Sunshine Act Meetings

Federal Register
Vol. 58, No. 151
Monday, August 9, 1993

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of a Matter To Be Withdrawn From Consideration at an Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the following will be withdrawn from the agenda for consideration at the open meeting of the Board of Directors of the Federal Deposit Insurance Corporation scheduled to be held at 10:00 a.m. on Tuesday, August 10, 1993, in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street, N.W., Washington, DC:

Memorandum and resolution re: Payment of claims arising from severance pay or "golden parachute" agreements of failed banks where employment has been terminated after bank failure.

Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 898–6757.

Dated: August 5, 1993.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 93–19168 Filed 8–5–93; 2:29 pm]

BILLING CODE 6714–01–M

NUCLEAR REGULATORY COMMISSION

DATES: Weeks of August 9, 16, 23, and 30, 1993.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of August 9

Wednesday, August 11

2:00 p.m.
Briefing on Strategic Information Technology Plan (Public Meeting)
(Contact: Fran Goldberg, 301–492–7216)
3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of August 16—Tentative

Thursday, August 19

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of August 23—Tentative

Wednesday, August 25

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of August 30—Tentative

Tuesday, August 31

10:00 a.m.
Briefing on NRC Research Program on Aging (Public Meeting)
(Contact: John Craig, 301–492–3850)
11:30 a.m.

Affirmation/Discussion and Vote (Public Meeting) (if needed)

ADDITIONAL INFORMATION: "Briefing on Status of Part 100 Rule Change and Proposed Update on Source Term and Related Issues" scheduled for August 2, was held on August 3.

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

To Verify the Status of Meeting Call (Recording)—(301) 504–1292.

CONTACT PERSON FOR MORE INFORMATION: William Hill, (301) 504–1661.

Dated: August 4, 1993.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary.

[FR Doc. 93–19170 Filed 8–5–93; 8:45 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

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 meetings during the week of August 9, 1993.

An open meeting will be held on Wednesday, August 11, 1993, at 10:00 a.m. A closed meeting will be held on Thursday, August 12, 1993, at 10:00 a.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 open meeting scheduled for Wednesday, August 11, 1993, at 10:00 a.m., will be:

Consideration of whether to issue a release that will approve amendments to the net capital rule, Rule 15c–3–1 under the Securities Exchange Act of 1934, to make the rule applicable to certain specialists that are currently exempt from the rule and generally exempt such specialists from the rule's haircut and undue concentration deductions. For further information, please contact Michael A. Macchiaroli at (202) 272–2904.

The subject matter of the closed meeting scheduled for Thursday, August 11, 993, at 10:00 a.m., will be:

Institution of administrative proceedings of an enforcement nature.
Institution of injunctive actions.
Settlement of injunctive actions.
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: Brian Lane at (202) 272–2400.

Dated: August 3, 1993.

Jonathan G. Katz,

Secretary.

[FR Doc. 93–19169 Filed 8–5–93; 2:29 pm]

BILLING CODE 8010–01–M

Corrections

Federal Register
Vol. 58, No. 151
Monday, August 9, 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.

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

Final Rule and Rule Amendments Concerning Composition of Various Self-Regulatory Organization Governing Boards and Major Disciplinary Committees

Correction

In rule document 93-16525 beginning on page 37644 in the issue of Tuesday, July 13, 1993, on page 37644 in the third column, under the **DATES** caption, in the second paragraph, the last sentence should read: "Each SRO must comply with § 1.64 (b)(2) and (3) as of the date of its next governing board election."

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 93-NM-28-AD]

Airworthiness Directives; Fokker Model F28 Mark 0100 Series Airplanes

Correction

In proposed rule document 93-18419 beginning on page 41210 in the issue of Tuesday, August 3, 1993, make the following corrections:

1. On page 41210, in the first column, the Docket Number appearing in the heading of the document should read as set forth above.

2. On the same page, in the second column, under the **ADDRESSES** caption, in the first paragraph, in the fifth and sixth lines "Docket No. 93-NM-28-D" should read "Docket No. 93-NM-28-AD".

3. On the same page, in the same column, under the **FOR FURTHER INFORMATION CONTACT** caption, in the third line "ANM-13" should read "ANM-113".

4. On the same page, in the third column, in the first full paragraph, in the seventh line, "Docket Number 93-NM-28-D" should read "Docket Number 93-NM-28-AD".

5. On the same page, in the same column, under the heading **Availability of NPRMs**, in the fourth line, "ANM-03" should read "ANM-103" and in the fifth line "93-NM-28-D" should read "93-NM-28-AD".

§ 39.13 [Corrected]

6. On page 41211, in the second column, in § 39.13, the airworthiness directive heading should read "Fokker: Docket 93-NM-28-AD".

7. On the same page, in the same column, in paragraph (b), in the 5th and 11th lines "ANM-13" should read "ANM-113".

8. On the same page, in the same column, in the "Note" following paragraph (b), in the last line, "ANM-13" should read "ANM-113".

BILLING CODE 1505-01-D

federal register

Monday
August 9, 1993

Part II

Federal Trade Commission

16 CFR Part 308

Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992; Rule

FEDERAL TRADE COMMISSION

16 CFR Part 308

Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992

AGENCY: Federal Trade Commission.

ACTION: Final trade regulation rule.

SUMMARY: The Federal Trade Commission issues its final Rule pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 ("TDDRA" or "the Act"). Titles II and III of the TDDRA directed the Federal Trade Commission ("FTC" or "Commission") to prescribe regulations, within 270 days of enactment on October 28, 1992, governing the advertising and operation of pay-per-call services, as well as billing and collection procedures for such services.

EFFECTIVE DATE: The Rule will become effective on November 1, 1993.

ADDRESS: Requests for copies of the Rule and the Statement of Basis and Purpose should be sent to Public Reference Branch, Room 130, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Division of Marketing Practices: David Torok (202) 326–3140, Carol Jennings (202) 326–3010, or Heather McDowell (202) 326–3356; Division of Advertising Practices: Mary Koelbel Engle (202) 326–3161, or Marianne Kastriner (202) 326–3165; Division of Credit Practices: Ronald Isaac (202) 326–3231, Federal Trade Commission, Washington, DC 20580.

SUPPLEMENTARY IMFORMATION: The Rule: (1) Sets forth disclosures that must be included in advertisements for pay-per-call services (including the cost of the call, the odds of winning a sweepstakes, non-affiliation with the Federal government, and parental permission for those under 18), as well as certain standards for ensuring that these disclosures are "clear and conspicuous"; (2) requires, for all pay-per-call services costing more than $2.00, a preamble containing certain specified information; (3) prohibits pay-per-call programs, and advertisements for such programs, that are directed to children under 12; (4) prohibits charging callers to pay-per-call services if they hang up prior to three seconds after a signal or tone indicating the end of the required preamble; (5) prohibits the use of 800 or other toll-free numbers for providing pay-per-call services; (6) prohibits the use of electronic tones that can automatically dial a pay-per-call number; (7) requires certain disclosures for billing statements for pay-per-call services; and (8) sets forth procedures for the correction of billing errors for telephone-billed purchases.

Statement of Basis and Purpose

I. Introduction

Congress enacted the TDDRA, Pub. L. 102–556, to curtail certain unfair and deceptive practices engaged in by some pay-per-call businesses, and to encourage the continued growth of the legitimate pay-per-call industry.[1] Title I of the Act[2] directs the Federal Communications Commission ("FCC") to enact regulations defining the obligations of common carriers with respect to the provision of pay-per-call services.[3] Title II of the Act[4] directs the FTC to enact regulations governing the advertising and operation of pay-per-call services. It requires that certain disclosures appear in all advertising for such services and in preambles to pay-per-call programs. Moreover, it prohibits pay-per-call providers from engaging in certain practices, such as directing their services to children under the age of 12. In addition, the Act authorizes the Commission to prescribe other regulations it deems necessary to prevent abusive practices in this industry or to prevent evasion of these requirements. Title III of the TDDRA[5] directs the FTC to prescribe regulations establishing procedures for the correction of billing errors with respect to telephone-billed purchases. The Act grants the Commission limited jurisdiction over common carriers for purposes of this Rule.[6] Finally, the Act provides that for enforcement purposes, the Rule promulgated by the FTC will be treated as a rule issued under § 18(a)(1)(B), and enforced pursuant to section 5, of the FTC Act.[7]

The Commission published a Notice of Proposed Rulemaking ("NPR") in the **Federal Register** on March 10, 1993,[8] and a 30-day comment period closed on April 9, 1993. Comments were received from 99 companies, organizations, governmental entities, and individuals.

Seven commenters represent state and local government agencies. These include: The Telecommunications Subcommittee of the Consumer Protection Committee of the National Association of Attorneys General ("NAAG") (members of the Subcommittee include the Attorneys General of Arizona, California, Connecticut, Florida, Illinois, Iowa, Kansas, Maine, Minnesota, New Jersey, New Mexico, New York, Pennsylvania, Tennessee, Vermont, Washington, West Virginia, and Wisconsin); the National Association of Consumer Agency Administrators ("NACAA"); the National Association of Regulatory Utility Commissioners ("NARUC"); the California Public Utilities Commission ("CAPUC"); the New York State Department of Public Service ("NYDPS"); the National Association of State Utility Consumer Advocates ("NASUCA"); and the Attorney General for the State of North Carolina (the latter two both joining the comments of NAAG). One Federal agency, the U.S. Postal Service ("USPS"), submitted comments.

Three public interest organizations filed comments: Consumer Action ("CA"); the National Consumers League ("NCL"); and (jointly) the Center for Media Education and the National PTA ("CME"). Thirteen common carriers, or associations representing common carriers, filed comments: American Telephone and Telegraph Company ("AT&T"); the Ameritech Operating Companies ("Ameritech"); the Bell Atlantic Telephone Companies ("Bell Atlantic"); BellSouth Telecommunications, Inc. ("BellSouth"); GTE Service Corporation ("GTE"); MCI Telecommunications Corporation ("MCI"); the National Telephone Cooperative Association ("NTCA"); NYNEX Telephone Companies ("NYNEX"); Pilgrim Telephone, Inc. ("Pilgrim"); Southwestern Bell Telephone Company ("Southwestern"); Sprint Corporation ("Sprint"); US West, Inc. ("US West") and the United States Telephone Association ("USTA").

Fifty-five information providers, and associations representing information providers, service bureaus and other related businesses, filed 15 discrete comments. Forty-one information providers (collectively referred to as "Fun Lines") filed identical copies of

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[1] 15 U.S.C. 5701(b).

[2] 47 U.S.C. 228.

[3] The FCC published its Notice of Proposed Rulemaking and Notice of Inquiry at 58 FR 14371 (March 17, 1993).

[4] 15 U.S.C. 5711–14.

[5] 15 U.S.C. 5721–24.

[6] In general, common carriers are not subject to the jurisdiction of the FTC Act. 15 U.S.C. 45(a)(2).

[7] 15 U.S.C. 57a(a)(1)(B); 15 U.S.C. 45.

[8] 58 FR 13370. The record of this proceeding has been designated by the number R311001. The record contains the following three categories of documents: Category A includes **Federal Register** notices and notifications concerning the public workshop conference; Category D includes comments filed in response to the NPR; and Category L includes the transcripts of the public workshop conference.

the same comment.[9] The other 14 comments from this sector of the industry came from the following parties: The Association of Information Providers of New York and Info Access, Inc. (filing jointly) ("AIP"); Call Interactive; Cox Enterprises, Inc. ("Cox"); ICN Corporation ("INC"); the Information Industry Association ("IIA"); the Interactive Information Services Council ("IISC"); Meganews; Money Minds, the National Association for Information Services ("NAIS");[10] New Insights, Inc. ("NII"); Phone Programs, Inc. ("PPI"); The Suarez Corporation ("Suarez"); Tele-Publishing, Inc. ("TPI"); and USA Today Information Center ("USA Today").

Three organizations representing advertising interests filed comments: the American Advertising Federation ("AAF"); the American Association of Advertising Agencies, Inc. ("AAAA"); and the Association of National Advertisers, Inc. ("ANA").[11] Two companies that provide third-party (non-common carrier) billing services for pay-per-call services, International Telemedia Associates, Inc. ("ITA") and VRS Billing Systems, Inc. ("VRS"), filed comments.

Others filing comments included three individual consumers (Alberta Buschmann, Marie Stevens, and Brad S. Parker) and the following 12 organizations or companies: Amalgamated MegaCorp ("Amalgamated"); the American Society of Travel Agents, Inc. ("ASTA"); Capital Cities/ABC, Inc. ("ABC"); the Children's Advertising Review Unit of the Council of Better Business Bureaus, Inc. ("CARU"); the Direct Marketing Association ("DMA"); Grocery manufacturers of America, Inc. ("GMA"); Kellogg Company ("Kellogg"); the National Infomercial Marketing Association ("NIMA") ; the Newspaper Association of America ("NAA"); the Promotion Marketing Association of America, Inc. ("PMA"); Summit Telecommunications Corporation ("Summit"); and the Yellow Pages Publishers Associations ("YPPA").

On April 22 and 23, 1993, Commission staff conducted a public workshop conference at the FTC headquarters. Those interested parties wishing to participate in the Conference were required to notify Commission staff by March 25, 1993. Commission staff were able to include all parties that gave timely notice of interest in participating. Participants included: AAAA, AAF, AIP, ANA, AT&T, CARU, CME, GMA, ICN, IIA, IISC, ITA, MCI, NAAG, NACAA, NAIS, NARUC, NCL, Pilgrim, PPI, TPI, and USTA. Howard Bellman served as a conference facilitator.[12] Participants discussed various aspects of the proposed regulations, including pay-per-call service standards, advertising requirements, and procedures for the resolution of billing disputes. They addressed each other's comments and questions and responded to questions from FTC staff members. The conference was open to the public, and comments from members of the public were invited each day. Mr. Blake Barker, of USA Today—Gannett Company, addressed the conference on both days during the public participation segment. The entire proceeding was transcribed and the transcript was placed on the public record.[13]

II. The Rule

A. *Section 308.2: Definitions*

The proposed rule defined the following terms: Bona fide educational service, Commission, pay-per-call services, person, presubscription or comparable arrangement, program-length commercial, provider of pay-per-call services, reasonably understandable volume, slow and deliberate manner, and sweepstakes.[14] The Commission sought comment as to whether these definitions were clear, meaningful, and appropriate.[15]

In the final Rule, the Commission has modified the definitions of three of these terms: Bona fide educational service (§ 308.2(a)); presubscription or comparable arrangement (§ 308.2(e)); and provider of pay-per-call services (§ 308.2(g)). In addition, the Commission has added a definition of the term "service bureau" (§ 308.2(i)), since it has determined that service bureaus should bear some liability for violations of the Rule by pay-per-call services using their call processing facilities. All other definitions have been adopted in the final Rule without change.

1. *Section 308.2(a): Definition of "Bona Fide Educational Service"*

The proposed rule in § 308.2(a) defined the term "bona fide educational service" to be any pay-per-call service that provides information or instruction relating to education, subjects of academic study, or other related areas of school study. The term describes the one statutorily-permitted exception to the prohibition against pay-per-call services directed to children under the age of 12 and advertisements for such services. The proposed rule defined such services solely in terms of the content of the pay-per-call service itself without reference to the party offering the service.

In the NPR, the Commission asked specifically whether the proposed definition was sufficiently narrow so as not to allow the exception to swallow the rule. The Commission also asked whether the definition should include an additional requirement concerning the nature of the party offering the pay-per-call service and, if so, what requirement should be used to include only those providers with a legitimate connection to education. Finally, the Commission asked whether another approach to defining the term "bona fide educational service" would be more useful.[16] Responsive comments were sharply divided. Some contended that the definition contained in the proposed rule was so broad as to virtually swallow the prohibition against services directed to children. Those commenters urged the Commission to include a requirement that bona fide educational services be provided only by individuals or organizations with a

[9] Fun Lines, Inc., A Personal Encounter, Inc., Advanced Gateways, Advanced Telecom Services, Inc., Almarc Communications, American International Communications, Chase Companies, CommNet, Inc., ConnecTec Corporation, Dobbs Enterprises, Ltd., Durango Associates, Fones, Inc., Gigaphone, Inc., Halo Communications, Independent Entertainment Group, Jamestown Entertainment, Inc., Jartel, Inc., Kaos Communications, Kuryl Communications, LO/AD Communications, National Automobile Data Service, National Communications Team, National Network, Inc., New Media Telecommunications, Inc., Northwest Nevada Telco, Pacific Teleconnect, Inc., Real People, Ltd., Ryder Communications, Inc., Seascape Productions, SimTel Communications, Source Communications, Talk Show, Inc., Telecharge Audio Network, Telecharge Support Systems, The Advantage Group, Inc., The Scoreboard, Inc., TVTV, Twelve Signs, Inc., Uni-Access Company, Worthington Voice Services, Inc., and 123 Communications.

[10] NAIS also filed with the FTC a copy of its comments filed in the FCC rulemaking pursuant to the TDDRA. (FCC, In the Matter of Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, CC Docket No. 93-22, RM 7990.) These comments were appended to the NAIS FTC comments (number 63).

[11] In addition to their comments filed during the 30-day comment period, AAAA and ANA addressed letters to each of the Commissioners prior to publication of the NPR. Representative copies of these letters have been placed on the public record as part of the comments filed in response to the NPR.

[12] Mr. Bellman is a mediator from Madison, Wisconsin. His cases have included mediations of state and federal public policy issues.

[13] References to the conference transcript are cited as "Tr." followed by the appropriate page designation. References to comments are cited as "Comment (public record comment number) (name of commenter) at (page number)."

[14] 58 FR at 13384–85.

[15] 58 FR at 13380 (questions 1 and 2).

[16] 58 FR at 13380 (question 2). The Commission did not receive any feasible alternative suggestions.

genuine connection to the field of education.[17] Others argued that the proposed definition already was sufficiently narrow, and that such an additional restriction would unfairly prohibit many companies, such as those offering computer support services, from providing valuable information to children under 12.[18] Several commenters also urged the Commission to interpret the term broadly to permit pay-per-call providers to offer young children services pertaining to topics other than traditional academic subjects, and presented in formats such as contests and games.[19] Others contended that such services should not qualify for the exemption.[20]

The Commission is not persuaded that the definition of the term "bona fide educational service" should be expanded or interpreted broadly in any manner. Congress clearly was concerned about pay-per-call services directed to children, and intended to permit only a narrow exemption to the ban. The explicit language in the TDDRA—the use of "bona fide" to modify "educational service"—is itself an indication that Congress intended that the exemption apply only to services of a genuinely educational nature. Moreover, in discussing the scope of the ban, the Senate Report stated:

> This ban does not extend to educational services to ensure that children have access to such programs. The Committee recognizes that some of these (pay-per call) programs are provided through schools, and therefore the children's use of these programs is supervised.[21]

Based on the written comments, the discussion at the public workshop conference, and review of the legislative history, the final Rule has been modified slightly to clarify the intended scope of the definition to insure that it is consistent with the congressional mandate for a narrow exception. The final Rule clarifies what was intended by the proposed rule as to the type of service that would qualify as a bona fide educational service. While the proposed rule defined the term to mean any service "*that provides* information" (emphasis added), the final Rule modifies the underlined phrase to require that the service be "*dedicated to providing* information" (emphasis added). After reviewing the comments and the transcript of the public workshop conference, the Commission determined that the proposed definition inadvertently may have permitted pay-per-call services containing only an incidental educational component to be directed to children under 12.[22] For example, a pay-per-call service featuring a popular cartoon character who offered to talk to children and, incidentally, to send them a series of math cards, charged to their parent's telephone bill, may have qualified under the proposed definition. The Commission believes that a service containing such an incidental educational component should not qualify for the "bona fide educational service" exemption under the Rule. On the other hand, if an encyclopedia publisher offered a geography lesson through a pay-per-call service, use of a cartoon character or well-known child star would not necessarily remove the service from the exemption. By using the phrase "dedicated to providing," the Commission intends to convey that this exemption is limited to those pay-per-call services of a genuinely educational nature. Accordingly, the Commission has modified § 308.2(a) of the final Rule.

2. Section 308.2(c): Definition of "Pay-Per-Call Service"

The definition of "pay-per-call service" (§ 308.2(c)) remains the same as it was in the proposed rule.[23] The term is defined in the TDDRA by reference to section 228 of the Communications Act of 1934.[24] The service provided may be audio information, audio entertainment, access to simultaneous voice conversation services, or any service, including provision of a product, for which the charges are assessed on the basis of the completion of the call. The caller pay a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call. The call is accessed through use of a 900 telephone number of other prefix or area code designated by the FCC for such services. However, the term does not include directory services provided by a common carrier or local exchange carrier; any service for which the charge is tariffed; or any service for which users are assessed charges only after entering into a presubscription or comparable arrangement with the provider of the service.

One commenter suggested that the Commission's Rule should extend to pay-per-call programs available through seven-digit local numbers (with a 976, 960 or other prefix) or through abbreviated N11 dialing arrangements.[25] Such calls would not fall within the statutory definition of "pay-per-call services" because they are not reached through a service access code designated by the FCC in accordance with the Communications Act.[26] US West, on the other hand, requested clarification that the FTC Rule will not apply to local pay-per-call numbers.[27]

The Commission is incorporating into the Rule the definition of "pay-per-call service" in the TDDRA. The Rule covers those pay-per-call services accessed through use of a 900 telephone number, as designated pursuant to FCC regulations.[28] There is no evidence of congressional intent that the Commission extend its Rule to cover pay-per-call programs accessed through local prefixes not designated by the FCC. Moreover, the record does not show evidence of deceptive or unfair practices, associated with use of such numbers, that have not or cannot be addressed by state regulatory or law enforcement authorities. In fact, title I of the TDDRA specifically recognizes state authority to regulate such services.[29]

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[17] Comments 31 (CA) at 2, 4; 40 (NACAA) at 3; 53 (CME) at 2, 5–9.

[18] Comments 30 (CARU) at 3; 34 (TPI) at 6; 37 (PPI) at 27–28; 41 (Kellogg) at 2; 63 (NAIS) at 27–28; Tr. at 395–98, 405–06.

[19] Comments 30 (CARU) at 3; 35 (AIP) at 2–3; (PPI) at 27–28; 63 (NAIS) at 27–28; Tr. at 403–04.

[20] Comments 40 (NACCAA) at 3; 53 (CME) at 5–9; Tr. at 403, 406.

[21] Senate Committee Report on S. 1579, S. Doc. No. 190, 102d Cong., 1st Sess. (1991) ("Senate Report") at 6. The TDDRA (Pub. L. No. 102–556, formerly H.R. 6191) is a combination of prior bills passed in each house of Congress during 1991 and early 1992. The Senate bill, S. 1579, and the House bill, H.R. 3490, were joined in conference in the 1992 session. There is no report on the bill as passed.

[22] Comment 53 (CME) at 6–7; Tr. at 407.

[23] 58 FR at 13384–85.

[24] 15 U.S.C. 5714(1); 47 U.S.C. 228(i).

[25] Comment 46 (Cox) at 7–8.

[26] 47 U.S.C. 228(b)(5).

[27] Comment 47 (US West) at 2 and 6. US West explained that although most such calls would be intrastate in nature, its local exchange carrier does have certain local pay-per-call services that cross state lines even though accessed by dialing a local number.

