

Dated: May 18, 1993.
Federal Deposit Insurance Corporation.
Robert E. Feldman,
Deputy Executive Secretary.
[FR Doc. 93-12167 Filed 5-18-93; 8:45 am]
BILLING CODE 6714-01-M

FEDERAL HOUSING FINANCE BOARD

TIME AND DATE: 9:00 a.m., Wednesday,
May 26, 1993.

PLACE: Board Room Second Floor,
Federal Housing Finance Board, 1777 F
Street, N.W., Washington, DC 20006.

STATUS: Parts of this meeting will be
open to the public. The rest of the
meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

PORTIONS OPEN TO THE PUBLIC: The Board
will consider the following:

1. Monthly FHLBank System Reports
 - A. Financial Report
 - B. Membership Report
 - C. Community Investment Program Report
2. Affordable Housing Program Loan Fund
Guidelines
3. Membership Regulation—Issues
4. Final Regulation Modifying Federal Home
Loan Bank Director Eligibility
Requirements
5. FHLBank System Records Retention Policy
6. Distribution of FHLBank Directorships
7. FHLBank of Boston Proposal to Lend to a
Nonmember Mortgagee

PORTIONS CLOSED TO THE PUBLIC: The
Board will consider the following:

1. Approval of the April Board Minutes
2. First Quarter FHLBank System Budget to
Actual Performance
3. Issuance of Debt Without Finance Board
Approval
4. System 2000 Update
5. Review of FHLBank Financial
Management Policy Compliance
 - A. 1st quarter duration/market value of
equity report
 - B. Financial Management Policy violations
6. Discussion of the merits of the System's
moving to 20:1 in conjunction with
changes to the Financial Management
Policy guidelines, particularly those that
effect the limits on mortgage-backed
securities investment limits on mortgage-
backed securities investment
7. Board Management Issues

The above matters are exempt under
one or more of sections 552b(c)(6), (8)
and 9(A) and (B) of title 5 of the United
States Code.

CONTACT PERSON FOR MORE INFORMATION:
Elaine L. Baker, Executive Secretary to
the Board, (202) 408-2837.

Philip L. Conover,
Managing Director.

[FR Doc. 93-12268 Filed 5-19-93; 3:37 pm]
BILLING CODE 6725-01-M

AGENCY HOLDING THE MEETING: BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 10:00 a.m., Wednesday,
May 26, 1993.

PLACE: Marriner S. Eccles Federal
Reserve Board Building, C Street
entrance between 20th and 21st Streets,
N.W., Washington, DC 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Summary Agenda: Because of its
routine nature, no substantive
discussion of the following item is
anticipated. This matter will be voted
on without discussion unless a member
of the Board requests that the item be
moved to the discussion agenda.

1. Proposed amendments to Regulations H
(Membership of State Banking Institutions in
the Federal Reserve System); K (International
Banking Operations); and Y (Bank Holding
Companies and Change in Bank Control) to
adopt a uniform multi-agency criminal
referral form. (Proposed earlier for public
comment; Docket No. R-0792)

Discussion Agenda

2. Publication for comment of proposed
amendments to Regulations H (Membership
of State Banking Institutions in the Federal
Reserve System) and Y (Bank Holding
Companies and Change in Bank Control)
regarding real estate appraisal standards
(including Docket No. R-0711, published
earlier for public comment).

3. Proposed new and enhanced Federal
Reserve Bank services to facilitate
implementation of same-day settlement of
checks. (Proposed earlier for public
comment; Docket No. R-0727).

4. Any items carried forward from a
previously announced meeting.

Note: This meeting will be recorded for the
benefit of those unable to attend. Cassettes
will be available for listening in the Board's
Freedom of Information Office, and copies
may be ordered for \$5 per cassette by calling
(202) 452-3684 or by writing to: Freedom of
Information Office, Board of Governors of the
Federal Reserve System, Washington, DC
20551.

CONTACT PERSON FOR MORE INFORMATION:
Mr. Joseph R. Coyne, Assistant to the
Board; (202) 452-3204.

Dated: May 19, 1993.

Jennifer J. Johnson,
Associate Secretary of the Board.

[FR Doc. 93-12204 Filed 5-19-93; 11:36 am]
BILLING CODE 6210-01-P

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: Approximately 11:30
a.m., Wednesday, May 26, 1993,
following a recess at the conclusion of
the open meeting.

PLACE: Marriner S. Eccles Federal
Reserve Board Building, C Street

entrance between 20th and 21st Streets,
N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments,
promotions, assignments, reassignments, and
salary actions) involving individual Federal
Reserve System employees.

2. Any items carried forward from a
previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION:

Mr. Joseph R. Coyne, Assistant to the
Board; (202) 452-3204. You may call
(202) 452-3207, beginning at
approximately 5 p.m. two business days
before this meeting, for a recorded
announcement of bank and bank
holding company applications
scheduled for the meeting.

Dated: May 19, 1993.

Jennifer J. Johnson,
Associate Secretary of the Board.

[FR Doc. 93-12203 Filed 5-19-93; 11:36 am]
BILLING CODE 6210-01-P-M

LEGAL SERVICES CORPORATION

Audit and Appropriations Committee
Meeting and Board of Directors Meeting
Changes

**"FEDERAL REGISTER" CITATION OF
PREVIOUS ANNOUNCEMENT:** 58 FR 29025.
**PREVIOUSLY ANNOUNCED TIME AND DATE OF
MEETING:** Meetings of the Legal Services
Corporation Board of Directors and its
Provision for the Delivery of Legal
Services, Audit and Appropriations,
Office of the Inspector General
Oversight Committees will be held on
May 24, 1993. The meetings will
commence at 8 a.m. and will be held in
the following order, with each meeting
commencing following adjournment of
the prior meeting and continuing until
all business has been concluded:

1. Provision for the Delivery of Legal
Services Committee;
2. Audit and Appropriations Committee;
3. Office of the Inspector General Oversight
Committee; and
4. Board of Directors.

**PREVIOUSLY ANNOUNCED LOCATION OF
MEETING:** The Legal Services
Corporation, 750 1st Street, NE., 11th
Floor, The Board Room, Washington,
DC 20002, (202) 336-8800.

CHANGES IN MEETING: Audit and
Appropriations Committee Meeting.
MATTERS TO BE CONSIDERED:

- The following will be added and
considered by the Audit and
Appropriations Committee as agenda
item number "8."

8. Consideration of Report on Review of
Guidelines Governing Board Travel.

- In addition, the following will be
added and considered by the Board of

Directors as sub-item "e." under agenda item number "8."

e. Consideration of Report on Review of Guidelines Governing Board Travel.

CONTACT PERSON FOR INFORMATION:

Patricia Batie (202) 336-8800.

Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments.

Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 336-8800.

Date Issued: May 19, 1993.

Patricia D. Batie,
Corporate Secretary.

[FR Doc. 93-12175 Filed 5-19-93; 10:23 am]

BILLING CODE 7060-01-M

MARINE MAMMAL COMMISSION

TIME AND DATE: The Marine Mammal Commission and its Committee of Scientific Advisors on Marine Mammals will meet in executive session on Wednesday, November 17, 1993, from 8:30 a.m. to 10:00 a.m. The public sessions of the Commission and the Committee meeting will be held on Wednesday, November 17, from 10:00 a.m. to 6:30 p.m., on Thursday, November 18, from 9:00 a.m. to 6:30 p.m., and on Friday, November 19, from 9:00 a.m. to 1:30 p.m.

PLACE: The Hotel Galvez, 2024 Seawall Boulevard, Galveston Island, Texas 77550.

STATUS: The executive session will be closed to the public. At it, matters relating to personnel, the internal practices of the Commission, and international negotiations in process will be discussed. All other portions of

the meeting will be open to public observation. Public participation will be allowed if time permits and it is determined to be desirable by the Chairman.

MATTERS TO BE CONSIDERED: The Commission and Committee will meet in public session to discuss a broad range of marine mammal matters. Among the issues that the Commission plans to consider at the meeting will be: implementation of the 1993 amendments to the Marine Mammal Protection Act; the 1993 International Whaling Commission meeting and preparations for 1994; marine mammal die-offs and stranding programs; Fish and Wildlife Service and National Marine Fisheries Service activities bearing on marine mammals in Alaska; conservation plans and programs; recovery plans and programs; and marine mammal/fisher interactions.

CONTACT PERSON FOR MORE INFORMATION: John R. Twiss, Jr., Executive Director, Marine Mammal Commission, 1825 Connecticut Avenue, NW., Room 512, Washington, DC., 20009, 202/606-5504.

Date: May 19, 1993.

John R. Twiss, Jr.,
Executive Director.

[FR Doc. 93-12161 Filed 5-18-93; 4:15 pm]

BILLING CODE 6320-31-M

**SECURITIES AND EXCHANGE COMMISSION
Agency Meeting**

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meeting during the week of May 17, 1993.

A closed meeting will be held on Friday, May 21, 1993, at 2:30 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at a closed meeting.

Commissioner Roberts, as duty officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matter of the closed meeting scheduled for Friday, May 21, 1993, at 2:30 p.m., will be:

- Institution of injunctive actions.
- Settlement of injunctive actions.
- Institution of administrative proceedings of an enforcement nature.
- Settlement of administrative proceedings of an enforcement nature.
- Opinions.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Christine Sakach at (202) 272-2300.

Dated: May 18, 1993.

Jonathan G. Katz,
Secretary.

[FR Doc. 93-12205 Filed 5-19-93; 11:36 am]

BILLING CODE 8010-01-M

Corrections

Federal Register

Vol. 58, No. 97

Friday, May 21, 1993

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

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 93-010N]

FSIS Proposed Strategic Plan; Public Hearings and Request for Comments

Correction

In notice document 93-11435 beginning on page 28389 in the issue of Thursday, May 13, 1993, make the following correction:

On page 28390, in the first column, in the table at the bottom of the page, under the heading FSIS hearing contact, in the second entry, "Lynda Spencer" should read "Lynda Spencer".

BILLING CODE 1505-01-D

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 270

[Release Nos. 33-6990, 34-32116, IC-19399, File No. S7-27-92]

RIN 3235-AF50

Repurchase Offers by Closed-End Management Investment Companies

Correction

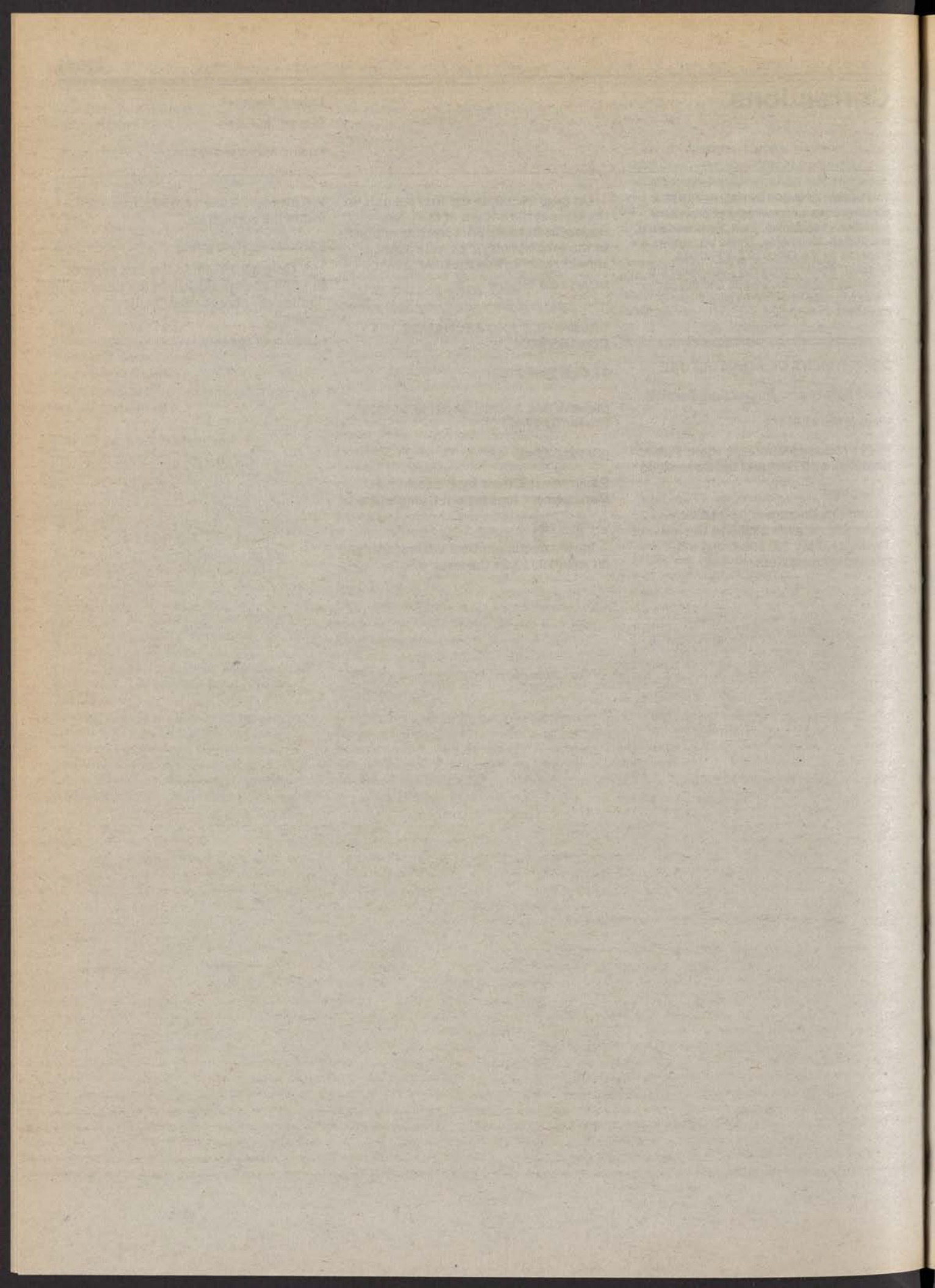
In rule document 93-8639 beginning on page 19330, in the issue of

Wednesday, April 14, 1993, make the following correction:

§ 270.23c-3 [Corrected]

1. On page 19344, in the first column, in § 270.23c-3(b)(2)(iii), in the third line, "policy of" should read "policy within".

BILLING CODE 1505-01-D



Friday
May 21, 1993

Part II

**Department of
Transportation**

**Research and Special Programs
Administration**

49 CFR Part 106 et al.

**Safeguarding Food From Contamination
During Transportation; Proposed Rule**

Test Report

DEPARTMENT OF TRANSPORTATION

Research and Special Programs
Administration49 CFR Parts 106, 107, 108, 110, 121,
171, 173, 178, and 180

[Docket No. FS-1; Notice No. 93-13]

RIN 2137-AC00

Safeguarding Food From
Contamination During TransportationAGENCY: Research and Special Programs
Administration (RSPA), DOT.ACTION: Notice of proposed rulemaking
(NPRM).

SUMMARY: RSPA is proposing regulations addressing the safe transportation of food products in highway and rail transportation. This action is required by the Sanitary Food Transportation Act of 1990 (SFTA). The intended effect of this rulemaking is to increase the level of safety associated with the transportation of food products. This proposal would restrict a cargo tank, tank car, or portable tank to the carriage of either food products or non-food products. RSPA has not identified any nonfood products that are acceptable to be carried in a tank vehicle that carries food products and, therefore, is not proposing an "acceptable nonfood product list." For other motor and rail vehicles, the proposal would forbid the transportation of food products in the same vehicle with poisons, infectious substances, hazardous wastes, or solid wastes (i.e., "unacceptable nonfood products"). However, such vehicles would be allowed to carry unacceptable nonfood products before or after the carriage of food products provided that the vehicle is free of any contaminating residues. The proposal would require any motor vehicle or rail vehicle that has transported unpackaged friable asbestos to be dedicated to the transportation of asbestos and refuse. These Food Safety Regulations (FSR) would not apply to: The transportation of products in farm vehicles, considered implements of husbandry, operated by a private carrier exclusively for agricultural purposes; the offering or accepting for transportation of cardboard, pallets, beverage containers, and other food packaging materials; or the transportation of food products which are packaged in two fully enclosed packagings.

DATES: *Comments.* Comments must be received on or before October 18, 1993.

Public Hearings. Public hearings will be held on (1) June 29, 1993, from 9:30

a.m. till 5 p.m. in Washington DC; and on (2) September 13 and 14 1993, from 2 p.m. till 5 p.m. on September 13, 1993, and from 9 a.m. till 5 p.m. on September 14, 1993, in Chicago, IL. Hearings may conclude before 5 p.m. and the second day of the hearing (September 14, 1993) may be cancelled if all persons wishing to give oral comments have been heard.

ADDRESSES: *Comments.* Copies of SFTA may be obtained from the Superintendent of Documents, Government Printing Office, Washington, DC 20402-9371 (202) 275-2091. Comments to this NPRM should be addressed to the Dockets Unit, Research and Special Programs Administration, U.S. Department of Transportation, Washington DC 20590-0001. Comments should identify the docket and be submitted, if possible, in five copies. Persons wishing to receive confirmation of receipt of their comments should include a self-addressed stamped postcard showing the docket number (i.e., Docket FS-1). The Dockets Unit is located in room 8421 of the Nassif Building, 400 Seventh Street, SW., Washington DC 20590-0001. Telephone: (202) 366-5046. Public dockets may be reviewed between the hours of 8:30 a.m. to 5 p.m., Monday through Friday.

Public Hearings. The public hearings will be held in the following locations: (1) June 29, 1993, at the Federal Aviation Administration's Auditorium, 3rd Floor, 800 Independence Avenue SW., Washington DC 20591; (2) September 13 and 14, at the Federal Aviation Administration Building, 2300 East Devon Ave., room 166-170, Des Plaines, Illinois, 60018.

Any person wishing to present an oral statement at the public hearing should notify John A. Gale, by telephone or in writing, at least two working days prior to the public hearing. Each request must identify the speaker; organization represented, if any; daytime telephone number; and the anticipated length of the presentation, not to exceed 10 minutes. Written text of the oral statement should be presented to the hearing officer prior to the oral presentation.

FOR FURTHER INFORMATION CONTACT:

Edmund J. Richards, (202) 366-0656, Interagency Coordinator for Hazardous Materials Safety, or John A. Gale, Office of Hazardous Materials Standards (202) 366-8553, RSPA, U.S. Department of Transportation, 400 Seventh Street SW., Washington DC 20590-0001.

SUPPLEMENTARY INFORMATION:**I. Background**

On November 3, 1990, the President signed the "Sanitary Food Transportation Act of 1990" (SFTA; 49 App. U.S.C. 2803-2812), which requires the Secretary of Transportation (Secretary) to promulgate regulations to promote the safe transportation of food products. SFTA was enacted in response to Congressional findings that: (1) Americans are entitled to receive food and other consumer products that are not made unsafe as a result of certain transportation practices; (2) the American public is threatened by the transportation of products potentially harmful to consumers in motor vehicles and rail vehicles that are used to transport food and other consumer products; and (3) the risks posed by such transportation practices are unnecessary, and such practices must be terminated. Congress expressed concern relative to practices including the transportation of wastes or potentially harmful nonfood products in the same vehicles that carry food, food additives, drugs, devices, and cosmetics, as defined in the Federal Food, Drug, and Cosmetic Act (hereinafter referred to collectively as "food products"), and the backhauling of chemicals or other potentially harmful nonfood products in cargo tank motor vehicles, rail tank cars, and tank trucks that also haul food products.

On February 20, 1991, DOT published a final rule in the Federal Register (56 FR 6810) which delegated the authority to issue the regulations to be promulgated under SFTA (i.e., sections 4, 5, 6, 7, and 8) to the Administrator of RSPA. In addition, the Federal Highway Administration (FHWA) and the Federal Railroad Administration (FRA) were delegated the authority to enforce, in their respective modes of transportation, SFTA and the regulations issued under SFTA (i.e., sections 9, 10, 11, 12 and 13 of SFTA).

On February 20, 1991, RSPA also published an advance notice of proposed rulemaking (ANPRM) in the Federal Register under Docket No. FS-1 (Notice No. 91-1; 56 FR 6934). The purpose of this notice was to solicit public comments on regulatory options concerning SFTA. RSPA received over 125 comments in response to Notice No. 91-1 from a wide range of entities likely to be affected by the requirements of SFTA. The ANPRM included more than 40 questions, but commenters were not limited to responding to those questions. The questions posed in the ANPRM and the comments received in response to the ANPRM concerned (1)

scope; (2) acceptable nonfood products; (3) unacceptable nonfood products; (4) dedicated vehicle products; (5) communication standards; (6) materials of construction for cargo tanks, rail tank cars and tank trucks; (7) minimum insurance or liability requirements; (8) waivers; and (9) other related issues.

In response to the President's January 28, 1992 announcement of a Federal regulatory review, DOT published a notice on February 7, 1992 (57 FR 4744, Docket RR-1) to solicit comments on the Department's regulatory programs. RSPA received several comments to Docket RR-1 concerning the FS-1 ANPRM.

The underlying theme of most of the comments received to the ANPRM and Docket RR-1 was for RSPA to focus on only the specific issues identified in SFTA and not burden the various affected industries with additional, cumbersome, unnecessary, and costly regulations. They also pointed out that there are many policies and procedures already in place that are consistent with the objectives of SFTA and that they should be used as a starting point wherever possible and practicable. In developing this NPRM, RSPA has considered these comments as they affect costs and operational requirements.

This proposal focuses on those areas where contamination can occur if proper precautions (e.g., cleaning, packaging, commodity separation) are not taken and where sufficient guidelines are not available. These precautions are necessary when there is the potential for a residue being left in reusable bulk packagings that could contaminate a load of food products, or have surface contact with food products.

II. Proposal

1. Scope

In accordance with SFTA, the Secretary is to issue regulations with respect to the transportation of food products in "motor vehicles and rail vehicles" which are used to transport either refuse or other nonfood products which are unsafe to the health of humans or animals. In section 5 of SFTA, the Secretary is to issue regulations with respect to the transportation of food products in "tank trucks, rail tank cars, and cargo tanks." In issuing regulations, the Secretary is to consider the extent to which packaging or similar means of protecting and isolating commodities are adequate to minimize or eliminate the potential risks of transporting food products in vehicles used for nonfood products. In addition, section 6(b)(2) of SFTA

provides that the regulations issued under SFTA shall not include cardboard, pallets, beverage containers, and other food packagings, except to the extent that the Secretary determines that the transportation of such items would make food products unsafe.

In the ANPRM, RSPA requested comments on those industry practices that should be excepted from the regulations that are to be promulgated under SFTA. RSPA also asked if the industry-accepted terms of "cargo tank, tank car, and portable tank", as defined in 49 CFR part 171, should be used in lieu of the terms tank trucks, rail tank cars, and cargo tanks.

Many motor carriers of food products which also transport cardboard and other packaging materials, equipment, and supplies used in the manufacture and distribution of food products asserted that two-way utilization of food vehicles promotes the efficient use of equipment and is a key factor in maintaining transportation by highway of food products at reasonable levels. Commenters pointed out that section 6(b)(2) of SFTA states that DOT shall not include cardboard, pallets, beverage containers, and other food packaging as "unacceptable nonfood products," unless DOT specifically determines these products to be unacceptable. One commenter added that shippers with USDA inspectors on site should be granted an exception from any regulations promulgated under SFTA.

One commenter stated that the container leasing industry, including the portion headquartered in the United States, leases to ship lines of every nationality moving in every direction from hundreds of ports throughout the world, without having knowledge of, or control over, what products are transported in the containers while they are in the possession of the ship lines. The commenter stated that the leasing companies have no knowledge of the condition of a container until it is returned to a depot agent of a leasing company somewhere in the world. One commenter recommended that containers used in international transport, tank containers protected by commercial practice, and reefers (refrigerated vehicles) be excepted from SFTA requirements.

Commenters addressing intermodal shipments agreed that there is virtually no way to know the prior use or movements of a container. Some commenters questioned whether the statute intended for freight containers to be covered or just "motor vehicle" and "rail vehicle" (secs. 3(b), 4(a), (c), 5(a), 6(a)). The commenters contended that containers are primarily marine

instruments, although intermodal, and can be carried on a chassis over the road and on a railroad flatcar or special purpose car. These commenters stated that there is no suggestion in the legislation that the container transport industry was within the legislative intent. No reference is made to transportation between the United States and other countries or to marine cargo containers. Accordingly, the commenters recommended that containers used in international transport be excepted.

The majority of commenters addressing truck renting and leasing explained that it is important to recognize that at no time during truck rental and leasing, either long- or short-term, are truck renting and leasing firms actually engaged in the transportation of goods and products. Operation and control of the vehicle always remains in the hands of the lessee or lessor. Therefore, they recommended that the commercial users of rented or leased vehicle be required to comply with SFTA regulations.

The regulations proposed under this NPRM would apply to persons who offer for transportation, except for transportation and transport food products and nonfood products by motor vehicles and railroad freight cars (i.e., transport vehicles). This proposal also applies to persons who offer for transportation, except for transportation, and transport food products and nonfood products in portable tanks, freight containers, bulk packagings, or international commerce that are transported by highway or rail. In addition, this proposal applies to persons who receive food products and nonfood products transported in cargo tanks.

Section 5 of SFTA requires regulation of cargo tanks, tank trucks, and rail tank cars that transport food products. In this NPRM, RSPA is proposing to use the phrase "cargo tank" to encompass both cargo tanks and tank trucks because these two terms are synonymous. In addition, this NPRM proposes to regulate the transportation of food products in portable tanks, freight containers, and other bulk packagings. Such bulk packagings are used to transport large quantities of food products which, if not free from contaminating residues, could make food products unsafe to the health of humans or animals. RSPA believes that food product contamination is as likely in such bulk packagings as it is when food products are transported in cargo tanks or van trailers. In fact, many portable tanks, freight containers, and other bulk packagings can transport

quantities equaling or exceeding those found in cargo tanks, van trailers or railroad freight cars. Therefore, RSPA is proposing to regulate food products that are transported in bulk packagings, freight containers, portable tanks, and in international commerce when such products are transported in the U.S. by highway or rail because of the Secretary's responsibility to ensure the safety of food products in all motor and rail transportation.

RSPA is proposing the following exceptions from the FSR: (1) Farm vehicles that are considered an implement of husbandry, operated by a private motor carrier, exclusively for agricultural purposes. (Because of the nature of such activities and because of their early position in the food processing and distribution chain, they do not pose a danger to the safety of humans and animals. In addition, subjecting farm vehicles to the regulations issued under SFTA, which are to be entitled the Food Safety Regulations (FSR; 49 CFR part 121), would impose a substantial burden on farm operations disproportionate to any benefit likely to be achieved.); (2) Food products packaged in two fully enclosed packagings, one of which is inside the other, except that such packagings may not be transported in vehicles used for dedicated vehicle products. (The integrity of such packagings is sufficient to protect the enclosed food from contamination during transportation and is consistent with the authority granted to the Secretary in section 4(c)(1) regarding decisions involving the adequacy of packaging standards.); and (3) Cardboard, pallets, crates, beverage containers, and other food packaging materials used in the transportation of food products. (Under normal transportation conditions such materials do not present a contamination threat to food products during transportation.).

Excepting food products packed in two fully enclosed packagings is consistent with RSPA's objective in minimizing the burden on the food industry while assuring our Nation's food supply. RSPA believes that several issues remain to be resolved on the topic of "double packed" foods and is, therefore, asking the following questions:

- (1) Should a mesh bag be considered a fully enclosed packaging?
- (2) Should a cardboard box or shrink wrap that has small openings on its top or sides be considered a fully enclosed packaging?
- (3) Should the outer packaging be subjected to a performance standard?

2. Acceptable Nonfood Products/Tank Vehicles

Section 5 of SFTA prohibits the transportation of food products in cargo tanks, rail tank cars, and tank trucks ("tank vehicles") that are used to transport nonfood products that would make food products unsafe to the health of humans or animals. The Secretary is required to publish a list of acceptable nonfood products that may be transported in tank vehicles that are suitable for the carriage of food products. Section 3 of SFTA defines "nonfood product" as any material, substance or product including refuse and solid waste, as such term is defined in the Solid Waste Disposal Act, that is not a food product.

Many commenters expressed concern about allowing food grade tank vehicles to carry any nonfood products. Some commenters expressed the opinion that tank vehicles used to carry food products should be dedicated to that purpose. One person stated that even a "DOT approved nonfood product" shipped in a food grade tank vehicle could result in adulteration of the food shipment. Another commenter stated that the list of acceptable nonfood products should be kept at a minimum and only those nonfood products which can be absolutely guaranteed not to contaminate food products should be included on the list. One commenter did suggest that food products should be allowed to be transported in tank vehicles that were used to carry detergents, soaps, sanitizers, alkalies, and acids commonly used in the food industry. Other products that could be moved with food products were reported to be substances described in the Food and Drug Administration (FDA) Food Additive Rules; the U.S. Department of Agriculture (USDA) approved list of substances of meat and poultry plants; and the International Codex Alimentarius.

Food products are at their greatest risks in transportation when placed in a tank vehicle that contains a residue from its previous load. Although this risk is compounded when the previous load was a nonfood product, even tank vehicles that are dedicated to food product service can pose a serious contamination threat if not properly cleaned. This risk arises from the fact that when placed in a tank vehicle, large volumes of food product are placed in direct contact with potentially contaminating residues. This risk is offset, however, by the fact that the food industry—shippers, carriers and consignees—generally does not allow its tank vehicles to be used for nonfood

products. Although food product safety is an important objective to food manufacturers, for product integrity and quality control purposes (e.g., flavor and texture), most companies have specific policies and procedures which require tank vehicles to be dedicated to a specific type of food product service and to be cleaned under very specific guidelines.

RSPA has determined that there are no nonfood products that are acceptable to be carried in a tank vehicle that carries food products and is, therefore, not proposing an "acceptable nonfood product list." There are numerous factors that must be considered in order to allow a nonfood product to be carried in a food tank vehicle, such as—the type of nonfood product, the type of food product to be carried, the type of tank vehicle and its materials of construction, and the cleaning procedure. However, RSPA is requesting further comments regarding which, if any, nonfood products should be allowed in food tanks, with appropriate rationale, and the conditions applicable to such transport.

3. Unacceptable Nonfood Products/Other Vehicles

Section 6 of SFTA prohibits the transportation of food products in motor vehicles and rail vehicles, other than tank vehicles, that are used to transport unacceptable nonfood products. The Secretary is required to publish a list of unacceptable nonfood products that may not be transported in vehicles used to transport food products. In the ANPRM, RSPA requested comments on what products should be placed on the "list of unacceptable nonfood products" and to what extent packaging removes the threat of contamination from these unacceptable nonfood products.

Those products that were described by commenters as being unacceptable to be transported in the same vehicle with food products were poisons, irritating substances, etiologic agents, radioactive materials, and certain miscellaneous commodities such as green salted hides, fish meal, or fish scraps. In addition, almost all commenters included some form of "solid waste" in this final list. RSPA received many comments on the ability of packaging to minimize the threat of food contamination. One commenter wrote " * * * the entire issue calls for a reasonable approach which recognizes the significant role that packaging plays. If the packaging is adequate and the integrity of the commodities are not compromised, then there is no problem in moving a load of packaged food items with packaged nonfood items that are overpacked or

double-packed." Other commenters thought that hazardous materials that are packaged in accordance with the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) are packaged well enough to travel in the same vehicles with food products, whereas some felt that certain hazardous materials, i.e., poisons in Packing Group I, packaged or not, should not travel with foods. A number of commenters see the HMR packaging requirements as being essentially leakproof, and see possible separation and isolation of the cargoes to be the only possible necessity. In contrast, one commenter noted that "no type of packaging can totally prevent leakage of the contents." Several commenters indicated that no hazardous material should be allowed to travel with foods. From another standpoint, a few commenters looked at the integrity of packagings for food products as being adequate enough to allow food products to be carried "in almost any trailer regardless of what it has carried and still be safe."

Many commenters stated that the following products should be allowed to be transported with food products: Crushed or broken cans and bottles, cardboard and other food packagings, pallets, truck cleaning products, out-of-date foods, dented cans, milk cases, lubricants, fertilizers, raw materials for food processing, product returns, plastics, lumber, and small tanks of compressed gases (oxygen and acetylene) used for emergency welding by truckers.

The HMR currently forbid the transportation of food products with materials bearing a POISON label. However, with the enactment of SFTA, there are additional hazardous materials and other products, packaged or unpackaged, that should never be transported with food products because of the threat they present to food products. As a result, RSPA is proposing to forbid the transport of food products in the same transport vehicle with materials meeting the definition of: (1) Division 6.1, Packing Group I and II (poisonous materials); (2) Division 6.2 materials (infectious substances); (3) Hazardous waste; or (4) Solid waste. However, a transport vehicle would be allowed to transport food products before and after the carriage of these materials, provided the vehicle is free from any contaminating residues. If a transport vehicle does contain a residue from one of these materials or from any material that could contaminate (i.e., corrupt, debase, or make impure) the food product to be loaded therein, as a result of their admixture, then the transport vehicle must be appropriately

cleaned prior to loading the food products. RSPA is not proposing any specific cleaning standard but is instead providing a performance-based safety requirement, thereby allowing industry to develop appropriate cleaning standards for the numerous types of materials and transport vehicles that are transported and used in our Nation's transportation system. RSPA is applying the responsibility of assuring such cleaning on both the shipper and carrier thereby establishing a partnership between these two parties to assure the cleanliness of the transport vehicle. However, in the event of a violation of the regulations due consideration will be given to any person who unknowingly violates the regulations (i.e., a carrier who accepts for transportation a sealed transport vehicle). Consistent with Section 3 of SFTA, RSPA is proposing to use the definition of "solid waste" as defined in the Solid Waste Disposal Act, except that RSPA is including "domestic sewage" in the definition. There are potential safety problems that could be experienced if food products were transported in the same vehicle with "domestic sewage."

D. Dedicated Vehicles Products

Section 7 of SFTA requires that the Secretary issue regulations prohibiting any person from using a motor vehicle or rail vehicle for the transportation of asbestos, in forms or quantities determined by the Secretary to be necessary, or of products that present an extreme danger to human or animal health despite any decontamination, removal, disposal, packaging or other isolation procedures, unless such vehicle is dedicated to transportation of asbestos, such extremely dangerous products, or refuse. In the ANPRM, comments were requested as to the materials that should be included on the "List of Dedicated Vehicle Products" and in what quantity and form asbestos should be regulated.

Very few commenters recommended that any products be added to the dedicated vehicle products list. However, one commenter did state that some 1,600 materials in the HMR should be included, e.g., white phosphorus, highly flammable butane, liquid chlorine, sodium hydroxide, flammable solids that are dangerous when wet, and insecticides.

Unpackaged, friable asbestos was identified by many commenters as extremely dangerous. Also, asbestos containing wastes, and water-soaked asbestos waste materials were mentioned as needing extremely good packaging to be safe (air tight and leak-

proof). However, most commenters agreed that vehicles carrying packaged asbestos, could still safely carry other materials, e.g., rock, sand, and the like. One commenter stressed that commercial asbestos fibers packaged in accordance with the HMR should not be required to be transported in dedicated vehicles.

RSPA has not identified any material that presents such a hazard that, despite any decontamination, removal, or packaging, should restrict that vehicle from carrying any product except asbestos, other dedicated vehicle products, or refuse. RSPA is proposing to require that asbestos, as mandated by SFTA, be carried in vehicles that are dedicated to the transport of asbestos and refuse. However, RSPA is limiting this proposal to those forms of asbestos that meet the definition of a hazardous substance in 49 CFR 171.8 and are carried in bulk in a transport vehicle (i.e., unpackaged). Consistent with section 3 of SFTA, RSPA has defined "refuse" as any discarded material to be transported to or disposed of in a landfill or incinerator, or required by law to be transported to or disposed of in a landfill or incinerator.

E. Communication Standards

Section 4 of SFTA requires, for motor and rail vehicles, the issuance of regulations for appropriate recordkeeping, identification, marking, certification or other means of verifying compliance with the regulations to be issued under SFTA. Section 5 of SFTA specifies that a tank truck or a cargo tank may not be used to transport food products or acceptable nonfood products unless the tank truck or cargo tank is identified by a permanent marking. Section 5 also requires persons who arrange for the use of a tank truck or a cargo tank to transport food or nonfood products, to disclose to the motor carrier if the product being transported is to be used as, or in the preparation of, a food or food additive, or as a nonfood product listed on the "acceptable nonfood product list."

In the ANPRM, RSPA requested comments on the types of recordkeeping, identification, marking, certification or other means of verification currently in place that could be used to promote compliance with the regulations issued under SFTA. Most of the commenters claimed that there is no comprehensive system in place to ensure the safe transportation of food products, but asserted that current industry practices generally provide adequate means of preventing adulteration of food products. Types of verification suggested by commenters

included verification of prior cleaning, identification of prior loads, basic construction guidelines for containers in direct contact with food, and standardized markings for cargo tanks.

The majority of commenters discussed whether a "cradle to grave" (grower to retailer) system should be developed to track the transportation of food products, and strongly discouraged the development of such a system. The commenters' responses ranged from "most companies presently maintain such records to be in a position to track and account for any shipment," to such a system being considered as "unreasonable, costly, and burdensome."

Commenters discussed different types of communication standards and whether the standards should apply to offerors, carriers, consignees, users and owners of vehicles subject to SFTA. The majority agreed that all communication standards should be minimal and standardized throughout the system.

Several commenters discussed the need for consistent methods of permanently marking vehicles (i.e., multi-purpose trucks could be marked "Food," "Food Products," "Nonfood," or "Nonfood products") near loading/unloading fittings and connections to identify a vehicle's acceptability or unacceptability for food products. One commenter supported identification requirements for all bulk shipments. Another commenter stated that it was aware that certain tank vehicles are currently marked "Food Grade" and recommended that only vehicles dedicated to food grade products be marked. One commenter stated that the marking requirement in section 5(c)(1) of SFTA only applies to cargo tanks. The commenter went on to state that since tank cars are owned by private parties who carefully control what moves in their tank cars, permanent markings are not necessary.

Several commenters recommended that a carrier notify an offeror of the acceptability of the vehicle. For example, one commenter wrote "that a certificate or letter of guarantee from the carrier that the vehicle complies with SFTA, the last three bills of lading, a wash certificate, and permanent marking of the vehicle should be made available where requested or required." Another commenter stated that certification by a carrier would effectively communicate acceptability of a vehicle for food products.

Many commenters stated that a written certification on the bill of lading regarding whether the load is a food product or not would be sufficient. Some persons suggested that both the

carrier and the offeror should certify to the consignee that the food product will be transported in accordance with SFTA. They stated that this method would equitably distribute liability to the appropriate parties. Many commenters believed that communication requirements should be kept to a minimum. One commenter stated that there is no reason to drastically change current communication standards as adequate safeguards are in place to promote compliance with the regulations to be promulgated under SFTA. Other commenters pointed out that tank cars are owned and operated by shippers and lessors who specify their use in the functional equivalent of dedicated service. The commenters went on to state that there are also car tracking and car assignment/car grading systems and policies in place that provide effective communication to both shippers and carriers and restrict the possibility of tank cars switching from food to nonfood product service.

Based on the comments received, RSPA does not find that elaborate communication requirements are necessary to comply with the other requirements proposed under this NPRM and are not justified considering the minimal benefit that may be derived. With respect to shipping paper disclosures, RSPA is proposing to limit disclosures to those shippers who offer food products for highway carriage in a cargo tank, as specified in SFTA. RSPA agrees with the many commenters to the ANPRM who stated that other communication requirements such as "cradle-to-grave" manifesting or a daily log would provide a limited benefit with enormous costs. However, RSPA requests comments on the need to establish additional shipping paper disclosures/certifications to assure compliance with the regulations to be promulgated under SFTA.

In accordance with section 5(c)(1) of SFTA, RSPA is proposing to require cargo tanks to be permanently marked Food Grade or with a recognized food or food type name (e.g., "milk," "sugar"). Consistent with the requirement in section 5(c)(3) of SFTA, RSPA is also proposing to forbid consignees from (1) accepting food products in a cargo tank unless it is so marked; or (2) accepting nonfood products, except spoiled food products transported for disposal, in a cargo tank marked for food grade service. However, RSPA is requesting specific comments on the possible ramifications of prohibiting consignees from accepting food or nonfood products in unauthorized tank vehicles.

Although certification by the carrier that a vehicle is clean is not a specific requirement of SFTA, the question was raised by RSPA in the ANPRM because it does represent an option for addressing the cleanliness of the vehicle when transporting food, especially if backhaul operations are involved. Several commenters supported some form of certification by the carrier, but there were also many commenters who were concerned about the additional costs involved as well as the fact that many companies have an inspection or "checkout" procedure to ensure the cleanliness of the vehicle prior to loading. Since the present system appears to be working well, RSPA has decided not to propose a written certification requirement at this time.

6. Materials of Construction for Cargo Tanks, Rail Tank Cars and Tank Trucks

Section 4 of SFTA requires the issuance of regulations for appropriate materials of construction for cargo tanks, rail tank cars and tank trucks, and their accessory equipment, that transport food products. In the ANPRM, RSPA requested comments as to the existence of any industry standards for the construction of food grade tank vehicles.

Commenters recommended that existing industry standards for the construction of cargo tanks, rail tank cars, and tank trucks be utilized for the purposes of SFTA. The standards already in place include the "3A Sanitary Standards" for milk containers, the International Maritime Organization's container specifications, the specifications in the United Nations Recommendations for the Transport of Dangerous Goods, and the container specifications in 49 CFR parts 178-180. Most commenters indicated that existing standards for materials and methods of construction are adequate and that little or no modification to existing standards is necessary.

Some commenters wrote that new or modified requirements for materials of construction would have little or no impact on current carriers since most of them are already utilizing food grade containers. If RSPA decides to impose new materials of construction requirements, most of the commenters suggested a grandfather clause be granted to allow continued use of existing trailers to reduce the costs associated with this change.

RSPA is proposing that cargo tanks, tank cars, and portable tanks that transport food (including their accessory equipment) be constructed so that they are compatible with, and will not contaminate the food products carried.

There are many current standards and industry practices in use regarding construction materials that provide adequate protection of food products in cargo tanks, tank trucks, and rail tank cars. Specifying new materials of construction standards would have little or no impact in improving safety over current practices, and shippers, carriers, and lessors should have the flexibility to choose their own combinations of construction materials and food products as long as the safety of the public is not jeopardized. Therefore, RSPA is proposing a performance standard to require that tank vehicles have food contact surfaces constructed of materials that will not contaminate the food products. Suitable food contact materials would be those approved by the FDA, in accordance with the Food, Drug and Cosmetic Act, or by the USDA under the Meat Inspection Act or the Poultry Inspection Act.

7. Minimum Insurance and Liability Requirements

Section 4 of SFTA states that the Secretary may establish provisions for minimum levels of financial responsibility. In the ANPRM, RSPA requested comments concerning whether the current insurance requirements of the Federal government are adequate for the risks addressed by SFTA and, if not, at what level should the financial responsibility requirements be set.

Overall, the majority of commenters agreed that the minimum levels of financial responsibility currently in effect for motor carriers (49 CFR part 387) are adequate for the risks addressed by SFTA. On the other hand, some commenters urged RSPA to increase the current minimum levels. Moreover, commenters expressed the opinion that all modes should be required to have financial responsibility at least equal to that of motor carriers. Several commenters were against the imposition of financial responsibility requirements on rail carriers. Commenters stated that the costs to obtain these levels of financial responsibility are dependent upon functions of risk, location, deductibles, and other variables.

The comments received concerning the kinds and levels of financial responsibility for offerors and freight forwarders potentially subject to SFTA were varied. A few commenters stated that insurance or other liability requirements, like that of motor carriers, should not be imposed on freight forwarders. Commenters also argued that shippers, brokers, and freight forwarders should bear a greater portion of the financial responsibility. There

were comments recommending that all entities subject to SFTA requirements should have the same level of financial responsibility.

Many commenters claimed that carriers, if not self-insured, maintain some form of product liability insurance which would meet or exceed the reasonable requirements for protecting food from contamination during transportation. Therefore, their view is that there is no need for additional coverage. However, one commenter argued that many small carriers and brokers do not have adequate financial responsibility levels. Another commenter, supporting the idea of self-insurance, stated that most first class railroads are self-insured up to \$5 million, and that short-line railroads carry liability insurance.

