing off the exhalation valve and then carefully replacing it after the test.

B. *Negative pressure fit check.* Close off the inlet opening of the canister or cartridge(s) by covering with the palm of the hand(s) or by replacing the filter seal(s), inhale gently so that the facepiece collapses slightly, and hold the breath for ten seconds. If the facepiece remains in its slightly collapsed condition and no inward leakage of air is detected, the tightness of the respirator is considered satisfactory.

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Part III

Federal Reserve System

12 CFR Parts 208 and 225

Capital Adequacy Guidelines; Minimum Tier 1 Leverage Measure and Transition Capital Standards; Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 225

[Regulation H, Regulation Y; Docket No. R-0683]

Capital Adequacy Guidelines; Minimum Tier 1 Leverage Measure and Transition Capital Standards

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: On December 29, 1989, the Board proposed for public comment transition capital guidelines to be applied through the end of 1990, as well as guidelines for a new capital to total assets leverage ratio. The Board is now issuing in final form transition capital standards and capital leverage guidelines that are substantially similar to those proposed. The standards the Board is adopting are minimum requirements. Any institution experiencing or anticipating significant growth would be expected to maintain capital ratios, including tangible capital positions, well above the minimum levels. In all cases, banking institutions should hold capital commensurate with the level and nature of all of the risks, including the volume and severity of problem loans, to which they are exposed.

EFFECTIVE DATE: September 10, 1990.

FOR FURTHER INFORMATION CONTACT: Richard Spillenkothen, Deputy Associate Director (202/452–2594), Roger T. Cole, Assistant Director (202/452–2618), Rhoger H. Pugh, Manager (202/728–5883), or Kelly S. Shaw, Senior Financial Analyst (202/452–3054), Division of Banking Supervision and Regulation, Board of Governors; Michael J. O'Rourke, Senior Attorney (202/452–3288) or Mark J. Tenhundfeld, Attorney (202/452–3612), Legal Division, Board of Governors; or Donald E. Schmid, Manager (212/720–6611) or Manuel J. Schnaidman, Senior Financial Analyst (212/720–6710), Federal Reserve Bank of New York. For the hearing impaired *only*, Telecommunication Device for the Deaf (TDD), Earnestine Hill or Dorothea Thompson (202/452–3544).

SUPPLEMENTARY INFORMATION:

I. Overview and Summary

When the Board of Governors of the Federal Reserve System ("Board") issued final risk-based capital guidelines on January 19, 1989, it indicated that the existing 5.5 percent and 6 percent primary and total capital to total assets (leverage) ratios would stay in effect at least until the end of 1990, when the interim minimum risk-based capital ratios take effect. The Board also indicated that it would consider proposing a revised leverage constraint that, if adopted, would replace the existing leverage guidelines. It was contemplated that the definition of capital for the new leverage guidelines would be consistent with the risk-based capital definition.

On December 29, 1989, the Board proposed for public comment transition capital guidelines to be applied through the end of 1990, as well as guidelines for a new leverage constraint. The comment period for the Federal Reserve's proposal ended on March 9, 1990. The Board received comments addressing various aspects of the proposal from 45 public commenters.

Based upon the comments received, and further consideration of the issues involved, the Board is now issuing in final form transition capital standards and capital leverage guidelines that are substantially similar to those proposed. The Board believes that adoption of these standards and guidelines should assist state-chartered member banks and bank holding companies (collectively, "banking organizations") in formulating their capital planning process and in strengthening their capital base.

Under the transition capital standards, a banking organization may choose up to the end of 1990 to conform to either the existing minimum capital adequacy ratios (5.5 percent primary capital and 6 percent total capital to total assets) or to the 7.25 percent year-end 1990 risk-based capital standard. The board is also establishing and applying during this period a minimum ratio of 3 percent Tier 1 capital to total assets (leverage ratio). For leverage purposes, Tier 1 is defined consistent with the year-end 1992 risk-based capital guidelines.

The existing 5.5 percent primary and 6.0 percent total capital to total assets leverage ratios will be dropped after year-end 1990. The new Tier 1 leverage ratio will then constitute the minimum capital to total assets standard for banking organizations.

The standards the Board is adopting are minimum requirements. Any institution operating at or near these levels would be expected to have well-diversified risk, including no undue interest rate risk exposure, excellent asset quality, high liquidity, good earnings and, in general, would have to be considered a strong banking organization, rated composite 1 under the appropriate bank or bank holding company rating system. Any institutions experiencing or anticipating significant growth would be expected to maintain capital ratios, including tangible capital positions, well above the minimum levels as has been the case in the past. For example, most such banking organizations generally have operated at capital levels ranging from 100 to 200 basis points above the stated minimums. Higher capital ratios could be required if warranted by the particular circumstances or risk profiles of individual banking organizations. Thus, for all but the most highly-rated institutions meeting the conditions set forth above, the minimum Tier 1 leverage ratio is to be 3 percent plus an additional cushion of at least 100 to 200 basis points. In all cases, banking institutions should hold capital commensurate with the level and nature of all of the risks, including the volume and severity of problem loans, to which they are exposed.

Whenever appropriate, including when an organization is undertaking expansion, seeking to engage in new activities or otherwise facing unusual or abnormal risks, the Board will continue to consider the level of an organization's tangible Tier 1 leverage ratio (after deducting all intangibles) in making an overall assessment of capital adequacy. This is consistent with the Federal Reserve's risk-based capital guidelines and long-standing Board policy and practice under the current leverage guidelines. Organizations experiencing growth, whether internally or by acquisition, are expected to maintain strong capital positions substantially above minimum supervisory levels, without significant reliance on intangible assets.

II. Background

The Federal Reserve's risk-based capital guidelines adopted in January 1989 set forth an interim minimum risk-based ratio effective year-end 1990 and a final minimum risk-based standard effective year-end 1992. In issuing its risk-based capital guidelines, the Board indicated that the existing 5.5 and 6.0 percent primary and total capital to total assets (leverage) ratios would stay in effect, at least until the end of 1990. A principal reason for this was to retain a capital constraint until the interim minimum risk-based capital ratios take effect.

The Board also indicated that even after minimum risk-based capital ratios become effective, retention of an overall leverage constraint might be deemed appropriate because the risk-based capital framework does not incorporate a comprehensive measure of interest rate risk. A minimun ratio of capital to

total assets would help to address this potential problem by imposing an overall limitation on the extent to which a banking organization could leverage its equity capital base.

In addition to interest rate risk, capital ratios may also not take full or explicit account of certain other risk factors that can affect a banking organization's risk profile. These factors include funding and market risks; investment or loan portfolio concentrations; asset quality; and the adequacy of internal policies, systems, and controls. These factors, which must be taken into account in determining the overall risk profile and capital adequacy of a banking organization, also suggest the need to encourage banking organizations to operate well above minimum supervisory ratios.

In issuing its risk-based capital guidelines, the Board indicated that retention of the existing leverage ratios would provide an element of stability during the risk-based capital transition period. The Board further stated that if retention of an overall leverage standard were deemed appropriate in the long-run, the Federal Reserve would consider replacing the existing primary and total capital to total assets leverage ratios with a standard that incorporates a definition of capital that is consistent with the definitions contained in the risk-based capital framework. At the time, the Board indicated that a leverage standard based upon a revised definition of capital, and used in conjunction with a strong risk-based capital requirement, could be set at a level different from the existing leverage standard it would replace.

On December 29, 1989, the Board accordingly proposed for public comment transition capital standards to be applied to state member banks and bank holding companies through the end of 1990, as well as guidelines for a new leverage constraint to be applied to banking organizations, which, if adopted, would replace the existing leverage guidelines. The comment period for the proposal ended March 9, 1990. The Board received comments from 45 public respondents that addressed various aspects of the proposal.[1]

Over 80 percent of the 39 respondents that addressed the proposed leverage guidelines supported the concept of a leverage constraint, although a number had reservations on particular details of the Board's proposed leverage guidelines. Among the issues commenters raised in connection with the leverage constraint was its relationship to banking organizations' CAMEL/BOPEC ratings, the primacy of the risk-based measure, and the definition of capital.

Only nine commenters discussed the Board's proposed transition capital standards. All agreed that the proposal to permit banking organizations a choice of conforming to either the existing minimum capital adequacy ratios or the 7.25 percent year-end 1990 risk-based capital standard would be beneficial.

Based on the comments received and further consideration of the issues involved, the Board is now issuing in final form transition capital guidelines to be applied through the end of 1990, as well as guidelines for a new minimum capital to total assets ratio which will replace the existing leverage guidelines at the end of 1990. These guidelines are substantially similar to those proposed. Taken together, the standards the Board is adopting should assist banking organizations in their capital planning process and, where necessary, their efforts to raise additional capital and strengthen their capital base.

III. Transition and Leverage Standards

A. Transition Standards

The Board proposed transition capital standards to apply during the first phase of the risk-based capital transition period, which ends at year-end 1990. All respondents that commented on this issue endorsed the standards. Accordingly, the Board is issuing the transition capital standards in the form proposed.

Under the adopted transition capital standards, a banking organization may conform to either the existing minimum capital adequacy ratios of 5.5 percent primary capital and 6 percent total capital to total assets, *or* to the 7.25 percent year-end 1990 minimum risk-based capital standard. It should be emphasized that banking organizations are not required to meet the interim risk-based standard prior to its year-end 1990 effective date. Rather, organizations have the option of complying with the risk-based standard during 1990, in lieu of meeting the existing primary and total capital adequacy guidelines. Regardless of which of these options is chosen during this period banking organizations would also have to meet the new proposed leverage standard set forth below.

B. New Leverage Standard

The Board also proposed to establish and apply during 1990 and thereafter a minimum Tier 1 capital to total assets (leverage) ratio of 3 percent. The 3 percent Tier 1 to total assets ratio would be a minimum for the top-rated banking organizations without any supervisory, financial or operational weaknesses or deficiencies. Other organizations would be expected to maintain capital ratios of at least 100 to 200 basis points above the minimum depending on their financial condition. The Board also proposed that at the end of 1990, the Tier 1 leverage ratio would replace the existing 5.5 percent and 6.0 percent primary and total capital to total assets leverage ratios.

The vast majority of commenters, while supporting the use of a leverage constraint, expressed the view that the risk-based capital ratio should serve as the primary measure of an organization's capital adequacy. Commenters were divided on the issue of what would constitute an acceptable minimum level of Tier 1 capital to total assets. Some stated that any minimum over 3 percent would be unduly burdensome and undermine risk-based capital, while others expressed concern that the proposed 3 percent minimum was too low and could lead to an erosion of capital levels. A few respondents endorsed the Board's proposed approach of setting a 3 percent minimum ratio for top-rated organizations and requiring higher capital levels for other organizations because it offered flexibility and placed what they viewed as appropriate reliance on the examination process. A number of commenters, however, stated their concerns that this approach could result in an uneven or inconsistent application of capital standards across organizations and could lead to uncertainty in the capital planning process.

After reviewing the comments received and further considering the issues involved, the Board is adopting its proposal to establish a minimum Tier 1 capital to total assets ratio. This leverage constraint will be used as a supplement to the risk-based capital measure. The Board is also adopting its proposal that the minimum Tier 1 ratio only apply to top-rated organizations without any operating, financial or supervisory deficiencies. Other organizations will be expected to hold an additional capital cushion of at least 100 to 200 basis points, based on their particular circumstances and risk profiles. In the Board's view, this

[1] A summary of the comments received is contained in a memorandum distributed at the Federal Reserve's June 20, 1990 public meeting, at which the board adopted the transition capital standards and leverage guidelines.

approach strikes a reasonable balance between the need to set a floor that is not so high as to undermine the risk-based capital standard, and the need to provide for an adequate limitation on leverage.

The Board proposed that the definition of Tier 1 capital for leverage purposes be consistent with the year-end 1992 risk-based capital definition. A number of commenters endorsed the use of consistent definitions because, in their view, it would minimize confusion and simplify the capital planning process. Some commenters approved the use of Tier 1 capital in the leverage ratio specifically because it would establish an equity standard. A small minority, however, stated their preference for a definition of capital for leverage purposes that would include non-Tier 1 elements such as the allowance for loan and lease losses.

The Board is accordingly adopting its proposal that the leverage standard employ the year-end 1992 definition of Tier 1 capital, as set forth in the risk-based capital guidelines, [2] and exclude any non-Tier 1 elements from its definition of capital. Total assets is defined for this purpose as total consolidated assets (defined net of the allowance for loan and lease losses), less goodwill and, on a case-by-case basis, any other intangible assets or investments in subsidiaries that the primary regulator determines should be deducted from Tier 1 capital.

As proposed, at the end of 1990 the Board will drop the existing leverage ratios, that is, the 5.5 percent and 6.0 percent primary and total capital to total assets leverage ratios. The new Tier 1 capital to total assets ratio will then constitute the leverage standard for banking organizations, and will be used thereafter to supplement the risk-based ratio in determining the overall capital adequacy of banking organizations.

The new Tier 1 leverage ratio differs in a number of respects from the current primary and total capital ratios as defined under the Federal Reserve's existing leverage guidelines. For example, primary capital includes the allowance for loan and lease losses (without limitation), and total capital includes limited amounts of subordinated debt. Neither of these elements, both of which are deemed to be Tier 2 components under the risk-based capital framework, is included in the definition of capital for the new Tier 1 leverage ratio. Moreover, the current primary and total capital leverage standards do not contain an absolute minimum for the level of permanent shareholders' equity in relation to assets—a minimum that is established by the Tier 1 leverage standard. Thus, the new Tier 1 leverage ratio reflects the amount of core equity that is available to support unanticipated losses—a key prudential measure for determining the health of individual banking organizations. In addition to these benefits, adoption of Tier 1 for the purpose of comparing capital to total assets will have the advantage of bringing the definition of capital for leverage purposes into line with the definition of capital for risk-based capital purposes.

The Board emphasizes that in all cases, the standards set forth above are supervisory minimums. An institution operating at or near these levels is expected to have well-diversified risk, including no undue interest rate risk exposure; excellent asset quality; high liquidity; good earnings; and in general be considered a strong banking organization, rated composite 1 under the CAMEL rating system for banks or the BOPEC rating system for bank holding companies. Institutions with high or inordinate levels of risk are expected to operate well above minimum capital standards. As has been the case in the past, institutions experiencing or anticipating significant growth are also expected to maintain capital ratios, including tangible capital positions, well above the minimum levels. For example, most such banking organizations generally have operated at capital levels ranging from 100 to 200 basis points above the stated minimums. Higher capital ratios could be required if warranted by the particular circumstances or risk profiles of individual banking organizations. Thus, for all but the most highly-rated institutions meeting the conditions set forth above, the minimum Tier 1 leverage ratio is to be 3 percent plus an additional cushion of at least 100 to 200 basis points. In all cases, banking institutions should hold capital commensurate with the level and nature of all of the risks, including the volume and severity of problem loans, to which they are exposed.

Whenever appropriate, including when an organization is undertaking expansion, seeking to engage in new activities or otherwise facing unusual or abnormal risks, the Board will continue to consider the level of an organization's tangible Tier 1 leverage ratio (after deducting all intangibles) in making an overall assessment of capital adequacy. This is consistent with the Federal Reserve's risk-based capital guidelines and long-standing Board policy and practice under the current leverage guidelines. Organizations experiencing growth, whether internally or by acquisition, are expected to maintain strong capital positions substantially above minimum supervisory levels, without significant reliance on intangible assets.

IV. Regulatory Flexibility Act Analysis

The Federal Reserve Board certifies that adoption of this proposal would not have a significant economic impact on a substantial number of small business entities (in this case, small banking organizations), in accord with the spirit and purposes of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). In addition, consistent with current policy, these guidelines generally will not apply on a consolidated basis to bank holding companies with consolidated assets of less than $150 million. Moreover, rather than requiring all banking organizations to raise additional capital, the guidelines are directed by institutions whose capital positions are less than fully adequate in relation to their risk and leverage profiles.

List of Subjects

12 CFR Part 208

Accounting, Agricultural loan losses, Applications, Appraisals, Banks, Banking, Branches, Capital adequacy, Confidential business information, Dividend payments, Federal Reserve System, Flood insurance, Publication of reports of condition, Reporting and recordkeeping requirements, Securities, State member banks.

12 CFR Part 225

Administrative practice and procedure, Appraisals, Banks, Banking, Capital adequacy, Federal Reserve System, Holding companies, Reporting

[2] At the end of 1922, Tier 1 capital for state member banks includes common equity, minority interests in equity accounts of consolidated subsidiaries, and qualifying noncumulative perpetual preferred stock, less goodwill. It excludes any other intangible assets and investments in subsidiaries that the Federal Reserve determines should be deducted from capital for supervisory purposes. This could be done on a case-by-case basis or for certain classes of intangible assets. For bank holding companies, Tier 1 capital at the end of 1992 includes common equity, minority interests in equity accounts of consolidated subsidiaries, and qualifying perpetual preferred stock. (Perpetual preferred stock is limited to 25 percent of Tier 1 capital.) In addition, Tier 1 excludes goodwill, and other intangibles and investments in subsidiaries that the primary regulator determines should be deducted from capital. Such deductions could be done on a case-by-case basis or for certain classes of intangible assets. (This summary of Tier 1 capital definitions is purely illustrative in nature. Comprehensive Tier 1 capital definitions are set forth in Appendix A to part 208 of the Board's Regulation H for state member banks and in Appendix A to part 225 of the Board's Regulation Y for bank holding companies.)

and recordkeeping requirements, Securities, State member banks.

For the reasons set forth in this document, and pursuant to the Board's authority under section 5(b) of the Bank Holding Company Act of 1956 (12 U.S.C. 1844(b)), and section 910 of the International Lending Supervision Act of 1983 (12 U.S.C. 3909), the Board amends 12 CFR parts 208 and 225 as follows:

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM

1. The authority citation for part 208 continues to read as follows:

Authority: Sections 9, 11(a), 11(c), 19, 21, 25, and 25(a) of the Federal Reserve Act, as amended (12 U.S.C. 321–338, 248(a), 248(c), 461, 481–486, 601, and 611, respectively); sections 4 and 13(j) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1814 and 1823(j), respectively); section 7(a) of the International Banking Act of 1978 (12 U.S.C. 3105); sections 907–910 of the International Lending Supervision Act of 1983 (12 U.S.C. 3906–3909); sections 2, 12(b), 12(g), 12(i), 15B(c)(5), 17, 17A, and 23 of the Securities Exchange Act of 1934 (15 U.S.C. 78b, 78*l*(b), 78*l*(g), 78*l*(i), 78o–4(c)(5), 78q, 78q–1, and 78w, respectively); section 5155 of the Revised Statutes (12 U.S.C. 36) as amended by the McFadden Act of 1927; and sections 1101–1122 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (12 U.S.C. 3310 and 3331–3351).

2. Section 208.13 is revised to read as follows:

§ 208.13 Capital adequacy.

The standards and guidelines by which the capital adequacy of state member banks will be evaluated by the Board are set forth in appendix A to part 208 for risk-based capital purposes, and, with respect to the ratios relating capital to total assets, in appendix B to part 208 and in appendix B to the Board's Regulation Y, 12 CFR part 225.

Appendix A—[Amended]

3. Footnote 1 to "I. Overview" of appendix A to part 208 is revised to read as follows:

[1] Supervisory ratios that relate capital to total assets for state member banks are outlined in Appendix B of this Part and in appendix B to part 225 of the Federal Reserve's Regulation Y, 12 CFR Part 225.

4. The last sentence of the first paragraph to "IV. Minimum Supervisory Ratios and Standards" of appendix A to part 208 is removed; the existing second paragraph now becomes the third paragraph and remains unchanged; and a new paragraph is added immediately following the first paragraph. The new second paragraph reads as follows:

Institutions with high or inordinate levels of risk are expected to operate well above minimum capital standards. Banks experiencing or anticipating significant growth are also expected to maintain capital, including tangible capital positions, well above the minimum levels. For example, most such institutions generally have operated at capital levels ranging from 100 to 200 basis points above the stated minimums. Higher capital ratios could be required if warranted by the particular circumstances or risk profiles of individual banks. In all cases, banks should hold capital commensurate with the level and nature of all of the risks, including the volume and severity of problem loans, to which they are exposed.

5. A second paragraph is added to "IV. B. Transition Arrangements" of Appendix A to Part 208 to read as follows:

Through year-end 1990, banks have the option of complying with the minimum 7.25 percent year-end 1990 risk-based capital standard, in lieu of the minimum 5.5 percent primary and 6 percent total capital to total assets capital ratios set forth in appendix B to part 225 of the Federal Reserve's Regulation Y. In addition, as more fully set forth in appendix B to this part, banks are expected to maintain a minimum ratio of Tier 1 capital total assets during this transition period.

6. Appendix B is added to part 208 to read as set forth below.

Appendix B To Part 208: Capital Adequacy Guidelines for State Member Banks: Tier 1 Leverage Measure

I. Overview

The Board of Governors of the Federal Reserve System has adopted a minimum ratio to Tier 1 capital to total assets to assist in the assessment of the capital adequacy of state member banks.[1] The principal objective of this measure is to place a constraint on the maximum degree to which a state member bank can leverage its equity capital base. It is intended to be used as a supplement to the risk-based capital measure.

The guidelines apply to all state member banks on a consolidated basis and are to be used in the examination and supervisory process as well as in the analysis of applications acted upon by the Federal Reserve. The Board will review the guidelines from time to time and will consider the need for possible adjustments in light of any significant changes in the economy, financial markets, and banking practices.

II. The Tier 1 Leverage Ratio

The Board has established a minimum level of Tier 1 capital to total assets of 3 percent. An institution operating at or near these levels is expected to have well-diversified risk, including no undue interest rate risk exposure; excellent asset quality; high liquidity; good earnings; and in general be considered a strong banking organization, rated composite 1 under the CAMEL rating system of banks. Institutions not meeting these characteristics, as well as institutions with supervisory, financial, or operational weaknesses, are expected to operate well above minimum capital standards. Institutions experiencing or anticipating significant growth also are expected to maintain capital ratios, including tangible capital positions, well above the minimum levels. For example, most such banks generally have operated at capital levels ranging from 100 to 200 basis points above the stated minimums. Higher capital ratios could be required if warranted by the particular circumstances or risk profiles of individual banks. Thus, for all but the most highly-rated banks meeting the conditions set forth above, the minimum Tier 1 leverage ratio is to be 3 percent plus an additional cushion of at least 100 to 200 basis points. In all cases, banking institutions should hold capital commensurate with the level and nature of all risks, including the volume and severity of problem loans, to which they are exposed.