[28] Pursuant to 47 CFR 64.1506, any service described in 47 CFR 64.1501(a)(1)–(2) (which is the same as § 308.2(c)(1)(A)–(B) of this rule) shall be offered "only through telephone numbers beginning with a 900 service access code." The FCC rule, at 47 CFR 64.1505(a), also prohibits carriers from providing interstate transmission services to an entity offering any service within the scope of 47 CFR 64.1501(a)(1) (which is the same as § 308.2(c)(1)(A) of this Rule) that is billed to a telephone subscriber on a collect basis at a rate above the tariffed rate for transmission of the call. Some commenters suggested that the Commission consider prohibiting collect pay-per-call services entirely or expanding the definition of a "pay-per-call service" to include those services charged to the customer on a collect basis. Comments 10 (NARUC) at 9–10; 15 (Nynex) at 2. However, it appears that it is now unnecessary for the Commission to address this issue.

[29] 47 U.S.C. 228(g)(4) states: "Nothing in this section shall preclude any State from enacting and enforcing additional and complementary oversight and regulatory systems or procedures, or both, so long as such systems and procedures govern intrastate services and do not significantly impede the enforcement of this section or other Federal statutes."

Accordingly, the final rule does not cover intrastate pay-per-call numbers.

3. *Section 308.2(e): Definition of "Presubscription or Comparable Arrangement"*

The definition of "presubscription or comparable arrangement" is important to the effectiveness of the Rule because any call placed pursuant to such an agreement is not afforded the protection of these regulations. The proposed definition required that a contractual agreement be established prior to the placement of a call to a pay-per-call service.[30]

Some parties noted the importance of having consistent definitions of this term by the FCC and the FTC.[31] Both agencies are using the same definition. In addition, several commenters suggested that the definition should be more specific, setting forth the required elements of the contractual agreement.[32] The definition in the final Rule has done this. In order to have a presubscription agreement, the service provider must clearly and conspicuously disclose to the consumer all material terms and conditions associated with the use of the service, including the service provider's name and address, a business telephone number which the consumer may use to obtain additional information or to register a complaint, and the rates for the service. In addition, the service provider must agree to notify the consumer of any future rate changes. The consumer must affirmatively agree to utilize the service on the terms and conditions disclosed by the service provider. Finally, the service provider must require the use of an identification number or other means to prevent unauthorized access to the service by nonsubscribers. These added requirements should ensure that any consumer entering a presubscription arrangement does so knowingly and with full disclosure of the terms of the agreement. Moreover, there seemed to be general agreement at the public workshop conference that the terms listed above should be part of any presubscription arrangement.[33]

In addition, NACAA urged that the definition require a written agreement, signed by the consumer.[34] NAAG suggested that the terms of the agreement be set forth in a written document.[35] Some industry groups, on the other hand, proposed that the Rule allow establishing such an agreement by telephone.[36] They noted that this is an industry accustomed to conducting business by telephone.

The Commission does not believe it necessary to require that a presubscription arrangement be contained in a signed, written agreement. If all of the required elements of presubscription can be achieved, to the satisfaction of both parties to the contract, without a written agreement, the parties should be free to exercise this option.[37]

IIA and Pilgrim requested that the definition include use of a charge or credit card.[38] IIA noted that Congress did not intend to include credit card transactions within the TDDRA. The Commission agrees with IIA that it appears Congress did not intend that services paid for by credit or charge card be included within this Rule.[39] In such transactions, the charge is not assessed on the basis of the completion of the call; rather the charge is assessed when the consumer provides the seller a credit or charge card number and authorizes a charge to the account. Moreoever, such transactions already have the protection of the Truth in Lending Act and the Fair Credit Billing Act.[40] Accordingly, the definition of "presubscription or comparable arrangement" has been modified to include those transactions where the consumer pays by authorizing a charge to a credit or charge card that is subject to the requirements of those statutes.[41] No other action taken by the consumer during the course of a call to a pay-per-call service can be construed as creating a presubscription agreement. However, such an agreement, provided it meets the criteria set forth in § 308.2(e)(1), could be established during the course of a call to an 800 telephone number or any other local or long distance telephone number.

4. *Section 308.2(g): Definition of "Provider of Pay-Per-Call Services"*

The proposed rule defined "provider of pay-per-call services" as "any person who sells a pay-per-call service."[42] Several parties commented that this definition was ambiguous and perhaps overly broad.[43] MCI requested clarification that the Commission did not intend the definition to encompass a carrier merely providing transmission or billing and collection services for a pay-per-call service.[44] In the final rule, the Commission has modified the definition accordingly.

In addition, the Commission has added language to make clear that the term includes any person who *offers* to sell a pay-per-call service. This ensures that the Rule covers anyone advertising such a service even before any completed calls have taken place.

5. *Section 308.2(i): Definition of "Service Bureau"*

As discussed in part II.D.12, *infra*, § 308.5(1) of the Rule imposes liability on a service bureau where it knew or should have known of violations of the Rule by pay-per-call providers using its call processing facilities. Therefore, the Commission has defined the term "service bureau" in § 308.2(i). The definition is consistent with industry usage of the term.[45] Service bureaus may perform a variety of services for pay-per-call providers. However, the key services are providing access to telephone service and voice storage. The definition also makes clear that common carriers are not considered service bureaus for purposes of the Rule.

B. *Section 308.3: Advertising of Pay-Per-Call Services*

Section 308.3 of the Rule sets forth the requirements for advertising pay-per-call services, including both what must be disclosed and how the disclosures must be made. To implement the TDDRA's requirements that disclosures be made "clearly and conspicuously," the proposed rule set forth detailed requirements as to what constituted "clear and conspicuous" disclosures. In the NPR, the Commission specifically sought comment on the advantages and disadvantages of providing detailed

[30] 58 FR at 13385.

[31] Comments 32 (MCI) at 1–2; (NAIS) at 6–7.

[32] Comments 23 (VRS) at 5; 33 (ITA) at 4–5; 63 (NAIS–FCC comments) at 3–5; 81 (Sprint) at 3–6.

[33] Tr. at 50–67.

[34] Comment 40 (NACAA) at 3.

[35] Comment 42 (NAAG), Attachment 1 at 1.

[36] Comments 23 (VRS) at 3–5; 35 (AIP) at 3; 54 (Amalgamated) at 3; 63 (NAIS) at 30.

[37] Of course, any business claiming exemption from the requirements of this Rule by virtue of a presubscription arrangement will bear the burden of proof that a valid agreement, meeting the requirements of § 308.2(e), has been established.

[38] Comments 52 (IIA) at 15–20; 60 (Pilgrim) at 7.

[39] Senate Report at 12.

[40] 15 U.S.C. 1601 *et seq.*

[41] The Rule makes clear that to qualify as a "presubscription arrangement," the calling party not only must disclose a credit or charge card number during the course of the call, but also must authorize a charge to that account for the service being called. CA pointed out that in some instances a credit or charge card number is requested as a screening device, with the actual charge then being billed on the telephone bill or through a third-party billing entity. Comment 31 (CA) at 1–2. The Commission is also aware of instances where telemarketers have requested a credit or charge card number, ostensibly "for identification purposes," then billed a charge to that account even though the customer never authorized such a charge.

[42] 58 FR at 13385.

[43] Comments 33 (ITA) at 5–6; 37 (PPI) at 27; 59 (USPS) at 1–2.

[44] Comment 32 (MCI) at 3–4.

[45] *See, e.g.*, Infotext Publishing, Inc., *The 1992 Telemedia Almanac, pp. 39–56 (1992).*

requirements for "clear and conspicuous" disclosures versus other approaches, such as performance standards and safe harbors.[46] Many commenters, particularly those representing the advertising industry, urged the Commission not to impose specific standards for disclosures, other than the statutorily required "clear and conspicuous" standard.[47] In contrast, many other commenters expressed agreement with the need for further guidance as to what "clear and conspicuous" means in the context of pay-per-call service advertisements, while disagreeing about the particulars of what that guidance should be.[48]

The Commission believes that merely requiring disclosures to be "clear and conspicuous" would not provide a useful guide of conduct for those affected by the regulations, nor would it adequately safeguard the interests of consumers in being informed of the required disclosures. The TDDRA itself mandates that the Commission "prescribe rules * * * (that) shall require" that various disclosures be made "clearly and conspicuously."[49] Moreover, the legislative history makes clear that Congress was concerned about the inadequacy of pay-per-call service advertisement disclosures,[50] and continued monitoring by Commission staff indicates that this remains a problem.

A number of commenters asserted that the "clear and conspicuous" standard is adequate.[51] In its comment, PMA stated that it endorses the Commission's previous enforcement policy statement that set standards for "clear and conspicuous" television disclosures,[52] and, referring to the sweepstakes industry, stated that these standards "are widely accepted and have become industry practice."[53] Nevertheless, the Commission's own observation of disclosures in sweepstakes promotions indicates that in some instances disclosures are being made in a fashion that may not be clear and conspicuous.[54] In this context, the Commission is concerned that merely requiring disclosures to be "clear and conspicuous" does not provide adequate guidance to the advertising community about what the Commission believes would satisfy such a standard. The legislative history indicates that Congress anticipated that the Commission would use its discretion to adopt more specific standards than a bare "clear and conspicuous " standard.[55] Accordingly, § 308.3 of the final Rule provides specific requirements for "clear and conspicuous" disclosures.

A number of commenters recommended that, if the rules contained guidance as to the particulars of "clear and conspicuous" disclosures, the particulars should be given in safe harbors, rather than in requirements.[56] The Commission rarely employs safe harbors in rulemakings and has decided against a safe harbor approach in this rulemaking. The advertising disclosure provisions of this Rule will be enforced by the attorneys general of the 50 states, as well as by the Commission.[57] The Commission believes that specificity in the standards for advertising disclosures is important to ensure uniform enforcement standards. If a safe harbor approach were adopted and advertisers chose not to comply with the safe harbor, the Commission and the state attorneys general would still be required to decide and prove *de novo*, on a case-by-case basis, that the disclosures were not clear and conspicuous. Moreover, the Commission and the state attorneys general would have to decide what level of communication of the disclosure to consumers would satisfy the "clear and conspicuous" requirement. The legislative history, as well as the experience of the Commission,[58] the state attorneys general,[59] consumer protection agencies,[60] and the U.S. Postal Service,[61] indicates widespread failure to make full and clear disclosure in advertisements for pay-per-call services.

Given this background, the Commission believes that specifying clear requirements as to what constitutes a "clear and conspicuous" disclosure is the appropriate approach in this rulemaking. For certain critical disclosures, including the cost and the parental permission advisory, the Commission has adopted very specific requirements. For other disclosures, it has adopted a more flexible approach while at the same time providing guidance beyond a minimal "clear and conspicuous" standard.

1. *Section 308.3(a): General Requirements*

Each section of the proposed rule mandating a disclosure required that the disclosure be presented clearly and conspicuously and explained how the disclosures were to be made "clearly and conspicuously." While the proposed rule contained certain minimum standards applicable to all disclosures in advertisements, these minimum standards were not set out separately, but rather were contained within each section, along with any further requirements for disclosures under those specific sections.

This format was not raised as an issue for comment and was not specifically addressed in the comments. However, a number of commenters suggested modifications to or exceptions from various sections of the proposed rule, and the final Rule has been revised to address some of those suggestions. After revision, some of the descriptions of what constituted "clear and conspicuous" disclosures became rather lengthy and, therefore, difficult to follow. Accordingly, the Commission thought it appropriate to reorganize the advertising section so that the requirements common to each of the sections so that the requirements common to each of the sections are

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[46] 58 FR at 13380–81 (question 15). To the extent that the Commission has not prescribed language to be used in making the required disclosures, the Commission has adopted a performance standard, *i.e.*, advertisers must ensure that the language they choose conveys the required information to consumers.

[47] Comments 14 (AAAA) at 6; 19 (AAF) at 4; 39 (IISC) at 16; 43 (GMA) at 20; 45 (ANA) at 4; 51 (USA Today) at 11; 58 (PMA) at 2.

[48] Comments 5 (Fun Lines) at 1; 35 (AIP) at 4; 37 (PPI) at 28–29, 34, 37; 46 (Cox) at 4–5; 61 (ICN) at 3; 80 (Suarez) at 2.

[49] 15 U.S.C. 5711(a)(1).

[50] House Committee Report on H.R. 3490, H.R. Doc. No. 430, 102d Cong., 2d Sess. (1992) ("House Report") at 4–6; Senate Report at 3, 8.

[51] Tr. at 342; Comments 14 (AAAA) at 6; 19 (AAF) at 4; 39 (IISC) at 16; 43 (GMA) at 20; 45 (ANA) at 4; 51 (USA Today) at 11; 58 (PMA) at 2.

[52] "Clear and Conspicuous" Disclosure, 3 Trade Reg. Rep. (CCH) ¶7569.09 (1970). In some respects, these standards would require more stringent requirements for television advertisements than the requirements in either the proposed rule or the final Rule.

[53] Comment 58 (PMA) at 2.

[54] For example, IISC submitted with its comment video tape samples of recent, non-pay-per-call service, sweepstakes promotions. During the public workshop conference, IISC stated its position that the disclosures in the advertisements submitted were clear and conspicuous. Tr. at 343, 347–48.

[55] 138 Cong. Rec. H538 (daily ed. Feb. 25, 1992) (H.R. 3490 was intended to give the FTC the authority to address type-size requirements for disclosures, as it has done in the past).

[56] Comments 14 (AAAA) at 4, 6; 37 (PPI) at 37–38; 39 (IISC) at 32; 43 (GMA) at 24; 45 (ANA) at 6; 52 (IIA) at 23; 60 (Pilgrim) at 10; 63 (NAIS) at 16.

[57] 15 U.S.C. 5712(a).

[58] *E.g., Phone Programs, Inc.*, D. 9247 (Dec. 10, 1992); *FTC* v. *M & H Assocs.*, No. HAR–92–2198 (D. Md. filed Aug. 7, 1992) (complaint and consent agreement); *FTC* v. *Starlink, Inc.*, No. 91–10–85 (E.D. Pa. filed Feb. 7, 1992) (complaint and stipulated final judgment and order for permanent injunction); *FTC* v. *Timmerman*, No. HAR–90–2007) (D. Md. filed Sept. 5, 1991) (complaint and consent order); *Audio Communications, Inc.*, No. C–3338 (July 24, 1991); *Teleline, Inc.*, No. C–3337 (July 24, 1991); *FTC* v. *Interactive Communications Technology, Inc.*, No. CV–F–91018 REC (E.D. Cal. filed Jan. 15, 1991) (complaint and consent order).

[59] Comment 42 (NAAG) at 6–10; Tr. at 303–04.

[60] Comments 21 (NCL) at 3–4; 40 (NACAA) at 1–2.

[61] Comment 59 (USPS) at 1.

grouped together in one section, numbered § 308.3(a). These requirements apply to each of the four sections requiring disclosures (now numbered § 308.3(b), cost of the call; § 308.3(c), sweepstakes; § 308.3(d), Federal programs; and § 308.3(f), parental permission for individuals under 18).

Section 308.3(a) of the final rule contains the "minimum standards" applicable §§ 308.3(b), (c), (d) and (f). Section 308.3(a)(1) requires disclosures to be in the same language as that principally used in the advertisement. No comment was received on this requirement, which was in the proposed rule and is consistent with the Commission's longstanding policy concerning clear disclosures in foreign language advertising.[62]

As originally proposed, print and video disclosures were required to be of a color or shade that readily contrasts with the background of the advertisement. Few commenters specifically addressed this provision. Several supported it,[63] while one commenter objected to it, without citing any specific reasons for the opposition.[64] The Commission believes that ready contrast between the disclosure and the background on which it appears is fundamental to readability.[65] The USPS commented that it has experience with enforcing similar requirements for certain disclosures.[66] The USPS noted that promoters acting in bad faith technically comply by using a contrasting color, but nevertheless the disclosure is still not noticeable, because it is a color such as bright yellow. The USPS suggested that the provision be modified to require that the contrasting background also maximize the visibility of the disclosure. The Commission believes that the USPS has raised a valid concern, but believes that the concern can be addressed by the provision, applicable to all disclosures, which prohibits the use of techniques likely to detract significantly from the communication of the disclosure (see discussion of § 308.3(a)(5) below). Thus, no change is made in the proposed regulations. The contrasting background requirement is now contained in § 308.3(a)(2) of the final Rule.

The proposed rule required disclosures in print advertisements to be parallel with the base of the advertisement. This provision was specifically supported,[67] while no specific opposition was stated. Again, this requirement is retained in the final Rule at § 308.3(a)(3).

The proposed rule required all audio disclosures in broadcast advertising to be delivered in a "slow and deliberate manner" and a "reasonably understandable volume," as those terms are defined in § 308.2(h) and (j). No commenters objected to the "reasonably understandable volume" requirement, but a few commenters objected to the "slow and deliberate manner" requirement.[68] The AAF opposed this requirement on the grounds that it might interrupt the style or flow of the broadcast. This term, however, is defined in the Rule as "a rate that renders the message intelligible to the receiving audience, and, in any event, at a cadence or rate no faster than that principally used in the advertisement or the pay-per-call service." Accordingly, the Commission believes that the stated concern does not weigh in favor of changing the regulations; these requirements are now found in § 308.3(a)(4).

In addition, the proposed rule provided that with respect to each disclosure, nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be made in any advertisement, nor shall any audio or video technique be used that is likely to detract significantly from the communication of the disclosure. Although one commenter objected to this provision as being inappropriate,[69] the Commission believes that it is needed to prevent circumvention of the "clear and conspicuous" requirements, either through the conveyance of other information or through the manner in which the disclosures are made. Furthermore, based on the concern noted above by USPS about circumvention of the contrasting background requirement, the Commission is modifying the regulations to include print techniques among those that may not be used to detract significantly from the communication of the disclosure. This requirement is found in § 308.3(a)(5) of the final Rule.

As originally proposed, the rule did not specifically address program-length commercials (infomercials), as distinguished from traditional television or radio advertisements, in the sections concerning sweepstakes and games of chance or information concerning a Federal program. The Commission is concerned that if required information is presented only once in particularly long commercials, consumers who do not see the entire advertisement will miss the disclosures. Therefore, the final Rule, § 308.3(a)(6), requires that, unless otherwise specified, required disclosures will be made at least three times, near the beginning, middle and end of any program-length commercial. This requirement will apply to disclosures required by §§ 308.3(c), (d), and (f). The section pertaining to cost disclosures, § 308.3(b), however, requires a more stringent standard, consistent with the TDDRA. A video presentation of the cost disclosure must appear adjacent to each presentation of the pay-per-call number (in any length commercial), and in radio program-length commercials the cost must be given following each delivery of the number.

2. *Section 308.3(b): Cost of the Call*

Section 308.3(b)(1) of the final Rule describes the requirements for disclosing the costs of a call to pay-per-call service. They are the same requirements as those for disclosure of costs in the preamble of the pay-per-call service itself, and will be discussed in part II.D.1.b, *infra*, covering this preamble requirement. This section will only discuss the manner in which the disclosures must be made, *i.e.*, the "clear and conspicuous" standards for cost disclosures in advertisements.

The proposed rule[70] required video and print disclosures to be placed adjacent to each presentation of the pay-per-call telephone number. Few comments focused specifically on this requirement, though a number in general objected to any particular placement requirements.[71] Two commenters specifically supported this

[62] 16 CFR 14.9.

[63] Comments 5 (Fun Lines) at 1; 59 (USPS) at 2; 61 (ICN) at 3–4.

[64] Comment 37 (PPI) at 11.

[65] Similar requirements are found in other Commission rules and guides. *E.g.*, Guide Concerning Fuel Economy Advertising for New Automobiles, 16 CFR 259.2(b)(1)(i), n.3 (each visual "estimated mpg" disclosure must be broadcast against a solid color background that contrasts easily with the color used for the numbers); Smokeless Tobacco Regulations, 16 CFR 307.6, 307.7 (required warning must be in type contrasting with all other printed material on package or advertisement).

[66] Comment 59 (USPS) at 2, n.1 (regarding enforcement of 39 U.S.C. 3001(d)(2), which provides that a direct mail piece that takes the form of a bill, but is in fact a solicitation, must bear a disclosure, "on its face, in conspicuous and legible type in contrast by typography, layout or color with other printing on its face").

[67] Comment 5 (Fun Lines) at 1.

[68] Comments 19 (AAF) at 2; 45 (ANA) at 4–5.

[69] Comment 35 (AIP) at 6–7. AIP stated that it preferred reasonably specific, objective regulations, and opposed this section because of its subjective nature.

[70] In the proposed rule, this section was numbered 308.3(a)(1). 58 FR at 13385.

[71] Comments 19 (AAF) at 2–5; 37 (PPI) at 11; 39 (IISC) at 17–18; 52 (IIA) at 23–24; 63 (NAIS) at 15–16.

requirement.[72] Because a pay-per-call service provider is likely to ensure that the pay-per-call number is in a prominent position in the advertisement, requiring the cost to be adjacent to the number also ensures a prominent place for the cost, thus fulfilling Congress's objective of ensuring that consumers are informed of this important information when they see the advertisement.[73] One commenter objected to the provision on the grounds that it would prevent the use of column-style advertising.[74] The Commission, however, interprets "adjacent to" as meaning above, below, or next to (on either side). Accordingly, in a column-style advertisement, the cost could be above or below the telephone number, and comply with the Rule.

Some commenters raised an additional concern regarding the adjacency requirement; namely, the application of the proposed rule to advertisements in which more than one pay-per-call number is advertised, generally in list form, with only one price applicable to all of the telephone numbers. These commenters suggested that in such cases, the cost need only be displayed once, rather than adjacent to each of the telephone numbers.[75] The Commission agrees that in such circumstances, it would be unduly restrictive to require display of the cost of the call next to each pay-per-call number. Accordingly, the Rule is revised to state that where an advertisement displays more than one pay-per-call number with the same cost, the cost need only be placed adjacent to the largest presentation of the pay-per-call number. Otherwise, the final Rule retains the requirement that the cost be placed adjacent to each presentation of the pay-per-call number.

As originally proposed, in television and print advertisements, each letter and numeral of the video portion of the cost disclosure were to be at least as large as each letter and numeral of the pay-per-call number to which they were adjacent. The Commission sought comment on the appropriateness of this requirement, and whether a more appropriate measure existed for ensuring that the cost is disclosed "clearly and conspicuously."[76] Numerous commenters specifically opposed the "same size" requirement.[77] As noted previously, many commenters believed it is sufficient to require that all disclosures, including cost, be "clear and conspicuous," and therefore they opposed any specific requirement, whatever it might be. Others suggested alternatives, such as one-quarter the size of the pay-per-call number, but in at least 12-point type.[78] One commenter suggested that the cost could be one-half the size of the pay-per-call number and still be conspicuous.[79] Another suggested that the disclosures be in type no smaller than that used for the majority of text in the ad, or in the average type size used in the ad.[80] A number of commenters suggested that any minimum type size requirements be in the form of safe harbors.[81] Some commenters supported the same size requirement.[82]

After reviewing the comments, the Commission is persuaded that the cost need not necessarily be in the same type size as the pay-per-call number. A copy test of print advertisements for a 900-number sweepstakes submitted by IISC indicated that cost disclosures one-half the size of the pay-per-call number produced recall not significantly different than a cost disclosure the same size as the pay-per-call number.[83] This copy test provides some evidence that the cost could be smaller than the pay-per-call number and still produce significant recall.[84] In addition, some commenters suggested that having the cost the same size as the pay-per-call number would be visually distracting, would make the cost difficult to distinguish from the pay-per-call number, or would otherwise render the advertisement ineffective.[85]

Under the final Rule, the cost of the call must be at least one-half the type size[86] of the pay-per-call number.[87] The Commission recognizes, however, that there may be certain kinds of advertisements (such as classified advertisements or matchbook cover advertisements) in which a type size one-half the size of the pay-per-call number would result in an illegible disclosure. In such cases, it may be necessary for the cost to be larger than one-half the size of the number in order not to violate § 308.3(a)(5) of the general disclosure requirements. That section prohibits anything inconsistent with or in mitigation of the required disclosures, and any technique that is likely to detract significantly from the communication of the disclosures. The Commission would consider a very small cost disclosure to fall within those prohibitions and, thus, not comply with the requirement that all disclosures be "clear and conspicuous."