RSPA is not proposing additional insurance requirements. In order to protect themselves from the inherent risks in today's market place, companies have secured significant levels of financial liability insurance. RSPA believes, as was stated by a majority of the commenters, that the current insurance requirements and company policies are adequate for the risks addressed by SFTA.

8. Waivers

Section 8 of SFTA authorizes the Secretary to waive, in whole or in part, application of SFTA if the Secretary determines that such waiver would not result in the unsafe transportation of food products. The waiver authority provides the Secretary the flexibility to adjust a broad rule to the myriad of special cases and accepted safe practices that already exist in the food industry. Waivers are meant to encourage innovation in better, more efficient ways to transport food products safely. In order to be granted a waiver, a petitioner must propose substitute measures that will provide the same level of safety as the regulations. Because section 8 of SFTA requires that any such waiver be published in the Federal Register and the fact that in 49 CFR part 107 RSPA has already established procedures for the issuing of exemptions from the HMR, RSPA is proposing to establish the waiver program in the same manner that the current exemption program is handled under the HMR for hazardous materials.

9. Other Related Issues

a. Incident Reporting

Section 4 of SFTA requires the Secretary to issue regulations with respect to the transportation of food products in motor vehicles and rail

vehicles which are used to transport nonfood products that could make food products unsafe to the health of humans or animals as a result of such transportation. In the ANPRM, RSPA requested comments on the need for an incident reporting system in order to evaluate the extent of the problem, the effectiveness of the regulatory program, and the need for any legislative or regulatory changes.

Approximately half of the commenters advocated the development of an incident reporting system to evaluate the extent of the perceived problem, effectiveness of the regulatory program, and the need for any changes. The other half opposed the development of any incident reporting system. Some of these opponents argued that incident reporting would be too costly and cumbersome for the small number of incidents that occur.

RSPA is proposing an incident report form that would be tailored to special informational needs such as the type of food product contaminated and the source of contamination. Some form of written incident reporting is necessary to develop a data base to properly manage the program, monitor compliance, determine deficiencies in the regulations, and identify those persons and practices that place our Nation's food supply at risk. Costs to the industry should be minimal. RSPA proposes to require that a carrier notify RSPA if that carrier has specific knowledge that its load of food products was contaminated during transportation. In addition, any person offering a food product who rejects a carrier's transport vehicle because of its potential to contaminate the food products would be required to report to RSPA. Furthermore, any person that receives a load of food or nonfood products in a cargo tank that is not authorized to carry food or nonfood products would be required to report such a receipt to RSPA.

A copy of the proposed incident report is published as an attachment to this notice. Part (A) of the form would require the date of the incident and part (B) would request the address where the incident occurred. Part (C) of the form would require the address, and a point of contact, for each party involved. Part (D) would require information on the packaging of the food product involved, if applicable, such as the type of packaging (e.g., cargo tank, metal drum, fiberboard box) and the capacity of the packaging. Part (E) of the form would require information on the food product involved, if applicable, such as the type of food product and the quantity involved. In Part (F), RSPA is requesting

information on the contaminant, if applicable. The type of contaminant and its packaging, and the quantity involved should be noted. Part (G) of the form is requesting information on those vehicles, food products or nonfood products that are rejected. RSPA is requesting information for the reason for the rejection, the last load transported in the transport vehicle, and if the transport vehicle had been cleaned subsequent to its last load. In Part (H) of the form, RSPA is requesting information as to the monetary cost of the incident. In Part (I) of the form, RSPA is requesting a description of the incident. This information should provide a clear understanding to RSPA of the incident and the reason for the contamination, for the rejection of the transport vehicle, or for the rejection of the product. Part (J) of the form is to be signed by the person filling out the form, including their company name and address.

b. Cleaning Standards

In the ANPRM, RSPA requested comments on what, if any, cleaning standard should be required for tank vehicles and other transport vehicles prior to the carriage of food products. Generally, commenters recommended cleaning procedures for decontaminating vehicles between loads. Suggestions included water and/or hot pressure wash of the interior and exterior of the vehicle with careful inspection to ensure it is clean for food service. Transporters of sweeteners and syrups stated that they have dedicated vehicles and do not use detergents or sanitizers to clean their tankers. Instead, they use hot pressure wash and suggest a wash ticket system. One commenter stated that detergent and hot water wash is adequate for food products, but an additional steam cleaning is required for nonfood products.

The majority of commenters suggested that the previous cargo carried should determine the type of cleaning necessary to prepare for the next food product. A few commenters indicated that a laboratory analysis to detect unacceptable residues was desirable and feasible, but most commenters indicated an "organoleptically" conducted inspection was most practical. This type of inspection requires the inspector to use senses of sight, smell, and touch to check for films, residues, loose objects, or other unsafe conditions that might lead to food contamination. Other factors influencing the type of cleaning necessary were suggested to be: the structure of a tank, how long a vehicle has been out of service, and the extent of contamination.

One commenter suggested that performance rather than procedural cleaning standards should be emphasized: "Emphasize inspection of cleaning results by the offeror of the food and a system of certification for tank/container wash facilities." Another commenter suggested that sanitization be required prior to transporting food. Several commenters wrote that effective washing of the inside unit with 180 °F water for a minimum of 30 minutes for rail and 15 minutes for truck should prepare a tank to carry food products. One commenter referred to the House of Representatives Report on SFTA (H.R. No. 390, Pt. 2, 101st Cong., 2d Sess. (1990)) which stated that a washout is adequate to prevent contamination. One commenter included an example of cleaning used by the corn wet milling and soft drink industries. These methods are designed for use with loads of sugars and syrups. Cleaning is conducted between each load or at least every 24 hours.

Two other commenters suggested that cleaning sites and/or equipment should be dedicated to food service because tank rinse water could be recirculated and re-utilized between a contaminating cargo and a food cargo. Commenters mentioned that some cleaning fluids might themselves taint foods in a food grade vehicle.

Because tank vehicles that transport food products would not be allowed to transport nonfood products RSPA is not proposing a cleaning standard for tank vehicles in such service. However, for the cleaning of tank vehicles in food product service and other transport vehicles that carry food product (e.g., reefers and rail box cars) RSPA is not proposing a specific cleaning standard but is requiring that vehicles be free from potential contaminating residues. Faced with tens of thousands of nonfood and food products and a myriad of vehicle types, materials of construction, and cleaning procedures, RSPA is not proposing a single cleaning/decontamination procedure. RSPA believes that the individual companies are best suited to determine the appropriate cleaning method for the removal of harmful residues.

c. Training and Enforcement

Like other rules issued by the Department, these regulations will be enforced in a variety of ways. The NPRM proposes an incident reporting system that should provide important information upon which to base enforcement activities. In some cases, the highway vehicles and railroad crews will be carrying documentation that will allow roadside or railyard inspection

and enforcement. In addition, we anticipate that members of the public will voluntarily alert federal and state inspectors to potential violations.

Under SFTA, Motor Carrier Safety Assistance Program (MCSAP) agencies may enforce the provisions of the Act, with the DOT providing training to the State enforcement agencies. In addition, enforcement of SFTA is a reimbursable MCSAP expense (49 CFR 350.79(c)(4)).

Request for Comments on State Enforcement and Training Requirements

Section 8(c) of SFTA requires the DOT "to develop and carry out a training program for inspectors to conduct vigorous enforcement [of the statute] * * *". Based on this requirement, comments are requested on the following questions:

1. In order for the States to adequately enforce SFTA requirements, is additional documentation necessary (shipping paper, record retention requirements, etc.)?

2. Comments are requested on the methods and procedures the States would utilize to enforce SFTA requirements during reviews and roadside inspection if additional documentation is not required.

3. What kind of training would be required in order for inspectors to recognize, as required by section 8(c) of SFTA, "adulteration problems associated with the transportation of food, food additives, drugs, devices, and cosmetics * * *".

Request for Comments on Enforcement Policy

It should be noted that although document tracking requirements are not being proposed in this rulemaking, the individual modal administrations may propose such paperwork requirements to the RSPA at a later time.

1. Commenters to the ANPRM stated that both the carrier and the shipper (offeror) of the food product should certify to the consignee that the products will be transported in accordance with SFTA. Accordingly, should additional shipping paper disclosures or certifications be required under SFTA?

2. If some form of certification is required, should these requirements adopt verbatim or closely parallel the current certification requirements specified in § 172.204 of the Hazardous Materials Regulations?

Consideration will be given to imposing additional recordkeeping requirements in a future rulemaking, if comments received to this proposal or future enforcement activity indicate that

additional documentation is required to enable the FHWA to adequately track as well as enforce SFTA requirements. If such documentation is proposed, a document may be required to be maintained by the shipper and at the carrier's principal place of business. Such a document may be required to accompany the vehicle while the food product is being transported. The document would contain, at a minimum, the signatures of both the carrier and shipper representatives, the cargo tank manufacturer's name, serial number, and unit number (if applicable), date, time, and name and address where the vehicle was last sanitized or cleaned, and the technical name of the product or the proper shipping name of the material that the vehicle last contained. The document maintained on the vehicle may be required to be on the vehicle until a non-edible product or hazardous materials are transported. Such documentation would assist the MCSAP agencies during enforcement of SFTA requirements during a roadside inspection.

III. Review by Section

Subchapter A's title would be revised to identify that it covers food safety, hazardous materials transportation, and pipeline safety.

Part 106 would be moved from subchapter B into subchapter A. The rulemaking procedures that are currently found in part 106 would also apply to the Food Safety Regulations.

Appendix A of Part 106 would be revised to delegate certain rulemaking procedures under SFTA to the Associate Administrator for Hazardous Materials Safety.

Part 107 would be moved from subchapter B to subchapter A. In addition, part 107 would be editorially revised to correctly reference the changed subchapters.

A new Part 108—Food Safety Program Procedures would be added with the following sections:

Subpart A—General Requirements

Section 108.1 Purpose and scope. This section would state the purpose and scope of this new part. This part would specify the procedures related to waivers, and OMB information collection requirements for the Food Safety Regulations (FSR; 49 CFR part 121).

Section 108.3 Definitions. This section would define certain terms that would be used in part 108.

Section 108.5 Request for confidential treatment. This section would specify the conditions under

which material will be treated as confidential.

Subpart B—Waivers

Section 108.101 Purpose and scope. This section would prescribe the procedure for applying for a waiver from the FSR.

Section 108.103 Application for waiver. This section would prescribe the specific information that RSPA will need in order to process a waiver application. Information needed will include the regulations from which relief is being sought and how the proposed variation will be as safe as the regulations in the FSR.

Section 108.105 Application for renewal. This section would prescribe the condition for renewing a waiver. RSPA proposes to have a five year expiration date for waivers. In order that renewals are processed in a timely fashion, RSPA proposes to require waiver renewals to be submitted 60 days before the expiration date of the waiver.

Section 108.107 Administrative review. Upon receipt of a waiver request, RSPA would review it and identify to the requesting party if the request is lacking any supporting information. If the request is complete, RSPA will begin processing the waiver request.

Section 108.109 Processing of application. Each complete application for a waiver would be published in the Federal Register for public comment. In addition, this section would prescribe conditions under which RSPA could deny a waiver request.

Section 108.111 Party to a waiver. This section proposes that if a waiver would also be beneficial to a company other than the original applicant, other companies could become party to the already existing waiver.

Section 108.119 Amendment, suspension, termination, and referral for enforcement action. Every waiver will be granted for a maximum of five years. However, if RSPA has just cause, it will revoke any waiver prior to the expiration date of the waiver.

Section 108.121 Petition for reconsideration. If a person believes that a waiver has been denied or revoked for unjust reasons, that person may petition the Associate Administrator of Hazardous Materials Safety in accordance with the provisions of this section.

Section 108.123 Availability for public inspection. Except for materials determined to be treated in a confidential manner, all information related to a waiver application is available for public inspection in RSPA's Dockets room.

Subchapter B—Food Safety Regulations

Part 121—General Information, Regulations, Communication Standards, and Definitions

Subpart A—General Information, Regulations, Communication Standards and Definitions

Section 121.1 Purpose and scope. This section would prescribe the purpose and scope of Subchapter B. The purpose of these regulations will be to ensure the safe transportation of food products. The regulations will cover the transportation of food products, and of materials which pose a hazard to the safety of food products (e.g., solid waste and asbestos), by railroad freight car and motor vehicle in commerce.

In response to a comment made by the USDA, RSPA is proposing to except from the FSR those farm vehicles, that are considered an implement of husbandry, operated by a private motor carrier, exclusively for agricultural purposes. USDA stated that subjecting farm vehicles to the FSR would not increase food safety because farmers have a vested interest in maintaining the quality of their products and are in such an early position in the food processing chain as not to pose a danger to human or animal health. This section would also except food products packaged in two fully enclosed packagings, one of which is inside the other, from the FSR, with the exception of the dedicated vehicle requirements. In addition, this section would except from the FSR the offering or acceptance for transportation of cardboard, pallets, beverage containers, and other food packing materials.

Section 121.3 General requirements. This section would specify that no food products may be transported with materials which pose a hazard to the safety of food products (e.g., solid waste and asbestos), by railroad freight car and motor vehicle in commerce. In addition, this section would prescribe that persons subject to the requirements of the FSR instruct each of their officers, agents, and employees having any responsibility for preparing for transportation a material subject to the requirements of this subchapter as to the applicable regulations.

Section 121.5 Definitions. This section would define several terms that would be used in subchapter B. Several of these terms are defined as in SFTA. One term defined in this section that was not defined in SFTA is "person." RSPA is proposing a generally accepted definition of person which is similar to the definition found in the HMTA. However, because Congress did not

expressly mention government entities in the passage of SFTA, RSPA is not proposing to include government entities in the definition of person.

Section 121.11 Incident reporting. This section would require that a carrier notify RSPA if that carrier has specific knowledge that its load of food products was contaminated during transportation. In addition, any person offering a food product who rejects a carrier's transport vehicle from carrying its food products because of the transport vehicle's potential to contaminate the food products would be required to report to RSPA. Furthermore, any person that receives a load of food or nonfood products in a cargo tank that is not authorized to carry food or nonfood products would be required to report such a receipt to RSPA. All notifications to RSPA would be accomplished by submitting a food safety incident report, a copy of which would be required to be maintained at the person's principal place of business for a period of two years. A copy of the proposed form is published as an attachment to this notice.

Section 121.13 Communication requirements. This section would require that cargo tanks, authorized to transport food products, be permanently marked with the words "Food Grade" or with a recognized food or food type name such as "milk" or "sugar." If the cargo tank is removed from food service, the marking would have to be removed because it would also be a violation of the FSR to transport a nonfood product, except for lawful disposal purposes, in a cargo tank that is marked for food grade use. In addition, except for private carriage, a person offering food products for transportation in a cargo tank must notify the carrier that the materials being offered for transportation are food products. This disclosure can be accomplished by a one-time notification, in writing, to the carrier that both the shipper and the carrier must sign, that covers a specific time period, and that the shipper maintains on file for three months following the last shipment. Otherwise, the shipper would have to provide the carrier a shipping document, at the time of pick-up, that the carrier must maintain in the cab of the cargo tank motor vehicle, stating that the product being offered for transportation is a food product.

This section proposes to require that any person attempting to sell or lease a transport vehicle that has transported a dedicated vehicle product to notify, in writing, potential buyers or lessors, that the transport vehicle is only allowed to carry other dedicated vehicle products and refuse. This section also proposes to

require that carriers notify consignees and consignors when a load of their food product has been contaminated in transportation. This notification must be done as soon as practicable so as to assure that prompt actions are taken to protect the public.

Subpart B—General Requirements for Shippers and Carriers of Food Products

Section 121.101 Food products in cargo tanks, tank cars, and portable tanks. This section would prohibit a person from offering for transportation or transporting a food product in a cargo tank, portable tank, or tank car that previously contained a nonfood product. In addition, this section would require a cargo tank, portable tank, or tank car, authorized to carry a food product, to be cleaned before loading a food product if the residue from the prior load has the potential to contaminate the subsequent load. This would reduce the risk of contamination to food products from the residue of a prior load of food products. Furthermore, this section would forbid a person from accepting a food product in a cargo tank that is not marked "FOOD GRADE" or other equivalent marking. Likewise, a person would be forbidden from accepting a nonfood product in a cargo tank that is marked "FOOD GRADE". The intent of this section is to prohibit those practices that have the potential to contaminate food products and are not otherwise specifically covered by the Food Safety Regulations (FSR; 49 CFR part 121).

Section 121.103 List of unacceptable nonfood products. This section would list those products that have been determined to be unacceptable nonfood products. This list includes materials that meet the definition of Division 6.1, Packing Groups I and II; Division 6.2; or hazardous waste; as these terms are defined in the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180); and solid waste.

Section 121.105 Food products in transport vehicles, freight containers, and bulk packagings other than cargo tanks, tank cars or portable tanks. This section would forbid any person from offering for transportation or transporting a food product in a transport vehicle, freight container or bulk packaging, other than a cargo tank, portable tank, or tank car, unless the vehicle is free from residues that are potentially contaminating to the food product. In addition, this section would forbid any person from offering for transportation or transporting a food product in a transport vehicle, freight container or bulk packaging with a material that is found in the list of

unacceptable nonfood products in § 121.103. This section would also require persons to clean each transport vehicle, freight container or bulk packaging prior to the loading of any food product if it contains a residue of an unacceptable nonfood product or from a prior load that has the potential to contaminate the food product to be loaded.

Section 121.107 List of dedicated vehicle products. This section would list those products that have been determined to be dedicated vehicle products. The only product RSPA has identified as a dedicated vehicle product at this time is asbestos—which was specifically identified in SFTA as a dedicated vehicle product. However, as authorized by SFTA, RSPA is limiting the restriction of transporting asbestos in dedicated vehicles to that asbestos which meets the definition of a hazardous substance in 49 CFR 171.8 and is placed in a transport vehicle without any intermediate forms of containment (i.e., unpackaged).

Section 121.109 Dedicated vehicle products. This section would restrict those transport vehicles that transport a dedicated vehicle product to the carriage of dedicated vehicle products and refuse.

Subchapter C

The HMR, subchapter C of chapter I of title 49, would be revised editorially to replace the words "Subchapter B" with the words "Subchapter A," where appropriate.

IV. Regulatory Analyses and Notices

A. Executive Order 12291 and DOT Regulatory Policies and Procedures

This rule, as proposed, does not meet the criteria specified in section 1(b) of Executive Order 12291 and is, therefore, not a major rule, but is a significant rule under the regulatory procedures of the Department of Transportation [44 FR 11034] because of significant public interest. A regulatory evaluation is available for review in the Docket.

RSPA estimates the potential benefits of this proposal at \$69.4 million annually. Of this total, \$12.7 million is from known sources of contamination (i.e., those directly attributable to contamination that occurred during transportation and were detected before being consumed), and \$56.7 million in undetected contaminated shipments. The cost of the proposal is estimated to be \$5.3 million annually. RSPA seeks comments on the magnitude of these estimates as well as the methodologies used to derive them. One category of benefits, "averted property damage,"

accounts for nearly 90 percent of the total estimated benefits, and includes \$6 million in food that spoils as a direct result of contamination during transportation and is detected and thus never consumed, and \$56.7 million in contaminated food that goes undetected and is consumed.

Under most circumstances where the consumer is able to detect contaminated or defective goods, the cost of property damage is likely to be borne by one or more of the following four parties: the producer, the shipper, the carrier, or the retailer. When the property damage is known, a rational retailer, carrier, or consumer would not accept the shipment or would seek recourse against one or more of the parties responsible for the contaminated product. Profit-seeking shippers, carriers, or retailers would find it in their interest to reduce contamination as long as it cost less to do so than the lost value of contaminated shipments. Consequently, in order for the true cost of the proposal (estimated at \$5.3 million) to be less than the known property damage (\$6 million), that the proposal would prevent, at least some shippers, carriers, or retailers would have to be missing opportunities to increase their net earnings.

In addition, consumers are likely to bear a substantial portion of the cost of property damage that falls into the "undetected" category. This may occur as a result of retailers not detecting spoilage before the food is sold or, worse, consumers not detecting it after purchase and not demanding a refund. In the event that the contamination is detected or can be detected by the consumer, the retailer, the carrier, or the shipper has incentives to identify the source of the contamination and seek appropriate compensation. To the extent the "undetected" contamination costs are borne ultimately by the consumer, the incentive to minimize the problem is reduced. RSPA is particularly interested in comments regarding the question of whether sufficient incentives already exist for shippers, carriers, and retailers to reduce property damage when it is cost-effective, and if not, why not? For example, is there reason to believe or evidence to suggest that shippers, carriers, or retailers do not ultimately bear the cost of property damage due to contamination occurring during the transportation process?

B. Executive Order 12612

The proposed rule has been reviewed in accordance with Executive Order 12612 ("Federalism"). Section 12 of SFTA provides that the provisions of the Hazardous Materials Transportation

Act (HMTA; 49 App. U.S.C. 1801 *et seq.*) relating to the relationship of the HMTA to State, political subdivision, or Indian tribe laws, regulations, or other requirements shall apply with respect to the relationship of SFTA to non-Federal laws and regulations that concern a subject covered by SFTA.

The Hazardous Materials Transportation Act contains express preemption provisions (49 App. U.S.C. 1811) that preempt a non-Federal requirement if (1) compliance with both the non-Federal and the Federal requirement is not possible; (2) the non-Federal requirement creates an obstacle to accomplishment of the Federal law or regulations; or (3) it is preempted under section 105(a)(4), concerning certain covered subjects, or section 105(b), concerning highway routing. This proposed rule, if adopted as final, would preempt any State, local, or Indian tribe requirements concerning subjects covered by SFTA and the Federal regulations, as provided by section 12 of SFTA. However, persons subject to this rule would not include State or local governments. RSPA lacks discretion in this area, and has determined that preparation of a federalism assessment is not warranted.

C. Impact on Small Entities

Based on limited information concerning size and nature of entities likely affected by this proposed rule, I certify this proposal will not, if promulgated, have a significant economic impact on a substantial number of small entities under criteria of the Regulatory Flexibility Act because the major impacts of this rule center on the dedication of tank vehicles which are primarily owned and operated by large corporations. This certification is subject to modification as a result of a review of comments received in response to this proposal.

D. Paperwork Reduction Act

The information collection requirements contained in proposed §§ 121.11 and 121.13 are being submitted to the Office of Management and Budget (OMB) for review under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collection of information should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC, Attention: Desk Officer for the Department of Transportation. All comments must reference the title for this notice "Safeguarding Food From Contamination During Transportation."

List of Subjects

49 CFR Part 106

Administrative practice and procedure, Foods, Hazardous materials transportation, Pipeline safety.

49 CFR Part 107

Administrative practice and procedure, Hazardous materials transportation, Packaging and containers, Penalties, Reporting and recordkeeping requirements.

49 CFR Part 108

Administrative practice and procedure, Confidential business information, Foods, Reporting and recordkeeping requirements, Transportation.

49 CFR Part 110

Disaster assistance, Education, Emergency preparedness, Grant programs—Environmental protection, Grant programs—Indians, Hazardous materials transportation, Hazardous substances, Indians, Reporting and recordkeeping requirements.

49 CFR Part 121

Foods, labeling, Reporting and recordkeeping requirements, Transportation.

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

49 CFR Part 178

Hazardous materials transportation, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 180

Hazardous material transportation, Motor carriers, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

In consideration of the foregoing, and under the authority of 49 App. U.S.C. 2804–2807, 49 CFR parts 106, 107, 108, 110, 121, 171, 173, 178, and 180 would be amended as follows:

1. The heading for subchapter A of title 49 subtitle B, chapter I, is revised to read as follows:

SUBCHAPTER A—HAZARDOUS MATERIALS TRANSPORTATION, SANITARY FOOD TRANSPORTATION, AND PIPELINE SAFETY

PART 106—RULEMAKING PROCEDURES

2. The authority citation for part 106 is revised to read as follows:

Authority: 49 App. U.S.C. 11472(h)(1); 49 App. U.S.C. 1672; 49 App. U.S.C. 1803, 1804, 1808; 49 App. U.S.C. 1653, 1657(e); 49 App. U.S.C. 2803; 49 App. U.S.C. 2002.

3. Part 106 is transferred from subchapter B to subchapter A of subtitle B, chapter I of 49 CFR.

4. Appendix A to part 106 is amended by adding paragraph (a)(4) to read as follows:

Appendix A to Part 106

* * * * *

(a) * * *

(4) The Sanitary Food Transportation Act of 1990, 49 App. U.S.C. 2803-2807.

* * * * *

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

5. The authority citation for part 107 is revised to read as follows:

Authority: 49 App. U.S.C. 1421(c), 1653(d), 1655, 1802, 1804, 1805, 1806, 1808-1811, 1815; 49 CFR 1.45 and 1.53 and app. A of 49 CFR part 1.

6. Part 107 is transferred from subchapter B to subchapter A of chapter I of 49 CFR.

7. A new part 108 is added to subchapter A of chapter I of Title 49 to read as follows:

PART 108—FOOD SAFETY PROGRAM PROCEDURES

Subpart A—General Provisions

Sec.

108.1 Purpose and scope.

108.3 Definitions.

108.5 Request for confidential treatment.

108.7 Service of process on non-residents of the United States.

108.9 Public docket room.

Subpart B—Waivers

Sec.

108.101 Purpose and scope.

108.103 Application for waiver.

108.105 Application for renewal.

108.107 Administrative review.

108.109 Processing of application.

108.111 Party to a waiver.

108.117 Withdrawal.

108.119 Amendment, suspension, termination, and referral for enforcement action.

108.121 Petitions for reconsideration.

108.123 Availability for public inspection.

Authority: 49 App. U.S.C. 2807.

Subpart A—General Provisions

§ 108.1 Purpose and scope.

(a) This part prescribes procedures utilized by the Research and Special Programs Administration, the Associate Administrator for Hazardous Materials Safety and the Office of Chief Counsel in carrying out their duties under the Act, pertaining to the safe transportation of food products.

(b) This subpart defines certain terms and prescribes procedures that are applicable to each proceeding described in this part.

§ 108.3 Definitions.

All terms defined in 49 App. U.S.C. 2802 of the Act are used in their statutory meaning. Other terms used in this part are defined as follows:

Act means the Sanitary Food Transportation Act of 1990, 49 App. U.S.C. 2803-2812.

Person means an individual, firm, copartnership, corporation, company, association, joint-stock association, including any trustee, receiver, assignee, or similar representative thereof.

Transport or transportation means any movement of property in commerce (including intrastate commerce) by motor vehicle or railroad freight car, and any loading, unloading, or storage incidental thereto.

§ 108.5 Request for confidential treatment.

(a) If any person filing a document with the Associate Administrator for Hazardous Materials Safety claims that some or all the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552), is information referred to in 18 U.S.C. 1905, or is otherwise exempt by law from public disclosure, and if that person requests the Associate Administrator for Hazardous Materials Safety not to disclose the information, that person shall file together with the document a second copy of the document from which has been deleted the information for which confidential treatment is claimed. The person shall indicate in the original document that it is confidential or contains confidential information and may file a statement specifying the justification for which confidential treatment is claimed. If the person states that the information comes within the exception in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, that person must include a statement as to why the information is privileged or confidential. If the person filing a document does not submit a second

copy of the document with the confidential information deleted, the Associate Administrator for Hazardous Materials Safety may assume that there is no objection to public disclosure of the document in its entirety.

(b) The Associate Administrator for Hazardous Materials Safety may grant or deny any claim of confidentiality. Notice of a decision by the Associate Administrator for Hazardous Materials Safety to deny the claim, in whole or in part, and an opportunity to respond shall be given to a person claiming confidentiality of information no less than five days prior to its public disclosure.

§ 108.7 Service of process on non-residents of the United States.

(a) **Designation of agent for service.** When a person who is not a resident of the United States is required by this subchapter or Subchapter B of this chapter to designate a permanent resident of the United States as his agent upon whom service of process may be made for him and on his behalf, the agent may be an individual, a firm, or a domestic corporation. Any number of principals may designate the same person as agent. A designation is binding on a principal even if the designation is not in compliance with all the requirements of this section, until rejected by the Associate Administrator for Hazardous Materials Safety. A designated agent may not assign performance of his functions under the designation to another person.

(b) **Form and contents of designation.** A designation of agent for service shall:

- (1) Be written in English and dated;
- (2) Be made in the legal form required to make it valid and binding on the principal under the laws, corporate bylaws, or other requirements governing the making of the designation by the principal at the place and time where it is made and the person or persons signing the designation shall certify that it is so made;

(3) State the full legal name, principal name of business, if any, and mailing address of the principal;

(4) Provide that it remains in effect until withdrawn or replaced by the principal;

(5) State the legal name and mailing address of the agent; and

(6) Bear a declaration of acceptance duly signed by the designated agent.

(c) **Method of service.** Service of any process, notice, order, decision, or requirement of the Associate Administrator for Hazardous Materials Safety may be made by registered or certified mail addressed to the agent with return receipt requested or in any

other manner authorized by law. If service cannot be effected because the agent has died (or, if a firm or a corporation ceases to exist) or moved, or otherwise does not receive correctly addressed mail, service may be made by publication in the **Federal Register**.

§ 108.9 Public docket room.

The public docket room in the RSPA offices at 400 7th Street, SW., Washington, DC provides for public inspection and copying:

(a) Copies of notices of proposed rulemaking issued by the RSPA, including advance notices, together with the comments received during rulemaking proceedings, copies of any related **Federal Register** notices, final rules, petitions for reconsideration, and decisions issued in response to petitions for reconsideration;

(b) Applications for waivers from the RSPA's regulations governing the transportation of food products, including supporting data, memoranda of any informal meetings with applicants, related **Federal Register** notices, comments received during the public comment period, and copies of decisions issued granting or denying applications for waivers; and

(c) Such other information pertaining to the RSPA's food safety program required by statute to be made available for public inspection and copying and any information which the RSPA determines should be made available to the public.

Subpart B—Waivers

§ 108.101 Purpose and scope.

This subpart prescribes procedures by which persons who are subject to the requirements of this subchapter, or subchapter B of this chapter, may obtain a waiver by proposing alternative measures or practices that will achieve equivalent levels of safety or levels of safety consistent with the public interest and the Act.

§ 108.103 Application for waiver.

(a) Any person who is subject to the requirements of this subchapter or subchapter B of this chapter, may apply to the Associate Administrator for Hazardous Materials Safety for a waiver from those requirements.

(b) Each application filed under this section for a waiver must:

(1) Be submitted in triplicate to: Associate Administrator for Hazardous Materials Safety, U.S. Department of Transportation, Washington, DC 20590-0001, Attention: Office of Exemptions and Approvals;

(2) Set forth the text or substance of the regulation from which the waiver is sought;

(3) State the name, street address, and telephone number of the applicant;

(4) Include a detailed description of the proposal, including when appropriate, plans, procedures, test results, previous waivers, if any, to be used;

(5) Describe all relevant shipping experience;

(6) Specify the proposed mode of transportation, identify any increased risks to food safety that are likely to result if the waiver is granted, and specify the control measures which the applicant considers necessary or appropriate to compensate for those increased risks;

(7) Specify the proposed duration or describe the proposed schedule of events for which the waiver is sought;

(8) Provide documentation explaining why the applicant believes the proposal including any control measures specified by the applicant will achieve a level of safety which:

(i) Is at least equal to that specified in the regulation from which the waiver is sought; or

(ii) If the regulations do not contain a specified level of safety, will be consistent with the public interest and will adequately protect against the risks to health and life which are inherent in the transportation of food products and unacceptable food products;

(9) If the applicant seeks to have the application processed on a priority basis, set forth the facts and reasons supporting priority handling; and

(10) If the applicant is not a resident of the United States, include a designation of a permanent resident of the United States as agent for service of process in accordance with § 108.7.

(c) Unless the Associate Administrator for Hazardous Materials Safety finds that there is good reason for priority processing of an application, each application is processed in the order in which it is received. To permit timely consideration, an application should be submitted at least 120 days before the requested effective date.

(d) If the applicant wishes to claim confidential treatment for any information contained in the application, the procedures set forth in § 108.5 apply.

§ 108.105 Application for renewal.

(a) Each application for the renewal of a waiver issued under this subpart must:

(1) Be submitted in triplicate to: Associate Administrator for Hazardous Materials Safety, U.S. Department of Transportation, Washington, DC 20590-0001, Attention: SFTA Waivers Branch;

(2) Identify the waiver for which a renewal is requested;

(3) State the name, address, and telephone number of the applicant;

(4) Include either—

(i) A certification by the applicant that the descriptions, technical information and assessment submitted in the original application, or as may have been updated by any subsequent application for renewal, remain accurate and correct; or

(ii) Such amendments to the previously submitted descriptions, technical information and assessment as is necessary to update them and assure their accuracy and correctness;

(5) A statement describing all relevant shipping experiences, including incidents involving contamination of food products, that have occurred in connection with the waiver since its issuance or most recent renewal or, if no food contamination has occurred, a certification to that effect. This statement must include the approximate number of shipments made or packages shipped, as appropriate.

(b) To permit timely consideration, an application for renewal should be submitted at least 60 days before the expiration date of the waiver.

(c) If, at least 60 days prior to the expiration of an existing waiver of a continuing nature, the holder files an application for renewal which is complete and conforms with the requirements of this section, the waiver will not be considered to have expired until the application for renewal has been finally determined.

§ 108.107 Administrative review.

A written application for a waiver submitted as provided in § 108.103(b) or the renewal of a waiver submitted as provided in § 108.105 is reviewed by the Associate Administrator for Hazardous Materials Safety to determine whether it is complete and conforms with the requirements of this subpart. If it is not returned to the applicant by the end of that period, it will be processed as provided in § 108.109. If an application is returned, the applicant will be informed in what respects the application is incomplete.

§ 108.109 Processing of application.

(a) After an application for a waiver or renewal of a waiver is determined to be complete, the Associate Administrator for Hazardous Materials Safety docket the application and, for an application under § 108.103, publishes a notice in the **Federal Register** affording an opportunity for interested persons to comment. All comments received before the close of

the comment period are considered before final action is taken on such an application.

(b) No public hearing, or other formal proceeding is held on an application filed under this subpart before its disposition under this section. However, during the processing of an application the Associate Administrator for Hazardous Materials Safety may require the applicant to supply additional information.

(c) The Associate Administrator for Hazardous Materials Safety may deny an application in accordance with the following:

(1) The application is denied if it does not contain adequate justification or if it contains any materially false or materially misleading statements, or does not include information required by § 108.103 or § 108.105, as appropriate.

(2) If an application is denied, the Associate Administrator for Hazardous Materials Safety will notify the applicant in writing of the reason for denial and publish notice of the denial in the Federal Register.

(d) If the Associate Administrator for Hazardous Materials Safety determines that the application contains adequate justification, the Associate Administrator for Hazardous Materials Safety grants it subject to such terms as appropriate, notifies the applicant in writing, and publishes in the Federal Register a notice of the grant.

(e) If the Associate Administrator for Hazardous Materials Safety determines that an application concerns a matter of such general applicability and future effect as to warrant being made the subject of rulemaking, the Associate Administrator for Hazardous Materials Safety may initiate rule making under part 106 of this chapter in addition to or instead of granting or denying the application.

§ 108.111 Party to a waiver.

(a) Any person who is eligible to apply for a waiver under § 108.103 may apply to the Associate Administrator for Hazardous Materials Safety to be made a party to an application filed under that section or § 108.105 or to a waiver or renewal granted under § 108.109(d).

(b) Each application filed under this section must:

(1) Be submitted to: Associate Administrator for Hazardous Materials Safety, U.S. Department of Transportation, Washington, DC 20590-0001, Attention: SFTA Waivers Branch;

(2) Identify the waiver application or waiver to which the applicant seeks to become a party;

(3) State the name, address and telephone number of the applicant; and

(4) If the applicant is not a resident of the United States, include a designation of a permanent resident of the United States as agent for service of process in accordance with § 108.7.

(c) The applicant becomes a party to a waiver application or waiver if the Associate Administrator for Hazardous Materials Safety determines that:

(1) The applicant is a person who is eligible to apply under § 108.103 for a waiver; and

(2) The waiver application or waiver to which the applicant seeks to become a party concerns a matter of a continuing nature and does not depend upon information entitled to confidential treatment.

(d) The Associate Administrator for Hazardous Materials Safety publishes in the Federal Register a notice of each application received under § 108.103, each initial determination made and each renewal granted under this section.

(e) A person who becomes a party to a waiver under this section is subject to the terms of that waiver, including the expiration date stated therein. The procedures set forth in § 108.105 through § 108.109 with respect to an application for renewal of a waiver apply to a party to a waiver.

§ 108.117 Withdrawal.

(a) An applicant may withdraw an application at any time prior to a final determination by the Associate Administrator for Hazardous Materials Safety.

(b) Except for documents for which confidential treatment was requested by the applicant, withdrawal of an application does not authorize the removal of any related records from the dockets or files of the RSPA.

§ 108.119 Amendment, suspension, termination, and deferral for enforcement action.

(a) A waiver and any renewal of a waiver terminates according to its terms but not later than five years after the date of issuance unless terminated sooner under paragraph (c) of this section.

(b) The Associate Administrator for Hazardous Materials Safety may amend or suspend a waiver if:

(1) The Associate Administrator for Hazardous Materials Safety determines that an activity under the waiver is not being performed in accordance with the terms of the waiver; or

(2) On the basis of information not available at the time the waiver was granted or renewed, such action is necessary to protect against risk to life or property.

(c) The Associate Administrator for Hazardous Materials Safety may terminate a waiver if:

(1) The Associate Administrator for Hazardous Materials Safety determines that the waiver is no longer consistent with the public interest;

(2) The waiver is no longer necessary because of an amendment to the regulations;

(3) The waiver was granted on the basis of false or misleading material information; or

(4) The waiver holder or parties to the waiver are found to be in violation of the specific terms of the waiver or applicable requirements of subchapter B of this chapter.

(d) Unless the Associate Administrator for Hazardous Materials Safety determines that immediate amendment, suspension, or termination of a waiver is necessary to abate the risk of an imminent hazard, the Associate Administrator for Hazardous Materials Safety notifies the holder of the waiver or a party to a waiver in writing of the reasons for amending, suspending or terminating the waiver and provides that person an opportunity to show cause why the waiver should not be amended, suspended, or terminated under paragraph (b) or (c) of this section.

(e) Notwithstanding paragraphs (b), (c) and (d) of this section, the Associate Administrator for Hazardous Materials Safety may refer a waiver for initiation of an enforcement case. If, as the result of the enforcement proceeding, the holder of the waiver or a party to a waiver is determined to have violated the terms of the waiver, the Associate Administrator for Hazardous Materials Safety may amend, suspend, or terminate the waiver.

§ 108.121 Petitions for reconsideration.

Any applicant for a waiver or renewal of a waiver aggrieved by an action taken by the Associate Administrator for Hazardous Materials Safety under this subpart, and any holder of a waiver suspended or terminated by the Associate Administrator for Hazardous Materials Safety under § 108.119 (b) or (c), may petition the Associate Administrator for Hazardous Materials Safety for reconsideration. The petition must be filed within 30 days of service of notification of that action. The petition must contain a brief statement of the complaint, and an explanation as to why that action is unreasonable or is not in the public interest.

§ 108.123 Availability for public inspection.

(a) Information relevant to an application under this part, including

the application and supporting data, memoranda of any informal meetings with the applicant, and the grant or denial of the application is available for public inspection, except as specified in paragraph (b) of this section, at the RSPA public dockets room, 400 7th Street, SW., Washington, DC 20590-0001. Copies of available information may be obtained, as provided in part 7 of this title.

(b) Information made available for inspection does not include materials which the Associate Administrator for Hazardous Materials Safety determines should be withheld from public disclosure under § 108.5 and in accordance with the applicable provisions of section 552(b) of title 5, United States Code, and part 7 of this title.

PART 110—HAZARDOUS MATERIALS PUBLIC SECTOR TRAINING AND PLANNING GRANTS

8. The authority citation for part 110 continues to read as follows:

Authority: 49 App. U.S.C. 1815; 49 CFR part 1.

8a. Part 110 is transferred from subchapter B to subchapter A of subtitle B, chapter I of 49 CFR.

9. Subchapter B of chapter I of title 49 is revised to read as follows:

SUBCHAPTER B—FOOD SAFETY REGULATIONS

PART 121—GENERAL INFORMATION, REGULATIONS, COMMUNICATION STANDARDS AND DEFINITIONS

Subpart A—General Information, Regulations, Communication Standards and Definitions

Sec.

- 121.1 Purpose and scope.
- 121.3 General requirements.
- 121.5 Definitions.
- 121.11 Incident reporting.
- 121.13 Communication requirements.

Subpart B—General Requirements for Shippers and Carriers of Food Products

- 121.101 Food products in cargo tanks, portable tanks, and tank cars.
- 121.103 List of unacceptable nonfood products.
- 121.105 Food products in transport vehicles, freight containers, and bulk packagings other than cargo tanks, portable tanks, and tank cars.
- 121.107 List of dedicated vehicle products.
- 121.109 Dedicated vehicle products.

Authority: 49 App. U.S.C. 2803, 2804, 2805, 2806 and 2807.

Subpart A—General Information, Regulations, Communication Standards and Definitions

§ 121.1 Purpose and scope.

(a) This subchapter prescribes the requirements governing the offering, acceptance for transportation, and the transportation of food products, and of materials which pose a hazard to the safety of food products (e.g., solid waste and asbestos), by railroad freight car and motor vehicle in commerce.

(b) The following are not subject to the requirements of this subchapter:

(1) Farm vehicles, considered implements of husbandry, operated by a private carrier exclusively for agricultural purposes;

(2) The offering or acceptance for transportation of food packing materials such as cardboard, pallets, and beverage containers; or

(3) Food packaged in two fully enclosed packagings, one of which is placed inside the other except that such packages may not be transported on vehicle used for dedicated vehicle products.

§ 121.3 General requirements.

(a) No person may offer, accept for transportation, or transport a food product, or a material which would make food products unsafe to humans or animals, unless that food product or material is handled and transported in accordance with this subchapter or a waiver issued under subchapter A of this chapter.

(b) Each person who offers or accepts for transportation, or transports material subject to the requirements of this subchapter must instruct any officer, agent, or employee of that person having responsibility for preparing for transportation or transporting the material as to the applicable regulations of this subchapter.

§ 121.5 Definitions.

In this subchapter: *Bulk packaging* means a packaging, other than a vessel or a barge, including a transport vehicle or freight container, in which food products or non-food products are loaded with no intermediate form of containment and which has:

(1) A maximum capacity greater than 450 L (119 gallons) or more than 0.45 cubic meters (16 cubic feet) as a receptacle for a liquid;

(2) A maximum net mass greater than 400 kg (882 pounds) and a maximum capacity greater than 450 L (119 gallons) as a receptacle for a solid; or

(3) A water capacity greater than 454 kg (1000 pounds) as a receptacle for a gas as defined in 49 CFR 173.115.

Cargo tank means a bulk packaging which:

(1) Is a tank intended primarily for the carriage of liquids or gases and includes appurtenances, reinforcements, fittings, and closures (for "tank", see 49 CFR 178.345-1(c), 178.337-1, or 178.338-1, as applicable);

(2) Is permanently attached to or forms a part of a motor vehicle, or is not permanently attached to a motor vehicle but which, by reason of its size, construction or attachment to a motor vehicle is loaded or unloaded without being removed from the motor vehicle; and

(3) Is not fabricated under a specification for cylinders, portable tanks, tank cars, or multi-unit tank car tanks.

Cargo tank motor vehicle means a motor vehicle with one or more cargo tanks permanently attached to or forming an integral part of the motor vehicle.

Contaminate means to corrupt, debase, or make impure by an admixture of a foreign substance not inherent to the material in question.

Cosmetic means:

(1) An article intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance; or

(2) An article intended for use as a component of any such article; except that such term shall not include soap.

Device means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is—

(1) Recognized in the official National Formulary, or the United States Pharmacopoeia, or any supplement to them;

(2) Intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in animals; or

(3) Intended to affect the structure or any function of animals, and which does not achieve any of its principal intended purposes through chemical action within or on animals and which is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

Drug means:

(1) Articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;

(2) Articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;

(3) Articles (other than food) intended to affect the structure or any function of animals; and

(4) Articles intended for use as a component of any article specified in paragraph (1), (2), or (3) of this definition, but does not include devices or their components, parts, or accessories.

Food means items, other than drugs or medicines, intended or suitable for consumption by humans or other animals and include:

(1) Articles used for food or drink for animals;

(2) Chewing gum; and

(3) Articles used for the components of any such article.