A bank's Tier 1 leverage ratio is calculated by dividing its Tier 1 capital (the numerator of the ratio) by its average total consolidated assets (the denominator of the ratio). The ratio will also be calculated using period-end assets whenever necessary, on a case-by-case basis. For the purpose of this leverage ratio, the definition of Tier 1 capital for year-end 1992 as set forth in the risk-based capital guidelines contained in appendix A of this part will be used.[2] Average total consolidated assets are defined as the quarterly average total assets (defined net of the allowance for loan and lease losses) reported on the bank's Reports of Condition and Income ("Call Report"), less goodwill and any other intangible assets and investments in subsidiaries that the Federal Reserve determines should be deducted from Tier 1 capital.[3]

Whenever appropriate, including when a bank is undertaking expansion, seeking to engage in new activities or otherwise facing unusual or abnormal risks, the Board will continue to consider the level of an individual bank's tangible Tier 1 leverage ratio (after deducting all intangibles) in making an overall assessment of capital adequacy. This is consistent with the Federal Reserve's risk-based capital guidelines and long-standing Board policy and practice with regard to leverage guidelines. Banks experiencing growth, whether internally or by acquisition, are expected to maintain strong capital positions substantially above minimum supervisory levels, without significant reliance on intangible assets.

[1] Supervisory risk-based capital ratios that relate capital to weighted risk assets for state member banks are outlined in Appendix A to this Part.

[2] At the end of 1992, Tier 1 capital for state member banks includes common equity, minority interests in equity accounts of consolidated subsidiaries, and qualifying noncumulative perpetual preferred stock, less goodwill. The Federal Reserve may exclude certain other intangibles and investments in subsidiaries as appropriate.

[3] Deductions from Tier 1 capital and other adjustments are discussed more fully in section II.B. of appendix A to this part.

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL

1. The authority citation for part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1831i, 1843(c)(8), 1844(b), 3106, 3108, 3907, 3909, 3310, and 3331–3351.

Appendix A—[Amended]

2. Footnote 1 to "I. Overview" of appendix A to part 225 is revised to read as follows:

[1] Supervisory ratios that relate capital to total assets for bank holding companies are outlined in appendices B and D of this part.

3. The last sentence of the first paragraph to "IV. Minimum Supervisory Ratios and Standards" of appendix A to part 225 is removed; the existing second paragraph now becomes the third paragraph and remains unchanged; and a new paragraph is added immediately following the first paragraph. The new second paragraph reads as follows:

Institutions with high or inordinate levels of risk are expected to operate well above minimum capital standards. Banking organizations experiencing or anticipating significant growth are also expected to maintain capital, including tangible capital positions, well above the minimum levels. For example, most such organizations generally have operated at capital levels ranging from 100 to 200 basis points above the stated minimums. Higher capital ratios could be required if warranted by the particular circumstances or risk profiles of individual banking organizations. In all cases, organizations should hold capital commensurate with the level and nature of all of the risks, including the volume and severity of problem loans, to which they are exposed.

4. A second paragraph is added to "IV. B. Transition Arrangements" of appendix A to part 225 to read as follows:

Through year-end 1990, banking organizations have the option of complying with the minimum 7.25 percent year-end 1990 risk-based capital standard, in lieu of the minimum 5.5 percent primary and 6 percent total capital to total assets ratios set forth in appendix B of this Part. In addition, as more fully set forth in appendix D to this part, banking organizations are expected to maintain a minimum ratio of Tier 1 capital to total assets during this transition period.

Appendix B—[Amended]

5. Three new sentences are added to the end of the first paragraph of appendix B to part 225 to read as follows:

* * * In this regard, the Board has determined that during the transition period through year-end 1990 for implementation of the risk-based capital guidelines contained in appendix A to this part and in appendix A to part 208, a banking organization may choose to fulfill the requirements of the guidelines relating capital to total assets contained in this Appendix in one of two manners. Until year-end 1990, a banking organization may choose to conform to either the 5.5 percent and 6 percent minimum primary and total capital standards set forth in this Appendix, or the 7.25 percent year-end 1990 minimum risk-based capital standard set forth in appendix A to this part and appendix A to part 208. Those organizations that choose to conform during this period to the 7.25 percent year-end 1990 risk-based capital standard will be deemed to be in compliance with the capital adequacy guidelines set forth in this appendix.

6. Appendix D is added to part 225 to read as set forth below.

Appendix D—Capital Adequacy Guidelines for Bank Holding Companies: Tier 1 Leverage Measure

I. Overview

The Board of Governors of the Federal Reserve System has adopted a minimum ratio of Tier 1 capital to total assets to assist in the assessment of the capital adequacy of bank holding companies ("banking organizations").[1] The principal objective of this measure is to place a constraint on the maximum degree to which a banking organization can leverage its equity capital base. It is intended to be used as a supplement to the risk-based capital measure.

The guidelines apply on a consolidated basis to bank holding companies with consolidated assets of $150 million or more. For bank holding companies with less than $150 million in consolidated assets, the guidelines will be applied on a bank-only basis unless: a) the parent bank holding company is engaged in nonbank activity involving significant leverage; [2] or b) the parent company has a significant amount of outstanding debt that is held by the general public.

The Tier 1 leverage guidelines are to be used in the inspection and supervisory process as well as in the analysis of applications acted upon by the Federal Reserve. The Board will review the guidelines from time to time and will consider the need for possible adjustments in light of any significant changes in the economy, financial markets, and banking practices.

II. The Tier 1 Leverage Ratio

The Board has established a *minimum* level of Tier 1 capital to total assets of 3 percent. A banking organization operating at or near these levels is expected to have well-diversified risk, including no undue interest rate risk exposure; excellent asset quality; high liquidity; good earnings; and in general be considered a strong banking organization, rated composite 1 under the BOPEC rating system for bank holding companies. Organizations not meeting these characteristics, as well as institutions with supervisory, financial, or operational weaknesses, are expected to operate well above minimum capital standards. Organizations experiencing or anticipating significant growth also are expected to maintain capital ratios, including tangible capital positions, well above the minimum levels. For example, most such organizations generally have operated at capital levels ranging from 100 to 200 basis points above the stated minimums. Higher capital ratios could be required if warranted by the particular circumstances or risk profiles of individual banking organizations. Thus, for all but the most highly-rated organizations meeting the conditions set forth above, the minimum Tier 1 leverage ratio is to be 3 percent plus an additional cushion of at least 100 to 200 basis points. In all cases, banking organizations should hold capital commensurate with the level and nature of all risks, including the volume and severity of problem loans, to which they are exposed.

A banking organization's Tier 1 leverage ratio is calculated by dividing its Tier 1 capital (the numerator of the ratio) by its average total consolidated assets (the denominator of the ratio). The ratio will also be calculated on the basis of period-end assets, whenever necessary on a case-by-case basis. For the purpose of this leverage ratio, the definition of Tier 1 capital for year-end 1992 as set forth in the risk-based capital guidelines contained in appendix A to this part will be used.[3] Average total consolidated assets are defined as the quarterly average total assets (defined net of the allowance for loan and lease losses) reported on the banking organization's Consolidated Financial Statements ("FR Y–9C Report"), less goodwill and any other intangible assets or investments in subsidiaries that the Federal Reserve determines should be deducted from Tier 1 capital.[4]

Whenever appropriate, including when an organization is undertaking expansion, seeking to engage in new activities or otherwise facing unusual or abnormal risks, the Board will continue to consider the level of an individual organization's tangible Tier 1 leverage ratio (after deducting all intangibles) in making an overall assessment of capital adequacy. This is consistent with the Federal Reserve's risk-based capital guidelines and long-standing Board policy and practice with regard to leverage guidelines. Organizations experiencing growth, whether internally or by acquisition, are expected to maintain strong

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[1] Supervisory risk-based capital ratios that relate capital to weighted risk assets for bank holding companies are outlined in Appendix A to this Part.

[2] A parent company that is engaged in significant off-balance sheet activities would generally be deemed to be engaged in activities that involve significant leverage.

[3] At the end of 1992, Tier 1 capital for bank holding companies includes common equity, minority interests in equity accounts of consolidated subsidiaries, and qualifying perpetual preferred stock. (Perpetual preferred stock is limited to 25 percent of Tier 1 capital.) In addition, Tier 1 excludes goodwill. The Federal Reserve may exclude certain other intangibles and investments in subsidiaries as appropriate.

[4] Deductions from Tier 1 capital and other adjustments are discussed more fully in section II.B. of Appendix A to this Part.

capital positions substantially above minimum supervisory levels, without significant reliance on intangible assets.

By the order of the Board of Governors of the Federal Reserve System, August 1, 1990.

William W. Wiles,

Secretary of the Board.

[FR Doc. 90-18404 Filed 8-9-90; 8:45 am]

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August 10, 1990

Part IV

Department of Labor

Pension and Welfare Benefits

29 CFR Parts 2570 and 2585

Prohibited Transaction Exemption Procedures; Employee Benefit Plans; Final Regulation and Removal of Interim Final Regulation

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Parts 2570 and 2585

RIN 1210-AA26

Prohibited Transaction Exemption Procedures; Employee Benefit Plans

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Final regulation and removal of interim final regulation.

SUMMARY: This document contains a final regulation that describes the procedures for filing and processing applications for exemptions from the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code of 1986 (the Code), and the Federal Employees' Retirement System Act of 1986 (FERSA). At this time, the Department is also removing an interim regulation which describes the exemption procedures under FERSA because such regulation is superseded by the final regulation contained herein. The Secretary of Labor is authorized to grant exemptions from the prohibited transaction provisions of ERISA, the Code, and FERSA and to establish an exemption procedure to provide for such exemptions. The final regulation updates the description of the Department of Labor's procedures to reflect changes in the Department's exemption authority and to clarify the procedures by providing a more comprehensive description of the prohibited transaction exemption process.

EFFECTIVE DATE: This regulation is effective September 10, 1990, and applies to all exemption applications filed at any time on or after that date.

FOR FURTHER INFORMATION CONTACT: Miriam Freund, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210, (202) 523-8194, or Susan Rees, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210, (202) 523-9141.

SUPPLEMENTARY INFORMATION: Public reporting burden for this collection of information is estimated to average 28.5 hours per response, including the time for reviewing the 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 the burden, to Director, Office of Information Management, U.S. Department of Labor, 200 Constitution Avenue NW., Room N-1301, Washington, DC 20210; and to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for PWBA, Office of Management and Budget, Room 3001, Washington, DC 20503.

Section 406 of ERISA prohibits certain transactions between employee benefit plans and "parties in interest" (as defined in section 3(14) of ERISA). In addition, sections 406 and 407(a) of ERISA impose restrictions on plan investments in "employer securities" (as defined in section 407(d)(1) of ERISA) and "employer real property" (as defined in section 407(d)(2) of ERISA). Most of the transactions prohibited by section 406 of ERISA are likewise prohibited by section 4975 of the Code, which imposes an excise tax on those transactions to be paid by each "disqualified person" (defined in section 4975(e)(2) of the Code in virtually the same manner as the term "party in interest") who participates in the transactions.

Both ERISA and the Code contain various statutory exemptions from the prohibited transaction rules. In addition, section 408(a) of ERISA authorizes the Secretary of Labor to grant administrative exemptions from the restrictions of ERISA sections 406 and 407(a) while section 4975(c)(2) of the Code authorizes the Secretary of the Treasury or his delegate to grant exemptions from the prohibitions of Code section 4975(c)(1). Sections 408(a) of ERISA and 4975(c)(2) of the Code direct the Secretary of Labor and the Secretary of the Treasury, respectively, to establish procedures to carry out the purposes of these sections.

Under section 3003(b) of ERISA, the Secretary of Labor and the Secretary of the Treasury are directed to consult and coordinate with each other with respect to the establishment of rules applicable to the granting of exemptions from the prohibited transaction restrictions of ERISA and the Code. Under section 3004 of ERISA, moreover, the Secretaries are authorized to develop jointly rules appropriate for the efficient administration of ERISA. Pursuant to these provisions, the Secretaries jointly issued an exemption procedure on April 28, 1975 (ERISA Proc. 75-1, 40 FR 18471, also issued as Rev. Proc. 75-26, 1975-1 C.B. 722). Under these procedures, a person seeking an exemption under both section 408(a) of ERISA and section 4975(c)(2) of the Code was obliged to file an exemption application with the Internal Revenue Service as well as with the Department of Labor.

Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978, effective on December 31, 1978), transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975 of the Code, with certain enumerated exceptions, to the Secretary of Labor. As a result, the Secretary of Labor now possesses authority under section 4975(c)(2) of the Code, as well as under section 408(a) of ERISA, to issue individual and class exemptions from the prohibited transaction rules of ERISA and the Code. The Secretary has delegated this authority, along with most of his other responsibilities under ERISA, to the Assistant Secretary for Pension and Welfare Benefits. See Secretary of Labor's Order 1-87, 52 FR 13139 (April 21, 1987).

FERSA also contains prohibited transaction rules that are applicable to parties in interest with respect to the Federal Thrift Savings Fund established by FERSA, and the Secretary of Labor is directed to prescribe, by regulation, a procedure for granting administrative exemptions from certain of those prohibited transactions. See 5 U.S.C. 8477(c)(3).

On June 28, 1988, the Department published a proposed rule in the **Federal Register** (53 FR 24422) updating ERISA Procedure 75-1 to reflect the changes made by Reorganization Plan No. 4 and extending the procedure to applications for exemptions from the FERSA prohibited transaction rules. In addition, the proposed regulation codified various procedures developed by PWBA since the adoption of ERISA Proc. 75-1. Formal adoption of those procedures will facilitate review of exemption applications. These new procedures also fill in some of the gaps left in ERISA Proc. 75-1, thereby providing a more detailed description both of the steps to be taken by applicants in applying for exemptions and the steps normally taken by the Department in processing such applications. Finally, the proposed regulation modified some of the procedures described in ERISA Proc. 75-1 to better serve the needs of the administrative exemption program as demonstrated by the Department's experience with the program over the previous fourteen years. These amendments were intended to promote the prompt and fair consideration of all exemption applications.

The notice of proposed rulemaking gave interested persons an opportunity to comment on the proposal. In response, the Department received three letters of comment regarding several

aspects of the proposed regulation. The following discussion summarizes the proposed regulation and the issues raised by the commentators and explains the Department's reasons for adopting the provisions of the final regulation.

The Scope of the Regulation

As explained in the notice of proposed rulemaking, the regulation establishes new procedures to replace ERISA Proc. 75–1. These new procedures reflect changes in the Department of Labor's exemption authority effected by Reorganization Plan No. 4 of 1978. Thus, the procedures apply to all applications for exemption which the Department has authority to issue under section 408(a) of ERISA, or, as a result of Reorganization Plan No. 4, under section 4975(c)(2) of the Code. The procedures reflect current practice under which the Department generally treats any exemption application filed solely under section 408(a) of ERISA or solely under section 4975(c)(2) of the Code as an application for exemption filed under both of these sections if the application relates to a transaction prohibited under corresponding provisions of both ERISA and the Code. The grant of an exemption by the Department in such instances protects disqualified persons covered by the exemption from the excise taxes otherwise assessable under section 4975 (a) and (b) of the Code.

However, the procedures do not apply to applications for exemption reserved to the jurisdiction of the Secretary of the Treasury by Reorganization Plan No. 4. To ascertain the correct procedures for filing and processing applications for these exemptions, applicants should consult the Internal Revenue Service.

The Department has also concluded that it is appropriate to apply the procedures provided here to exemption applications filed under FERSA, as well as those filed under ERISA or the Code, as provided by proposed § 2570.30, which has been adopted without change in the final regulation. Although the prohibited transaction provisions of FERSA and the scope of the Department's exemptive authority under FERSA differ somewhat from that under ERISA and the Code, administrative exemption matters under FERSA are likely to involve many of the same issues as are presented by similar matters involving private plans. Thus, adopting uniform procedures should help assure uniform administration of the exemption programs.

Applications for Exemption under FERSA

On December 29, 1988, the Department published an interim regulation in the **Federal Register** (29 CFR part 2585, 53 FR 52688) describing the procedures for filing and processing applications for exemptions from the prohibited transaction provisions of FERSA. For such applications, the interim regulation adopted the procedures then currently followed (pursuant to ERISA Proc. 75–1) by applicants for exemptions from the prohibited transaction provisions of ERISA and the Code. The interim final regulation was effective commencing December 29, 1988 until the effective date of the final regulation contained herein for all prohibited transaction exemption applications (under ERISA, the Code, and FERSA).[1]

Section 2585.12 of the interim regulation provides that this regulation shall expire on the effective date of the revised prohibited transaction exemption procedure, published in proposed form on June 28, 1988, 53 FR 24422, and that the Department will publish a document removing these interim regulations when it adopts final regulations based on the published proposal. Accordingly, this notice of final rulemaking removes the interim regulations as of September 10, 1990, the effective date of the final regulation contained herein.

In regard to FERSA exemption applications, the Department received a comment relating to the adoption of ERISA class exemptions for FERSA purposes. This comment suggested that the final regulation clarify that the Department will follow the procedure authorized under section 8477(c)(3)(E) of FERSA, which permits the Secretary of Labor to determine that an exemption granted for any class of fiduciaries or transactions under section 408(a) of ERISA shall constitute an exemption for FERSA purposes upon publication of notice in the **Federal Register** without affording interested persons opportunities to present their views (in writing or at a hearing).

The procedure described in the preceding paragraph was not used in conjunction with the Department's adoption for FERSA purposes of a number of specific class exemptions under ERISA (i.e., Prohibited Transaction Exemptions (PTE) 75–1, 76–19, 80–26, 80–51, 82–63, and 86–128). In that instance, the Department published in the **Federal Register** both a notice of proposed adoption of class exemptions under ERISA (53 FR 38105, September 29, 1988), which invited the public to submit written comments or requests for a hearing on the proposed adoption, and also a notice of final adoption of these class exemptions (PTE T88–1, 53 FR 52838, December 29, 1988). In this regard, the Department notes that, with respect to ERISA class exemptions which may be proposed in the future and which may also be relevant under FERSA, the Department will solicit the views of the Executive Director of the Federal Retirement Thrift Investment Board in advance of the publication of the proposed exemption to determine whether such exemption should also be proposed for FERSA purposes.

Also regarding FERSA exemption applications, the Department received another comment requesting clarification that the mere existence of routine audit activity conducted by the Department pursuant to the requirements of section 8477(g) of FERSA [2] will not provide a basis for denial of, or failure to consider, an application for exemption under FERSA. It is the view of the Department that those audits conducted by the Department in carrying out its responsibilities in connection with its regular program of compliance audits under FERSA section 8477(g) would not constitute an "investigation" for purposes of §§ 2570.33(a)(2) and 2570.37(b) of the regulation [3] or an "examination" for purposes of § 2570.35(a)(7). [4] The Department would

[1] Under section 111 of the FERSA Technical Corrections Act of 1986 (Pub. L. 99–556, October 27, 1986), the Department's existing exemptions procedures were made applicable to exemption applications under FERSA until the earlier of the date of publication of final regulations adopting an exemption procedure or December 31, 1988.

[2] Section 8477(g) of FERSA requires the Secretary of Labor to establish a program to carry out audits to determine the level of compliance with the requirements of this section relating to fiduciary responsibilities and prohibited activities of fiduciaries with respect to the Thrift Savings Fund of the Federal Employees' Retirement System. The Department has interpreted section 8477(g) to mean that the Department has a continuing responsibility to audit the Thrift Savings Fund established by FERSA.

[3] These sections relate, in pertinent part, to: the Department's nonconsideration of exemption applications which are the subject of an investigation for possible violations of FERSA or which involve a party in interest who is the subject of such an investigation (§ 2570.33(a)(2)); and to the notification of the Division of Exemptions of certain investigations initiated after the filing of an exemption application (§ 2570.37(b)).

[4] This section of the regulation requires certain exemption applications to include copies of correspondence relating to investigations, examinations, litigation, or continuing controversies with specified Federal agencies.

not, however, be precluded from denying, or failing to consider, an application based on an investigation prompted by information arising as a result of such a routine audit.

Definitions

Section 2570.31 of the proposed regulation defined the following terms for purposes of the exemption procedures: affiliate, class exemption, Department, exemption transaction, individual exemption, and party in interest. No comments were received regarding these definitions which are adopted in the final regulation as proposed. However, the Department has added to this section a definition of the term "pooled fund" in response to a comment requesting that a special rule be added to the final regulation regarding information to be furnished in exemption applications relating to plans affected by an exemption transaction undertaken by a pooled investment vehicle. (This comment is discussed in more detail below.)

Who May Apply for Exemptions

Section 2570.32(a) of the proposed regulation provided that exemption proceedings may be initiated by the Department either on its own motion or upon the application of: (1) Any party in interest to a plan which is or may be a party to the exemption transaction, (2) any plan which is a party to the exemption transaction, or (3) an association or organization representing parties in interest who may be parties to an exemption transaction covering a class of parties in interest or a class of transactions.

One of the comments received recommended modifying this paragraph of the regulation to permit an exemption application to be filed by any fiduciary or prospective fiduciary with respect to plan assets under such fiduciary's management or control, regardless of whether such fiduciary either represents a specific plan with respect to the exemption application or would be a party to the exemption transaction. The commentator clarified his comment by explaining that he intended this category of applicants to cover prospective fiduciaries, such as persons creating and/or managing a new investment vehicle in which plans are expected to participate if the requested exemption is granted, but in which no plans participate at the time the exemption application is filed. The commentator noted that in the past the Department has granted individual exemptions to institutional investment managers in connection with their investment management of individual plans' investment accounts or pooled investment funds in which several unidentified plans may participate.

In the Department's view, the reference in proposed § 2570.32(a)(1) to "any party in interest to a plan who is or may be a party to the exemption transaction" includes the prospective fiduciaries mentioned by the commentator. Therefore, § 2570.32(a) is adopted in the final regulation without change.

Section 2570.32 (b) and (c) of the proposed regulation set forth simplified rules relating to representation of applicants by third parties. No comments were received regarding these paragraphs, which are adopted in the final regulation without change.

Applications the Department Will Not Ordinarily Consider

Section 2570.33(a) of the proposed regulation described the circumstances under which the Department will not ordinarily consider the merits of an exemption application. Thus, this paragraph provided that the Department will not ordinarily consider an incomplete application. In this regard, the Department emphasizes that applicants should not file exemption applications until they have compiled all the information required by § 2570.34 and, if applicable, § 2570.35, and can submit this information in an organized and comprehensive fashion together with all necessary supporting documents and statements. In addition, the proposal made it clear that the Department ordinarily will not consider applications that involve a transaction, or a party in interest with respect to such transaction, that is the subject of an ERISA enforcement action or investigation. In certain cases, however, the Department may exercise its discretion to consider exemption applications in these categories where, for example, deficiencies in the exemption application are merely technical, or where an enforcement matter is clearly unrelated to the exemption transaction.