The proposed rule required that in television advertising, the cost must appear on the screen for the same duration as the video display of the pay-per-call number. A few commenters opposed this requirement,[88] but because it reflects a statutory mandate,[89] the final Rule retains the requirement.

The proposed rule required that disclosures in television advertisements always appear at least once simultaneously in both the audio and video portions of the advertisement, with one exception: Advertisements fifteen seconds or shorter would not require an audio disclosure if the pay-per-call number was not stated in the audio portion of the advertisement. The Commission sought comment on this proposed requirement and the proposed exception.[90] Several commenters

[72] Comments 59 (USPS) at 2; 61 (ICN) at 3–4.

[73] House Report at 4–5.

[74] Comment 19 (AAF) at 3.

[75] Comments 35 (AIP) at 6; 52 (IIA) at 21.

[76] 58 FR at 13380 (question 3).

[77] Comments 5 (Fun Lines) at 1; 19 (AAF) at 2; 22 (Meganews) at 3; 35 (AIP) at 4–5; 37 (PPI) at 7–9; 39 (IISC) at 16; 45 (ANA) at 4–5; 46 (Cox) at 3–4; 48 (DMA) at 3–5; 51 (USA Today) at 10–11; 52 (IIA) at 23–24; 61 (ICN) at 3; 63 (NAIS) at 12–15.

[78] Comment 5 (Fun Lines) at 1.

[79] Comment 35 (AIP) at 4.

[80] Comment 52 (IIA) at 24–25.

[81] Comments 33 (ITA) at 6; 37 (PPI) at 38; 39 (IISC) at 32; 43 (GMA) at 24; 45 (ANA) at 6; 52 (IIA) at 23; 60 (Pilgrim) at 10; 63 (NAIS) at 16.

[82] Comments 21 (NCL) at 1; 27 (NYDPS) at 1 (both generally supporting the proposed regulations); 40 (NACAA) at 4; 42 (NAAG) at 12 (generally supporting the proposed regulations); 59 (USPS) at 2.

[83] Comment 39 (IISC) at 31, Appendix A at 14.

[84] The study contained some methodological flaws, however. For example the study did not control additional factors—such as the format or organization of the 900-number information, and the type size of the rules of the game—that are likely to affect perceptions of the communications elements for which the study was designed (*e.g.*, the type size of the cost of the call). The advertisements were quite cluttered and were likely to have presented information overload problems with respect to the targeted information, *i.e.*, the 900 number, as evidenced by the fact that when asked what the main points of the advertisement were, only 28.5% of the respondents in the *industry* version of the advertisement mentioned the 900 number.

[85] Comments 19 (AAF) at 3; 22 (Meganews) at 2; 35 (AIP) at 5; 46 (Cox) at 3; 51 (USA Today) at 11.

[86] The Commission recognizes that the type set used for pay-per-call numbers and the cost disclosures will have both upper and lower case. When determining what type size to use for the cost disclosure, the upper case of the cost should be one-half the size of the upper case of the pay-per-call number. A similar measurement should be made for the lower case characters.

[87] In several 900-number cases, the Commission required parental permission video disclosures to be one-half the size of the pay-per-call number. *Fone Telecommunications, Inc.*, C–3432 (June 21, 1993); *Audio Communications, Inc.*, No. C–3338 (July 24, 1991); *Teleline, Inc.*, No. C–3337 (July 24, 1991). In addition, at least one state (Louisiana) requires that the cost be one-half the size of the largest pay-per-call number. La. Admin. Code tit. 51, Ch. 19–B, Sec. 1731 (1992).

[88] Comments 37 (PPI) at 11; 45 (ANA) at 4–5.

[89] 15 U.S.C. 5711(a)(1)(G).

[90] 58 FR at 13380–81 (questions 6 and 10).

supported this requirement.[91] Several others believed that simultaneous audio-video disclosures should not be required; they urged that advertisers be given the choice of using either audio or video for disclosures.[92] The Commission appreciates that allowing advertisers the choice of using the audio or video format for disclosures would provide more flexibility and allow for more creativity in the design of advertisements. However, the Commission believes that simultaneous audio-video disclosures are particularly appropriate for the cost disclosures, given the importance of this information to the consumer.[93] Accordingly, § 308.3(b)(2)(i) of the final Rule retains the audio-video disclosure requirement for the cost disclosure.

However, second exception to the simultaneous audio-video disclosure requirement has been added for advertisements that do not provide *any* audio information, including the pay-per-call number, about the pay-per-call service. No audio disclosures would be required for such advertisements. One commenter noted that mandatory audio disclosures would disallow the use of "scroll" ads commonly used on cable television.[94] These ads frequently scroll independently of the sound, which may be a rebroadcast radio transmission. In addition, some pay-per-call service advertisements occur in one portion of the television screen, while most of the screen is devoted to an unrelated program; the pay-per-call service advertisement has no audio component. For instance, a sports game could be ongoing on the screen, with the accompanying play-by-play in the audio portion, while the bottom of the screen might contain an advertisement for a pay-per-call service providing sports scores. The Commission believes that for these types of advertisements (*i.e.*, advertisements that either have no audio component or otherwise provide no information about the pay-per-call service in the audio component) it would be unduly restrictive to require audio disclosures. Accordingly, the final Rule is modified to provide an exception for such advertisements.

The proposed rule did not specifically address pay-per-call service advertisements in which the pay-per-call number is presented only in the audio portion of the advertisement, and not in the video portion. As proposed, the rule would have required video disclosure of the cost, even though the pay-per-call number would not have been made in the video portion. Because the proposed rule's requirements as to size and placement of the cost disclosure were tied to the video pay-per-call number, the proposed rule was ambiguous as to the size and placement requirements for the cost in such advertisements. Accordingly, the Commission has modified the proposed rule to require that in advertisements in which the pay-per-call number is presented only in the audio portion, the cost of the call is required only in the audio portion, immediately following the first and last delivery of the pay-per-call number. In program-length commercials (where the pay-per-call number is presented only in the audio portion), however, the cost must be disclosed immediately following each delivery of the pay-per-call number. In such program-length commercials, disclosure of the cost only after the first and last presentation of the pay-per-call number would be inadequate because of the likelihood that some consumers would tune in during the middle of the advertisement and miss the disclosure.

As proposed, the rule required that the cost be disclosed at least once in radio advertisements, immediately following the first presentation of the pay-per-call number, while in any program-length radio commercial, the cost must be disclosed each time the pay-per-call number is given. The Commission sought comment on whether it would be appropriate for the cost to be disclosed with each presentation of the pay-per-call number in all radio advertisements.[95] Few commenters focused on this question. NACAA and CA commented that the cost should be disclosed immediately after each time the pay-per-call number is given.[96] The AAF commented that repetition of the cost after the pay-per-call number would lengthen the advertisement, and thus increase the advertisement's cost.[97] According to the AAF, repetition of the pay-per-call number is required in order for listeners to retain the number, or to allow them to write it down, while such repetition is not required for the cost. The proposed rule, however, required repetition of the cost only in program-length radio commercials. Most radio commercials are short enough that consumers who hear the pay-per-call number are likely to hear the cost—even if it is only presented once. However, if the cost is only given once during a fifteen- to thirty-minute commercial, consumers might easily miss it. The Commission believes the rule as proposed is appropriate, and this section of the regulations has not been changed in the final rule.[98]

3. *Section 308.3(c): Sweepstakes; Games of Chance*

Section 308.3(c) addresses pay-per-call services that advertise sweepstakes, including games of chance. The proposed rule[99] incorporated the requirements of the TDDRA[100] that such advertisements clearly and conspicuously disclose the odds of winning a prize, award, service, or product at no cost or at reduced cost, or the factors that will determine the odds, if the odds are not calculable in advance. The proposed rule limited the application of the odds disclosure requirement to those situations where the prize, etc., is offered in connection with a sweepstakes or game of chance.

The Commission requested comment on whether other types of promotions,

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[91] Comments 21 (NCL) at 1; 27 (NYDPS) at 1; 40 (NACAA) at 2; 42 (NAAG) at 12 (all generally supporting the proposed regulations); 53 (CME) at 18 (generally supporting the proposed regulations, but opposing the 15-second exception).

[92] Comments 19 (AAF) at 2; 34 (TPI) at 5; 37 (PPI) at 11; 39 (IISC) at 34–35; 45 (ANA) at 4; 48 (DMA) at 3; 49 (NIMA) at 3–4; 58 (PMA) at 2; 63 (NAIS) at 15 (if the pay-per-call number is not presented in the audio portion, the disclosures should not have to be presented in the audio portion either).

[93] Consumer communications research indicates that video-only presentation of information produces weaker recall than audio-only or audio-video presentation. *E.g.*, S. Ducoffe, *The Impact of Product Usage Warnings in Alcoholic Beverage Advertising*, 9 J. Pub. Pol'y & Mktg. 16, 26–27 (1990); D.D. Lovil, A.B. Padderud, *Video Disclosures in Television Advertising: Are They Effective?*, 31 J. of Communications 72–77 (1981); C.G. Penney, *Modality Effects in Short-Term Verbal Memory*, 82 Psychological Bull. 68–84 (1975). In the Ducoffe study, recall of alcohol warnings in beer commercials was tested, using different combinations of warnings and subjects. Among subjects for whom the product was relevant who were exposed to a high-severity warning, 63.3% in the audio condition, 74.1% in the audio-video condition, and only 14.3% in the video condition recalled the presence of a warning without aid. *Id.* at 24. In general, however, among all of the different combinations of warnings and subjects, audio-video warnings failed to produce greater recall than audio-only disclosures, suggesting the lack of impact of video disclosured. *Id.* at 27. Nevertheless, some studies have shown audio-video warnings to affect recall more than audio-only warnings. *E.g.*, Morris, Mazis & Brinberg, *Prescription Drug Information for Consumers: An Experiment of Source and Format*, in *Current Issues and Research in Advertising* (J. Leigh & C. Martin, Jr., eds. 1984).

[94] Comment 34 (TPI) at 5.

[95] 58 FR 13380 (question 3).

[96] Comments 31 (CA) at 4; 40 (NACAA) at 4.

[97] Comment 19 (AAF) at 2.

[98] Under the final Rule, television advertisements with audio-only presentation of the pay-per-call number must deliver the cost immediately following the first and last presentations of the pay-per-call number, while in (non-program-length) radio advertisements, it must be presented only once. The Commission believes that different standards for the different media are appropriate because in a radio advertisement, to receive any information, the consumer must be listening; in contrast, with television advertisements, the consumer's attention may be at least partially focused on the screen and not entirely on the audio.

[99] In the proposed rule, this section was numbered 308.3(b). 58 FR at 13385–86.

[100] 15 U.S.C. 5711(a)(1)(B).

such as lotteries or games of skill, should be subject to this provision, and whether the proposed rule was sufficiently clear as to the types of promotions subject to the rule.[101] Two commenters suggested that the provision apply to games of skill as well as games of chance.[102] One commenter opposed extending the requirement to games of skill because a true game of skill has no element of chance.[103] The Commission is persuaded that determining the odds even for games of skill having some element of chance would be problematic. The TDDRA, by requiring that the odds of winning be disclosed, was clearly directed at games where the winner is determined by chance. Accordingly, the final Rule applies only to sweepstakes and games of chance.

Several commenters noted that the proposed regulations could be read as requiring the odds disclosure in situations where it presumably was no intended, such as situations where no odds would be associated with receipt of the service or product.[104] For instance, if an information provider running a sweepstakes offered, as an incentive for entering the sweepstakes, a token to all those who entered, and this token was not in the prize to be awarded to the winner of the sweepstakes, then the proposed regulations could be read as requiring the odds disclosure for receipt of the token, even though the odds of receiving the token would be 1:1. Based on these comments, the Commission has decided to clarify the language of this section. Thus, the final Rule only requires the odds disclosure with respect to prizes "to be awarded to the winner" of the sweepstakes, rather than for prizes "in connection with the offering" of a sweepstakes.

The proposed rule required that the odds be disclosed in all advertisements, including television and radio advertisements. The Commission recognizes that at times it could be quite time- and space-consuming to disclose all the odds, particularly in games with multiple prizes and complex odds structures. In the NPR, the Commission posed questions regarding ways in which this burden might be lessened.[105] A number of commenters urged that no odds disclosures be required in broadcast advertisements, pointing to the Commission's Games of Chance Rule,[106] which, since 1983, has granted a temporary exemption to the odds disclosure requirement for broadcast advertisements.[107] The Commission, however, is constrained by the language of the TDDRA, which requires that the odds of winning be disclosed in advertisements, without an exception for television or radio advertisements. The Commission received no feasible suggestions in the comments on how to lessen the burden of odds disclosures in broadcasting advertising. Commission staff also specifically raised this issue in the public workshop conference, and once again the participants did not offer any feasible suggestions.[108] Accordingly, this requirement is retained unchanged in the final Rule.

Some commenters expressed confusion over the proposed rule's requirement that if the odds of winning are not determinable in advance, the factors used in determining the odds must be disclosed. Two commenters indicated concern that this information could not be disclosed if the odds of winning depended upon the number of entries received.[109] It is the Commission's position that when the odds depend upon the number of entries received, a statement to that effect satisfies the requirement to disclose the factors used in determining the odds.

As proposed, the rule required a disclosure that no purchase (*i.e.*, no call to the pay-per-call service) is required to participate, along with a disclosure of a free alternative method of entry and instructions on how to enter.[110] The Commission requested comment on the preferability of allowing the free method of entry information to be disclosed in the preamble rather than in the advertisement.[111]

Several commenters opposed the proposed advertising disclosure requirements,[112] while several others supported them.[113] Some commenters opposing the requirements referred to the burden of having to make lengthy disclosures, particularly in broadcast media. The commenters favoring the requirements expressed the opinion that pay-per-call number sweepstakes are unlike traditional sweepstakes in which the consumer is presented with the alternative of entering the sweepstakes either by purchasing a particular product or, for example, by sending in a postcard, because in the case of a pay-per-call number sweepstakes, there is no separate product to be purchased. Rather, the purchase is accomplished through calling the pay-per-call number.

The Commission believes this last concern is valid. Although consumers may generally be aware of the "no purchase required" disclaimer typically found in sweepstakes advertisements, they may not appreciate that, in the case of an advertisement for a pay-per-call number, the "purchase" is calling the pay-per-call number. In this regard, it is significant that a 1992 Harris consumer survey showed that 35% of adult Americans were unaware of the difference between 900 numbers and 800 (toll-free) numbers,[114] while another 1992 survey indicated that 50% of adult Americans did not expect to be charged for 900 number calls.[115] In other words, between one-third and one-half of adult Americans may not realize that 900 numbers cost money. It is reasonable to expect, therefore, that at least one-third of adults would not equate calling a pay-per-call service with making a purchase and would believe that they could enter the contest without cost.

The Commission thus believes that to prevent consumer deception, sweepstakes offered through pay-per-call numbers should disclose, either in advertising or in the preamble to the call, that no call to the pay-per-call service is necessary to enter the sweepstakes. The USPS stated in its comment that some promoters have used confusing phrases in print advertising to describe the free entry option, such as "manual handling."[116] At the public workshop conference, some commenters stated that saying "no purchase necessary" is confusing to consumers, and the IISC indicated it did not object to alternative language, such as "no telephone call necessary."[117] The Commission believes it should be made completely clear to consumers that they do not have to incur a charge in order to enter a sweepstakes. Accordingly, the final Rule is modified slightly to make clear that the disclosure should state that no call to the pay-per-

[101] 58 FR at 13380 (question 7).

[102] Comments 31 (CA) at 5; 59 (USPS) at 3–4.

[103] Comment 37 (PPI) at 31.

[104] Comments 37 (PPI) at 27; 52 (IIA) at 22; 63 (nais) at 16–17.

[105] 58 FR at 13381 (question 9).

[106] 16 CFR part 419.

[107] 48 FR at 1046 (1983).

[108] Tr. at 440–461.

[109] Comments 37 (PPI) at 10; (IIA) at 22.

[110] Offering a free method of entering a sweepstakes or game of chance is necessary to avoid violation of the Federal law prohibiting commercial lotteries, 18 U.S.C. 1301, *et seq.*

[111] 58 FR at 13380–81 (question 8).

[112] Comments 39 (IISC) at 10; 45 (ANA) at 5; (IIA) at 22–23; 58 (PMA) at 1; 63 (NAIS) at 21–23.

[113] Comments at 21 (NCL) at 13; 31 (CA) at 6; 37 (PPI) at 10; 40 (NACAA) at 6; 42 (NAAG), Appendix 1 at 2–3; 59 (USPS) at 5.

[114] Comment 21 (NCL) at 10.

[115] Comment 42 (NAAG), Appendix 2 at 1–2.

[116] Comment 59 (USPS) at 5.

[117] Tr. at 424–426.

call number (rather than no purchase) is necessary to enter the sweepstakes.[118]

Disclosing that no call to the pay-per-call number is necessary to enter the sweepstakes, however, is insufficient without also telling consumers how to enter the sweepstakes without calling the pay-per-call number. As originally proposed, the rule required advertisements to disclose an alternative means of entry and instructions on how to enter. As noted above, a number of commenters argued that it was too burdensome to make these disclosures in broadcast advertisements, particularly in the size required by the proposed rule. After reviewing the comments and considering the discussion of this issue at the public workshop conference,[119] the Commission believes that the proposed rule should be modified to require disclosure of the existence of an alternative method of entry and a cost-free means of learning of that method: Either a local or toll-free telephone number that consumers may call to learn of the information, or an address that consumers may write to for instructions on how to enter.[120] The actual instructions on how to enter without cost need not be disclosed so long as consumers are adequately informed how to obtain that information.

At least one commenter disliked the alternative of allowing disclosure of the free method of entry information in the preamble, citing the relative costliness of making disclosures in the preamble compared to making them in advertisements.[121] Other commenters raised the concern that if consumers are forced to call the pay-per-call number in order to learn of the free method of entry, the tendency may be for them simply to stay on the line and enter through the pay-per-call service.[122]

The Commission has decided to allow pay-per-call providers to place the free method of entry information *either* in the advertisement or in the preamble. If provided in the preamble, the information must be presented at a reasonably understandable volume and in a slow and deliberate manner, as those terms are defined in § 308.2(h) and (j).

The proposed rule required that the advertisement disclose the scheduled termination date of the game of chance. In addition, the Commission had requested comment on the desirability of requiring disclosure of other limitations on the sweepstakes program's availability, such as geographical restrictions, time-of-day availability, or touch-tone phone requirements; the name, city, state, and customer service telephone number of the promoter or provider of the pay-per-call service; and the value of the prize.[123] Several commenters noted that sweepstakes are already subject to a plethora of Federal and State regulations,[124] and objected to the requirement to disclose the game's termination date or the other information not required by the TDDRA.[125] The Commission is persuaded that sweepstakes promotions run through pay-per-call services are not sufficiently different from other sweepstakes promotions with respect to these types of disclosures that it is necessary for this Rule to address these issues, either to prevent unfair or deceptive practices, or to prevent evasion of the regulations. Accordingly, the final Rule does not contain the requirement to disclosure the game's termination date, or any of the additional disclosure requirements listed above.

A number of commenters, however, noted that pay-per-call service sweepstakes are frequently used to promote prizes that are represented to be far more valuable than is actually the case.[126] The legislative history indicates that Congress was also concerned about the problem.[127] The Commission requested comment on the advisability of requiring disclosure of the material terms and conditions of receiving a service or product through a pay-per-call service.[128] One of the material terms suggested was a clear and accurate description of the service or product. While the Commission has decided not to include this requirement for all pay-per-call service advertisements (relying instead on general compliance with section 5 of the FTC Act), in the case of pay-per-call service sweepstakes, the Commission is persuaded that sufficient evidence exists, as presented in the comments, that explicitly requiring a clear and accurate description of sweepstakes prizes is required in order to prevent deceptive practices.[129] Thus, the final Rule requires that in advertisements for pay-per-call service sweepstakes, any characterization of the prizes or awards must be truthful and accurate. The Rule does not impose an affirmative duty to describe the prizes; it simply requires that to the extent that the advertisement identifies, describes, or otherwise characterizes the prizes, such characterization must be truthful and accurate.

With respect to the manner in which the required disclosures must be made, the proposed rule stated that in television advertisements, there must be a simultaneous audio-video disclosure and that each line of the video disclosure must occupy at least one-tenth of the vertical field of the television screen. Several commenters objected to these specific requirements.[130] After reviewing the comments, the Commission believes that the Rule's purpose would better be served by allowing more flexibility in the size and presentation of the sweepstakes disclosures. Because the regulations require several disclosures, there is a concern that the advertisement would become overly cluttered with information, with the result that the important information would not appear prominently in the advertisement.[131] In addition, variability in disclosure size among advertisements may be desirable because it is likely to lessen the potential for the disclosures to "wear-out," thus enhancing their noticeability.[132] The proposed rule is

[118] This disclosure requirement does not prescribe a specific phrase that must be used. The Commission, however, interprets the Rule as requiring a specific statement that no call to a pay-per-call telephone number, or to a telephone call costing money, is required. It is the Commission's opinion that stating that "no purchase is necessary to enter" would not comply with the Rule.

[119] Tr. at 412–22.

[120] Providers of pay-per-call services that choose to provide a local or toll-free telephone number have the responsibility of ensuring that the telephone numbers are adequately staffed or otherwise adequately maintained so that the free method of entry information is readily accessible to consumers who call those telephone numbers.

[121] Comment 37 (PPI) at 32.

[122] Comments 31 (CA) at 2; 40 (NACAA) at 6; 42 (NAAG) at 14.

[123] 58 FR at 13380 (question 7).

[124] *See, e.g.*, Comment 58 (PMA) at 1 and Appendix (listing federal and state laws and regulations governing contests and promotions). *E.g.*, Minn. Stat. Sec. 609.75 (labels and advertisements must clearly state the scheduled termination date of the promotion).

[125] Comments 37 (PPI) at 9–11, 31; 39 (IISC)—at 10–11; 45 (ANA) at 6; 58 (PMA) at 1.

[126] Comments 21 (NCL) at 13–14; 31 (CA) at 6; (NACAA) at 5; 42 (NAAG) at 13–14; 59 (USPS) at 4, 7.

[127] House Report at 5.

[128] 58 FR at 13382 (question 16).

[129] Comments 21 (NCL) at 13–14; 31 (CA) at 6; 40 (NACAA) at 5; 42 (NAAG) at 13–14; 59 (USPS) at 4, 7.