Food additive means any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food (including any substance intended for use in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting, or holding food; and including any source of radiation intended for any such use), if such substance is not generally recognized, among experts qualified by scientific training and experience to evaluate its safety, as having been adequately shown through scientific procedures (or, in the case of a substance used in food prior to January 1, 1958, through either scientific procedures or experience based on common use in food) to be safe under the conditions of its intended use; except that such term does not include—

(1) A pesticide chemical in or on a raw agricultural commodity;

(2) A pesticide chemical to the extent that it is intended for use or is used in the production, storage, or transportation of any raw agricultural commodity;

(3) A color additive;

(4) Any substance used in accordance with a sanction or approval granted prior to the enactment of this paragraph pursuant to the Food Drug and Cosmetic Act, the Poultry Product Inspection Act (21 U.S.C. 451) or the Meat Inspection Act of March 4, 1907 (34 Stat. 1260), as amended and extended (21 U.S.C. 71); or

(5) A new animal drug approved by the Food and Drug Administration.

Food product means either a cosmetic, drug, device, food or food

additive, or combination thereof, as defined in this subchapter.

Implement of husbandry means a motor vehicle designed or adapted and used exclusively for agricultural operations and only incidentally operated or moved upon the highways.

Motor vehicle includes a vehicle, machine, tractor, trailer, or semitrailer, or any combination thereof, propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property. It does not include a vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

Nonfood product means any material that does not meet the definition of a food product.

Person means an individual, firm, copartnership, corporation, company, association, joint-stock association, including any trustee, receiver, assignee, or similar representative thereof.

Portable tank means a bulk packaging (except a cylinder having a water capacity of 1000 pounds or less) designed primarily to be loaded onto, or on, or temporarily attached to a transport vehicle or ship and equipped with skids, mountings, or accessories to facilitate handling of the tank by mechanical means. It does not include a cargo tank, tank car, multi-unit tank car tank, or trailer carrying 3AX, 3AAX, or 3T cylinders.

Railroad freight car means a car designed to carry freight or non-passenger personnel by rail, and includes a box car, flat car, gondola car, hopper car, tank car and occupied caboose.

Refuse means any discarded material to be transported to or disposed of in a landfill or incinerator, or required by law to be transported to or disposed of in a landfill or incinerator.

RSPA means the Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590.

Solid waste means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, or solid or dissolved material in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act,

as amended (86 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

Transport vehicle means a cargo-carrying vehicle such as an automobile, van, tractor, truck, semitrailer, tank car, cargo tank, or railroad freight car used for the transportation of cargo by any mode. Each cargo-carrying body (trailer, rail car, tank etc.) is a separate transport vehicle.

Transports or Transportation means any movement of property in commerce (including intrastate commerce) by motor vehicle or rail freight car.

United States means the fifty States, the District of Columbia, Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Northern Mariana Islands, Guam, or any other territory or possession of the United States.

§ 121.11 Incident reporting.

(a) A carrier who has specific knowledge that a shipment of food product under its control was contaminated during transportation must, in addition to notifying the consignee and consignor (see § 121.13(e)), report in writing, on DOT form F xxxx.x, in duplicate, to RSPA within 30 days of discovering such information.

(b) A person offering a food product for transportation who rejects a carrier's transport vehicle, freight container, or bulk packaging for the transportation of its food product because the transport vehicle, freight container, or bulk packaging has the potential to contaminate the food product must report, on DOT form F xxxx.x, in duplicate, to RSPA, within 30 days of such rejection.

(c) A carrier whose transport vehicle, freight container, or bulk packaging was rejected due to possible contamination must provide any necessary information that is needed for the person to comply with paragraph (b) of this section.

(d) A person who has received or rejected a shipment of a food product or nonfood product that was transported in violation of § 121.13 (a) or (b) must report, on DOT form F xxxx.x, in duplicate, to RSPA, within 30 days of such rejection.

(e) A person making a report under this section shall send the report to the Information Systems Manager, DHM-63, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590-0001; a copy of the report shall be retained, for a period of two years, at the person's principal place of business, or at other places as authorized and

approved in writing by an agency of the Department of Transportation.

§ 121.13 Communication requirements.

(a) No person may offer for transportation or transport a food product in a cargo tank unless the cargo tank is permanently marked, in a clearly visible location, with the words "Food Grade" or with a recognized food or food-type name (e.g., milk or sugar) in letters at least 50 mm (2.0 inches) in height.

(b) No person may offer for transportation or transport a nonfood product in a cargo tank marked "Food Grade" or marked with a recognized food or food type name (e.g., milk or sugar).

(c) Each person who offers for transportation a food product to be transported in a cargo tank that is not operated by that person must disclose to the carrier that the product to be carried is a food product. Disclosure can be accomplished in the following manner:

(1) In a written document signed by both the shipper and carrier, provided that both the shipper and carrier maintain a copy of the document on file, at their principal place of business, for at least 3 months following the last shipment. This notification may be used to cover multiple shipments by the same shipper and carrier; or

(2) By providing the carrier a shipping document at the time of pick-up that clearly states that the product being offered is a food product. This shipping document must be maintained by the carrier in the cab of the cargo tank motor vehicle for the duration of the shipment.

(d) Each person selling or leasing a transport vehicle, freight container, or bulk packaging that has been used to transport a dedicated vehicle product (see § 121.105), must disclose that fact to any potential buyer or lessee in writing.

(e) If a food product has been contaminated during transportation, the carrier must notify the consignor and the consignee of such fact, either orally or in writing, as soon as practicable, in order that prompt actions may be taken to protect the public.

Subpart B—General Requirements for Shippers and Carriers of Food Products

§ 121.101 Food products in cargo tanks, portable tanks, and tank cars.

(a) No person may offer, accept for transportation or transport a food product in a cargo tank, portable tank, or tank car that—

(1) Was previously loaded with or contains a nonfood product; or

(2) Previously contained a food product, unless the cargo tank, tank car or portable tank is free from all residues from the prior load so as not to contaminate the food product.

(b) No person may accept delivery of a food product from a cargo tank unless the cargo tank is marked in accordance with § 121.13 of this part.

(c) No person may accept delivery of a nonfood product, except spoiled food products that have been transported for disposal, from a cargo tank that is marked in accordance with § 121.13 of this part.

(d) No person may offer for transportation or transport a food product in a cargo tank, tank car, or portable tank that is constructed of materials, including its accessory equipment, that will contaminate the food product.

§ 121.103 List of unacceptable nonfood products.

List of unacceptable nonfood products. Unacceptable nonfood products are as follows:

(a) A material meeting the definition of Division 6.1, Packing Group I or II, material, in 49 CFR 171.8, except when transported in accordance with 49 CFR 173.4, 173.25, or 177.841(e);

(b) A material meeting the definition of Division 6.2, as defined in 49 CFR 171.8;

(c) A material meeting the definition of a hazardous waste, as defined in 49 CFR 171.8; and

(d) Solid waste.

§ 121.105 Food products in transport vehicles, freight containers, and bulk packagings other than cargo tanks, portable tanks, and tank cars.

(a) No person may offer, accept for transportation, or transport a food product in the same transport vehicle, freight container, or bulk packaging with an unacceptable nonfood product listed in § 121.103.

(b) No person may offer for transportation or transport a food product in a transport vehicle, freight container, or bulk packaging, if it contains a residue of a material identified in § 121.103 or any other previously loaded material that has the potential to contaminate the food product unless it has been cleaned prior to the loading of the food product.

(c) No person may offer for transportation or transport a food product in the same transport vehicle or freight container with a package bearing a KEEP AWAY FROM FOOD label, (see subchapter C of this chapter), unless the packages are segregated in accordance with the requirements in § 174.680(b) or

§ 177.841(e)(3) of this chapter, as appropriate.

§ 121.107 List of dedicated vehicle products.

List of dedicated vehicle products. The dedicated vehicle product is asbestos, meeting the definition of a hazardous substance in 49 CFR 171.8, when placed in a transport vehicle without any intermediate form of containment.

§ 121.109 Dedicated vehicle products.

No person may offer for transportation or transport any food or nonfood product, except for refuse and dedicated vehicle products, in a transport vehicle that has carried a dedicated vehicle product listed in § 121.107.

SUBCHAPTER C—HAZARDOUS MATERIALS REGULATIONS

PART 171—GENERAL INFORMATION, REGULATIONS AND DEFINITIONS

10. The authority citation for part 171 continues to read as follows:

Authority: 49 App. U.S.C. 1802, 1803, 1804, 1805, 1808 and 1818; 33 U.S.C. 1321; 49 CFR part 1.

§ 171.2 [Amended]

11. In 49 CFR 171.2, remove the words "subchapter B" and add, in their place, the words "subchapter A" in paragraphs (c) and (d)(3).

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

12. The authority citation for part 173 continues to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1805, 1806, 1807, 1808, 1817; 49 CFR part 1, unless otherwise noted.

13. In 49 CFR part 173, remove the words "subchapter B" and add, in their place, the words "subchapter A" in § 173.22(a)(2)(iv) and § 173.124(a)(1)(ii)(A).

PART 178—SPECIFICATIONS FOR PACKAGINGS

14. The authority citation for part 178 continues to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1805, 1806, 1808; 49 CFR part 1.

15. In 49 CFR part 178, remove the words "subchapter B" and add, in their place, the words "subchapter A" in § 178.320, in the definition of "Manufacturer", § 178.337-18(a), and § 178.345-15(a).

PART 180—CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS

16. The authority citation for part 180 continues to read as follows:

Authority: 49 U.S.C. App. 1803; 49 CFR part 1.

17. In 49 CFR part 180, remove the words "subchapter B" and add, in their place, the words "subchapter A" in § 180.3 (a), (b)(3) and (b)(5) and § 180.413 (a)(1) and (a)(2).

Issued in Washington, DC on May 14, 1993, under authority delegated in 49 CFR 1.53(i).

Alan I. Roberts,

*Associate Administrator for Hazardous
Materials Safety.*

Attachment to Preamble

Food Safety Incident Report

DOT Form F xxxx.x

(A) Date of Incident: _____

(B) Location of Incident: _____

Address: _____

City: _____

State: _____

Zip: _____

(C) Consignor's Information:

Name: _____

Company: _____

Address: _____

City: _____

State: _____

Zip: _____

Phone: _____

Carrier's Information:

Name: _____

Company: _____

Address: _____

City: _____

State: _____

Zip: _____

Phone: _____

Consignee's Information:

Name: _____

Company: _____

Address: _____

City: _____

State: _____

Zip: _____

Phone: _____

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(D) Food Packaging Information:

Type of Packaging: _____

Capacity: _____

(E) Food Product Information:

Product Name: _____

Quantity: _____

(F) Contamination Information:

Contaminant: _____

Contaminant Packaging: _____

How Contaminated: _____

(G) Rejection Information:

Reason for Rejection: _____

Last load, if nonfood: _____

Tank cleaned?: _____

(H) Damages:

Value of lost product: _____

Cost of disposal: _____

Cost of cleaning: _____

(I) Description of Incident (including how the incident happened, the time it occurred, how it was discovered, and any remedial actions taken): _____

(J) _____

Signature _____

Date _____

Company name and _____

Address _____

[FR Doc. 93-11819 Filed 5-20-93; 8:45 am]

BILLING CODE 4910-60-P

Federal Register

**Friday
May 21, 1993**

Part III

Department of Health and Human Services

Food and Drug Administration

**21 CFR Part 1 et al.
Food Labeling; Metric Labeling
Requirements; Proposed Rule**

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 1, 100, 101, and 104

[Docket No. 92N-0406]

Food Labeling; Metric Labeling Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend its food labeling regulations to require the use of the most appropriate units of both the customary inch/pound (Avoirdupois System) and the International System of Units (SI) for the declaration of the net quantity of contents on food labels. This action is being taken in accordance with 1992 amendments to the Fair Packaging and Labeling Act (the FPLA).

DATES: Written comments by July 20, 1993. The agency is proposing that any final rule that may issue based on this proposal become effective on February 14, 1994.

ADDRESSES: Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: James R. Taylor, Center for Food Safety and Applied Nutrition (HFS-158), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-205-5229.

SUPPLEMENTARY INFORMATION:

I. Background

A. Historical

The use of metric units in the United States was first authorized by law in 1866 (Metric System Act of July 28, 1866; 14 Stat. 339). In 1875, the United States signed the Treaty of the Meter in Paris, which established the International Bureau of Weights and Measures and recognized the meter as the accepted international unit of measure. However, the inch-pound system continued to be the predominant form of measurement in the United States (Ref. 1).

On August 9, 1968, the Metric Study Act (Pub. L. 90-472) was enacted. This act directed the Secretary of Commerce to conduct a study to determine the advantages and disadvantages of increased use of the SI metric system in the United States and to submit a full report to Congress within 3 years. The report, "A Metric America: A Decision

Whose Time Has Come," was submitted to Congress in August, 1971. The findings of the study were that " * * * eventually the United States will join the rest of the world in the use of the metric system as the predominant common language of measurement. Rather than drifting to metric with no national plan to help the sectors of our society and guide our relationships abroad, a carefully planned transition in which all sectors participate voluntarily is preferable" (Ref. 1).

On December 23, 1975, President Gerald Ford signed the Metric Conversion Act of 1975 (15 U.S.C. 205b). Section 3 of this legislation (as amended on August 23, 1988) (Pub. L. 100-418) declared a national policy:

(1) to designate the metric system of measurement as the preferred system of weights and measures for United States trade and commerce.

(2) to require that each Federal agency, by a date certain and to the extent economically feasible by the end of the fiscal year 1992, use the metric system of measurement in its procurements, grants, and other business-related activities * * *.

(3) to seek out ways to increase understanding of the metric system of measurement through educational information and guidance and in Government publications; and

(4) to permit the continued use of traditional systems of weights and measures in nonbusiness activities.

The act directed the establishment of a U.S. Metric Board to coordinate the nationwide voluntary conversion to the metric system. However, no time period was set within which conversion should take place, and no funds were authorized to finance the expenses that would have been incurred in conversion.

B. Recent Developments

On August 23, 1988, Congress passed the Omnibus Trade and Competitiveness Act (Pub. L. 100-418) which based on a finding that world trade was increasingly geared towards the metric SI (metric system). It further found that U.S. industry was often at a competitive disadvantage when dealing in international markets because of its nonstandard measurement system, and that it was sometimes excluded from these markets when it was unable to deliver goods which were measured in metric terms. Consequently, Congress declared the SI to be the preferred system of weights and measures for U.S. trade and commerce. It also required that each Federal agency, by the end of fiscal year 1992, use SI units in its procurements, grants, and other business related activities, except to the extent that such use was impractical or

was likely to cause significant inefficiencies or loss of markets to U.S. firms, such as when foreign competitors are producing competing products in nonmetric units. Further, it directed Federal agencies to seek out ways to increase public understanding of the SI through educational information and guidance and in Government publications, and to permit the continued use of traditional systems of weights and measures in nonbusiness activities.

On July 25, 1991, President George Bush issued Executive Order 12770, "Metric Usage in Federal Government Programs," which designated the Secretary of Commerce to direct and coordinate efforts by Federal departments and agencies to implement Government SI usage in accordance with section 3 of the Metric Conversion Act (15 U.S.C. 205b), as amended by section 5164(b) of the Omnibus Trade and Competitiveness Act. In support of these efforts, all executive branch departments and agencies of the U.S. Government were specifically directed, among other things, to use, to the extent feasible by September 30, 1992, or by such other date or dates established by the department or agency in consultation with the Secretary of Commerce, SI units of measurement in Federal Government procurements, grants, and other business-related activities. Other business-related activities included all uses of measurement units in agency programs and functions related to trade, industry, and commerce.

On February 14, 1992, the American Technology Preeminence Act of 1991 (the ATPA) (Pub. L. 102-245) was enacted. Section 107 of the ATPA amended the FPLA (15 U.S.C. 1451 et seq) to require, among other things, that the most appropriate units of the SI be used as the primary system for measuring quantity in the declaration of net quantity of contents on consumer packages. This provision was to take effect on February 14, 1994.

However, it soon became clear that these amendments had the potential to impose a significant economic burden on U.S. industry. Therefore, on August 3, 1992, President Bush signed Pub. L. 102-329 (the technical amendments) which repealed section 107 of the ATPA and made technical amendments to the FPLA with respect to its treatment of SI units. As a result of these technical amendments, the FPLA now: (1) Permits, in lieu of the term "weight" the use of the term "mass"; (2) requires use of the most appropriate units of both the customary inch-pound system and the SI for the declaration of the net quantity

of contents; (3) removes the requirement for the dual declaration (for example, 24 oz (1 lb 8 oz)) of the net quantity of contents in the customary inch-pound system of measure on packages labeled in terms of weight that contain less than 4 pounds or 1 gallon, on packages labeled in terms of linear measure, and on packages labeled in terms of the measure of area; (4) permits the statement of the net quantity of contents on random weight packages to be expressed in pounds and decimal fractions of a pound carried out to not more than 3 decimal places and makes SI declaration of the net quantity of contents on such packages optional; and (5) exempts all foods packaged at the retail store level from the requirement that the statement of the net quantity of contents include a statement in terms of SI units.

The technical amendments did not change the February 14, 1994, effective date for the metric labeling requirements of the ATPA. However, they provide that the SI labeling requirements will have no effect on the sale or distribution of products whose labels were printed before the effective date. Further, nothing in the technical amendments applies to unit pricing, advertising, recipe programs, nutrition labeling, or other general pricing information. Finally, nothing in the technical amendments is to be construed to require changes in package size or to affect in any way the size of packages.

II. Provisions of the Proposed Rule

FDA is proposing to amend the food labeling provisions in § 101.105 (21 CFR 101.105) by redesignating § 101.105 as new § 101.7 and revising it to implement the provisions of the ATPA and the technical amendments summarized in section I. of this document.

A. Revised Section Heading

The agency is proposing to revise the section heading of proposed § 101.7 to read: "Declaration of net quantity of contents" instead of the present wording "Declaration of net quantity of contents when exempt." This revision is necessary to correct the title of this section, which does not accurately reflect the provisions of the regulation. As currently published, this section contains many more provisions than are implied by the current title. The section provides general provisions for the declaration of the statement of net quantity of contents on all food labels and contains no information pertaining to when a food is exempt from a

declaration of the net quantity of contents.

The agency recognizes that there are several existing regulations that reference § 101.105. Therefore, the agency is further proposing to make the necessary editorial changes to reflect the proposed redesignation in those sections of the regulations in parts 1, 100, 101, and 104.

B. SI Terminology

The agency is proposing in § 101.7 to include the term "mass" or "masses" in conjunction with the term "weight" or "weights." The technical amendments revised the FPLA by striking the term "weight" or "weights" wherever it appeared and by inserting in its place the phrase "weight or mass" or "weights or masses." The use of the term "mass" in conjunction with the term "weight" in the regulation will conform the nomenclature of this regulation to the definition specified by the National Institute of Standards and Technology (NIST), Department of Commerce. This definition, which is contained in the NIST Handbook No. 44, 1993 ed., paragraph 3.2.1, Appendix B, entitled "Specifications, Tolerances and Other Technical Requirements for Weighing and Measuring Devices," (Ref. 2) states: "The mass of a body is a measure of its inertial property or the amount of matter it contains." The inclusion of the term "mass" in the regulation will permit the use of the more appropriate term "mass" when referring to the measure of the amount of matter an object contains.

C. SI Standards

The agency is proposing in § 101.7(b) to include the appropriate SI units of mass, volume, or capacity. The proposed revision will require the declaration of the net quantity of contents to be stated in units of both the customary inch-pound system and the SI of measure rather than the inch-pound system only. This proposed revision implements section 4(a)(2) of the FPLA, as amended, which requires that the net quantity of contents be separately and accurately stated using the most appropriate units of both the customary inch-pound system and the SI.

To reduce the possibility for confusion, the agency tentatively finds that proposed § 101.7 should contain a complete description of the terminology applicable to all fractions of units of the SI, their name, symbol, and multiplying factor. This description will permit manufacturers to identify the most appropriate SI units for the declaration of the net quantity of contents appropriate to their products. The

General Conference on Weights and Measures (CPGM) of the Meter Convention, of which the United States is a member, is the definitive reference on the SI. The CPGM has established base units for the SI, has established a set of prefixes, has established the derived and supplementary units, and has established a comprehensive specification for the units of measurement. Therefore the agency is proposing in new § 101.7(d)(2) to provide this information as a ready reference to all interested parties. This information is also available in the following NIST Special Publications: "The International System of Units (SI)" (Ref. 3); "Guide for the Use of the International System Units" (Ref. 4); "Interpretation of the SI for the United States" (Ref. 5); and in the final rule entitled, "Metric Conversion Policy for Federal Agencies" published by the Department of Commerce in the Federal Register of January 2, 1991 (56 FR 160) (15 CFR part 19, subpart B). FDA has previously provided guidance on the use of SI units in the form of Compliance Policy Guide (CPG) 7150.17, dated April 1, 1987. FDA intends that the provisions of the final rule based upon this proposal will supersede the guidance of CPG 7150.17.

The agency is also proposing in § 101.7(m) to include the acceptable abbreviations that may be used when stating the net quantity of contents in SI units. This information is also readily available in the publications listed above. The agency is proposing to add this information to those abbreviations currently contained in the regulation for use in conjunction with the customary inch-pound system of measure because the FPLA mandates the declaration of the net quantity of contents to be in the most appropriate units of both the customary inch-pound system and the SI.

The agency is proposing in new § 101.7(r) to provide a specific conversion chart for use in calculating the conversion of SI quantities to inch-pound quantities and inch-pound quantities to SI quantities. Uniform conversion factors are necessary to ensure that net content declarations are consistent from product to product. For example, the conversion from ounces to grams must always use the same factor, 28.3495, and not 28.00, 28.3, or 28.35. Use of one factor by one manufacturer and a different factor by another manufacturer would result in different SI quantities for the same amount in ounces or vice versa and would result in consumer confusion. Thus, the proposed change will help to eliminate this confusion.

The chart in proposed § 101.7(r) is derived from the "Metric/Inch-Pound Conversion Factors" appearing as Appendix A to the "Uniform Packaging and Labeling Regulations" adopted by the National Conference of Weights and Measures (NCWM) which is contained in NIST Handbook 130 (1993) (Ref. 6). FDA is proposing the use of the NIST chart as the specific standard for converting SI and inch-pound quantities over conversion charts produced by other entities (both public and private) because the U.S. Department of Commerce has been designated in Executive Order 12770 to direct and coordinate efforts by Federal departments and agencies to implement Government SI usage in accordance with the Metric Conversion Act of 1975 and the Omnibus Trade and Competitiveness Act of 1991. NIST is that part of the U.S. Department of Commerce most concerned with weights and measures, specifically the establishment and maintenance of U.S. standards of weights and measures.

FDA specifically solicits comments concerning the rounding procedures that should be used for metric/inch-pound conversions, and whether such procedures should be included in the provisions of any final rule based on this proposal. At the present time, the agency rounds up (i.e., increases by 1 unit the last digit retained) when the digits to be discarded begin with a 5 or more. However, FDA is aware that a number of State regulatory agencies prefer to follow other rounding rules. For example, the National Conference on Weights and Measures (NCWM) is considering a revision of NIST Handbook 130 (Ref. 7) to address conversion of inch-pound units to SI units for quantity declarations on packages. That revision permits packers to round down to avoid overstating the net contents. Also, the revision differs slightly from current FDA rounding procedures in another respect. When the first digit dropped is 5 followed by a zero, and the last digit retained is an even number, the converted figure is rounded down (e.g., 2.450 rounds to 2.4). Under other circumstances the converted figure is rounded up (e.g., 2.550 rounds to 2.6). Both NIST and FDA rounding procedures provide that the converted figure is rounded down where the first digit dropped is less than 5.

Further, FDA solicits comments about whether significant digits should be addressed in the provisions of any final rule based on this proposal. (The American Heritage Dictionary defines significant digits as "digits of the decimal form of a number beginning

with the leftmost nonzero digit and extending to the right to include all digits warranted by the accuracy of measuring devices used to obtain the numbers.") NIST procedures (Ref. 7) provide that it is the packager's responsibility to select the appropriate number of significant digits to use in a quantity declaration. FDA generally agrees with this position. However, FDA questions whether the final rule should provide more guidance. For example, should the final rule address the use of zero digits at the end of a number? FDA's previously mentioned CPG 7150.17 (p. 7) contains the following guidance about such zero digits:

(a) If the first significant digit of the metric value is EQUAL TO OR LARGER than the first significant digit of the inch-pound value, round the metric value to the SAME NUMBER of significant digits as there are in the inch-pound value.

(b) If the first significant digit of the metric value is SMALLER than the first significant digit of the inch-pound value, round the metric value to ONE MORE significant digit than is in the inch-pound value.

D. Examples of the Quantity of Contents Declaration

The agency is proposing in new § 101.7(d)(3) to include specific examples of the inch-pound/SI declaration of the net quantity of contents. These examples are provided as a convenience to interested persons because the FPLA, as amended, requires the use of the most appropriate units of both the customary inch-pound system and the SI when declaring the net quantity of contents on consumer commodities. This information is also contained in CPG 7150.17. Additionally, the agency is also proposing in new § 101.7(d)(4) to provide an example of the SI/inch-pound arrangement of the declaration of the net quantity of contents to clarify how this information is to be presented on the label. The addition of this information to the proposed revised regulation represents no change in FDA's policy.

The "e" mark that is included in examples in proposed § 101.7(d)(3) is a special symbol used on packages marketed within the European Community (EC). The EC requires that the "e" mark be at least 3 millimeters (mm) high and appear in the same field as the statement of the net quantity of contents. For example: "Net Wt 99 g e 3.5 oz."

The "e" mark is used by the packer or importer to provide a guarantee that the package to which it is applied has been made up in accordance with the "average system of weights and measures," which is used in the EC (Ref.

8). The absence of the "e" mark on a product shipped in the EC would result in the shipment being subjected to customs inspection in each country that it entered. U.S. companies that obtain authorization from an EC member State may market their products in the EC and facilitate shipment of their products by using the "e" mark on their packages. However, it has been FDA's policy not to permit any intervening material between the expression of measure and the actual amount of the measure, e.g., "Net Wt 24 oz (1 lb 8 oz)" or "Net Wt 24 oz (1.5 lb)," within the statement of the net quantity of contents. However, from information supplied by industry through NIST (Ref. 9), FDA tentatively concludes that it is impractical to require manufacturers to maintain dual packaging for marketing their products, i.e., one set for U.S. markets and another set for the EC. Consequently the agency is proposing in § 101.7(f) to permit the voluntary placement of the "e" mark within the statement of the net quantity of contents as shown in the example above (and in proposed § 101.7(d)(3) and (d)(4)) by those manufacturers that intend to market products in the EC. FDA advises that compliance with the provisions proposed below does not necessarily ensure that a package to which it is applied has been made up in accordance with the "average system of weights and measures," which is used in the EC.

E. Use of Decimal Fractions

The agency is proposing in § 101.7(d)(1) to permit the expression of decimal fractions in the declaration of the net quantity of contents to be made to not more than 3 decimal places rather than to not more than 2 decimal places as is currently required. The proposed revision responds to amended section 4(a)(3)(A)(ii) of the FPLA, which permits the use of 3 decimal places for the expression of the net quantity of contents for random weight generated packages when expressed in terms of pounds and decimal fractions of a pound. The expression of decimal fractions to 3 places is the position of the NCWM concerning the declaration of the net quantity of contents as expressed in NIST Handbook 130. Accordingly, FDA is proposing the changes in § 101.7(d)(1) pursuant to the FPLA, as amended, and to make this regulation compatible with other Federal agencies' interpretations concerning the use of decimal fractions in the declaration of the net quantity of contents. The proposed revision represents a change in FDA's policy concerning the declaration of decimal fractions in the statement of the net

quantity of contents. The agency is also proposing to make this change in § 101.7(j) for consistency.

F. SI Equivalents

The agency is proposing in § 101.7(f) to include the SI equivalents to the inch-pound terms used in the regulation. In this paragraph, for example, the regulation maintains packages having a principal display panel of 5 square inches. The agency is parenthetically adding the SI equivalent of 32 cm². The proposed revision will provide interested parties with the SI equivalents to these inch-pound terms calculated using the appropriate conversion factors. The proposed revision conforms to the requirements of Executive Order 12770 to use SI units of measurement in all Federal Government, business-related activities. Such activities include the use of such units in agency programs and functions related to trade, industry, and commerce. The addition of this information to the proposed revised regulation does not represent a change in FDA's policy. The agency is also proposing in § 101.7(i), (l), and (q) to include the SI equivalents to the customary inch-pound terms.

G. Editorial Changes

The agency is proposing in § 101.7(e) to include the word "display" after the word "alternate principal." The proposed revision is an editorial change to clarify that the term "display panel" applies to both the principal display panel as well as the alternate principal display panel. The proposed addition of this word to the revised regulation is only for clarity and does not represent a change in FDA's policy.

Section 4(a)(3)(A) of the FPLA no longer requires that all packages that contain less than 4 pounds or 1 gallon bear a dual declaration of the net quantity of contents in terms of the customary inch-pound system of measure (for example, in total ounces and in the largest whole unit with any remainder in terms of ounces or common or decimal fractions of the largest whole unit, as appropriate). Consequently, the agency believes that this dual declaration of the net quantity of contents in terms of the Avoirdupois system should not be required by regulation. FDA believes that retention of this requirement by regulation would not be consistent with the law and is no longer required to facilitate value comparisons. Accordingly, the agency is proposing to delete the requirement for a dual declaration of the net quantity of contents in the customary inch-pound system of measure from the regulation.

The proposed deletion from the regulation represents a change in FDA's policy in response to the FPLA, as amended.

The agency is proposing in § 101.7(n) to permit the dual inch-pound declaration of the net quantity of contents on a voluntary basis as a convenience to consumers. The agency is also proposing in § 101.7(n) examples of the voluntary dual declaration of the net quantity of contents for packages containing less than 4 pounds or 1 gallon. Because the proposed revised regulation does not require such dual declarations, examples of such dual declarations are no longer necessary. The agency is requesting comments on whether it should permit voluntary dual declaration as proposed below. Depending on the comments that are submitted, the agency may delete the provisions for voluntary dual quantity declaration from the final rule.

The agency is proposing to remove the provision in the regulation (§ 101.105(p)) that provides for the use of SI units as an alternative declaration of the net quantity of contents. The FPLA, as amended, requires the use of the most appropriate units of both the customary inch-pound system and SI units for the declaration of the net quantity of contents. Consequently, the existing provisions are obsolete.

Further, FDA is proposing to make use of the term "net weight" optional. This term has been required for many years to modify all declarations of quantity of contents in terms of weight. The agency no longer believes this term is necessary to avoid consumer confusion because the required presence of the declaration in SI units will make the fact that the declaration is in terms of weight or mass rather than in terms of fluid measure.

H. Exemption From SI Labeling Requirements

The agency is proposing in § 101.7(t)(1) to exempt all foods packaged at the retail store level from the requirement that the statement of the net quantity of contents include a statement in terms of the SI metric system of measure. This proposed exemption implements new section 4(a)(6) of the FPLA, which specifically exempts all foods packaged at the retail store level from the requirement that the statement of net quantity of contents include a statement in terms of SI units.

III. Exclusions From SI Labeling Requirements

The agency is proposing to provide specific exclusions to the requirements for the use of the SI units when

declaring the net quantity of contents. Section 2 of the technical amendments specifically excluded: Unit pricing, advertising, recipe programs, nutrition labeling, and other general pricing information from the requirements of the amendments concerning the use of the SI units when declaring the net quantity of contents. Accordingly, the agency is proposing to include these exclusions in new § 101.7(t)(2).

IV. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(11) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

V. Economic Impact

As required by the Regulatory Flexibility Act and Executive Orders 12291 and 12612, FDA has examined the economic implications of the proposed rule to amend part 101. The Regulatory Flexibility Act requires regulatory relief for small businesses where feasible. Executive Order 12291 compels agencies to use cost-benefit analysis as a component of decisionmaking, and Executive Order 12612 requires Federal agencies to ensure that Federal solutions, rather than State or local solutions, are necessary. The agency finds that this proposed rule is not a major rule as defined by Executive Order 12291. In accordance with the Regulatory Flexibility Act (Pub. L. 96-354), FDA has determined that this proposed rule may have a significant adverse impact on small businesses. Finally, because this regulation applies to food for interstate commerce and individual State regulations would hinder interstate commerce, FDA finds that there is no substantial federalism issue which would require an analysis under Executive Order 12612.

A. Costs

Congress established February 14, 1994, as the effective date for the ATPA. FDA has opted to delay the application of certain requirements of the Nutrition Labeling and Education Act of 1990 (the 1990 amendments) until May 8, 1994. Therefore, most firms will be able to make label changes reflecting both the 1990 amendments and the technical amendments, thus incurring no additional costs of compliance associated with the technical amendments. However, manufacturers of foods exempted from the requirements of section 403(q) of the act

may incur costs in complying with the SI requirements of the technical amendments to the FPLA. Such foods could include foods with no nutritional value, foods packaged in small packages, medical foods, certain infant formulas, raw agricultural commodities and raw fish, and foods manufactured by small businesses exempted under section 403(q)(5)(D) of the act. There are approximately 500 medium and large firms that would incur the additional administrative and printing costs of complying with the technical amendments. The agency estimates that administrative costs will be approximately \$215 per medium firm and \$1,575 per large firm, or a total of \$245,000 for all affected firms. Printing costs for this regulation will be approximately \$520,000. FDA estimates the total costs of compliance of the technical amendments to be \$765,000. The agency does not have the information to determine that compliance with the technical amendments would be impracticable for these firms.

The 1990 amendments exempted foods produced by small businesses, defined as firms with annual gross sales of \$500,000 or less, or sales of more than \$500,000 annually with less than \$50,000 in food sales. However, the technical amendments did not specifically exempt foods produced by small businesses. Therefore, FDA, as required by the Regulatory Flexibility Act, has examined the impact of the proposed regulations on small firms.

There are approximately 8,100 small firms that are exempt from the requirements of mandatory nutrition labeling that would, therefore, incur the costs of complying with the technical amendments. There are three categories of cost associated with label changes: Administrative costs, printing costs, and inventory disposal costs. Administrative costs are the dollar value of the incremental administrative effort expended in order to comply with a regulation. Printing costs, which include label redesign costs, are the costs of printing new labels and may be minimized if adequate time is given for firms to incorporate these changes into planned label changes. Inventory costs are the costs of disposal of existing labels where firms have inventories that outlast the compliance period. Inventory costs can be minimized by allowing sufficient time for firms to exhaust existing stocks of labels. Under the technical amendments, all label stocks existing on February 14, 1994, may be used until exhausted. Therefore, these requirements need not cause firms to incur label inventory loss.

Administrative costs are typically smaller with longer compliance periods. Using a model generated for FDA by Research Triangle Institute (RTI), the agency determines that small firms would incur administrative costs of \$215 per firm or a total of approximately \$1.7 million for all affected firms (Ref. 10).

Printing costs, which are primarily redesign costs, are reduced by a longer compliance period because firms can incorporate mandated label changes into planned label changes. This would be possible for only a few small firms, perhaps as much as 20 percent (Ref. 10). The average small firm maintains 19 months of label inventory but redesigns its labels once every 30 months (Ref. 10). Therefore, printing costs will not be significantly reduced by allowing firms to use up existing stocks of labels. Using a model generated for FDA by RTI and assuming a one-color change, the agency determines that printing costs for small firms will be approximately \$7.5 million (Ref. 10).

Thus, FDA estimates that the total costs to small firms for the technical amendments to be approximately \$9.2 million. For these small firms, this could represent a significant cost imposition. In the summer of 1992, FDA held small business forums in response to the costs of the 1990 amendments. FDA received 77 comments in testimony and in writing. These comments indicate that small firms operate with low profit margins, between .5 percent and 5 percent of sales. For a small firm with sales of \$100,000, a requirement for SI labeling could reduce annual profits by as much as one-third. Such a reduction in profits could hinder the growth of a small firm.

FDA recognizes that the costs of compliance with the SI metric requirement could be significant for some small businesses. In the legislative history of the 1992 technical amendments, there was a discussion of the fact that under the FPLA, the Secretary of Health and Human Services (and FDA, by delegation) has the authority to exempt businesses from the SI requirements if compliance will result in economic hardship or significant cost (138 Congressional Record H5345 (daily ed. June 29, 1992)). As one Congressman noted, the goal of SI labeling is competitiveness, so it is important to avoid any anticompetitive effects.

Thus, FDA is prepared to include an exemption in proposed § 101.7 if comments demonstrate that compliance with the new requirements of section 4 of the FPLA is impracticable or not necessary for adequate protection of

consumers (section 5(b) of the FPLA (15 U.S.C. 1454(b))). However, the agency notes that this exemption is intended to be granted only in exceptional circumstances (138 Congressional Record H5345). Comments that support an exemption, in addition to presenting information that FDA can use to define the size of firms eligible for the exemption should provide information to support that a finding of exceptional circumstances is appropriate in this instance. Based on the information presently available, however, FDA is unable to conclude that exceptional circumstances exist for small firms that would make compliance with the requirements of the proposed rule impracticable.

The agency finds that this proposed rule is not a major rule as defined by Executive Order 12291. FDA concludes these actions may have a significant adverse impact on small businesses as defined by the Regulatory Flexibility Act.

B. Benefits

There are no health and safety benefits of this regulation. Although these regulations move the United States closer to the SI system and, thus, harmonization with international markets, these requirements alone cannot be construed as causing any of the benefits of such harmonization. Manufacturers already have the option of using SI units of measurement. Further, manufacturers of products sold internationally—either exported out of the United States or imported to the United States—will most likely have several labels for different countries because of other requirements such as language, standard package sizes, and nutrition information. Amending the requirements for declaration of net quantity of contents statements will not significantly reduce the costs of maintaining multiple labels for international trade. Therefore, based on the information presently available FDA concludes that there are no benefits of this regulation.

VI. Comments

Interested persons may, on or before July 20, 1993, submit to the Dockets Management Branch (address above) written comments regarding this proposal. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the above office between 9 a.m. and 4 p.m., Monday through Friday.

VII. References

The following references have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Cooper E. R., "The Metric Conversion Act of 1975, Legislative History and Implementation 1970-1980," Report No. 80-0203 SPR, Congressional Research Service, The Library of Congress, Washington, DC, August 31, 1978, Updated October 24, 1980.

2. NIST Handbook 44, 1993 ed., "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices," U.S. Department of Commerce, NIST, Gaithersburg, MD, October 1992.

3. NIST Special Publication 330, 1991 ed., "The International System of Units (SI)," U.S. Department of Commerce, NIST, Gaithersburg, MD, August 1991.

4. NIST Special Publication 811, "Guide for the Use of the International System of Units," U.S. Department of Commerce, NIST, Gaithersburg, MD, September 1991.

5. NIST Special Publication 814, "Interpretation of the SI for the United States and Metric Conversion Policy for Federal Agencies," U.S. Department of Commerce, NIST, Gaithersburg, MD, October 1991.

6. NIST Handbook 130, 1993, "Uniform Laws and Regulations," U.S. Department of Commerce, NIST, Gaithersburg, MD, October 1992.

7. Letter from Edward C. Heffron, Chairman NCWM SI Working Group, NCWM, March 19, 1993.

8. Council Directive of 20 January 1976, The Council of The European Communities, Article 5, *Official Journal of the European Communities*, 21.2.76, No L46/2.

9. Letter from Crabtree and Evelyn, Ltd., November 18, 1989.

10. RTI, "Compliance Costs of Food Labeling Regulations," FDA Contract No. 223-87-2097, Project Officer—Richard A. Williams, Jr., December 1990.

List of Subjects

21 CFR Part 1

Cosmetics, Drugs, Exports, Food labeling, Imports, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 100

Administrative practice and procedure, Food labeling, Reporting and recordkeeping requirements.

21 CFR Part 101

Food labeling, Reporting and recordkeeping requirements.

21 CFR Part 104

Food grades and standards, Frozen foods, Nutrition.

Therefore, under the Federal Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, and under authority delegated to the Commissioner

of Food and Drugs, it is proposed that 21 CFR parts 1, 100, 101, and 104 be amended as follows:

PART 1—GENERAL ENFORCEMENT REGULATIONS

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

Authority: Secs. 4, 5, 6 of the Fair Packaging and Labeling Act (15 U.S.C. 1453, 1454, 1455); secs. 201, 403, 502, 505, 512, 602, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 343, 352, 355, 360b, 362, 371); sec. 215 of the Public Health Service Act (42 U.S.C. 216).

2. Section 1.1 is amended by revising paragraph (c) to read as follows:

§ 1.1 General.

(c) The definition of package in § 1.20 and of principal display panel in §§ 101.1, 201.60, 501.1, 701.10 and 801.60 of this chapter; and the requirements pertaining to uniform location, lack of qualification, and separation of the net quantity declaration in §§ 101.7(f), 201.62(e), 501.105(f), 701.13(f) and 801.62(e) of this chapter to type size requirements for net quantity declaration in §§ 101.7(i), 201.62(h), 501.105(i), 701.13(i) and 801.62(h) of this chapter, to initial statement of ounces in the dual declaration of net quantity in §§ 201.62(i) and (k), 501.105(j) and (m), 701.13(j) and (m) and 801.62(i) and (k) of this chapter, to initial statement of inches in declaration of net quantity in §§ 201.62(m), 701.13(c), and 801.62(m) of this chapter, to initial statement of square inches in declaration of net quantity in §§ 201.62(n), 701.13(p) and 801.62(n) of this chapter, to prohibition of certain supplemental net quantity statements in §§ 101.7(n), 201.62(o), 501.105(o), 701.13(g) and 801.62(o) of this chapter and to servings representations in § 501.8 of this chapter are provided for solely by the Fair Packaging and Labeling Act. The other requirements of this part are issued under both the Fair Packaging and Labeling Act and the Federal Food, Drug, and Cosmetic Act, or by the latter act solely, and are not limited in their application by section 10 of the Fair Packaging and Labeling Act.

§ 1.20 [Amended]

3. Section 1.20 *Presence of mandatory label information* is amended in paragraph (e) by removing "§ 101.105(f)" and adding in its place "101.7(f)".

4. Section 1.24 is amended by revising paragraphs (a)(2), (a)(5)(iii), and (a)(6)(i); by removing and reserving paragraph (a)(6)(ii), by revising paragraphs

(a)(6)(iii), (a)(7)(i) and (a)(7)(ii); by removing paragraph (a)(7)(iii); by revising paragraph (a)(8), (a)(9)(ii), and (a)(10)(i); by removing and reserving paragraph (a)(10)(ii); by revising paragraphs (a)(10)(iii), (a)(11), (a)(12), and (a)(13)(i); by removing and reserving paragraph (a)(13)(ii); and by revising paragraph (a)(13)(iii) to read as follows:

§ 1.24 Exemptions from required label statements.

(a) * * *

(2) Random food packages, as defined in § 101.7(j) of this chapter, bearing labels declaring net weight, price per unit or multiple units, and total price shall be exempt from the type size and placement requirements of § 101.7 of this chapter if the accurate statement of net weight is presented conspicuously on the principal display panel of the package. In the case of food packed in random packages at one place for subsequent shipment and sale at another, the price sections of the label may be left blank provided they are filled in by the seller prior to retail sale. This exemption shall also apply to uniform weight packages of cheese and cheese products labeled in the same manner and by the same type of equipment as random food packages exempted by this paragraph (a)(2) except that the labels shall bear a declaration of price per unit and not price per multiple units.

(5) * * *

(iii) Soft drinks packaged in bottles which display other required label information only on the closure shall be exempt from the placement requirements for the declaration of contents prescribed by § 101.7(f) of this chapter if the required content declaration is blown, formed, or molded into the surface of the bottle in close proximity to the closure.

(6)(i) Ice cream, french ice cream, ice milk, fruit sherbets, water ices, quiescently frozen confections (with or without dairy ingredients), special dietary frozen desserts, and products made in semblance of the foregoing, when measured by and packaged in 1/2-liquid pint and 1/2-gallon measure-containers, as defined in the "Measure Container Code of National Institute of Standards and Technology (NIST) Handbook 44," Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices, Sec. 4.43 "Measure-Containers," which is incorporated by reference in accordance with 5 U.S.C.