One comment was received specifically regarding investigations, and it is discussed above under the heading "Applications for Exemption under FERSA." In addition, the Department has amended § 2570.33(a)(2) (relating to certain investigations and enforcement actions) to conform to a similar revision to § 2570.35(a)(7) (discussed below) made in response to two other comments received regarding the proposed requirement to include information in an application concerning certain investigations, examinations, litigation, or continuing controversy involving specified Federal agencies with respect to any plan or party in interest involved in the exemption transaction. The effect of these amendments is to expand the proposed regulation in order to broaden the scope of exemption applications which the Department will ordinarily consider.

No comments were received on paragraphs (b) and (c) of proposed § 2570.33, which are adopted without change in the final regulation. These paragraphs relate to the Department's written explanation to an applicant whose exemption application the Department has decided not to consider, and to applications for individual exemption relating to transaction(s) covered by a class exemption under consideration by the Department.

Exemption Application Contents—General Information

As previously noted in the proposed regulation, the Department's experience to date with the administrative exemption program suggests that the program's efficiency could be increased and applicants can receive more timely treatment of their applications for exemption if the quality of exemption applications filed were improved. In the past, applications have been incomplete, have omitted or misstated facts or legal analyses needed to justify requests for exemptive relief, and in some cases have been so poorly drafted that the details of the transactions for which exemptive relief is sought ("exemption transactions") are unclear. The time and effort required to deal with such deficient applications and to obtain accurate and complete information about exemption transactions have contributed to processing delays. Moreover, in many exemption applications, the discussion of the substantive basis for the exemption does not take adequate account of positions adopted by the Department with respect to other similar applications.

The proposed regulation attempted to address these problems in a number of ways. First, the proposal required that applicants provide more complete information in their applications about exemption transactions and about the plans and the parties in interest involved in those transactions. The Department's experience suggests that this additional information is very helpful, and often essential, for a complete understanding of the exemption transaction and of the context surrounding it, and that the omission of such additional information in exemption applications will delay

review of these applications on their merits.

For the same reason, the proposed regulation required filing with the exemption application copies of the relevant portions of documents bearing on transactions for which individual exemptions are sought. Such filing will avoid delays in the evaluation of exemption applications pending receipt of relevant documents. By filing comprehensive applications with necessary supporting documentation, applicants can do much to facilitate the Department's review of requested exemptions and to expedite the exemption process as a whole.

To further expedite the exemption process, the proposed regulation required that an applicant include with his application a statement explaining why the requested exemption satisfies requirements set forth in sections 408(a) of ERISA and 4975(c)(2) of the Code and 5 U.S.C. 8477(c)(3)(C) that an exemption be:

(1) Administratively feasible;

(2) In the interests of the plan and of its participants and beneficiaries; and

(3) Protective of the rights of the plan's participants and beneficiaries.

This requirement is not new. Under ERISA Proc. 75–1, applicants have been required to include with their applications statements explaining why a requested exemption satisfies the statutory prerequisites for an exemption. Too often, however, applicants have attempted to satisfy this requirement with generalizations and perfunctory assurances about the benefits to be reaped by plans and their participants and beneficiaries from the proposed exemption.

The Department will not seek out reasons to grant an exemption that has not been adequately justified by an applicant. Indeed, the Department considers that it is the responsibility of applicants to demonstrate clearly that exemptions they are requesting meet statutory criteria. Accordingly, under both the proposed and the final regulation, applicants are expected to review the statutory criteria for granting administrative exemptions and explain with as much specificity as possible why a requested exemption would pose no administrative problems, what benefits affected plans and their participants and beneficiaries can expect to receive from it, and what conditions would be attached to protect the rights of participants and beneficiaries of affected plans.[5]

Under ERISA Proc. 75–1, applicants have been given the option, but have not been required, to submit a draft of the proposed exemption. Both the proposed and the final regulation preserve this option. However, while not requiring the submission of a draft of the proposed exemption, the Department recommends that applicants include in their exemption applications draft language which defines the scope of the requested exemption, including the specific conditions under which the requested exemption would apply. A draft which explains the exemption requested in a clear and concise manner and focuses on what the applicant considers to be the essential features of the exemption transaction and the critical safeguards supporting the requested relief is likely to facilitate the process of review. Obviously, the degree of detail necessary to describe the proposed exemption adequately will vary depending on the complexity of the transaction and the kind of relief requested.

Section 2570.34 of the proposed regulation listed the information that is required in every exemption application, whether it be an application for individual or class exemption. In addition, the information specified in § 2570.35 of the regulation must be included in applications for individual exemptions. Some specific items of information are discussed below.

Shared Representation

Section 2570.34(a)(3) of the proposed regulation required each exemption application to disclose whether the same person will represent both the plan and the parties in interest involved in an exemption transaction in matters relating to the application. The proposal noted that such shared representation may raise questions under the exclusive purpose and prudence requirements of sections 403(c) and 404(a) of ERISA and under the prohibited transaction provisions of section 406 of ERISA and section 4975(c)(1) of the Code. No comments have been received regarding this subparagraph, which is adopted as proposed.

Third-Party Declarations

Section 2570.34(b)(5)(iii) of the proposed regulation required a declaration under penalty of perjury to accompany specialized statements from third-party experts submitted to support an exemption application, such as appraisals, analyses of market conditions, or opinions of independent fiduciaries. Specifically, the proposal required a declaration under penalty of perjury, that to the best of the expert's knowledge and belief, the representations made in the specialized statement are true and correct. This declaration was to be dated and signed by the expert who prepared the statement.

One of the comments received urged deletion of this requirement and expressed concern that it would cause additional expense to applicants because new third-party statements would be required once the appraiser, engineer, financial specialist, or other expert became aware of their intended use as part of an exemption application. The commentator advised subsequently that such experts either may be reluctant to provide any sort of attestation because of unknown liabilities which may arise by using the expert's report as part of an exemption application, or may seek an additional, and perhaps substantial, fee for furnishing an attestation due to the unknown liabilities.

In this regard, the Department notes that, with respect to any matter within the jurisdiction of any department or agency of the United States, it is a crime, punishable by a fine of up to $10,000 and/or imprisonment of up to five years, for anyone knowingly and willfully to falsify, conceal, or cover up by any trick, scheme or device a material fact; to make any false, fictitious, or fraudulent statements or representations; or to make or use any false writing or document knowing the same contains any false, fictitious, or fraudulent statement or entry (18 U.S.C. § 1001). It is the view of the Department that this provision applies to applicants for exemptions under ERISA, the Code, or FERSA, to fiduciaries (independent or otherwise) representing the plan in an exemption transaction, and to third-party experts who prepare statements or reports that such experts know will be included in exemption applications.

Nevertheless, the Department recognizes that third-party experts such as appraisers, bankers, financial analysts, and other specialized consultants usually do not function as fiduciaries with respect to a plan if such experts' authority, responsibility, or contact with respect to the plan is limited to providing an opinion which may be included in an exemption application and which will be considered by plan fiduciaries who will decide what, if any, action they will take on behalf of the plan based upon such

[5] The Department must find that the statutory criteria are satisfied before granting a prohibited transaction exemption. The legislative history of ERISA makes it clear, however, that the Department has broad discretion in determining whether or not to grant an exemption. H.R. Rep. 1280, 93 Cong., 2d Sess. 311 (1974).

opinion. The Department believes that such experts need not be held to the same degree of accountability regarding exemption applications covering transactions where a plan fiduciary has the authority and responsibility to make decisions on behalf of a plan. Thus, the Department has decided to modify proposed § 2570.34(b)(5)(iii) to provide that a statement of consent, rather than a declaration under penalty of perjury, is required from each such expert which acknowledges that his or her statement is being submitted to the Department as part of an exemption application. The Department believes that such a consent statement from a third-party expert will not require an applicant to obtain a new report from the expert because the expert's consent statement may refer to his or her previously issued report. (However, the Department may require an updated report in any case if the substantive information contained in a report submitted with an exemption application is out of date.)

Conversely, where an independent fiduciary represents the plan in an exemption transaction, that fiduciary is subject to all of the responsibilities imposed by part 4 of subtitle B of title I of ERISA. None of the comments received questioned the need for such a fiduciary to provide the declaration under penalty of perjury required under the proposed regulation, and the Department has decided to retain this proposed requirement for such plan fiduciaries in the final regulation. As a result, the Department has modified § 2570.34(b)(5)(ii) and has added § 2570.34(b)(5)(iv) to clarify that a declaration is required for such plan fiduciaries.

Pooled Funds

One comment suggested that § 2570.35 of the proposed regulation be modified to provide a special rule regarding information to be included in an application for an individual exemption involving a pooled investment fund, such as a pooled separate account maintained by an insurance company or a collective investment fund maintained by another financial institution. The commentator pointed out that, as proposed, § 2570.35 would require information to be submitted regarding each plan participating in a pooled investment fund, resulting in the submission of an overwhelming volume of information unrelated to the exemption transaction. However, the commentator recognized that information regarding certain plans may be relevant to the exemption application in view of the potential for conflicts of interest involving such plans. Such plans would include any plan maintained for employees of the sponsor or other fiduciary of the pooled investment fund, and a plan whose participation in the pooled fund exceeded a specified percentage of the total fund assets.

The Department agrees with this comment and, accordingly, has added a new paragraph (c) to § 2570.35, which contains a special rule for applications for individual exemptions involving pooled funds [as defined in § 2570.31(g)]. Subparagraph (1) of § 2570.35(c) excepts such applications from including certain information otherwise required relating to among other things: reportable events under section 4043 of ERISA, notice of intent to terminate a plan (section 4041 of ERISA), the number of participants and beneficiaries of each plan participating in the pooled fund, and the percentage of each such plan's assets involved in the exemption transaction.

Subparagraph (2) of the special rule provides that certain information otherwise required by § 2570.35 (a) and (b) of the regulation must be furnished by reference to the pooled fund rather than the plans participating in such fund. This information pertains to: Identifying information; any prior violations of the Code's exclusive benefit rule or of the prohibited transaction provisions of the Code, ERISA or FERSA; any prior applications for exemption from such prohibited transaction provisions; any lawsuits or criminal actions regarding conduct with respect to any employee plan; any criminal convictions described in section 411 of ERISA; any investigation or continuing controversy with specified Federal agencies regarding compliance with ERISA, Code provisions relating to employee plans, or FERSA provisions relating to the Federal Thrift Savings Fund; whether the exemption transaction has been consummated and, if so, certain related information regarding correction of the prohibited transaction and payment of excise taxes; the identification of persons with investment discretion over any assets involved in the exemption transaction and each such person's relationship to the parties in interest involved in the exemption transaction; investments involving certain parties in interest; the fair market value of the pooled fund; the identity of the person who will pay the costs of the exemption application, notifying interested persons, and the fee of any independent fiduciary involved in the exemption transaction; and an analysis of the facts relevant to the exemption transaction as reflected in documents submitted with the application. The pooled fund, rather than participating plans, must also furnish copies of all relevant documents, including, for example, the most recent financial statements of the pooled fund.

Subparagraph (3) of the special rule requires information to be furnished with pooled fund exemption applications with respect to: the aggregate number of plans expected to participate in the pooled fund, and the limits (if any) imposed by the pooled fund on the amount or percentage of each participating plan's assets that may be invested in the pooled fund.

Subparagraph (4) of § 2570.35(c) contains additional requirements for applications for individual exemptions involving pooled funds. These requirements apply to plans whose investments in the pooled fund represent more than 20% of the pooled fund's total assets [6] and those plans covering employees of the pooled fund's sponsor, and other fiduciaries with discretion over pooled fund assets. The Department believes that additional information is warranted in those situations where the potential for decision making that may inure to the benefit of a fiduciary or other party in interest is increased. For each of these plans, the additional requirements provide for the furnishing of certain individual plan information described in § 2570.35(a), in addition to the information required under § 2570.35 (c)(2) and (c)(3). The Department believes this information is necessary for its determination as to whether sufficient protections are incorporated into the exemption transaction.

The Department further notes that the decision by the fiduciaries of certain plans to invest in a pooled fund may involve a separate prohibited transaction, apart from any prohibited transaction which may be entered into by the pooled fund itself. In this regard, the Department notes that the information required to be submitted on behalf of such plans is to be provided in accordance with the general rule contained in § 2570.35, rather than the special rule for pooled funds.

Finally, the Department believes that the special rule for pooled funds is less burdensome to applicants than the rules set forth in the proposed regulation. As noted by a commentator, the proposed regulation would have required the submission of voluminous amounts of material, as information would have to be submitted on behalf of each plan investing in a pooled fund. The final

[6] See section I(e) of PTE 84-14 (49 FR 9494, March 13, 1984) the class exemption involving qualified professional asset managers.

regulation limits the amount of material to be submitted since it requires only information relating to the pooled fund and, where applicable, certain plans investing in the pooled fund. In addition, the Department believes that its ability to analyze and process applications for exemption involving pooled funds will be enhanced by this special rule. In this regard, the Department believes that the final regulation eliminates a significant amount of material that otherwise would have been required.

Lawsuits, Certain Criminal Convictions, Investigations, Examinations, Continuing Controversies, etc.

Sections 2570.35(a) (5), (6), and (7) of the proposed regulation required exemption applications to disclose information regarding whether the applicant or any of the parties to the exemption transaction is or has been, within a specified number of years past, a defendant in any lawsuit or criminal action concerning conduct as a fiduciary or other party in interest with respect to any employee benefit plan (§ 2570.35(a)(5)), convicted of a crime described in section 411 of ERISA (§ 2570.35(a)(6)), or under investigation or examination or engaged in litigation or a continuing controversy with certain Federal agencies (§ 2570.35(a)(7)). Proposed § 2570.35(a)(7) also required disclosure of whether any plan affected by the exemption transaction has been under such investigation, examination, litigation, or continuing controversy, and further required the applicant to submit copies of all correspondence with the specified Federal agencies regarding substantive issues involved in such investigation, etc.

Two of the comments urged deletion of the disclosure requirements of proposed § 2570.35(a) (5) and (7) on the basis that such disclosure is difficult, costly, and almost always irrelevant to the exemption transaction.

The Department continues to believe that the proposed disclosure is relevant to the exemption transaction. With regard to § 2570.35(a)(5) (relating to lawsuits or certain criminal actions), the Department views the disclosure required as directly concerning the conduct of the applicant and other parties in interest participating in the exemption transaction. The Department believes that such information is necessary in evaluating the credibility and integrity of such parties, some of whom may possess substantial discretion regarding the exemption transaction or may make representations upon which the Department must rely in determining whether the statutory criteria for an exemption have been satisfied. In addition, the proposed disclosure assists the Department in ensuring that the exemption transaction contains appropriate safeguards.

Further, the Department does not agree that the disclosure required by § 2570.35(a)(5) imposes any significant burdens on applicants. The Department believes that prudent fiduciaries would, in the normal course of carrying out their responsibilities, ascertain such information about the parties they intend to deal with in investment and other plan transactions. However, the Department has determined that it would be appropriate to modify proposed § 2570.35(a)(5) in the final regulation to limit disclosure to the applicant or any of the parties in interest involved in the exemption transaction.

Regarding the disclosure required by proposed § 2570.35(a)(7) (relating to investigations, examinations, litigation, and continuing controversy by or with the specified Federal agencies), the Department believes that such information is necessary to ensure that the Department's exemption activities do not compromise its enforcement efforts. Although the Department is most interested in information involving investigations, etc. that are directly related to the subject exemption transactions and the participating parties, the Department believes, nevertheless, that its exemption staff, and not the applicants, should determine which investigations, examinations, etc, are relevant.

One of the comments further suggested that it is inappropriate to require applicants to disclose matters which have resulted in no formal allegations of violations of law. The Department notes, however, that the affected parties may include, as part of their disclosure, any qualifications or explanations they deem appropriate for consideration by the Department, including information on the final disposition of any matter.

Another commentator suggested that disclosure under § 2570.35(a)(7) be limited to a reference to the investigation or litigation without requiring submission of copies of "all correspondence" involved in the investigation. In this regard, the Department notes that the proposed regulation did not require submission of copies of all correspondence, but only of correspondence relating to the substantive issues involved in the investigation, examination, litigation, or controversy. Specifically, the Department intended to require submission of copies of correspondence containing only that information directly relevant to determining whether or not the requested exemption should be granted. After considering the comment, the Department has modified § 2570.35(a)(7) to clarify that the phrase "substantive issues" refers to issues related to compliance with the provisions of parts 1 and 4 of subtitle B of title I of ERISA (reporting and disclosure (part 1) and fiduciary responsibility (part 4)), section 4975 of the Code, or sections 8477 or 8478 of FERSA (fiduciary responsibilities, liability and penalties (section 8477) and bonding (section 8478)). Copies of correspondence relating to any of these substantive issues is necessary in order for the Department to determine the effect the requested exemption may have on the Department's enforcement activities in each case under investigation, examination, etc.

One of the comments noted that proposed § 2570.35(a)(5), (6), and (7) required the disclosure of information regarding any parties to the exemption transaction and suggested limiting the required disclosure to fiduciaries authorizing the transaction and any parties in interest involved in the exemption transaction. This comment pointed out that investment transactions may involve multiple parties, many of whom are neither plan fiduciaries nor parties in interest. After due consideration, the Department agrees with this suggestion and, accordingly, has modified § 2570.35(a)(5), (6), and (7) to limit the required disclosure to any parties in interest involved in the exemption transaction. The Department notes that this group includes, among others, the fiduciary authorizing the exemption transaction.

See the heading "Applications for Exemption under FERSA," above, regarding modification to proposed § 2570.35(a)(7) as applicable to the Federal Thrift Savings Plan established by FERSA.

Party-in-Interest Investments

Proposed § 2570.35(a)(16) required an application for individual exemption to disclose information regarding any plan investments in loans to, property leased to, or securities issued by, any party in interest involved in the exemption transaction. One of the comments suggested deletion of this requirement due to the difficulty of identifying such investments in view of the "look-through" rule contained in the Department's plan asset regulation (29 CFR 2510.3–101). This comment suggested that the proposed disclosure may involve many transactions, by an

entity whose underlying assets include "plan assets," which are totally unrelated to the exemption transaction. The comment further indicated that this disclosure would be burdensome for exemption transactions involving numerous parties in interest, such as those involving pooled funds.

The Department agrees that, for exemption applications involving pooled funds, furnishing the proposed disclosure could be burdensome inasmuch as such applications generally do not relate to specific plans. Accordingly, the Department has adopted a special rule for applications for individual exemption involving pooled funds, discussed above (under the heading "Pooled Funds"), which limits this type of disclosure to the pooled fund and to certain plans participating therein.

Regarding exemption applications involving specific individual plans, it appears to the Department that the information to be disclosed under proposed § 2570.35(a)(16) must be maintained, in any event, to satisfy the annual reporting requirements of section 103 of ERISA, as well as the recordkeeping requirements of section 107. Therefore, the Department believes that this disclosure requirement should not impose any additional burdens on the applicant. The information to be disclosed will enable the Department to determine whether the exemption transaction, in conjunction with other plan investments involving parties in interest, would unduly concentrate the plan's assets in such investments so as to raise questions under the fiduciary responsibility provisions of section 404 of ERISA. For these reasons, the Department has decided to adopt § 2570.35(a)(16) as proposed, subject to the special rule for applications for individual exemption involving pooled funds in § 2570.35(c).

Costs Related to the Exemption Application

Proposed § 2570.35(a)(18) and (19) required the exemption application to identify the person who will bear the costs of the exemption application, of notifying interested persons, and of the fee charged by any independent fiduciary involved in the exemption transaction. The preamble to the proposed regulation noted that a plan's payment of the expenses associated with the filing or processing of an exemption application raises questions under the fiduciary responsibility and the prohibited transaction restrictions to the extent that any party in interest benefits from the transaction for which an exemption is sought (see section 406(a)(1)(D) of ERISA).

One of the commentators requested that the Department provide a more specific discussion of when it believes such questions will be raised. The comment states that, in many cases, it is appropriate for the plan to pay the expenses attributable to obtaining an exemption, and that an independent fiduciary's fees are generally paid by the plan receiving such fiduciary's services in order to ensure that such fiduciary conducts its activities in a totally independent manner and without any potential influence from persons other than the plan paying such fees.

The proposed disclosure of who pays the fees for an exemption application is intended to enable the Department to review the appropriateness of such payment by a plan in the context of a specific exemption request. Such disclosure is also intended to aid the exemption staff in evaluating whether the economic merits of the transaction, taking into account the costs attributable to the exemption application, support a finding that the proposed transaction is in the interests of the plan and its participants and beneficiaries. While the Department agrees that there may be certain instances in which it would be appropriate for a plan to pay all or part of the costs attendant with obtaining an exemption, such as where it is necessary to ensure the independence of an independent fiduciary or third-party expert, the Department believes that the propriety of such payments by a plan is an inherently factual determination which can be made only on a case-by-case basis.

In this regard, the Department notes that, when evaluating the propriety of the payment by a plan of certain expenses, plan fiduciaries must first consider the general fiduciary responsibility provisions of sections 403 and 404 of ERISA. Section 403(c)(1) provides, in part, that the assets of an employee benefit plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan. Similarly, section 404(a)(1)(A) requires, in part, that a fiduciary of a plan discharge his duties for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan. Thus, a payment that is not a distribution of benefits to participants or beneficiaries of a plan would not be consistent with the requirements of sections 403(c)(1) and 404(a)(1)(A) unless it was used to defray a reasonable expense of administering the plan.

In addition, section 406(a)(1)(D) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect transfer to, or use by or for the benefit of, a party in interest of any assets of the plan. It is the responsibility of appropriate plan fiduciaries to determine whether a particular expense is a reasonable administrative expense under sections 403(c)(1) and 404(a)(1)(A) of ERISA or whether plan payment of an expense would constitute a prohibited use of plan assets for the benefit of a party in interest under section 406(a)(1)(D) of ERISA.

Copies of Documents

Section 2570.35(b)(1) of the proposed regulation required each application for individual exemption to include true copies of all documents bearing on the exemption transaction, such as contracts, deeds, agreements, instruments, and relevant portions of plan documents, including trust agreements.

One comment objected to this requirement on the grounds that having to assemble the required documents is time consuming, costly, and unnecessary if the exemption application properly describes all pertinent plan provisions and other documents in sufficient detail to allow the Department to evaluate the merits of the exemption transaction. In this regard, the Department notes that the documents with respect to which copies are requested are all documents which would be readily available to the parties to the exemption transaction. Accordingly, the Department does not believe that there would be a significant burden in either compiling the documents or in transmitting copies to the Department. Further, the Department notes that it is not uncommon for representations contained in an exemption application to be inconsistent with the provisions of the governing documents or for the latter to contain provisions with respect to which clarifications or other representations are needed in order for the requested exemption to be proposed. On the basis of the Department's experience with exemptions, scrutiny of the relevant documents is, in the large majority of cases, a necessary prerequisite to a complete understanding of the exemption transaction and the implications for affected plans and

parties in interest. Moreover, in the Department's experience, the inclusion of copies of the requested documents, as part of the exemption application, has expedited the processing of the requested exemption.