[130] Comments 14 (AAAA) at 4–6; 22 (Meganews) at 3; 37 (PPI) at 11; 39 (IISC) at 16, 29; 45 (ANA) at 5, 7; 52 (IIA) at 22; 58 (PMA) at 2; 63 (NAIS) at 22.

[131] Comments 19 (AAF) at 4; 35 (AIP) at 5; 37 (PPI) at 10; 39 (IISC) at 37–38; 45 (ANA) at 6; 46 (Cox) at 3; 48 (DMA) at 4; 49 (NIMA) at 3–5; 61 (ICN) at 4–5.

[132] *See* Bhalla & Lastovicka, *The Impact of Changing Cigarette Warning Message Content and Format*, in *Advances in Consumer Research* 305, 309 (T. Kinnear ed. 1984) (varying the content and format of messages enhances noticeability and attention); R. Petty & J. Cacioppo, *Communication and Persuasion: Control and Peripheral Routes of*

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modified to allow the required disclosures to be presented either in audio or video form. Where video disclosures are used, they must appear on the screen in sufficient size and for sufficient time to allow consumers to read and comprehend them. If audio disclosures are used, they must, of course, be given in a slow and deliberate manner and at a reasonably understandable volume.

In print advertisements, the proposed rule required that the disclosures be in at least 12-point type. A number of objections were raised to this requirement,[133] with several commenters responding to the Commission's question whether this requirement would be feasible for different types of advertising media.[134] Some commenters pointed out that classified ads generally only use 6-point type, and do not necessarily allow variation in size or typeface, so that the rule would prevent the use of that medium for some advertisements.[135] As the Commission suggested in the NPR, and as several commenters noted, in the case of billboards, a 12-point disclosure would be inappropriate.[136] In addition, some extrinsic evidence was submitted indicating that consumer recall of odds disclosures made in 12-point type was no better than when made in 10-point type.[137] The Commission has decided that the purposes of the Rule would best be served by a more flexible standard. Therefore, the final Rule requires that the disclosures be made in a sufficient size and prominence, and in such location in the advertisement, that the information is noticeable, readable, and comprehensible. This flexibility enables variation in the size of disclosures, relative to the type and size of the advertisement, so long as the information is always readable and of sufficient prominence to be readily noticed. Moreover, this flexible standard addresses the concerns raised by the copy test evidence[138] that a 12-point requirement was too rigid to allow effective presentation of both the selling message and the required disclosures.

Attitude Change 68–73 (1986) (once consumers become accustomed to an advertising message, repetition of the same message results in decreased effectiveness).

[133] Comments 14 (AAAA) at 5; 22 (Meganews) at 3; 37 (PPI) at 11, 28–29, 37; 39 (IISC) at 16–24, 29–32; 45 (ANA) at 5; 58 (PMA) at 2.

[134] 58 FR at 13381 (question 10).

[135] Comments 22 (Meganews) at 3; 46 (Cox) at 5; 48 (DMA) at 4; 52 (IIA) at 24; 63 (NAIS) at 20–23; 73 (NII) at 5; 80 (Suarez) at 2.

[136] Comments 14 (AAAA) at 15; 37 (PPI) at 34; 48 (DMA) at 4.

[137] Comment 39 (IISC) at 37.

[138] See comment 39 (IISC), Appendix B.

4. *Section 308.3(d): Federal Programs*

Section 308.3(d) covers advertisements for pay-per-call services that provide information on Federal programs, but that are not sponsored or endorsed by any Federal agency.[139] The proposed rule[140] required that the advertisement clearly and conspicuously disclose, at the beginning, that the pay-per-call service is not authorized, endorsed, or approved by any Federal agency. While few comments focused on this provision, those that did stated that the Rule ought to provide better definition of services that "provide information on a Federal program." The IIA, for instance, suggested that the provision be narrowed to cover only those services that contain "a seal, insignia, trade or brand name, or any other term or symbol that reasonably could be interpreted or construed as implying any Federal government connection, approval, or endorsement."[141] This language is found in a U.S. Postal Service statute prohibiting sending through the mail certain materials that contain the above information, without a disclosure regarding lack of Federal government approval or endorsement.[142]

IIA commented that the provision should not cover programs that merely provide information originating with or obtained from the Federal government.[143] Similarly, NAIS commented that the disclosure should only be required on programs exclusively or predominantly dedicated to the provision of Federal program information, or that otherwise give the appearance of Federal sponsorship or authority.[144] After reviewing the comments, the Commission is persuaded that further clarification is warranted.

The Commission agrees that programs giving the appearance of Federal sponsorship or endorsement should contain the disclosure. While the legislative history of the TDDRA does not shed any light on congressional intent with respect to this provision, the Commission believes that the statute is reasonably interpreted as intending to require the disclosure in those situations in which consumers may be misled about the program's affiliation with the Federal government. The Commission is not persuaded, however, that such misinterpretation would be limited to those programs that predominantly or exclusively are dedicated to providing information on a Federal program.[145] The final Rule, therefore, is modified to make clear that pay-per-call services that provide information on a Federal program include services that give the appearance of Federal affiliation. The Rule states that such services include those using a seal, insignia, trade or brand name, or any other term or symbol that reasonably could be interpreted or construed as implying any Federal Government connection, approval, or endorsement.

The TDDRA requires the Federal programs disclosure to be made at the beginning of the advertisement.[146] Accordingly, the proposed rule required that in both television and radio advertisements, the disclosure must begin within the first fifteen seconds of the advertisement, while in print advertisements, the disclosure must appear within the top one-third of the advertisement. Two commenters objected to this requirement, but it appears that they were unaware of the statutory requirement that the disclosure be made in the beginning of the advertisement, and thus they did not offer any alternative way of fulfilling the statutory requirement.[147] Thus, no modification will be made in the final Rule.

The final issue with respect to the Federal programs disclosure concerns the size and manner of the disclosure. As proposed, the rule required a simultaneous audio-video disclosure in television advertisements, and specified that each line of the video disclosure must occupy at least one-tenth of the vertical field of the television screen. For the reasons stated above in the sweepstakes section, the Commission has decided to modify the proposed rule to allow the disclosure to be made in either the audio or video portion of the advertisement. If a video disclosure is used, it must appear on the screen in sufficient size and for sufficient time to

[139] An example would be a service providing access to information in the Federal Register or the Congressional Record.

[140] In the proposed rule, this section was numbered 308.3(c). 58 FR at 13386.

[141] Comment 52 (IIA) at 7.

[142] 39 U.S.C. 3001(h), (i).

[143] Comment 52 (IIA) at 6.

[144] Comment 63 (NAIS) at 24.

[145] At the same time, the Commission does not contemplate that the disclosure would be required in programs that make only incidental use of, or incidental reference to, information obtained from the Federal government. For example, a winery could run a promotional campaign highlighting the wine region's attraction as a tourist destination, and give the population of the region, by referring to the most recent U.S. Census. The Commission does not interpret the regulations as applying to such a pay-per-call service, merely because it referred to U.S. Census Bureau data.

[146] 15 U.S.C. 5711(a)(1)(C).

[147] Comments 37 (PPI) at 12; 63 (NAIS) at 25.

allow consumers to read and comprehend the disclosure. An audio disclosure must be delivered in accordance with the requirements of § 308.3(a)(4).

Similarly, the proposed rule required that the disclosure in print advertisements be in at least 12-point type. Again, for the reasons stated in the sweepstakes section, the Commission has decided to modify the proposed rule to require that print disclosures be made in a sufficient size and prominence, and in such location in the advertisement, that the information is noticeable, readable, and comprehensible.

5. *Section 308.3(e): Prohibition on Advertising to Children*

As required by the TDDRA,[148] section 308.3(e) of the Rule prohibits a provider of pay-per-call services from directing advertisements for such services at children under the age of 12, unless the service is a bona fide educational service (as defined in § 308.2(a)).[149] In the proposed rule,[150] advertisements directed to children under 12 were defined, both by the type of medium in which they appear as well as by the nature and content of the advertisement, in the form of a rebuttable presumption. Advertisements directed to children under 12 were presumed to include the following: Advertisements appearing in publications directed to children (*e.g.*, children's books, magazines and comic books); advertisements appearing during or immediately adjacent to television programs directed to children (*e.g.*, children's programming as defined by the FCC,[151] animated programs, and after-school specials directed to children); advertisements broadcast during or immediately adjacent to radio programs directed to children; advertisements appearing on a commercially prepared video directed to children; and advertisements or promotions appearing on product packaging directed to children.

In addition, in the proposed rule, any advertisement, regardless of placement, that is directed to children under 12 in light of its subject matter, visual content, age of models, language, characters, tone, message, or the like, would also be presumed directed to children under the age of 12. However, the proposed rule provided that this presumption could be rebutted with competent and reliable evidence demonstrating that the receiving audience was composed predominantly of individuals aged 12 or older. The final Rule retains the use of content-based criteria, but only as a factor for the Commission to consider in determining whether an advertisement is directed to children under 12.

The Commission specifically sought comment on several discrete issues regarding this provision of the proposed rule: (1) Whether structuring the definition of advertising to children under 12 in the form of a rebuttable presumption is appropriate and useful; (2) whether the use of audience composition and readership data to demonstrate whether a particular advertisement is directed to that age group is appropriate and useful; and (3) the appropriate criteria for the Commission to rely upon in determining whether an advertisement is directed to children under 12.[152] Included with these questions was a specific request by the Commission for any data that would assist the Commission in setting a specific percentage of audience composition that would reflect accurately a "children's audience."[153] The NPR also asked, among other things, whether the definition provided sufficient guidance as to the type of advertisement that would be presumed directed to children, and whether it was appropriate for the Commission to rely, at least in part, on the content of an advertisement as a factor.[154] This section discusses each of these issues.

The comments were divided regarding whether the definition of advertisements directed to children under 12 should take the form of a rebuttable presumption. Some of the commenters urged the Commission to maintain this format because they believed that the proposed definition properly placed on the advertiser the burden of proving the composition of the receiving audience.[155] In addition, several commenters stated that a standard based on audience composition data provides objective, measurable proof, using data that advertisers already use and analyze in determining where to place advertisements.[156] In particular, PPI favored using audience composition data as the basis for the definition, and stated that it should be given a more prominent role than merely as evidence to rebut the presumption.[157] Most of the commenters that favored the rebuttable presumption also favored reliance on audience composition data to rebut the presumption. However, nearly all of those commenters also urged the Commission to make it more difficult to rebut the presumption by requiring a higher percentage of audience members

[148] 15 U.S.C. 5711(a)(1)(D).

[149] A number of commenters raised First Amendment issues with respect to the congressional ban on all pay-per-call advertising and services directed to children under 12. Comments 14 (AAAA) at 2–4, 7–9; 30 (CARU) at 2; 39 (IISC) at 6–8, 11–13; 45 (ANA) at 1–3, 8–9; 48 (DMA) at 7–8, 10; 63 (NAIS) at 7–8, 25. Several of these commenters also challenged the constitutionality of the advertising restrictions generally. Under the First Amendment, commercial speech that is misleading or fraudulent may be prohibited altogether, and even commercial speech that is neither misleading nor fraudulent may be restricted, provided the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest. *See Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) (cited in Senate Report at 4–5); *see also Board of Trustees of the State Univ. of New York* v. *Fox*, 492 U.S. 469, 475 (1989); *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S.Ct. 1505, 1510 (1993).

The test is not whether the regulation, as applied, represents the "least restrictive means" available, but merely whether it has been "narrowly tailored" to serve the government's asserted interest without ensnaring protected, non-commercial speech. *Fox*, 492 U.S. at 480; *see, e.g., FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43–44 (D.C. Cir. 1985) (injunction did not impose a sweeping or blanket prohibition and was not broader than reasonably necessary to prevent deception). The fit between the government's goals and the means chosen to meet those goals need not be "perfect," but simply "reasonable." *Fox*, 492 U.S. at 480. The legislative history of the TDDRA notes, for example, that programming aimed at children may be subject to reasonable restrictions, where such restrictions serve a substantial interest and are otherwise consistent with First Amendment requirements. *See* Senate Report at 4–5 (*citing FCC* v. *Pacifica Foundation*, 438 U.S. 726, 749 (1978) (quoting *Ginsberg* v. *New York*, 390 U.S. 629 (1968)).

As explained throughout this statement of basis and purpose, the Commission has considered and evaluated various regulatory alternatives in determining the final scope and extent of its regulations. The Commission believes that the requirements set forth in the final Rule are reasonable, are narrowly tailored to meet the required regulatory and law enforcement objectives, and are no more extensive than necessary to serve the purposes articulated by Congress in the statute and the legislative history.

[150] 58 FR at 13386.

[151] The FCC defines "children's programming" as "programs originally produced and broadcast for an audience of children 12 years old and under." FCC, Report and Order, Policy and Rules Concerning Children's Television Programming, Docket No. 90–570 (April 9, 1991). Thus, the FCC definition relates to children *12 years old and under*, while this rule prohibits pay-per-call services and advertisements for such services directed to children *under the age of 12*. Nevertheless, the FCC's definition provides a useful benchmark.

[152] 58 FR at 13381 (question 11).

[153] *Id.* at 13381 (question 13.b).

[154] *Id.* at 13381–82 (question 14).

[155] Comments 21 (NCL) at 4, 16–17; 31 (CA) at 7; 37 (PPI) at 35; 40 (NACAA) at 6; 42 (NAAG) at 15; 53 (CME) at 14–15.

[156] Comments 37 (PPI) at 35–36; 53 (CME) at 15. On the same issue, CA stated that pay-per-call providers should not be permitted to rebut the presumption with evidence other than audience composition data due to the inherent subjectivity of such information. Comment 31 (CA) at 7.

[157] Comment 37 (PPI) at 12–13.

12 and older than suggested in the NPR.[158]

On the other hand, a significant number of commenters were opposed to a rebuttable presumption format. These commenters generally took the position that while the factors identified in the proposed rule might be appropriate if considered together, none of them were sufficient alone, and none were sufficient to rise to the level of presumptive evidence.[159] Moreover, several of these commenters stated that any presumption contained in the Rule should run in favor of the pay-per-call providers and against the Commission—*i.e.*, that all advertisements for pay-per-call services should be presumed directed to children aged 12 and older, unless the Commission is able to prove otherwise.[160] A majority of the commenters opposing the rebuttable presumption also took the position that the percentages identified by the Commission in the NPR were inappropriate because they made it too difficult to rebut the presumption.[161] However, only PPI responded to the Commission's request for relevant data, by providing a one-page list showing the audience composition for several different types of television programs, and circulation data for several magazines.[162]

With respect to the criteria detailed in the proposed rule that would raise the presumption that an advertisement is directed to children under 12, there was general agreement by the commenters that the factors identified by the Commission were appropriate, provided that the presence of one factor would not raise the presumption by itself.[163] The public workshop conference was particularly enlightening regarding this issue, and it is clear that the weight of the comments indicates that the criteria developed by the Commission are thought to be comprehensive and reasonable indicia of whether a particular advertisement is directed to children under the age of 12. However, many of the participants also indicated that it would be necessary for the Commission to review an advertisement in light of all of the factors in making its determination.[164] Many of the commenters that favored the use of the delineated criteria, when taken as a whole, also opposed the use of any one factor to raise the presumption that an advertisement is directed at young children.[165]

Several of the commenters noted that the use of media-based criteria, *i.e.*, placement of the advertisements in particular types of media, was appropriate because that is the manner in which most advertisers place their advertisements.[166] CME also urged the Commission to retain the content-based portion of the criteria in the final Rule, emphasizing that there was legislative history to support this aspect of the definition.[167]

In contrast, a few of the commenters were completely opposed to the presumption criteria as set forth in the proposed rule. Several commenters expressed concern over the ambiguity of these criteria or the fact that they were not narrowly tailored, while others indicated a preference for no criteria at all, or simply disagreed with the criteria listed in the proposed rule.[168] Some of those commenters who opposed any criteria felt that the Rule should merely restate the TDDRA's ban on all advertisements directed to children under 12. For the reasons stated in part II.B., *supra*, regarding clear and conspicuous disclosures, the Commission believes this suggestion would violate the congressional mandate that the Commission enact implementing regulations, and that it would produce an unenforceable Rule.

Two commenters objected to considering advertisements placed immediately adjacent to children's television programs as advertisements directed to children under 12 because doing so would prohibit pay-per-call providers from placing advertising as "run-of-station" spots—*i.e.*, allowing the particular television station to place the advertisements at any available time, rather then specifying a particular placement.[169] According to one commenter, it is more expensive for advertisers to specify during which television program they want their advertising placed, rather than placing a "run-of-station" advertisement.[170]

After reviewing the comments and the transcript of the public workshop conference, the Commission has decided to modify the form of the prohibition on advertisements directed to children under 12. The Commission is persuaded that a one-factor rebuttable presumption is unworkable. As drafted, the proposed rule would permit only audience composition data to rebut the presumption. While audience composition data is available for a wide variety of broadcast programming through established services such as Nielsen Television Viewing Profiles, and for magazines through reader profiles, there are currently few data sources for cable channels, nor is their readily available data for other types of advertising formats, such as product packaging. Since no factor alone could have raised the presumption, such a rule could subject many pay-per-call advertisements to a one-factor test without a real opportunity for the advertiser to rebut the presumption. Absent a meaningful source of audience composition data, this approach would be inconsistent with the Commission's approach to reviewing advertising claims; *i.e.*, the Commission generally examines the totality of the circumstances, including the advertisement is placed and the nature of the advertisement itself. Thus, after reviewing the comments, the Commission believes that audience composition data may not be a realistic rebuttal factor, but that it is of use, when available, as an indicator of when an advertisement is directed to children under 12.

The final Rule has two distinct tests for determining whether an advertisement is directed to children under 12. The first test is found in

[158] Comments 31 (CA) at 7; 40 (NACAA) at 6; 42 (NAAG) at 15; 53 (CME) at 16–17.

[159] Comments 19 (AAF) at 5; 43 (GMA) at 7–8, 13, 15–16; 41 (Kellogg) at 3–5; 45 (ANA) at 9–10; 48 (DMA) at 8–10; 63 (NAIS) at 25–26.

[160] Comments 14 (AAAA) at 8; 19 (AAF) at 5; 45 (ANA) at 9; 48 (DMA) at 10; 52 (IIA) at 27.

[161] Comments 19 (AAF) at 5–6; 43 (GMA) at 17–18; 45 (ANA) at 10.

[162] Comment 37 (PPI), unnumbered attachment.

[163] Comments 19 (AAF) at 5; 35 (AIP) at 8; 43 (GMA) at 8, 15; 45 (ANA) at 9; 52 (IIA) at 25; 53 (CME) at 10–14; 63 (NAIS) at 26. CA supported a medium-based definition, but did not comment specifically on the criteria. Comment 31 (CA) at 7. NCL supported this provision of the rule as proposed. Comment 21 (NCL) at 16–17.

[164] Tr. at 360–85. Additionally, several participants at the public workshop conference stated that audience composition data should be considered as one of the criteria to examine in determining whether an advertisement is directed to a particular age group. Tr. at 373–75, 384.

[165] Comments 19 (AAF) at 5; 43 (GMA) at 15–16; 52 (IIA) at 27; 63 (NAIS) at 26–27; Tr. at 371.

[166] Comments 52 (IIA) at 26; 53 (CME) at 12; Tr. at 381–82.

[167] Comment 53 (CME) at 13 (citing House Report at 14). Clearly the House Committee contemplated that the Commission could use both a media-based and a content-based definition. *See also* Comments 31 (CA) at 7; 52 (IIA) at 26–27.

[168] Comments 20 (ABC) at 1–2; 30 (CARU) at 2–3; 35 (AIP) at 8 (favored all media-based criteria, but opposed content-based criteria as unnecessarily vague); 37 (PPI) at 12, 35; 45 (ANA) at 10 (believed criteria to be relevant factors but opposed the rebuttable presumption and would not support using criteria as part of that presumption); 48 (DMA) at 8. Some commenters identified, in their written comments, particular criteria they believed to be vague, ambiguous, or overly broad. Comments 14 (AAAA) at 10; 43 (GMA) at 12–15; 45 (ANA) at 8; 63 (NAIS) at 27. At the public workshop conference, however, some of these same parties indicated agreement with the criteria if they are examined together, and no single factor is determinative.

[169] Comments 34 (TPI) at 6; 63 (NAIS) at 27; Tr. at 387.

[170] Comments 34 (TPI) at 6; Tr. at 387–88.

§ 308.3(e)(2), which addresses the case where audience composition data or readership data is available and demonstrates that a majority (more than 50%) of the viewing audience of the program or readership [171] of the periodical is composed of children under 12. This first test defines any pay-for-call advertisement in those media placements as an advertisement directed to children under 12 and, therefore, completely prohibits such advertisements. Such a finding will be based solely on preexisting competent and reliable audience composition or readership data. This section does not create a new evidentiary burden on a pay-per-call provider to create a database where one does not already exist.

The Commission set the threshold for a "children's audience," *i.e.*, when children under 12 comprise over 50% of the viewers, based on its review of the comments and on its experience and expertise in regulating advertising.[172] An audience composed of over 50% young children can reasonably be characterized as a "children's audience." [173] The Nielsen data provided by PPI demonstrate that very few television programs or periodicals would fall into this category. According to that data, Saturday and Sunday morning cartoons, such as "Beetlejuice," would have an audience composed of more than 50% children under 12. Prime time programs with a juvenile appeal, like "Growing Pains," have approximately 40% of their audience in that age group. With respect to periodicals, the data provided indicate that publications such as "Game Players Guide to Nintendo" have an under-12 readership of 30%.[174] Thus, based on the record, the 50% cutoff would not sweep too broadly, as there are very few television programs or periodicals that would fall into the prohibited category.[175]

The second test for determining whether an advertisement is directed to children under 12 is contained in §§ 308.3(e)(3)(i)-(vii). Under this test, if competent and reliable audience composition data or readership data do not demonstrate that more than 50 percent of the audience or readership is composed of children under 12, the Commission will consider where the advertisement is placed and its nature and content in determining whether an advertisement is directed to children under 12.[176] Sections 308.3(e)(3)(i)-(vi) set forth the media placements the Commission will consider. As discussed below, these sections have been modified slightly compared to the corresponding sections of the proposed rule.[177] On the other hand, § 308.3(e)(3)(vii) of the final Rule, which remains essentially the same as proposed, states that the Commission will consider the content of the advertisement itself, regardless of where it is placed, in determining whether a particular advertisement is directed to children under the age of 12.

While the criteria contained in the second test are virtually the same as those set forth in the proposed rule, the use of the criteria is entirely different. Under the proposed rule, the existence of any one of the criteria could raise the presumption that a particular advertisement was directed to children under 12. In contrast, under the final Rule, if competent and reliable audience composition or readership data demonstrates that 50 percent or less of the audience is composed of children under 12, or if such data does not exist, the Commission will consider the placement of the advertisement as well as the nature and content of the advertisement itself in making its determination.

The Commission is persuaded by the comments that it would be unreasonable to find that an advertisement violated the statutory prohibition on advertising to children based on the existence of only one factor where it is not evident that a majority of the audience is under 12. Consistent with the Commission's approach to advertising cases generally, in these cases the Commission will examine the totality of circumstances in making its determination. However, the Commission will not assign any particular weight to any of the delineated criteria, nor will it state, in the abstract, the number of factors that it will require to be present in order to find a violation.[178] Under this section, audience composition data will not play a role in the Commission's analysis except to place an advertisement in a category of review where the Commission will consider both the placement and content of the advertisement. After reviewing the comments, the Commission is persuaded that this is a fair and reasoned approach.