552(a) and 1 CFR part 51, are exempt from the requirements of § 101.7(b)(2) of this chapter to the extent that net contents of 8-fluid ounces and 64-fluid ounces (or 2 quarts) may be expressed as 1/2 pint and 1/2 gallon, respectively. Copies are available from the Office of Food Labeling, Center for Food Safety and Applied Nutrition (HFS-150), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, or available for inspection at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

(ii) [Reserved]

(iii) The foods named in paragraph (a)(6)(i) of this section, when measured by and packaged in 1/2-liquid pint, 1-liquid pint, 1-liquid quart, 1/2-gallon, and 1-gallon measured containers, as defined in the "Measure Container Code of National Institute of Standards and Technology Handbook 44," Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices, Sec. 4.43 "Measure-Containers," which is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, are exempt from the requirement of § 101.7(f) of this chapter that the declaration of net contents be located within the bottom 30 percent of the principal display panel. Copies are available from the Office of Food Labeling, Center for Food Safety and Applied Nutrition (HFS-150), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, or available for inspection at the Office of the Federal Register, 800 North Capitol St. NW., suite 700, Washington, DC.

(7)(i) Milk, cream, light cream, coffee or table cream, whipping cream, light whipping cream, heavy or heavy whipping cream, sour or cultured sour cream, half-and-half, sour or cultured half-and-half, reconstituted or recombined milk and milk products, concentrated milk and milk products, skim or skimmed milk, vitamin D milk and milk products, fortified milk and milk products, homogenized milk, flavored milk and milk products, buttermilk, cultured buttermilk, cultured milk or cultured whole buttermilk, low-fat milk (0.5 to 2.0 percent butterfat), and acidified milk and milk products, when packaged in containers of 8- and 64-fluid ounce capacity, are exempt from the requirements of § 101.7(b)(2) of this chapter to the extent that net contents of 8 fluid ounces and 64 fluid ounces (or 2 quarts) may be expressed as 1/2 pint and 1/2 gallon, respectively.

(ii) The products listed in paragraph (a)(7)(i) of this section, when packaged in glass or plastic containers of 1/2-pint,

1-pint, 1-quart, 1/2-gallon, and 1-gallon capacities are exempt from the placement requirement of § 101.7(f) of this chapter that the declaration of net contents be located within the bottom 30 percent of the principal display panel, provided that other required label information is conspicuously displayed on the cap or outside closure and the required net quantity of contents declaration is conspicuously blown, formed, or molded into or permanently applied to that part of the glass or plastic container that is at or above the shoulder of the container.

(8) Wheat flour products, as defined by §§ 137.105, 137.155, 137.160, 137.165, 137.170, 137.175, 137.180, 137.185, 137.200, and 137.205 of this chapter, packaged in conventional 2-, 5-, 10-, 25-, 50-, and 100-pound packages are exempt from the placement requirement of § 101.7(f) of this chapter that the declaration of net contents be located within the bottom 30 percent of the area of the principal display panel of the label.

(9) * * *

(ii) Twelve shell eggs packaged in a carton designed to hold 1 dozen eggs are exempt from the placement requirements for the declaration of contents prescribed by § 101.7(f) of this chapter if the required content declaration is otherwise placed on the principal display panel of such carton and if, in the case of such cartons designed to permit division by retail customers into two portions of one-half dozen eggs each, the required content declaration is placed on the principal display panel in such a manner that the context of the content declaration is destroyed upon division of the carton.

(10) * * *

(i) In 8-ounce and in 1-pound packages is exempt from the requirements of § 101.7(f) of this chapter that the net contents declaration be placed within the bottom 30 percent of the area of the principal display panel;

(ii) [Reserved]

(iii) In 4-ounce, 8-ounce, and 1-pound packages with continuous label copy wrapping is exempt from the requirements of §§ 101.3 and 101.7(f) of this chapter that the statement of identity and net contents declaration appear in lines generally parallel to the base on which the package rests as it is designed to be displayed, provided that such statement and declaration are not so positioned on the label as to be misleading or difficult to read as the package is customarily displayed at retail.

(11) Margarine as defined in § 166.110 of this chapter and imitations thereof in 1-pound rectangular packages, except

for packages containing whipped or soft margarine or packages that contain more than four sticks, are exempt from the requirement of § 101.7(f) of this chapter that the declaration of the net quantity of contents appear within the bottom 30 percent of the principal display panel provided an accurate statement of net weight appears conspicuously on the principal display panel of the package.

(12) Corn flour and related products, as they are defined by §§ 137.211, 137.215, and 137.230 through 137.290 of this chapter, packaged in conventional 5-, 10-, 25-, 50-, and 100-pound bags are exempt from the placement requirement of § 101.7(f) of this chapter that the declaration of net contents be located within the bottom 30 percent of the area of the principal display panel of the label.

(13)(i) Single strength and less than single strength fruit juice beverages, imitations thereof, and drinking water when packaged in glass or plastic containers of 1/2-pint, 1-pint, 1-quart, 1/2-gallon, and 1-gallon capacities are exempt from the placement requirement of § 101.7(f) of this chapter that the declaration of net contents be located within the bottom 30 percent of the principal display panel: *Provided*, That other required label information is conspicuously displayed on the cap or outside closure and the required net quantity of contents declaration is conspicuously blown, formed, or molded into or permanently applied to that part of the glass or plastic container that is at or above the shoulder of the container.

(ii) [Reserved]

(iii) Single strength and less than single strength fruit juice beverages, imitations thereof, and drinking water when packaged in glass, plastic, or paper (fluid milk type) containers of 8- and 64-fluid ounce capacity, are exempt from the requirements of § 101.7(b)(2) of this chapter to the extent that net contents of 8 fluid ounces and 64 fluid ounces (or 2 quarts) may be expressed as 1/2 pint (or half pint) and 1/2 gallon (or half gallon), respectively.

* * * * *

PART 100—GENERAL

5. The authority citation for 21 CFR part 100 continues to read as follows:

Authority: Secs. 201, 301, 307, 402, 403, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 337, 342, 343, 348, 371).

§ 100.155 [Amended]

6. Section 100.155 *Salt and iodized salt* is amended in paragraph (a) by

removing "§ 101.105" and adding in its place "§ 101.7".

PART 101—FOOD LABELING

7. The authority citation for 21 CFR part 101 continues to read as follows:

Authority: Secs. 4, 5, 6 of the Fair Packaging and Labeling Act (15 U.S.C. 1453, 1454, 1455); secs. 201, 301, 402, 403, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 342, 343, 348, 371).

§ 101.2 [Amended]

8. Section 101.2 *Information panel of package form food* is amended in paragraphs (b) and (f) by adding "§ 101.7," after "§ 101.5," and before "§ 101.8"; and in the introductory text of paragraph (c) by removing "§ 101.105(h)(1) and (2)" and adding in its place "§ 101.7(h)(1) and (h)(2)".

§ 101.7 [Redesignated from § 101.105]

9. Section 101.105 is redesignated as § 101.7 and revised to read as follows:

§ 101.7 Declaration of net quantity of contents.

(a) The principal display panel of a food in package form shall bear a declaration of the net quantity of contents. This shall be expressed in the terms of weight or mass, measure, numerical count, or a combination of numerical count and weight or mass or measure. The statement shall be in terms of fluid measure if the food is liquid, or in terms of weight or mass if the food is solid, semisolid, or viscous, or a mixture of solid and liquid; except that such statement may be in terms of dry measure if the food is a fresh fruit,

fresh vegetable, or other dry commodity that is customarily sold by dry measure. If there is a firmly established general consumer usage and trade custom of declaring the contents of a liquid by weight or mass, or solid, semisolid, or viscous product by fluid measure, it may be used. Whenever the Commissioner of Food and Drugs determines that an existing practice of declaring net quantity of contents by weight or mass, measure, numerical count, or a combination in the case of a specific packaged food does not facilitate value comparisons by consumers and offers opportunity for consumer confusion, he will by regulation designate the appropriate terms to be used for such commodity.

(b)(1) Statements of weight or mass shall be in terms of the largest whole unit in both the avoirdupois pound and ounce and grams and kilograms as defined by the International System of Units (SI).

(2) Statements of fluid measure shall be in terms of the largest whole unit in both the U.S. gallon (gal) of 231 cubic inches (in³) and quart, pint, and fluid ounce subdivisions thereof and the SI milliliter or liter and shall:

(i) In the case of frozen food that is sold and consumed in a frozen state, express the volume at the frozen temperature;

(ii) In the case of refrigerated food that is sold in a refrigerated state, express the volume at 40 °F (4 °C); and

(iii) In the case of other foods, express the volume at 68 °F (20 °C).

(iv) In the case of fluid measure of 1 gallon or more, it shall be expressed in the largest whole unit (gallon (liters))

followed by common or decimal fractions of a gallon (liter) or by the next smaller whole unit or units (quarts, or quarts and pints) with any remainder in terms of fluid ounces (milliliters) or common or decimal fractions of the pint or quart.

(3) Statements of dry measure shall be in terms in both the U.S. bushel of 2,150.42 in³ and peck (pk), dry quart, and dry pint subdivisions thereof and the SI milliliter or liter.

(c) When the declaration of quantity of contents by numerical count does not give adequate information as to the quantity of food in the package, it shall be combined with such statement of weight or mass, measure, or size of the individual units of the foods as will provide such information.

(d)(1) The declaration may contain common or decimal fractions of the customary inch-pound system units of measure and decimal fractions of SI units. A common fraction shall be in terms of halves, quarters, eighths, sixteenths, or thirty-seconds; except that if there exists a firmly established general consumer usage and trade custom of employing different common fractions in the net quantity declaration of a particular commodity, they may be employed. A common fraction shall be reduced to its lowest terms; a decimal fraction shall not be carried out to more than 3 places. A statement that includes small fractions of an ounce shall be deemed to permit smaller variations than one which does not include such fractions.

(2) The declaration shall present SI fractions as:

SI PREFIXES

Name	Symbol	Multiplying factor ¹
mega.....	M.....	x 10 ⁶
kilo.....	k.....	x 10 ³
hecto.....	h.....	x 10 ²
deca.....	da.....	x 10
deci.....	d.....	x 10 ⁻¹
centi.....	c.....	x 10 ⁻²
milli.....	m.....	x 10 ⁻³
micro.....	µ.....	x 10 ⁻⁶

¹ e.g., 10² = 100; 10³ = 1000; 10⁻¹ = 0.1; 10⁻² = 0.01
Thus, 2 km = 2 x 1000 = 2000 m; 3 cm = 3 x 0.01 = 0.03 m

(3) Examples of inch-pound/SI declaration:

(i) "Net Wt 15 oz (425 g)" or "Net Wt 1 lb 8 oz (680 g)" or "Net Wt 3.5 oz (99 g) e" (assumes ounces are known to 3 significant digits).

(ii) "Net 12 fl oz (355 mL)" or "Net Contents 1 gal (3.79 L)." (iii) "15 oz (425 g)" or "1 lb 8 oz (680 g)" or "3.5 oz (99 g) e."

(4) Examples of metric/inch-pound declaration:

(i) "Net Mass 425 g (15 oz)" or "Net Mass 680 g (1 lb 8 oz)" or "Net Mass 99 g e (3.5 oz)" (assumes ounces are known to 3 significant digits).

(ii) "Net 500 mL (1 pt 0.9 fl oz)" or "Net Contents 1 L (1 qt 1.8 fl oz)." (iii) "500 mL (1 pt 0.9 fl oz)" or "1 L (1 qt 1.8 fl oz)." (e) The declaration shall be located on the principal display panel of the label, and with respect to packages bearing alternate principal display panels, it

shall be duplicated on each principal display panel.

(f) The declaration shall appear as a distinct item on the principal display panel, shall be separated (by at least a space equal to the height of the lettering used in the declaration) from other printed label information appearing above or below the declaration and (by at least a space equal to twice the width of the letter "N" of the style of type used in the quantity of contents statement) from other printed label information appearing to the left or right of the declaration. However, the "e" mark, a symbol used to facilitate trade in and among members of the European Community, shall not be considered to be a qualifying word or phrase and may be used as part of the statement of the net quantity of contents where warranted. When used, the "e" mark shall be at least 3 millimeters (mm) in height and shall appear immediately after the metric portion of the quantity of contents statement. The declaration shall not include any term qualifying a unit of weight or mass, measure, or count (such as "jumbo quart" and "full gallon") that tends to exaggerate the amount of the food in the container. It shall be placed on the principal display panel within the bottom 30 percent of the area of the label panel in lines generally parallel to the base on which the package rests as it is designed to be displayed: *Provided*, That on packages having a principal display panel of 5 square inches (32 cm²) or less, the requirement for placement within the bottom 30 percent of the area of the label panel shall not apply when the declaration of net quantity of contents meets the other requirements of this part.

(g) The declaration shall accurately reveal the quantity of food in the package exclusive of wrappers and other material packed therewith: *Provided*, That in the case of foods packed in containers designed to deliver the food under pressure, the declaration shall state the net quantity of the contents that will be expelled when the instructions for use as shown on the container are followed. The propellant is included in the net quantity declaration.

(h) The declaration shall appear in conspicuous and easily legible boldface print or type in distinct contrast (by typography, layout, color, embossing, or molding) to other matter on the package; except that a declaration of net quantity blown, embossed, or molded on a glass or plastic surface is permissible when all label information is so formed on the surface. Requirements of

conspicuousness and legibility shall include the specifications that:

(1) The ratio of height to width (of the letter), except for the "e" mark, shall not exceed a differential of 3 units to 1 unit (no more than 3 times as high as it is wide).

(2) Letter heights pertain to upper case or capital letters, except for the "e" mark. When upper and lower case or all lower case letters are used, it is the lower case letter "o" or its equivalent that shall meet the minimum standards.

(3) When fractions are used, each component numeral shall meet one-half of the minimum height standards.

(i) The declaration shall be in letters and numerals in a type size established in relationship to the area of the principal display panel of the package and shall be uniform for all packages of substantially the same size by complying with the following type specifications:

(1) Not less than one-sixteenth of an inch (1.6 mm) in height on packages the principal display panel of which has an area of 5 square inches (32 cm²) or less.

(2) Not less than one-eighth of an inch (3.2 mm) in height on packages the principal display panel of which has an area of more than 5 (32 cm²) but not more than 25 square inches (161 cm²).

(3) Not less than three-sixteenths of an inch (4.8 mm) in height on packages the principal display panel of which has an area of more than 25 (161 cm²) but not more than 100 square inches (645 cm²).

(4) Not less than one-fourth of an inch (6.4 mm) in height on packages the principal display panel of which has an area of more than 100 square inches (645 cm²), except not less than 1/2 inch (12.7 mm) in height if the area is more than 400 square inches (258 dm²).

Where the declaration is blown, embossed, or molded on a glass or plastic surface rather than by printing, typing, or coloring, the lettering sizes specified in paragraphs (h)(1) through (h)(4) of this section shall be increased by one-sixteenth of an inch (1.6 mm).

(j) If the net quantity of contents declaration appears on a random package, that is, a package which is one of a lot, shipment, or delivery of packages of the same consumer commodity with varying weights and with no fixed weight pattern, it may, when the net weight exceeds 1 pound, be expressed in terms of pounds and decimal fractions of the pound carried out to not more than 3 decimal places. When the net weight does not exceed 1 pound, the declaration on the random package may be in decimal fractions of the pound in lieu of ounces. The net quantity of contents declaration on a random package is not required to, but

may include a statement in terms of the SI metric system carried out to not more than 3 decimal places.

(k) The declaration may appear in more than one line. The term "net weight" or "net mass" may be used when stating the net quantity of contents in terms of weight or mass. For example: "Net Wt 1 lb (453 g)" or "Net Mass 453 g (1 lb)" or "453 g (16 oz)." Use of the terms "net" or "net contents" in terms of fluid measure or numerical count is also optional. It is sufficient to distinguish avoirdupois ounces from fluid ounces through association of terms; for example, "Net wt. 6 oz" or "6 oz Net wt." and "6 fl oz" or "Net contents 6 fl oz".

(l) The inch-pound portion of the declaration may be expressed both in ounces, with identification by weight or by liquid measure and, if applicable (1 pound or 1 pint or more) followed in parentheses by a declaration in pounds for weight for weight units, with any remainder in terms of ounces or common or decimal fractions of the pound or in the case of liquid measure, in the largest whole units (quarts, quarts and pints, or pints, as appropriate) with any remainder in terms of fluid ounces or common or decimal fractions of the pint or quart.

(m) For quantities, the following abbreviations and none other may be employed (periods and plural forms are optional):

Unit	Abbreviation
weight	wt
pint	pt
ounce	oz
quart	qt
pound	lb
fluid	fl
gallon	gal
kilogram	kg
meter	m
gram	g
centimeter	cm
decimeter	dm
milligram	mg
millimeter	mm
microgram	µg
square meter	m ²
liter	L
square centimeter	cm ²
milliliter	mL
cubic meter	m ³
cubic centimeter	cm ³

(n) Nothing in this section shall prohibit supplemental statements at locations other than the principal display panel(s) describing in nondescriptive terms the net quantity of contents: *Provided*, That such supplemental statements of net quantity of contents shall not include any term qualifying a unit of weight or mass.

measure, or count that tends to exaggerate the amount of the food contained in the package; for example, "jumbo quart" and "full gallon." Dual or combination declarations of net quantity of contents as provided for in paragraphs (a), (c), and (l) of this section (for example, dual inch-pound declarations, a combination of net weight or mass plus numerical count, net contents plus dilution directions of a concentrate, etc.) are not regarded as supplemental net quantity statements and may be located on the principal display panel.

(o) The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in current good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

(p) The declaration of net quantity of contents on pickles and pickle products, including relishes but excluding one or two whole pickles in clear plastic bags which may be declared by count, shall be expressed in terms of the U.S. gal of 231 in³ and quart, pint and fluid ounce subdivisions thereof and SI liters or milliliters.

(q) On a multiunit retail package, a statement of the quantity of contents shall appear on the outside of the package and shall include the number of individual units, the quantity of each individual unit, and, in parentheses, the total quantity of contents of the multiunit package in terms of the avoirdupois pound and ounce or fluid ounces and SI kilograms and grams or SI liters and milliliters, except that such declaration of total quantity need not be followed by an additional parenthetical declaration in terms of the largest whole units and subdivisions thereof. A multiunit retail package may thus be properly labeled: "6-1 pt bottles—(3 qts)/6-473 mL bottles—(2.8 L)"; or "3-1 lb cans—

(net wt. 3 lbs)/3-454 g cans—(net wt. 1.36 kg)". For the purposes of this section, "multiunit retail package" means a package containing two or more individually packaged units of the identical commodity and in the same quantity, intended to be sold as part of the multiunit retail package but capable of being individually sold in full compliance with all requirements of the regulations in this part. Open multiunit retail packages that do not obscure the number of units or prevent examination of the labeling on each of the individual units are not subject to this paragraph if the labeling of each individual unit complies with the requirements of paragraphs (f) and (i) of this section. The provisions of this section do not apply to butter or margarine covered by the exemptions in § 1.24(a)(10) and (a)(11) of this chapter.

(r) For calculating the conversion of SI quantities to inch-pound quantities and inch-pound quantities to SI quantities, the following SI/inch-pound conversion chart and none other shall be employed:

METRIC/INCH-POUND CONVERSION FACTORS

Inch-pound	SI
Length	Length
1 inch = 2.54 cm*	1 millimeter = 0.039 370 1 in
1 foot = 30.48 cm*	1 centimeter = 0.393 701 in
1 yard = 0.9144 m*	
Area	Area
1 square inch = 6.4516 cm ²	1 square centimeter = 0.155 000 in ²
1 square foot = 929.030 cm ²	1 square decimeter = 0.107 639 ft ²
1 square yard = 0.836 127 m ²	1 square meter = 10.769 9 ft ²
Volume or Capacity	Volume or Capacity
1 cubic inch = 16.3871 cm ³	1 cubic centimeter = 0.061 023 7 in ³
1 cubic foot = 0.028 316 8 m ³	1 cubic decimeter = 0.035 314 7 ft ³
1 cubic yard = 0.764 555 m ³	1 cubic meter = 35.314 7 ft ³ = 1.307 95 yd ³
1 fluid ounce = 29.573 5 mL	1 milliliter = 0.033 814 0 fl oz
1 liquid pint = 473.177 mL = 0.473 177 L	1 liter = 1.05669 liq qt
1 liquid quart = 946.353 mL = 0.964 353 L	liter = 0.264 172 gal
1 dry pint = 550.610 0 mL	
dry quart = 1.101 221 L	
1 dry peck = 8.809 768 L	
1 gallon = 3.785 41 L	
1 bushel = 35.2391 L	
Weight or Mass	Weight or Mass
1 ounce = 28.3495 g	1 milligram = 0.000 035 274 0 oz
1 pound = 453.592 g = 0.453 kg	1 gram = 0.035 274 0 oz
	1 kilogram = 2.294 62 lb

* Exactly

Note: These conversion factors are given to 6 significant digits to provide such accuracy when necessary.

(s) Where the declaration of net quantity of contents is in terms of net weight or mass and/or drained weight or mass or volume and does not accurately reflect the actual quantity of the contents or the product falls below the applicable standard of fill of container because of equipment malfunction or

otherwise unintentional product variation, and the label conforms in all other respects to the requirements of this chapter (except the requirement that food falling below the applicable standard of fill of container shall bear the general statement of substandard fill specified in § 130.14(b) of this chapter), the mislabeled food product, including any food product that fails to bear the general statement of substandard fill

specified in § 130.14(b) of this chapter, may be sold by the manufacturer or processor directly to institutions operated by Federal, State or local governments (schools, prisons, hospitals, etc.): *Provided, That:*

(1) The purchaser shall sign a statement at the time of sale stating that he is aware that the product is mislabeled to include acknowledgement of the nature and extent of the

mislabeling, (e.g., "Actual net weight may be as low as —percent below labeled quantity") and that any subsequent distribution by him of said product except for his own institutional use is unlawful. This statement shall be kept on file at the principal place of business of the manufacturer or processor for 2 years subsequent to the date of shipment of the product and shall be available to the Food and Drug Administration upon request.

(2) The product shall be labeled on the outside of its shipping container with the statement(s):

(i) When the variation concerns net weight or mass and/or drained weight or mass or volume, "Product Mislabeled. Actual net weight (drained weight or volume where appropriate) may be as low as —percent below labeled quantity. This Product Not for Retail Distribution", the blank to be filled in with the maximum percentage variance between the labeled and actual weight or mass or volume of contents of the individual packages in the shipping container, and

(ii) When the variation is in regard to a fill of container standard, "Product Mislabeled. Actual fill may be as low as —percent below standard of fill. This Product Not for Retail Distribution".

(3) The statements required by paragraphs (s)(2)(i) and (s)(2)(ii) of this section, which may be consolidated where appropriate, shall appear prominently and conspicuously as compared to other printed matter on the shipping container and in boldface print or type on a clear, contrasting background in order to render them likely to be read and understood by the purchaser under ordinary conditions of purchase.

(t)(1) All foods packaged at the retail store level for direct sale to consumers are exempt from the provisions of this section that require that the statement of net quantity of contents include SI units.

(2) None of the requirements of this section concerning the declaration of the net quantity of contents in SI units shall apply to unit pricing, advertising, recipe programs, nutrition labeling, or other general pricing information.

10. Section 101.13 *Nutrient content claims—general principles* is amended in paragraph (d)(2), (g)(1), and (i)(2) by removing "\$ 101.105(i)", wherever it appears, and adding in its place "\$ 101.7(i)".

PART 104—NUTRITIONAL QUALITY GUIDELINES FOR FOODS

11. The authority citation for 21 CFR part 104 continues to read as follows:

Authority: Secs. 201, 403, 701(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 343, 371(a)).

§ 104.5 [Amended]

12. Section 104.5 *General principles* is amended in paragraph (b) by removing "\$ 101.105" and adding in its place "\$ 101.7".

Dated: April 22, 1993.

Michael R. Taylor,

Deputy Commissioner for Policy.

[FR Doc. 93-11945 Filed 5-20-93; 8:45 am]

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Federal Register

**Friday
May 21, 1993**

Part IV

Department of Housing and Urban Development

Office of the Assistant Secretary

**24 CFR Part 968
Vacancy Reduction Program; Proposed
Rule**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Part 968

[Docket No. R-93-1659; FR-3398-P-01]

RIN 2577-AB26

Vacancy Reduction Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule and notice of distribution of survey.

SUMMARY: The Department is proposing regulations to implement the Vacancy Reduction Program. Under this program, certain Public Housing Agencies (PHAs) are required to develop and submit a plan regarding vacancies in units owned or operated by the PHA. Each plan will be required to include the elements specified in the statute and this rule. In addition, assessment teams will conduct on-site assessments of the vacancy situations of participating PHAs and may provide assistance to PHAs in developing their plans. Funds from the Vacancy Reduction Program will be made available through competitions to implement the plans. The assistance available under this program is intended to supplement other initiatives of the PHA that will reduce the rate of addressable vacancies in a PHA's inventory.

DATES: Comments must be received by June 21, 1993, to assure their consideration.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Rules Docket Clerk, Office of General Counsel, room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500.

Communications should refer to the above docket number and title.

Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Janice D. Rattley, Director, Office of Construction, Rehabilitation and Maintenance, Public and Indian Housing, room 4138, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410, telephone (202) 708-1800. Individuals with hearing or speech impairments may call HUD's TDD

number: (202) 708-0850. (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:**Paperwork Reduction Statement**

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). No person may be subjected to a penalty for failure to comply with these information collection requirements until they have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the Federal Register.

The public reporting burden for the collection of information requirements contained in this rule is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under the Preamble heading, Other Matters. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street, SW., room 10276, Washington, DC 20410-0500; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for HUD, Washington, DC 20503.

At the end of the public comment period on this rule, the Department may amend the information collection requirements set out to reflect public comments or OMB comments received concerning the information collection.

Justification for Shortened Comment Period

It is the general practice of the Department to provide for a 60-day public comment period on all proposed rules. However, because of a statutory deadline for the issuance of proposed and final rules, and in order to make it possible to commit program funds during Fiscal Year 1993, the Department is shortening its usual 60-day public comment period to 30 days.

Although section 510 of the Cranston-Gonzalez National Affordable Housing Act (Pub. L. 101-625, approved November 28, 1990) (NAHA) authorized funding for FYs 1991 and 1992, funds were not appropriated for the Vacancy Reduction Program in either year, and

the Department took no action toward implementing the program. Instead, the Department pursued other actions to address the vacancy problem, some of which are noted later in this preamble. However, the 1992 Act created an explicit set-aside of modernization funds for implementation of the program. Therefore, the Department interprets the expedited notice-and-comment rulemaking requirements set out in section 191 of the 1992 Act as applying to the Vacancy Reduction Program.

Background

Section 510 of the Cranston-Gonzalez National Affordable Housing Act added a new section 14(p) to the United States Housing Act of 1937 (42 U.S.C. 14371) (1937 Act). Recently section 14(p) was amended by section 115 of the Housing and Community Development Act of 1992 (Pub. L. 102-550, approved October 28, 1992) (1992 Act), and funding was made available for the first time for the program.

Section 14(p) requires any public housing agency (PHA) to participate in the Vacancy Reduction Program (program) if the PHA has a vacancy rate that exceeds twice the national average, is designated as troubled under section 6(j) of the 1937 Act, or has been placed under a receiver pursuant to section 6(j)(3) of the 1937 Act. Each PHA participating in the program will be required to develop a vacancy reduction plan that identifies vacant dwelling units in its inventory and the reasons for the vacancies, and describes actions to be taken by the PHA for the following five years to eliminate the vacancies.

In addition, the vacancy situations of every participating PHA will be reviewed on-site by assessment teams consisting of representatives of the Department, independent experts knowledgeable about vacancy problems and management issues relating to public housing, and PHA officials. The assessment teams will submit recommendations to HUD and the PHA, and may assist the PHA in preparing its vacancy reduction plan.

The plans will be the basis for selecting those PHAs that will receive assistance under the program. For troubled PHAs, funding of vacancy reduction activities would be contingent upon the PHA making, or providing reasonable assurances of, substantial progress in remedying any management deficiencies.

Staged Implementation of the Vacancy Reduction Program

Because the appropriated funding is extremely limited in relation to the total

need, the Department proposes to implement the Vacancy Reduction Program in stages. The selection of PHAs to receive assistance for vacancy reduction activities will be based on competitions to be announced in Notices of Funding Availability (NOFAs) that will be published periodically in the Federal Register. Each NOFA would be targeted according to certain characteristics that could be identified as being shared by a number of PHAs with vacancy problems. The characteristics targeted in each NOFA would be based on the statements required by statute to be included in a vacancy reduction plan and would function as threshold factors for the NOFA. The targeted characteristics would vary among funding rounds until all PHAs meeting the statutory eligibility criteria for the program are ensured a chance to compete for funds or until funds are no longer appropriated for the program. For example, the first round of funding may focus on PHAs that have a high percentage of their total units vacant because of turnover problems, or where vacant units need not more than \$10,000 in repairs or rehabilitation. A PHA will not be excluded from a funding round based on size or other demographic criteria. An objective of the Department is to use the available funds so that the optimal number of units will be reoccupied and the PHAs will continue, through management improvements, to reduce the vacancy problem.

Use of Survey to Determine FY 1993 NOFA Threshold Factors

The Department currently is surveying all PHAs that the Department believes meet the statutory eligibility criteria for the Vacancy Reduction Program. The results of the survey will be used to define the threshold factors for NOFA competitions and to schedule assessments.

Any PHA that has not received a survey form, "survey of vacancy rates in selected low rent public housing agencies and self-assessment of major causes of vacancies," and that has a vacancy rate of 16% or greater (i.e., twice the average vacancy rate), is a troubled or mod-troubled PHA, or is in receivership, should immediately call 1-800-436-1304 to receive a survey form. It is important that all survey forms be completed and returned as requested.

The Department expects that analysis of the survey responses will provide a sufficient basis for identifying appropriate threshold factors for FY 1993 and for determining which PHAs

would meet those threshold factors. The Department would then begin to schedule assessment team visits, as discussed under the next heading in this preamble, for those PHAs that the Department believes would meet the threshold factors for the first NOFA. In the event that survey results are not received or cannot be analyzed sufficiently on a timely basis, the Department may rely on vacancy and other data from its existing data systems (including data from PHMAP and HUD Form 51234) to select the FY 1993 threshold factors and schedule assessments. Upon publication of the NOFA, a PHA that could meet the threshold factors and has not already been scheduled for an assessment team visit will be permitted to request an assessment, as discussed later in this preamble.

On-Site Assessments

The Secretary is required to provide for an on-site assessment of the vacancy situation at each PHA by a team including representatives of the Department, independent experts knowledgeable about vacancy problems and management issues relating to public housing, and officials of the PHA. The members of each assessment team will be selected by the Secretary.

Each assessment team will assess the vacancy situation of the PHA to determine the causes of the vacancies, and will examine indicators of the management performance of the PHA relating to vacancies. Recommendations for management improvements will be submitted by the assessment team to both the Secretary and the PHA. In addition, the assessment team may assist the PHA in preparing its vacancy reduction plan.

The Department will determine a priority order for the scheduling of assessments, based on the survey responses or alternative data (as discussed above), and the threshold factors that would be established in NOFAs, and will continue to send teams to assess the vacancy situations of PHAs that are required to participate in the program, until all assessments are complete or funds are no longer available for program activities.

Funding of Activities

From the amounts set aside for the Vacancy Reduction Program from appropriations for modernization activities under section 14 of the 1937 Act, the Secretary is required to provide assistance to PHAs for reasonable costs of implementing management improvements, rehabilitating vacant dwelling units, and carrying out other

vacancy reduction activities. Funding decisions will be made based primarily upon the vacancy reduction plans submitted by participating PHAs in response to NOFAs. The Department is eager to make funds available to PHAs for vacancy reduction activities during this fiscal year, and expects to publish this summer, simultaneously with the final rule, the first NOFA for the program. Although it is highly desirable that an assessment be completed for each PHA before it prepares its vacancy reduction plan in response to a NOFA, the Department will permit PHAs that have not had assessments to compete for funds. Selection of such a PHA would be subject to HUD review and approval of the PHA's plan and a requirement that its vacancy reduction plan be revised as necessary in response to a subsequent assessment, which would be conducted before any funds may be provided to the PHA.

Failure to Make Progress

Section 14(p)(3) requires that:

"(A) Upon the expiration of the 24-month period beginning upon the receipt of assistance under paragraph (5) by a public housing agency, the Secretary shall, after reviewing the progress made in complying with the plan, reserve from the annual contribution attributable to each unit vacant for the 24-month period an amount determined by the Secretary but not exceeding 80 percent of such contribution. The Secretary may not reserve any amounts under this subparagraph for any vacant dwelling unit that is vacant because of modernization, reconstruction, or lead-based paint reduction activities.

(B) The Secretary shall deposit any amounts reserved under subparagraph (A) in a separate account established on behalf of the public housing agency, and such amounts shall be available to the agency only for the purpose of carrying out activities in compliance with the vacancy reduction plan of the agency.

(C) If, after the expiration of the 24-month period beginning upon the reservation under subparagraph (A) of amounts for a public housing agency, the Secretary determines that the agency has not made significant progress to comply with the provisions of the vacancy reduction plan of the agency, the amount remaining in the account for the agency established under subparagraph (B) shall be recaptured by the Secretary."

The Department does not intend to implement this portion of the statute at this time, but seeks comment on possible methods of implementing it.

Section-by-Section Analysis

The Department is proposing to establish the Vacancy Reduction Program as new subpart D in 24 CFR part 968, with conforming amendments made as necessary in other sections of

title 24. The following discussion is a section-by-section description of the proposed rule, highlighting areas where the rule would expand on the statutory requirements and indicating areas in which the Department is especially interested in soliciting comment.

Section 968.103 addresses the allocation of funds under section 14 of the 1937 Act. The Department proposes to amend paragraph (c) to account for the new set-aside for the Vacancy Reduction Program. The new language would repeat the statutory scheme for setting aside four percent of the section 14 funds remaining after deducting amounts for emergencies and natural and other disasters. Paragraph (c)(1) would provide that 20 percent of these funds would be available for activities under section 6(j) of the 1927 Act, while the remaining 80 percent would be available for the Vacancy Reduction Program, as would be implemented by this rule. Section 968.103 would also be amended to clarify that the Vacancy Reduction Program does not apply to Indian Housing Authorities (IHAs).

Subpart D of part 968 would be added to implement the Vacancy Reduction Program. Initially, subpart D would encompass §§ 968.401-968.425.

Section 968.401 would state the policy of the Department with respect to achieving high occupancy rates in public housing, in order to ensure maximum use of available housing resources.

Section 968.403 would repeat the statutory definition of PHAs to which the Vacancy Reduction Program is applicable, with some modification. The Department has reviewed the universe of PHAs with vacancy rates exceeding twice the national average, and has developed a list of approximately 400 PHAs meeting that criterion.

Section 968.405 would define terms that are used in subpart D to the extent these terms are not applicable to the remainder of part 968.

Section 968.407 establishes the requirement that eligible PHAs submit a five-year vacancy reduction plan, and specifies the contents of the plan. For purposes of identifying components of a plan that may be identified as eligible for funding, within the limits of appropriated amounts, each submitted plan would be organized in a manner that would facilitate review by the Department. For each action proposed to eliminate vacancies, the plan would include a schedule, which would show the number of vacancies that the PHA expects to eliminate by the end of each

12-month period during the five years of the plan. The number of vacancies projected to be eliminated by 24 months after beginning to receive assistance under the program would be the PHA's vacancy reduction goal, for the purpose of calculating the amounts to be reserved in accordance with § 968.419.

Components of a plan that involve capital improvements to dwelling units would be required to ensure that, after the improvements, the units would meet or exceed the Housing Quality Standards set forth in 24 CFR 882.109, as amended by regulatory requirements concerning lead-based paint hazards.

Section 968.410 would explain the requirement for an on-site assessment of a participating PHA's vacancy situation, including the composition and responsibilities of the assessment teams and the purpose of the assessments. Because of the number of PHAs that would have to be assessed under this program, the possible complexity of some of the assessments, and the statutory ceiling on the funding of program activities, the Department believes that it will not be possible to complete all of the assessments in time to begin funding approved activities in this fiscal year. Therefore, and because the Department wants to make money available as soon as possible for the intended program purposes, assessments will be scheduled on a priority basis.

The Department has sent a survey to PHAs that have been identified as meeting the eligibility criteria for the program (see "Use of Survey to Determine FY 1993 NOFA Threshold Factors," above in this preamble). The responses to this survey or, if necessary, alternative data as described above, will be used to define a universe of vacancy related problems that could feasibly be addressed in a funding round to be completed during FY 1993. At the same time a final rule is published for this program, the Department would publish a NOFA, announcing the available funds and the eligibility and selection criteria.

Meanwhile, as it is preparing the NOFA and final rule for publication, the Department will schedule and begin assessments of those PHAs whose survey responses indicate that they may meet the threshold factors that will be established for the first round of funding competition. (The threshold factors will be based on the survey responses or, if necessary, alternative data, and will be consistent with the statutory parameters for participation in the Vacancy

Reduction Program.) Because the Department will consider the results of the on-site assessment in determining the reasonableness of a vacancy reduction plan, a PHA must have an assessment completed before it may use funds for vacancy reduction activities.

Upon publication of the NOFA, any PHA that has not already been scheduled for an assessment team visit, but believes that the PHA meets the threshold criteria for the first round of funding competition, will be asked to contact the Department immediately. The Department will work with the PHA to schedule an assessment as soon as possible. A PHA that demonstrates that it meets the other eligibility factors and should be funded under the announced selection criteria will not be denied funding because of the lack of a completed assessment. If necessary, the Department will select the PHA during the funding competition, but will not permit the PHA to begin using the funds awarded to it until an assessment has been completed and either the results of the assessment are found to be consistent with the funding decision, or the PHA's vacancy reduction plan has been revised appropriately.

Section 968.413 would establish eligible uses and limitations on the use of funds available for the Vacancy Reduction Program. Paragraphs (a), (b), and (c) echo the statute establishing the program. Paragraph (d) establishes that funding decisions would be through a competitive process, on the basis of priorities to be established by the Department. The threshold factors for any funding round would be determined in a manner that would parallel the scheduling of assessments, as discussed above with regard to § 968.410.

Section 968.425 would list program requirements that would apply to the Vacancy Reduction Program in addition to the requirements specified in other sections of subpart D and § 968.110.

Other Matters

Public Reporting Burden

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). The Department has determined that the following provisions contain information collection requirements.

Submission requirements	Number of respondents*	Number responses per respondent	Total annual responses	Hours per response	Total hours
VRP plans/application	50	1	50	80	4,000
Recordkeeping	50	1	50	2	100
Reporting requirements	50	1	50	4	200
Total Annual Reporting Burden					4,300

* Congress has authorized funding for the Vacancy Reduction Program for two years. HUD estimates that a maximum of 50 agencies will be selected to receive onsite assessments required to receive assistance under the program.

Environmental Review

A finding of no significant impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The finding of no significant impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the office of the Rules Docket Clerk at the above address.

Major Rule

This rule would not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulations issued by the President on February 17, 1981. An analysis of the rule indicates that it would not (1) have an annual effect on the economy of \$100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this proposed rule before publication and by approving it certifies that this rule would not have a significant economic impact on a substantial number of small entities. The rule would implement a statutory program that would provide funding to PHAs for limited activities designed to reduce the number of vacant dwelling units in their inventories.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this proposed rule would not have substantial direct effects on States or their political subdivisions, or the

relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the rule is not subject to review under the Order. The rule would merely implement a statutory program that would provide funding to PHAs for limited activities designed to reduce the number of vacant dwelling units in their inventories.

Executive Order 12606, the Family

The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that this proposed rule would not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. No significant change in existing HUD policies or programs will result from promulgation of this rule, as those policies and programs relate to family concerns.

Regulatory Agenda

This rule was listed as item 1558 in the Department's Semiannual Agenda of Regulations published on April 26, 1993 (58 FR 24382, 24433) in accordance with Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects in 24 CFR Part 968

Grant programs—housing and community development, Loan programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, part 968 of title 24 of the Code of Federal Regulations is proposed to be amended as follows.

PART 968—PUBLIC HOUSING MODERNIZATION

1. The authority citation for part 968 continues to read as follows:

Authority: 42 U.S.C. 1437d and 14371; 42 U.S.C. 3535(d).

2. Section 968.103 is amended by revising paragraph (c) to read as follows:

§ 968.103 Allocation of funds under section 14.

* * * * *

(c) *Set-asides.* After deducting amounts for the reserve for natural and other disasters and for emergencies under paragraph (b) of this section, HUD shall set aside from the funds remaining:

(1) *Regarding vacancy reduction*, an amount equal to 4 percent of those funds, to be further allocated as follows:

(i) Twenty percent of this four percent shall be available only for carrying out activities under section 6(j) of the United States Housing Act of 1937; and

(ii) Eighty percent of this four percent shall be available under the vacancy reduction program (see subpart D of 24 CFR part 968).

2. *Regarding the comprehensive grant program*, no more than five percent for the purpose of providing credits to PHAs that were formerly designated as mod troubled agencies under the Public Housing Management Assessment Program (PHMAP) (see 24 CFR part 901). The purpose of this set-aside is to compensate these PHAs for amounts not allocated by HUD because of a PHA's prior designation as a mod troubled agency.

(3) *Nonapplicability to IHAs.* The Vacancy Reduction Program in subpart D of this part does not apply to IHAs. In addition, because the PHMAP performance indicators under 24 CFR part 901 do not apply to IHAs, these agencies cannot be deemed "mod troubled" for purposes of the CGP and are not eligible for funding under paragraph (c)(1)(i) of this section. Hence, IHAs are not subject to any reduction in funding under section 14(k)(5)(A) of the Act, and IHAs do not participate in the set-aside credits established under paragraph (c)(2) of this section.

3. A new subpart D is added to read as follows:

Subpart D—Vacancy Reduction Program

Sec.
968.401 Purpose.
968.403 Applicability.
968.405 Definitions.
968.407 Vacancy Reduction Plan.

Sec.

- 968.410 Assessments.
 968.413 Funding.
 968.425 Other Program Requirements.

§ 968.401 Purpose.

Section 14(p) of the United States Housing Act of 1937 establishes the Vacancy Reduction Program, in conjunction with statutory provisions on public and Indian housing modernization. It is the policy of the Department that public housing agencies should maximize the use of housing resources, using every reasonable means to achieve and maintain high levels of occupancy by eligible families in PHA-owned or -operated housing.

§ 968.403 Applicability.

(a) *Participation.* A PHA shall participate in the vacancy reduction program under this subpart if:

(1) The PHA has a vacancy rate among dwelling units owned or operated by the PHA that exceeds twice the average vacancy rate among all public housing agencies;

(2) The PHA is designated as a troubled agency under section 6(j) of the Act; or

(3) A receiver has been appointed for the PHA pursuant to section 6(j)(3) of the Act.

(b) *Exclusions.* Units owned or operated by a PHA that are not eligible for funding under section 14 of the Act are excluded from coverage under this subpart. These units shall not be eligible for funding and shall not be used to calculate the eligibility of a PHA under this subpart.

§ 968.405 Definitions.

In addition to the definitions applicable under § 968.105, the following definitions apply to this subpart:

Average vacancy rate means, for purposes of determining eligibility under this subpart, the average vacancy rate for all public housing agencies.

NOFA means Notice of Funding Availability. NOFAs announcing available funding under the program will be published periodically in the *Federal Register*, and will set out the application requirements and selection criteria applicable to a particular round of funding.

Operating subsidy means the annual contribution for operating subsidy made to the PHA by HUD, which is determined in accordance with part 990 of this chapter.

PHA means public housing agency. For purposes of this subpart, the term excludes Indian Housing Authorities.

Troubled PHA means a public housing agency that has been designated as a troubled agency (including mod troubled) under section 6(j) of the United States Housing Act of 1937.

Vacancy or vacant unit means a dwelling unit that is not under an effective lease to an eligible family. An effective lease is a lease under which an eligible family has a right to possession of the unit and is being charged rent.

§ 968.407 Vacancy reduction plan.

(a) *Submission of plan.* Each PHA to which this subpart applies, in accordance with § 968.403, shall submit a vacancy reduction plan. The plan shall contain the elements identified in paragraph (b) of this section, and shall be organized so that each of the elements can be identified, reviewed, and funded separately.