For these reasons, the final regulation adopts proposed § 2570.35(b)(1) without change. However, the Department wishes to clarify three points regarding this requirement. First, for exemption transactions in which identical documents will be executed by more than one party, the submission of only one specimen document will satisfy the requirements of this paragraph.

Second, in the case of exemption transactions which are proposed, copies of the documents relating to the proposed transaction need not be executed or dated when they are submitted with the exemption application if the documents are complete in every other respect. In this regard, the Department strongly encourages requesting an administrative exemption before entering into a prohibited transaction because of the ability to incorporate all of the necessary safeguards into the transaction. By contrast, such safeguards cannot be put into place after a prohibited transaction has occurred.

Third, only copies of documents need be submitted. The Department may not be able to return original documents and, therefore, urges that only true copies of documents be submitted.

Where To File an Application

Although no comments were received regarding this section, which is adopted as proposed, the Department wishes to advise applicants that including the room number of the Division of Exemptions in the address will generally expedite its delivery. The current room number of the Division of Exemptions, Room N–5671, is not included in the regulation to avoid the need to amend the regulation every time the room number of the Division changes.

Duty To Amend and Supplement Information

The proposed regulation continued the requirement established in ERISA Proc. 75–1 that an applicant promptly notify the Division of Exemptions if he discovers that any material fact or representation contained in his application, or in any supporting documents or testimony, was inaccurate or if any such fact or representation changes. However, the proposed regulation added the requirement that an applicant notify the Division of Exemptions when anything occurs that may affect the continuing accuracy of such facts or representations.

Two comments received indicated confusion as to the expiration date of the duty to update information submitted as part of an exemption application. Accordingly, the final regulation clarifies § 2570.37 (a) and (b) to indicate that such duty applies only during the pendency of the exemption application and expires after the exemption is granted. The Department also wishes to clarify that, in § 2570.37(a), the phrase "continuing accuracy of any such fact or representation" refers to future events or changes known before the exemption is granted that will render inaccurate facts stated or representations made before such grant. The Department also wishes to note that exemptions are granted only to transactions as described. Therefore, if an exemption is granted and the transaction is not as described in some material aspect, the exemption does not take effect or protect parties in interest from liability for the transaction. See § 2570.49 of the regulation.

Tentative Denial Letters

Although ERISA Proc. 75–1 established no procedures to be followed by the Department in denying exemption applications or by applicants in responding to such denials, the Department has developed procedures over the years to notify applicants first to the tentative and, later, of the final denial of their applications. In large part, the proposed regulation codified these procedures.

Under the proposed regulation, the Department may decide to deny an exemption request at any one of a number of stages in the review process. For example, it may decide after its initial review of an application that the requested exemption does not satisfy the statutory criteria set forth in sections 408(a) of ERISA and 4975(c)(2) of the Code. In that event, the Department will send a tentative denial letter to the applicant pursuant to § 2570.38 of the regulation. That letter will inform the applicant of the Department's tentative decision to deny the application and of the reasons therefor. Under § 2570.38, an applicant has 20 days from the date of this letter to request a conference with the Department and/or to notify the Department of his intent to submit additional information in writing to support the application. If the Department receives no request for a conference and no notice of intent to submit additional information within that time, it will send the applicant a final denial letter pursuant to § 2570.41 of the regulation.

One of the comments received suggested that: (1) The final regulation should clarify that the Department's exemption staff may request applicants to provide additional information before a tentative denial letter is issued, and (2) rather than a "short statement" of the reasons for a tentative denial, the tentative denial letter should provide a detailed explanation of the basis for the Department's decision. Regarding the first suggestion, the comment indicates that it is unreasonable to expect an applicant to anticipate, when the exemption application is filed, all of the material which the Department may find pertinent to its consideration of an exemption application.

As stated above (under the heading "Exemption Application Contents—General Information"), the Department's view is that the applicant bears the responsibility to demonstrate clearly that the requested exemption meets the statutory criteria. While nothing in the proposed regulation would preclude the Department's exemption staff from exercising its discretion and contacting an applicant for a clarification or additional information, the Department anticipates that such contact will be limited to exemption applications which, upon initial review, meet the essential requirements of the regulation. It is not administratively feasible to expect the Department's exemption staff to solicit information in every case. Moreover, such a procedure would, in effect, shift the burden of developing the exemption application from the applicant to the exemption staff.

Similarly, the imposition of a requirement that tentative denial letters detail all the reasons for the denial would, in effect, shift the analytical burden from the applicant to the Department. As with the circumstances under which additional information is solicited from applicants, the Department believes that the degree of detail required for a tentative denial letter should be left to the discretion of the exemption staff. The Department believes that a general statement of the reasons for a tentative denial is sufficient inasmuch as the issuance of a tentative denial letter does not terminate the exemption proceedings. Rather, the tentative denial letter offers the applicant the opportunity to have a conference and/or to submit additional information for consideration. In addition, a requirement to issue a comprehensive and detailed tentative denial letter in most cases would

significantly increase the time required to conclude a final action.

For these reasons, the Department has decided to adopt proposed § 2570.38 without change.

Opportunities To Submit Additional Information

Section 2570.39 of the proposed regulation provided that if an applicant wishes to submit additional information in support of a tentatively denied exemption application, he may notify the Department of his intention to do so within the prescribed 20-day period either by telephone or by letter. After issuing such a notice, an applicant has 30 days from the date of the notice to furnish additional information to the Department. If an applicant notifies the Department of his intent to submit additional information but requests no conference, and subsequently fails to submit the promised information within the prescribed 30-day period, the Department will issue the applicant a final denial letter pursuant to § 2570.41 of the regulation. However, an applicant who realizes that he will be unable to submit his additional information within the allotted time may avoid receiving a final denial letter by withdrawing his application before the end of the 30-day period pursuant to § 2570.44.

As an alternative to withdrawing his application, an applicant who, for reasons beyond his control, is unable to meet the 30-day deadline may request an extension of time for filing additional information, pursuant to § 2570.39 of the regulation. However, the Department will grant such extensions of time only in unusual circumstances.

No comments were received on this section of the proposed regulation which is adopted without change in the final regulation.

Conferences

Section 2570.40 of the proposed regulation described the procedures regarding conferences on exemption applications which the Department has tentatively decided to deny. Under this proposed section, an applicant is entitled to only one conference with respect to any exemption application, and is also given 20 days after the date of any conference to submit to the Department in writing any additional data or arguments discussed at the conference but not previously or adequately presented in writing. Under the proposal, an applicant is deemed to have waived his right to a conference if he fails, without good cause, to appear for a scheduled conference or to schedule a conference for any of the times proposed by the Department within the 45-day period following the receipt of his request for a conference.

Proposed § 2570.40 is adopted without change in the final regulation. The only comment received regarding this proposed section suggested that the Department continue its practice of informally consulting with applicants on exemption applications in addition to holding conferences. In this regard, the Department will continue to informally contact applicants as it deems appropriate.

Final Denial Letters

Proposed § 2570.41 is adopted without change in the final regulation. No comments were received on this section which specifies the circumstances in which the Department may issue a final denial letter denying a requested exemption. In most cases, the same procedure will also be followed in denying exemptions that the Department has already proposed through publication of a notice of proposed exemption in the **Federal Register**. However, in cases where the Department holds a hearing on an exemption, § 2570.41(a)(3) of the proposed regulation allowed the Department to issue a final denial letter without first issuing a tentative denial letter and without providing the applicant with the opportunity for a conference. In the Department's view, where a hearing on a proposed exemption is conducted, the applicant and other proponents of the exemption have adequate opportunity to present their views and other evidence in support of the exemption.

Notice of Proposed Exemption

The proposed regulation did not significantly alter the procedures established by ERISA Proc. 75–1 for granting an exemption. Under § 2570.42 of the regulation, the Department will publish a notice of proposed exemption in the **Federal Register** if, after reviewing an exemption application and any additional information submitted by an applicant, the Department tentatively concludes that the requested exemption satisfies the statutory criteria for the granting of an exemption and that the requested exemption is otherwise appropriate. This proposed section also described the contents of the notice of proposed exemption.

No comments were received on proposed § 2570.42, which is adopted without change in the final regulation.

Notifying Interested Persons

Like ERISA Proc. 75–1, the proposed regulation required applicants to provide notice to interested persons in the event that the Department decides to propose the exemption. Section 2570.34 of the proposal required an applicant to submit with his application a description of the interested persons to whom notice will be provided and a description of the manner in which the applicant proposed to provide notice. That section also required an applicant to provide an estimate of the time he will need to furnish notice to interested persons following publication of a notice of proposed exemption.

Section 2570.43 of the proposed regulation provided guidance on methods an applicant may use to notify interested persons of a proposed exemption and indicated what must be included in the notice. In addition to the Notice of Proposed Exemption published in the **Federal Register**, the applicant must include in the notification to interested persons a supplemental statement. Section 2570.43 also stated that, once the Department has published a notice of proposed exemption, the applicant must notify the interested persons described in his application in the manner indicated in the application unless the Department has informed the applicant beforehand that it considers the method of notification described in the application to be inadequate. Where the Department has so informed an applicant, it will also secure from the applicant an agreement to provide notice in the time and manner and to the persons designated by the Department. After furnishing notification, an applicant must provide the Department with a declaration under penalty of perjury certifying that notice was given to the persons and in the manner and time specified in his application or the superseding agreement with the Department.

One of the comments received concerning notification requested clarification that, in the case of a pooled fund, the notification requirement would be satisfied if the notice to interested persons is furnished to the appropriate fiduciary of each of the plans participating in the pooled fund, but not to all participants and beneficiaries of such plans.

In the Department's view, the individuals or organizations that will constitute "interested persons" depends on the nature of the exemption being requested. For this reason, the proposed regulation did not attempt to delineate the term "interested persons" for purposes of the notification requirements of § 2570.43. As previously noted, the applicant is required to include, as part of the exemption application, a description of the

interested persons to whom the applicant intends to provide notice (§ 2570.34(b)(2)(i)). If the Department finds that either the method of providing the notice or the persons to whom the applicant proposes to provide notice is inadequate, the Department will, pursuant to § 2570.43, secure an agreement from the applicant on the appropriate method of providing the notice and/or the scope of the notice to be provided. The Department believes that this approach provides the flexibility necessary to accommodate the varied types of exemption applications, as well as circumstances unique to a particular applicant.[7]

Accordingly, the Department has decided to adopt § 2570.43 as proposed. However, subparagraph (b)(2) of this section has been modified to insert references to the Code and FERSA, and to reflect the current room number of the Division of Exemptions in a footnote to that section. Paragraph (d) of this section has also been modified to clarify that the declaration accompanying the statement to be furnished to the Department regarding the notice to interested persons must be made under penalty of perjury, as stated in the preamble to the proposed regulation (53 FR 24422, at 24425, June 28, 1988).

Withdrawal and Reinstatement of Exemption Applications

Section 2570.44 of the proposed regulation permitted an applicant to withdraw his application at any time and to reinstate the application later. Reinstatement may be requested without resubmitting any information or materials previously furnished if no more than two years has elapsed from the withdrawal date. The request for reinstatement must be accompanied by any additional information that was outstanding at the time of withdrawal.

No comments were received on this proposed section, which is adopted in the final regulation without change.

Requests for Reconsideration of Final Denials

Under § 2570.45 of the proposed regulation, after the Department has issued a final denial letter on an exemption, it will not reconsider an application covering the same transaction unless the applicant presents significant new facts or arguments in support of the exemption which, for good reason, the applicant could not have submitted for consideration during the Department's initial review of the exemption application. An applicant must present the significant new facts or arguments in a request for reconsideration within 180 days after the issuance of the final denial letter.

Proposed § 2570.45 also stated that only one request for reconsideration of any finally denied application will be considered by the Department. Although no comments were received on this section of the proposed regulation, the Department has modified this section in the final regulation to clarify that the Department will not limit the number of requests for reconsideration of final denials based solely on the applicant's failure to respond timely to a tentative denial letter or to furnish additional information timely (i.e., within the time frames provided under §§ 2570.38(b) or 2570.39(e), respectively).

The Department has also clarified in the final regulation that the declaration required under § 2570.45(c) must be made under penalty of perjury. This clarification is consistent with the requirement of § 2570.34(b)(5) that every original exemption application must be accompanied by a similar declaration under penalty of perjury. The Department intends that the same type of declaration should accompany both an original exemption application and a request for reconsideration of a final denial based on the merits of such an application.

Hearings

Section 408(a) of ERISA precludes the Department from granting an exemption from the fiduciary self-dealing prohibitions of section 406(b) unless the Department affords an opportunity for a hearing and makes a determination on the record with respect to the three statutory criteria established for granting an exemption.[8] Because these provisions specify that an opportunity for a hearing must be given before an exemption from these prohibitions is granted, but not before such an exemption is denied, the Department interprets these provisions to mean that only opponents of such an exemption must be given an opportunity for a hearing. Moreover, the Department has concluded that it must provide a hearing on the record to opponents of such a proposed exemption only where it appears that there are material factual issues relating to the proposed exemption that cannot be fully explored without such a hearing. Indeed, in the Department's experience, such hearings are not useful where the only issues to be decided are matters of law or where material factual issues can be adequately explored by less costly and more expeditious means, such as written submissions. Accordingly, under § 2570.46 of the proposed regulation, the Department requires that persons who may be adversely affected by the grant of an exemption from the fiduciary self-dealing prohibitions offer some evidence of the existence of issues that can be fully examined only at a hearing before it will grant a request for a hearing. Where persuasive evidence of the existence of such issues is offered, however, the Department will grant the requested hearing.

Under § 2570.47 of the proposed regulation, the Department may schedule a hearing on its own motion if it determines that a hearing would be useful in exploring issues relevant to the requested exemption. Under the proposed procedures, if the Department decides to conduct a hearing on an exemption under either § 2570.46 or § 2570.47, the applicant must notify interested persons of the hearing in the manner prescribed by the Department. Ordinarily, such notice may be provided by furnishing interested persons with a copy of the notice of hearing published by the Department in the **Federal Register** within 10 days of its publication. After furnishing notice, the applicant must submit to the Department a declaration under penalty of perjury certifying that notice has been provided in the manner prescribed.

Any testimony or other evidence offered at a hearing held under either § 2570.46 or § 2570.47 becomes part of the administrative record to be used by the Department in making its final decision on an exemption application.

No comments were received on proposed §§ 2570.46 and 2570.47, which are adopted without change in the final regulation.

Grant of Exemption

Section 2570.48 of the proposed regulation provided that if, after considering all of an applicant's submissions, together with any comments received from interested persons and the record of any hearing held in connection with a requested exemption, the Department determines that the exemption should be granted, it will publish a notice in the **Federal Register** granting the exemption. This proposed section also described the contents of the grant notice.

[7] The Department notes that the form of the notice is prescribed under § 2570.43(b) of the regulation.

[8] Section 4975(c)(2) of the Code and 5 U.S.C. 8477(c)(3)(D) (added by FERSA) contain similar hearing requirements. The following discussion of the hearing requirements of section 408(a) of ERISA is equally applicable to those statutory provisions.

No comments were received on proposed § 2570.48, which is adopted without change in the final regulation.

Limits on the Effect of Exemptions

Notwithstanding the duty to amend and supplement exemption applications provided under § 2570.37, the Department expressly conditions every exemption on the accuracy and completeness of the facts and representations provided by an applicant in support of the exemption. Therefore, as indicated under § 2570.49 of the proposed regulation, an exemption does not take effect or protect parties in interest from liability unless the material facts and representations contained in the application or in any other materials, documents, or testimony submitted by the applicant in support of the application were true and complete.

Thus, for example, in the case of a continuing exemption transaction such as a loan or a lease, if any of the material facts described in the application were to change after the exemption is granted, the exemption would cease to apply as of the date of such change even though, pursuant to § 2570.37, the applicant would not be obligated to notify the Department of such change. In the event of any such change, the parties in interest involved in the exemption transaction may apply for a new exemption to protect themselves from liability on or after the date of such change. Such an application should be submitted before such change occurs (see the discussion of prospective, versus retroactive, exemptions under the heading "Copies of Documents," above).

No comments were received on proposed § 2570.49, which is adopted without change in the final regulation.

Revocation or Modification of Exemptions

Section 2570.50 of the proposed regulation described the circumstances under which the Department may revoke or modify a previously granted exemption and the rights afforded to the applicant and to other interested persons in the event such revocation or modification is proposed. This section also provided that ordinarily such revocation or modification will be prospective only. Under this proposed section, one of the circumstances permitting the Department to modify or revoke an exemption was a change in policy which calls into question the continuing validity of the Department's original conclusions regarding the granted exemption.

Two of the comments objected to permitting a change in policy as grounds for revoking or modifying a granted exemption. The commentators argued that disturbing transactions already reviewed and approved by the Department would inject an unneeded element of uncertainty into the exemption process. Moreover, concern was expressed that the revocation of an exemption could severely disrupt an applicant's business and impose great financial hardship. A commentator suggested that the final regulation include a prohibition against revocation of an exemption until the affected party in interest is given both written notice of the facts or conduct which may warrant the revocation and an opportunity to demonstrate compliance with the requirements of the exemption.[9]

Proposed § 2570.50 is intended to provide the Department with the flexibility to undertake appropriate action in those cases where, subsequent to the grant of an exemption, potentially abusive practices or changes in the regulatory environment of an industry are identified which would cause the Department to reconsider its policy with respect to whether the exemption transactions continue to satisfy the statutory criteria under section 408(a) of ERISA.

With regard to the procedural issues raised by one of the comments, the Department notes that paragraph (b) of proposed § 2570.50 provides for notice to interested persons by publication in the **Federal Register**, notice to the applicant of the proposed revocation or modification, and an opportunity for the interested persons and the applicant to submit comments on the proposed revocation or modification.

After careful consideration of the comments, the Department has decided to adopt § 2570.50 as proposed. However the Department has clarified paragraph (b) to provide that the notice of proposed revocation or modification given to the applicant must be in writing.

Public Inspection and Copies

Section 2570.51 of the proposed regulation provided that the public may examine and copy any exemption application and all correspondence and documents submitted in regard thereto and may receive photocopies of all or any portion of such administrative record for a specified charge per page. For this reason, the Department cannot honor requests to keep confidential any information submitted regarding an exemption application. Therefore, none of the information submitted in regard to a requested exemption should be material that the applicant or other sender does not wish to disclose to the public.

No comments were received on proposed § 2570.51, which is adopted without change in the final regulation.

Executive Order 12291 Statement

The Department has determined that this regulatory action would not constitute a "major rule" as that term is used in Executive Order 12291 because the action would not result in: an annual effect on the economy of $100 million; a major increase in costs or prices for consumers, individual industries, government agencies, or geographical regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in the domestic or export markets.

Regulatory Flexibility Act Statement

The Department has determined that this regulation would not have a significant economic impact on small plans or other small entities. As stated previously, this regulation would do little more than describe procedures that reflect practices already in place for filing and processing applications for exemptions from the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974, the Internal Revenue Code of 1986, and the Federal Employee Retirement System Act of 1986.

Paperwork Reduction Act

This regulation modifies current collection of information requirements. It does so largely by codifying requests for facts and opinions that are routinely addressed to applicants for exemptions under current procedures. Accordingly, the regulation will not increase the paperwork burden for applicants. The regulation has been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511). The final regulation is assigned control number 1210–0060.

Authority

The final regulation set forth herein is issued pursuant to the authority granted

[9] This comment compares the revocation of an exemption to the revocation of a license granted by an agency of the United States Government pursuant to 5 U.S.C. 558(c). The Department is expressing no opinion herein as to the applicability of 5 U.S.C. 558(c) to the revocation of prohibited transaction exemptions under ERISA, the Code, or FERSA.

in sections 408(a) (Pub. L. 93–406, 88 Stat. 883, 29 U.S.C. 1108(a)) and 505 (Pub. L. 93–406, 88 Stat. 894, 29 U.S.C. 1135) of ERISA, under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), under 5 U.S.C. 8477(c)(3), and under Secretary of Labor's Order No. 1–87 (52 FR 13139, April 21, 1987).

List of Subjects in 29 CFR Part 2570

Administrative practice and procedure, Employee benefit plans, Employee Retirement Income Security Act, Federal Employees' Retirement System Act, Party in interest, Pensions, Prohibited transactions.

Final Regulation

For the reasons set out in the preamble, parts 2570 and 2585 of chapter XXV of title 29 of the Code of Federal Regulations are amended as follows:

PART 2570—[AMENDED]

1. The authority for part 2570 is revised to read as follows:

Authority: 29 U.S.C. 1108(a), 1135; Reorganization Plan No. 4 of 1978; 5 U.S.C. 8477(c)(3); Secretary of Labor's Order No. 1–87.

Subpart A is also issued under 29 U.S.C. 1132(i).

2. By adding in the appropriate place the following new subpart B to part 2570.

Subpart B—Procedures for Filing and Processing Prohibited Transaction Exemption Applications

Sec.

Subpart B—Procedures for Filing and Processing Prohibited Transaction Exemption Applications

§ 2570.30 Scope of rules.

(a)(1) The rules of procedure set forth in this subpart apply to all applications for exemption which the Department has authority to issue under:

(i) Section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA);

(ii) Section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code) (see Reorganization Plan No. 4 of 1978); or

(iii) The Federal Employees' Retirement System Act of 1986 (FERSA) (5 U.S.C. 8477(c)(3)).

(b) The Department will generally treat any exemption application which is filed solely under section 408(a) of ERISA or solely under section 4975(c)(2) of the Code as an exemption filed under both section 408(a) and section 4975(c)(2) if it relates to a transaction that would be prohibited both by ERISA and by the corresponding provisions of the Code.

(c) The procedures set forth in this subpart represent the exclusive means by which the Department will issue administrative exemptions. The Department will not issue exemptions upon oral request alone. Likewise, the Department will not grant exemptions orally. An applicant for an administrative exemption may request and receive oral advice from Department employees in preparing an exemption application. However, such advice does not constitute part of the administrative record and is not binding on the Department in its processing of an exemption application or in its examination or audit of a plan.

§ 2570.31 Definitions.

For purposes of these procedures, the following definitions apply:

(a) An *affiliate* of a person means—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any director of, relative of, or partner in, any such person;

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner; and

(4) Any employee or officer of the person who—

(i) Is highly compensated (as defined in section 4975(e)(2)(H) of the Code), or

(ii) Has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets.