The criteria identified in the final Rule are identical, for the most part, to the criteria set forth in the proposed rule which raised the presumption that an advertisement was directed to children under 12.[179] Based on overwhelming approval by the commenters and the conference participants of the criteria outlined in the proposed rule, the Commission decided to incorporate them into the final Rule. However, the Commission has added several new factors, including advertisements that appear: (1) On television stations or channels directed to children under 12; (2) on radio stations directed to children under 12; and (3) preceding a movie, shown in a movie theater, directed to children under 12. The Commission has expanded these categories of advertising placement because under the final Rule, the criteria merely provide guidance as

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[171] The proposed rule did not include the phrase "readership data" in connection with evidence to rebut the presumption that an advertisement was directed to children. However, in the final Rule the Commission added that phrase to clarify that the Rule is intended to cover evidence regarding readership of print media as well as viewership of broadcast media.

[172] Several commenters suggested that 50% was an appropriate threshold for determining whether an advertisement was directed to children under 12. Comments 19 (AAF) at 5; 43 (GMA) at 17–18; Tr. at 378 (GMA: "at least 50% would be a more realistic figure"), 380, 383 (PPI: "50% is a fair percentage").

[173] PPI and CME both urged the Commission to avoid a one-time look at audience composition data, but instead, to ensure that the data reflect audience composition over a reasonable period of time. Comments 37 (PPI) at 37; 53 (CME) at 15. While the Rule does not explicitly state that audience composition data be examined over time, the Commission contemplates that such data generally would be viewed over time, and not on a one-time basis. There may be instances, however, where a one-time look at audience composition or readership data will be sufficient to demonstrate that the receiving audience is composed of a majority of those under 12.

[174] Comment 37 (PPI), unnumbered attachment.

[175] As indicated above, the NPR specifically requested data regarding audience composition for different television shows. PPI did provide evidence and it amply supports the Commission's 50% threshold. In addition, during the public workshop conference, Commission staff asked again whether any participant had data regarding audience composition, and no additional data was supplied. One participant, AAAA, stated at the public workshop conference that nearly all Saturday morning cartoons and some of the afternoon specials specifically designed for children's viewing have an audience over 50% under 12. Tr. at 381–82.

[176] NAIS expressed concern that audience composition data does not exist for certain forms of advertising, such as product packaging. Comment 63 (NAIS) at 26. While not explicit, this provision is intended to cover situations where data does not exist. Thus, this provision does not require pay-per-call providers to conduct research to determine who may be viewing or receiving an advertisement, in the event that such data does not already exist.

[177] This section of the proposed rule was numbered 308.3(d)(2). 58 FR at 13386.

[178] *See Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (even when Constitutional rights are implicated, weighing several criteria is permitted).

[179] ABC expressed concern that the phrase "after-school specials," as used in this section, referred specifically to the "ABC After-School Specials" which ABC asserts are geared toward a teen audience. Comment 20 (ABC) at 2. The final Rule modifies the phrase to the more generic "after school programs," to clarify that the Commission will consider the placement of an advertisement in any program that is directed to young children and shown in the afternoon.

to the type of media-placement that the Commission will consider. Thus, the addition of these factors will not create an additional burden on pay-per-call providers, but will merely provide notice to the industry that the Commission will consider such placement in its determination of what constitutes advertising of pay-per-call services to children under 12.

6. *Section 308.3(f): Advertising to Individuals Under 18*

As required by the TDDRA,[180] all pay-per-call advertisements directed primarily to individuals under the age of 18 are required to provide a clear and conspicuous parental permission disclosure. In the proposed rule,[181] advertisements directed to individuals under 18 were defined in terms of a rebuttable presumption based on the medium in which the advertisement was placed, as well as by the nature and content of the advertisement itself. The criteria used to determine if a program was directed to those under 18 were virtually identical to the criteria used to determine if a program was directed to children under 12.

In the proposed rule, advertisements directed primarily to individuals under 18 were presumed to include the following: advertisements appearing in publications directed primarily to individuals under 18 (*e.g.*, certain books, magazines and comic books); advertisements appearing during or immediately adjacent to television programs directed primarily to individuals under 18 (*e.g.*, mid-afternoon weekday television shows); advertisements broadcast on radio stations directed primarily to individuals under 18; and advertisements appearing on a commercially-prepared video directed primarily to individuals under 18. Finally, any advertisement, regardless of placement, that was directed primarily to individuals under 18 in light of its subject matter, visual content, age of models, language, characters, tone, message, or the like was presumed to be directed primarily to individuals under the age of 18. However, the proposed rule provided that this presumption could be rebutted with competent and reliable evidence demonstrating that the receiving audience was composed primarily of individuals aged 18 or older.

In the final Rule, the Commission has adopted the same approach for requiring the parental permission disclosure as it has in implementing the prohibition on advertising directed to children. Accordingly, § 308.3(f) of the final Rule sets forth the same two-part test and the same criteria—both in terms of the media-placement and nature and content of the advertisement—that the Commission will consider in determining whether an advertisement is directed primarily to individuals under the age of 18. This section of the final Rule also retains many of the criteria listed in the proposed rule.[182] In addition, the Commission has added two new criteria, including advertisements that: (1) Appear on cable or broadcast television stations directed primarily to individuals under 18; and (2) precede a movie, shown in a movie theater, directed primarily to individuals under 18. Like the additions to the criteria contained in § 308.3(e), these new factors do not create an additional burden on pay-per-call providers; they merely provide additional guidance as to the type of media placement that the Commission will consider.

Under the proposed rule, the standard required to demonstrate that the receiving audience was composed primarily of individuals aged 18 or older was different from the standard required to demonstrate that the receiving audience was composed predominantly of children aged 12 or older. These different standards ("predominantly" versus "primarily") were based on the specific language differences in the TDDRA. Thus, the Commission contemplated that in order to rebut the presumption that an advertisement was directed primarily to individuals under 18, the advertiser would need only to show that more than half of the receiving audience was 18 or older. In contrast, the Commission contemplated that in order to rebut the presumption that an advertisement was directed to children under the age of 12, the advertiser would have to show that more than two-thirds to three-quarters of the audience was 12 years of age or older.[183]

The Commission recognized, however, in the NPR, the potential difficulties raised by these provisions, and accordingly asked whether the use of the words "predominantly" and "primarily" was meaningful and whether the corresponding percentages contemplated by the Commission were appropriate. As discussed above in part II.B.5, *supra*, the Commission also requested audience composition data that would assist it in setting standards for audience size.

Few commenters focused specifically on the definition of advertisements to individuals under 18.[184] Those that did were divided as to whether the standard for rebutting the presumption should be the same as that for children under 12, or whether it should be different, based on dissimilar language used in the TDDRA.[185] The commenters that favored different standards generally based their assertions on the language of the statute.[186] These commenters also urged the Commission to set an even higher standard for rebutting the presumption that an advertisement was directed to individuals under 18. In contrast, several commenters objected to the proposed rule's reliance on two different standards; however, few provided reasons for their beliefs.[187] CA asserted that there was no justification for two standards and that in order to protect consumers, both standards should be set at 25% (*i.e.*, any audience composed of 25% or more of a certain age group would constitute an audience of that group).[188] On the other hand, GMA proposed a threshold of 50% for both groups.[189]

Based on its review of the comments, the Commission has decided to use the same standard of audience composition data for both groups.[190] As noted in the NPR,[191] the Commission contemplated in the original proposal that to rebut the presumption that an advertisement was directed primarily to individuals under 18, over 50% of the audience would have to be individuals 18 and over. Consistent with that policy, the Commission has determined that any advertisement, appearing where

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[180] 15 U.S.C. 5711(a)(1)(E).

[181] In the proposed rule, this section was numbered 308.3(e). 58 FR at 13386–87.

[182] As noted above, the weight of the comments supported the criteria outlined in the proposed rule.

[183] 58 FR at 13381 (question 13).

[184] The reason for this may be that if an advertisement falls into this category, the only requirement is that the pay-per-call provider include a parental permission disclosure in the advertisement. In contrast, if an advertisement is deemed to be directed to children under 12, then it is completely prohibited under the Rule. Moreover, the industry already appears to include parental permission disclosures in many of its pay-per-call advertisements.

[185] The TDDRA prohibits advertisements *directed* to children under 12, but requires parental permission disclosure in advertisements *directed primarily* to individuals under 18. 15 U.S.C. 5711(a)(1) (D) and (E).

[186] Comments 40 (NACAA) at 6; 42 (NAAG) at 15; 53 (CME) at 16.

[187] Comments 21 (NCL) at 17; 31 (CA) at 7; 43 (GMA) at 17–18.

[188] Comment 31 (CA) at 7.

[189] Comment 43 (GMA) at 17–18.

[190] The reasons for deleting the rebuttable presumption from this section of the final Rule are the same as the reasons for deleting the similar presumption in the prohibition against advertisements to children under 12, discussed in part II.B.5, *supra*.

[191] 58 FR at 13374.

available audience composition or readership data demonstrates that a majority (more than 50%) of the viewing audience of the programming or the readership of the periodical is composed of individuals under 18, will be required to include the parental permission disclosure.[192] While the Commission initially contemplated the use of two different standards, upon examination of the record, the Commission has decided to adopt the same standard for both age categories. The legislative history does not provide any explanation for the discrepancy in statutory language, and it is not apparent that Congress had differing intents. The over-50% audience cutoff figure can just as reasonably be applied to the under-18 age group as it can to the under-12 group. As in the case with advertisements directed to children, if advertisements do not fall into this delineated category, the Commission will consider a number of other criteria in its determination to apply the Rule.

In the proposed rule, the parental permission disclosure was required to be clear and conspicuous, as that term was set forth in the rule. The proposed rule included requirements that in television or videotape advertisements, the video disclosure concerning parental permission be adjacent to the largest presentation of the pay-per-call number, and that each line of the video portion of the disclosure occupy at least one-tenth of the vertical field of the television screen. In any program-length commercial (*i.e.*, 15 minutes or longer), the video disclosure had to appear simultaneously with and for the same duration as each presentation of the pay-per-call number. In print advertisements, the disclosure was required to be adjacent to the largest presentation of the pay-per-call number, and each letter or numeral was required to be at least 12-point type. In any program-length radio commercial, the disclosure was required to be delivered immediately preceding each delivery of the pay-per-call number.

While the Commission received many comments pertaining to the clear and conspicuous standards set out in the proposed rule, including the specific size and placement specifications, the Commission did not receive many comments specific to the particular requirements set forth in this section of the proposed rule. Several comments favored the proposed size requirement for the parental permission disclosure,[193] while others opposed the specifications as too restrictive end rigid.[194] Another comment expressed concern that requiring both the cost and parental permission disclosures to be adjacent to the pay-per-call number would result in cluttered disclosures.[195] CME generally supported the rule as proposed, but saw no basis for exempting 15-second advertisements that contain no audio presentation of the pay-per-call number from the simultaneous audio-video disclosure requirements.[196]

Regarding the language of the parental permission disclosure, one commenter requested that the Commission adopt the language prescribed in its consent orders relating to children's 900 numbers.[197] Another commenter questioned whether an advertisement in a magazine with a readership composed of individuals 16–35 years old [198] could merely disclose that one must be 18 years old to call the service.[199] The Commission has decided not to require any specific language in advertisements directed to individuals under 18, nor will it provide "safe harbor" language in this instance. The Commission's existing orders in this area dealt with advertisements clearly directed at a very young age group (*i.e.*, Santa Claus and Easter Bunny lines), and therefore it was reasonable to construct a disclosure that could be easily understood by young children. In contrast, the Rule requires a parental permission disclosure in advertisements directed to an audience that may contain young children and teenagers.

Given the inherent difficulty of creating specific language that would be appropriate to a broad range of services and age groups, the Commission has declined to do so. Those who produce pay-per-call services can exercise their discretion in developing disclosures both appropriate to the particular service and appropriate to the age group in need of the required warning. Furthermore, there is evidence to suggest that when consumers view the same warning in advertisements over long periods of time, they ignore it because the disclosure has "worn out." [200] Thus, requiring specific language for this disclosure could have the unintended effect of desensitizing the target audience to the required warning. Accordingly, no specific language is mandated.[201]

As discussed in part II.B.1, *supra*, the final Rule requires that all disclosures comply with the standards set forth in § 308.3(a). In addition, each letter of the parental permission disclosure in any advertisement must be, at a minimum, one-half the size of each letter or numeral of the largest presentation of the pay-per-call number.

The Commission has modified the size requirements for the parental permission disclosure for the same reasons as those discussed above concerning the size requirements for the disclosure regarding the cost of the call.[202] The legislative history indicates that Congress was particularly concerned that the cost of the call and the parental permission disclosures be adequately conveyed to consumers. Therefore, the parental permission disclosure, like the cost disclosure, must be presented at least once simultaneously in both the audio and video portions of a television advertisement.[203] However, based on the comments, the Commission believes that it would be impractical to require that both disclosures appear adjacent to the pay-per-call number. The Commission recognizes the need of pay-per-call providers to have some flexibility in designing advertisements for their services. Thus, the parental permission disclosure need not appear adjacent to and simultaneously with the pay-per-call number. In television advertisements, however, the video disclosure must remain on the screen for sufficient time to allow consumers to read and comprehend it. The Commission believes that by maintaining the requirement that the

[192] One commenter specifically suggested that 50% was an appropriate threshold in the context of advertisements directed primarily to individuals under 18. Comment 43 (GMA) at 18. Many commenters simply did not address the issue. This over-50% figure, however, includes all those under the age of 18, including those below the age of 12 who happen to be in the audience. To the extent that advertising continues to reach the under-12 age group, it should include the parental permission warning.

[193] Comments 31 (CA) at 7–8; 53 (CME) at 17.

[194] Comments 37 (PPI) at 13–14; 43 (GMA) at 19; 63 (NAIS) AT 29.

[195] Comment 63 (NAIS) at 29.

[196] Comment 53 (CME) at 17–19.

[197] Comment 53 (CME) at 22.

[198] In placing an advertisement in a magazine with a readership of individuals between the ages of 16 and 35, the advertiser would have to consider the particular spread of that readership. If more than 50% of the readers were under 18, the advertisement would be considered directed primarily to those under 18. If less than 50% of the readers were under 18, the advertiser would have to look to the criteria set forth in § 308.3(f)(4) to determine whether the disclosure is required.

[199] Comment 35 (AIP) at 9.

[200] *See* footnote 132, citing marketing studies indicating that repetition of the same advertising message results in decreased effectiveness.

[201] The TDDRA requires a statement that conveys that individuals under 18 must have parental permission to call the number. Given this statutory mandate, the Commission believes that it is not sufficient for an advertisement merely to advise the viewer that one must be 18 years old to call.

[202] *See* part II.B.2, *supra*.

[203] The same limited exceptions that apply to this requirement in the cost disclosure section will also apply here.

parental permission disclosure be the same size as the cost disclosure, by tying these sizes to the size of the pay-per-call number,[204] and by requiring that the statement be in both the audio and video portions of television advertisements, the Rule ensures that the disclosure will be clear and conspicuous. Moreover, as discussed in part II.D.1.d, *infra, all* preambles for pay-per-call services must also state that individuals under 18 years of age must have their parent's permission before calling.

In any program-length advertisement (radio or television), the disclosure must be delivered at least three times, near the beginning, middle and end of the commercial. This should ensure that those who may tune in to only a portion of the commercial will nonetheless receive the information.

7. Section 308.3(g): Electronic Tones in Advertisements

The TDDRA mandates that the Commission prescribe a rule prohibiting a provider of pay-per-call services from using advertisements that emit electronic tones that can automatically dial a pay-per-call telephone number.[205] The proposed rule included this prohibition, and the Commission received no comments on this provision. Accordingly, it is included in the final Rule as proposed.

8. Section 308.3(h): Telephone Solicitations

The proposed rule required the provider of pay-per-call services to ensure that any telephone message soliciting calls to a pay-per-call service disclose the cost of the call in a slow and deliberate manner and in a reasonably understandable volume, in accordance with the cost disclosure requirements set out in the proposed rule at §§ 308.3(a)(1)(i)–(v). As explained in the NPR, such messages might be accessed through a toll-free telephone number, for example,[206] or through any regular long distance or local telephone exchange.[207] The Commission did not receive any comment on this provision, and it has been retained unchanged, except to reflect that the sections setting forth the cost disclosure requirements are now contained in §§ 308.3(b)(1)(i)-(v) of the final Rule.

9. Section 308.3(i): Referral to Toll-Free Telephone Numbers

The proposed rule closely tracked the language of the TDDRA,[208] and prohibited providers of pay-per-call services from referring in advertisements to an 800 telephone number, or any other telephone number advertised as or widely understood to be toll-free, if callers to that number may be connected to an access number for, or may otherwise be transferred to, a pay-per-call service. One commenter suggested that this section be expanded to prohibit advertisements referring to "toll-free numbers" for which any charge is levied due to the completion of the call.[209]

As will be discussed in part II.D.9, *infra,* the Commission has expanded the prohibition against providing pay-per-call services through an 800 or toll-free telephone number to parallel the statutory provision on common carrier requirements, as well as the relevant FCC regulations, restricting the use of 800 numbers. The prohibited uses of toll-free numbers now include: (1) The calling party being assessed a charge for the call simply by virtue of completing the call; (2) the calling party being connected to an access number for, or otherwise transferred to, a pay-per-call service; (3) the calling party being charged for information conveyed during the call, unless there is a presubscription or comparable arrangement; and (4) the calling party being called back collect for the provision of audio information services, simultaneous voice conversation services, or products.

The Commission believes that if pay-per-call services are prohibited on toll-free telephone lines, providers should not be permitted to advertise such services. Accordingly, this section of the final Rule states that providers of pay-per-call services are prohibited from referring in advertisements to an 800 telephone number, or any other telephone number advertised or widely understood to be toll-free, if that number violates the prohibition concerning toll-free numbers set forth in § 308.5(i) of the Rule.

C. Section 308.4: Special Rule for Infrequent Publications

In the TDDRA, Congress left to the discretion of the Commission whether to grant certain exemptions to "infrequent publications," based on the fact that many such publications have a policy against publishing specific prices.[210] The proposed rule allowed an exemption from the cost disclosure requirements for advertisements for pay-per-call services that appear in publications that meet certain requirements. This section is intended to cover publications such as a yellow pages telephone directory, or other publications published on an infrequent basis. Instead of the usual cost disclosures required by the proposed rule, advertisements for pay-per-call services in this type of publication are permitted simply to include a clear and conspicuous disclosure that a call to the pay-per-call service may result in a substantial charge above the long-distance charge. In order to qualify for this exemption, the proposed rule required that the publication be: (1) Widely distributed; (2) printed annually or less frequently; and (3) one that has an established and written policy of not publishing specific prices in advertisements.

The final Rule retains the exemption for infrequent publications, with several modifications, as noted below.[211] First, the Rule does not require that an infrequent publication's policy against publishing specific prices be in *writing,* only that it be an *established* policy. In the NPR, the Commission specifically asked whether it would be sufficient if a publication had an established, but unwritten, policy of not publishing prices.[212] While few commenters

[204] As noted in the cost disclosure section, above, there may be certain kinds of advertisements in which a type size one-half the size of the pay-per-call number would not be adequate to provide a clear and conspicuous disclosure.

[205] 15 U.S.C. 5711(a)(1)(F).

[206] As required by the TDDRA, 15 U.S.C. 5711(a)(2)(F), the final Rule, at § 308.5(i), prohibits the providing of pay-per-call services through toll-free telephone numbers. Thus the caller cannot be connected or transferred to a pay-per-call service after calling a toll-free number. However, there is no prohibition against using a toll-free number to advertise a pay-per-call service so long as no direct connection or transfer to the service can be made.

[207] The Telephone Consumer Protection Act of 1991, 47 U.S.C. 227 ("TCPA"), would ban all computer-generated calls to homes, including those soliciting calls to pay-per-call services, unless such calls are made for emergency purposes or the subscriber consents in advance to them. The TCPA became effective December 20, 1992. However, the United States District Court for the District of Oregon found that this provision of the TCPA placed an unconstitutional restriction on protected commercial speech, and therefore prohibited its enforcement. *Moser* v. *FCC,* No. 92–1408–RE (D. Or. May 21, 1993). On July 19, 1993, the government filed, in the U.S. Court of Appeals for the 9th Circuit, a notice of appeal of this decision.

[208] 15 U.S.C. 5711(a)(1)(I).

[209] Comment 21 (NCL) at 17–18.

[210] 15 U.S.C. 5711(a)(7).

[211] One commenter, CA, opposed the exemption for infrequent publications because it feared that such an exemption would create a loophole that would allow providers to avoid disclosure requirements set forth in other sections of the Rule. CA stated, however, that if such an exemption were created, it should be tightly regulated to protect consumers. Comment 31 (CA) at 8. The Commission is persuaded by the weight of the comments that the Rule should include an exemption for infrequent publications. The requirement that the publication be published annually, or less frequently, lessens the likelihood that such a publication will be a popular forum for advertising pay-per-call services.

[212] 58 FR at 13382 (question 17.b).

focused specifically on this issue, those that did were unanimous in their opposition to the requirement in the proposed rule that such policy be in writing.[213] One commenter, YPPA, suggested that such a requirement would create a disproportionate burden on smaller directory publishers because many of these publishers do not maintain the staff necessary to draft and analyze written policies.[214] The commenter further explained that, while most directory publishers do, indeed, have an established policy against publishing specific prices, many do not have a written policy to that effect.[215] Thus, it could be costly for many infrequent publishers to develop a written policy regarding the publication of prices for pay-per-call services. Moreover, the language of the TDDRA describes a publication with an "established policy" against publishing specific prices, and does not mention the need for a written policy.[216] Thus, the Commission is persuaded that the requirement in the proposed rule that infrequent publications must have a written policy against publishing specific prices in advertisements in order to qualify for this exemption is unnecessarily restrictive; accordingly, the final Rule does not contain such a requirement.[217]

Second, in the actual disclosure requirement for infrequent publications, the final Rule deletes the phrase "above the long-distance charge," and will only require a disclosure that the call may result in a "substantial charge." One commenter, US West, indicated some confusion as to whether the language as originally proposed was prescriptive (*i.e.*, whether the language in the proposed rule was always required in the advertisement) and also whether the disclosure requirement applied only to pay-per-call services in which a long-distance charge was also going to be assessed.[218] US West correctly noted that in some cases, a call to a pay-per-call service may not, in fact, result in a charge greater than one might expect to pay for a long-distance call.[219] US West also noted that the TDDRA did not require this additional language. The TDDRA merely stated that in lieu of requiring infrequent publications to publish specific prices, such publications could be required to disclose that a "substantial charge" may be incurred.[220] The Commission believes that US West has raised a legitimate concern, and that the phrase "above the long-distance charge" in the proposed rule may be confusing. Thus, § 308.4(a) of the final Rule requires that an advertisement in an infrequent publication clearly and conspicuously disclose only that a call to the advertised service may result in a *substantial charge*. While the Commission does not intend for the actual language of this provision to be required to be used in the advertisements, any disclosure would have to convey the message that the charge for the call might be significant—*i.e.*, more than a consumer might expect to pay for a local or even a long-distance telephone call. For example, it is the Commission's opinion that the use of the phrase "pay-per-call" adjacent to the pay-per-call number in such an advertisement, as suggested by one commenter,[221] would not suffice, as it does not necessarily convey this message.