(b) *Contents of plan.* The format of a plan submitted for funding under this program will be defined in NOFAs to be published periodically in the *Federal Register*. Each vacancy reduction plan submitted by a PHA under paragraph (a) of this section shall include statements:

(1) Identifying vacant dwelling units administered by the PHA and explaining the reasons for the vacancies;

(2) Describing the actions to be taken by the PHA during the following five years to eliminate the vacancies. The PHA shall:

(i) State project-specific actions that it is taking or intends to take that will eliminate vacancies, such as modernization, demolition, disposition, modification of occupancy policies, and other physical or management improvements; and

(ii) For each project identified, set out a schedule for completing the actions identified in paragraph (b)(2)(i) of this section and removing the dwelling units from the PHA's inventory of vacant units. For each action, the schedule shall include the number of vacancies that will be eliminated by the end of each 12-month period after the PHA begins to receive assistance under this subpart. The projection of the number of vacancies to be eliminated by the end of the second 12-month period (24 months after the PHA begins to receive assistance) will be used to calculate the amount to be deposited in any reserve account in accordance with § 990.104 of this chapter.

(3) Identifying any impediments that will prevent elimination of the vacancies within the five-year period;

(4) Identifying any vacant units funded for comprehensive modernization, major reconstruction, demolition, or disposition activities;

(5) Identifying any vacant dwelling units that are eligible for comprehensive modernization, major reconstruction, demolition, or disposition, but have not been funded or approved for these activities and are not likely to be funded or approved for at least three years. The statement shall include an estimate of the amount of assistance necessary to complete the comprehensive modernization, major reconstruction, demolition, or disposition of these units;

(6) Identifying any vacant units not identified under paragraphs (b)(4) and (b)(5) of this section. The statement shall include a description of any appropriate activities relating to elimination of the vacancies in these units and an estimate of the amount of assistance necessary to carry out the activities identified under this paragraph;

(7) Setting forth an agenda for implementation of management improvements during the first fiscal year beginning after submission of the plan. The statement should include any management improvements recommended by the assessment team pursuant to § 968.410 and an estimate of the amount of assistance necessary to implement the management improvements; and

(8) Of any other information that the Secretary shall deem appropriate, as provided in the applicable NOFA.

(c) *Housing standards.* To the extent that a plan involves modernization, reconstruction, or rehabilitation activities that have not been funded or approved previously and are not planned to be undertaken using Comprehensive Grant Program funds, the plan must reflect cost estimates that are based on compliance with, at a minimum, the Housing Quality Standards, as set forth in 24 CFR 882.109 and amended by the regulations concerning lead-based paint in public housing in 24 CFR part 35.

§ 968.410 Assessments.

(a) *Requirement.* Each PHA participating in the program under this subpart shall cooperate with an onsite assessment of the vacancy situation of the PHA by an assessment team, whose members will be selected by the Secretary in accordance with paragraph (b) of this section. The Secretary will schedule assessments in a priority order, based on:

(1) The nature and extent of each PHA's vacancy problem, and HUD's goal of achieving maximum reoccupancy using the funds available; and

(2) The availability of assessment teams and the expected level of complexity of the assessments to be scheduled.

(b) *Composition of assessment team.* The assessment team shall include representatives of HUD, an equal number of independent experts knowledgeable with respect to vacancy problems and management issues relating to public housing, and officials of the PHA.

(c) *Scope of assessment.* The assessment team shall assess the vacancy situation of the PHA to determine the causes of the vacancies, including any management deficiencies or modernization activities. At least one member of the assessment team shall consult with residents of the PHA's units regarding the vacancy situation of the PHA. The assessment team shall also examine indicators of the management performance of the PHA relating to vacancy, which shall include consideration of the performance of the PHA as measured by the indicators under paragraphs (A) and (E) of section 6(j)(1) of the Act (implemented by 24 CFR 901.10(b)(1) and 901.10(b)(5)).

(d) *Report of assessment team.* The assessment team shall submit to the PHA and the Secretary written recommendations for management improvements to eliminate or alleviate management deficiencies and for strategies to deal with vacant units. The assessment team may assist the PHA in preparing the vacancy reduction plan under § 968.407, including determining appropriate actions to eliminate vacancies.

§ 968.413 Funding.

(a) *Eligible activities.* Except as provided in paragraph (b) of this section, assistance may be provided under this subpart to PHAs submitting vacancy reduction plans for reasonable costs of the following activities:

(1) Implementing management improvements;

(2) Rehabilitating vacant dwelling units identified in the plan in accordance with § 968.407; and

(3) Carrying out vacancy reduction activities described in the plan in accordance with § 968.407.

(b) *Assistance to troubled PHAs.* Assistance may be provided to a troubled PHA for the activities identified in paragraphs (a)(2) and (a)(3) of this section only if the PHA:

(1) Demonstrates substantial progress in remedying any management deficiencies; or

(2) Provides reasonable assurances that substantial progress will be made to remedy any management deficiencies.

(c) *Costs of assessment teams.* The Secretary may use amounts appropriated for activities under this subpart for any travel, administrative, and other necessary expenses of assessment teams under § 968.410.

(d) *Determination of assistance amounts.* (1) Whether a PHA is to receive assistance, and the amount of any assistance, under this subpart will be determined through a competitive process. A portion of a PHA's plan, rather than the entire plan, may be funded. Each round of funding will be described in a Notice of Funding Availability published in the Federal

Register. Funding rounds will parallel the schedule of assessments determined by the Secretary under § 968.410.

(2) In determining the amount of any assistance to be awarded to a PHA, HUD will consider the adequacy and reasonableness of the PHA's vacancy reduction plan, the capacity of the PHA's management to carry out the proposed activities in a timely and effective manner, the extent to which the proposed activities will improve the PHA's vacancy problem, and any other factors that the Secretary finds to be appropriate for inclusion in a Notice of Funding Availability.

§ 968.425 Other program requirements.

In addition to the program requirements applicable to this subpart under § 968.110, each PHA participating in the vacancy reduction program under this subpart shall certify that any modernization, reconstruction, or rehabilitation activities that are funded under this subpart will bring the affected vacant units into compliance with the Housing Quality Standards, as set forth in 24 CFR 882.109 and amended by the regulations concerning lead-based paint in the public housing at 24 CFR part 35.

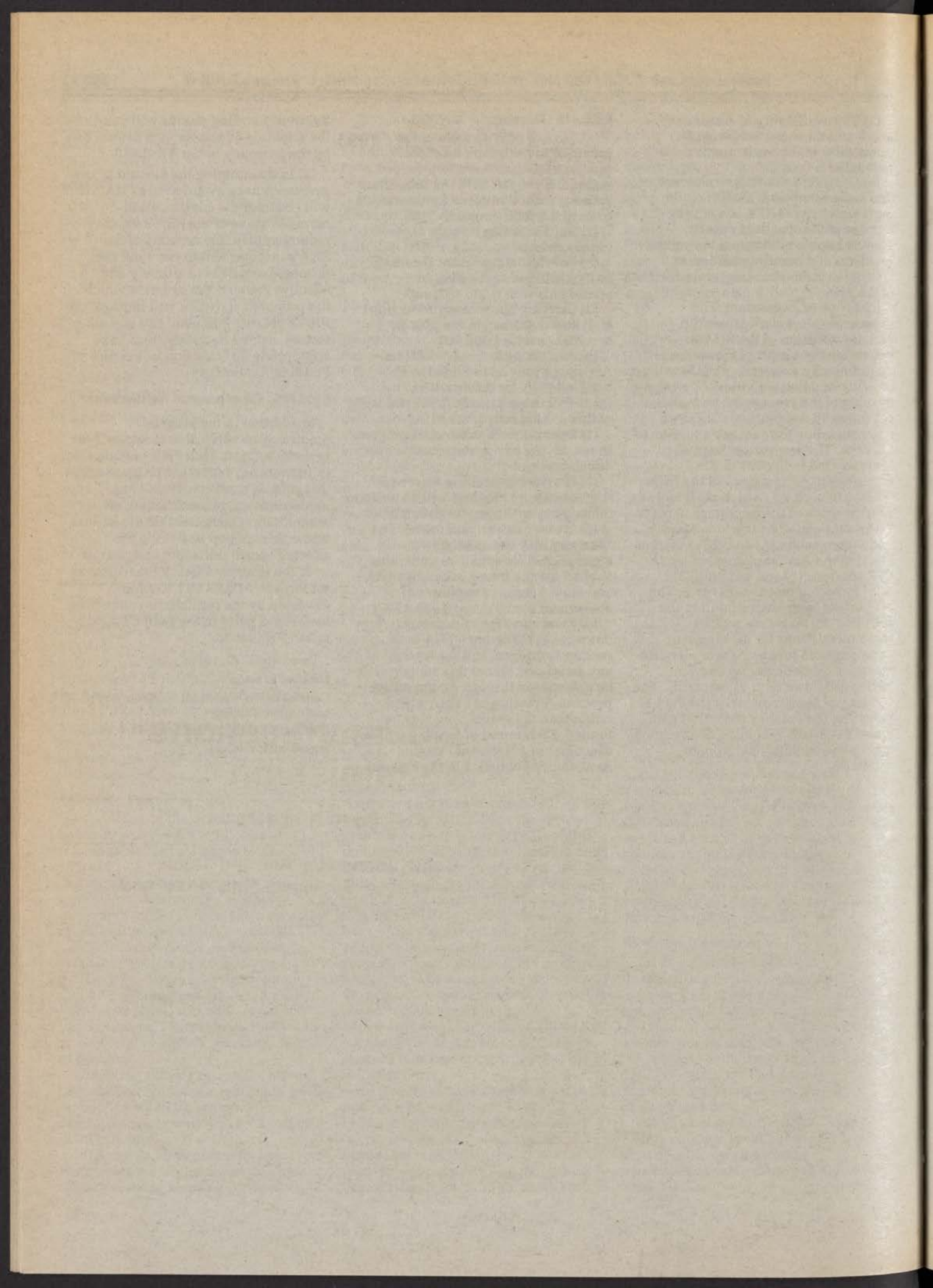
Dated: April 29, 1993.

Michael B. Janis,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 93-12063 Filed 5-20-93; 8:45 am]

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Federal Register

Friday
May 21, 1993

Part V

Federal Communications Commission

47 CFR Parts 0 and 76

Cable Television Act and Cable
Television Systems; Final Rule and
Proposed Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0 and 76

[MM Docket No. 92-266, FCC 93-177]

RIN 3060-AF41

Cable Television Act

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Report and Order and Further Notice of Proposed Rule Making, which amends the Commission's rules to implement sections 623 (subscriber rate regulation), 612 (commercial leased access), and 622(c) (subscriber bill itemization) of the Communications Act of 1934, as amended by the Cable Act of 1992 is divided into two segments. The Further Notice of Proposed Rule Making (Further NPRM) may be found elsewhere in this *Federal Register*. The Further NPRM examines whether the Commission should refine its initial analysis by excluding the rates of cable systems with less than 30 percent penetration from its analysis of systems facing effective competition. The Report and Order summarized here, primarily: (1) Develops a process for identifying those situations where effective competition exists (and rate regulation is thus precluded); (2) establishes the boundaries between local, state, and federal responsibilities; (3) develops procedural and substantive rules to govern the regulation of basic service tier, cable programming related service, and equipment and service rates, and leased channel rates. The rules and procedures adopted in this decision are intended to ensure that subscribers pay reasonable rates for regulated cable services with minimum regulatory and administrative burden on cable entities.

EFFECTIVE DATE: June 21, 1993.

FOR FURTHER INFORMATION CONTACT:

Judy Herman, Scott Roberts, (202) 632-6302, Gina Harrison, (202) 632-7792, or Beverly McKittrick (202) 632-5414, Mass Media Bureau (information concerning certification, complaints, and procedures); Florence Setzer, (202) 653-5940, Office of Plans and Policy; and Jay Atkinson (202) 632-7500, or Patrick Donovan, (202) 632-1295, Common Carrier Bureau (information concerning rates, formulations, and calculations).

SUPPLEMENTARY INFORMATION: This is a synopsis of the Report and Order segment of the Commission's Report and Order and Further Notice of

Proposed Rule Making in MM Docket No. 92-266, FCC 93-177, adopted April 1, 1993, and released May 3, 1993.

The complete text of this Report and Order and Further Notice of Proposed Rule Making is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Service, at (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Synopsis of the Report and Order

1. This Report and Order, as mandated by the 1992 Cable Act, enacts rate regulations for cable systems that, as a first step, provide for significant reductions in current cable rates. The Further NPRM segment of this decision may be found elsewhere in this *Federal Register*. The Further NPRM examines whether the Commission should refine its initial analysis by excluding the rates of cable systems with less than 30 percent penetration from its analysis of systems facing effective competition, even though such systems are defined as systems that face effective competition under sections of the 1992 Cable Act. In a related decision, the Commission issued an Order (58 FR 17530, April 5, 1993, revised at 58 FR 19616, April 15, 1993) freezing regulated cable service rates at the April 5, 1993, level for 120 days, from April 5, 1993, through August 3, 1993. The Notice of Proposed Rule Making (NPRM) in this proceeding may be found at 58 FR 48 (January 4, 1993). A list of parties commenting in response to the NPRM may be found in Appendix B of the full text of the Report and Order and Further Notice of Proposed Rule Making.

2. This Report and Order reflects a comprehensive approach to cable rate regulation that achieves a reasonable balancing of statutory requirements and that will promote the broad policy objectives reflected in the statute. As required by the 1992 Cable Act, it provides for regulation of cable rates by local franchising authorities and the Commission pursuant to jurisdictional and procedural requirements that have been designed to reduce burdens on cable operators, local authorities, the Commission, and consumers.¹ In addition, the requirements will govern permitted rate levels for cable service

and balance the interests of consumers and of cable operators. The required rate reductions should not hinder the ability of the cable industry to continue to provide quality services to consumers. On a going forward basis, price caps for regulated cable systems will reduce administrative burdens and permit the continued growth of services while effectively governing future rate levels.

A. Rate Regulation of Cable Service

(1) Rollback of Cable Service Rates

3. The Report and Order first concludes that Congress was concerned that rates of systems not subject to effective competition reflect undue market power and are unreasonable to the extent they exceed competitive rate levels. This interpretation is buttressed by a Commission survey of cable system rates as of September 30, 1992, which revealed that, on average, rates of systems not subject to effective competition are approximately ten percent higher than rates of comparable systems subject to effective competition, as that term is defined in the statute. The results of this survey, as well as our reading of Congressional intent, thus indicate that the Commission's initial implementation of rate regulation of cable service should and will generally lead to significant reductions from current rate levels for most cable systems.

4. The Commission's rules will enable local franchise authorities to require rates for the basic tier, and the Commission to require rates for cable programming services on the basis of individual complaints, to fall approximately ten percent from their September 30, 1992 levels, unless the operator is already charging rates that are at or under the "competitive" benchmark level or unless the operators can justify a higher rate, based on costs. The Commission estimates that this rollback will affect approximately three-quarters of cable systems, with a total consumer benefit of approximately \$1 billion. Rates of all regulated systems will then be subject to a price cap that will govern the extent to which rates can be raised in the future without a cost-of-service showing. The Commission will also examine systems with rates substantially above the benchmark to determine whether further rate reductions are appropriate, and will seek to refine the benchmark through further industry surveys, which could also result in additional rate reductions.

¹ For a more complete analysis of the Commission's program for minimizing the burden placed on small cable operators and on franchising authorities in less populated franchise areas, see the Final Regulatory Flexibility Analysis Statement in the full text of the decision and summarized below.

(2) Standards and Procedures for Identification of Cable Systems Subject to Effective Competition

a. Application of Effective Competition Tests

5. The Report and Order considers the definition of "effective competition." Cable service and equipment rates may only be regulated under the 1992 Cable Act if the cable system is not subject to effective competition. Under the statute, "effective competition" exists if: (a) Fewer than 30 percent of households in the franchise area subscribe to the cable system; (b) the franchise area is served by at least two unaffiliated multichannel video programming distributors (multichannel distributors) each of which offers comparable programming to at least 50 percent of households in the franchise area, and if the number of households subscribing to programming services offered by multichannel distributors other than the largest multichannel distributor exceeds 15 percent of households in the franchise area; or (c) the franchise authority itself is a multichannel distributor and offers video programming to at least 50 percent of the households in the franchise area.

6. The Report and Order, for purposes of applying the second and third statutory tests for effective competition, construes multichannel distributor generally to include entities that distribute more than one channel of video programming in a franchise area. More specifically, the Commission interprets multichannel distributors as including cable systems, multipoint distribution service (MMDS) operators, satellite master antenna television service (SMATV) operators, direct broadcast satellite (DBS) service operators, television receive-only earth station (TVRO) distributors, and video dialtone service providers.² However, the Commission finds that, in order to qualify as an entity effectively competing with a cable operator, the facilities a multichannel distributor uses cannot be those of the operator. Therefore, leased access providers operating on cable systems will not be treated as multichannel distributors. The Report and Order defers a ruling on whether a multiplexed broadcast signal qualifies a broadcaster as multichannel distributor until the question can be considered under more concrete circumstances, and also finds it too early in the development of local

multipoint distribution service (LMDS) to conclude whether LMDS providers should be treated as multichannel distributors for purposes of the effective competition test.

7. Also, for purposes of applying the three statutory tests for effective competition, the Report and Order clarifies that a multichannel distributor's service is offered in a franchise area when the service is both technically and actually available, with no regulatory, technical, or other impediments to households taking service. Service will be deemed technically available when the multichannel distributor is physically able to deliver service to a household wishing to subscribe, with only minimal additional investment by the distributor, if necessary. The nature of such additional investment by the distributor will be controlling. Specifically, if the additional investment is of a community nature or is necessary to serve an entire neighborhood or community, the service will be held to be not technically available. On the other hand, if the additional investment is necessary to serve only a single subscriber or a few subscribers (e.g., a low power signal booster), the service will be considered technically available. A service will be viewed as actually available if subscribers in the franchise area are reasonably aware through marketing efforts that the service is available. The full text of the Report and Order discusses in greater detail how the technical and actual availability tests apply to various multichannel distributors.

8. The Commission also interprets "household" for purposes of implementing the three statutory tests for effective competition. Each separately billed or billable customer will be counted as a household subscribing to or being offered video programming services, except that individual residences of multiple dwelling units will be treated as separate households. The Report and Order further concludes that, for purposes of applying the 15 percent threshold within the second statutory test for effective competition, the subscribers of alternative multichannel distributors should be determined on a cumulative basis. However, only those multichannel distributors that offer programming to at least 50 percent of households in the franchise area will be included in the 15 percent cumulative measurement.

9. The Report and Order determines that a multichannel distributor will be deemed to offer "comparable programming" to that provided by a

cable system if it offers at least twelve channels of video programming, including at least one nonbroadcast channel.

b. Finding of Effective Competition

10. The Report and Order next considers the Commission's statutory mandate to "find" that a cable system is not subject to effective competition before authorizing rate regulation. The Report and Order finds that, for purposes of implementing rate regulation by local franchising authorities, cable operators will be presumed not to be subject to effective competition. Franchising authorities may rely on this presumption when filing a certification to regulate basic rates with the Commission, unless they have knowledge to the contrary. The cable operator will then have the burden of rebutting this presumption with evidence demonstrating that effective competition does in fact exist.

11. In order to ensure that cable operators have access to information necessary to mount a meaningful challenge to the presumption of no effective competition, the Report and Order requires that competitors respond, within 15 days to requests from cable operators for relevant information if such information is not otherwise available. Responses by alternative distributors to requests for information from cable operators may be limited to the numerical totals needed to calculate the distributor's reach and penetration in the franchise area. The Commission plans to initiate a rulemaking shortly proposing a requirement that competitors file with the Commission annual registration statements containing such data.

12. The Report and Order declines to adopt the NPRM's proposal that, as in basic service regulation, a determination of effective competition for cable programming services, subject to regulation by the Commission, be made on a system-wide basis where a single system services more than one franchise area. The Commission is concerned that regulation on a system-wide basis might have the effect of merging for regulatory purposes competitive and non-competitive franchise area. Thus, the Report and Order adopts a franchise-area approach to determining effective competition for cable programming service complaints.

(3) Regulation of the Basic Service Tier

a. Assertion of Jurisdiction Over Basic Service and Equipment Rates

13. The Report and Order next discusses several issues pertaining to

² One exception is that a joint venture between a telephone company and a cable system located in the same franchise area to offer video dialtone service will not be considered effective competition to that incumbent system.

regulation of the basic cable service tier. It first reviews the matter of jurisdiction over basic rate regulation. Briefly, the 1992 Cable Act requires local authorities wishing to regulate basic service and equipment rates to certify in writing to the Commission that: (1) Their rate regulations will be consistent with the rate regulations prescribed by the Commission; (2) they have the legal authority to adopt, and the personnel to administer, rate regulations; and (3) their procedural rules provide an opportunity for consideration of the views of interested parties. Such certification filed with the Commission by a franchising authority will become effective 30 days after filing unless the Commission finds that the franchising authority has not met one of the three criteria above. If the Commission disapproves the certification, after notice and a reasonable opportunity for the authority to comment, the franchising authority will be notified of any revisions or modifications necessary to gain approval. If certification is disapproved or revoked, the Commission will exercise the franchise authority's regulatory jurisdiction until the authority becomes qualified by filing a new certification that meets the requirements set forth above. Such new certifications will become effective upon approval by the Commission, which approval (or disapproval) will be issued within 90 days of filing.

14. The Report and Order analyzes the division of rate regulation responsibilities between the Commission and local governments. The Commission is concerned about situations where a franchising authority chooses not to file a certification because it knows that it cannot meet certification standards, particularly that it does not have the resources to administer rate regulation or the legal authority to act, but nevertheless believes that rates in the franchise area should be regulated. Where a local franchising authority notifies the Commission that it lacks the legal authority to regulate basic service rates, the Commission will assume jurisdiction until the local government secures such authority. Local governments requesting that the Commission assume jurisdiction on this ground should submit with their request a statement detailing the nature of the legal infirmity. If an otherwise qualified franchising authority does not meet the other certification requirements or its procedural regulations do not provide interested parties an opportunity to comment as provided in section 623(a)(3)(C) of the 1992 Cable Act, the

Commission will permit the authority an opportunity to cure the defect. As required by section 623(a)(6) of the 1992 Cable Act, the Commission will assume jurisdiction until the franchising authority cures the defect.

15. If a franchising authority requests that the Commission assume jurisdiction over basic tier rates because the franchising authority lacks sufficient resources, it must demonstrate why its franchise fees are inadequate to provide the necessary resources.

16. The Commission will not regulate basic rates where a local government voluntarily chooses not to seek certification because it is satisfied with the rates charged by the local cable operator.

17. All provisions in cable franchising agreements that prohibit rate regulation by franchise authorities are preempted by the 1992 Cable Act. Where rate regulation is barred at the state level, i.e., where neither the state nor the locality may regulate rates, the franchising authority will be considered to lack the legal authority to regulate cable rates, and the Commission will assume jurisdiction over basic service and equipment rates until the franchising authority can be certified. State laws, however, that prohibit local governments, but not state governments, from engaging in rate regulation are not preempted. In these cases, basic rate regulation will be conducted at the state level. In a related matter, the Massachusetts Community Antenna Television Commission (MCATC) seeks clarification of the term "franchising authority," for rate regulation purposes, and specifically, asks whether MCATA would be considered a franchising authority as authorized by the 1992 Cable Act. In response, the Report and Order cites the definition of "franchising authority" as "any governmental entity empowered by Federal, State, or local law to grant a franchise." In Massachusetts' case, this entity is MCATC.

18. Franchising authorities intending to regulate basic rates must first submit a certification form with the Commission. The form, which will be available from the Commission, is published below. Franchising authorities will be required to serve copies of their certification requests on cable operators on or before the date the certification form is filed with the Commission.

19. The Commission will permit but not require two or more communities served by the same cable system to file a joint certification and exercise joint regulatory jurisdiction. Joint

certification for communities served by different systems will also be permitted.

20. Because of the statutory requirement that franchising authority certifications become effective within 30 days of filing unless the Commission finds the certifications requirements are not met, operators will not be afforded an opportunity to contest any of the grounds for certification before certification. Therefore, challenges to certification will be allowed only after the fact, as discussed below. Operators will also not have an opportunity to contest a finding of effective competition at the Commission until after a franchising authority is certified. However, cable operators may challenge a finding of effective competition before rate regulation can be imposed upon them.

21. The certification process will work as follows. Franchising authorities may begin filing certifications with the Commission on June 21, 1993 although there is no deadline by which a franchising authority must seek certification. The franchising authority must use the Commission's certification form and must certify that it has served a copy of the certification request on the cable operator. The franchising authority must either send the certification form by registered mail, "return receipt requested," or hand-deliver the form to the Commission and obtain a date-stamped copy. Franchising authorities will not be notified when their certification becomes effective. The certification will take effect 30 days after it is filed unless the Commission denies certification within that period. The franchising authority will then have 120 days in which to adopt regulations consistent with the Commission's regulations and, if such rules are not already in place, to promulgate rules providing a reasonable opportunity for consideration of the views of interested parties. The franchising authority must notify the cable operator that it has been certified and has adopted appropriate regulations before it can begin regulating rates and, if necessary, ordering refunds.

22. Cable operators may file a petition for reconsideration of the franchising authority's certification, subject to normal Commission requirements and procedures, including the statutory requirement that such a petition be filed within 30 days. The 30-day period will begin to run from the 30th day after the certification was filed with the Commission. A petition for revocation, however, may be filed at any time after the expiration of the reconsideration period. If the petition for reconsideration challenges the finding

that effective competition is absent, rate regulation will be automatically stayed until resolution of the petition, subject to refund liability back to the date the petition was filed if the Commission subsequently determines that there is no effective competition.

23. Challenges to franchising authority certifications on other grounds may also be raised by a petition for reconsideration, if filed within 30 days, or later by a petition for revocation. The Commission will not impose an automatic stay of rate regulation when such challenges are made. However, the party filing the petition may request a stay of rate regulation. If the Commission receives a large volume of petitions for reconsideration of certification requests, the effective competition challenges will be reviewed first. The remaining petitions will then be processed generally on the basis of the size of the community, the largest communities being considered first. Other factors, such as date of filing, however, may also be a factor in determining which challenges will receive priority. Smaller communities in need of immediate relief may petition the Commission for expedited consideration.

24. Where the Commission denies a certification on other than effective competition grounds, the franchising authority will be notified and informed of any modifications that must be made in order to obtain Commission approval. If, after this opportunity to cure, the authority still fails to meet the certification requirements, its certification will be denied and the Commission will regulate basic service rates. Cable operators and franchising authorities may appeal the Commission's decision on reconsideration, subject to normal procedures (47 CFR 1.101-1.120).

25. A franchising authority's certification will be revoked if, after a reasonable opportunity to comment, it is determined that state and local laws and regulations do not conform to the Commission's rate regulations governing cable rates. A franchising authority's certification may also be revoked if it fails to fulfill one of the three conditions for certification set forth above. However, in the latter cases, the Commission will first remand to the franchising authority with directions on how defects should be corrected. Resubmissions will be considered on an expedited basis. In all cases of revocation, the Commission will assume jurisdiction over basic service rates until an authority becomes recertified. While a petition for revocation on a basis other than the presence of effective

competition is pending, however, and absent grant of a stay, the franchising authority may continue to regulate the basic service rates of its franchisees.

26. A petitioner for revocation against a franchising authority must serve a copy of its petition on the franchising authority, and the petition must contain a statement that such service was made. Franchising authorities will be allowed 30 days to file oppositions to such petitions, and 15 days will be allowed for replies.

27. A cable operator once not subject to effective competition that later become subject to effective competition, may petition the franchising authority to change its regulatory status. Oppositions must be filed within 15 days of the time public notice of the petition is given. Oppositions must be served on the operator, who bears the burden of proving the existence of effective competition. Franchising authorities must provide operators with seven days to reply, and must reach a decision on such petitions within 30 days after the pleading cycle closes. That decision must be publicly released. Franchising authorities further must submit to the Commission within ten days any decision changing the regulatory status of the cable system. Such decisions will become final 30 days from the public notice of the decision, unless the Commission receives a petition or other pleading opposing it, or decides on its own motion that the decision is defective. If the initial determination that effective competition exists is upheld, the franchising authority and the Commission would cease regulating basic cable service rates. Operators denied a change in status by a franchising authority would be entitled to seek review of that finding by the Commission, by means of a petition for revocation as discussed above. In situations where a franchising authority has not been certified, an operator may petition the Commission directly for a change in status, and the same time period for filing pleadings as set forth above for local franchising authorities will apply.

28. In order to expedite a finding of changed status, a joint statement may also be submitted by the cable operator and a franchising authority stating that effective competition exists. The joint statement must state which of the three statutory tests for effective competition has been met and explain how the test has been satisfied. The statement must also be released to the public by the franchising authority on or before the day it is submitted to the Commission. Such joint statements will become final decisions within 30 days of filing with

the Commission, unless challenged by an interested party.

29. Upon denial or revocation of certification, the Commission will notify the local franchising authority and the cable operator of the action, and inform them that the Commission is assuming jurisdiction over regulation of basic service rates. Cable operators will be required to file their basic rate schedule with the Commission and with the local franchising authority, on the appropriate Commission form, within 30 days of notification. Basic rate filings for existing rates or proposed rate increases for services and equipment (including increases in the average channel charge that result from reductions in the number of channels in a tier) must calculate relevant benchmarks, caps, and permitted adjustment factors as indicated on the appropriate FCC form. Cable operators with existing or proposed rates above the permitted per channel rate must submit a cost-of-service showing sufficient to support a finding that the rates are reasonable.

30. Basic rate filing must be served on the franchising authority on or before the day they are filed with the commission. Such filings will be placed on public notice by the Commission. Filings proposing rates or rate increases within the Commission's reasonableness standard must be made on 30-days notice and can become effective 30 days after public notice of them is given if they are unopposed, unless the Commission issues an order deferring their effective date or denying them.

31. Filings proposing rates above the presumptively reasonable level must be made on 90-days notice and be accompanied by a cost-of-service showing. Petitions opposing filings which propose a rate or rate increase that falls under the presumptively reasonable level must be filed within 15 days after public notice of the filing, and must be served on the cable operator. Oppositions will be due five days after filing of the petition. Petitions opposing filings which propose rates above the presumptively reasonable level should be filed within 30 days after public notice of the rate filing, with oppositions due in ten days after petitions are filed. Although the Commission expects that filings proposing a rate above the presumptively reasonable level can be reviewed within the same 180-day constraint imposed on franchising authorities, extraordinary circumstances, such as the volume of cases, could prevent resolution of all basic rate cases which come to the

Commission within the same 180-day deadline.

32. The Commission will assume basic rate jurisdiction until the franchising authority files a "petition for recertification" and the petition is subsequently approved. The petition should be clearly marked as a "petition for recertification," should contain a clear showing, supported by either objectively verifiable data or affidavit reasons for revocation or denial no longer pertain, and must attach a copy of the earlier decision denying or revoking the original certification. The new certification request must be served on the cable operator and any interested party that participated in the proceeding denying or revoking the original certification. Any party wishing to oppose the new certification request must do so within 15 days after the request is filed. The authority may reply within seven days.

b. Implementation and Enforcement of Basic Tier Rates

33. *Review by Local Franchising Authorities.* The cable operator will then have 30 days to file its schedule of rates for the basic service tier and accompanying equipment with the franchising authority.

34. A two-step approach will be used regarding franchise authority review of a cable operator's current basic service rates and proposed rate increases. Under the first step, if a franchising authority is able to determine that a cable operator's current rates for the basic service tier and accompanying equipment are reasonable under the Commission's rate standards, the rates will go into effect 30 days after filing with the franchising authority. Similarly, if the franchising authority finds that a proposed rate increase is reasonable under the Commission's rules, the increase will go into effect 30 days after filing with the franchising authority.

35. Under the second step, if the franchising authority is unable to determine whether the proposed rates are reasonable, based on the material before it, or if the cable operator has submitted a cost-of-service showing seeking to justify a rate above the reasonable level, the franchising authority may toll the effective date of the proposed rates for 90 additional days if necessary to ensure that a proposed rate is within the Commission's reasonableness standard. It may also toll the effective date of the proposed rates for 150 days to evaluate a cost-of-service showing seeking to justify a rate above the presumptively reasonable level.

36. To toll the effective date of the proposed rates, the franchising authority must issue a brief order, within the initial 30-day period, explaining that the franchising authority needs additional time to review the proposed rates. If the franchising authority is unable to determine whether the proposed rate complies with the Commission's reasonable rate standard, then the order tolling the effective date of the proposed rate should explain why the franchising authority could not make such a determination. The order should also provide the cable operator an opportunity to cure any deficiencies in its original filing. If the franchising authority fails to take action on proposed rates within these additional 90 or 150 days, the proposed rates will go into effect, subject to subsequent refund orders. If a franchise authority wishes to retain the right to order refunds, it must, at minimum, issue an order stating that it will need additional time to reach a decision on the merits of the proposed rates, and request that the operator keep accurate account of all amounts received by reason of the proposed rate and on whose behalf such amounts are paid.

37. To assure that interested parties have an adequate opportunity to comment, cable operators will be required to notify subscribers in writing of a proposed increase in the rates for the basic service tier and accompanying equipment at approximately the same time it notifies the franchising authority, i.e., at the billing cycle that is at least 30 days before any proposed increase is effective. Cable operators will not, however, be required to publish a notice of a proposed rate increase in newspapers or provide information to subscribers regarding how to lodge complaints. Operators must include in their subscriber notifications the name and address of the local franchising authority, so that the requisite information for public participation in ratemaking proceedings can be readily obtained by a subscriber.

38. The rules adopted leave franchising authorities flexibility regarding the manner in which interested parties will be permitted to participate meaningfully in rate proceedings. In fact, many jurisdictions already have rules governing pleading cycles and public participation in such proceedings. However, any such rules must provide a reasonable opportunity for consideration of the views of interested parties, and should take into account the time periods that franchising authorities have to act on either initial review of basic cable rates or requests for increases.

39. A franchising authority will be required to issue a written decision whenever it disapproves either an initial basic cable rate or a request for an increase in whole or in part, or approves a proposed rate over the objections of interested parties. However, an authority is not required to issue a written decision if it is approving a basic cable rate or rate increase in its entirety and there have been no objections. Franchising authorities can also decide for themselves whether and when to conduct formal or informal hearings as long as they act on rate cases within the prescribed time periods established above, and provide interested parties with notice and a meaningful opportunity to participate. Thus, no rule is adopted to govern this issue.

40. The Report and Order further establishes that the burden of proof should be on the cable operator to demonstrate that its initial rates for the basic service tier and accompanying equipment, or proposed increases in these rates, comply with section 623 of the 1992 Cable Act and the Commission's implementing regulations. If an initial rate or a proposed increase is presumptively reasonable under the Commission's standards, then the cable operator will merely have to show how the rate at issue meets the criteria. However, if an initial rate or a proposed increase exceeds the presumptively reasonable level, then the cable operator will have to make a cost-of-service showing to justify the proposed rate. The filing of existing rates in excess of the Commission's presumptively reasonable level for the basic service tier, whether or not accompanied by a cost-of-service showing could result in a prospective rate reduction or a rate prescription.

41. Pursuant to the new rules, franchising authorities have the right to collect information, including proprietary information, to make a rate determination in those cases where operators have submitted initial rates or have proposed increases that exceed the Commission's presumptively reasonable level, as defined by the Commission's regulations. In cases where initial or proposed rates comply with the Commission's reasonableness standard, however, requests for additional information should relate to having an operator properly document that its prices are in accord with that standard. The Commission will require, to protect the confidentiality of certain business information, that the franchising authorities apply the same procedures that the Commission will apply regarding information submitted to the

Commission in the cable programming services complaint process. (See 47 CFR 0.459.)

42. Regarding automatic adjustments, the Report and order states that certain price changes beyond a cable operator's control (discussed further *infra*) can automatically be passed through to subscribers in addition to the reasonable rate. However, a cable operator must notify a franchising authority 30 days in advance of a rate increase based on automatic adjustment items, and the authority must pass on them within these 30 days.

43. *Remedies and Appeals.* The first remedy available to a franchising authority in conjunction with an initial review of rates for the basic service tier and accompanying equipment is a prospective rate reduction. Under this remedy, after a review of basic service tier and equipment rates, if a franchising authority determines that the rates for the basic service tier or equipment exceed permitted levels, that franchising authority may order a prospective reduction of those rates to bring them into compliance with the Commission's rate standards. In addition, reductions below the permitted basic service tier rate may be ordered if a cable operator opts for a cost-of-service showing.

44. A second remedy, a rate prescription may also be utilized. Under this remedy, a franchising authority may prescribe a reasonable rate in place of a proposed unreasonable rate. The prescribed rate may not be lower than the Commission's permitted rate, unless the operator has sought to justify the proposed basic service tier rate by a cost-of-service showing. In such a case, a franchising authority could reduce an operator's rate for the basic service tier to a level below the Commission's permitted rate level, if indicated by cost-of-service showing.

45. The third remedy the Commission considers is whether and when a franchising authority can order refunds to subscribers. The Commission, while concluding that franchising authorities will be able to order refunds, stresses that this is not an unlimited power, but should be used mainly in three situations. First, if a cable operator fails to comply with a rate decision and continues to charge unreasonable rates, the authority can order refunds back to the effective date of its rate order. Second, as part of its initial review of existing cable rates, an authority has the discretion to order refunds for unreasonable rates that exceed the Commission's permitted levels absent a persuasive cost-of-service showing by the operator. The permissible refund period ends on the date the operator

implements a prospective rate reduction or begins charging a prescribed rate and begins either at the effective date of our rules on this matter or one year, whichever is a shorter period. Third, if an authority has tolled a proposed rate increase for 90 or 150 additional days and has not completed its review by the end of these time periods, the proposed rates can go into effect subject to a refund if portions of the rates are later found to be unreasonable. The refund period will be calculated from the date of the accounting order to the point a prospective rate reduction is issued, and then back in time from the date of the accounting order to the effective date of our rules, or to the point where the total refund period would equal one year, whichever is less.

46. A franchising authority must afford cable operators due process by providing notice and an opportunity to participate before ordering refunds. Franchising authorities, in administering the payments of refunds, should follow procedures analogous to those which the Commission is adopting for refunds for cable programming services. Refunds could include interest, computed at the applicable published Internal Revenue Service rates for tax refunds and additional tax payments.

47. While a franchising authority may have such remedies available under local law, the Commission does not believe it necessary for franchising authorities to use punitive sanctions such as fines or forfeitures for violations of rate regulations. Therefore, the Commission preempts local laws to the extent that they permit the use of such sanctions merely upon a determination that either existing rates on a request for an increase is unreasonable.

48. Once a franchising authority issues a rate decision, interested parties, including the operator, may wish to appeal it. The Commission is the sole forum for appeals of local decisions on rates for the basic service tier and accompanying equipment involving whether or not a franchising authority has acted consistently with the 1992 Cable Act or our implementing rules. Appeals must be filed within 30 days of the date a franchising authority publicly releases the text of its rate decision as computed under 47 CFR 1.4(b). Oppositions can be filed within 15 days after the appeal is filed and must be served on the party appealing the rate decision. Replies can be filed within seven days after the last day for filing oppositions and shall be served on the parties to the proceeding. Appeals of local rate decisions that do not depend upon determining whether a franchising

authority has acted consistently with the 1992 Cable Act or the Commission's appeal could be heard in state or local courts.

49. *Notification of Availability of Basic Service.* Cable operators must notify subscribers of the availability of basic tier service within 90 days or three billing cycles from the effective date of the rules adopted in this proceeding and notify new subscribers at the time of installation. To the extent that this notification requirement conflicts with local franchise agreements or rules, the commission is preempting local regulations. Operators who can demonstrate that they have satisfied the notification requirement in the 12 months prior to the effective date of our cable regulations will be exempt from this requirement as it pertains to current subscribers, provided that their notice conforms to the format and content requirements of our rules. Such notification must be included with the cable bill, so that it is not lost in promotional material. However, it is not required that this notice be included in all sales literature prior to installation and hookup.

50. Notification of basic service tier availability must state not only that a basic tier service is available, but must also set forth the price of the service and list the services that are included. This notification should be in a written form which "clearly and conspicuously" informs the subscriber of the above information. Finally, although cable companies will not be required to maintain copies of such notifications in their public inspection files, the cable company will bear the burden of providing that it is in compliance, if challenged.

c. Regulation of Basic Service Tier and Equipment Rates

51. *Components of the Basic Service Tier Subject to Rate Regulation.* The 1992 Cable Act requires cable operators to offer subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. The basic tier must include, at a minimum, all must-carry signals, all PEG channels required by the franchising authority to be carried on the basic tier, and all domestic television broadcast signals other than superstations, whether carried pursuant to mandatory carriage provisions or a retransmission consent agreement. The cable operator may add other channels of programming to its basic tier at its discretion. The statutory definition preempts provisions of franchise agreements that require

additional services to be carried on the basic tier.

52. In examining the language of 47 U.S.C. 543(b)(7)(A), and the 1992 Cable Act's legislative history, the Commission finds that subscribers must purchase the basic service tier in order to gain access to any video programming, included that offered on a per-program or per-channel basis. However, purchase of the basic tier is not required in order to buy non-video programming services such as digital cable radio and personal communications services.

53. The *Report and Order* determines that cable operators subject to rate regulation may have only one "basic" tier which must be unbundled from all other tiers. Multiple basic tiers will not be permitted for rate regulation purposes.

54. *Regulations Governing Rates of the Basic Service Tier.* The 1992 Cable Act requires the Commission to establish regulations that will assure reasonable rates for the basic service tier, but does not explicitly define "reasonable." Instead, it requires that regulations be designed to achieve statutory goals and take into account the enumerated statutory factors. We conclude that the statute does not require the Commission to place primary weight on any of the statutory factors governing rates for the basic service tier, but that we may do so as part of a reasoned balancing of statutory requirements and factors. Based on statutory findings and goals, as well as results from the Commission's industry survey, the Commission determines that under the statute we can, and should, place primary weight on the rates of systems subject to effective competition. Accordingly, the Commission's regulations governing rates for the basic service tier are aimed toward achieving rate levels that are closer to rates of systems subject to effective competition.

55. The *Report and Order* examines the relative merits of a benchmarking versus a cost-of-service approach as the primary method for regulating rates for the basic service tier. The Commission concludes a benchmark will be incorporated into the framework for regulation of basic service tier rates because a benchmark formula can protect consumers from excessive rates and keep the costs of administration and compliance low. The Commission's rules, however, allow cable operators to use cost-of-service principles to justify rates higher than permitted by the system's benchmark.

56. Local authorities may not elect cost-of-service regulation as their primary mode of regulation of the basic

service tier, because such an approach would be less consistent with Congressional intent than benchmark regulation. Therefore, local governments must apply the benchmark system of rate regulation.

57. The Commission declines to adopt a regulatory framework for cable service that seeks lower per-channel rates for the basic service tier in comparison to higher tiers because any supposed advantages in producing a low priced basic tier would be eviscerated by the incentives for cable operators to reduce offerings on the basic service tier. Accordingly, the Commission establishes a tier-neutral framework for rate regulation that applies the same standards of reasonableness to the basic service tier and to cable programming services.

58. The *Report and Order* discusses the various benchmark alternatives proposed in the NPRM. The Commission perceives a Congressional concern reflected in the Cable Act of 1992 that current rates for cable service result, in part, from an ability to raise rates to unreasonable levels because of a lack of effective competition, and that rates are unreasonable to the extent they exceed competitive levels. This concern is confirmed by the results of the Commission's industry survey, which finds the rates of systems not subject to effective competition exceed competitive levels by approximately 10 percent on an average industry basis. Thus, the Commission concludes that the reasonableness of rates of the basic service tier shall be determined by reference to the rates of systems subject to effective competition. The *Report and Order*, therefore, adopts a benchmark formula based on the average September 30, 1992, rates of systems subject to effective competition. In general, the formula will be used to calculate the rate that the average cable system with a given number of channels, subscribers and satellite-delivered signals would charge if it faced effective competition. The Commission's industry survey does not provide a sufficient basis for identifying other system characteristics that would warrant application of different rate structures. As the Commission gains more experience with cable rate regulation, it may reevaluate this conclusion. This competitive benchmark is expressed as a rate per channel. The Commission adopts and provides a table of benchmark rates denied from the formula, for systems with particular numbers of channels, subscribers, and satellite signals.