(b) A *class exemption* is an administrative exemption, granted under section 408(a) of ERISA, section 4975(c)(2) of the Code, and/or 5 U.S.C. 8477(c)(3), which applies to any parties in interest within the class of parties in interest specified in the exemption who meet the conditions of the exemption.

(c) *Department* means the U.S. Department of Labor and includes the Secretary of Labor or his delegate exercising authority with respect to prohibited transaction exemptions to which this subpart applies.

(d) *Exemption transaction* means the transaction or transactions for which an exemption is requested.

(e) An *individual exemption* is an administrative exemption, granted under section 408(a) of ERISA, section 4975(c)(2) of the Code, and/or 5 U.S.C. 8477(c)(3), which applies only to the specific parties in interest named or otherwise defined in the exemption.

(f) A *party in interest* means a person described in section 3(14) of ERISA or 5 U.S.C. 8477(a)(4) and includes a *disqualified person*, as defined in section 4975(e)(2) of the Code.

(g) *Pooled fund* means an account or fund for the collective investment of the assets of two or more unrelated plans, including (but not limited to) a pooled separate account maintained by an insurance company and a common or collective trust fund maintained by a bank or similar financial institution.

§ 2570.32 Persons who may apply for exemptions.

(a) The Department may initiate exemption proceedings on its own motion. In addition, the Department will initiate exemption proceedings upon the application of:

(1) Any party in interest to a plan who is or may be a party to the exemption transaction;

(2) Any plan which is a party to the exemption transaction; or

(3) In the case of an application for an exemption covering a class of parties in interest or a class of transactions, in addition to any person described in paragraphs (a)(1) and (a)(2) of this section, an association or organization representing parties in interest who may be parties to the exemption transaction.

(b) An application by or for a person described in paragraph (a) of this section, may be submitted by the applicant or by his authorized representatives. If the application is submitted by a representative of the

applicant, the representative must submit proof of his authority in the form of:

(1) A power of attorney; or

(2) A written certification from the applicant that the representation is authorized.

(c) If the authorized representative of an applicant submits an application for an exemption to the Department together with proof of his authority to file the application as required by paragraph (b) of this section, the Department will direct all correspondence and inquiries concerning the application to the representative unless requested to do otherwise by the applicant.

§ 2570.33 Applications the Department will not ordinarily consider.

(a) The Department will not ordinarily consider:

(1) An application that fails to include all the information required by §§ 2570.34 and 2570.35 or otherwise fails to conform to the requirements of these procedures; or

(2) An application for exemption involving a transaction or transactions which are the subject of an investigation for possible violations of part 1 or 4 of subtitle B of title I of ERISA or section 8477 or 8478 of FERSA or an application for an exemption involving a party in interest who is the subject of such an investigation or who is a defendant in an action by the Department or the Internal Revenue Service to enforce the above-mentioned provisions of ERISA or FERSA.

(b) If for any reason the Department decides not to consider an exemption application, it will inform the applicant of that decision in writing and of the reasons therefor.

(c) An application for an individual exemption relating to a specific transaction or transactions will ordinarily not be considered separately if the Department is considering a class exemption relating to the same type of transaction or transactions.

§ 2570.34 Information to be included in every exemption application.

(a) All applications for exemptions must contain the following information:

(1) The name(s) of the applicant(s);

(2) A detailed description of the exemption transaction and the parties in interest for whom an exemption is requested, including a description of any larger integrated transaction of which the exemption transaction is a part;

(3) Whether the affected plan(s) and any parties in interest will be represented by the same person with regard to the exemption application;

(4) Reasons a plan would have for entering into the exemption transaction;

(5) The prohibited transaction provisions from which exemptive relief is requested and the reason why the transaction would violate each such provision;

(6) Whether the exemption transaction is customary for the industry or class involved;

(7) Whether the exemption transaction is or has been the subject of an investigation or enforcement action by the Department or by the Internal Revenue Service; and

(8) The hardship or economic loss, if any, which would result to the person or persons on behalf of whom the exemption is sought, to affected plans, and to their participants and beneficiaries from denial of the exemption.

(b) All applications for exemption must also contain the following:

(1) A statement explaining why the requested exemption would be—

(i) Administratively feasible;

(ii) In the interests of affected plans and their participants and beneficiaries; and

(iii) Protective of the rights of participants and beneficiaries of affected plans.

(2) With respect to the notification of interested persons required by § 2570.43:

(i) A description of the interested persons to whom the applicant intends to provide notice;

(ii) The manner in which the applicant will provide such notice; and

(iii) An estimate of the time the applicant will need to furnish notice to all interested persons following publication of a notice of the proposed exemption in the **Federal Register**.

(3) If an advisory opinion has been requested with respect to any issue relating to the exemption transaction—

(i) A copy of the letter concluding the Department's action on the advisory opinion request; or

(ii) If the Department has not yet concluded its action on the request:

(A) A copy of the request or the date on which it was submitted together with the Department's correspondence control number as indicated in the acknowledgment letter; and

(B) An explanation of the effect of a favorable advisory opinion upon the exemption transaction.

(4) If the application is to be signed by anyone other than an individual party in interest seeking exemptive relief on his own behalf, a statement which—

(i) Identifies the individual who will be signing the application and his position with the applicant; and

(ii) Explains briefly the basis of his familiarity with the matters discussed in the application.

(5)(i) A declaration in the following form: Under penalty of perjury, I declare that I am familiar with the matters discussed in this application and, to the best of my knowledge and belief, the representations made in this application are true and correct.

(ii) This declaration must be dated and signed by:

(A) The applicant himself in the case of an individual party in interest seeking exemptive relief on his own behalf;

(B) A corporate officer or partner where the applicant is a corporation or partnership;

(C) A designated officer or official where the applicant is an association, organization or other unincorporated enterprise;

(D) The plan fiduciary who has the authority, responsibility, and control with respect to the exemption transaction where the applicant is a plan.

(iii) Specialized statements from third-party experts, such as appraisals or analyses of market conditions, submitted to support an application for exemption must also be accompanied by a statement of consent from such expert acknowledging that he or she knows that his or her statement is being submitted to the Department as part of an application for exemption.

(iv) For those applications requiring an independent fiduciary to represent the plan in the exemption transaction, each statement submitted by said independent fiduciary must contain a signed and dated declaration under penalty of perjury that, to the best of said fiduciary's knowledge and belief, the representations made in such statement are true and correct.

(c) An application for exemption may also include a draft of the requested exemption which defines the transaction and parties in interest for which exemptive relief is sought and the specific conditions under which the exemption would apply.

§ 2570.35 Information to be included in applications for individual exemptions only.

(a) Except as provided in paragraph (c) of this section, every application for an individual exemption must include, in addition to the information specified in § 2570.34, the following information:

(1) The name, address, telephone number, and type of plan or plans to which the requested exemption applies;

(2) The Employer Identification Number (EIN) and the plan number (PN) used by such plan or plans in all

reporting and disclosure required by the Department;

(3) Whether any plan or trust affected by the requested exemption has ever been found by the Department, the Internal Revenue Service, or by a court to have violated the exclusive benefit rule of section 401(a) of the Code, or to have engaged in a prohibited transaction under section 503(b) of the Code or corresponding provisions of prior law, section 4975(c)(1) of the Code, section 406 or 407(a) of ERISA, or 5 U.S.C. 8477(c)(3);

(4) Whether any relief under section 408(a) of ERISA, section 4975(c)(2) of the Code, or 5 U.S.C. 8477(c)(3) has been requested by, or provided to, the applicant or any of the parties on behalf of whom the exemption is sought and, if so, the exemption application number or the prohibited transaction exemption number;

(5) Whether the applicant or any of the parties in interest involved in the exemption transaction is currently, or has been within the last five years, a defendant in any lawsuit or criminal action concerning such person's conduct as a fiduciary or party in interest with respect to any plan;

(6) Whether the applicant or any of the parties in interest involved in the exemption transaction has, within the last 13 years, been convicted of any crime described in section 411 of ERISA;

(7) Whether, within the last five years, any plan affected by the exemption transaction or any party in interest involved in the exemption transaction has been under investigation or examination by, or has been engaged in litigation or a continuing controversy with, the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, or the Federal Retirement Thrift Investment Board involving compliance with provisions of ERISA, provisions of the Code relating to employee benefit plans, or provisions of FERSA relating to the Federal Thrift Savings Fund. If so, the applicant must submit copies of all correspondence with the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, or the Federal Retirement Thrift Investment Board regarding the substantive issues involved in the investigation, examination, litigation, or controversy which relate to compliance with the provisions of part 1 or 4 of subtitle B of title I of ERISA, section 4975 of the Code, or section 8477 or 8478 of FERSA. For this purpose, the term "examination" does not include routine audits conducted by the Department pursuant to section 8477(g) of FERSA;

(8) Whether any plan affected by the requested exemption has experienced a reportable event under section 4043 of ERISA;

(9) Whether a notice of intent to terminate has been filed under section 4041 of ERISA respecting any plan affected by the requested exemption;

(10) Names, addresses, and taxpayer identifying numbers of all parties in interest involved in the subject transaction;

(11) The estimated number of participants and beneficiaries in each plan affected by the requested exemption as of the date of the application;

(12) The percentage of the fair market value of the total assets of each affected plan that is involved in the exemption transaction;

(13) Whether the exemption transaction has been consummated or will be consummated only if the exemption is granted;

(14) If the exemption transaction has already been consummated:

(i) The circumstances which resulted in plan fiduciaries causing the plan(s) to engage in the subject transaction before obtaining an exemption from the Department;

(ii) Whether the transaction has been terminated;

(iii) Whether the transaction has been corrected as defined in Code section 4975(f)(5);

(iv) Whether Form 5330, Return of Excise Taxes Related to Employee Benefit Plans, has been filed with the Internal Revenue Service with respect to the transaction; and

(v) Whether any excise taxes due under section 4975(a) and (b) of the Code by reason of the transaction have been paid.

(15) The name of every person who has investment discretion over any assets involved in the exemption transaction and the relationship of each such person to the parties in interest involved in the exemption transaction and the affiliates of such parties in interest;

(16) Whether or not the assets of the affected plan(s) are invested in loans to any party in interest involved in the exemption transaction, in property leased to any such party in interest, or in securities issued by any such party in interest, and, if such investments exist, a statement for each of these three types of investments which indicates:

(i) The type of investment to which the statement pertains;

(ii) The aggregate fair market value of all investments of this type as reflected in the plan's most recent annual report;

(iii) The approximate percentage of the fair market value of the plan's total assets as shown in such annual report that is represented by all investments of this type; and

(iv) The statutory or administrative exemption covering these investments, if any.

(17) The approximate aggregate fair market value of the total assets of each affected plan;

(18) The person(s) who will bear the costs of the exemption application and of notifying interested persons; and

(19) Whether an independent fiduciary is or will be involved in the exemption transaction and, if so, the names of the persons who will bear the cost of the fee payable to such fiduciary.

(b) Each application for an individual exemption must also include:

(1) True copies of all contracts, deeds, agreements, and instruments, as well as relevant portions of plan documents, trust agreements, and any other documents bearing on the exemption transaction;

(2) A discussion of the facts relevant to the exemption transaction that are reflected in these documents and an analysis of their bearing on the requested exemption; and

(3) A copy of the most recent financial statements of each plan affected by the requested exemption.

(c) *Special rule for applications for individual exemption involving pooled funds*:

(1) The information required by paragraphs (a) (8) through (12) of this section is not required to be furnished in an application for individual exemption involving one or more pooled funds;

(2) The information required by paragraphs (a) (1) through (7) and (a) (13) through (19) of this section and by paragraphs (b) (1) through (3) of this section must be furnished by reference to the pooled fund, rather than to the plans participating therein. (For purposes of this paragraph, the information required by paragraph (a) (16) of this section relates solely to other pooled fund transactions with, and investments in, parties in interest involved in the exemption transaction which are also sponsors of plans which invest in the pooled fund.);

(3) The following information must also be furnished—

(i) The estimated number of plans that are participating (or will participate) in the pooled fund; and

(ii) The minimum and maximum limits imposed by the pooled fund (if any) on

the portion of the total assets of each plan that may be invested in the pooled fund.

(4) Additional requirements for applications for individual exemption involving pooled funds in which certain plans participate.

(i) This paragraph applies to any application for individual exemption involving one or more pooled funds in which any plan participating therein—

(A) Invests an amount which exceeds 20% of the total assets of the pooled fund, or

(B) Covers employees of:

(*I*) The party sponsoring or maintaining the pooled fund, or any affiliate of such party, or

(*II*) Any fiduciary with investment discretion over the pooled fund's assets, or any affiliate of such fiduciary.

(ii) The exemption application must include, with respect to each plan described in paragraph (c)(4)(i) of this section, the information required by paragraphs (a) (1) through (3), (a) (5) through (7), (a) (10), (a) (12) through (16) and, (a) (18) and (19), of this section. The information required by this paragraph must be furnished by reference to the plan's investment in the pooled fund (e.g., the names, addresses and taxpayer identifying numbers of all fiduciaries responsible for the plan's investment in the pooled fund [§ 2570.35(a) (10)], the percentage of the assets of the plan invested in the pooled fund [§ 2570.35(a) (12)], whether the plan's investment in the pooled fund has been consummated or will be consummated only if the exemption is granted [§ 2570.35(a) (13)], etc.).

(iii) The information required by paragraph (c) (4) of this section is in addition to the information required by paragraphs (c) (2) and (3) of this section relating to information furnished by reference to the pooled fund.

(5) The special rule and the additional requirements described in paragraphs (c) (1) through (4) of this section do not apply to an individual exemption request solely for the investment by a plan in a pooled fund. Such an application must provide the information required by paragraphs (a) and (b) of this section.

§ 2570.36 Where to file an application.

The Department's prohibited transaction exemption program is administered by the Pension and Welfare Benefits Administration (PWBA). Any exemption application governed by these procedures should be mailed or otherwise delivered to: Exemption Application, PWBA, Office of Exemption Determinations, Division of Exemptions, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

§ 2570.37 Duty to amend and supplement exemption applications.

(a) During the pendency of his exemption application, an applicant must promptly notify the Division of Exemptions in writing if he discovers that any material fact or representation contained in his application or in any documents or testimony provided in support of the application is inaccurate, if any such fact or representation changes during this period, or if, during the pendency of the application, anything occurs that may affect the continuing accuracy of any such fact or representation.

(b) If, at any time during the pendency of his exemption application, an applicant or any other party in interest who would participate in the exemption transaction becomes the subject of an investigation or enforcement action by the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, or the Federal Retirement Thrift Investment Board involving compliance with provisions of ERISA, provisions of the Code relating to employee benefit plans, or provisions of FERSA relating to the Federal Thrift Savings Fund, the applicant must promptly notify the Division of Exemptions.

(c) The Department may require an applicant to provide documentation it considers necessary to verify any statements contained in the application or in supporting materials or documents.

§ 2570.38 Tentative denial letters.

(a) If, after reviewing an exemption file, the Department concludes that it will not grant the exenption, it will notify the applicant in writing of its tentative denial of the exemption application. At the same time, the Department will provide a short statement of the reasons for its tentative denial.

(b) An applicant will have 20 days from the date of a tentative denial letter to request a conference under § 2570.40 of these procedures and/or to notify the Department of its intent to submit additional information in writing under § 2570.39 of these procedures. If the Department does not receive a request for a conference or a notification of intent to submit additional information within that time, it will issue a final denial letter pursuant to § 2570.41.

(c) The Department need not issue a tentative denial letter to an applicant before issuing a final denial letter where the Department has conducted a hearing on the exemption pursuant to either § 2570.46 or § 2570.47 of these procedures.

§ 2570.39 Opportunities to submit additional information.

(a) An applicant may notify the Department of its intent to submit additional information supporting an exemption application either by telephone or by letter sent to the address furnished in the applicant's tentative denial letter. At the same time, the applicant should indicate generally the type of information that he will submit.

(b) An applicant will have 30 days from the date of the notification discussed in paragraph (a) of this section to submit in writing all of the additional information he intends to provide in support of his application. All such information must be accompanied by a declaration under penalty of perjury attesting to the truth and correctness of the information provided, which is dated and signed by a person qualified under § 2570.34(b)(5) of these procedures to sign such a declaration.

(c) If, for reasons beyond his control, an applicant is unable to submit in writing all the additional information he intends to provide in support of his application within the 30-day period described in paragraph (b) of this section, he may request an extension of time to furnish the information. Such requests must be made before the expiration of the 30-day period and will be granted only in unusual circumstances and for limited periods of time.

(d) If an applicant is unable to submit all of the additional information he intends to provide in support of his exemption application within the 30-day period specified in paragraph (b) of this section, or within any additional period of time granted to him pursuant to paragraph (c) of this section, the applicant may withdraw the exemption application before expiration of the applicable time period and reinstate it later pursuant to § 2570.44 of these procedures.

(e) The Department will issue, without further notice, a final denial letter denying the requested exemption pursuant to § 2570.41 of these procedures where—

(1) The Department has not received the additional information that the applicant indicated he would submit within the 30-day period described in paragraph (b) of this section, or within any additional period of time granted pursuant to paragraph (c) of this section;

(2) The applicant did not request a conference pursuant to § 2570.38(b) of these procedures; and

(3) The applicant has not withdrawn his application as permitted by paragraph (d) of this section.

§ 2570.40 Conferences.

(a) Any conference between the Department and an applicant pertaining to a requested exemption will be held in Washington, DC, except that a telephone conference will be held at the applicant's request.

(b) An applicant is entitled to only one conference with respect to any exemption application. An applicant will not be entitled to a conference, however, where the Department has held a hearing on the exemption under either § 2570.46 or § 2570.47 of these procedures.

(c) Insofar as possible, conferences will be scheduled as joint conferences with all applicants present where:

(1) More than one applicant has requested an exemption with respect to the same or similar types of transactions;

(2) The Department is considering the applications together as a request for a class exemption;

(3) The Department contemplates not granting the exemption; and

(4) More than one applicant has requested a conference.

(d) The Department will attempt to schedule a conference under this section for a mutually convenient time during the 45-day period following the later of—

(1) The date the Department receives the applicant's request for a conference, or

(2) The date the Department notifies the applicant, after reviewing additional information submitted pursuant to § 2570.39, that it is still not prepared to propose the requested exemption.

If the applicant is unable to attend a conference at any of the times proposed by the Department during this 45-day period or if the applicant fails to appear for a scheduled conference, he will be deemed to have waived his right to a conference unless circumstances beyond his control prevent him from scheduling a conference or attending a scheduled conference within this period.

(e) Within 20 days after the date of any conference held under this section, the applicant may submit to the Department a written record of any additional data, arguments, or precedents discussed at the conference but not previously or adequately presented in writing.

§ 2570.41 Final denial letters.

(a) The Department will issue a final denial letter denying a requested exemption where:

(1) The conditions for issuing a final denial letter specified in § 2570.38(b) or § 2570.39(e) of these procedures are satisfied;

(2) After issuing a tentative denial letter under § 2570.38 of this part and considering the entire record in the case, including all written information submitted pursuant to § 2570.39 and § 2570.40(e) of these procedures, the Department decides not to propose an exemption or to withdraw an exemption already proposed; or

(3) After proposing an exemption and conducting a hearing on the exemption under either § 2570.46 or § 2570.47 of this part and after considering the entire record in the case, including the record of the hearing, the Department decides to withdraw the proposed exemption.

§ 2570.42 Notice of proposed exemption.

If the Department tentatively decides, based on all the information submitted by an applicant, that the exemption should be granted, it will publish a notice of proposed exemption in the **Federal Register**. The notice will:

(a) Explain the exemption transaction and summarize the information received by the Department in support of the exemption;

(b) Specify any conditions under which the exemption is proposed;

(c) Inform interested persons of their right to submit comments in writing to the Department relating to the proposed exemption and establish a deadline for receipt of such comments;

(d) If the proposed exemption includes relief from the prohibitions of section 406(b) of ERISA, section 4975(c)(1) (E) or (F) of the Code, or section 8477(c)(2) of FERSA, inform interested persons of their right to request a hearing under § 2570.46 of this part and establish a deadline for receipt of requests for such hearings.

§ 2570.43 Notification of interested persons by applicant.

(a) If, as set forth in the exemption application, the notification that an applicant intends to provide to interested persons upon publication of a notice of proposed exemption in the **Federal Register** is inadequate, the Department will so inform the applicant and will secure the applicant's written agreement to provide what it considers to be adequate notice under the circumstances.

(b) If a notice of proposed exemption is published in the **Federal Register** in accordance with § 2570.42 of this part, the applicant must notify interested persons of the pendency of the exemption in the manner and time period specified in the application or in any superseding agreement with the Department. Any such notification must include:

(1) A copy of the notice of proposed exemption; and

(2) A supplemental statement in the following form:

> You are hereby notified that the United States Department of Labor is considering granting an exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, the Internal Revenue Code of 1986, or the Federal Employees' Retirement System Act of 1986. The exemption under consideration is explained in the enclosed Notice of Proposed Exemption. As a person who may be affected by this exemption, you have the right to comment on the proposed exemption by [date].[1] [If you may be adversely affected by the grant of the exemption, you also have the right to request a hearing on the exemption by [date].][2]
>
> Comments or requests for a hearing should be addressed to: Office of Exemption Determinations, Pension and Welfare Benefits Administration, room _____,[3] U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, ATTENTION: Application No. _____.[4]
>
> The Department will make no final decision on the proposed exemption until it reviews all comments received in response to the enclosed notice. If the Department decides to hold a hearing on the exemption before making its final decision, you will be notified of the time and place of the hearing.

(c) The method used to furnish notice to interested persons must be reasonably calculated to ensure that interested persons actually receive the notice. In all cases, personal delivery and delivery by first-class mail will be considered reasonable methods of furnishing notice.

(d) After furnishing the notice required by this section, an applicant must provide the Department with a statement confirming that notice was furnished to the persons and in the manner and time designated in its exemption application or in any

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[1] The applicant will write in this space the date of the last day of the time period specified in the notice of proposed exemption.

[2] To be added in the case of an exemption that provides relief from section 406(b) of ERISA or corresponding sections of the Code or FERSA.

[3] The applicant will fill in the room number of the Division of Exemptions. As of the date of this final regulation, the room number of the Division of Exemptions was N–5671.

[4] The applicant will fill in the exemption application number, which is stated in the notice of proposed exemption, as well as in all correspondence from the Department to the applicant regarding the application.

superseding agreement with the Department. This statement must be accompanied by a declaration under penalty of perjury attesting to the truth of the information provided in the statement and signed by a person qualified under § 2570.34(b)(5) of these procedures to sign such a declaration. No exemption will be granted until such a statement and its accompanying declaration have been furnished to the Department.

§ 2570.44 Withdrawal of exemption applications.

(a) An applicant may withdraw his application for an exemption at any time by informing the Department, either orally or in writing, of his intent to withdraw.