The proposed Rule did not address requirements for alphabetical listings contained in infrequent publications, such as the white or yellow pages alphabetical listings. Although the Commission did not specifically solicit comments on this issue, several commenters proposed that the final Rule exempt from *all* disclosure requirements any alphabetical listings contained in such publications.[222] Although such listings are paid for, they are, as YPPA noted, usually limited to the name, address, and telephone number of the pay-per-call provider. Moreover, the listings themselves occupy a very small amount of space, leaving virtually no room in or adjacent to the listing for any disclosures.[223] The Commission is persuaded that if the final Rule requires that all disclosures set forth in the proposed rule be included in alphabetical listings of the type commonly found in telephone directories, then such listings would not be feasible for listing pay-per-call providers' names and telephone numbers. Based on the comments, the Commission has decided to add a section to the final Rule, stating that the provider of a pay-per-call service that places an alphabetical listing in an infrequent publication is not required to make *any* of the disclosures required by § 308.3, provided that such listing does not contain any information except the name, address, and telephone number of the pay-per-call provider. The inclusion of any additional information, such as a slogan, would trigger all relevant disclosure requirements.

D. *Section 308.5: Operation of Pay-Per-Call Services*

Section 308.5 of the Rule sets forth the various requirements and prohibitions that apply to the operation of pay-per-call services.

1. *Section 308.5(a): Preamble Message*

As required by the TDDRA, each pay-per-call message must be preceded by an introductory message, or preamble, that discloses various facts relevant to the consumer's decision to complete the call and incur the charge for the service.[224] These disclosures are set forth in § 308.5(a) of the Rule. Both NACAA and NAAG suggested that the Rule require the preamble to precede any other information in the pay-per-call message.[225] This is the intent of the Commission, and the Commission believes the Rule imposes this requirement by describing the preamble as "an introductory disclosure message."

(a) Section 308.5(a)(1): Name of Provider and Description of Service

The preamble must identify the name of the provider of the pay-per-call service and describe the service that is offered. The TDDRA requires description of the service, but not identification of the name of the provider.[226] However, FCC regulations that have governed the interstate transmission of pay-per-call services by common carriers since 1991 have required identification of the name of the provider in the preamble.[227] The

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[213] Comments 56 (YPPA) at 3–7; 57 (US West) at 20; 63 (NAIS) at 31. Another commenter, AIP, opposed the requirement that the publication be published annually or less frequently. Comment 35 (AIP) at 9–10. However, the TDDRA specifically states that any exemption for cost disclosures be permitted only in publications that are published annually or less frequently. 15 U.S.C. 5711(a)(7). Therefore, the Commission will retain that condition.

[214] Comment 56 (YPPA) at 4, 6–7.

[215] *Id.* at 3–7.

[216] 15 U.S.C. 5711(a)(7).

[217] However, such a publication will have the burden of proving that it had an established, but unwritten, policy against publishing specific prices in advertisements.

[218] Comment 57 (US West) at 21–22.

[219] Comment 57 (US West) at 22.

[220] 15 U.S.C. 5711(a)(7).

[221] Comment 57 (US West) at 22.

[222] Comments 56 (YPPA) at 11; 57 (US West) at 21.

[223] Comment 56 (YPPA) at 11. YPPA also noted that this exclusion is explicit in some state laws. *See* Iowa Admin. Code 714A.1(1) (1992).

[224] 15 U.S.C. 5711(a)(2)(A).

[225] Comments 40 (NACAA) at 8; 42 (NAAG) at 16.

[226] 15 U.S.C. 5711(a)(2)(A)(i).

[227] 47 CFR 64.711(b) (to be deleted as of November 1, 1993). With the promulgation of both FTC and FCC regulations pursuant to the TDDRA, the FCC will rescind its preamble requirements. The new FCC rule obligates any common carrier assigning a telephone number to a pay-per-call service provider to require, by contract or tariff, that such provider comply with regulations promulgated by the FTC pursuant to titles II and III of the TDDRA. 47 CFR 64.1502.

FCC noted that this requirement would "provide important additional information to the consumer with little or no additional burden on the (interexchange carriers) or information providers."[228]

The Commission sought comment as to the usefulness of this requirement, and asked whether the address or location of the pay-per-call service provider should also be disclosed in the preamble.[229] Identification of the provider in the preamble was supported by USTA, VRS, CA, NACAA, USPS, and Sprint.[230] USTA suggested that this requirement helps to "eliminate the possibility of an erroneous perception of an affiliation between the local telephone company and a 900 service provider in the eyes of the customer." USPS pointed out that the information may help a consumer to avoid dealing with an entity with whom he or she has had problems in the past. Sprint, CA, and USPS supported preamble disclosure of the address of the provider; Sprint and CA also advocated inclusion of the provider's business telephone number in the preamble. PPI opposed the requirement, stating that the identity of the provider was irrelevant in most cases and should be left to the discretion of the pay-per-call provider.[231] NII asserted that the information could be confusing to the caller, who may be familiar with the name of the program but not the corporate identity of the pay-per-call provider.[232]

The Commission has determined that it is appropriate to require identification of the name of the provider in the preamble. The industry has been required to incorporate this information into the preamble since the FCC regulations went into effect in 1991. No member of the industry has argued that it is burdensome to do so. Moreover, as pointed out by USTA, the information may be important in some cases to dispel erroneous consumer perceptions about the identity of the pay-per-call provider. Because of the unique nature of this transaction, the consumer generally will have little or no idea of the identity of the business entity before placing the call and incurring the charge. Since the information may be of benefit to some consumers, and the obligation to provide it does not appear to be burdensome to the industry, the requirement will be retained.

However, the Rule will not require that additional information, such as the address and business telephone number of the provider, be given in the preamble. There is little basis to conclude that this additional information would be particularly beneficial to consumers in a preamble. Moreover, the information with regard to the address is otherwise available to consumers. Pursuant to FCC regulations, common carriers assigning telephone numbers to pay-per-call providers, and offering billing and collection services to such providers, must establish a local or toll-free telephone number to answer consumers' questions regarding pay-per-call services and to give callers the name and mailing address of the provider of any pay-per-call service offered by that carrier.[233] This toll-free number must appear in any telephone bill containing charges for such services.[234]

(b) Section 308.5(a)(2): Cost of the Call

The preamble must disclose the cost of the call. The TDDRA requires that this disclosure include "the total cost or the cost per minute and any other fees for that service and for any other pay-per-call service to which the caller may be transferred."[235] The preamble requirement in the final Rule, § 308.5(a)(2), parallels the cost disclosure requirement for advertising, set forth in § 308.3(b)(1). If a flat fee is charged for the call, the preamble must disclose the total cost. If the call is billed on a time-sensitive basis, the preamble must state the cost per minute and any minimum charges. In addition, if the length of the program can be determined in advance, the preamble must disclose the maximum charge that could be incurred if the caller listens to the complete program.

Some industry associations opposed this latter requirement, which is phased slightly differently in the final Rule than it was in the NPR.[236] Both IISC and NAIS asserted that the FTC has exceeded its statutory authority by requiring a disclosure of total cost in some instances where the pay-per-call provider assesses charges on a time-sensitive basis. They argued that the TDDRA's use of the word "or" in the phase "the total cost or the cost per minute"[237] precludes the Commission from adopting this provision.[238]

The Commission does not believe its statutory mandate to be so restricted, particularly in light of other language in the TDDRA which authorizes the Commission to adopt additional measures to prevent practices that might evade the Rule or otherwise undermine its protections.[239] The provision applies only in those limited situations where the program is a fixed duration, but the pay-per-call provider has elected to impose a per minute charge rather than a flat fee.[240] If the complete program is 10 minutes in length, but the advertising and preamble disclose only that the cost is $2.95 per minute, the consumer cannot make an informed choice to place the call, without knowing that the full price of the information will be $29.50. In the absence of any requirement that the total cost be disclosed in this instance, there would be an incentive for some pay-per-call providers to lengthen the program and place key information near the end of the program to discourage the caller from hanging up.

Moreover, this disclosure has been required under FCC regulations since 1991.[241] In adopting its preamble requirement, the FCC stated: "The benefits to consumers in the form of full knowledge of the total cost for pay-per-call programs which have a predictable duration will outweigh the minimal

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[228] FCC, Report and Order, Policies and Rules Concerning Interstate 900 Telecommunications Services, CC Docket No. 91-65, ¶ 26 at 13 (October 23, 1991) ("FCC 900 Telecommunications Services Rule of 1991").

[229] 58 FR at 13382 (question 18).

[230] Comments 16 (USTA) at 14; 23 (VRS) at 5–6; 31 (CA) at 8–9; 40 (NACAA) at 8; 59 (USPS) at 7–8; 81 (Sprint) at 7.

[231] Comment 37 (PPI) at 39.

[232] Comment 73 (NII) at 5.

[233] 47 CFR 64.1509.

[234] 47 CFR 64.1510. Under the FTC Rule, § 308.5(j), pay-per-call providers must ensure that any billing statement for their services includes this local or toll-free telephone number. *See* section II.D.10, *infra*. This requirement ensures that billing entities that are not common carriers will also be obligated to display this information on the bill. The failure to display this number on the bill would constitute a billing error, pursuant to § 308.7(a)(2)(viii) of the Rule.

[235] 15 U.S.C. 5711(a)(2)(A)(ii).

[236] The proposed rule stated: "If the duration of the program can be determined in advance, the preamble shall also state the total cost for the complete program." 58 FR at 13387. The wording has been changed in order to clarify the intent of this provision.

[237] 15 U.S.C. 5711(A)(1)(A) and (a)(2)(A)(ii).

[238] Comments 39 (IISC) at 12–13, 25–26, 42; 63 (NAIS) at 11–12, 34.

[239] 15 U.S.C. 5711(a)(4) states: "The rules issued by the Commission under this section shall include provisions to prohibit unfair or deceptive acts or practices that evade such rules or undermine the rights provided to customers under this title, including through the use of alternative billing or other procedures."

[240] The obligation to disclose total cost will not apply to programs of undetermined length, such as programs that are interactive or asynchronous because they depend upon input from or options selected by the caller (other than the ultimate option of hanging up prior to completion of the program or the option of repeating the program, if available). Some industry representatives indicated at the public workshop conference that they had no objection to a required total cost disclosure for time-based calls so long as such a provision applied only to those programs that would not vary in length. Tr. at 110, 127–28.

[241] 47 CFR 64.711(a) (to be deleted as of November 1, 1993).

difficulties that some information providers may have in implementing this disclosure requirement."

The proposed rule additionally required, for time-sensitive calls where the duration of the program could not be determined in advance, that the preamble state that the length of the call is subject to caller discretion. The proposed disclosure was qualified by the phrase "unless it is otherwise clear from the context that such is the case."[242] The Commission asked whether this additional disclosure was necessary and appropriate.[243] Various providers of pay-per-call services and industry associations asserted that this language is unnecessary.[244] Some believed it to be self-evident that when charges are stated on a per-minute basis, the length of the call is determined by the caller. Other comments suggested that the qualifying language ("unless it is otherwise clear from the context * * *") was ambiguous and confusing.[245]

The Commission has dropped this proposal requiring disclosure that the length of the call be subject to caller discretion. The Commission is persuaded that in most instances, that fact will be self-evident to the consumer. Moreover, the Commission is concerned about unduly lengthening both the parable and the required advertising disclosures by an added statement that may have only marginal consumer benefit.[246]

The proposed requirement for disclosure of the cost of variable rate calls, § 308.5(a)(2)(iii), evoked very little comment. This provision remains unchanged in the final Rule. For these calls, the preamble must state the cost of the initial portion of the call, any minimum charges, and the range of rates that may be charged depending on options chosen by the caller. This seems to be the minimum necessary information that should be disclosed for complex programs which involve varying rate structures. The capability for variable-rate billing within the same call leaves open the possibility of deception and abuse if the multi-rate structure is not carefully disclosed to the consumer. The Commission has tried to construct a disclosure requirement to preclude this possibility of misuse.

Finally, the Rule at § 308.5(a)(2)(iv), as mandated by the TDDRA,[247] requires disclosure of any other fees that will be charged for the service, as well as fees for any other pay-per-call service to which the caller may be transferred. The required disclosure of "any other fees * * * for the service" prevents a pay-per-call provider from imposing undisclosed, additional charges for the service by designating them as something other than the cost of the call. For example, such additional fees might include charges for computer time, or charges for the mailing of print information that the consumer is supposed to receive by calling the 900 number. AIP noted that "(t)he proposed rules do not specify whether usual toll charges must be disclosed where such tolls are charged in addition to the charge for pay-per-call services."[248] The Commission believes that the clear intent of the TDDRA is to require full disclosure of all fees the consumer will be charged in order to receive the advertised service. If the pay-per-call provider imposes a "toll" charge upon the caller, in addition to the charge for the pay-per-call service itself, that charge should be disclosed in advertising and the preamble. Likewise, if multiple calls to the same or a different number are required to receive the advertised service, those charges must also be disclosed.

Both NACAA and NAAG propose that the Commission prohibit a pay-per-call provider from transferring a caller from one pay-per-call service to another.[249] However, the TDDRA does not prohibit this practice.[250] It requires only that full disclosure be made, in both advertising for and the preamble to the first pay-per-call, of the cost of any service to which the caller may be transferred. Given the apparent congressional intent to permit this practice, so long as full disclosure is made, the Commission declines to prohibit all such transfers. It is hoped that by requiring the disclosure of the costs of multiple services within one advertisement and one preamble, the use of such transfers will be limited to those services where such a transfer may perform a legitimate, non-deceptive purpose. The disclosure obligation applies to any program where the caller may be transferred to another pay-per-call service without hanging up and dialing the second number.

(c) Section 308(a)(3): Changes Begin After the Preamble

The preamble must state that charges for the call will begin, and that to avoid charges the call must be terminated, three seconds after a clearly discernible signal or tone indicating the end of the preamble. The TDDRA makes no reference to a signal or tone. However, it requires that callers be informed that charges begin at the end of the introductory message and that the pay-per-call provider enable the caller to hang up at or before the end of that message without incurring any charge whatsoever.[251] The Commission included the tone requirement in the proposed rule,[252] and various parties commented on this provision. AT&T supported the proposal, noting that "(t)his signal or tone would clarify any possible misunderstanding of when the charges will begin."[253] However, AT&T noted that such a tone is not currently available from the carrier and must emanate from the provider's equipment. Some industry associations and pay-per-call providers opposed the requirement, asserting that a tone is intrusive, unnecessary, and inappropriate for calls involving live conversation.[254] Their views were repeated at the public workshop conference. On the other

[242] 58 FR at 13387.

[243] 58 FR at 13360 (questions 4 and 5) and 13382 (question 19).

[244] Comments 22 (Meganews) at 4; 37 (PPI) at 29–31, 40; 39 (IISC) at 29; 52 (iia) at 22; 61 (ICN) at 4–6 Tr. at 112–114.

[245] Comments 35 (AIP) at 3–4; 40 (NACAA) at 4.

[246] IISC noted that many states, as well as some industry guidelines, require that advertising for pay-per-call services billed on a time-sensitive basis disclose the length of the average call. Comment 39 (IISC) at 28–29. NAAG proposed that the FTC require disclosure in advertising of the average cost of the call as well as a statement that "the total amount of the charges increases each minute that the customer stays on the line." Comment 42 (NAAG) at 12 and Attachment 1 at 2. USPS recommended that both advertising and preambles for certain calls, involving recorded programs that require some caller interaction, disclose either the average length and cost of the call or the minimum and maximum length and cost. Comment 59 (USPS) at 3 and 8. The FCC, in 1991, declined to include an average cost disclosure in its preamble requirement. It did so because of the difficulties in calculating a meaningful average, and because it was "concerned that an average cost requirement could, itself, be used to deceive consumers." FCC 900 Telecommunications Services Rule of 1991, ¶ 23 at 12. The FTC likewise shares these concerns. For example, the average call might be short if a number of consumers hang up prematurely because the service did not meet their expectations. Accordingly the commission declines to include an average cost or length disclosure requirement in either advertising or the preamble.

[247] 15 U.S.C. 5711(a)(2)(A)(ii).

[248] Comment 35 (AIP) at 3.

[249] Comments 40 (NACAA) at 4; 42 (NAAG) at 12.

[250] It appears that the TDDRA did intend to prohibit transfer from an 800 or other toll-free number to a pay-per-call service (15 U.S.C. 5711(a)(1)(I) and (a)(2)(F)), and the Commission has done this in § § 308.3(i) and 308.5(i)(2) of the Rule. *See* parts II.B.9, *supra*, and II.D.9, *infra*.

[251] 15 U.S.C. 5711(a)(2)(A)(iii) and (a)(2)(B).

[252] 58 FR at 13387.

[253] Comment 62 (AT&T), Attachment A at i.

[254] Comments 22 (Meganews) at 4; 35 (AIP) at 11; 37 (PPI) at 16, 41; 61 (ICN) at 6; 63 (NAIS) at 39. Some of the opposition to the proposal seemed to be based on the assumption that the FTC would require the tone to be generated by the carrier. This was not the intent of the proposed requirement, and apparently such a system is not technologically feasible at the present time.

hand, NCL and NACAA both emphasized that a tone is a clear, easily-understood signal and one that is familiar to many telephone-users because of its prevalent use on telephone answering machines.[255]

It is the judgment of the Commission that such a signal or tone is a useful and important benchmark to indicate to the caller that the introductory message has concluded and charges are about to begin.[256] In fact, a similar requirement has been in place since the FCC adopted its regulations in 1991. Those regulations mandate that billing begin only "after a specific identified event following the disclosure message, such as a signal tone."[257] The required signal or tone need not be intrusive and annoying as feared by some industry commenters. It could be a chime or other musical note that is pleasing to the ear, so long as it is clearly discernible by the caller.

In addition to the signal or tone, the proposed rule also stated that the preamble shall inform the caller that he or she "may avoid any charge for the call by hanging up at or before the sound of the tone."[258] A few commenters opposed this provision, describing the message as an unnecessarily negative "kill message."[259] The language of the final Rule makes clear that callers must be informed both when charges begin and how to avoid being charged for the call. However, the Commission does not intend to mandate any specific language for this portion of the preamble. The choice of words is left to the discretion of the pay-per-call provider, so long as the caller is left with no doubt as to when he or she must hang up to avoid being charged for the call.

(d) Section 308.5(a)(4): Parental Permission Required for Those Under 18

The preamble must state that anyone under the age of 18 must have parental permission to make the call. Some commenters suggested that the disclosure not be required for all pay-per-call programs, but only those programs directed to, or likely to be of interest to, individuals under 18.[260] However, the TDDRA clearly requires the disclosure to be included on all pay-per-call programs.[261]

A few commenters suggested that the Commission provide model, safe harbor language for the parental permission advisory.[262] CME proposed, for example: "This telephone call costs money. If you are under 18 and you do not have your mom or dad's permission, hang up now and there will be no charge for this call." This language was derived from FTC consent orders with certain pay-per-call providers.[263] While there is merit to the CME proposal, the Commission has decided not to try to write a specific disclosure that might be appropriate to all pay-per-call programs. The language mandated by the FTC consent orders, and now proposed by CME, was created for pay-per-call programs specifically directed to young children. Such programs are now prohibited by the TDDRA and § 308.5(h) of this Rule. However, the parental permission advisory must be included in the preambles to all pay-per-call programs. Some of these programs will be directed, or clearly of interest, to those under 18. Other programs may hold little interest for that age group. Given the inherent difficulty of creating specific language that would be appropriate to such a broad range of programs, the Commission has declined to do so. Those who produce pay-per-call programs can exercise their discretion in developing disclosures that are appropriate both to the particular program and to the age group to which the words are directed.

NACAA proposed a requirement that the parental consent advisory be stated in language that is "no higher than a fifth-grade level."[264] It is essential to the effectiveness of this disclosure requirement that it be clear and readily understandable to the population under the age of 18, including some children under the age of 12.[265] However, the Commission is not convinced that it is necessary to mandate a specific educational standard for the disclosure.

(e) Section 308.5(a)(5): Information About a Federal Program

Finally, if the pay-per-call service provides information about a Federal program, but is not operated or authorized by any Federal agency, the preamble must state that the service is not authorized, endorsed, or approved by any Federal agency. In the proposed rule, this provision simply tracked the requirement set forth in the TDDRA.[266] However, for the reasons discussed above with regard to § 308.3(d) of the Rule (which requires a similar disclosure in advertising for such services), the Commission has determined that the requirement should be further clarified. Therefore, language has been added to this provision, § 308.5(a)(5), to make clear that the disclosure is required if the pay-per-call service uses a trade or brand name, or any other term that reasonably could be interpreted to imply a Federal government connection, approval, or endorsement. Thus, a program which purports to provide information about a federal benefit program, while actually trying to sell a product or service, would be obligated to make the disclosure. Likewise, a program that does provide information on a Federal program, in more than an incidental manner, would also be required to give the disclosure.[267]

2. Section 308.5(b): No Charge to Caller for Preamble Message

The TDDRA requires providers of pay-per-call services to enable callers to hang up at or before the end of the preamble message without incurring any charge whatsoever.[268] In the proposed rule, the Commission expanded on this requirement by allowing consumers to hang up without charge at any time prior to five seconds after the conclusion of the preamble. The Commission proposed this additional brief period in order to give consumers sufficient time, after hearing the complete preamble message, to make the decision to disconnect and to do so without incurring any charge for the call.

In the NPR, the Commission sought comment on the following aspects of this provisions: (1) Its usefulness, as well as its costs and benefits; (2) whether five seconds was a sufficient length of time to assure that consumers who hang up at the end of the preamble

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[255] Tr. at 168–81.

[256] The Rule then requires an additional three-second delay to allow the caller sufficient time to hang up after the signal or tone. See discussion of § 308.5(b), *infra*.

[257] 47 CFR 64.711(c) (to be deleted as of November 1, 1993).

[258] 58 FR at 13387.

[259] Comments 39 (IISC) at 42; 61 (ICN) at 6; 63 (NAIS) at 34.

[260] Comments 34 (TPI) at 6–7; 37 (PPI) at 16, 40; 61 (ICN) at 6.

[261] 15 U.S.C. 5711(a)(2)(A)(iv).

[262] Comments 53 (CME) at 22–23; 60 (Pilgrim) at 12.

[263] *Audio Communications, Inc.*, No. C–3338 (July 24, 1991); *Teleline, Inc.*, No. C–3337 (July 24, 1991); *Phone Programs, Inc.*, D. 9247 (Dec. 10, 1992); *Fone Telecommunications*, File No. 912–3086 (March 17, 1993).

[264] Comment 40 (NACAA) at 8.

[265] This population necessarily includes some children under the age of 12. Even though pay-per-call programs, and advertisements for such programs, cannot be directed to those under 12 (§§ 308.3(e) and 308.5(h)), children in that age group can and do call pay-per-call services.

[266] 58 FR at 13387; 15 U.S.C. 5711(a)(2)(A)(v).

[267] However, data services, providing the non-verbal transmission of information, are exempt from the preamble requirement under § 308.5(d) of the Rule.