59. The Commission concludes that it will consider reasonable a per channel rate for the basic service tier that is at,

or below, the benchmark level when a system becomes subject to regulation. Where a cable system is not charging rates that are above its competitive benchmark level, the Commission can assume that its rates do not reflect undue market power, even in the absence of effective competition. Therefore, the initial regulated rate for such a system shall be its rate in effect on the date the system becomes subject to regulation, regardless of the amount that rate is below the benchmark.

60. Rates exceeding the applicable benchmark at the time regulation begins are presumptively unreasonable, because they exceed the average rate charged by systems subject to effective competition with a given number of channels, subscribers and satellite-delivered signals. Some systems with rates at the onset of regulation that are above the benchmark may have had rates that were below their benchmark level on September 30, 1992. Such systems are not subject to a rollback from levels in effect on September 30 because the rates were presumptively reasonable on that date. These systems must reduce rates from existing levels to the benchmark, but they may maintain increases from September 30, 1992 levels up to the benchmark, and adjust rates to reflect inflation.

61. For a system with basic tier rates above the benchmark both when it becomes subject to regulation and on September 30, 1992, the maximum permitted rate will be the September 30, 1992 rates reduced up to 10 percent, but no lower than the benchmark rate for that system.

62. Instead of requiring all systems to now reduce rates to benchmark levels, the Commission will take the following steps to address systems with September 30, 1992, rates more than 10 percent above their benchmark level: (1) Conduct further surveys to refine the competitive benchmark, and further assess the competitive rate differential between systems subject, and not subject, to effective competition, and to gather cost information; (2) examine in the Further NPRM whether the Commission can, or should, exclude from competitive benchmark calculations, systems with less than 30 percent penetration; and (3) carefully scrutinize, through cost investigations, rates of cable systems that exceed the benchmark by significant amounts even after the 10 percent rollback.

63. The foregoing determinations define the initial permitted rate for the basic service tier when the system becomes subject to regulation. Those systems with initial rates based on adjusted September 30, 1992 rates, may

further adjust those rates to reflect inflation occurring between September 30, 1992 and the time when regulation of the basic service tier begins. They must also apply an efficiency adjustment, specified in the rules, to those rates if the total number of subscribers or channels on the system changes between September 30, 1992 and the time of regulation. After those adjustments are made, the initial permitted rate for the basic service tier will then be capped as described in the next section.

64. The benchmark formula is set forth as explained in appendix E of the full text of the Report and Order and Further Notice of Proposed Rule Making. However, to assist operators and regulators in applying the formula, and to ensure its uniform application, the Commission has developed FCC Form 393, that sets forth precisely how the formula is to be used in calculating the permitted rate for a regulated cable system. This form must be used when systems submit their basic rate schedule for review to local franchise authorities (or the Commission, where it is regulating basic rates). Similarly, the form must be used by cable operators when responding to subscriber complaints filed at the Commission concerning cable programming service rates.

65. Having applied the benchmark formula to determine a given system's competitive per channel rate, the system must then calculate its current per channel rate using the same methodology, so that it may be compared to the competitive benchmark. Form 393 sets forth the precise computations that should be made to ascertain the system's rate per channel as of the initial date of regulation.

66. The Commission adopts price cap requirements to govern rate increases for the basic service tier once the initial regulated per channel rate has been determined. A price cap approach is an effective alternative to cost-of-service regulation in other regulated areas, and is consistent with the Commission's statutory mandate. At the same time, the Commission has provided for adjustments to the price cap, based on inflation and other factors beyond an operator's control, to assure that the cap does not unduly restrict cable operators' ability to recover costs. The possibility of a cost-of-service showing will also assure that cable operators can recover appropriate costs of service. The price cap rate for the basic service tier will be expressed as a rate per channel to facilitate rate calculations and review.

67. Those systems with rates in effect on the date regulation begins that are below the benchmark, as calculated pursuant to FCC Form 393, are not subject to rollbacks, but will nonetheless have their rates capped at the level in effect on that date. Rate increases for such systems will then be subject to price caps on a going-forward basis, unless a cable system justifies higher rates based on cost-of-service principles.

68. The Report and Order also establishes an annual adjustment index that permits changes in each system's cap for the basic service tier based on general changes in the cost of doing business. The Commission adopts the GNP fixed weight price index (GNP-PI) as the annual adjustment index for the cap for basic service tier rates. Under these rules, cable operators may adjust the capped base per channel rate for the basic service tier annually after the final GNP-PI is published by the Department of Commerce for the preceding year. This approach represents the best balance between the administrative burdens imposed by more frequent rate adjustments and the need to permit prompt adjustments for inflation.

69. There are several categories of costs that cable operators may "pass through" to subscribers without a cost-of-service showing, even if resulting rates exceed the applicable price cap. (For cost reductions in these categories, however, cable operators must make rate reductions to reflect such savings.) The Commission first considers retransmission consent fees, and concludes that such costs should be treated as external to the benchmark. However, the Commission is concerned that external treatment during the initial period in which cable operators and broadcasters will establish retransmission consent agreements may unduly skew incentives away from fair bargaining for reasonable retransmission fees. The Commission believes that a delay in onset of external treatment for retransmission consent fees will serve to protect subscribers from any precipitous increase in rates after October 6, 1993. Hence, the Commission will accord retransmission consent costs external treatment only after October 6, 1994, and only for new or additional fees beyond those already in effect on October 6, 1994. The Commission will also monitor initial retransmission consent agreements and their potential impact on subscribers, and may reexamine external treatment if it appears that retransmission consent fees have an unwarranted impact on subscribers.

70. The Commission will also treat programming costs other than retransmission consent, as external to the benchmark. We will monitor the impact of external treatment of programming cost increases and consider making programming costs subject to the cap if it appears that this treatment is diserving subscribers. The Commission's accounting and cost allocation requirements will determine the share of programming costs to be allocated to the basic service tier. The Report and Order also limits external treatment of programming costs for programming obtained from affiliated entities to the percentage change in the admissions component of the Consumer Price Index between the effective date of the price increase and the date the previous price took effect.

71. The Commission also excludes from the cap, taxes, franchise fees, and the costs of satisfying franchise requirements, including the costs of satisfying franchise requirements for local, public, educational and governmental (PEG) access channels. The Commission's accounting and cost allocation requirements provide that costs associated with PEG channels carried on the basic tier will be directly assigned to the basic tier where possible, and remaining costs will be allocated between tiers in proportion to the number of channels on each tier. Because franchise fees may be assessed on a tier-subscriber, or revenue-sensitive basis, the Commission will require that franchise fees be allocated between tiers and subscribers in a manner reflective of the way they are assessed. The specific methodology to be used in calculating and allocating external costs will be prescribed in Commission forms.

72. The Commission determines that for all categories of external costs other than franchise fees, changes in external costs shall be measured from the date on which the system becomes subject to regulation, or 180 days from the effective date of our regulations (December 20, 1993), whichever occurs first. Thus, any changes in external costs occurring prior to that date, including from September 30, 1992, will not be accorded external treatment. The industry competitive rate level derived from the Commission's survey data which formulated the benchmark formula was adjusted to remove franchise fees. Thus, the Commission permits the full amount of franchise fees to be accorded external treatment at the time the system becomes subject to regulation, rather than only the amount of additional franchise fees incurred after that date.

73. Finally, for all categories of external costs, other than franchise fees, the Commission permits external treatment for increases in such costs only to the extent that they exceed inflation as measured by the GNP-PI. This requirement does not apply to franchise fees, however, because the benchmark and the Commission prescribed formula for determining the permitted per-channel rate, are adjusted to exclude franchise fees. Thus, the total amount of increases in franchise fees will be accorded external treatment. Similarly, since the benchmark does not reflect retransmission consent fees, we will accord external treatment to the total amount of retransmission consent fees, after October 4, 1994.

74. The Commission additionally finds that increases for external costs up to the full extent of inflation will not be permitted if, in fact, they have not increased by the full amount of inflation. Thus, the Commission will also require that permitted per channel rates be adjusted downward from the rate that would result if based on a full inflation adjustment, to the extent one or more external costs increase less than inflation.

75. As detailed above, the Commission's primary method of regulating cable service rates will be a price cap mechanism applied to rates determined in relation to the competitive benchmark. However, the starting price cap level is based on industry-wide data and does not necessarily reflect individual systems' costs of providing cable service. Thus, the Commission cannot be certain that the initial capped rate will permit all cable operators to fully recover the costs of providing basic tier service and to continue to attract capital. Accordingly, a cable operator is permitted to make a cost-of-service showing to determine the reasonable rate for its system anytime it wants to propose a rate higher than its benchmark-derived on price cap-permitted rate. The Commission rejects the alternative of permitting cable operators to exceed the cap only when the rate as applied to them is determined to be confiscatory. Thus, an operator may exceed the benchmark or capped rate if it can make the necessary cost showings in certain circumstances. The fact that an operator has incurred a cost will not establish its right to recover that cost from subscribers. The extent to which costs can be recovered from subscribers will be governed by cost-of-service standards. The Commission will permit local authorities to prescribe any rate that is justified by the cost showing, precluding a rate lower than the

benchmark in the operator's current rate level.

76. The Report and Order considers cost-of-service standards to govern the extent to which cable operators may exceed capped rates for the basic service tier based on costs. The Commission believes that cost-of-service standards should be established at the national level. However, the current record is not sufficient to permit the crafting of detailed cost-of-service standards for cable service. Accordingly, a Second Further Notice of Proposed Rulemaking will be issued shortly to seek additional comment on the development of appropriate standards.

77. Pending this rulemaking, which the Commission intends to complete on an expedited basis, cable operators may elect to maintain current above benchmark rates and attempt to justify them in their initial rate filings based on cost-of-service showings. Cable operators that reduce rates in accordance with Commission requirements may seek to raise rates above the cap pursuant to the general procedures the Commission is establishing for cable operators seeking rate increases for the basic service tier. Local authorities (or the Commission in situations where it regulates basic rates) will review cost-of-service showings by cable operators seeking to raise rates above capped levels. Cable operators or subscribers may then appeal the local decision to the Commission. The Commission will review such local decisions on a case-by-case basis pending the cost-of-service rulemaking.

78. *Regulations Governing Rates for Equipment.* This segment of the Report and Order establishes regulations which set, on the basis of actual cost, the rates for installation and lease of equipment used by subscribers to receive the basic service tier, and installation and lease of monthly connections for additional television receivers. The Commission first defines what equipment is covered by the mandate in the 1992 Cable Act.

79. The Report and Order concludes that equipment "used to receive the basic service tier" is broadly interpreted and includes converter boxes, remote controls, connections for additional television sets and cable home wiring. The Commission's expansive reading of the phrase "used to receive the basic service tier" means that equipment and installations used to receive both basic tier service and other services, would be regulated according to actual cost guidelines described below. Although the Commission believes that Congress intended the Commission's regulations to encourage a competitive market in the provision of equipment and service

installation, the Commission does not have, at this time, the information it would need to establish a separate effective competition test for installation and equipment. The Commission has begun a proceeding to investigate these issues. (See Notice of Inquiry in ET Docket No. 93-7, 58 FR 7205, February 5, 1993.) Therefore, all systems subject to rate regulation must comply with the actual cost standards for equipment and service installations used to receive the basic service tier.

80. The Commission next decides that cable systems must unbundle charges for equipment, installation, and additional outlets from the rates for basic service. In addition, an operator must calculate individual charges for installation, remote control unit, and converter box. An operator may establish one charge for all other customer equipment or develop individual charges for specified other equipment.

81. The Report and Order establishes actual cost standards for setting rates for lease of equipment and installation. Local franchising authorities regulating equipment used to receive the basic service tier shall require cable operators to establish an Equipment Basket to which the operator will assign the direct costs of service installation, leasing, maintaining and servicing customer equipment, but not the direct costs of equipment sold to customers. The Basket will include an allocation of all system joint and common costs that installation, leasing and repairing equipment share with other system activities, excluding general system overhead. The Equipment Basket costs include a reasonable profit. An operator must also calculate an Hourly Service Charge ("HSC") through which it would recover all Equipment Basket costs (including a reasonable profit) except for the operator's costs of purchasing and financing the lease of customer equipment. The HSC will be computed by taking the sum of all annual Equipment Basket costs except purchase cost of all equipment, and dividing that sum by the operator's total annual person hours dedicated to leasing, installing and equipment repair services.

82. Charges for leasing each type of remote control unit shall be designed to recover the operator's cost of purchasing and financing the remote, and expected repair and service charges over the useful life of the equipment. Expected repair and service charges are to be determined by multiplying the estimated annual average number of repair and service hours per remote by the HSC. Charges for leasing converter

boxes and all other equipment shall be calculated in the same manner as for remotes. For installation charges, the cable operator must elect a uniform installation charge that is calculated based upon either: (1) The HSC times the person hours of the visit; or (2) the HSC times the average hours spent per that type of installation visit.

83. The Commission's guidelines do not preclude an operator from selling equipment to subscribers. The equipment price shall be set at no higher than necessary to recover the operator's costs, including all costs incurred for storing and preparing equipment for sale up to the time it is provided to the customer, including a reasonable profit. The purchaser is responsible for maintaining and repairing any purchased equipment, but cable operators may also sell service contracts. The price of these contracts shall be based on the HSC times the estimated average number of hours required for maintenance and repair over the expected life of the equipment. The cable operator shall provide notice at the time of sale that system upgrades might make a customer's purchased equipment incompatible with the new cable system technology.

84. The Commission's rules permit cable operators to offer promotions, including a permanent below cost offering of installations. However, instead of allowing cable operators unlimited discretion to price all equipment and installation below cost, the Commission will require that below cost offerings be reasonable in scope in relation to the operator's overall offerings in the Equipment Basket. Additionally, certain limits on cable operators' discretion to recover their costs are imposed. Specifically, cable operators must exclude the costs of promotions from the Equipment Basket, but may include these costs in general overhead as part of a cost-of-service showing. The Commission will review this treatment of promotional costs when it addresses the issue of whether the Commission should take steps to promote a competitive market for equipment.

85. Concerning connections for additional television receivers, the Commission is requiring that costs associated with the installation of, and equipment used with, additional connections be included in the Equipment Basket. Cable operators will recover the costs of additional connections in the charges for installation or lease of customer equipment used with the additional connection. The installation charge for additional connections is the HSC times

the person hours of the visit or the HSC times the average number of hours spent per visit. If the operator elects to use an average installation time, the Commission is requiring two rates: One for wiring additional connections at the time of the installation and another if the operator makes a separate visit to install the additional connection. Remotes and other equipment involved are to be leased to the customer at the same rate as equipment used with primary outlets. Any network costs for boosting the signal to serve more than one outlet in a home should be treated as part of general system overhead. If a subscriber requests additional connections that exceed network design capabilities and require additional customer premises equipment, the cable operator may recover the costs of the additional equipment through an additional connection charge, developed by using the Commission's actual cost guidelines for other leased equipment.

86. The Commission also allows a cable operator, if it incurs additional charges for programming carried on basic or cable programming services channels that it transmits to additional outlets, to recover these charges through a monthly charge levied for additional outlets in fact receiving that programming. The Commission finds no Congressional intention to prevent cable operators from establishing reasonable limits on the number of additional connections for each primary outlet in commercial or residential installations other than single family installations. Cable operators are thus permitted to establish reasonable multiple primary service charges, including reasonable discounted primary service charges, in such circumstances.

87. *Costs of Franchise Requirements.* The 1992 Cable Act requires that the Commission's rate regulations for the basic service tier include standards to identify costs that are attributable to satisfying franchise requirements to support public educational and governmental channels, to the use of such channels or to any other services. The Report and Order finds that, as proposed in the NPRM, costs attributable to satisfying franchise requirements shall include: (1) The sum of per channel costs for the number of channels used to meet franchise requirements for public, educational and governmental channels; (2) any direct costs of providing any other services required under the franchise; and (3) a reasonable allocation of overhead.

88. *Customer Changes.* The Cable Act of 1992 requires that regulations for the

basic tier include standards and procedures to prevent unreasonable charges for a customer changing equipment or service tiers. The Commission concludes that these regulations should apply to any changes in the number of service tiers and charges for changing equipment that are initiated at the subscriber's request after the installation of initial service. These same standards should apply to upgrades and downgrades in service tiers. Furthermore, the Commission requires that customers be allowed 30 days after notice of retiering or rate increases to change service tiers at no charge.

89. Operators may impose only a nominal charge for changing service tiers effected solely by coded entry on a computer terminal or by other similarly simple methods. The Commission considers any charge under \$2.00 nominal. The Commission will also allow franchising authorities the discretion to consider additional community specific factors in evaluating these charges. However, these charges cannot exceed the actual costs of changing tiers, as discussed below.

90. The Commission recognizes that charges for changing tiers have the potential to increase customer churn, but the Commission lacks specific data on this topic. Therefore, the Commission has created an exception to the cap on rates for changing service tiers effected by coded entry on a computer terminal or other similar methods. Cable operators who believe their system has an increasing and unacceptable level of churn in changing service tiers may establish an increased charge for changing service tiers more than two times in one year, provided that such changes are not requested in response to a rate increase or a restoration of tiered service. The operator must prove to the franchising authority that the churn level in changing service tiers has reached an unacceptable level and that its escalating scale of charges is reasonable. In addition, the cable system must notify all subscribers that they will be subject to an increased charge if they change service tiers more than the specified number of times in one year.

91. For changes in service tiers or equipment that involve more than coded entry on a computer or other similarly simple method, the Commission adopts the actual cost guidelines for equipment and installation. The actual cost charge would be either the HSC times the amount of time it takes to effect the

change or HSC times the average time such changes take.

(4) Regulation of Cable Programming Services

a. Definition of "Cable Programming Service"

92. Under the 1992 Act, regulation of "cable programming service" rates and equipment is to be conducted by the Commission, not local franchising authorities. "Cable programming service" is defined broadly in the statute as all video programming provided over a cable system except that provided on the basic service tier or on a per-channel or per-program basis. The Commission decides to also exclude per-program and per-channel premium services offered repetitively over multiple channels on a multiplexed or time-shifted basis. Further, the Commission will not regulate collective offerings of otherwise exempt per-channel or programming services, as long as two essential conditions are met. First, the price for the combined package must not exceed the sum of the individual charges for each component service. Second, the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the collective offering. This second condition is satisfied when the offering provides consumers with a realistic service choice. Under the requirements of the evasion provision of Section 623(h), we retain the discretion to review such situations on a case-by-case basis.

b. Complaints Regarding Cable Programming Service Rates

93. *Procedures for Receiving, Considering, and Resolving Complaints.* The 1992 Act provides that rate regulation of cable programming services and equipment will occur only in response to specific complaints—i.e., the Commission will not regulate cable programming service rates until it receives a complaint that a particular operator's rates are unreasonable. The 1992 Cable Act affords complainants 180 days from the effective date of the Commission's rules to challenge existing rates. The 1992 Cable Act provides that complaints regarding a change, in rates must be filed within "a reasonable period of time" following that change in rates, including a change in rates resulting from a tiering change. The Report and Order allows that such complaints must be filed within 45 days from the time a subscriber receives a bill from the cable operator that reflects the rate increase. Late filed complaints will

be dismissed with prejudice, i.e., without an opportunity to refile.

94. In order to make the "minimum showing" required in the 1992 Cable Act, and avoid dismissal of a complaint, e.g., the name and address of the cable operator, the tier price the number of channels on the challenged tier. The complainant must allege that the rate is unreasonable because it violates the Commission's rate regulations. The complainant will not, however, be required to provide the underlying information and calculations necessary to judge the particular rate against the Commission's rate standards. Complainants must use the complaint form adopted by the Commission, and serve a copy on the cable operator and franchising authority by first class mail.

95. Complainants whose complaints fail initially to meet this minimum showing required and are thus dismissed, without prejudice, will be sent a copy of the standard complaint form and instructions for completing the form. In addition, such complainants will receive an information letter describing why the original complaint was defective and outlining the complainant's right to refile their complaint. For a complaint filed on the standard form, but which is otherwise defective, complainants will have an additional 30 days from the date of the Commission's notice to file a correct complaint. If the corrected complaint again fails to meet the minimum showing, the Commission will dismiss it with prejudice and will notify the complainant and the cable operator accordingly.

96. The Commission adopts a standardized form for use in filing complaints, as attached below. This form will be widely available, not only from the Commission, but also from franchising authorities and cable operators. Complainants must attach to the standard complaint form a copy of the most recent bill reflecting the disputed rate or rate increase. Complainants must also serve a copy of the complaint both on the cable operator and on the franchising authority. Service must be accomplished at the same time the complainant files the complaint with the Commission. Subscribers need not obtain the franchising authority's concurrence before filing a complaint with the Commission. Franchising authorities will not be permitted to formally review and adjudicate cable programming service complaints in the first instance.

97. Cable operators are not obliged to respond to any complaint that the Commission has determined is defective and notified the parties accordingly.

Absent such notification, however, the cable operator must respond, using the standardized form. The burden in such cases will be on the cable operator to prove the rate in question is not unreasonable. A cable operator must file its response with the Commission within 30 days from the date of service of the complaint, unless the Commission notifies the operator during the 30-day filing period that the complaint fails to satisfy the minimum showing requirement. In addition to its response on the merits, the cable operator may also include a motion to dismiss stating with particularity the reasons the operator thinks the complaint is procedurally defective.

98. In the event there are multiple complaints regarding the identical rate increase, the cable operator may file a consolidated response to all complaints. The cable operator shall serve its response on the complainant and the local franchising authority by first class mail. To simplify the procedure, the Commission will not require a reply by the complainant. Any cable operator failing to file and serve a response to a valid complaint may be deemed in default, and an order may be entered against the cable operator finding the rate in question to be unreasonable and mandating appropriate relief.

99. The rules delegate authority to the Commission's staff to adjudicate cable programming service complaints and order appropriate relief. A party to a complaint may petition the Commission for a review of the staff's decision, and existing procedures governing reconsideration and review will apply to decisions granting or denying a complaint. Final Commission decisions are subject to judicial review.

100. The Commission's existing *ex parte* rules concerning adjudicative proceedings to complaint proceedings will apply. Cable programming service rate complaints will be considered informal complaints and become "restricted proceedings" once a formal opposition is filed by the cable operator. From that point on, *ex parte* presentations will be prohibited. The Commission may be required to apply special *ex parte* procedures in instances where numerous complaints are filed against a single cable system's rates, presenting a particular burden on all parties involved to serve copies on each complainant of every pleading or decision document.

101. The Commission will use its existing rules and procedures regarding proprietary information submitted in the cable programming service complaint process. Such information will be considered routinely available

for public inspection absent a cable operator's request for confidential treatment pursuant to 47 CFR 0.459. The Commission declines to adopt formal rules at this time regarding limited access for parties to information submitted by the cable operator that the Commission has determined to be confidential within the meaning of Exemption 4 of the Freedom of Information Act.

102. Finally, the Commission reemphasizes its commitment to the use of alternative dispute resolution technique to expedite and improve the administrative process. Parties wishing to employ such techniques in the cable programming service context in lieu of Commission adjudication of a complaint may so advise Commission staff. The Commission will hold in abeyance any complaint in which the parties are actively exploring alternative dispute resolution in lieu of Commission adjudication. Persons seeking information regarding the use of alternative dispute resolution may contact the Commission's Designated ADR Specialist in the Office of the General Counsel.

103. *Remedial and Enforcement Procedures for Rates Found to be Unreasonable.* If cable programming service rates are found to be unreasonable, the Commission will order the operator to reduce rates to a specific reasonable level and to reflect the reduced rate in prospective bills to customers. By rule, the Commission's decision requiring a prospective rate reduction shall remain binding on the cable operator for one year unless a different time period is indicated in the mandating order, or the one year requirement is waived. The operator will also be required to refund overages (plus interest) to all subscribers, with refunds being calculated from the date the first relevant complaint was filed until the date the operator implements the reduced rate prospectively in bills to subscribers. The cable operator will have the option of either identifying actual subscribers who paid the unreasonable charge and refunding the overage directly, or refunding the overage by means of a prospective percentage reduction in the service rate for all subscribers to cover the cumulative overcharge.

104. The cable operator must implement any reduction in rates or refunds within 60 days from the date the Commission releases an order finding the contested rate to be unreasonable and mandating a remedy. Any unreasonable charges paid by customers after the filing of a complaint but prior to receiving a bill reflecting a

reduced rate will be included in the calculation of refunds. The Commission also affirms its authority, under the 1992 Cable Act, to reduce rates and order refunds for the class of subscribers that paid unreasonable rates for a particular service, even if our determination with respect to a particular service rate was based on a complaint filed by a single consumer.

105. One exception to this general approach to calculating refunds concerns the provision allowing complainants 180 days to challenge cable programming service rates as of the effective date of the Commission's rules. The 1992 Cable Act bars complaints against that rate thereafter, unless the cable operator subsequently raises its rate. Should a complaint be filed challenging a subsequent rate increase the refund shall be no greater than the difference between the operator's disputed rate and its (unchallenged) rate in existence as of the effective date of our rules. As with all refunds for cable programming service rates, the refund liability will extend from the date a valid complaint is filed with the Commission.

106. The Commission will use its existing procedures concerning the effectiveness of rate reductions or refund requirements during the period of appeal of cable programming service rate decisions. These procedures provide that the Commission staff, acting on delegated authority, or the Commission, may stay remedial requirements pending disposition of a petition for reconsideration of an application for review. Cable operators may petition the Commission for a stay of remedial requirements.

107. The Commission also adopts a requirement that cable operators must certify their compliance with Commission orders requiring prospective rate reductions, refunds, or other remedial relief to subscribers. This certification must be signed by an authorized representative of the cable operator, must reference the applicable Commission order, and must state that the cable operator has complied fully with all provisions of that order. The certification shall also include a description of the precise measures the operator has taken to implement the remedies ordered by the Commission. The cable operator must file this certification with the Commission within 90 days of the release date of the order requiring remedial relief.

108. Cable operators that fail to effect cable programming service rate reductions, refunds or other remedial measures mandated by the Commission will be subject to enforcement action.

Such enforcement action may include monetary forfeitures pursuant to Section 503(b) of the Communications Act. The Commission will not impose forfeitures on a cable operator simply because a rate is found to be unreasonable.

109. Finally, although the Commission appreciates any informal assistance provided by local authorities, the 1992 Cable Act does not authorize the Commission to give local authorities any formal powers over implementation and enforcement of our cable programming service rate complaints.

c. Regulations Governing Rates

110. The Commission concludes that standards for identifying cable programming services rates that are unreasonable in individual instances will comply with the Cable Act of 1992 if they reflect a reasoned balancing of the statutory factors and if we explain how our standards reflect these statutory factors. The Commission finds, while not mandated by the statute, that primary weight should be given to the rates of systems subject to effective competition.

111. The Commission further believes that a "bad actor" test for cable programming service rates, designed to reach those cable operators whose rates for cable programming services are "egregious" would not fulfill the mandate of the Cable Act. We conclude that Congress used the term "unreasonable" in provisions regarding cable programming services rather than "reasonable" as a reflection of the different procedural regulatory scheme for protecting consumers from excessive rates for basic and for cable programming services. Congress did not require different substantive standards. Therefore, when assessing a complaint that a cable system's cable programming service rates are unreasonable, the Commission will use the same test of reasonableness adopted for basic service rate regulation.

112. As is the case for the basic service tier, the Commission will use a benchmark approach as the principal form of rate regulation for cable programming services, with cost-of-service showings used only by cable systems whose rates exceed the benchmark.

113. The Commission has explained and justified in detail above, adoption and application of the benchmark approach that will be used to set the initial per channel rate for the basic service tier, and application of the price cap to govern future rate increases once the initial rate level has been set by comparison to the benchmark. The same considerations that applied to basic tier

rates apply to the cable programming services tier as well. Accordingly, the Commission adopts the same benchmark approach for purposes of resolving complaints regarding cable programming services as for the basic service tier and applies it in the same manner to determine the initial permitted per channel rate for cable programming services. The Commission also adopts the same price cap requirements for cable programming service as for the basic service tier, including the same annual adjustment index, and requirements for, and treatment of, external costs.

114. Systems with a per-channel rate for cable programming services at or below the benchmark at the time the system becomes subject to regulatory review will be considered reasonable, and that rate will be its permitted rate with rates that are below the benchmark capped at that level. For systems with rates at the time of regulation that are above the benchmark, the permitted level for such systems will be determined by a further comparison to the rates in effect on September 30, 1992.

115. For systems with September 30, 1992, rates that are above the benchmark, the rate shall be the September 30, 1992, per-channel rate reduced by 10 percent, but no lower than the benchmark, and then adjusted forward by inflation. For systems with rates on September 30, 1992, that were below the benchmark, the permitted rate shall be the benchmark rate adjusted forward by inflation. The price cap will then be applied to the per channel rate determined by the above comparison of rates to the benchmark. Price cap requirements will be the same as for the basic service tier.

116. As for basic service, the Commission will permit cable operators to exceed the benchmark rate for cable programming services based on costs. Similarly, the Commission will adopt cost-of-service standards for application by the Commission to determine the extent to which cable operators may exceed capped rates for cable programming services. However, as for the basic service tier, the record does not permit the Commission to fashion cost-of-service standards at this time. Accordingly, the Commission will adopt and issue separately a Second Further Notice of Proposed Rule Making to establish cost-of-service standards for cable services including cable programming services.

117. Regarding equipment subject to regulation as cable programming services, the Report and Order states that complaints concerning rates for

equipment and installation used to receive cable programming services, either solely or in conjunction with unregulated programming, shall be subject to the same actual cost standard implemented for basic tier equipment and installation. The costs of equipment and installation used to receive cable programming services shall be included in the Equipment Basket and the charges associated with this equipment shall be determined on the same basis as charges for other equipment subject to the actual cost methodology. However, because the Commission has jurisdiction over cable programming services, it will review any complaints or issues concerning such equipment or installation.

118. The Commission further concludes that cable operators will be required to unbundle equipment and installation rates from rates for cable programming services. The Commission also concludes that cable operators shall be required to unbundle installation rates for cable programming services from rates for equipment leasing.

(5) Provisions Applicable to Cable Service Generally

a. Geographically Uniform Rate Structure

119. The 1992 Cable Act requires cable operators to "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." The Commission concludes that this requirement does not preclude operators from establishing reasonable categories of customers and services. The Commission concludes that for purposes of the 1992 Cable Act a "geographic area" means the franchise area. Thus, a cable operator is generally required by this provision to have a uniform rate structure within each franchise area. The Commission also decides that bulk discounts may be permitted if they pass on cost savings of volume offerings to the subscribers affected, provided that all multiple dwelling buildings in the franchise area receive the same bulk discount rate structures and the operator can demonstrate that it derives some economic benefit from providing the bulk discount.

b. Discrimination

120. Section 623(e) of the Cable Act states that no federal, state or local government can be prohibited from (1) prohibiting discrimination among subscribers (except that reasonable discounts to senior citizens or other economically disadvantaged groups may

not be prohibited) and (2) regulation of equipment facilitating the reception of cable service by hearing-impaired individuals. The Report and Order finds that a cable operator may offer reasonable discounts to senior citizens and other economically disadvantaged individuals. For this purpose, an "economically disadvantaged individual" is defined as a person who receives federal, state or local welfare assistance. Further, the Commission strongly encourages cable operators to carry more closed-captioned video programming. Franchising authorities are free to adopt specific regulations regarding the installation an offering of equipment for reception of cable service by the hearing impaired, but in the absence of evidence indicating that Federal intervention in this area is necessary, the Commission declines to adopt specific closed-captioning rules for cable at this time.

c. Negative Option Billing

121. The 1992 Act provides that an operator may not charge a subscriber for "any service or equipment that the subscriber has not affirmatively requested by name." This limitation on so-called "negative option billing" applies whenever a new tier or single channel service is added. However, the Commission recognizes that, on balance, consumer benefits from giving operators the ability to diversify, improve, or otherwise modify their offerings in a tier outweighs the slight reduction in consumer choice that would result from exempting such changes from the negative option billing requirements. Thus, restructuring undertaken to respond to the Commission's new rate regulations will not bring the negative option billing provision into play as long as subscribers continue to receive the same number of channels and the same equipment, and the total price for the services does not change. On a going-forward basis, the provision does not apply to changes in the mix of channels in a tier, or restructurings of service, even when those changes are accompanied by a rate increase, unless the changes alter the fundamental nature of the service tier.

d. Collection of Information

122. The 1992 Cable Act envisions that within one year of its enactment, cable operators will file with the Commission financial information necessary for the enforcement and administration of the statute. The Commission has already taken steps to satisfy this requirement by directing a random sample of cable systems to submit certain rate and other

information to aid in fashioning benchmarks. Therefore, the Report and Order does not establish collection of information requirements, but the Commission will explore this issue in a Second Further Notice of Proposed Rule Making in the future.

e. Prevention of Evasions

123. The 1992 Cable Act requires that the Commission establish and periodically review regulations to prevent evasion of its cable rate regulations. The Report and Order defines prohibited "evasions" as any practice or action which avoid the rate regulation provisions of the 1992 Cable Act or the Commission's rules contrary to the intent of the Act or its underlying policies. The rules the Commission has adopted in this proceeding, particularly the initial rate freeze describe above, parallel substantive standards for basic tier and cable programming service tiers, and cost based equipment regulations, are all intended to address potential evasions, including those that might result from retiering of services. The Commission will review its cable rate rules two years from their effective date, and every three years thereafter, unless circumstances indicate more or less frequent reviews would be in the public interest. Additionally, franchising authorities and subscribers may address specific instances of evasive behavior in rate regulation proceedings, in which the burden will be on the cable operator to demonstrate that the alleged evasion was primarily for a legitimate business purpose and not an attempt to evade rate regulation.

124. However, in order to provide some guidance to the public, franchising authorities, and the industry regarding the Commission interpretation of the prevention of evasion provisions of the 1993 Cable Act and the Commission's implementing regulations, the Commission addresses certain practices that have been questioned as evasive behavior in this proceeding. The Report and Order clarifies that all retiering is not potentially evasive. Retiering otherwise permitted under the Commission's rules will not be deemed an evasion. The Commission also does not believe that retiering effectuated between the date the 1992 Cable Act was enacted and the effective date of the rate regulations is a *per se* evasion. Finally, the Commission believes that the following practices, if established by evidence, are evasions: (1) implicit rate increases; (2) a significant decline in customer service without a similar decline in price; and (3) deceptive practices such as improper cost shifting or intentionally misstating revenues.

f. Small System Burdens

125. Franchise authorities regulating small cable systems are permitted to exempt those systems from having to file an initial rate schedule with the franchising authority. In such cases, the small system need simply certify to the authority that its rates for basic service and equipment are reasonable under the Commission's rate standards. However, a small system whose rates exceed the benchmark, a small system proposing to increase its basic service rates or a small system that is the subject of a cable programming service complaint is not exempted from the procedures the Commission has established. For these purposes, a "small system" is a system served by an integrated headend with fewer than 1,000 subscribers.

126. Although the Commission does not agree with those commenters who support complete exemption for small systems from substantive rate regulation, the unique characteristics of small systems justify application of a somewhat different standard to them. This Commission reflects its awareness of this difference in several aspects of its program for implementing the rate provisions of the 1992 Cable Act. For example, the rate formula the Commission develops for evaluating the reasonableness of cable rates accounts for characteristics unique to small system operators, as does the Commission's rate approach which permits the pass through of many external costs beyond the operator's control.

127. The Commission finds that no distinction should be made between small systems that are independent and those controlled by MSOs, and therefore will apply small system relief to systems with under 1,000 subscribers, regardless of whether the system is an independent one or owned by an MSO.

128. Regarding measurement of small system size, for rate regulation purposes, the Commission will determine system size by a system's headend, including any other headends or microwave receive sites that are technically integrated to the system's principal headend, rather than on a franchise basis.

g. Grandfathering of Rate Agreements

129. The Report and Order concludes that section 623(j) of the 1992 Cable Act provides that franchising authorities already regulating rates pursuant to a franchise agreement executed before July 1, 1990, may continue to regulate basic service and equipment rates for the remainder of the franchise term without following the Commission's

substantive rate standards and without filing a certification with the Commission. In lieu of filing certification, franchising authorities with such "grandfathered" agreements will simply notify the Commission of its intent to continue regulating basic cable rates. The Commission declines, however, to grandfather agreements executed after July 1, 1990, as suggested by some commenters.

130. The Commission also finds that section 623(j) of the Cable Act does not supersede the Commission's regulation of cable programming services. Thus, the Commission shall regulate basic cable programming service rates in all cases, irrespective of whether there is a grandfathered rate agreement regulating basic cable rates. Consistent with this decision, grandfathered agreements will not be enforceable to the extent they seek to limit a cable operator's ability to retier service offerings.

h. Reports on Average Prices

131. In order to comply with the requirements of section 623(k) of the 1992 Cable Act, which requires the Commission to annually publish statistical reports regarding average cable rates and associated fees (including a comparison between systems which are and which are not subject to effective competition), the Report and Order finds a need to collect certain cable system data, including: (a) Rates charged for basic cable service, cable programming services, and other cable programming; (b) fees for converter boxes, remote control units, installation and disconnection; and (c) any other charges for equipment or service levied on subscribers. The Commission will also collect information on system size (measured by number of subscribers), system channel capacity, and other characteristics such as percent of distribution plant above or below ground, length of distribution plant, subscriber density per mile. The Commission will address this issue in more detail in an upcoming Second Further Notice of Proposed Rule Making. This information will be collected either on a sample basis or from the industry as a whole.

132. The Commission will also solicit specific information from cable operators on their leased access channel usage and rates. This information collection may, or may not, be part of the process of collecting system rate data and financial information to satisfy the collection of information provisions in section 623(g) of the 1992 Cable Act.

i. Effective Date

133. The Commission establishes June 21, 1993, as the effective date of the regulations adopted in this decision.

B. Leased Commercial Access

(1) Leased Access: Background

134. Section 612 of the Cable Act of 1984 (Communications Act, section 612(a), 47 U.S.C. 532(a)) established a federal scheme through channel leasing to assure access to cable systems by third parties unaffiliated with the cable operator. Specifically, these provisions require that a cable system with 36 or more activated channels make available a portion of their channel capacity for lease by outside unaffiliated parties. Each system operator subject to this requirement was to establish "the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operator, financial condition, or market development of the cable system." The Cable Act of 1992 revised these provisions to provide the Commission with expanded authority to regulate the commercial leasing of cable channels for those cable systems required to make such channel capacity available. The legislative history of the 1992 Cable Act shows particular Congressional concern that some cable operators may have established unreasonable terms or may have had financial incentives to refuse to lease channel capacity to potential leased access users out of competitive motives, especially if the operator had a financial interest in the programming services it carried. Congress and the Commission appear to be in agreement that commercial leasing of cable channels could serve important diversity and competition objectives and that more centralized regulatory oversight would assist in the achievement of these objectives. The Commission will now be in a position to take a more active role in administering these requirements.

135. Given the other matters pending in this proceeding, the Commission did not receive a large number of comments on leased access issues. Thus the rules the Commission adopts in this regard should be viewed as a starting point that will need refinement both through the rulemaking process and as the Commission addresses issues on a case-by-case basis. The Commission is aware that leasing issues may need to be addressed in quite different fashions depending upon the nature of the service involved. Thus, the Report and Order is not attempting to comprehensively address all the issues potentially involved, many of which can

better be resolved in a more specific concrete factual setting.

136. In the rules adopted, the Commission sets a standard for maximum leased access rates based on the highest implicit fee charged a nonaffiliated programmer within the same program category. The Commission also addresses issues regarding access terms and conditions, tier placement, technical standards for use, technical support, security deposits, conditions based on content and requirements for billing and collection service. A procedure for the expedited resolution of disputes is also established. Finally, the Commission decides that the leased access rules and related rate controls adopted will be applicable to systems regardless of the effective competition test governing basic tier and programming service rate regulation.

(2) Leased Access: Terms and Conditions of Use

137. The cable operator and commercial leased access user may negotiate channel placement and tier access for leased programming. Parties must take into account the nature of the service being offered; the relationship between the charge imposed and the desirability of the channel; and, the need to provide competition in delivery service and diversity of programming. In order to guarantee that a variety of individuals and groups have access to the channels, each lessee will only be allowed to lease up to one channel's capacity if there are other users demanding use of the additional designated channels. Cable operators may not apply programming production standards to leased access users that are any higher than those applied to PEG channels. Operators must provide the minimal amount of technical support necessary for users to air their material, and leased access programmers must reimburse operators for the reasonable cost of any technical support operators provide. Cable operators will have the discretion to require reasonable security or other assurances from programmers who are unable to prepay in full for access to leased commercial channels. Cable operators may not set terms and conditions for users based on content except to the extent necessary to establish a reasonable price for use of channel capacity and to comply with the Commission's indecency standards. Cable operators are also required to provide billing and collection services for leased access users, unless the operator demonstrates the existence of third party billing and collection services which in terms of cost and

accessibility, offer leased access users an alternative substantially equivalent to that offered comparable non-leased programmers. Finally, the Report and Order finds that the 1984 and 1992 Cable Acts do not authorize the Commission to require that operators apply the same rates, terms and conditions for the leasing of channel capacity by both affiliated and nonaffiliated programmers.

(3) Leased Access: Maximum Reasonable Rates

a. Leased Access

138. The maximum commercial leased access rates that a cable operator may charge is the highest net implicit fee charged any nonaffiliated programmer within the same program category. The implicit rate is calculated by determining the amount paid per month by subscribers for the service and amounts explicitly paid by the programmer and deducting from that the amount that is paid per month to the programming service vendor. The difference between the amount received and the amount paid is the net implicit leased channel rate. Such rates are to be calculated separately for (1) pay-per-program or pay channels, (2) channels containing more than fifty percent direct sales (home shopping networks), (3) and all other channels.

b. Access Rates for Not-for-Profit Programmers

139. The Commission declines to establish special rates for not-for-profit programmers, or to require that operators set aside capacity for such purposes. The Report and Order finds that the procedures adopted for establishing maximum reasonable rates adequately ensure that the interests of such programmers are considered.

(4) Leased Access: Reporting Requirements

140. Although specific reporting requirements for leased access will not be implemented, the Commission will gather necessary information on leased channel usage and rates in its general reporting and monitoring process mechanisms for cable systems. The Commission believes it possible to efficiently collect such information as part of the process in which data relating to system rate and financial information are collected for purposes of compliance with sections 623(g) and 623(k) of the 1992 Cable Act, and will address the gathering of leased access data in that context.

(5) Leased Access: Procedures for Resolution of Disputes

141. The Report and Order states that review of leased access rates or terms and conditions will be triggered by the filing of a complaint with the Commission. To guard against determinations based on a stale record, and to forestall development of patterns of abuse, petitions must be filed within 60 days of the alleged violation. A petitioner will be required to state concisely the facts constituting a leased access rule violation, and the specific rule or regulation allegedly violated, and to serve a copy of the petition of the operator. The operator will then have 30 days from the date the petition is filed to respond. In the case of a rate dispute, an operator would be required to submit data showing the rate charged was not higher than the highest implicit fee it charged for a comparable category of service. Operators will also be required to submit the affidavit of a responsible company official to support their response. If after reviewing the operator's submission, the Commission finds a *prima facie* violation of the leased access rules, the operator may be required to produce additional information.

142. After the evidence has been submitted, the complainant must show by clear and convincing evidence that the operator has violated the leased access rules or otherwise acted unreasonably or in bad faith. For successful complainants, relief could take various forms, including, but not limited to, refunds, and injunctive measures. The Commission will also use, where necessary, forfeitures. Pending resolution of a dispute, the operator will be required to provide access if the leased access provider is willing to take access under the rates, terms, and conditions set by the operator, subject to any refund or other relief the Commission orders.

143. The Commission again encourages parties in disputes, including leased access related disputes, to try to resolve their differences through informal means such as the ADR process described above. The Commission believes that ADR can offer an exceptionally swift and economical way to resolve disputes, and because ADR is voluntary, parties may elect it at any time.

(6) Leased Access: Minority and Educational Programmers Alternative

144. In accordance with the statutory provisions, up to 33 percent of a system's designated leased channel capacity may be used for qualified

minority or educational programming purchased by the system operator, rather than for leased channel programming. For purposes of implementing this provision, the Commission clarifies that programming that covers "minority viewpoints" or is "directed at members of minority groups" has to cover the viewpoints of or be targeted to members of minority groups as defined in section 309(i)(3)(c)(ii) of the Communications Act. (That section identifies Blacks, Hispanics, American Indians, Alaska natives, Asians and Pacific islanders as minority groups.) The Commission further believes that 90 percent of programming must be devoted to the coverage of minority or educational programming to qualify as a statutory source of minority or educational programming, devoting "substantially all" its programming to qualifying purposes.