(b) Upon receiving an applicant's notice of intent to withdraw an application for an individual exemption, the Department will confirm by letter the applicant's withdrawal of the application and will terminate all proceedings relating to the application. If a notice of proposed exemption has been published in the **Federal Register**, the Department will publish a notice withdrawing the proposed exemption.

(c) Upon receiving an applicant's notice of intent to withdraw an application for a class exemption or for an individual exemption that is being considered with other applications as a request for a class exemption, the Department will inform any other applicants for the exemption of the withdrawal. The Department will continue to process other applications for the same exemption. If all applicants for a particular class exemption withdraw their applications, the Department may either terminate all proceedings relating to the exemption or propose the exemption on its own motion.

(d) If, following the withdrawal of an exemption application, an applicant decides to reapply for the same exemption, he may submit a letter to the Department requesting that the application be reinstated and referring to the application number assigned to the original application. If, at the time the original application was withdrawn, any additional information to be submitted to the Department under § 2570.39 of these procedures was outstanding, that information must accompany the letter requesting reinstatement of the application. However, the applicant need not resubmit information previously furnished to the Department in connection with a withdrawn application unless reinstatement of the application is requested more than two years after the date of its withdrawal.

(e) Any request for reinstatement of a withdrawn application submitted in accordance with paragraph (d) of this section, will be granted by the Department, and the Department will take whatever steps remained at the time the application was withdrawn to process the application.

§ 2570.45 Requests for reconsideration.

(a) The Department will entertain one request for reconsideration of an exemption application that has been finally denied pursuant to § 2570.41 (a)(2) or (a)(3) of this part if the applicant presents in support of the application significant new facts or arguments, which, for good reason, could not have been submitted for the Department's consideration during its initial review of the exemption application.

(b) A request for reconsideration of a previously denied application must be made within 180 days after the issuance of the final denial letter and must be accompanied by a copy of the Department's final letter denying the exemption and a statement setting forth the new information and/or arguments that provide the basis for reconsideration.

(c) A request for reconsideration must also be accompanied by a declaration under penalty of perjury attesting to the truth of the new information provided, which is signed by a person qualified under § 2570.34(b)(5) of these procedures to sign such a declaration.

(d) If, after reviewing a request for reconsideration, the Department decides that the facts and arguments presented do not warrant reversal of its original decision to deny the exemption, it will send a letter to the applicant reaffirming that decision.

(e) If, after reviewing a request for reconsideration, the Department decides, based on the new facts and arguments submitted, to reconsider its denial letter, it will notify the applicant of its intent to reconsider the application in light of the new information presented. The Department will then take whatever steps remained at the time it issued its final denial letter to process the exemption application.

(f) If, at any point during its subsequent processing of the application, the Department decides again that the exemption is unwarranted, it will issue a letter affirming its final denial.

§ 2570.46 Hearings in opposition to exemptions from restrictions on fiduciary self-dealing.

(a) Any interested person who may be adversely affected by an exemption which the Department proposes to grant from the restrictions of section 406(b) of ERISA, section 4975(c)(1)(E) or (F) of the Code, or section 8477(c)(2) of FERSA may request a hearing before the Department within the period of time specified in the **Federal Register** notice of the proposed exemption. Any such request must state:

(1) The name, address, and telephone number of the person making the request;

(2) The nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption; and

(3) A statement of the issues to be addressed and a general description of the evidence to be presented at the hearing.

(b) The Department will grant a request for a hearing made in accordance with paragraph (a) of this section where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing. However, the Department may decline to hold a hearing where:

(1) The request for the hearing does not meet the requirements of paragraph (a);

(2) The only issues identified for exploration at the hearing are matters of law; or

(3) The factual issues identified can be fully explored through the submission of evidence in written form.

(c) An applicant for an exemption must notify interested persons in the event that the Department schedules a hearing on the exemption. Such notification must be given in the form, time, and manner prescribed by the Department. Ordinarily, however, adequate notification can be given by providing to interested persons a copy of the notice of hearing published by the Department in the **Federal Register** within 10 days of its publication, using any of the methods approved in § 2570.43(c) of this part.

(d) After furnishing the notice required by paragraph (c) of this section, an applicant must submit a statement confirming that notice was given in the form, manner, and time prescribed. This statement must be accompanied by a declaration under penalty of perjury attesting to the truth of the information provided in the statement, which is signed by a person qualified under § 2570.34(b)(5) of these procedures to sign such a declaration.

§ 2570.47 Other hearings.

(a) In its discretion, the Department may schedule a hearing on its own motion where it determines that issues relevant to the exemption can be most fully or expeditiously explored at a hearing.

(b) An applicant for an exemption must notify interested persons of any hearing on an exemption scheduled by the Department in the manner described in § 2570.46(c). In addition, the applicant must submit a statement subscribed as true under penalty of perjury like that required in § 2570.46(d).

§ 2570.48 Decision to grant exemptions.

(a) If, after considering all the facts and representations submitted by an applicant in support of an exemption application, all the comments received in response to a notice of proposed exemption, and the record of any hearing held in connection with the proposed exemption, the Department determines that the exemption should be granted, it will publish a notice in the **Federal Register** granting the exemption.

(b) A **Federal Register** notice granting an exemption will summarize the transaction or transactions for which exemptive relief has been granted and will specify the conditions under which such exemptive relief is available.

§ 2570.49 Limits on the effect of exemptions.

(a) An exemption does not take effect or protect parties in interest from liability with respect to the exemption transaction unless the material facts and representations contained in the application and in any materials and documents submitted in support of the application were true and complete.

(b) An exemption is effective only for the period of time specified and only under the conditions set forth in the exemption.

(c) Only the specific parties to whom an exemption grants relief may rely on the exemption. If the notice granting an exemption does not limit exemptive relief to specific parties, all parties to the exemption transaction may rely on the exemption.

§ 2570.50 Revocation or modification of exemptions.

(a) If, after an exemption takes effect, changes in circumstances, including changes in law or policy, occur which call into question the continuing validity of the Department's original conclusions concerning the exemption, the Department may take steps to revoke or modify the exemption.

(b) Before revoking or modifying an exemption, the Department will publish a notice of its proposed action in the **Federal Register** and provide interested persons with an opportunity to comment on the proposed revocation or modification. In addition, the Department will give the applicant at least 30 days notice in writing of the proposed revocation or modification and the reasons therefor and will provide the applicant with the opportunity to comment on the revocation or modification.

(c) Ordinarily the revocation or modification of an exemption will have prospective effect only.

§ 2570.51 Public inspection and copies.

(a) The administrative record of each exemption application will be open to public inspection and copying at the Public Disclosure Branch, PWBA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

(b) Upon request, the staff of the Public Disclosure Branch will furnish photocopies of an administrative record, or any specified portion of that record, for a specified charge per page.

§ 2570.52 Effective Date.

This regulation is effective with respect to all applications for exemptions filed with the Department under section 408(a) of ERISA, section 4975(c)(2) of the Code, or 5 U.S.C. 8477(c)(3) at any time on or after September 10, 1990. Applications for exemptions under section 408(a) of ERISA and/or section 4975 of the Code filed before September 10, 1990, are governed by ERISA Procedure 75–1. Applications for exemption under 5 U.S.C. 8477(c)(3) filed before September 10, 1990, but after December 29, 1988 are governed by part 2585 of chapter XXV of title 29 of the *Code of Federal Regulations,* (section 29 CFR part 2585 as revised July 1, 1990). Applications under 5 U.S.C. 8477(c)(3) filed before December 29, 1988 are governed by ERISA Procedure 75–1.

PART 2585— [REMOVED]

3. The regulations in part 2585 of chapter XXV of title 29 of the Code of Federal Regulations are removed.

Signed at Washington, DC, this 27th day of July , 1990.

David G. Ball,

Assistant Secretary for Pension and Welfare Benefits, U.S. Department of Labor.

[FR Doc. 90-18443 Filed 8-9-90;8:45am]

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Friday
August 10, 1990

Part V

Department of Transportation

Federal Aviation Administration

14 CFR Parts 11, 21, 23, 25, 33, 34, 43, 45, 91

Fuel Venting and Exhaust Emission Requirements for Turbine Engine Powered Airplanes; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR parts 11, 21, 23, 25, 33, 34, 43, 45, 91

[Docket No. 25613; Amdt. Nos. 11-34, 21-68, 23-40, 25-70, 33-14, 43-33, 45-20, 91-218]

RIN 2120-AC62

Fuel Venting and Exhaust Emission Requirements for Turbine Engine Powered Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule codifies as new part 34 all of the applicable aircraft engine fuel venting and exhaust emission requirements of Special Federal Aviation Regulation (SFAR) 27–5, and the test procedures specified under the regulations implementing the Clean Air Act. This rule consolidates all of the requirements and test procedures into this part, and inserts into other affected parts the requirements to comply with new part 34. New part 34 does not alter any of the requirements specified under SFAR 27–5 or the regulations implementing the Clean Air Act.

EFFECTIVE DATES: This regulation is effective September 10, 1990. The incorporation by reference of certain publications listed in the regulations was previously approved by the Director of the Federal Register on November 22, 1983 (48 FR 56740, December 23, 1983).

FOR FURTHER INFORMATION CONTACT: Harvey Van Wyen, Research and Engineering Branch (AEE–110), Office of Environment and Energy, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, Telephone: (202) 267–3558.

SUPPLEMENTARY INFORMATION: This rule replaces SFAR 27–5 with a new Federal Aviation Regulation part 34 as authorized by section 232 of the Clean Air Act, as amended (42 U.S.C. 7401) (the Act) and by the authority delegated to the Administrator of the FAA by the Secretary of Transportation. This rule also amends references to SFAR 27–5 in other parts of the FARs (parts 11, 21, 43, 45, and 91). References to new part 34 will be added to parts 23, 25, and 33 of the FARs. This codification of SFAR 27–5 and 40 CFR part 87 is based on Notice No. 88–9 (53 FR 18530, May 23, 1988). Comments were invited. All comments received have been considered in the issuance of this final rule.

Synopsis of the Proposal

Overview

When the Environmental Protection Agency (EPA) originally issued 40 CFR part 87, Control of Air Pollution from Aircraft and Aircraft Engines; Emission Standards and Test Procedures in 1973, it was recognized that some portions of the standards could be implemented in a very short time period while other portions would require a much longer time period for development and testing. In accordance with section 232 of the Clean Air Act, as amended (42 U.S.C. 7401), the FAA proceeded to promulgate compliance regulations for the near-term requirements in the form of a Special Federal Aviation Regulation, SFAR 27–5. Subsequent to the original issuance of 40 CFR part 87, the EPA has recognized that some of the longer-term requirements were either unneeded or practically unattainable. Those longer-term requirements, originally scheduled to become effective in 1978, have been extensively revised by the EPA. Revised 40 CFR part 87 now contains all current aircraft and aircraft engine emission standards. Under the requirement of section 232 of the Clean Air Act Amendments of 1970, the FAA has promulgated, in SFAR 27–5, compliance regulations for all of the standards in 40 CFR part 87.

By this rulemaking, the FAA will continue to comply with section 232 of the Clean Air Act Amendments of 1970 by establishing a new part 34 to 14 CFR containing all of the compliance regulations for fuel venting and engine exhaust emissions. This rule also revises other affected parts to require compliance with part 34. Since SFAR 27–5 and its amendments were issued, they have, by definition, been considered temporary, and their exact status has been confusing to the parties directly or indirectly affected by the regulations. The other parts directly affected by SFAR 27–5 have heretofore referenced only SFAR 27–5 and the reader has been required to review SFAR 27–5 in its entirety in order to determine its effect on other parts. The FAA, with this final rule, codifies the compliance regulations in a single part of the Federal Aviation Regulations, and revises the other affected parts accordingly.

The provisions of 40 CFR part 87 are applicable to each individual aircraft gas turbine engine of the classes, and as of dates, specified in that part. Compliance would require exhaust emission testing of each individual engine that is subject to the requirements of 40 CFR part 87. The EPA has recognized in the preamble to 40 CFR part 87, and specifically in § 87.89, that testing each individual engine would be excessively costly.

The EPA concluded that it was necessary to develop a practical interpretation of the requirement for demonstrated compliance by each individual engine and to substitute a preproduction certification program as a compliance procedure in place of compliance testing. The promulgation of such a preproduction certification compliance program has been delegated to the FAA subject to the concurrence of the Administrator of the EPA. The FAA consulted extensively with the EPA on this matter. The EPA concluded that an acceptable preproduction certification compliance program must demonstrate that, at minimum, with 90 percent confidence, 95 percent of the engines would meet the gaseous emission standards, and with 90 percent confidence, every engine would meet the smoke standards. The International Civil Aviation Organization (ICAO), in its Standards and Recommended Practices for Aircraft Engine Emissions, adopted a similar preproduction certification compliance procedure based upon a composite of historical engine-to-engine variability. Since the EPA stressed the desirability of commonality with ICAO, the FAA, with the concurrence of the EPA, adopted the compliance procedure defined in Appendix 6 to ICAO Annex 16, Volume II—Aircraft Engine Emissions, First Edition, June 1981.

The FAA solicited comments and recommendations concerning equivalent procedures in a Notice of Proposed Rulemaking (53 FR 18530, May 23, 1988). No comments were received on the equivalent procedures issue. The FAA will give any future recommendation full consideration if it is accompanied by substantive supporting data demonstrating equivalency. Should an acceptable equivalent procedure be proposed, the FAA will seek EPA concurrence with that proposed equivalent procedure as an alternative compliance procedure. The FAA cannot, however, adopt any proposed compliance procedure unless it has the concurrence of the Administrator of the EPA.

Regulatory History

Under section 232 of the Clean Air Amendments of 1970, Public Law 91–604, the FAA is required to issue regulations that ensure compliance with all aircraft emission standards promulgated under section 231 of the Act, which are currently prescribed in 40 CFR part 87 originally issued on July 6, 1973 (38 FR

19088, July 17, 1973). Accordingly, on December 26, 1973, the FAA issued SFAR 27, (38 FR 35427, December 28, 1973). The purpose of SFAR 27 was to ensure compliance with the aircraft and aircraft engine emission standards and test procedures issued by the EPA in 40 CFR part 87.

SFAR 27, as originally issued, required compliance only with those standards and procedures in 40 CFR part 87 that were effective beginning February 1, 1974. Since its issuance, SFAR 27 has been amended seven times by the FAA. On December 23, 1974, the FAA issued SFAR 27–1 (39 FR 45008, December 30, 1974) to require compliance with the fuel venting emission standards in 40 CFR part 87 that became effective January 1, 1975. SFAR 27–2, effective January 1, 1976 (40 FR 55311, November 28, 1975), required compliance with smoke emissions standards in 40 CFR part 87 applicable to new and in-use aircraft turbofan or turbojet engines with a rated power of 29,000 pounds thrust or greater that are designed for operation on subsonic airplanes. SFAN 27–3 (42 FR 64876, December 29, 1977) required compliance with smoke emission standards in 40 CFR part 87 for JT3D engines manufactured on and after January 1, 1978. A fourth amendment, SFAR 27–4 (45 FR 71960, October 30, 1980), was issued to require phased compliance with smoke emission standards by in-use JT3D engines beginning on January 1, 1981, with total compliance required by January 1, 1985. Subsequently, the requirement for compliance by in-use JT3D engines was automatically deleted under the terms of SFAR 27, § 3(b), when the EPA deleted underlying requirement from 40 CFR part 87 (48 FR 2716, January 20, 1983).

On December 21, 1982, the EPA revised 40 CFR part 87 and republished the rule in its entirety (47 FR 58462, December 30, 1982). The revised rule contained a number of changes in definitions as well as new standards for smoke and unburned hydrocarbon emissions. The FAA is required by 40 CFR 87.89 to establish and approve a testing program to assure compliance with part 87 by January 1, 1984. On December 8, 1983, the FAA issued amended SFAR 27–5 (48 FR 56735, December 23, 1983) which required compliance with all of the provisions of revised 40 CFR part 87 and contained an EPA-approved testing program. The effective date of SFAR 27–5 was January 1, 1984. On October 4, 1983, the EPA issued a stay of the January 1, 1984, effective date for EPA's smoke standards, applicable to aircraft turbine engines rated below 26.7 kilonewtons (kN) (6000 pounds) thrust in response to a petition by the General Aviation Manufacturers Association (GAMA) (48 FR 46481, October 12, 1983). On July 30, 1984, the EPA denied the GAMA petition and established an August 9, 1985 effective date for smoke standards applicable to aircraft turbine engines rated below 26.7 kN (49 FR 31873, August 9, 1984). On October 9, 1984, the EPA changed the definition of "very low production" engines in the provisions for exemptions and revised the exhaust emission test fuel specification (49 FR 41000, October 18, 1984). On March 18, 1986, the FAA amended SFAR 27–5 to correct the authority citations for petitions for exemptions to SFAR 27–5 (51 FR 10612, March 28, 1986). On September 15, 1989, the FAA amended SFAR 27–5 to reflect delegations of authority that were affected by a recent agencywide reorganization (54 FR 39288, September 25, 1989).

Discussion of Comments

A total of seven written responses containing comments were received by the FAA subsequent to the publication of Notice 88–9. All of the comments submitted to the docket have been reviewed. The proposed amendments to parts 11, 21, 23, 25, 33, 45 and 91 and the new part 34 have been revised to reflect those relevant comments and suggestions within the scope of Notice 88–9.

Many of the comments regarding technical amendments to parts 11, 21, 23, 25, 33, 45 and 91 were found to be of sufficient merit to warrant revisions to the final rule. Those comments recommending substantive changes to part 34 were not adopted, since part 34 is restricted to the direct implementation of 40 CFR part 87 which was promulgated by the EPA. The substantive portion of part 34 is intended to be essentially a word-for-word reproduction of the substantive portions of 40 CFR part 87. Future comments regarding the substantive aspects of 40 CFR part 87 should be addressed to the EPA.

Comments pertaining to amending parts 11, 21, 23, 25, 33, 45 and 91:

One commenter noted that the proposed change in § 23.903(a)(1) and a similar change in § 25.903(a)(1) were inconsistent with a previous broad revision for all categories of aircraft which introduced a common requirement with the words "Each engine must have a type certificate." The commenter noted that the wording as stated in the NPRM would exclude engines certificated on the basis of Civil Air Regulation 13 (the predecessor to the present FAR part 33) and all engines certificated under the provisions of § 21.29. The commenter's proposed wording also addresses another commenter's concern that the requirement for the certification of each engine under part 34 should be restated to emphasize that the requirement is in effect only when part 34 is applicable to that particular engine. The wording proposed by the commenter was adopted for §§ 23.903(a)(1) and 25.903(a)(1) of the final rule.

Regarding the proposed changes to §§ 23.951(d) and 25.951(d), two commenters noted that the requirements of parts 23 and 25 apply to the airplane, not the engines. The proposed change offered by one of the commenters was adopted in the final rule by changing the phrase "Each fuel system for a turbine engine must * * * " to the phrase "Each fuel system for a turbine engine powered airplane must * * * ".

One commenter noted that although the NPRM proposed to amend 14 CFR parts 11, 21, 23, 45 and 91 and add a new part 34, there was no corresponding change proposed for part 33 requiring the applicant for a certification under part 21 to show compliance with the applicable requirements of part 34. The FAA concurs with the comment and has added an appropriate revision to part 33 in the final rule.

One commenter noted that the proposed wording in the NPRM for § 45.13(a)(7) and 45.13(a)(7)(i) is inconsistent with the current practice that engines that do not have gaseous or exhaust smoke emission standards imposed by 40 CFR part 87, namely turboprop (Class TP) engines of less than 1000 kW rated power, do not need to indicate any information on emissions on their identification plates. The commenter recommended adding the words "exhaust emissions" to the first sentence in § 45.13(a)(7) as follows: "* * * indicates compliance with the applicable exhaust emissions provisions of part 34 * * * ". A similar change was recommended for § 45.13(a)(7)(i). These minor clarifications were adopted by the FAA in the final rule. The same commenter also suggested that the requirements for a "permanent powerplant record" under § 45.13(a)(7)(i) and (ii) be changed to "engine logbook". The suggestion was not adopted in the final rule. The FAA does not have a requirement for an "engine logbook" nor could the FAA determine that "engine logbook" was an industry standard or custom. Therefore, the generic term "permanent powerplant record" was kept in the final rule.

One commenter suggested that as a matter of practical convenience the

proposed requirement for 14 CFR 91.27(d) commence as follows: [14 CFR part 91 will be completely revised as of August 18, 1990 (see 54 FR 34284, August 18, 1990) to renumber all of its sections. Section 91.27 will be renumbered as § 91.203 and § 91.28 will be renumbered as § 91.715. Hereafter in this preamble, references to the renumbered Part 91 will be shown in brackets.] "Except as provided in § 91.28 [91.715], no person * * * ", and that § 91.28 [91.715] be amended to reflect the exhaust emission exemption of 40 CFR 87.7, as is currently provided for certificates of airworthiness in § 91.28(a) [91.715(a)]. The recommendation was not adopted in the final rule. Part 87 allows for an exemption for airplanes that do not comply with emission standards when operated on flights of short duration or at infrequent intervals. These exemptions from emission compliance are not as broad as those exemptions allowed for airworthiness under § 91.28 [91.715]. Part 34 does and must reflect the requirements of 40 CFR 87.7.

Comments Pertaining to the New Part 34

Based on the comments received, a definition for "reference day conditions" was added to § 34.1, and § 34.1 definitions for "date of manufacture," "aircraft," and "Administrator" were amended for clarity or to conform with an existing definition of the term in use in the FARs.

Several of the comments pertained to typographical errors in the NPRM and the inclusion of additional terms in the abbreviations table in § 34.2. The commenters' recommended changes were adopted in the final rule.

Regarding the proposed § 34.60(b), a commenter suggested that the requirement to use a dynamometer for engines producing shaft power is unduly restrictive. The commenter stated that acceptance testing of most new turboprop engines is done using a propeller with either a calibrated test-stand torquemeter or the engine's integral torque measuring device. The commenter concluded that if these devices are acceptable to the FAA for determining an engine's power output they should be equally acceptable for the part 34 tests. The comment was not adopted in the final rule. The requirement for the dynamometer was established by the EPA in 40 CFR 87.60(b). The FAA may, however, approve alternative test procedures under the provisions of § 34.3(a) or § 34.5 if proper applications are submitted. Part 34 reflects, and must continue to reflect, the requirements of 40 CFR part 87.60(b).