[268] 15 U.S.C. 5711(a)(2)(B).

will not be billed for the call; and (3) whether the Rule should require some period of silence between the end of the preamble and the start of the program to indicate to consumers that this was the appropriate time to hang up if they so choose.[269] A number of law enforcement agencies and public interest organizations supported some period of time between the end of the preamble and the commencement of charges.[270] For example, a NARUC resolution recommended that any Federal regulation of pay-per-call services require sufficient time after the preamble to allow the caller to hang up without incurring a charge. In addition, New York currently requires ten seconds between the end of the preamble and the commencement of charges, for intrastate pay-per-call services, to give the consumer adequate time to respond to the information in the preamble.[271]

On the other hand, a number of providers and associations representing their interests opposed any such delay in the commencement of charges as unnecessarily burdensome and restrictive.[272] PPI noted that each additional second in the introductory period costs the information provider one cent. Other providers stated their belief that consumers have sufficient notice to hang up if they do not wish to be charged, given the preamble and the tone requirement.[273]

The Commission believes that consumers must be given some period of time, after listening to the entire preamble, to physically hang up the telephone and still not be charged for the call. In an effort to balance the needs of consumers with the cost of this requirement to providers of pay-per-call services, the Commission has decided to reduce the required period of time to three seconds. AT&T noted at the public workshop conference that a three-second period of silence currently is required by that carrier, for pay-per-call services on its network, between the end of the preamble message and the commencement of charges. According to AT&T, it has no evidence to indicate that such a time period is inadequate.[274] The Commission believes this brief interval will be sufficient to address consumers' needs, while minimizing the costs to providers.

As for the question of silence after the preamble, PPI noted that any silence on a pay-per-call service is "deadly" to the provider, since consumers hang up when they hear silence.[275] At least two other providers raised a similar concern at the public workshop conference.[276] Given this potential for harm to the providers of pay-per-call services, the Commission has determined that no period of silence is necessary between the preamble and the start of the message. The Commission does not believe that consumers will be confused if the message begins immediately after the preamble, especially since consumers will hear a signal or tone indicating that the preamble has ended.[277]

At least two commenters suggested, as an alternative to a period of delay between the preamble and billing, that the Rule permit providers to allow consumers an affirmative means of positively accepting charges for a pay-per-call service.[278] For example, a pay-per-call service may state in the preamble that consumers must press a certain key on their telephone keypad to indicate that they accept the charges for the service. The program would not begin until consumers take the required positive action. Although the major carriers do not offer positive acceptance at this time,[279] the Commission believes this option should not be precluded by the regulations. Positive acceptance gives consumers adequate time to decide if they wish to be billed for the call. Any further delay after the consumer indicates acceptance of charges and before billing commences would be superfluous. Accordingly, the final Rule adopts this provision as an exception to the required three-second period after the end of the preamble.

As a final matter, a number of commenters suggested that providers should be permitted to bill consumers for the cost of the preamble, if the consumer in fact decides to remain on the line after the preamble is complete.[280] On the other hand, at the public workshop conference, both NAAG and NACAA objected to any such provision, stating that the preamble is like a price tag for which the consumer should not be required to pay.[281] While the Commission understands the providers' contention that charging consumers for the preamble on completed calls may be equitable, we believe an argument can be made that the TDDRA prohibits such charges.[282] At a minimum, the statutory language signals congressional disfavor for charging consumers for the preamble time. Moreover, the FCC recently considered this issue, and concluded that providers should not be permitted to charge consumers for the preamble.[283] Accordingly, the Commission declines to adopt such a provision.

3. Section 308.5(c): Nominal Cost Calls

The TDDRA gives the Commission the discretion to exempt from the preamble requirements pay-per-call services provided at "nominal charges, as defined by the Commission."[284] As stated in the NPR, "(t)his exemption provision recognizes that below a certain minimal level, it may not be cost effective for the provider to offer the service if all of the disclosures required by § 308.5(a) must be included in a preamble for which the consumer cannot be charged."[285] Therefore, the proposed rule exempted from the preamble requirements any pay-per-call service for which the total cost, whether billed on a flat rate or a time sensitive basis, is $2.00 or less. The Commission also asked a series of detailed, factual

[269] 58 FR at 13382 (question 21).

[270] Comments 10 (NARUC) at 4, 18; 31 (CA) at 9 (at least five seconds of silence; if no silence, at least a ten-second delay); 40 (NACAA) at 8 (five seconds of silence); 59 (USPS) at 8 (at least two or three seconds of silence).

[271] Comment 27 (NYDPS) at 2.

[272] Comments 22 (MegaNews) at 4; 37 (PPI) at 41; 39 (IISC) at 42; 61 (ICN) at 6–7; 63 (NAIS) at 34–35.

[273] *See, e.g.*, comment 22 (MegaNews) at 4.

[274] Tr. at 136.

[275] Comment 37 (PPI) at 41.

[276] *See* statement of TPI, Tr. at 158. In addition, Blake Barker of USA Today noted that in 1988, when he was a provider of an interactive weather service, the local public utility commission mandated six seconds of silence between the end of the preamble and the start of the message. Within 90 days, Mr. Barker stated that the completed calls to this service dropped by 63 percent because consumers incorrectly thought there was a problem with the service. Tr. at 264–65. *See also* Tr. at 119.

[277] At least one commenter suggested that the proposed regulations were unclear as to the sequence of events required at the beginning of a pay-per-call service. *See* comment 52 (IIA) at 32. The Commission believes the final Rule clearly requires the following sequence of events: (1) A preamble message, containing all of the information required by § 308.5(a); (2) a signal or tone, indicating the end of the preamble; and (3) an additional three seconds after the sound of the signal or tone, which do not have to be silent, before charges may begin.

[278] Comments 23 (VRS) at 6–7; 60 (Pilgrim) at 13–14.

[279] Tr. at 149–50.

[280] Comments 35 (AIP) at 10–11; 51 (USA Today) at 3, 9–10; 61 (ICN) at 6–7; 63 (NAIS) at 37.

[281] Tr. at 102–03, 167.

[282] For example, the TDDRA states that preambles should inform the caller that charges for the call begin at the end of the introductory message, 15 U.S.C. 5711(a)(2)(A)(iv), and that providers should enable the caller to hang up at or before the end of the introductory message without incurring any charge whatsoever 15 U.S.C. 5711(a)(2)(B).

[283] FCC, Order on Reconsideration, Policies and Rules Concerning Interstate 900 Telecommunications Services, CC Docket No. 91–65, ¶¶ 12–17 at 7–9 (March 10, 1993) ("FCC Reconsideration Order").

[284] 15 U.S.C. 5711(a)(5)(B).

[285] 58 FR at 13375.

questions to determine whether the $2.00 fee level was appropriate.[288]

A large number of commenters suggested various rates at which the nominal cost exemption should be set, but most commenters provided little if any factual information to support their contentions. In a second attempt to gain useful data, Commission staff at the public workshop conference asked those in attendance for specific factual information to support an appropriate nominal cost level. Once again, very little evidence was forthcoming.[287]

The commenters presented the following factual information to us. First, MCI indicated that in 1992, more than 50 percent of all consumer requests for credit for pay-per-call services that it received were for services costing more than $10.00, while less than 30 percent of consumer credit requests were for calls of $5.00 or less.[288] PPI submitted an ATT&T graph showing that during February of an unidentified year, the refund rate for calls below $10.00 was less than two percent.[289] USA Today cited comments in the FCC rulemaking proceeding by a "major interstate carrier," which stated that 12 percent of the total amount of pay-per-call services on that carrier's network fell below $2.00 in charges, while 30 percent were under $5.00 in total charges. The chargeback rate for these programs was less than 2 percent.[290]

While an argument can be made that refund rates are a measure of the level of consumer dissatisfaction, it is also possible that consumers simply fail to complain about low-cost calls they find unsatisfactory. NAAG noted at the public workshop conference that its law enforcement experience tends to show that the latter scenario is more typical.[291] Moreover, both NAAG and NACAA stated that the nominal cost exemption should not be set at the level where consumer refund requests rise, but rather at the level where providers can make a profit even though they include the preamble in their programs.[292] The Commission agrees. No evidence presented by any commenter showed that providers cannot make a profit, while still delivering the preamble, on calls that cost more than $2.00. In addition, it appears that Congress wanted to limit any exemption for nominal cost calls to services costing either $2.00 or $3.00.[293] Finally, the Commission agrees with the commenters who stated that consumers can be equally harmed by making a number of calls to a lower priced pay-per-call service as by one call to a higher priced service.[294] Accordingly, the Commission has decided to maintain the $2.00 threshold for nominal cost calls that will be exempt from the preamble requirements of § 308.5(a).

4. Section 308.5(d): Data Service Calls

In the NPR, the Commission asked whether the final Rule should exempt from the preamble requirements data services, *i.e.*, pay-per-call services that transmit data from one computer to another. The exemption would address situations where no individual is present to receive the information in the preamble.[295] A number of commenters in general supported such an exemption.[296] Bell Atlantic noted that such calls have not caused the same consumer problems as have voice messages. IIA states that facsimile machines may disconnect in the time it takes to complete a preamble. Moreover, the FCC recently determined that legitimate pay-per-call data services may not be able to place a verbal preamble on their programs, because no reasonable method exists.[297]

Based on this information, the Commission believes an exemption from the preamble requirements is appropriate for data services. Section 308.5(d) of the Rule sets forth this exemption, and states that it applies only when the entire call consists of the non-verbal transmission of information. In other words, this exemption applies to any call in which two machines (*i.e.*, computers, facsimile machines or the like) communicate, without the transmission of the spoken word. However, the exemption will not apply to an entertainment program providing music instead of the spoken word.

5. Section 308.5(e): Bypass Mechanism

The TDDRA gives the Commission discretion to exempt from the preamble requirements calls from frequent callers or regular subscribers using a bypass mechanism to avoid listening to the preamble.[298] However, the Act further requires that any such bypass mechanism be disabled after the institution of any price increase for "a period of time sufficient to give such frequent callers adequate and sufficient notice of the price change."[299] Accordingly, the proposed rule stated that providers of pay-per-call services that offer frequent callers the option of activating a bypass mechanism to avoid the preamble will not be in violation of § 308.5(a), provided that any such bypass mechanism is disabled for no less than 30 days after the institution of a price increase or a change in the nature of the service offered. In the NPR, the Commission asked, among other things, if this exemption was useful and appropriate.[300]

The limited number of commenters who responded to this proposal generally supported the exemption.[301] CA believed that the bypass mechanism should be disabled for 60 days after any "significant" change in the preamble, while PPI stated that the bypass should be disabled for only 15 days after a change in the program. The Commission continues to believe that 30 days is an appropriate period of time to give frequent callers adequate and sufficient notice of any increase in price or change in the nature of the service offered. Accordingly, the Commission is adopting the proposed language of this section in the final Rule.[302]

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[288] 58 FR at 13383 (question 22).

[287] Tr. at 80–97.

[288] Comment 32 (MCI) at 12.

[289] Comment 37 (PPI) at 43 and unnumbered attachment.

[290] Comment 51 (USA Today) at 6–7.

[291] Tr. at 86–87.

[292] Tr. at 86–87, 92–93.

[293] *See* Senate Report at 13, 18. The FCC also limited the nominal cost exemption to the preamble requirements at $2.00 in both its original regulations of the pay-per-call industry, 47 CFR 64.711(a), and in its reconsideration of those regulations released in March 1993. FCC Reconsideration Order, ¶¶ 5–8 at 4–6.

[294] Comments 18 (Bell Atlantic) at addendum; 53 (CME) at 20–22.

[295] 58 FR at 13383 (question 24).

[296] Comments 18 (Bell Atlantic) at addendum; 31 (CA) at 10; 37 (PPI) at 45; 52 (IIA) at 10–12, 33–34; 62 (AT&T), Attachment A at i-ii.

[297] FCC Reconsideration Order, ¶ 11 at 7.

[298] 15 U.S.C. 5711(a)(5)(A).

[299] 15 U.S.C. 5711(a)(2)(E).

[300] 58 FR at 13383 (question 23).

[301] Comments 27 (NYDPS) at 2; 31 (CA) at 10; 37 (PPI) at 43–45. CA suggested that any bypass code should be vendor specific, so that casual callers cannot activate the bypass on programs for which they have not heard the preamble. The Commission does not believe such a specific requirement is necessary, since callers who use a bypass mechanism do so at their own risk, knowing they are skipping important disclosure information in the preamble.

[302] Some providers suggested that the bypass mechanism may be a vehicle for consumers to avoid pay-per-call service charges, if information is provided during the preamble period, since providers cannot bill for the time it takes to complete a preamble message. For example, if consumers call a pay-per-call service, immediately bypass the preamble, and obtain the information they seek within the normal preamble time, those consumers will not be billed for their calls, even though they obtained information from the programs. *See* comment 37 (PPI) at 18–19; Tr. at 101–02. While the Commission recognizes this problem exists, a provider is not required to use a bypass mechanism. Furthermore, while carriers currently may not be able to detect when a consumer has activated a bypass mechanism, they may develop such an ability in the future. Nothing in the Commission's Rule should be interpreted as prohibiting a provider from initiating billing as soon as a caller has bypassed the preamble.

6. Section 308.5(f): Billing Limitations

Congress required the Commission to prohibit providers of pay-per-call services from billing consumers in excess of the amounts described in the preamble, and from billing for services provided in violation of the rules prescribed by the Commission pursuant to the TDDRA.[303] The proposed rule incorporated this prohibition.

The Commission received only one comment concerning this provision. NAAG suggested that providers of pay-per-call services also be prohibited from billing consumers for any services provided in violation of any other law, regulation or rule, not simply the final Rule adopted by the Commission in this proceeding.[304] The Commission believes such a provision could be quite burdensome, because it would require billing entities, through their collection contracts with providers, to make evaluations of other Federal or state laws and regulations about which they may have no knowledge. Moreover, states have their own enforcement programs for these purposes. Accordingly, the Commission is adopting the language as proposed in the NPR.

7. Section 3085.(g): Stopping the Assessment of Time Based Charges

The TDDRA mandates regulations requiring providers of pay-per-call services to stop the assessment of time-based charges immediately upon disconnection by the caller.[305] The proposed rule adopted this provision verbatim. The Commission received no comments on this requirement, as proposed, and therefore is incorporating this provision into the final Rule. As stated in the NPR, the Commission recognizes that time-sensitive billing is accomplished in one-minute increments, and that any portion of a minute will be billed as a full time. Such a billing method will not be considered a violation of this provision.

8. Section 3085.(h): Prohibition on Services to Children

Pursuant to the TDDRA,[306] the proposed rule imposed a ban on pay-per-call services, except for bona fide educational services, directed to children under the age 21. In a manner similar to the ban on advertisements for pay-per-call services that are directed to children under 12, the proposed rule framed this ban in terms of a rebuttable presumption.

For the reasons set forth in part II.B.5, *supra*, concerning the prohibition on directing advertising of pay-per-call services to children under 12, the Commission is eliminating the use of a rebuttable presumption in this section of the final Rule as well. Instead, the Rule sets forth the criteria the Commission will use to determine whether a pay-per-call service is directed to children under the age of 12. These criteria include the following: (1) Whether the pay-per-call service is advertised in the manner set forth in §§ 308(e)(2) and (3) of the Rule; and (2) whether the pay-per-call service, regardless of when or where it is advertised, is directed to children under 12 in light of its subject matter, content, language, featured personality, characters, tone, message or the like.

9. Section 308.5(i): Prohibition Concerning Toll-Free Numbers

The TDDRA, in title II, prohibits the providing of pay-per-call services "through an 800 number or other telephone number advertised or widely understood to be toll free."[307] The proposed rule tracked this statutory language.[308] However, some commenters suggested the need to make it clear that the Rule prohibits any charge for a call to an 800 number, even if there is no actual connection or transfer to a 900 number.[309] Others suggested that the Rule explicitly prohibit collect call backs that result from a call to an 800 number.[310] It is clear from title I of the TDDRA that Congress intended to prohibit both of these uses of 800 telephone numbers.[311] Accordingly, in the final Rule, the provision concerning toll-free numbers, § 308.5(i), has been expanded to parallel the statutory provision on common carrier requirements, as well as the relevant FCC regulations restricting the use of 800 numbers.[312]

The prohibited uses of 800 and other toll-free numbers[313] include: (1) The calling party being assessed a charge for the call simply by virtue of completing the call; (2) calling party being connected to an access number for, or otherwise transferred to, pay-per-call service; (3) the calling party being charged for information conveyed during the call, unless there is a presubscription or comparable arrangement; and (4) the calling party being called back collect for the provision of audio or data information services, simultaneous voice conversation services, or products.[314]

NAAG suggested that this provision also include a reference to local numbers.[315] However, the provision covers any telephone number that is "widely understood to be toll free." This would include total numbers where the consumer expects the call to be a tool-free one.

AIP suggested that this section should apply only to calls billed through the telephone company and not to service that are "billed privately."[316] The Commission does not believe that Congress intended to limit the prohibited conduct to services billed through the telephone bill.[317] Toll-free numbers can be used to provide pay-per-call services in only two situations. First, calls to toll-free telephone numbers can be billed pursuant to a presubscription arrangement that meets the criteria set forth in § 308.2(e). Second, calls to toll-free telephone numbers also can be billed to credit or charge card accounts, if authorized by the caller, since the definition of presubscription arrangement also includes calls billed in that manner. Apart from these two situations, charges

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[303] 15 U.S.C. 5711(a)(2)(G). Title I of the Act imposes a similar requirement on common carriers that bill for pay-per-call services. The carrier must ensure that a telephone subscriber is not billed for any services that the carrier knows, or reasonably should know, were provided in violation of regulations issued by the FTC pursuant to title II of the Act. 47 U.S.C. 228(d)(1).

[304] Comment 42 (NAAG) at 16–17.

[305] 15 U.S.C. 5711(a)(2)(D).

[306] 15 U.S.C. 5711(a)(2)(C).

[307] 15 U.S.C. 5711(a)(2)(F).

[308] 58 FR at 13388.

[309] Comments 21 (NCL) at 17–18, 40 (NACAA) at 7; Tr. at 74, 76–78.

[310] Comments 55 (GTE) at 2–4, 61 (Sprint) at 13.

[311] 47 U.S.C. 288(c)(6).

[312] 47 CFR 64.1504.

[313] This provision also has been modified to prohibit any person, not just pay-per-call providers, from engaging in these practices. This is necessary to address a problem inherent in the definition of "pay-per-call services." That definition, as set forth in title I of the statute, 47 U.S.C. 228(i), and incorporated into this Rule, § 308.2(c), includes a provision that such services are accessed through use of a 900 telephone number (or other prefix or area code designated by the FCC). Therefore, an information provider that is charging customers for information conveyed pursuant to a call to an 800 telephone number is not, by definition, a "provider of pay-per-call services." The problem is resolved by prohibiting any person from engaging in such conduct.

[314] Summit's comment describes a system for providing audio information via calls to an 800 number and collect call backs. As described, the system affords the consumer two opportunities to indicate positive acceptance of a collect return call. Summit requests that the FTC include in its Rule provisions governing this type of service. However, it is clear that the TDDRA prohibits this type of service. *See* 47 U.S.C. 228(c)(6)(D). After the effective date of this Rule, and the parallel FCC regulations, the use of 800 numbers to generate collect call backs will no longer be permitted.

[315] Comment 42 (NAAG), Attachment 1 at 6.

[316] Comment 15 (AIP) at 11–12.

[317] Under 15 U.S.C. 5711(a)(4), Congress authorized the Commission to include provisions necessary to prevent evasion of its regulations through the use of alternative billing procedures.

for calls to 800, and other toll-free numbers, are prohibited.

10. Section 308.5(j): Disclosure Requirements for Billing Statements

The TDDRA requires providers of pay-per-call services to ensure that any billing statements for their pay-per-call service charges: (1) Display those charges in a part of the consumer's bill that is identified as not being related to local and long distance telephone charges; and (2) for each charge so displayed, specify, at a minimum, the type of service, the amount of the charge, and the date, time and duration of the call.[318] The proposed rule incorporated these provisions. In addition, the NPR asked whether the provider's name, address or city and state should be required in the billing statements discussed in this section of the proposed rule.[319]

One commenter stated that the requirement in the proposed rule that pay-per-call service charges be displayed in a separate part of the consumer's telephone bill was unnecessary.[320] However, this requirement is mandated by the TDDRA and cannot be deleted.[321]

Another commenter stated that the separate identification of charges for pay-per-call services is appropriate, but that the Commission should not require these charges to be segregated on a separate page of the consumer's bill, since any additional pages in a telephone bill increases costs to the billing entities and ultimately to the providers.[322] The Commission did not intend that charges for pay-per-call services must be printed on a separate page of the consumer's telephone bill. Rather, pay-per-call charges simply must be displayed in *a portion* of the consumer's bill that is identified as not being related to local and long distance telephone charges. The method and manner used to segregate these charges, and to identify them as not being related to other telephone charges, is left to the discretion of the billing entity. The Commission believes this section of the proposed rule provides the proper degree of flexibility to the industry, while creating the necessary separation in consumers' telephone bills between pay-per-call charges and local and long distance telephone charges. Accordingly, the Commission is adopting this provision as proposed.

The proposed rule also required all pay-per-call service charges on a consumer's bill to specify the type of service, the amount of the charge, and the date, time and duration of the call. One commenter noted a potential problem with this provision. According to US West, when a pay-per-call service is billed on a flat-rate basis, the billing entity may not receive information on the duration of the call, since that information is irrelevant to the amount of the charge for the call.[323] To address this concern, the final Rule, at § 308.5(j)(2), includes a provision that the duration of the call need only be specified for calls billed on a time-sensitive basis.

In response to the NPR question whether the provider's name or address should be required on a consumer's billing statement,[324] CA and NACAA both stated that such a provision would aid consumers and enforcement agencies in determining the identity of the provider.[325] Many other commenters opposed this proposal, however. Ameritech stated that the inclusion of additional information about the provider on a consumer's bill would increase both the size and complexity of the bill, which ultimately may produce a negative consumer reaction.[326] BellSouth and US West both stated that it would be difficult for the local exchange carrier to keep a current database of this information.[327] At the public workshop conference, both USTA and ICN noted that each additional line of information placed on a consumer's telephone bill increases the costs to produce that bill.[328] Finally, a number of commenters stated that it is not necessary to present this information on the consumer's telephone bill, since consumers are able to call a toll-free telephone number to obtain this information.[329]

After considering the comments on this matter, the Commission has determined that the costs to providers and billing entities of having this information printed on a consumer's telephone bill outweighs the benefits of such a requirement to consumers and law enforcement agencies. This is especially true since billing entities are required to provide consumers with a toll-free telephone number to obtain additional information about any pay-per-call charges.

Title I of the TDDRA requires common carriers to disclose on a billing statement a local or toll-free telephone number where consumers can obtain answers to their questions and information on their rights and obligations with regard to their use of pay-per-call services, and can obtain the name and mailing address of any provider of pay-per-call services offered by that carrier.[330] Given this carrier requirement, and the importance of such information to consumers, the Commission has decided to add a similar provision to the final Rule. Thus; providers of pay-per-call services shall endure that any billing statement for such provider's charges shall display the local or toll-free telephone number discussed above.[331] No other requirements have been added to this section of the final Rule.