C. Subscriber Bill Itemization

145. Section 622(c) of the 1992 Cable Act provides that cable operators may identify as a separate line item on each regular customer bill: (1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid; (2) the amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels; and (3) the amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber. The purpose of this provision is to ensure that cable operators are not prevented, by a franchise agreement or otherwise, from itemizing the specific costs enumerated in section 622(c). System operators are not required by the provision to undertake any such itemization, nor does the provision, by itself, preclude the itemization of additional costs (whether or not governmentally imposed) or otherwise mandate that subscriber bills have any particular format or content.

146. The Report and Order states that costs that may be itemized include those that are direct and verifiable, as well as reasonable allocation of overhead, and for Public Education Governmental (PEG) channel costs, and the sum of the per channel costs for the number of channels used to meet franchise requirements. To the extent a franchising authority imposes special costs not of benefit to all subscribers in consideration of the award or renewal of

a franchise, these may be included in an itemization as either a franchise fee or PEG cost, as appropriate. If required under a franchise agreement, these costs could include support of institutional networks, free wiring of public buildings, provision of special municipal video services, and voice and data transmissions.

147. *Copyright and Retransmission Fees.* The Commission finds that costs such as copyright and retransmission consent fees are not within the category of fees or taxes imposed by governmental authority. Thus, such costs are not encompassed within the protections of section 622(c) of the 1992 Cable Act.

148. *Format.* The Commission finds that any bill itemized pursuant to section 622(c) may require only one payment for the operator's services on the part of a consumer, the total for which must include all fees and costs itemized pursuant to section 622(c). The language of the 1992 Cable Act expressly permits the itemization of certain governmentally imposed costs. Beyond the guidelines given above, the Commission refrains from dictating how a cable operator choosing to itemize may format its bill and implement section 622(c). Local franchising authorities may adopt regulations for format consistent with those adopted in this Report and Order. However, the Commission underscores that it would frustrate the intent of the statute if a franchising authority imposed burdensome additional itemization on an operator choosing to itemize.

D. Cost Accounting/Cost Allocation Requirements

149. The rate regulations that the Commission adopts impose a price cap on cable service rates with certain categories of costs defined as external to the cap. Cost accounting and cost allocation requirements are necessary to assure that costs that are intended to receive external treatment are in fact accorded such treatment. The regulations additionally authorize cable operators to make cost-of-service showings to justify a rate higher than the capped level. Cost accounting and cost allocation requirements are also necessary to permit identification of costs that will justify a rate above the cap.

150. The Commission has an insufficient record on which to determine the optimum level of rate averaging for the cable industry. Accordingly, while the Commission is adopting in the Report and Order requirements that will permit immediate implementation of the rules,

the Commission has determined that it will include in a Second Further Notice of Proposed Rule Making issues pertaining to what cost accounting and cost allocation requirements should be adopted on a permanent basis.

151. The cost accounting rules the Commission adopts will nevertheless permit a successful immediate implementation of rate regulations. Cable operators are required to identify certain locally incurred costs such as franchise fees and local taxes at the franchise level.

152. Instead of mandating that other costs be identified at any level, for purposes of calculating external costs or cost of service, cable operators shall identify costs at the level at which, for accounting purposes, they identified the category of costs on April 3, 1993. Cable operators in any cost-of-service showing must justify and explain this identification and demonstrate that it is, in fact, the level used to identify costs on April 3, 1993. Costs will then be allocated to the franchise level on a per subscriber basis. Costs allocated to, or directly identified at, the franchise level will then be allocated between tiers in proportion to the number of channels on each tier. Programming costs and retransmission consent fees will be allocated to the tier on which the programming or broadcast signal is offered. Because franchise fee determinations may be revenue, tier, or subscriber sensitive, franchise fees must be allocated between tiers and subscribers in a manner most consistent with the way the franchise fee is assessed by franchise authorities.

153. It is important to note that the regulations adopted in this Report and Order may change over time. In accordance with the statute, the Commission will review and monitor the effect of its initial rate regulations on the cable industry and consumers, and refine and improve the rules as necessary. In addition, the Commission will issue in the near future, a separate Second Further Notice of Proposed Rule Making to obtain a better record for adoption of cost-of-service showing by cable operators seeking to raise rates above capped level.

Final Regulatory Flexibility Analysis Statement

154. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605, it is certified that this decision will have a strong impact on a substantial number of small entities. As detailed in the Commission's response to the comment submitted by the Office of Advocacy of the United States Small Business Administration (Office of Advocacy), in

reply to the Initial Regulatory Flexibility Statement contained in the NPRM, the Commission has attempted, wherever possible within the statutory constraints, to balance the weight of the 1992 Cable Act implementation burden evenly between cable operators and franchising authorities. (The Commission's extensive reply to the Office of Advocacy may be found in the complete Final Regulatory Flexibility Act in the full text of this decision.) However, the intent of the 1992 Cable Act, to ensure cable subscribers of quality programming and service at reasonable cost, requires some unavoidable new responsibility for operators and for franchise authorities, as well as for the Commission. There will be, for example, extensive additional recordkeeping and reporting requirements; franchising authorities will need to file for certification and will play a major role in determining whether, for rate regulation purposes, a cable system in their franchise area faces effective competition; cable operators will need to notify customers periodically of the availability of basic services. With this in mind, the Commission, as stated above, will continue to monitor its cable rate regulations to evaluate its effectiveness not only in realizing the goals set out in the 1992 Cable Act, but to assess the weight and the appropriateness of the burdens imposed on the affected parties. The full text of the Final Regulatory Flexibility Analysis Statement may be found in the complete text of this Report and Order/Further NPRM.

155. The Secretary shall send a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*, (1981)).

156. Accordingly, it is ordered that, pursuant to Sections 4(i), 4(j), 303(r), 612, 622(c), and 623 of the Communications Act of 1934, 47 U.S.C. 154(i), 154(j), 303(r), 532, 542(c), and 543, the REPORT AND ORDER is adopted amending part 76 of the Commission's rules, as indicated below.

157. It is further ordered that the Secretary shall send a copy of this Report and Order, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981).

158. It is further ordered that the requirements and regulations

established in this Report and Order shall become effective on June 21, 1993.

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

Donna R. Searcy,
Secretary.

Amendatory Text

Parts 0 and 76 of chapter I of title 47 of the Code of Federal Regulations are amended as follows:

PART 0—COMMISSION ORGANIZATION

1. The authority citation for part 0 continues to read as follows:

Authority: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.61 is amended by adding paragraphs (j) through (n) to read as follows:

Mass Media Bureau

§ 0.61 Functions of the Bureau.

* * * * *

(j) After Commission assumption of jurisdiction to regulate cable television rates for basic service and associated equipment, acts upon cable operator requests for approval of existing or increased rates.

(k) Reviews appeals of local franchise authorities rate making decisions involving rates for the basic service tier and associated equipment, except when such appeals raise novel or unusual issues.

(l) Acts upon complaints involving cable programming service rates except for final action on complaints raising novel or unusual issues.

(m) Evaluates certification requests filed by cable system franchising authorities pursuant to subpart N, part 76 of this chapter.

(n) Periodically reviews and, when appropriate, revises standard forms used in administering:

(1) The Commission's complaint process regarding cable programming service rates;

(2) The certification process for local franchising authorities wishing to regulate rates, and

(3) The substantive rate regulation standards prescribed by the Commission.

3. Section 0.455 is amended by adding paragraphs (a) (11) and (12) to read as follows:

§ 0.455 Other locations at which records may be inspected.

(a) * * *

(11) All complaints against cable television operators filed under

§§ 76.950 and 76.951 of this chapter, all documents filed in connection therewith, and all communications related thereto, unless the cable operator has submitted a request pursuant to § 0.459 that such information not be made routinely available for public inspection.

(12) All cable operator requests for approval of existing or increased cable television rates for basic service and associated equipment over which the Commission has assumed jurisdiction pursuant to 47 CFR 76.913, and 76.943 of this chapter, all documents filed in connection therewith, and all communications related thereto, unless the cable operator has submitted a request pursuant to § 0.459 that such information not be made routinely available for public inspection.

PART 76—CABLE TELEVISION SERVICE

4. The authority citation for part 76 is revised to read as follows:

Authority Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552 as amended, 106 Stat. 1460.

§ 76.5 [Amended]

5. Section 76.5 is amended by removing paragraph (gg).

§ 76.10 [Removed]

6. Section 76.10 is removed.

§ 76.33 [Removed]

7. Section 76.33 is removed.

8. Section 76.900, added at 58 FR 19627, April 15, 1993, which would have become effective October 6, 1993, is withdrawn.

§§ 76.800–76.899 [Reserved]

9. Sections 76.800 through 76.899 are reserved.

10. Subpart N is added to part 76 to read as follows:

Subpart N—Cable Rate Regulation

- Sec.
- 76.900 Temporary freeze of cable rates.
 - 76.901 Definitions.
 - 76.905 Standards for identification of cable systems subject to effective competition.
 - 76.906 Presumption of no effective competition.
 - 76.910 Franchising authority certification.
 - 76.911 Petition for reconsideration of certification.
 - 76.912 Joint certification.
 - 76.913 Assumption of jurisdiction by the Commission.
 - 76.914 Revocation of certification.
 - 76.915 Change in status of cable operator.
 - 76.916 Petition for recertification.

- Sec.
- 76.920 Composition of the basic tier.
 - 76.921 Buy-through of other tiers prohibited.
 - 76.922 Rates for the basic service tier and cable programming service tiers.
 - 76.923 Rates for equipment and installation used to receive the basic service tier.
 - 76.924 Cost accounting and cost allocation requirements.
 - 76.925 Costs of franchise requirements.
 - 76.930 Initiation of review of basic cable service and equipment rates.
 - 76.931 Notification of basic tier availability.
 - 76.932 Notification of proposed rate increase.
 - 76.933 Franchising authority review of basic cable rates and equipment costs.
 - 76.934 Small systems.
 - 76.935 Participation of interested parties.
 - 76.936 Written decision.
 - 76.937 Burden of proof.
 - 76.938 Proprietary information.
 - 76.940 Prospective rate reduction.
 - 76.941 Rate prescription.
 - 76.942 Refunds.
 - 76.943 Fines.
 - 76.944 Commission review of franchising authority decisions on rates for the basic service tier and associated equipment.
 - 76.945 Procedures for Commission review of basic service rates.
 - 76.950 Complaints regarding cable programming service rates.
 - 76.951 Standard complaint form; other filing requirements.
 - 76.952 Information to be provided by cable operator on monthly subscriber bills.
 - 76.953 Limitation on filing a complaint.
 - 76.954 Initial review of complaint; minimum showing requirement; dismissal of defective complaints.
 - 76.955 Additional opportunity to file corrected complaint.
 - 76.956 Cable operator response.
 - 76.957 Commission adjudication of the complaint.
 - 76.960 Prospective rate reductions.
 - 76.961 Refunds.
 - 76.962 Implementation and certification of compliance.
 - 76.963 Forfeiture.
 - 76.964 Advance written notification of rate increases.
 - 76.970 Commercial leased access rates.
 - 76.971 Commercial leased access terms and conditions.
 - 76.975 Commercial leased access dispute resolution.
 - 76.977 Minority and educational programming used in lieu of deregulated commercial leased access capacity.
 - 76.980 Charges for customer changes.
 - 76.981 Negative option billing.
 - 76.982 Continuation of rate agreements.
 - 76.983 Discrimination.
 - 76.984 Geographically uniform rate structure.
 - 76.985 Subscriber bill itemization.

Subpart N—Cable Rate Regulation

§ 76.900 Temporary freeze of cable rates.

(a) The average monthly subscriber bill for services provided by cable operators subject to regulation under

Section 623 of the Communications Act shall not increase above the average monthly subscriber bill determined under rates in effect on April 5, 1993, for a period of 120 days.

(b) The average monthly subscriber bill shall be calculated by determining for a monthly billing cycle the sum of all billed monthly charges for all cable services subject to regulation under section 623 of the Communications Act and dividing that sum by the number of subscribers receiving any of those services. The average monthly subscriber bill determined under rates in effect on April 5, 1993, shall be calculated based on customer charges for the most recent monthly billing cycle ending prior to April 5, 1993.

§ 76.901 Definitions.

(a) *Basic service.* The basic service tier shall, at a minimum, include all signals of domestic television broadcast stations provided to any subscriber (except a signal secondarily transmitted by satellite carrier beyond the local service area of such station, regardless of how such signal is ultimately received by the cable system) any public, educational, and governmental programming required by the franchise to be carried on the basic tier, and any additional video programming signals a service added to the basic tier by the cable operator.

(b) *Cable programming service.* Cable programming service includes any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than:

(1) Video programming carried on the basic service tier as defined in this section;

(2) Video programming offered on a pay-per-channel or pay-per-program basis; or

(3) A combination of multiple channels of pay-per-channel or pay-per-program video programming offered on a multiplexed or time-shifted basis so long as the combined service:

(i) Consists of commonly-identified video programming; and

(ii) Is not bundled with any regulated tier of service.

(c) *Small system.* A small system is a cable television system that serves fewer than 1,000 subscribers. The service area of a small system shall be determined by the number of subscribers that are served by a system's principal headend, including any other headends or microwave receive sites that are technically integrated to the system's principal headend.

§ 76.905 Standards for identification of cable systems subject to effective competition.

(a) Only the rates of cable systems that are not subject to effective competition may be regulated.

(b) A cable system is subject to effective competition when any one of the following conditions is met:

(1) Fewer than 30 percent of the households in its franchise area subscribe to the cable service of a cable system.

(2) The franchise area is:

(i) Served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.

(3) A multichannel video programming distributor, operated by the franchising authority for that franchise area, offers video programming to at least 50 percent of the households in the franchise area.

(c) Each separately billed or billable customer will count as a household subscribing to or being offered video programming services, with the exception of multiple dwelling buildings billed as a single customer. Individual units of multiple dwelling buildings will count as separate households.

(d) A multichannel video program distributor, for purposes of this section, is an entity such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, a video dialtone service provider, or a satellite master antenna television service provider that makes available for purchase, by subscribers or customers, multiple channels of video programming.

(e) Service of a multichannel video programming distributor will be deemed offered:

(1) When the multichannel video programming distributor is physically able to deliver service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service; and

(2) When no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably

aware that they may purchase the services of the multichannel video programming distributor.

(f) For purposes of determining the number of households subscribing to the services of a multichannel video programming distributor other than the largest multichannel video programming distributor, under paragraph (b)(2)(ii) of this section, the number of subscribers of all multichannel video programming distributors that offer services to at least 50 percent of the households in the franchise area will be aggregated.

(g) In order to offer comparable programming within the meaning of paragraph (b)(2)(i) of this section, a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.

§ 76.906 Presumption of no effective competition.

In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.

§ 76.910 Franchising authority certification.

(a) A franchising authority must be certified by the Commission in order to regulate the basic service tier and associated equipment of a cable system within its jurisdiction.

(b) To be certified, the franchising authority must file with the Commission a written certification that:

(1) The franchising authority will adopt and administer regulations with respect to the rates for the basic service tier that are consistent with the regulations prescribed by the Commission for regulation of the basic service tier;

(2) The franchising authority has the legal authority to adopt; and the personnel to administer, such regulations;

(3) Procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties; and

(4) The cable system in question is not subject to effective competition. Unless a franchising authority has actual knowledge to the contrary, the franchising authority may rely on the presumption in § 76.906 that the cable operator is not subject to effective competition.

(c) The written certification described in paragraph (b) of this section shall be made by filing the FCC form designated

for that purpose. The form must be filed by

(1) Registered mail, return receipt requested, or

(2) Hand-delivery to the Commission and a date-stamped copy obtained. The date on the return receipt or on the date-stamped copy is the date filed.

(d) A copy of the certification form described in paragraph (c) of this section must be served on the cable operator before or on the same day it is filed with the Commission.

(e) Unless the Commission notifies the franchising authority otherwise, the certification will become effective 30 days after the date filed, *provided, however,* That the franchising authority may not regulate the rates of a cable system unless it:

(1) Adopts regulations:

(i) Consistent with the Commission's regulations governing the basic tier; and

(ii) Providing a reasonable opportunity for consideration of the views of interested parties, within 120 days of the effective date of certification; and

(2) Notifies the cable operator that the authority has been certified and has adopted the regulations required by paragraph (e)(1) of this section.

(f) If the Commission denies a franchising authority's certification, the Commission will notify the franchising authority of any revisions or modifications necessary to obtain approval.

§ 76.911 Petition for reconsideration of certification.

(a) A cable operator (or other interested party) may challenge a franchising authority's certification by filing a petition for reconsideration. The petition may allege either of the following:

(1) The cable operator is not subject to rate regulation because effective competition exists as defined in § 76.905.

(2) The franchising authority does not meet the certification standards set forth in 47 U.S.C. 543(a)(3).

(b)(1) The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined in § 76.905, exists in the franchise area.

(2) For purposes of paragraph (a)(1) of this section, if the evidence establishing effective competition is not otherwise available, cable operators may request from a competitor information regarding the competitor's reach and number of subscribers. A competitor must respond to such request within 15 days. Such responses may be limited to numerical totals.

(c) Stay of rate regulation. (1) The filing of a petition for reconsideration pursuant to paragraph (a)(1) of this section will automatically stay the imposition of rate regulation pending the outcome of the reconsideration proceeding.

(2) A petitioner filing pursuant to paragraph (a)(2) of this section may request a stay of rate regulation.

(3) In any case in which a stay of rate regulation has been granted, if the petition for reconsideration is denied, the cable operator may be required to refund any rates or portion of rates above the permitted tier charge which were collected from the date the petition was filed.

(d) The filing of a petition for reconsideration alleging the presence of effective competition based on frivolous grounds is prohibited, and may be subject to forfeitures.

(e) If the Commission upholds a challenge to a certification filed pursuant to paragraph (a)(2) of this section, the Commission will notify the franchising authority of the revisions necessary to secure approval and provide the authority an opportunity to amend its certification however necessary to secure approval. *Provided, however, That* pending approval of certification, the Commission will assume jurisdiction over basic cable service rates in that franchise area.

§ 76.912 Joint certification.

(a) Franchising authorities may apply for joint certification and may engage in joint regulation, including, but not limited to, joint hearings, data collection, and ratemaking. Franchising authorities jointly certified to regulate their cable system(s) may make independent rate decisions.

(b) Franchising authorities may apply for joint certification regardless of whether the authorities are served by the same cable system or by different cable systems and regardless of whether the rates in each franchising area are uniform.

§ 76.913 Assumption of jurisdiction by the Commission.

(a) Upon denial or revocation of the franchising authority's certification, the Commission will regulate rates for cable services and associated equipment of a cable system not subject to effective competition, as defined in § 76.905, in a franchise area. Such regulation by the Commission will continue until the franchising authority has obtained certification or recertification.

(b) A franchising authority unable to meet certification standards may petition the Commission to regulate the

rates for basic cable service and associated equipment of its franchisee when:

(1) The franchising authority lacks the resources to administer rate regulation; *Provided, however, That* the request must be accompanied by a demonstration that franchise fees are insufficient to fund any additional activities required to administer basic service rate regulation; or

(2) The franchising authority lacks the legal authority to regulate basic service rates; *Provided, however, That* the authority must submit with its request a statement detailing the nature of the legal infirmity.

(c) The Commission will regulate basic service rates pursuant to this Section until the franchising authority qualifies to exercise jurisdiction pursuant to § 76.916.

§ 76.914 Revocation of certification.

(a) A franchising authority's certification shall be revoked if:

(1) After the franchising authority has been given a reasonable opportunity to comment, it is determined that state and local laws and regulations do not conform to the Commission's rate regulations governing cable rates, §§ 76.922 through 76.925.

(2) After being given an opportunity to cure the defect, a franchising authority fails to fulfill one of the three conditions for certification, set forth in 47 U.S.C. 543(a)(3), or any of the provisions of § 76.910(b).

(b) In all cases of revocation, the Commission will assume jurisdiction over basic service rates until an authority becomes recertified. The Commission will also notify the franchising authority regarding the corrective action that may be taken.

(c) A petition for revocation must be served on the franchising authority and contain a statement that service was made. The franchising authority may file an opposition within 30 days of filing of the petition. A reply may be filed within 15 days of filing the opposition.

(d) While a petition for revocation is pending, and absent grant of a stay, the franchising authority may continue to regulate the basic service rates of its franchisees.

§ 76.915 Change in status of cable operator.

(a) A cable operator that becomes subject to effective competition, may petition the franchising authority for change in its regulatory status. The operator bears the burden of proving the existence of effective competition. Oppositions may be filed within 15 days

of public notice of the filing of the petition, and must be served on the operator. Cable operators may reply within 7 days of filing of oppositions.

(b) Franchising authority decisions on petitions for change in status must be made within 30 days after the pleading cycle set forth in paragraph (a) of this section closes. Franchising authorities must notify the Commission within ten days of any decision changing status. Unless the Commission receives an opposition to such change in status, the decision will become final 30 days after adoption by the franchising authority.

(c) After an initial determination of the franchising authority that effective competition exists becomes final, the franchising authority will then cease regulating basic cable service rates, and the Commission's regulatory authority over cable programming services for the system in the franchise area will also cease.

(d) A cable operator and a franchising authority may submit a joint statement that effective competition exists. The joint statement must stipulate which of the three statutory tests for effective competition has been met and explain how the test has been satisfied. These joint statements will become final decisions within 30 days of filing with the Commission, unless challenged by an interested party.

(e) Cable operators denied a change in status by a franchising authority may seek review of that finding at the Commission by filing a petition for revocation.

(f) In cases where a local franchising authority has not been certified to regulate rates, a cable operator may petition the Commission for change in its regulatory status. The time periods in paragraph (a) of this section will apply to oppositions and replies concerning these petitions.

§ 76.916 Petition for recertification.

(a) After its request for certification has been denied or its existing certification has been revoked, a franchising authority wishing to assume jurisdiction to regulate basic service and associated equipment rates must file a "Petition for Recertification" accompanied by a copy of the earlier decision denying or revoking certification.

(b) The petition must:

(1) Meet the requirements set forth in 47 U.S.C. 543(a)(3);

(2) State that the cable system is not subject to effective competition; and

(3) Contain a clear showing, supported by either objectively verifiable data such as a state statute, or by affidavit, that the reasons for the

earlier denial or revocation no longer pertain.

(c) The petition must be served on the cable operator and on any interested party that participated in the proceeding denying or revoking the original certification.

(d) Oppositions may be filed within 15 days after the petition is filed, and must be served on the petitioner. Replies may be filed within seven days of filing of oppositions, and must be served on the opposing party(ies).

§ 76.920 Composition of the basic tier.

Every subscriber of a cable system must subscribe to the basic tier in order to subscribe to any other tier of video programming or to purchase any other video programming.

§ 76.921 Buy-through of other tiers prohibited.

(a) No cable system operator may require the subscription to any tier other than the basic service tier as a condition of subscription to video programming offered on a per channel or per program charge basis. A cable operator may, however, require the subscription to one or more tiers of cable programming services as a condition of access to one or more tiers of cable programming services.

(b) A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per-channel or per-program charge basis.

(c) Prior to October 5, 2002, the provisions of paragraph (a) of this section shall not apply to any cable system that lacks the capacity to offer basic service and all programming distributed on a per channel or per program basis without also providing other intermediate tiers of service:

(1) By controlling subscriber access to nonbasic channels of service through addressable equipment electronically controlled from a central control point or

(2) Through the installation, noninstallation, or removal of frequency filters (traps) at the premises of subscribers without other alteration in system configuration or design and without causing degradation in the technical quality of service provided.

(d) Any retiering of channels or services that is not undertaken in order to accomplish legitimate regulatory, technical, or customer service objectives and that is intended to frustrate or has the effect of frustrating compliance with paragraphs (a) through (c) of this section is prohibited.

§ 76.922 Rates for the basic service tier and cable programming services tiers.

(a) *Basic and cable programming service tier rates.* Basic service tier and cable programming service rates shall be subject to regulation by the Commission and by state and local authorities, as is appropriate, in order to assure that they are in compliance with the requirements of 47 U.S.C. 543. Rates that are demonstrated, in accordance with these rules, not to exceed the "Initial Permitted Per Channel Charge" or the "Subsequent Permitted Per Channel Charge" as described below, or the equipment charges as specified in § 76.923, will be accepted as in compliance. The maximum monthly charge per subscriber for a tier of regulated programming services offered by a cable system shall consist of a permitted per channel charge multiplied by the number of channels on the tier, plus a charge for franchise fees. The maximum monthly charges for regulated programming services shall not include any charges for equipment or installations. Charges for equipment and installations are to be calculated separately pursuant to § 76.923 of these rules.

(b) *Initial permitted per channel charge.* (1) The permitted per channel charge on the initial date of regulation shall be, at the election of the cable operator, either:

(i) A charge determined pursuant to a cost-of-service proceeding; or
(ii) The charge specified in paragraphs (b)(1)(ii) (A), (B), or (C) of this section as applicable;

(A) If the operator's per channel charge for regulated programming services and equipment in effect on the date of initial regulation is equal to or below the benchmark per channel charge, as adjusted forward for inflation from September 30, 1992, to the date of initial regulation, then the permitted per channel charge shall be the per channel charge in effect on the date of initial regulation, adjusted for equipment.

(B) If (1) The operator's per channel charge for regulated programming services and equipment in effect on the date of initial regulation is above the benchmark per channel charge, as adjusted forward for inflation from September 30, 1992, until the initial date of regulation, and:

(2) The operator's per channel charge for regulated programming services and equipment in effect on September 30, 1992, was above the benchmark per channel charge, then the permitted per channel charge is nine-tenths of the per channel charge in effect on September 30, 1992, but no lower than the benchmark per channel charge,

additionally adjusted for inflation from September 30, 1992, to the initial date of regulation, for equipment, and for any charges in the number of channels offered on all regulated tiers.

(C) If: (1) The operator's per channel charge for regulated programming services and equipment in effect on the date of initial regulation is above the benchmark per channel charge, as adjusted forward for inflation from September 30, 1992, until the initial date of regulation, and:

(2) The operator's per channel charge for regulated programming services and equipment in effect on September 30, 1992, was below the benchmark per channel charge, then the permitted per channel charge is the benchmark rate per channel adjusted for inflation from September 30, 1992, to the initial date of regulation, for equipment, and for any charges in the number of channels offered on all regulated tiers.

(2) For purposes of this section, the initial date of regulation for the basic service tier shall be the date on which local notice is given pursuant to § 76.910 of our rules, that the provision of the basic service tier is subject to regulation. For a cable programming services tier, the initial date of regulation shall be the first date on which a complaint on the appropriate form is filed with the Commission concerning rates charged for the cable programming services tier.

(3) For purposes of this section, rates in effect on the initial date of regulation or on September 30, 1992, shall be the rates charged to subscribers for service received on that date.

(c) *Subsequent permitted per channel charge.* After the initial date of regulation, the permitted channel charge for regulated programming services shall be, at the election of the cable operator, either:

(1) A per channel rate determined pursuant to a cost-of-service showing, or:

(2) The prior permitted per channel charge previously approved by a regulatory authority, adjusted for inflation and external costs in accordance with the price cap requirements set forth in paragraph (d) of this section.

(d) *Price cap requirements—(1) Inflation adjustments.* Permitted per channel charges for regulated programming services may be adjusted periodically on account of inflation. Adjustments to permitted per channel charges on account of inflation shall be based on changes in the Gross National Product Price Index published by the Bureau of Economic Analysis of the United States Department of Commerce.

(2) *External costs.* Permitted per channel charges for regulated programming services may also be adjusted for changes in external costs measured on a per channel per subscriber basis. To the extent external cost increases are greater or less than the GNP-PI for the relevant period, the per-channel charge will be adjusted accordingly. Per channel charges may not be increased if external costs increase at a rate less than inflation. Permitted per channel charges also shall be decreased on account of external costs to the extent such costs decrease from previous levels.

(i) *Categories.* External Costs shall consist of costs in the following categories:

(A) State and local taxes applicable to provision of cable television service;

(B) Franchise fees;

(C) Costs of complying with franchise requirements, including costs of providing public, educational, and governmental access channels as required by the franchising authority;

(D) Retransmission consent fees; and

(E) Programming costs.

(ii) The permitted per channel charge for a tier of regulated programming services shall be adjusted on account of programming costs and retransmission consent fees only for programming or broadcast signals offered on that tier.

(iii) The permitted per channel charge shall not be adjusted for costs of retransmission consent fees or charges in those fees incurred prior to October 6, 1994.

(iv) The starting date for adjustments on account of external costs for a tier of regulated programming service shall be the initial date of regulation of the tier or 180 days from the effective date of these rules, if the initial date of regulation occurs on or after 180 days from the effective date of these rules.

(v) Changes in franchise fees shall not result in an adjustment to permitted per channel charges, but rather shall be calculated separately as part of the maximum monthly charge per subscriber for a tier of regulated programming services.

(vi) Adjustments to permitted per channel charges on account of increases in costs of programming obtained from affiliated programmers, as defined in § 76.901 of the rules, shall be the lesser of actual increases or the previous permitted rate level increased by the amount of inflation.

(vii) Adjustments to permitted per channel charges on account of increases in costs of programming shall be further adjusted to reflect any revenues received by the operator from the programmer.

§ 76.923 Rates for equipment and installation used to receive the basic service tier.

(a) *Scope.* The equipment regulated under this section consists of all equipment in a subscriber's home that is used to receive the basic service tier, regardless of whether such equipment is additionally used to receive other tiers of regulated programming service and/or unregulated service. Such equipment shall include, but is not limited to:

(1) Converter boxes;

(2) Remote control units;

(3) Connections for additional television receivers; and

(4) Other cable home wiring.

Subscriber charges for such equipment shall not exceed charges based on actual costs in accordance with the requirements set forth below.

(b) *Unbundling.* A cable operator shall establish rates for remote control units, converter boxes, other customer equipment, installation, and additional connections separate from rates for basic tier service. In addition, the rates for such equipment and installations shall be unbundled one from the other.

(c) *Equipment basket.* A cable operator shall establish an Equipment Basket, which will include all costs associated with providing customer equipment and installation under this section. Equipment Basket costs shall be limited to the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment, as determined in accordance with the cost accounting and cost allocation requirements of § 76.924. The Equipment Basket shall not include general administrative overhead including general marketing expenses. The Equipment Basket shall include a reasonable profit.

(d) *Hourly service charge.* A cable operator shall establish charges for equipment and installation using the Hourly Service Charge (HSC) methodology. The HSC shall equal the operator's annual Equipment Basket costs, excluding the purchase cost of customer equipment, divided by the total person hours involved in installing, repairing, and servicing customer equipment during the same period. The HSC is calculated according to the following formula:

$$\text{HSC} = \frac{\text{EB} - \text{CE}}{\text{H}}$$

Where, EB=annual Equipment Basket Cost; CE=annual purchase cost of all customer equipment; and

H=person hours involved in installing and repairing equipment per year. The purchase cost of customer equipment shall include the cable operator's invoice price plus all other costs incurred with respect to the equipment until the time it is provided to the customer.

(e) *Installation charges.* Installation charges shall be either:

(1) The HSC multiplied by the actual time spent on each individual installation; or

(2) The HSC multiplied by the average time spent on a specific type of installation.

(f) *Remote charges.* Monthly charges for rental of a remote control unit shall consist of the average annual unit purchase cost of the type of remote leased, including acquisition price and incidental costs such as sales tax, financing and storage up to the time it is provided to the customer, added to the product of the HSC times the average number of hours annually repairing or servicing a remote, divided by 12 to determine the monthly lease rate for a remote according to the following formula:

$$\text{Monthly Charge} = \frac{\text{UCE} + (\text{HSC} \times \text{HR})}{12}$$

Where, HR=average hours repair per year; and UCE=average annual unit cost of remote. Separate charges shall be established for each significantly different type of remote control unit.

(g) *Other equipment charges.* The monthly charges for rental of converter boxes and other customer equipment shall be calculated in the same manner as for remote control units. Separate charges shall be established for each significantly different type of converter box and each significantly different type of other customer equipment.

(h) *Additional connection charges.* The costs of installation and monthly use of additional connections shall be recovered as charges associated with the installation and equipment cost categories, and at rate levels determined by the actual cost methodology presented in the foregoing paragraphs (e), (f), and (g) of this section. An operator may recover additional programming costs and the costs of signal boosters on the customers premises, if any, associated with the additional connection as a separate monthly unbundled charge for additional connections.

(i) *Charges for equipment sold.* A cable operator may sell customer

premises equipment to a subscriber. The equipment price shall recover the operator's cost of the equipment, including costs associated with storing and preparing the equipment for sale up to the time it is sold to the customer, plus a reasonable profit. An operator may sell service contracts for the maintenance and repair of equipment sold to subscribers. The charge for a service contract shall be the HSC times the estimated average number of hours for maintenance and repair over the life of the equipment.

(j) *Promotions.* A cable operator may offer equipment or installation at charges below those determined under paragraphs (e) through (g) of this section, as long as those offerings are reasonable in scope in relation to the operator's overall offerings in the Equipment Basket and not unreasonably discriminatory. Operators may not recover the cost of a promotional offering by increasing charges for other Equipment Basket elements, or by increasing programming service rates above the maximum monthly charge per subscriber prescribed by these rules. As part of a general cost-of-service showing, an operator may include the cost of promotions in its general system overhead costs.

(k) *Franchise fees.* Equipment charges may include a properly allocated portion of franchise fees.

§ 76.924 Cost accounting and cost allocation requirements.

(a) *Applicability.* The requirements of this section are applicable to cable operators for which the basic service tier is regulated by local franchising authorities or the Commission, or, with respect to a cable programming services tier, for which a complaint has been filed with the Commission. The requirements of this section are applicable for purposes of rate adjustments on account of external costs and for cost-of-service showings.

(b) *Generally accepted accounting principles.* Cable operators shall maintain their accounts in accordance with generally accepted accounting principles, except as otherwise directed by the Commission.

(c) *Accounts required.* Cable operators shall maintain accounts in a manner that will enable identification of appropriate costs and application of the Commission's cost assignment and allocation procedures, to cost categories necessary for rate adjustments due to changes in external costs and for cost-of-service showings. Such categories shall be sufficiently detailed and supported to permit verification and

audit against the company's accounting records.

(d) *Accounting level.* Except to the extent indicated below, cable operators shall aggregate expenses and revenues at either the franchise, system, regional, or company level in a manner consistent with practices of the operator as of April 3, 1992. However, in all events, cable operators shall identify at the franchise level their costs of franchise requirements, franchise fees, local taxes, and local programming.

(e) *Cost allocation requirements.* (1) For purposes of establishing expenses at the franchise level, cable operators shall allocate expenses and revenues aggregated at higher levels to the franchise level based on the ratio of the total number of subscribers served at the franchise level to the total number of subscribers served at the higher level.

(2) Except to the extent indicated below, all categories of costs allocated to, or identified at, the franchise level shall be allocated to the basic service tier based on the ratio of channels in the basic tier to the total number of channels offered in the franchise area, including nonregulated and leased commercial access channels. These costs shall be allocated to each tier of cable programming services based on the ratio of channels in that tier to the total number of channels offered in the franchise area.

(3) Costs of programming and retransmission consent fees, however, shall be allocated only to the tier on which the programming or broadcast signal at issue is offered.

(4) Costs of franchise fees shall be allocated among equipment and installations, program service tiers and subscribers in a manner that is most consistent with the methodology of assessment of franchise fees by local authorities.

(5) Costs of public, educational, and governmental access channels carried on the basic tier shall be directly assigned to the basic tier where possible.

(f) *Common costs.* Expenses which cannot be assigned to any single expense or service category shall be described as common costs. Common costs shall be allocated to expense categories as follows:

(1) Wherever possible, common costs are to be allocated to service cost categories based on direct analysis of the origin of the costs themselves.

(2) When direct analysis is to possible, common costs shall, if possible, be allocated to service cost categories based on an indirect, cost-causative linkage to other costs directly

assigned or allocated to the service cost category.

(3) When neither direct nor indirect measures of cost allocation can be found, common costs shall be allocated to each service cost category based on the ratio of all costs directly assigned and attributed to a service cost category over total costs directly assignable and attributable.

(g) *Unrelated expenses and revenues.* Cable operators shall exclude from cost categories used to develop rates for the provision of regulated cable service, equipment, and leased commercial access, any direct or indirect expenses and revenues not related to the provision of such services. Common costs of providing regulated cable service, equipment, and leased commercial access and unrelated activities shall be allocated between them in accordance with paragraph (f) of this section.

(h) *Part-time channels.* In situations where a single channel is divided on a part-time basis and is used to deliver service associated with different tiers or with pay per channel or pay per view service, a reasonable and documented allocation of that channel between services shall be required along with the associated revenues and costs.

§ 76.925 Costs of franchise requirements.

(a) The costs of satisfying franchise requirements to support public, educational, and governmental channels shall consist of the sum of:

(1) All per channel costs for the number of channels used to meet franchise requirements for public, educational, and governmental channels;

(2) Any direct costs of meeting such franchise requirements; and

(3) A reasonable allocation of general and administrative overhead.

(b) The costs of satisfying any other requirement under the franchise shall consist of the direct and indirect costs including a reasonable allocation of general and administrative overhead.

§ 76.930 Initiation of review of basic cable service and equipment rates.

A cable operator shall file its schedule of rates for the basic service tier and associated equipment with a franchising authority within 30 days of receiving written notification from the franchising authority that the franchising authority has been certified by the Commission to regulate rates for the basic service tier.

§ 76.931 Notification of basic tier availability.

A cable operator shall provide written notification to subscribers of the

availability of basic tier service by September 19, 1993, or three billing cycles from June 21, 1993, and to new subscribers at the time of installation. This notification shall include the following information:

- (a) That basic tier service is available;
- (b) The cost per month for basic tier service;
- (c) A list of all services included in the basic service tier.

§ 76.932 Notification of proposed rate increase.

A cable operator shall provide written notice to a subscriber of any increase in the price to be charged for the basic service tier or associated equipment at least 30 days before any proposed increase is effective. The notice should include the name and address of the local franchising authority.

§ 76.933 Franchising authority review of basic cable rates and equipment costs.

(a) After a cable operator has submitted for review its existing rates for the basic service tier and associated equipment costs, or a proposed increase in these rates (including increases in the baseline channel change that results from reductions in the number of channels in a tier), the existing rates will remain in effect or the proposed rates will become effective after 30 days from the date of submission: *Provided, however,* That the franchising authority may toll this 30-day deadline for an additional time by issuing a brief written order as described in paragraph (b) within 30 days of the rate submission explaining that it needs additional time to review the rates.

(b) If the franchising authority is unable to determine, based upon the material submitted by the cable operator, that the existing or proposed rates are within the Commission's permitted basic service tier charge or actual cost of equipment as defined in §§ 76.922 and 76.923, or if a cable operator has submitted a cost-of-service showing pursuant to §§ 76.937(c) and 76.924, seeking to justify a rate above the Commission's basic service tier charge as defined in §§ 76.922 and 76.923, the franchising authority may toll the 30-day deadline in paragraph (a) of this section to request and/or consider additional information or to consider the comments from interested parties as follows:

- (1) For an additional 90 days in cases not involving cost-of-service showings; or
 - (2) For an additional 150 days in cases involving cost-of-service showings.
- (c) If a franchising authority has availed itself of the additional 90 or 150

days permitted in paragraph (b) of this section, and has taken no action within these additional time periods, then the proposed rates will go into effect at the end of the 90 or 150 day periods, or existing rates will remain in effect at such times, subject to refunds if the franchising authority subsequently issues a written decision disapproving any portion of such rates: *Provided, however,* That in order to order refunds, a franchising authority must have issued a brief written order to the cable operator by the end of the 90 or 150-day period permitted in paragraph (b) of this section directing the operator to keep an accurate account of all amounts received by reason of the rate in issue and on whose behalf such amounts were paid.

§ 76.934 Small systems.

A franchising authority that has been certified, pursuant to § 76.910 to regulate rates for basic service and associated equipment may permit a small system as defined in § 76.901 to certify that the small system's rates for basic service and associated equipment comply with § 76.922, the Commission's substantive rate regulations.

§ 76.935 Participation of interested parties.

In order to regulate basic tier rates or associated equipment costs, a franchising authority must have procedural laws or regulations applicable to rate regulation proceedings that provide a reasonable opportunity for consideration of the views of interested parties. Such rules must take into account the 30, 120, or 180-day time periods that franchising authorities have to review rates under § 76.933.

§ 76.936 Written decision.

(a) A franchising authority must issue a written decision in a ratemaking proceeding whenever it disapproves an initial rate for the basic service tier or associated equipment in whole or in part, disapproves a request for a rate increase in whole or in part, or approves a request for an increase in whole or in part over the objections of interested parties. A franchising authority is not required to issue a written decision that approves an unopposed existing or proposed rate for the basic service tier or associated equipment.

(b) Public notice must be given of any written decision required in paragraph (a) of this section, including releasing the text of any written decision to the public.

§ 76.937 Burden of proof.

(a) A cable operator has the burden of proving that its existing or proposed

rates for basic service and associated equipment comply with 47 U.S.C. 543, and §§ 76.922 and 76.923.

(b) For an existing or a proposed rate for basic tier service or associated equipment that is within the permitted tier charge and actual cost of equipment as set forth in §§ 76.922 and 76.923, the cable operator must submit the appropriate FCC form.

(c) For an existing or a proposed rate for basic tier service that exceeds the permitted tier charge as set forth in §§ 76.922 and 76.923, the cable operator must submit a cost-of-service showing to justify the proposed rate.

§ 76.938 Proprietary information.

A franchising authority may require the production of proprietary information to make a rate determination and in such cases must apply procedures analogous to those set forth in § 0.459 regarding requests for confidentiality.

§ 76.940 Prospective rate reduction.

A franchising authority may order a cable operator to implement a reduction in basic service tier or associated equipment rates where necessary to bring rates into compliance with the standards set forth in §§ 76.922 and 76.923.

§ 76.941 Rate prescription.

A franchising authority may prescribe a reasonable rate for the basic service tier or associated equipment after it determines that a proposed rate is unreasonable.

§ 76.942 Refunds.

(a) A franchising authority may order a cable operator to refund to subscribers that portion of previously paid rates determined to be in excess of the permitted tier charge or above the actual cost of equipment, unless the operator has submitted a cost-of-service showing which justifies the rate charged as reasonable. Before ordering a cable operator to refund previously paid rates to subscribers, a franchising authority must give the operator notice and opportunity to comment.

(b) An operator's liability for refunds is limited to a one-year period, *except that* an operator that fails to comply with a valid rate order issued by a franchising authority or the Commission shall be liable for refunds commencing from the effective date of such order until such time as it complies with such order.

(c) The refund period shall run as follows:

- (1) From the date the operator implements a prospective rate reduction

back in time to June 21, 1993, or one year, whichever is shorter.

(2) From the date a franchising authority issues an accounting order pursuant to § 76.933(c), and ending on the date the operator implements a prospective rate reduction ordered by a franchising authority or one year, whichever is shorter.

(d) The cable operator, in its discretion, may implement a refund in the following manner:

(1) By returning overcharges to those subscribers who actually paid the overcharges, either through direct payment or as a specifically identified credit to those subscribers' bills; or

(2) By means of a prospective percentage reduction in the rates for the basic service tier or associated equipment to cover the cumulative overcharge. This shall be reflected as a specifically identified, one-time credit on prospective bills to the class of subscribers that currently subscribe to the cable system.

(e) Refunds shall include interest computed at applicable rates published by the Internal Revenue Service for tax refunds and additional tax payments.

§ 76.943 Fines.

(a) A franchising authority may impose fines or monetary forfeitures on a cable operator that does not comply with a rate decision or refund order directed specifically at the cable operator, provided the franchising authority has such power under state or local laws.

(b) A cable operator shall not be subject to forfeiture because its rate for basic service or equipment is determined to be unreasonable.

§ 76.944 Commission review of franchising authority decisions on rates for the basic service tier and associated equipment.

(a) The Commission shall be the sole forum for appeals of decisions by franchising authorities on rates for the basic service tier or associated equipment involving whether or not a franchising authority has acted consistently with the Cable Act or §§ 76.922 and 76.923. Appeals of ratemaking decisions by franchising authorities that do not depend upon determining whether a franchising authority has acted consistently with the Cable Act or §§ 76.922 and 76.923, may be heard in state or local courts.