One commenter indicated that the turbine fuel specifications contained in proposed § 34.61 are not consistent with the latest American Society for Testing Materials (ASTM) recommendations. In response, the FAA notes that the EPA initially adopted the turbine fuel specifications identical to those contained in appendix 4 of Volume 2 of ICAO Annex 16. However, after much consideration, the EPA subsequently revised the fuel specifications (47 FR 58462, December 30, 1982). As required, 14 CFR part 34 must directly adopt the revised EPA fuel specification (with the exception of a correction of a typographical error in the units of measure for kinematic viscosity). It should be noted that § 34.61 fuel specifications are more stringent than the fuel specifications in appendix 4 of Volume 2 of ICAO Annex 16.

Section 34.7 states that all petitions for rulemaking involving either the substance of an emission standard or test procedure prescribed by the EPA, or a compliance date for such standard or procedure, must be submitted to the EPA. As stated in the NPRM (53 FR 18530, May 23, 1988), informational copies of such petitions are invited by the FAA. One commenter wrote that to invite rather than require is ambiguous and would set an undesirable precedent. The commenter concluded that if copies of the petition are not required, the provision to invite informational copies of the petition should be removed from the regulation. The commenter's suggestion has not been adopted in the final rule. The FAA feels that the invited information copies will expedite the required consultation process between the FAA and the EPA in order to determine if action on such petitions requires rulemaking under sections 231 and 232 of the Clean Air Act, as amended.

One commenter was concerned that the fuel venting and exhaust emission requirements of part 34 would be applied to auxiliary power unit (APU) installations through the requirements of parts 23 and 25. The EPA proposed to withdraw emission control requirements from APU's in 1978 (43 FR 12615, March 24, 1978) and omitted APU emission control requirements from their final rule (47 FR 58462, December 30, 1982). Therefore, the FAA does not intend to impose part 34 requirements on APUs.

A commenter suggested that where engine power is expressed in kilonewton(s), the equivalent in pounds of thrust should also be shown. The suggestion has merit and was adopted in the final rule.

Several commenters suggested changes in the arrangement of part 34 sections and deletion of certain wording as a means of simplifying part 34 without affecting the content of 40 CFR part 87. The suggestions were not adopted in the final rule. The FAA chose to incorporate, to the maximum extent possible, the substantive portions of 40 CFR part 87 into 14 CFR part 34 on a word-for-word and section-to-section basis in order to maintain consistency between the two bodies of rules.

One commenter requested assurance from the FAA that the new part 34 would not place any new or additional regulatory burden on owners/operators of in-use JT3D engines manufactured before 1978. New part 34 is intended to codify only the provisions of Special Federal Aviation Regulation (SFAR) 27–5, and the EPA standards and test procedures contained in 40 CFR part 87. New part 34 does not place any new or additional regulatory burden on owners/operators of any aircraft or aircraft engines; it merely recodifies the existing rules of SFAR 27 and 40 CFR part 87. This includes in-use JT3D engines manufactured before 1978. There is no requirement in new part 34 to retrofit in-use JT3D engines manufactured before 1978.

Paperwork Reduction Act

Information collection requirements contained in SFAR 27–5 were approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and was assigned OMB control number 2120–0508. That control number will be designated for §§ 34.7 and 45.13, as listed in § 11.101(a).

Regulatory Evaluation

The FAA has reviewed the final rule establishing the new part 34, "Fuel Venting and Exhaust Emission Requirements for Turbine Powered Airplanes," to determine what, if any, economic impact it will have on the aviation industry. The FAA concludes that part 34 will not have a significant economic impact on the aviation industry and that it does not constitute a major rule pursuant to Executive Order 12291.

Section 232 the Clean Air Act Amendments of 1970, Public Law 91–604, requires the FAA to issue regulations that ensure compliance with all aircraft emissions standards promulgated under section 231 of the Clean Air Act, which are currently prescribed in 40 CFR part 87. These standards and their applicability are clearly defined in 40

CFR part 87, and the FAA has no option but to enforce them.

As part of the process of promulgating 40 CFR part 87, the EPA conducted an economic analysis of the proposed regulations and determined that they would not constitute a major rule, as defined by Executive Order 12291 (47 FR 58469, December 30, 1982). This determination was based on the expected economic impact being well below the $100 million per year threshold set forth in the Executive Order, and the expectation that the rules would not impose significantly increased costs or other adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. enterprises to compete with those of other countries. The EPA's economic analysis containing this determination can be found in Public Docket Number OMSAPC–78–1, which may be examined at the Environmental Protection Agency, Central Docket Section, West Tower Lobby, Gallery I, 401 M Street SW., Washington, DC 20406. A copy of the EPA's economic analysis has also been placed in Docket 25613 for the convenience of those interested in reviewing it. The FAA has reviewed and concurs with the findings in the EPA economic analysis.

Following the EPA's revision of 40 CFR part 87, the FAA issued amended SFAR 27–5 (48 FR 56735, December 23, 1983), which required compliance with all of the provisions of 40 CFR part 87. The SFAR was most recently amended on September 15, 1989 (54 FR 39288, September 25, 1989). The purpose of part 34 is to replace SFAR 27–5 as a permanent part in the FAR's and to continue the enforcement of 40 CFR part 87, as required by the statute. This action does not in any way change, add to, or take away from the standards in 40 CFR part 87 or the requirements for compliance currently implemented under SFAR 27–5. Part 34 will not impose any new or additional regulatory requirements. On May 23, 1988, the FAA issued a notice of proposed rulemaking indicating its intention to promulgate part 34. This NPRM contained a regulatory evaluation asserting that no new or additional cost burdens would be imposed by the new regulation. No comments were submitted in Docket 25613 disputing this assertion. Therefore, the FAA is assured that no new or additional cost burden will result from the promulgation of this regulation.

Part 34 is easier to review and understand than SFAR 27–5. Thus, persons affected by 40 CFR part 87 will be relieved from a burden and a slight, unquantifiable benefit will result from this action. Because this beneficial economic impact is considered minimal, the FAA determines that no further analysis is necessary. Accordingly, the FAA concludes that this rulemaking action will not have a significant economic impact on the aviation industry and that it does not constitute a major rule pursuant to Executive Order 12291.

International Trade Impact Analysis

Part 34 will neither eliminate any present regulation nor impose any new regulation. As a result, affected operators will not incur additional costs or significant costs savings. Thus, part 34 will not have any impact on trade opportunities for either U.S. firms doing business overseas or foreign firms doing business in the United States.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 was enacted to ensure that small entities are not unnecessarily or disproportionately burdened by Government regulations. The Act requires a Regulatory Flexibility Analysis if a rule has a significant economic impact, either detrimental or beneficial, on a substantial number of small business entities. As noted above, part 34 will neither eliminate any present regulations nor impose any new regulations and, thus, will not have a significant economic impact, either detrimental or beneficial, on affected operators. Consequently, the FAA determines that, under the criteria of the Regulatory Flexibility Act of 1980, a regulatory flexibility analysis is not required.

Environmental Analysis

Pursuant to Department of Transportation, "Policies and Procedures for Considering Environmental Impacts" (FAA Order 1050.1D, appendix 7, paragraph 4, change 3, December 5, 1986), the FAA is categorically excluded from providing an environmental analysis with regard to part 34 because it is mandated by law to issue regulations to ensure compliance with the EPA aircraft emissions standards and the EPA has performed all required environmental analyses prior to the issuance of those standards.

Federalism Implications

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Conclusion

The FAA has determined that this document involves regulations which are not considered to be major under the procedures and criteria prescribed in Executive Order 12291. The rule is considered not significant under to Department of Transportation Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). A copy of the evaluation prepared for this action is contained in the regulatory docket. A copy of the evaluation may be obtained from the person identified in the section entitled "**FOR FURTHER INFORMATION CONTACT.**" For the reasons stated in the regulatory evaluation, I certify that these regulations, if promulgated, will not have a significant economic impact on a substantial number of small entities. In addition, these proposals, if adopted, would have little or no impact on trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

List of Subjects

14 CFR Parts 11, 21, 23, 25, 33, 43, 45, and 91

Air transportation, Aircraft, Aviation safety.

14 CFR Part 34

Air pollution control, Aircraft, Incorporation by reference.

The Final Rule

Accordingly, the FAA amends 14 CFR, chapter I, by amending parts 11, 21, 23, 25, 33, 43, 45, and 91, and adding a new part 34 as follows:

PART 11—GENERAL RULE-MAKING PROCEDURES

1. The authority citation for part 11 continues to read as follows:

Authority: 49 U.S.C. 1341(a), 1343(d), 1348, 1354(a), 1401 through 1405, 1421 through 1431, 1481, 1502; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983).

2. By removing SFAR 27–5.

§ 11.101 [Amended]

3. In § 11.101(a), by removing from the chart the reference and control number for SFAR 27; and by inserting into the chart the following references:

§ 34.7 2120–0508.

§ 45.13 2120–0508.

PART 21—CERTIFICATION PROCEDURES FOR PRODUCTS AND PARTS

4. The authority citation for part 21 is revised to read as follows:

Authority: 49 U.S.C. 1344, 1348(c), 1352, 1354(a), 1355, 1421 through 1431, 1502, 1651(b)(2), 42 U.S.C. 7572; E.O. 11514; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983).

5. By removing SFAR 27-5.

6. In § 21.17, paragraph (a) introductory text is revised to read as follows:

§ 21.17 Designation of applicable regulations.

(a) Except as provided in § 23.2, § 25.2, and in parts 34 and 36 of this chapter, an applicant for a type certificate must show that the aircraft, aircraft engine, or propeller concerned meets—

* * * * *

7. In § 21.21, paragraph (b) introductory text and (b)(1) are revised to read as follows:

§ 21.21 Issue of type certificate: normal, utility, acrobatic, commuter, and transport category aircraft; aircraft engines; propellers.

* * * * *

(b) The applicant submits the type design, test reports, and computations necessary to show that the product to be certificated meets the applicable airworthiness, aircraft noise, fuel venting, and exhaust emission requirements of the Federal Aviation Regulations and any special conditions prescribed by the Administrator, and the Administrator finds—

(1) Upon examination of the type design, and after completing all tests and inspections, that the type design and the product meet the applicable noise, fuel venting, and emissions requirements of the Federal Aviation Regulations, and further finds that they meet the applicable airworthiness requirements of the Federal Aviation Regulations or that any airworthiness provisions not complied with are compensated for by factors that provide an equivalent level of safety; and

* * * * *

8. In § 21.29, paragraph (a)(1)(i) and (b) are revised to read as follows:

§ 21.29 Issue of type certificate: import products.

(a) * * *

(1) * * *

(i) The applicable aircraft noise, fuel venting and exhaust emissions requirements of this subchapter as designated in § 21.17, or the applicable aircraft noise, fuel venting and exhaust emissions requirements of the country in which the product was manufactured, and any other requirements the Administrator may prescribe to provie noise, fuel venting and exhaust emission levels no greater than those provided by the applicable aircraft noise, fuel venting, and exhaust emission requirements of this subchapter as designated in § 21.17; and

* * * * *

(b) A product type certificated under this section is considered to be type certificated under the noise standards of part 36, and the fuel venting and exhaust emission standards of part 34, of the Federal Aviation Regulations where compliance therewith is certified under paragraph (a)(1)(i) of this section, and under the airworthiness standards of that part of the Federal Aviation Regulations with which compliance is certified under paragraph (a)(1)(ii) of this section or to which an equivalent level of safety is certified under paragraph (a)(1)(ii) of this section.

9. In § 21.31, paragraph (d) is revised to read as follows:

§ 21.31 Type design.

* * * * *

(d) Any other data necessary to allow, by comparison, the determination of the airworthiness, noise characteristics, fuel venting, and exhaust emissions (where applicable) of later products of the same type.

10. In § 21.33, paragraph (b)(1) is revised to read as follows:

§ 21.33 Inspection and tests.

* * * * *

(b) * * *

(1) Compliance with the applicable airworthiness, aircraft noise, fuel venting, and exhaust emission requirements;

* * * * *

11. In § 21.93, paragraph (c) is added to read as follows:

§ 21.93 Classification of changes in type design.

* * * * *

(c) For purposes of complying with part 34 of this chapter, any voluntary change in the type design of the airplane or engine which may increase fuel venting or exhaust emissions is an "emissions change."

12. In § 21.101, paragraph (a) introductory text is revised to read as follows:

§ 21.101 Designation of applicable regulations.

(a) Except as provided in § 23.2 and § 25.2 and parts 34 and 36 of this chapter, an applicant for a change to a type certificate must comply with either—

* * * * *

13. In § 21.115, paragraph (a) is revised to read as follows:

§ 21.115 Applicable requirements.

(a) Each applicant for a supplemental type certificate must show that the altered product meets applicable airworthiness requirements as specified in paragraphs (a) and (b) of § 21.101 and, in the case of an acoustical change described in § 21.93(b), show compliance with the applicable noise requirements of § 36.7 and § 36.9 of this chapter and, in the case of an emissions change described in § 21.93(c), show compliance with the applicable fuel venting and exhaust emissions requirements of part 34.

* * * * *

14. In § 21.183, paragraph (g) is added to read as follows:

§ 21.183 Issue of standard airworthiness certificates for normal, utility, acrobatic, commuter, and transport category aircraft; manned free balloons; and special classes of aircraft.

* * * * *

(g) *Fuel venting and exhaust emission requirements.* Notwithstanding all other provisions of this section, and irrespective of the date of application, no airworthiness certificate is issued, on and after the dates specified in part 34 for the airplanes specified therein, unless the airplane complies with the applicable requirements of that part.

15. In § 21.187 paragraph (c) is added to read as follows:

§ 21.187 Issue of multiple airworthiness certification.

* * * * *

(c) The aircraft complies with the applicable requirements of part 34.

16. Section 21.257 is revised to read as follows:

§ 21.257 Type certificates: issue.

An applicant is entitled to a type certificate for a product manufactured under a delegation option authorization if the Administrator finds that the product meets the applicable airworthiness, noise, fuel venting, and exhaust emission requirements (including applicable acoustical change or emissions change requirements in the case of changes in type design).

17. In § 21.451, paragraph (d) is revised to read as follows:

§ 21.451 Limits of applicability.

* * * * *

(d) Notwithstanding any other provision of this subpart, a DAS may not issue a supplemental type certificate

involving the exhaust emissions change requirements of part 34 or the acoustical change requirements of part 36 of this chapter until the Administrator finds that those requirements are met.

PART 23—AIRWORTHINESS STANDARDS: NORMAL, UTILITY, ACROBATIC, AND COMMUTER CATEGORY AIRPLANES

18. The authority citation for part 23 continues to read as follows:

Authority: 49 U.S.C. 1344, 1354(a), 1355, 1421, 1423, 1425, 1428, 1429, 1430; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983).

19. In § 23.903, paragraph (a)(1) is revised to read as follows:

§ 23.903 Engines.

(a) * * *

(1) Each engine must have a type certificate and must meet the applicable requirements of part 34 of this chapter.

* * * * *

20. In § 23.951, paragraph (d) is added to read as follows:

§ 23.951 General.

* * * * *

(d) Each fuel system for a turbine engine powered airplane must meet the applicable fuel venting requirements of part 34 of this chapter.

PART 25—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY AIRPLANES

21. The authority citation for part 25 continues to read as follows:

Authority: 49 U.S.C. 1344, 1354(a), 1355, 1421, 1423, 1424, 1425, 1428, 1429, 1430; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983).

22. In § 25.903, paragraph (a)(1) is revised to read as follows:

§ 25.903 Engines.

(a) * * *

(1) Each engine must have a type certificate and must meet the applicable requirements of part 34 of this chapter.

* * * * *

23. In § 25.951, paragraph (d) is added to read as follows:

§ 25.951 General.

* * * * *

(d) Each fuel system for a turbine engine powered airplane must meet the applicable fuel venting requirements of part 34 of this chapter.

PART 33—AIRWORTHINESS STANDARDS: AIRCRAFT ENGINES

24. The authority citation for part 33 continues to read as follows:

Authority: 49 U.S.C. 1344, 1354(a), 1355, 1421, 1423, 1424, 1425; 49 U.S.C. 106(g) (Revised Pub L. 97–449, January 22, 1983).

25. In § 33.1, paragraph (b) is revised to read as follows:

§ 33.1 Applicability.

* * * * *

(b) Each person who applies under part 21 for such a certificate or change must show compliance with the applicable requirements of this part and the applicable requirements of part 34 of this chapter.

PART 43—MAINTENANCE, PREVENTIVE MAINTENANCE, REBUILDING, AND ALTERATION

26. The authority citation for part 43 continues to read as follows:

Authority: 49 U.S.C. 1354, 1421 through 1430; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 22, 1983).

27. By removing SFAR 27–5.

PART 45—IDENTIFICATION AND REGISTRATION MARKETING

28. The authority citation for part 45 continues to read as follows:

Authority: 49 U.S.C. 1348, 1354, 1401, 1402, 1421, 1423, and 1522; 49 U.S.C. 106(g) (Revised Pub L. 97–449, January 12, 1983).

29. By removing SFAR 27–5.

30. In § 45.13, paragraph (a)(7) is redesignated as paragraph (a)(8) and a new paragraph (a)(7) is added to read as follows:

§ 45.13 Identification data.

(a) * * *

(7) On or after January 1, 1984, for aircraft engines specified in part 34 of this chapter, the date of manufacture as defined in § 34.1 of that part, and a designation, approved by the Administrator of the FAA, that indicates compliance with the applicable exhaust emission provisions of part 34 and 40 CFR part 87. Approved designations include COMPLY, EXEMPT, and NON-US as appropriate.

(i) The designation Comply indicates that the engine is in compliance with all of the applicable exhaust emissions provisions of part 34. For any engine with a rated thrust in excess of 26.7 kilonewtons (6000 pounds) which is not used or intended for use in commercial operations and which is in compliance with the applicable provisions of part 34, but does not comply with the hydrocarbon emissions standard of § 34.21(d), the statement "May not be used as a commercial aircraft engine" must be noted in the permanent powerplant record that accompanies the engine at the time of manufacture of the engine.

(ii) The designation EXEMPT indicates that the engine has been granted an exemption pursuant to the applicable provision of § 34.7 (a)(1), (a)(4), (b), (c), or (d), and an indication of the type of exemption and the reason for the grant must be noted in the permanent powerplant record that accompanies the engine from the time of manufacture of the engine.

(iii) The designation NON-US indicates that the engine has been granted an exemption pursuant to § 34.7(a)(1), and the notation "This aircraft may not be operated within the United States", or an equivalent notation approved by the Administrator of the FAA, must be inserted in the aircraft logbook, or alternate equivalent document, at the time of installation of the engine.

* * * * *

PART 91—GENERAL OPERATING AND FLIGHT RULES

31. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; Articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 Stat. 1180); 42 U.S.C. 4321 et seq.; E.O. 11514; 49 U.S.C. 106(g) (Revised Pub L. 97–449, January 12, 1983).

When adopted, the following amendment will be reflected in new part 91 effective on August 18, 1990:

32. By removing SFAR 27–5.

33. In § 91.203, paragraph (d) is added to read as follows:

§ 91.203 Civil aircraft: Certifications required.

* * * * *

(d) No person may operate a civil airplane (domestic or foreign) into or out of an airport in the United States unless it complies with the fuel venting and exhaust emissions requirements of part 34 of this chapter.

34. Part 34 is added to read as follows:

PART 34—FUEL VENTING AND EXHAUST EMISSION REQUIREMENTS FOR TURBINE ENGINE POWERED AIRPLANES

Subpart A—General Provisions

Sec.

Authority: 42 U.S.C. 1857f–10; 49 U.S.C. 106(g); 49 U.S.C. App. 1348(c), 1354(a), 1421, 1423.

Subpart A—General Provisions

§ 34.1 Definitions.

As used in this part, all terms not defined herein shall have the meaning given them in the Clean Air Act, as amended (42 U.S.C. 7401 et. seq.):

Act means the Clean Air Act, as amended (42 U.S.C. 7401 et. seq.).

Administrator means the Administrator of the Federal Aviation Administration or any person to whom he has delegated his authority in the matter concerned.

Administrator of the EPA means the Administrator of the Environmental Protection Agency and any other officer or employee of the Environmental Protection Agency to whom the authority involved may be delegated.

Aircraft as used in this part means any airplane as defined in 14 CFR part 1 for which a U.S. standard airworthiness certificate or equivalent foreign airworthiness certificate is issued.

Aircraft engine means a propulsion engine which is installed in, or which is manufactured for installation in, an aircraft.

Aircraft gas turbine engine means a turboprop, turbofan, or turbojet aircraft engine.

Class TP means all aircraft turboprop engines.

Class TF means all turbofan or turbojet aircraft engines except engines of Class T3, T8, and TSS.

Class T3 means all aircraft gas turbine engines of the JT3D model family.

Class T8 means all aircraft gas turbine engines of the JT8D model family.

Class TSS means all aircraft gas turbine engines employed for propulsion of aircraft designed to operate at supersonic flight speeds.

Commercial aircraft engine means any aircraft engine used or intended for use by an "air carrier" (including those engaged in "intrastate air transportation") or a "commercial operator" (including those engaged in "intrastate air transportation") as these terms are defined in the Federal Aviation Act and the Federal Aviation Regulations.

Commercial aircraft gas turbine engine means a turboprop, turbofan, or turbojet commercial aircraft engine.

Date of manufacture of an engine is the date the inspection acceptance records reflect that the engine is complete and meets the FAA approved type design.

Emission measurement system means all of the equipment necessary to transport the emission sample and measure the level of emissions. This includes the sample system and the instrumentation system.

Engine model means all commercial aircraft turbine engines which are of the same general series, displacement, and design characteristics and are approved under the same type certificate.

Exhaust emissions means substances emitted into the atmosphere from the exhaust discharge nozzle of an aircraft or aircraft engine.

Fuel venting emissions means raw fuel, exclusive of hydrocarbons in the exhaust emissions, discharged from aircraft gas turbine engines during all normal ground and flight operations.

In-use aircraft gas turbine engine means an aircraft gas turbine engine which is in service.

New aircraft turbine engine means an aircraft gas turbine engine which has never been in service.

Power setting means the power or thrust output of an engine in terms of kilonewtons thrust for turbojet and turbofan engines or shaft power in terms of kilowatts for turboprop engines.

Rated output (r0) means the maximum power/thrust available for takeoff at standard day conditions as approved for the engine by the Federal Aviation Administration, including reheat contribution where applicable, but excluding any contribution due to water injection and excluding any emergency power/thrust rating.

Rated pressure ratio (rPR) means the ratio between the combustor inlet pressure and the engine inlet pressure achieved by an engine operation at rated output.

Reference day conditions means the reference ambient conditions to which the gaseous emissions (HC and smoke) are to be corrected. The reference day conditions are as follows: Temperature = 15°C, specify humidity = 0.00629 kg H_2O/kg of dry air, and pressure = 101325 Pa.

Sample system means the system which provides for the transportation of the gaseous emission sample from the sample probe to the inlet of the instrumentation system.

Shaft power means only the measured shaft power output of a turboprop engine.