(b) Any participant at the franchising authority level in a ratemaking proceeding may file an appeal of the franchising authority's decision with the Commission within 30 days of release of the text of the franchising authority's

decision as computed under § 1.4(b) of this chapter. Oppositions may be filed within 15 days after the appeal is filed, and must be served on the party(ies) appealing the rate decision. Replies may be filed 7 days after the last day for oppositions and shall be served on the parties to the proceeding.

§ 76.945 Procedures for Commission review of basic service rates.

(a) Upon assumption of rate regulation authority, the Commission will notify the cable operator and require the cable operator to file its basic rate schedule with the Commission within 30 days, with a copy to the local franchising authority.

(b) Basic service and equipment rate schedule filings for existing rates or proposed rate increases (including increases in the baseline channel change that results from reductions in the number of channels in a tier) must use the appropriate FCC forms. Cable operators with existing or proposed rates above the permitted tier rate must submit a cost-of-service showing sufficient to support a finding that the rates are reasonable.

(c) Filings proposing annual adjustments or rates within the rates regulation standards in §§ 76.922 and 76.923, must be made 30 days prior to the proposed effective date and can become effective on the proposed effective date unless the Commission issues an order deferring the effective date or denying the rate proposal. Petitions opposing such filings must be filed within 15 days of public notice of the filing by the cable operator and be accompanied by a certificate that service was made on the cable operator and the local franchising authority. The cable operator may file an opposition within five days of filing of the petition, certifying to service on both the petitioner and the local franchising authority.

(d) Filings proposing a rate not within the rate regulation standards of §§ 76.922 and 76.923, must be made 90 days before the requested effective date. Petitions opposing such filings must be filed within 30 days of public notice of the filing, and be accompanied by a certificate that service was made on the cable operator and the local franchising authority. The cable operator may file an opposition within 10 days of the filing of the petition, and certifying that service was made on the petitioner and the local franchising authority.

§ 76.950 Complaints regarding cable programming service rates.

Any subscriber, franchising authority, or other relevant state or local

government entity may file with the Commission a complaint challenging the reasonableness of a cable operator's rate for cable programming service, or the reasonableness of a cable operator's charges for installation or rental of equipment used for the receipt of cable programming service.

§ 76.951 Standard complaint form; other filing requirements.

(a) Any complaint regarding a cable operator's rate for cable programming service or associated equipment must be filed using standard complaint form, FCC 329. The cable operator must provide a copy of the standard complaint form to any subscriber upon request.

(b) The following information must be provided on the standard complaint form:

(1) The complainant's name, mailing address, and daytime telephone number;

(2) The name, mailing address, and FCC community unit identifier of the relevant cable operator.

(Note: pursuant to § 76.952, the cable operator must provide its FCC community unit identifier on monthly bills to subscribers);

(3) The name and address of the relevant franchising authority.

(Note: pursuant to § 76.952, the cable operator must provide this information on monthly bills to subscribers);

(4) An indication whether the complainant is challenging the reasonableness of:

(i) A rate concerning cable programming service or associated equipment in effect on June 21, 1993; or
(ii) A rate increase for cable programming service or associated equipment;

(5) For subscriber complaints regarding a rate increase, the date the complainant first received a bill from the cable operator reflecting the increased rate;

(6) A description of the cable programming service or associated equipment involved and, if applicable, how the service or associated equipment has changed;

(7) The current rate for the cable programming service or associated equipment at issue and, if the complainant is challenging the reasonableness of a rate increase, the most recent rate for the service or associated equipment immediately prior to the rate increase;

(8) An indication whether the complainant is filing:

(i) a complaint regarding this specific rate for the first time; or

(ii) a corrected complaint that was dismissed without prejudice;

(9) If the complainant is filing a corrected complaint, an indication of the date the complainant filed the prior complaint and the date the complainant received notification from the Commission that the prior complaint was defective;

(10) A certification that a copy of the complaint, including all attachments, is being served contemporaneously via first class mail on the cable operator and, if the complainant is a subscriber, on the relevant franchising authority;

(11) An allegation that the rate in question is unreasonable because it violates the Commission's rate regulations; and

(12) A certification that, to the best of the complainant's knowledge, the information provided on the form is true and correct.

(c) The complainant must attach to the standard complaint form a copy of the most recent bill reflecting the disputed rate or rate increase.

(d) A complaining subscriber may, but is not required to, attach to the standard complaint form a statement from the relevant franchising authority presenting its views on the reasonableness of the rate in question.

§ 76.952 Information to be provided by cable operator on monthly subscriber bills.

All cable operators must provide the following information to subscribers on monthly bills:

(a) The name and mailing address of the relevant franchising authority; and

(b) The FCC community unit identifier for the cable system.

§ 76.953 Limitation on filing a complaint.

(a) *Complaint regarding a rate in effect on June 21, 1993.*

Notwithstanding paragraph (b) of this section, a complaint regarding a rate for cable programming service or associated equipment in effect on June 21, 1993, must be filed by December 20, 1993.

(b) *Complaint regarding a rate increase.* Except as provided in paragraph (a) of this section, a complaint alleging an unreasonable rate for cable programming service or associated equipment may be filed against a cable operator only in the event of a rate increase. A complaint regarding a rate increase for cable programming or associated equipment must be filed with the Commission within 45 days from the date the complainant receives a bill from the cable operator that reflects the increased rate.

(c) Late-filed complaints will be dismissed with prejudice.

§ 76.954 Initial review of complaint; minimum showing requirement; dismissal of defective complaints.

(a) The Commission will conduct an initial review of a complaint to determine if it meets the minimum showing required to allow the complaint to go forward. The minimum showing shall be satisfied if the complaint is filed using the standard complaint form described in § 76.951 and includes all information and attachments required by that form. A complainant will not be required, as part of the minimum showing, to provide the underlying information and calculations necessary to judge the cable programming service rate in question against the Commission's rate standards.

(b) A complaint that does not meet the minimum showing requirement described in paragraph (a) of this section will be considered defective. A defective complaint will be dismissed without prejudice to filing a corrected complaint as provided by § 76.955. The Commission will notify the complainant by mail of the dismissal. The filing of a complaint on the applicable form, but which is otherwise defective, will toll the limitation period established by § 76.953.

§ 76.955 Additional opportunity to file corrected complaint.

(a) If the Commission dismisses an initial complaint without prejudice pursuant to § 76.954, the complainant shall have one additional opportunity to cure the defect and file a corrected complaint.

(b) For a complaint filed on the applicable form but is otherwise defective, the complainant must cure the defect and file a corrected complaint with the Commission within 30 days from the date of the Commission's dismissal notice. Failure to cure the defect and file a corrected complaint within this time period will result in dismissal of the complaint with prejudice.

§ 76.956 Cable operator response.

(a) Unless the Commission notifies a cable operator to the contrary, the cable operator must file with the Commission a response to a complaint filed on the applicable form, within 30 days of the date of service of the complaint. The response shall indicate when service occurred. Service by mail is complete upon mailing. See § 1.47(f). The response shall include the information required by the appropriate FCC form. The cable operator must serve its response on the complainant (and, if the complainant is a subscriber, the relevant

franchising authority) via first class mail.

(b) The burden shall be on the cable operator to prove that the service rate or equipment charge in question is not unreasonable. The cable operator may carry its burden in the following manner:

(1) For a service rate at or below the permitted level, by providing information and calculations that demonstrate that the rate in question falls at or below the permitted level;

(2) For a service rate that exceeds the permitted level;

(i) By providing proof that the cable system has reduced the rate for the cable programming service at issue to a level at or below the permitted level; or

(ii) By providing detailed cost-based information that demonstrates that the rate in question is reasonable despite the fact that it exceeds the permitted level.

(3) For a charge for equipment installation or rental, by providing information that demonstrates that the charge is based on the cable operator's actual cost.

(c) In addition to responding to the merits of a complaint, the cable operator may also move for dismissal of the complaint for failure to meet the minimum showing requirement. Any such motion for dismissal must state with particularity the reasons the cable operator believes the complaint is defective and shall not relieve the cable operator of its obligation to respond to the merits of the complaint.

(d) A cable operator may file a consolidated response to multiple complaints regarding the identical rate or rate increase. A consolidated response must be filed within 30 days from the date of service of the first complaint received, unless the Commission notifies the cable operator to the contrary. A cable operator may amend a consolidated response to address new issues raised by complaints received after the cable operator's initial response.

(e) A cable operator that fails to file and serve a response to a valid complaint may be deemed in default. If the Commission deems a cable operator in default, the Commission may enter an order against the cable operator finding the rate to be unreasonable and mandating appropriate relief.

(f) A cable operator need not respond to any complaint that is:

(1) Not filed on the applicable form; or

(2) That the Commission determined is defective and has so notified the cable operator.

§ 76.957 Commission adjudication of the complaint.

The Commission will consider the complaint and the cable operator's response and then determine by written decision whether the rate for the cable programming service or associated equipment is unreasonable or not. If it determines that the rate in question is unreasonable, the Commission will grant the complaint and may order appropriate relief, including, but not limited to, prospective rate reductions and refunds. If it determines that the rate in question is reasonable, the Commission will deny the complaint.

§ 76.960 Prospective rate reductions.

Upon a finding that a rate for cable programming service or associated equipment is unreasonable, the Commission may order the cable operator to implement a prospective rate reduction to the class of customers subscribing to the cable programming service at issue. The Commission's decision regarding a prospective rate reduction shall remain binding on the cable operator for one year unless the Commission specifies otherwise.

§ 76.961 Refunds.

(a) Upon a finding that a rate for cable programming service or associated equipment is unreasonable, the Commission may order the cable operator to refund to subscribers that portion of previously paid rates which is deemed unreasonable.

(b) The cumulative refund due subscribers shall be calculated from the date a valid complaint is filed until the date a cable operator implements a prospective rate reduction as ordered by the Commission pursuant to § 76.960.

(c) The cable operator, in its discretion, may implement a refund in the following manner:

(1) By returning overcharges to those subscribers who actually paid the overcharges, either through direct payment or as a specifically identified, one-time credit to those subscribers' bills; or

(2) By means of a prospective percentage reduction in the unreasonable cable programming service rate or equipment charge to cover the cumulative overcharge. This shall be reflected as a specifically identified, one-time credit on prospective bills to the class of subscribers that currently subscribe to the cable programming service or associated equipment at issue.

(d) Refunds shall include interest computed at applicable rates published by the Internal Revenue Service for tax refunds and additional tax payments.

Interest shall accrue from the date a valid complaint is filed until the refund issues.

§ 76.962 Implementation and certification of compliance.

(a) *Implementation.* A cable operator must implement remedial requirements, including prospective rate reductions and refunds, within 60 days from the date the Commission releases an order mandating a remedy.

(b) *Certification of compliance.* A cable operator must certify to the Commission its compliance with any Commission order mandating remedial requirements. Such certification shall:

- (1) Be filed with the Commission within 90 days from the date the Commission releases an order mandating a remedy;
- (2) Reference the applicable Commission order;
- (3) State that the cable operator has complied fully with all provisions of the Commission's order;
- (4) Include a description of the precise measures the cable operator has taken to implement the remedies ordered by the Commission; and
- (5) Be signed by an authorized representative of the cable operator.

§ 76.963 Forfeiture.

(a) If any cable operator willfully fails to comply with the terms of any Commission order, including an order mandating remedial requirements after a finding of unreasonable cable programming service or equipment rates, or any Commission rule, the Commission may, in addition to other remedies, impose a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. 503(b).

(b) A cable operator shall not be subject to forfeiture because its rate for cable programming service or equipment is determined to be unreasonable.

§ 76.964 Advance written notification of rate increases.

In addition to the requirement of § 76.309(c)(3)(i)(B) regarding advance notification to customers of any changes in rates, programming services or channel positions, a cable operator shall give the relevant franchising authority a minimum of 30 days advance written notification of any changes in rates for cable programming service or associated equipment.

§ 76.970 Commercial leased access rates.

(a) Cable operators shall designate channel capacity for commercial use by persons unaffiliated with the operator in

accordance with the requirement of 47 U.S.C. 532.

(b) The maximum commercial leased access rates that a cable operator may charge is the highest implicit net fee charged any nonaffiliated programmer (excluding leased access programmers) within the same program category.

(c) The implicit fee charged an unaffiliated programmer shall be calculated by determining the monthly price per subscriber that the operator pays to carry the programming of nonaffiliated providers and deducting the monthly price subscribers pay to view the programming of the nonaffiliated provider. This difference is multiplied by the percentage of subscribers able to receive the nonaffiliated provider's programming. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services).

(d) For each of the three program categories as defined in paragraph (f) of this section, the highest implicit net fee charged any nonaffiliated provider in each category shall be the maximum monthly leased access rate per subscriber that the operator could charge a commercial leased access programmer in that category. The highest implicit net fee shall be based on contracts in effect in the previous calendar year. Maximum rates for shorter periods can be calculated by prorating the monthly maximum rate.

(e) Upon request, a schedule of commercial leased access rate shall be provided to prospective leased access programmers. Operators shall maintain, for Commission inspections, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the net implicit fees, and justifications for all adjustments.

(f) For purposes of paragraph (b) of this section there are three program categories:

- (1) Programming for which a per-event or per channel charge is made;
- (2) Programming more than fifty percent of the capacity of which is used to sell products directly to customers; and
- (3) All other programming.

§ 76.971 Commercial leased access terms and conditions.

(a)(1) The cable operator and unaffiliated commercial leased access user may negotiate channel placement and tier access for leased programming, taking into account:

(i) The nature of the service (pay or general distribution channel, complete channel or individual program);

(ii) The relationship between the charge imposed and the desirability of the channel; and

(iii) The need to provide competition in program delivery and to afford users a genuine outlet for their programming.

(2) Where demand for commercial leased access capacity exceeds available supply, each lessee will be allowed to lease up to one channel's capacity.

(b) Cable operators may not apply programming production standards to leased access that are any higher than those applied to public, educational and governmental access channels.

(c) Cable operators are required to provide unaffiliated leased access users the minimal level of technical support necessary for users to present their material on the air, and may not unreasonably refuse to cooperate with a leased access user in order to prevent that provider from obtaining channel capacity, *provided however*, That leased access providers must reimburse operators for the reasonable cost of any technical support that operators actually provide.

(d) Cable operators may require reasonable security deposits or other assurances from users who are unable to prepay in full for access to leased commercial channels.

(e) Cable operators may not set terms and conditions for commercial leased access use based on content, *except*:

(1) To the limited extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person; or

(2) To comply with 47 U.S.C. 532 (h), (j) and § 76.701.

(f)(1) A cable operator shall provide billing and collection services for commercial leased access cable users, unless the operator demonstrates the existence of third party billing and collection services which in terms of cost and accessibility, offer leased access users an alternative substantially equivalent to that offered comparable non-leased programmers.

(2) If an operator can make the showing required in paragraph (f)(1) of this section, it must, to the extent technically feasible make available data necessary to enable a third party to bill and collect for the leased access user.

§ 76.975 Commercial leased access dispute resolution.

(a) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available in accordance with the provisions of Title VI of the

Communications Act may bring an action in the district court of the United States for the judicial district in which the cable system is located to compel that such capacity be made available.

(b) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available or to charge rates for such capacity in accordance with the provisions of title VI of the Communications Act, or our implementing regulations, §§ 76.970 and 76.971, may file a petition for relief with the Commission.

(c) A petition must contain a concise statement of the facts constituting a violation of the statute or the Commission's Rules, the specific statute(s) or rule(s) violated, and certify that the petition was served on the cable operator.

(d) A petition must be filed within 60 days of the alleged violation.

(e) The cable operator or other respondent will have 30 days from the filing of the petition in which to file a response. If a leased access rate is disputed, the response must show that the rate charged is not higher than the highest implicit fee the operator charges for a comparable category of service, and submit the affidavit of a responsible company official in support. If, after a response is submitted, the staff finds a *prima facie* violation of our rules, the staff may require a respondent to produce additional information, or specify other procedures necessary for resolution of the proceeding.

(f) The Commission, after consideration of the pleadings, may grant the relief requested, in whole or in part, including, but not limited to ordering refunds, injunctive measures, or forfeitures pursuant 47 U.S.C. 503, denying the petition, or issuing a ruling on the petition or dispute.

(g) To be afforded relief, the petitioner must show by clear and convincing evidence that the cable operator has violated the Commission's leased access provisions in 47 U.S.C. 532 or §§ 76.970 and 76.971, or otherwise acted unreasonably or in bad faith in failing or refusing to make capacity available or to charge lawful rates for such capacity to an unaffiliated leased access programmer.

(h) During the pendency of a dispute, a party seeking to lease channel capacity for commercial purposes, shall comply with the rates, terms and conditions prescribed by the cable operator, subject to refund or other appropriate remedy.

§ 76.977 Minority and educational programming used in lieu of deregulated commercial leased access capacity.

(a) A cable operator required by this section to designate channel capacity for commercial use pursuant to 47 U.S.C. 532, may use any such channel capacity for the provision of programming from a qualified minority programming source or from any qualified educational programming sources, whether or not such source is affiliated with cable operator. The channel capacity used to provide programming from a qualified minority programming source or from any qualified educational programming source pursuant to this Section may not exceed 33 percent of the channel capacity designated pursuant to 47 U.S.C. 532.

(b) For purposes of this section, a qualified minority programming source is a programming source that devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority-owned.

(c) For purposes of this section, a qualified educational programming source is a programming source that devotes substantially all of its programming to educational or instructional programming that promotes public understanding of mathematics, the sciences, the humanities, or the arts and has a documented annual expenditure on programming exceeding \$15 million. The annual expenditure on programming means all annual costs incurred by the programming source to produce or acquire programs which are scheduled to be televised, and specifically excludes marketing, promotion, satellite transmission and operational costs, and general administrative costs.

(d) For purposes of paragraphs (b) and (c) of this section, *substantially all* means that 90% or more of the programming offered must be devoted to minority or educational purposes, as defined in paragraphs (b) and (c) of this section, respectively.

(e) For purposes of paragraph (b) of this section, "minority" is defined as in 47 U.S.C. 309(i)(3)(c)(ii) to include Blacks, Hispanics, American Indians, Alaska Natives, Asians and Pacific Islanders.

§ 76.980 Charges for customer changes.

(a) This section shall govern charges for any changes in service tiers or equipment provided to the subscriber that are initiated at the request of a subscriber after initial service installation.

(b) The charge for customer changes in service tiers effected solely by coded entry on a computer terminal or by other similarly simple methods shall be a nominal amount, not exceeding actual costs, as defined in paragraph (c) of this section.

(c) The charge for customers changes in service tiers or equipment that involve more than coded entry on a computer or other similarly simple method shall be based on actual cost. The actual cost charge shall be either the HSC, as defined in Section 76.923 of the rules, multiplied by the number of persons hours needed to implement the change, or the HSC multiplied by the average number of persons hours involved in implementing customer changes.

(d) A cable operator may establish a higher charge for changes effected solely by coded entry on a computer terminal or by other similarly simple methods, subject to approval by the franchising authority, for a subscriber changing service tiers more than two times in a twelve month period, except for such changes ordered in response to a change in price or channel line-up. If a cable system adopts such an increased charge, the cable system must notify all subscribers in writing that they may be subject to such a charge for changing service tiers more than the specified number of times in any twelve month period.

(e) Downgrade charges that are the same as, or lower than, upgrade charges are evidence of the reasonableness of such downgrade charges.

(f) For 30 days after notice of retiering or rate increases, a customer may obtain changes in service tiers at no additional charge.

§ 76.981 Negative option billing.

A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. This provision, however, shall not preclude the addition or deletion of a specific

program from a service offering, the addition or deletion of specific channels from an existing tier of service, or the restructuring or division of existing tiers of service that do not result in a fundamental change in the nature of an existing service or tier of service provided that such change is otherwise consistent with applicable regulations. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.

§ 76.982 Continuation of rate agreements.

During the term of an agreement executed before July 1, 1990, by a franchising authority and a cable operator providing for the regulation of basic cable service rates, where there was not effective competition under Commission rules in effect on that date, the franchising authority may regulate basic cable rates without following section 623 of the 1992 Cable Act or §§ 76.910 through 76.942. A franchising authority regulating basic cable rates pursuant to such a rate agreement is not required to file for certification during the remaining term of the agreement but shall notify the Commission of its intent to continue regulating basic cable rates.

§ 76.983 Discrimination.

(a) No Federal agency, state, or local franchising authority may prohibit a cable operator from offering reasonable discounts to senior citizens or to economically disadvantaged groups.

(1) Such discounts must be offered equally to all subscribers in the franchise area who qualify as members of these categories, or any reasonable subcategory thereof.

(2) For purposes of this section, members of economically disadvantaged groups are those individuals who receive federal, state or local welfare assistance.

(b) Nothing herein shall preclude any Federal agency, state, or local

franchising authority from requiring and regulating the reception of cable service by hearing impaired individuals.

§ 76.984 Geographically uniform rate structure.

(a) The rates charged by cable operators subject to §§ 76.922 and 76.923 shall be provided pursuant to a rate structure that is uniform throughout each franchise area in which cable service is provided.

(b) This section does not prohibit the establishment by cable operators of reasonable categories of service and customers with separate rates and terms and conditions of service, within a franchise area.

§ 76.985 Subscriber bill itemization.

(a) Cable operators may identify as a separate line item of each regular subscriber bill the following:

(1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.

(2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.

(3) The amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber. In order for a governmental fee or assessment to be separately identified under this section, it must be directly imposed by a governmental body on a transaction between a subscriber and an operator.

(b) The charge identified on the subscriber bill as the total charge for cable service should include all fees and costs itemized pursuant to this section.

(c) Local franchising authorities may adopt regulations consistent with this section.

BILLING CODE 6712-01-M

Federal Communications Commission
Washington, D.C. 20554

Approved by OMB
X66-XXX
Expires 05/01/93

INSTRUCTIONS FOR FCC 329 CABLE PROGRAMMING SERVICE RATE COMPLAINT FORM

1 This FCC form is to be used by subscribers, franchising authorities, and other relevant state or local government entities seeking to file a complaint with the FCC challenging the reasonableness of a cable company's rates for cable programming service or for installation or rental of equipment used to receive cable programming service.

2 The term "cable programming service" includes all video programming provided by a cable company except: (1) programming provided on the basic service tier; or (2) programming provided on a pay-per-channel or pay-per-program basis. See Question 9.

3 The "basic service tier" is the tier that includes over-the-air television broadcast signals and public, educational and governmental access channels. Under federal law, in most instances, your local franchising authority rather than the FCC regulates rates for the basic service tier or associated equipment. Therefore, if you believe that your rate for the basic service tier or associated equipment is unreasonable, you should contact your local franchising authority to determine if it is authorized to regulate basic service tier rates.

4 Under federal law, video programming provided on a pay-per-channel or pay-per-program basis (for example, a premium movie channel such as HBO or a pay-per-view sports event) is not subject to rate regulation by either the FCC or your local franchising authority.

5 If you are concerned about your rates for cable programming service or associated equipment, then you may fill out this form and submit an original and one copy to the FCC. The FCC will examine the reasonableness of your cable programming service rate according to a specific formula. If the rate the cable company currently is charging you for the cable programming service is greater than the rate produced by the FCC's formula, the cable company's rate will be presumed unreasonable. In these circumstances, unless the cable company can provide cost information to justify the reasonableness of its rate, the FCC may order a refund and/or a prospective rate reduction for the cable programming service at issue.

6. Please note the following time limitations for filing a complaint:

- If you are challenging the reasonableness of a rate increase for cable programming service or associated equipment, your complaint must be actually received by the FCC within 45 days from the date you receive a bill from your cable company reflecting the rate increase. (Note: a reduction in number of channels may constitute an effective rate increase even though the existing rate for the cable programming service remains unchanged.)

- The only exception to the 45 day time limitation concerns cable programming service and associated equipment rates in effect when the FCC's rules become effective – that is, June 21, 1993. You may challenge the reasonableness of such rates, but you must file your complaint within 180 days from June 21, 1993 – that is, by December 18, 1993.

- After December 18, 1993, you may only file complaints about rate increases and you must follow the general 45-day filing requirement described above.

- Late-filed complaints will be dismissed with no opportunity to refile.

7 In addition to the cable company's name and mailing address, you should provide the cable company's "FCC Community Unit Identifier." (The FCC Community Unit Identifier is a number assigned to each cable system by the FCC for administrative purposes.) Also, you must provide the name and mailing address of the local franchising authority. (The local franchising authority is the local municipal, county or other government organization that regulates cable television in your community.) FCC rules require the cable company to furnish all this information to you on your monthly bill. If this information does not appear either on the front or back of your monthly bill, contact your cable company, your local franchising authority, or your local government to obtain the necessary information before filling out this form.

8 You must indicate whether you are challenging the reasonableness of: (1) a rate concerning cable programming service or associated equipment

in effect on June 21, 1993; or (2) a rate increase. Except for a limited opportunity to challenge existing rates in effect on June 21, 1993, complaints may be filed only in the event of a rate increase.

9. If you are a subscriber, you must attach two copies of your monthly cable bill reflecting the rate or rate increase about which you are complaining. If you are challenging the reasonableness of a rate concerning cable programming service or associated equipment in effect on June 21, 1993, the bill should reflect that rate. If you are challenging the reasonableness of a rate increase, the bill should reflect the increased rate. (If you are challenging the reasonableness of a rate increase and have a previous bill which reflects the rate immediately prior to the increase, please attach two copies of the previous bill – note, however, that this is optional.)

10. You must check the box stating your belief that the cable programming service rate is unreasonable. The FCC staff will apply the formula mentioned in paragraph 5 to determine whether the cable company's rate is presumed reasonable or not – you do not need to make this calculation.

11. You must fill in all information required by this form.

12. You may contact your local franchising authority for assistance in filling out this form. In addition, you may attach two copies of a statement from your local franchising authority describing its views on the reasonableness of the cable programming service rate in question. This is not a requirement. If you do attach such a statement, you should also mail a copy of it to the cable company.

13. You must sign and date this form.

14. Once you complete the form copies must be mailed, including all attachments, to the following: Original and one copy: Federal Communications Commission, Attn: Cable Programming Service Rate Complaint, Room L-16, 1919 M Street, N.W., Washington, D.C. 20554; the cable company (at the address listed on your complaint); and the local franchising authority (at the address listed on your complaint).

Please be sure to send all copies to the correct address. If you do not, we may not be able to process your complaint.

15. NOTE: If you do not mail a copy of this form, including all attachments, to the cable company at the same time you mail your complaint to the FCC, the cable company will not be required to respond and your complaint may be dismissed.

16. If your complaint meets the requirements listed above, the FCC will require the cable company to respond to your complaint within thirty days and provide a justification for the reasonableness of your rate. The cable company must provide you with a copy of its response to the FCC.

17 The FCC staff will examine your complaint and the cable company's response and then rule on the reasonableness of the cable programming service rate. This ruling will be in writing, and you will receive a copy by mail. If the FCC staff determines that the rate in question is unreasonable, it may order refunds and/or prospective rate reductions. If it determines that the rate in question is reasonable, the FCC staff will deny the complaint.

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The solicitation of personal information in this form is authorized by the Communications Act of 1934, as amended. The Commission will use the information provided in this form to determine the reasonableness of a cable company's rates. In reaching that determination, or for law enforcement purposes, it may become necessary to refer personal information contained in this form to another government agency. All information provided in this form will be available for public inspection. Your response is required to obtain the requested relief.

Public reporting burden for this collection of information is estimated to average 30 minutes, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Records Management Division, AMO-PIRS, Washington, D.C. 20554, and to the Office of Management and Budget, Paperwork Reduction Project (3060-XXXX), Washington, D.C. 20503.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1975, 5 U.S.C. 522a(h)(2) AND THE PAPERWORK REDUCTION ACT OF 1980, P.L. 96-311, DECEMBER 11, 1980, 44 U.S.C. 3507.

Federal Communications Commission
Washington, D. C. 20554

FCC 329

CABLE PROGRAMMING SERVICE RATE COMPLAINT FORM

(Carefully read instructions on reverse before filling out form)

Approved by OMB
3060-XXXX
Expires 00/00/00

1. Complainant's Name		
Mailing Address		
City	State	ZIP Code
Daytime Telephone No. (include area code):		

2. Local Franchising Authority's Name		
Mailing Address		
City	State	ZIP Code

3. Cable Company's Name		
Mailing Address		
City	State	ZIP Code
Cable Company's FCC Community Unit Identifier (if known):		

4. Indicate whether this is the first time you have filed a complaint with the FCC or whether you are filing a corrected complaint to cure a defect in a prior complaint. CHECK ONE.

☐ First time complaint
☐ Corrected complaint

5. If you are filing a corrected complaint to cure a defect in a prior complaint, indicate the date the prior complaint was filed with the FCC and the date you received notification from the FCC that the prior complaint was defective.

Date prior complaint filed:

Month	Date	Year
-------	------	------

Date you received FCC notification that the prior complaint was defective:

Month	Date	Year
-------	------	------

6. Indicate whether you are challenging the reasonableness of: (1) a rate concerning cable programming service or associated equipment in effect on June 21, 1993; or (2) a rate increase. (See the Instructions for different filing deadlines depending on which type of complaint you are filing.) CHECK ONE.

☐ Rate in effect on June 21, 1993
☐ Rate increase

7. If you are a subscriber challenging the reasonableness of a rate increase, indicate the date you first received a bill from the cable operator reflecting the rate increase about which you are complaining.

Month	Date	Year
-------	------	------

8. Indicate the current monthly rate for the cable programming service or associated equipment and, if you are challenging the reasonableness of a rate increase, the most recent rate in effect immediately prior to the rate increase.

Current Monthly Rate: \$

Month	Year
-------	------

Previous Monthly Rate: \$

Month	Year
-------	------

9. In the tables below, describe the cable programming service to which the complaint is addressed and, if applicable, how it has changed. If this space is insufficient, include any additional comments on a separate page attached to this form.

List channels by name included in the service:

List channels by name deleted from the service (if any):

List channels by name added to the service (if any):

10. If you are a subscriber, you must attach two copies of your current bill reflecting the rate or rate increase about which you are complaining. NOTE: Failure to attach two copies of your current bill reflecting the rate or rate increase may result in dismissal of your complaint.

I have attached two copies of my current bill.

☐ Yes ☐ No

11. Optional: If you are a subscriber challenging the reasonableness of a rate increase, attach two copies of a previous bill (if available) reflecting the rate immediately prior to the rate increase.

I have attached two copies of my previous bill.

☐ Yes ☐ No

12. I certify that I am sending a copy of this complaint, including all attachments, to the cable company and the local franchising authority at the addresses listed above via first class mail, postage prepaid, at the same time I am sending two copies of this complaint to the FCC. NOTE: Failure to satisfy this requirement may result in dismissal of your complaint. The cable company will not be required to respond unless you send a copy of the complaint to the cable company by mail.

☐ Yes ☐ No

Date sent:

Month	Date	Year
-------	------	------

13. I believe that the cable company's rate for the cable programming service or associated equipment described above is unreasonable because it violates the FCC's rate regulations. (CHECK BOX)

☐

14. I certify that, to the best of my knowledge, the information supplied on this form is true and correct.

Signature

Date

(Note to complainant: This complaint form will be maintained in the FCC's records under the cable company's community unit number. It will not be filed under your name.)

FCC 329
June 1993

Federal Communications Commission
Washington, D.C. 20554

Approved by OMB
3060-XXXX
Expires 06/00/00

INSTRUCTIONS FOR FCC 328 FRANCHISING AUTHORITY CERTIFICATION

1. The Cable Television Consumer Protection and Competition Act, enacted in October 1992, changes the manner in which cable television systems that are not subject to effective competition are regulated. In general, rates for the basic service tier (the tier required as a condition of access to all other video services and containing, among other services, local broadcast station signals and public, educational, and public access channels) and associated equipment will be subject to regulation by local or state governments ("franchising authorities"). Rates for cable programming services and associated equipment (all services except basic and pay channels) will be subject to regulation by the FCC. Rates for pay channels (channels for which there is a specific per-channel or per-program charge) are not regulated.

2. Only cable systems that are not subject to effective competition may be regulated. Effective competition means that (a) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; (b) the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or (c) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.

3. In order to regulate basic service tier rates, a franchising authority must be certified by the FCC. In order to be certified, a franchising authority must complete this form. An original and one copy of the completed form and all attachments must be returned to the FCC by registered mail, return receipt requested, to the FCC at the address on the form.

4. A copy of the form must be served on the cable operator by first-class mail on or before the date the form is sent or delivered to the FCC.

5. The franchising authority's certification will become effective 30 days after the date stamped on the postal return receipt unless otherwise notified by the Commission by that date. The franchising authority cannot begin to regulate rates, however, until it has actually adopted the required regulations (see below) and until it has notified the cable operator that it has been certified and that it has adopted the required regulations.

6. In order to be certified, franchising authorities must answer "yes" to Questions 3, 4, and 5, which are explained as follows:

7. Question 3: The franchising authority must adopt rate regulations consistent with the Commission's regulations for basic cable service. To fulfill this requirement for certification, the franchising authority may simply adopt a regulation indicating that it will follow the regulations established by the FCC.

The franchising authority has 120 days to adopt these regulations after the time it is certified. The franchising authority may not, however, begin to regulate cable rates until after it has adopted these regulations and until it has notified the cable operator that it has been certified and has adopted the required regulations.

8. Question 4(a): The franchising authority's "legal authority" to regulate basic service must come from state law. In some states, only the state government may regulate cable rates. In those states, the state government should file this certification. Provisions in franchise agreements that prohibit rate regulation are void, and do not prevent a franchising authority from regulating the basic service tier and associated equipment.

Question 4(b): The franchising authority must have a sufficient number of personnel to undertake rate regulation.

A franchise authority unable to answer "yes" to questions 4(a) or 4(b) may wish to review the FCC's Report and Order in Docket 92-266, FCC 93-177 (released May 3, 1993) for further information on the establishment of alternative federal regulatory procedures.

9. Question 5: Franchising authorities must have procedural regulations allowing for public participation in rate regulation proceedings. If a franchising authority does not have these regulations already in place, it must adopt them within 120 days of certification and before it may undertake rate regulation.

10. Question 6: Most cable systems are not subject to effective competition, as defined by the Cable Act. (The definition is included above and on the form.) The franchising authority may presume that the cable system in its jurisdiction is not subject to effective competition.

For purposes of applying the definition of effective competition (see Item 2 above), "multichannel video programming distributors" include a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, a video dialtone service, and a satellite master antenna television system. A multichannel video programming distributor's services will be deemed "offered" when they are both technically and actually available. Service is "technically available" when the multichannel distributor is physically able to deliver the service to a household wishing to subscribe, with only minimal additional investment by the distributor. A service is "actually available" if subscribers in the franchise area are reasonably aware through marketing efforts that the service is available. Subscribership of those multichannel video programming distributors offering service to at least 50 percent of the households in a franchise area will be aggregated to determine whether at least 15 percent of the households in the franchise area are served by competitors. A multichannel video programming distributor must offer at least 12 channels of programming, at least one channel of which is nonbroadcast, to be found to offer "comparable" video programming.

11. This certification form must be signed by a government official with authority to act on behalf of the franchising authority.

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The solicitation of personal information in this form is authorized by the Communications Act of 1934, as amended. The Commission will use the information provided in this form to determine if the franchise authority should be authorized to regulate cable rates. In reaching that determination, or for law enforcement purposes, it may become necessary to refer personal information contained in this form to another government agency. All information provided in this form will be available for public inspection. Your response is required to obtain the requested authority.

Public reporting burden for this collection of information is estimated to average 30 minutes, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Records Management Division, AMD-PIRS, Washington, D. C. 20554, and to the Office of Management and Budget, Paperwork Reduction Project (3060-XXXX), Washington, D. C. 20503.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1975, 5 U.S.C. 522a(e)(3) AND THE PAPERWORK REDUCTION ACT OF 1980, P.L. 96-311, DECEMBER 11, 1980, 44 U.S.C. 3507.

Federal Communications Commission
Washington, D. C. 20554

FCC 328

Approved by OMB
3060-XXXX
Expires 09/00/00

CERTIFICATION OF FRANCHISING AUTHORITY TO REGULATE BASIC CABLE SERVICE RATES AND INITIAL FINDING OF LACK OF EFFECTIVE COMPETITION

1. Name of Franchising Authority		
Mailing Address		
City	State	ZIP Code
Telephone No. (include area code):		
Person to contact with respect to this form:		

2. a. Name (s) and address(es) of cable system(s) and associated FCC community unit identifiers within your jurisdiction. (Attach additional sheets if necessary.)

Cable System's Name		
Mailing Address		
City	State	ZIP Code
Cable System's FCC Community Unit Identifier:		

Cable System's Name		
Mailing Address		
City	State	ZIP Code
Cable System's FCC Community Unit Identifier:		

2. b. Name (s) of system(s) and associated community unit identifiers you claim are subject to regulation and with respect to which you are filing this certification. (Attach additional sheets if necessary.)

Name of System	Community Unit Identifier
Name of System	Community Unit Identifier

2. c. Have you served a copy of this form on all parties listed in 2.b.? ☐ Yes ☐ No

3. Will your franchising authority adopt (within 120 days of certification) and administer regulations with respect to basic cable service that are consistent with the regulations adopted by the FCC pursuant to 47 U.S.C. Section 543(b)? ☐ Yes ☐ No

4. With respect to the franchising authority's regulations referred to in Question 3,

a. Does your franchising authority have the legal authority to adopt them? ☐ Yes ☐ No

b. Does your franchising authority have the personnel to administer them? ☐ Yes ☐ No

5. Do the procedural laws and regulations applicable to rate regulation proceedings by your franchising authority provide a reasonable opportunity for consideration of the views of interested parties? ☐ Yes ☐ No

6. The Commission presumes that the cable system(s) listed in 2.b. is (are) not subject to effective competition. Based on the definition below, do you have reason to believe that this presumption is correct? ☐ Yes ☐ No

(Effective competition means that (a) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; (b) the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or (c) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.)

Signature

Title

Date

Return the original and one copy of this certification form (as indicated in Instructions), along with any attachments, to:

Federal Communications Commission
Attn: Cable Franchising Authority Certification
Room L-16
1919 M Street, N.W.
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MM Docket No. 92-266; FCC 93-177]

Broadcast Services; Cable Television Systems

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This proposed rule is one segment of the Report and Order/ Further Notice of Proposed Rule Making (Report/Further NPRM). The final rules adopted in this decision may be found elsewhere in this issue. In the Notice of Proposed Rule Making (NPRM) in this proceeding, the Commission sought comment on whether or not a cable system is subject to effective competition. This Report/Further NPRM seeks comment on whether the Commission should exclude the rates of systems in low penetration areas in calculating the competitive rate differential. This action is taken in order to comply with the Cable Act of 1992.

DATES: Comments are due on or before June 17, 1993 and Reply comments are due on or before July 2, 1993.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Patrick Donovan, Common Carrier Bureau, (202) 632-1295.

SUPPLEMENTARY INFORMATION: This is a synopsis of the proposed rules segment of the Commission's Report and Order/ Further Notice of Proposed Rule Making in MM Docket No. 92-266, FCC 93-177, adopted April 1, 1993, and released May 3, 1993. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 1919 M Street, NW., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Service (ITS), at (202) 857-3800, 2100 M Street, NW., suite 140, Washington, DC 20037.

Synopsis of Further Notice of Proposed Rule Making

1. The Commission, as part of its Report/Further NPRM, seeks additional comment on whether it should exclude the rates of systems in low penetration areas in calculating the competitive rate differential. The NPRM, 58 FR 48 (January 4, 1993) in this proceeding sought comment on how to determine when a cable system is subject to effective competition.

2. In order to assure that the Commission adequately consider the

rates of systems subject to effective competition, as required by the Cable Act of 1992, the Commission conducted in December 1992 an industry survey in this proceeding, which collected data from cable systems subject and not subject to effective competition, for determining whether rates were reasonable or unreasonable. That survey was based on data from systems subject to effective competition under each of the three independent statutory criteria used to define effective competition in Section 623 of the 1992 Cable Act, including systems in areas expected to have less than 30 percent cable penetration. The comparison of rates of systems subject to and those systems not subject to effective competition produces a competitive rate differential of approximately 10 percent.

3. The Commission notes that it is possible, however, that exclusion of rates of systems in low penetration areas may produce a better measure of competitive rate differential, because the low penetration of cable systems in some areas may be attributable to factors other than the presence of competing video distribution services. The preliminary analysis reveals that exclusion of low penetration areas would produce a competitive rate differential of approximately 28 percent. For these reasons, the Commission seeks comment on whether it should include within the data upon which the competitive rate differential is founded, only rates of systems that face effective competition in the form of competing multichannel service providers.

4. The Commission seeks comment on whether it should in fact exclude or give substantially less weight to systems in low penetration areas in calculating the competitive rate differential. The Commission also seeks comment on whether the rates of such systems provide an accurate measure of competitive rate levels. Given the inclusion of such systems in section 623(l)(1) of the Communications Act, which identifies those systems exempt from rate regulation, the Commission seeks comment on whether it may lawfully exclude the rates of such systems from its competitive rate calculations.

5. Should the record demonstrate that excluding the rates of low penetration systems would better reflect competitive rates, and, if making such an exclusion is lawful under the Act, then the Commission proposes to further reduce rates. In that event, the Commission seeks comment on how it should give effect to the resulting competitive rate differential. Should the Commission redefine the benchmark formula and per

channel rate tables? Should the Commission require systems above a new benchmark to lower rates additional amounts to achieve a total rate reduction of approximately 28 percent from prerogulated levels, and should the Commission phase-in any further rate reductions? What would be the impact on consumers and the industry? The Commission further seeks comment on whether it should apply any new competitive rate differential in a manner different than that selected in the Report and Order.

Administrative Matters

Initial Regulatory Flexibility Analysis

6. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. Reason for action. The Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to prescribe rules and regulations for determining reasonable rates for basic tier cable service and to establish criteria for identifying unreasonable rates for cable programming services. The Commission has adopted rate regulations that require a comparison to the rate of cable systems subject to effective competition, as defined in the Cable Act of 1992. This Further NPRM proposes a comparison to rates of cable systems subject to effective competition, excluding those systems with less than 30 percent market penetration.

II. Objectives. To propose rules to implement section 623 of the Cable Television Consumer Protection and Competition Act of 1992. We also desire to adopt rules that will be easily interpreted and readily applicable and, whenever possible, minimize the regulatory burden on affected parties.

III. Legal Basis. Action as proposed for this rulemaking is contained in sections 4(i), 4(j), 303(r) and 623 of the Communications Act of 1934, as amended.

IV. Description, potential impact and number of small entities affected. Until we receive more data, we are unable to estimate the number of small cable systems that would be affected by any of the proposals discussed in the Further Notice of Proposed Rulemaking. We have, however, attempted to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by section 623(i) of the Cable Act of 1992.

V. Reporting, record keeping and other compliance requirements. The proposals under consideration in this Further Notice of Proposed Rulemaking

do not include the possibility of new reporting and record keeping requirements for cable systems.

VI. Federal rules which overlap, duplicate or conflict with this rule.
None.

VII. Any significant alternatives minimizing impact on small entities and consistent with stated objectives.

Wherever possible, the Further NPRM proposes general rules, or alternative rules for small systems, to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by section 3(i) of the Cable Act of 1992.

7. As required by section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further NPRM, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The

Secretary shall cause a copy of the Further NPRM, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, Public Law No. 96-354, 94 Stat. 1164, 5 U.S.C. 601 et seq. (1981).

Ex Parte

8. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. See generally 47 CFR 1.1202, 1.203, and 1.206(a).

Comment Dates

9. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before June 17, 1993, and reply comments on or before July 2, 1993. To file formally in this proceeding, you must file an original plus four copies of all comments, reply

comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, room 239, 1919 M Street, NW., Washington, DC 20554.

Ordering Clauses

10. Authority for this proposed Rule Making is contained in sections 4(i), 4(j), 303(r), 612(c) and 623 of the Communications Act of 1934, as amended 47 U.S.C. 154(i), 154(j), 303(r), 532(c), 542(c) and 543.

List of Subjects in 47 CFR Part 76

Cable television.
Federal Communications Commission.
Donna R. Searcy,
Secretary.
[FR Doc. 93-12146 Filed 5-20-93; 8:45 am]
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