Smoke means the matter in exhaust emissions which obscures the transmission of light.

Smoke number (SN) means the dimensionless term quantifying smoke emissions.

Standard day conditions means standard ambient conditions as described in the United States Standard Atmosphere 1976, (i.e., temperature = 15° C, specific humidity = 0.00 kg H_2O/kg dry air, and pressure = 101325 Pa.)

Taxi/idle (in) means those aircraft operations involving taxi and idle between the time of landing roll-out and final shutdown of all propulsion engines.

Taxi/idle (out) means those aircraft operations involving taxi and idle between the time of initial starting of the propulsion engine(s) used for the taxi and the turn onto the duty runway.

§ 34.2 Abbreviations.

The abbreviations used in this part have the following meanings in both upper and lower case:

EPA United States Environmental Protection Agency
FAA Federal Aviation Administration, United States Department of Transportation
HC Hydrocarbon(s)
HP Horsepower

hr Hour(s)
H_2O water
kg Kilogram(s)
kJ Kilojoule(s)
LTO Landing and takeoff
min Minute(s)
Pa Pascal(s)
rO Rated output
rPR Rated pressure ratio
sec Second(s)
SP Shaft power
SN Smoke number
T Temperature, degrees Kelvin
TIM Time in mode
W Watt(s)
°C Degrees Celsius
% Percent

§ 34.3 General requirements.

(a) This part provides for the approval or acceptance by the Administrator or the Administrator of the EPA of testing and sampling methods, analytical techniques, and related equipment not identical to those specified in this part. Before either approves or accepts any such alternate, equivalent, or otherwise nonidentical procedures or equipment, the Administrator or the Administrator of the EPA shall consult with the other in determining whether or not the action requires rulemaking under sections 231 and 232 of the Clean Air Act, as amended, consistent with the responsibilities of the Administrator of the EPA and the Secretary of Transportation under sections 23l and 232 of the Clean Air Act.

(b) Under section 232 of the Act, the Secretary of Transportation issues regulations to ensure compliance with 40 CFR part 87. This authority has been delegated to the Administrator of the FAA (49 CFR 1.47).

(c) *U.S. airplanes.* This Federal Aviation Regulation (FAR) applies to civil airplanes that are powered by aircraft gas turbine engines of the classes specified herein and that have U.S. standard airworthiness certificates.

(d) *Foreign airplanes.* Pursuant to the definition of "aircraft" in 40 CFR 87.1(c), this FAR applies to civil airplanes that are powered by aircraft gas turbine engines of the classes specified herein and that have foreign airworthiness certificates that are equivalent to U.S. standard airworthiness certificates. This FAR applies only to those foreign civil airplanes that, if registered in the United States, would be required by applicable Federal Aviation Regulations to have a U.S. standard airworthiness certificate in order to conduct the operations intended for the airplane. Pursuant to 40 CFR 87.3(c), this FAR does not apply where it would be inconsistent with an obligation assumed by the United States to a foreign country in a treaty, convention, or agreement.

(e) Reference in this regulation to 40 CFR part 87 refers to title 40 of the Code of Federal Regulations, chapter I—Environmental Protection Agency, part 87, Control of Air Pollution from Aircraft and Aircraft Engines (40 CFR part 87).

(f) This part contains regulations to ensure compliance with certain standards contained in 40 CFR part 87. If EPA takes any action, including the issuance of an exemption or issuance of a revised or alternate procedure, test method, or other regulation, the effect of which is to relax or delay the effective date of any provision of 40 CFR part 87 that is made applicable to an aircraft under this FAR, the Administrator of FAA will grant a general administrative waiver of its more stringent requirements until this FAR is amended to reflect the more relaxed requirements prescribed by EPA.

(g) Unless otherwise stated, all terminology and abbreviations in this FAR that are defined in 40 CFR part 87 have the meaning specified in that part, and all terms in 40 CFR part 87 that are not defined in that part but that are used in this FAR have the meaning given them in the Clean Air Act, as amended by Public Law 91–604.

(h) All interpretations of 40 CFR part 87 that are rendered by the EPA also apply to this FAR.

(i) If the EPA, under 40 CFR 87.3(a), approves or accepts any testing and sampling procedures or methods, analytical techniques, or related equipment not identical to those specified in that part, this FAR requires an applicant to show that such alternate, equivalent, or otherwise nonidentical procedures have been complied with, and that such alternate equipment was used to show compliance, unless the applicant elects to comply with those procedures, methods, techniques, and equipment specified in 40 CFR part 87.

(j) If the EPA, under 40 CFR 87.5, prescribes special test procedures for any aircraft or aircraft engine that is not susceptible to satisfactory testing by the procedures in 40 CFR part 87, the applicant must show the Administrator that those special test procedures have been complied with.

(k) Wherever 40 CFR part 87 requires agreement, acceptance, or approval by the Administrator of the EPA, this FAR requires a showing that such agreement or approval has been obtained.

(l) Pursuant to 42 U.S.C. 7573, no state or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless that standard is identical to a standard made applicable to the aircraft by the terms of this FAR.

(m) If EPA, by regulation or exemption, relaxes a provision of 40 CFR part 87 that is implemented in this FAR, no state or political subdivision thereof may adopt or attempt to enforce the terms of this FAR that are superseded by the relaxed requirement.

(n) If any provision of this FAR is rendered inapplicable to a foreign aircraft as provided in 40 CFR 87.3(c) (international agreements), and § 34.3(d) of this FAR, that provision may not be adopted or enforced against that foreign aircraft by a state or political subdivision thereof.

(o) For exhaust emissions requirements of this FAR that apply beginning February 1, 1974, January 1, 1976, January 1, 1978, January 1, 1984, and August 9, 1985, continued compliance with those requirements is shown for engines for which the type design has been shown to meet those requirements, if the engine is maintained in accordance with applicable maintenance requirements for 14 CFR chapter I. All methods of demonstrating compliance and all model designations previously found acceptable to the Administrator shall be deemed to continue to be an acceptable demonstration of compliance with the specific standards for which they were approved.

(p) Each applicant must allow the Administrator to make, or witness, any test necessary to determine compliance with the applicable provisions of this FAR.

§ 34.4 [Reserved].

§ 34.5 Special test procedures.

The Administrator or the Administrator of the EPA may, upon written application by a manufacturer or operator of aircraft or aircraft engines, approve test procedures for any aircraft or aircraft engine that is not susceptible to satisfactory testing by the procedures set forth herein. Prior to taking action on any such application, the Administrator or the Administrator of the EPA shall consult with the other.

§ 34.6 Aircraft safety.

(a) The provisions of this part will be revised if at any time the Administrator determines that an emission standard cannot be met within the specified time without creating a safety hazard.

(b) Consistent with 40 CFR 87.6, if the FAA Administrator determines that any emission control regulation in this part cannot be safely applied to an aircraft, that provision may not be adopted or

enforced against that aircraft by any state or political subdivision thereof.

§ 34.7 Exemptions.

Notwithstanding part 11 of the Federal Aviation Regulations (14 CFR part 11), all petitions for rulemaking involving either the substance of an emission standard or test procedure prescribed by the EPA that is incorporated in this FAR, or the compliance date for such standard or procedure, must be submitted to the EPA. Information copies of such petitions are invited by the FAA. Petitions for rulemaking or exemption involving provisions of this FAR that do not affect the substance or the compliance date of an emission standard or test procedure that is prescribed by the EPA, and petitions for exemptions under the provisions for which the EPA has specifically granted exemption authority to the Secretary of Transportation are subject to part 11 of the Federal Aviation Regulations (14 CFR part 11). Petitions for rulemaking or exemptions involving these FARs must be submitted to the FAA.

(a) *Exemptions based on flights for short durations at infrequent intervals.* The emission standards of this part do not apply to engines which power aircraft operated in the United States for short durations at infrequent intervals. Such operations are limited to:

(1) Flights of an aircraft for the purpose of export to a foreign country, including any flights essential to demonstrate the integrity of an aircraft prior to a flight to a point outside the United States.

(2) Flights to a base where repairs, alterations or maintenance are to be performed, or to a point of storage, or for the purpose of returning an aircraft to service.

(3) Official visits by representatives of foreign governments.

(4) Other flights the Administrator determines, after consultation with the Administrator of the EPA, to be for short durations at infrequent intervals. A request for such a determination shall be made before the flight takes place.

(b) *Exemptions for very low production engine models.* The emissions standards of this part do not apply to engines of very low production after the date of applicability. For the purpose of this part, "very low production" is limited to a maximum total production for United States civil aviation applications of no more than 200 units covered by the same type certificate after January 1, 1984. Engines manufactured under this provision must be reported to the FAA by serial number on or before the date of manufacture and exemptions granted under this provision are not transferable to any other engine.

(c) *Exemptions for new engines in other categories.* The emissions standards of this part do not apply to engines for which the Administrator determines, with the concurrence of the Administrator of the EPA, that application of any standard under § 34.21 is not justified, based upon consideration of—

(1) Adverse economic impact on the manufacturer;

(2) Adverse economic impact on the aircraft and airline industries at large;

(3) Equity in administering the standards among all economically competing parties;

(4) Public health and welfare effects; and

(5) Other factors which the Administrator, after consultation with the Administrator of the EPA, may deem relevant to the case in question.

(d) *Time-limited exemptions for in-use engines.* The emissions standards of this part do not apply to aircraft or aircraft engines for time periods which the Administrator determines, with the concurrence of the Administrator of the EPA, that any applicable standard under § 34.11(a), or § 34.31(a), should not be applied based upon consideration of—

(1) Documentation demonstrating that all good faith efforts to achieve compliance with such standard have been made;

(2) Documentation demonstrating that the inability to comply with such standard is due to circumstances beyond the control of the owner or operator of the aircraft; and

(3) A plan in which the owner or operator of the aircraft shows that he will achieve compliance in the shortest time which is feasible.

(e) Applications for exemption from this part shall be submitted in duplicate to the Administrator in accordance with the procedures established by the Administrator in part 11.

(f) The Administrator shall publish in the Federal Register the name of the organization to whom exemptions are granted and the period of such exemptions.

(g) No state or political subdivision thereof may attempt to enforce a standard respecting emissions from an aircraft or engine if such aircraft or engine has been exempted from such standard under this part.

Subpart B—Engine Fuel Venting Emissions (New and In-Use Aircraft Gas Turbine Engines)

§ 34.10 Applicability.

(a) The provisions of this subpart are applicable to all new aircraft gas turbine engines of classes T3, T8, TSS, and TF equal to or greater than 36 kilonewtons (8090 pounds) rated output, manufactured on or after January 1, 1974, and to all in-use aircraft gas turbine engines of classes T3, T8, TSS, and TF equal to or greater than 36 kilonewtons (8090 pounds) rated output manufactured after February 1, 1974.

(b) The provisions of this subpart are also applicable to all new aircraft gas turbine engines of class TF less than 36 kilonewtons (8090 pounds) rated output and class TP manufactured on or after January 1, 1975, and to all in-use aircraft gas turbine engines of class TF less than 36 kilonewtons (8090 pounds) rated output and class TP manufactured after January 1, 1975.

§ 34.11 Standard for fuel venting emissions.

(a) No fuel venting emissions shall be discharged into the atmosphere from any new or in-use aircraft gas turbine engine subject to the subpart. This paragraph is directed at the elimination of intentional discharge to the atmosphere of fuel drained from fuel nozzle manifolds after engines are shut down and does not apply to normal fuel seepage from shaft seals, joints, and fittings.

(b) Conformity with the standard set forth in paragraph (a) of this section shall be determined by inspection of the method designed to eliminate these emissions.

(c) As applied to an airframe or an engine, any manufacturer or operator may show compliance with the fuel venting and emissions requirements of this section that were effective beginning February 1, 1974 or January 1, 1975, by any means that prevents the intentional discharge of fuel from fuel nozzle manifolds after the engines are shut down. Acceptable means of compliance include one of the following:

(1) Incorporation of an FAA-approved system that recirculates the fuel back into the fuel system.

(2) Capping or securing the pressurization and drain valve.

(3) Manually draining the fuel from a holding tank into a container.

Subpart C—Exhaust Emissions (New Aircraft Gas Turbine Engines)

§ 34.20 Applicability.

The provisions of this subpart are applicable to all aircraft gas turbine engines of the classes specified beginning on the dates specified in § 34.21.

§ 34.21 Standards for exhaust emissions.

(a) Exhaust emissions of smoke from each new aircraft gas turbine engine of class T8 manufactured on or after February 1, 1974, shall not exceed a smoke number (SN) of 30.

(b) Exhaust emissions of smoke from each new aircraft gas turbine engine of class TF and of rated output of 129 kilonewtons (29,000 pounds) thrust or greater, manufactured on or after January 1, 1976, shall not exceed

$SN = 83.6\ (rO)^{-.274}$ (rO is in kilonewtons).

(c) Exhaust emission of smoke from each new aircraft gas turbine engine of class T3 manufactured on or after January 1, 1978, shall not exceed a smoke number (SN) of 25.

(d) Gaseous exhaust emissions from each new commercial aircraft gas turbine engine that is manufactured on or after January 1, 1984, shall not exceed:

(1) Classes, TF, T3, T8 engines with rated output equal to or greater than 26.7 kilonewtons (6000 pounds)

Hydrocarbons: 19.6 grams/kilonewton rO.

(2) Class TSS

Hydrocarbons: $140(0.92)^{rPR}$ grams/kilonewton rO.

(e) Smoke exhaust emissions from each gas turbine engine of the classes specified below shall not exceed:

(1) Class TF of rated output less than 26.7 kilonewtons (6000 pounds) manufactured on or after August 9, 1985

$SN = 83.6(rO)^{-0.274}$ (rO is in kilonewtons) not to exceed a maximum of SN = 50.

(2) Classes T3, T8, TSS, and TF of rated output equal to or greater than 26.7 kilonewtons (6000 pounds) manufactured on or after January 1, 1984

$SN = 83.6(rO)^{-0.274}$ (rO is in kilonewtons) not to exceed a maximum of SN = 50.

(3) Class TP of rated output equal to or greater than 1,000 kilowatts (1340 HP) manufactured on or after January 1, 1984

$SN = 187(rO)^{-0.168}$ (rO is in kilowatts).

(f) The standards set forth in paragraphs (a), (b), (c), (d), and (e) of this section refer to a composite gaseous emission sample representing the operating cycles set forth in the applicable sections of subpart G of this part, and exhaust smoke emissions emitted during operations of the engine as specified in the applicable sections of subpart H of this part, measured and calculated in accordance with the procedures set forth in those subparts.

Subpart D—Exhaust Emissions (In-use Aircraft Gas Turbine Engines)

§ 34.30 Applicability.

The provisions of this subpart are applicable to all in-use aircraft gas turbine engines certificated for operation within the United States of the classes specified, beginning on the dates specified in § 34.31.

§ 34.31 Standards for exhaust emissions.

(a) Exhaust emissions of smoke from each in-use aircraft gas turbine engine of Class T8, beginning February 1, 1974, shall not exceed a smoke number (SN) of 30.

(b) Exhaust emissions of smoke from each in-use aircraft gas turbine engine of Class TF and of rated output of 129 kilonewtons (29,000 pounds) thrust or greater, beginning January 1, 1976, shall not exceed

$SN = 83.6(rO)^{-0.274}$ (rO is in kilonewtons).

(c) The standards set forth in paragraphs (a) and (b) of this section refer to exhaust smoke emissions emitted during operations of the engine as specified in the applicable section of subpart H of this part, and measured and calculated in accordance with the procedure set forth in this subpart.

Subpart E—[Reserved]

Subpart F—[Reserved]

Subpart G—Test Procedures for Engine Exhaust Gaseous Emissions (Aircraft and Aircraft Gas Turbine Engines)

§ 34.60 Introduction.

(a) Except as provided under § 34.5, the procedures described in this subpart shall constitute the test program used to determine the conformity of new aircraft gas turbine engines with the applicable standards set forth in this part.

(b) The test consists of operating the engine at prescribed power settings on an engine dynamometer (for engines producing primarily shaft power) or thrust measuring test stand (for engines producing primarily thrust). The exhaust gases generated during engine operation must be sampled continuously for specific component analysis through the analytical train.

(c) The exhaust emission test is designed to measure hydrocarbons, carbon monoxide and carbon dioxide concentrations, and to determine mass emissions through calculations during a simulated aircraft landing-takeoff (LTO) cycle. The LTO cycle is based on time in mode data during high activity periods at major airports. The test for non-TSS class propulsion engines consists of at least the following four modes of engine operations: taxi/idle, takeoff, climbout, and approach. The TSS class propulsion engine test requires an additional mode for descent. The mass emission for the modes are combined to yield the reported values.

(d) When an engine is tested for exhaust emissions on an engine dynamometer or test stand, the complete engine (with all accessories which might reasonably be expected to influence emissions to the atmosphere installed and functioning), shall be used if not otherwise prohibited by § 34.62(a)(2). Use of service air bleed and shaft power extraction to power auxiliary, gearbox-mounted components required to drive aircraft systems is not permitted.

(e) Other gaseous emissions measurement systems may be used if shown to yield equivalent results and if approved in advance by the Administrator or the Administrator of the EPA.

§ 34.61 Turbine fuel specifications.

For exhaust emission testing, fuel meeting the specifications listed below shall be used. Additives used for the purpose of smoke suppression (such as organometallic compounds) shall not be present.

SPECIFICATION FOR FUEL TO BE USED IN AIRCRAFT TURBINE ENGINE EMISSION TESTING

Property values	Allowable range of
Specific Gravity at 15°C	0.78–0.82.
Distillation Temperature, °C	
10% Boiling Point	160–201.
Final Boiling Point	240–285.
Net Heat of Combustion, kj/Kg.	42,860–43,500.
Aromatics, Volume %	15–20.
Naphthalenes, Volume %	1.0–3.0.
Smoke Point, mm	20–28.
Hydrogen, Mass %	13.4–14.0.
Sulphur, Mass %	less than 0.3%.
Kinematic Viscosity at—20°C, mm^2/sec.	4.0–6.5.

§ 34.62 Test procedure (propulsion engines).

(a)(1) The engine shall be tested in each of the following engine operating modes which simulate aircraft operation to determine its mass emission rates. The actual power setting, when corrected to standard day conditions, should correspond to the following

percentages of rated output. Analytical correction for variations from reference day conditions and minor variations in actual power setting should be specified and/or approved by the Administrator:

Mode	Class		
	TP	TF, T3, T8	TSS
Taxi/idle	(*)	(*)	(*)
Takeoff	100	100	100
Climbout	90	85	65
Descent	NA	NA	15
Approach	30	30	34

*See paragraph (a) of this section.

(2) The taxi/idle operating modes shall be carried out at a power setting of 7 percent rated thrust unless the Administrator determines that the unique characteristics of an engine model undergoing certification testing at 7 percent would result in substantially different HC emissions than if the engine model were tested at the manufacturers, recommended idle power setting. In such cases the Administrator shall specify an alternative test condition.

(3) The times in mode (TIM) shall be as specified below:

Mode	TP	TF, T3, or T8	TSS
Taxi/idle	26.0 Min.	26.0 Min.	26.0 Min.
Takeoff	0.5	0.7	1.2
Climbout	2.5	2.2	2.0
Descent	N/A	N/A	1.2
Approach	4.5	4.0	2.3

(b) Emissions testing shall be conducted on warmed-up engines which have achieved a steady operating temperature.

§ 34.63 [Reserved]

§ 34.64 Sampling and analytical procedures for measuring gaseous exhaust emissions.

The system and procedures for sampling and measurement of gaseous emissions shall be done in accordance with appendices 3 and 5 to ICAO Annex 16, Volume II—Aircraft Engine Emissions, First Edition, June 1981. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. This document can be obtained from the International Civil Aviation, P.O. Box 400, Succursale: Place de L'Aviation Internationale, 1000 Sherbrooke Street West, Montreal, Quebec, Canada H3H 2R2. Copies may be inspected at the FAA Office of the Chief Counsel, Rules Docket, room 916, Federal Aviation Administration Headquarters Building, 800 Independence Avenue SW., Washington, DC, or at the FAA New England Regional Office, 12 New England Executive Park, Burlington, Massachusetts, or at the Office of the Federal Register, 1100 L Street NW., room 8401, Washington, DC.

§ 34.65–34.70 [Reserved]

§ 34.71 Compliance with gaseous emission standards.

Compliance with each gaseous emission standard by an aircraft engine shall be determined by comparing the pollutant level in grams/kilonewton/thrust/cycle or grams/kilowatt/cycle as calculated pursuant to § 34.64 with the applicable emission standard under this part.

Subpart H—Test Procedures for Engine Smoke Emissions (Aircraft Gas Turbine Engines)

§ 34.80 Introduction.

Except as provided under § 34.5, the procedures described in this subpart shall constitute the test program to be used to determine the conformity of new and in-use gas turbine engines with the applicable standards set forth in this part. The test is essentially the same as that described in §§ 34.60–34.62, except that the test is designed to determine the smoke emission level at various operating points representative of engine usage in aircraft. Other smoke measurement systems may be used if shown to yield equivalent results and if approved in advance by the Administrator or the Administrator of the EPA.

§ 34.81 Fuel specifications.

Fuel having specifications as provided in § 34.61 shall be used in smoke emission testing.

§ 34.82 Sampling and analytical procedures for measuring smoke exhaust emissions.

The system and procedures for sampling and measurement of smoke emissions shall be done in accordance with appendix 2 to ICAO Annex 16, Volume II—Aircraft Engine Emissions, First Edition, June 1981. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. This document can be obtained from the International Civil Aviation, P.O. Box 400, Succursale: Place de L' Aviation Internationale, 1000 Sherbrooke Street West, Montreal, Quebec, Canada H3H 2R2. Copies may be inspected at the FAA Office of the Chief Counsel, Rules Docket, room 916, Federal Aviation Administration Headquarters Building, 800 Independence Avenue, SW., Washington, DC, or at the FAA New England Regional Office, 12 New England Executive Park, Burlington, Massachusetts, or at the Office of the Federal Register, 1100 L Street, NW., room 8401, Washington, DC.

§ 34.83–§ 34.88 [Reserved]

§ 34.89 Compliance with smoke emission standards.

Compliance with each smoke emission standard shall be determined by comparing the plot of the smoke number as a function of power setting with the applicable emission standard under this part. The smoke number at every power setting must be such that there is a high degree of confidence that the standard will not be exceeded by any engine of the model being tested. An acceptable alternative to testing every engine is described in appendix 6 to ICAO Annex 16, Volume II—Aircraft Engine Emissions, First Edition, June 1981. Other methods of demonstrating compliance may be approved by the Administrator with the concurrence of the Administrator of the EPA.

Issued in Washington, DC, on July 26, 1990.

James B. Busey,

Administrator.

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