11. Section 308.5(k): Refunds to Consumers

Pursuant to the TDDRA,[332] the proposed rule stated that the provider of pay-per-call services shall be liable for refunds to consumers who have been billed, and have paid charges, for pay-per-call services found to have violated any provision of the final Rule or any other Federal rule or law.[333] The Commission received only two comments concerning this section. First, USTA stated that this provision should permit credits to consumers, in addition to requiring refunds.[334] According to USTA, local telephone companies, who deal with their customers on a recurring monthly basis, prefer to issue credits on a monthly bill rather than refunds when a customer inquiry is resolved in the customer's favor. USTA stated that the final Rule should not inadvertently prevent this. The Commission agrees. Actual cash refunds to consumers may not be necessary, when pay-per-call programs are found to have violated Federal law, if in fact consumer redress can be distributed more quickly and with less expense by way of credits on consumers' telephone bills. The final

[318] 15 U.S.C. 5711(a)(2)(H). Title I of the Act imposes the same requirements on common carriers that offer billing and collection services to pay-per-call service providers. 47 U.S.C. 228(d)(4).

[319] 58 FR at 13382 (question 18.b).

[320] Comment 22 (MegaNews) at 5.

[321] *See* 15 U.S.C. 5711(a)(2)(H)(i).

[322] Comment 50 (BellSouth) at 6. *See also* comment 55 (GTE) at 4–5 (the section should only require that the billing statement "display the pay-per-call service charges in such a way as to clearly distinguish them from the consumer's local and long distance telephone charges").

[323] Comment 57 (US West) at 11–12.

[324] 58 FR at 13382 (question 18.b).

[325] Comments 31 (CA) at 9; 40 (NACAA) at 9.

[326] Comment 29 (Ameritech) at 2–3.

[327] Comments 50 (BellSouth) at 7; 57 (US West) at 14–15.

[328] Tr. at 231–32, 245–47.

[329] Comments 13 (NTCA) at 5–6; 29 (Ameritech) at 2–3; 50 (BellSouth) at 7; 57 (US West) at 14–15.

[330] 47 U.S.C. 228(d)(4)(C).

[331] Such a provision is also important to ensure that third party billers, not covered by the FCC rules governing carriers, also disclose on their bills for pay-per-call services this local or toll-free telephone number.

[332] 15 U.S.C. 5711(a)(2)(I).

[333] 58 FR at 13388.

[334] Comment 16 (USTA) at 13.

Rule has been modified to permit such credits.

NAAG submitted the second comment concerning this section of the proposed rule. NAAG recommended that providers should be liable for refunds to consumers for programs found to have violated any law, regulation or rule, whether state or Federal.[335] The Commission believes that expanding this provision to cover any state law, regulation or rule would in effect require the Commission to expend considerable resources monitoring and enforcing the laws of all fifty states. Moreover, states can exercise their independent authority in this area. Accordingly, with the exception of the minor change discussed above, this section of the proposed rule remains unchanged.

12. Section 308.5(1): Service Bureau Liability

In the NPR, the Commission asked whether service bureaus should be required to monitor all pay-per-call services that operate on their equipment, and be held liable for some or all violations of the Rule by those services.[336] Two commenters responded negatively. PPI stated that such a provision would be a "discriminating and unwarranted intrusion on this industry," [337] while Pilgrim maintained that liability should be placed only on the party who has responsibility or control over the activity.[338] on the other hand, a number of commenters suggested that such liability is appropriate. CA claimed that providers have hidden behind service bureaus in the past, making if difficult for consumers to resolve complaints.[339] NACAA argued that service bureau liability is appropriate, if the company knew or should have known of the violations, since it is providing the necessary equipment for the violation to occur.[340] Southwestern agreed, for the following reasons: A service bureau is often the only party with direct contact to the provider; it profits from the pay-per-call service; and it can move the fastest to effect any necessary changes in a program found to be violating the Rule.[341] Finally, USPS stated that since a service bureau profits from pay-per-call services, it should be liable for violations and be required to forfeit its income from any promotion found to violate the Rule.[342]

Based on the comments, the Commission believes that some degree of service bureau liability is warranted. Service bureaus provide the equipment, and often numerous other forms of assistance, to providers of pay-per-call services. Without service bureau assistance, many providers would be unable to distribute their programs. Given service bureaus' degree of involvement in the delivery of pay-per-call services, as well as the profits they make from these services, the Commission concludes that they should be held liable for violations of the Rule by their client providers.[343]

At the same time, however, the Commission has determined that service bureau liability should not be absolute. The Commission understands that it may be impossible for a service bureau to monitor constantly all programs operating on its equipment, and that providers may change programs without the knowledge or consent of the service bureau. Accordingly, the final Rule states that a service bureau shall be liable for violations of the Rule by pay-per-call services using its call processing facilities only where the service bureau either knew or should have known of the violation.

Where service bureaus assist pay-per-call providers in the creation of pay-per-call programs and advertising for such programs, they likely will be in a position to know whether there are violations. Similarly, if a service bureau receives a number of consumer complaints, or information that a program is generating a high rate of billing error notices, the service bureau would be alerted to the fact that violations may be occurring.

13. Other Questions

The NPR posed a series of additional questions concerning the operation of pay-per-call services. For example, the TDDRA states that the Commission shall consider requiring providers of pay-per-call services to automatically disconnect a call after one full cycle of the programs.[344] In the NPR, the Commission asked whether the final Rule should require such a disconnection.[345] NACAA believed that such a requirement would be appropriate, since consumers can redial if they want to hear a program again.[346] On the other hand, Bell Atlantic argued that such a provision would not be in the public interest, since many callers may want to hear a program a second time.[347] The Commission agrees with the latter view. Consumers will be told the cost of the program in both the advertisement and the preamble. With this knowledge, the Commission believes consumers will stay on the line to hear a program a second time only if it contains information they want to hear again. Moreover, no commenter demonstrated any consumer harm caused by the absence of such a requirement. The Commission therefore has decided not to impose such a provision in the final Rule.

The TDDRA also states that the Commission should consider a regulation requiring providers of pay-per-call services to include a beep tone or other appropriate signal during a live interactive program so that callers will be alerted to the passage of time.[348] The Commission sought comment in the NPR whether such a provision should be promulgated.[349]

A number of commenters stated that such a tone should be required in order to prevent consumers from losing track of time during these calls.[350] On the other hand, PPI stated that such a tone is intrusive and interferes with the listener's enjoyment of the program.[351] NII stated that, as a small provider, it does not have the technology available to include a recurring beep tone during its live programs.[352] In addition, at the public workshop conference, other providers discussed how any tone requirement was both awkward and difficult to produce during live conversations.[353]

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[335] Comment 42 (NAAG) at 17.

[336] 58 FR at 13383 (question 29).

[337] Comment 37 (PPI) at 47.

[338] Comment 60 (Pilgrim) at 17.

[339] Comment 31 (CA) at 10–11.

[340] Comment 40 (NACAA) at 10.

[341] Comment 44 (Southwestern) at 3.

[342] Comment 59 (USPS) at 8–9.

[343] FCC regulations enacted pursuant to the TDDRA mandate that common carriers assigning numbers for pay-per-call services must require, by contract or tariff, that the provider of the services comply with the FTC regulations enacted pursuant to titles II and III of the Act. 47 U.S.C. 228(c)(1); 47 CFR 64.1502. In addition, such carriers must specify, by contract or tariff, that programs not in compliance with FTC regulations will be terminated following notice to the information provider. 47 U.S.C. 228(c)(2); 47 CFR 64.1503. In those instances where the common carrier contracts directly with a service bureau, that in turn subcontracts with individual pay-per-call providers, it appears that the carrier will have to require the service bureau to require compliance with the FTC rule by those information providers using its call processing facilities.

[344] 15 U.S.C. 5711(a)(6)(A).

[345] 58 FR at 13383 (question 25).

[346] Comment 40 (NACCA) at 9.

[347] Comment 18 (Bell Atlantic) at addendum. *See also* comment 44 (Southwestern) at 1–2.

[348] 15 U.S.C. 5711(a)(6)(B).

[349] 58 FR at 13383 (question 26).

[350] Comments 18 (Bell Atlantic) at addendum 2; 31 (CA) at 10; 40 (NACCA) at 9; 59 (USPS) at 9.

[351] Comment 37 (PPI) at 46.

[352] Comment 73 (NII) at 5.

[353] Tr. at 170, 172. This discussion at the public workshop conference concerned the requirement that a tone be used to signal the end of the preamble, but it is relevant to this proposal as well.

The Commission does not believe the potential consumer benefit from a tone signaling the passage of time during the course of a live conversation with a pay-per-call service is sufficient to justify this requirement, given the difficulties involved in generating tones during a live conversation and the potential cost involved. Accordingly, the Commission has decided not to include such a requirement in the final Rule.[354]

In order to address the potential problem of billing for pay-per-call services through the use of fraudulent billing tapes, the Commission asked in the NPR whether the final Rule should include a requirement that all billing for pay-per-call services be based on the call detail records provided by the certified carrier of the call.[355] A number of commenters suggested this would be a good idea.[356] However, the commenters presented little or no information concerning the costs of such a requirement or actual experiences with fraudulent billing tapes. Given this lack of evidence, the Commission does not believe the record supports the imposition of such a requirement.

Finally, the NPR asked if the Rule should include protection against the unauthorized use of a consumer's telephone to call pay-per-call services. The Commission suggested, for example, requiring either an access code or a PIN number which consumers must dial before being able to access pay-per-call services.[357] Individual providers can require such a PIN number to access their individual programs. However, a large number of commenters stated that a system-wide access code or PIN number is currently unavailable, would be extremely costly to implement, and would stifle the growth of this industry by inhibiting the occasional caller from accessing pay-per-call services.[358] Based on this uniform opposition, the Commission will not impose such a requirement in the final Rule.

E. Section 308.6: Access to Information

The TDDRA authorizes the Commission to require common carriers providing telephone services to pay-per-call providers to make the following information available to the Commission: "Any records and financial information maintained by such carrier relating to the arrangements (other than for the provision of local exchange service) between such carrier and any provider of pay-per-call services."[359] Section 308.6 of the Rule incorporates this requirement as set forth in the statute.[360]

In the NPR, the Commission asked whether the Rule should include a list of the types of records that common carriers must maintain for this purpose, and, if so, what types of information should be included in the list and how long it should be maintained.[361] Comments were mixed on the recordkeeping issue. NTCA, Bell Atlantic, Ameritech, MCI, AT&T, NAIS, and Sprint asserted that no new recordkeeping requirement should be imposed.[362] As noted by some of these commenters, the FCC already requires that carriers maintain call detail records for 18 months.[363] US West suggested that the FTC not list required records, but give examples of the kind of information in which it is interested.[364] On the other hand, NACAA, NAAG, USPS, and Pilgrim believed the FTC Rule should include a recordkeeping requirement.[365] NAAG proposed that common carriers be required to compile records regarding the number of complaints and credits issued against pay-per-call providers. NACAA suggested that carriers be required to maintain records of arrangements for pay-per-call services for as long as the applicable statute of limitations.[366] NACAA further proposed that the Rule require these records be made available to state officials who will share enforcement responsibility. USPS also advocated that the Rule allow for access to records by other Federal and state agencies and proposed a three-year recordkeeping requirement.

The Commission has determined not to impose a specific recordkeeping requirement in the Rule. Common carriers are already subject to recordkeeping requirements imposed by the FCC. Discussion at the public workshop conference showed, in addition, that carriers have recordkeeping systems in place that in some cases may exceed Federal legal requirements.[367] There is no clear basis, at the present time, to warrant a conclusion that existing requirements and recordkeeping systems maintained by the carriers are inadequate for purposes of enforcement of this Rule. Finally, the Commission does not believe that the TDDRA authorizes it to require the carriers to make information available to other law enforcement agencies. However, the Commission notes that its Rules of Practice make provision, under certain circumstances, for the sharing of information with other Federal and state law enforcement agencies.[368]

F. Section 308.7: Billing and Collection for Pay-Per-Call Services

1. Section 308.7(a): Definitions

The proposed rule defined the following terms to apply to the billing and collection of pay-per-call services: Billing entity; billing error; customer; preexisting agreement; providing carrier; telephone-billed purchase; and vendor.[369] The final Rule changes only the definition of "providing carrier."

(a) Section 308.7(a)(1): Definition of "Billing Entity"

NACAA commented that the definition of "billing entity" should expressly include third-party billers. The NPR did in fact state explicitly that the term "billing entity" applies to third-party billers.[370] The Commission believes that by expressly stating that the term applies to "*any* person who transmits a billing statement to a customer for a telephone-billed purchase or *any* person who assumes responsibility for receiving and responding to billing error complaints or inquiries" (emphasis added), the definition is sufficiently broad to leave

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[354] In contrast, as previously discussed in part II.D.1.c., *infra*, the Commission believes that the consumer benefits of a signal or tone indicating the end of the preamble are significant, justifying such a requirement at that time.

[355] 48 FR at 13383 (question 27).

[356] Comments 23 (VRS) at 7–8; 31 (CA) at 10; 44 (Southwestern) at 2; 50 (BellSouth) at 9; 59 (USPS) at 8.

[357] 58 FR at 13383 (question 30).

[358] Comments 16 (USTA) at 14; 23 (VRS) at 8–9; 29 (Ameritech) at 4; 37 (PPI) at 48; 40 (NACAA) at 10; 44 (Southwestern) at 4; 50 (BellSouth) at 8; 52 (IIA) at 34- 35; 62 (AT&T), Attachment A at ii; 81 (Sprint) at 8–9.

[359] 15 U.S.C. 5711(a)(3).

[360] In addition, title I of the Act lists certain categories of information that common carriers must make available on request to Federal and state agencies and other interested persons. These include: (A) A list of the telephone numbers for each of the pay-per-call services carried; (B) a short description of each such service; (C) a statement of the total cost or the cost per minute and any other fees for each such service; (D) a statement of the pay-per-call service's name, business address, and business telephone number; and (E) such other information as the FCC considers necessary for the enforcement of its regulations and other applicable Federal statutes and regulations.

[361] 58 FR at 13383 (question 32).

[362] Comments 13 (NTCA) at 7–8; 18 (Bell Atlantic) at 6–7; 29 (Ameritech) at 5; 32 (MCI) at 5; 62 (AT&T), Attachment A at iii; 63 (NAIS) at 40; 81 (Sprint) at 9–10.

[363] 47 CFR 42.6.

[364] Comment 57 (US West) at 16–17.

[365] Comments 40 (NACAA) at 11; 42 (NAAG) at 33; 59 (USPS) at 9; 60 (Pilgrim) at 17–18.

[366] The statute of limitations in civil penalty actions is five years. 28 U.S.C. 2462.

[367] Tr. at 462–87. USTA pointed out that a number of states have record retention requirements more extensive than those imposed by the FCC. Tr. at 468.

[368] *See, e.g.*, 16 CFR 4.11(c).

[369] 58 FR at 13388.

[370] 58 FR at 13376.

no doubt that it applies to third-party billers. Moreover, as stated in the NPR, the term would also apply to any person who assumes responsibility for receiving or responding to billing error complaints, even if that person does not send billing statements to customers.[371]

(b) Section 308.7(a)(2): Definition of "Billing Error"

"Billing error" is defined by the TDDRA to encompass a number of situations that result in the reflection of a mistake or inaccuracy on a billing statement for a telephone-billed purchase about which a customer might complain or seek clarification.[372] The billing errors described in the Act closely resemble those described in the Fair Credit Billing Act's definition of "billing error."[373]

The proposed rule expanded upon the Act's definition of "billing error" in § 308.7(a)(2)(i), by including in the definition of billing error "a reflection on a billing statement of a telephone-billed purchase that was not made by the customer nor made from the telephone of the customer *who was billed for the purchase*" (emphasis added). The Commission sought comment as to whether this definition should be changed to permit a customer to allege as a "billing error" a telephone-billed purchase made by someone other than the customer using the customer's telephone without permission, *i.e.*, an "unauthorized charge."[374] NACAA answered in the affirmative, commenting that parents must be able to dispute calls made by children without their consent.[375] NAAG agreed, insisting that the billing and collection procedure must permit customers to present all claims they might have.[376] CA remarked that the right to challenge unauthorized charges is accorded to consumers under the Fair Credit Billing Act ("FCBA"); hence, they should have a similar right under this Rule.[377]

Industry members generally opposed the idea, taking the position that a customer is responsible for all calls placed from the customer's telephone, regardless of whether the customer knew of or approved the call.[378] Bell Atlantic commented that this has always been the rule in the telecommunications industry and that this principle has been affirmed by the courts.[379] Sprint observed that most common carriers' tariffs hold the customer responsible for the payment of all charges for telephone service.[380] ICN pointed out that the concern about calls made by minors should be addressed by the TDDRA's prohibition on pay-per-call services (other than bona fide educational services) directed to children under 12 and the disclosures required for programs directed primarily to persons under 18.[381]

Several commenters supported continuance of the current industry practice, which, generally, is to allow the customer a one-time credit for a pay-per-call charge that the customer claims he or she did not make or authorize, and then to hold the customer responsible for any subsequent unauthorized charges or to impose mandatory blocking.[382]

None of the comments shed any light on how a billing entity might determine whether a customer had in fact made or authorized a telephone-billed purchase for which the customer denied any responsibility. MCI remarked that there is no way for the billing entity to prove that a call was or was not authorized; thus, it is pointless to permit the customer to assert such a claim as a "billing error" when the billing entity has no way of investigating the truth of that assertion.[383] ICN commented that the inability to evaluate such claims might cause local exchange carriers to give the customer a credit anytime such a claim was raised, forcing the information provider to bear the loss.[384] This could lead to consumer abuse of the privilege.

The Commission finds these arguments persuasive. Furthermore, Congress has directed the Commission to consider the extent to which these regulations should diverge from the requirements of the TILA and FCBA to be cost effective to billing entities, as well as to protect consumers.[385] Therefore, the Commission has decided against changing the definition of "billing error" to include claims of unauthorized charges. This will not preclude billing entities from continuing to grant customers a one-time forgiveness of such charges, nor will it preclude them from investigating these claims. They will not, however, have to follow the billing review procedures prescribed by the Rule in doing so.

AT&T commented that the definition of "billing error" is overbroad to the extent it includes "a telephone-billed purchase for which the customer requests additional clarification, including documentary evidence thereof," § 308.7(a)(2)(ii). It expressed concern that to include such requests in the definition might trigger unnecessary notification requirements when the customer is merely seeking clarification and not actually disputing the charge.[386]

This provision is mandated by the Act,[387] which directs the Commission to promulgate rules under this section substantially similar to the requirements imposed under the TILA and the FCBA.[388] The Official Staff Commentary on Regulation Z[389] clarifies that a request for documentation, such as for receipts or sales slips, unaccompanied by an allegation of error or a request for additional clarification, does not trigger the error-resolution procedures of the FCBA.[390] Furthermore, a request for additional clarification need not trigger the notification requirements under this Rule if the customer, after initially inquiring about a telephone-billed purchase, agrees that the billing statement was correct or agrees to withdraw voluntarily the billing error notice.[391]

Several commenters recommended that the definition of "billing error" be expanded to include specifically the following: (1) Charges for calls in which the vendor failed to comply with any of the advertising or pay-per-call standards of this Rule; and (2) charges for calls involving any unfair, misleading, or

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[371] *Id.*

[372] 15 U.S.C. 5724(2).

[373] 15 U.S.C. 1666(b).

[374] 58 FR at 13383 (question 34).

[375] Comment 40 (NACAA) at 12.

[376] Tr. at 190.

[377] Comment 31 (CA) at 11. In fact, it is not the FCBA but Regulation Z, the implementing regulation of the Truth in Lending Act ("TILA") and the FCBA, promulgated by the Board of Governors of the Federal Reserve System, which gives consumers this right. 12 CFR 226.13(a)(1). The credit card situation is clearly distinguishable from one involving a pay-per-call service. The former involves a credit card and a credit card number that can be lost or stolen. Moreover, the cardholder's signature is generally required, which would allow for subsequent verification of the cardholder's identity. A consumer's telephone, however, is usually only accessible to those who have been granted access to the consumer's residence, and no identification code peculiar to the consumer is needed to initiate a call from that telephone. Thus, the Board had a logical reason for permitting consumers to allege unauthorized credit card charges as "billing errors," which does not appear to apply to pay-per-call services.

[378] *See, e.g.*, comments 13 (NTCA) at 4–5; 16 (USTA) at 15; 18 (Bell Atlantic), addendum at 2–3; 81 (Sprint) at 11.

[379] Comment 18 (Bell Atlantic), addendum at 2–3.

[380] Comment 81 (Sprint) at 11.

[381] Tr. at 206.

[382] Comments 31 (CA) at 11; 37 (PPI) at 50; 38 (CAPUC) at 85–86; Tr. at 193–94, 196–98, 200, 203.

[383] Tr. at 203.

[384] Tr. at 206.

[385] 15 U.S.C. 5721(d)(10).

[386] Comment 62 (AT&T) at 5.

[387] 15 U.S.C. 5724(2)(B).

[388] 15 U.S.C. 5721(a)(2).

[389] 12 CFR part 226, Supplement I.

[390] 12 CFR part 226, Supplement I, Comment 226.13(a)(6)–1.

[391] Section 308.7(e) of the Rule.

deceptive acts or practices under Federal or state law.[392] NARUC and NAAG maintain that this expansion of the definition is necessary to ensure continuance of the general practices currently followed by most local telephone companies and inter-exchange carriers for handling pay-per-call billing disputes.[393]

Industry members objected to an allegation of a law violation being considered a "billing error," contending that it would place an unreasonable administrative burden on billing entities if they had to follow the billing review procedures set forth in the Rule every time a customer lodged such a claim.[394] Moreover, they argued, it would force billing entities to become policemen, essentially performing the task of the regulatory enforcement agencies, a function that they are not equipped to perform.[395] IISC remarked that such a provision would suggest to consumers that they can be the initial arbiter of what is false or deceptive or misleading.[396]

The Commission interprets § 308.7(a)(2)(iii) of the Rule to include as a "billing error" any allegation by a customer that representations made by a vendor or an agent of the vendor, whether through advertising or otherwise, were inconsistent with the product or service delivered to the customer or what the customer expected to receive. However, the Commission declines to expand the definition to apply expressly to any violation of this Rule, or any other state or Federal law or regulation. To expand the definition in this manner could be quite burdensome, requiring billing entities to evaluate other Federal or state laws and regulations about which they may have no knowledge.

The Commission also seeks to clarify that a subjective claim of dissatisfaction with the quality or value of a product or service received is not a "billing error" under § 308.7(a)(2). However, an objective assertion by the customer that the quality or value of the product or service received was less than or substantially different from that represented by the provider might constitute a "billing error" under § 308.7(a)(2)(iii) as a telephone-billed purchase "not provided to the customer in accordance with the stated terms of the transaction."

Finally, the proposed rule added a section to the TDDRA definition of "billing error," § 308.7(a)(2)(viii). In this section, a billing error is defined to include the failure to display charges for a telephone-billed purchase on a billing statement in the manner prescribed by § 308.5(j) of the Rule, *i.e.*, by segregating them from other telephone charges and specifying the type of service, the amount of the charge, and the date, time, and, for calls billed on a time-sensitive basis, duration of the call. This section is included in the final Rule as proposed.

(c) Section 308.7(a)(3): Definition of "Customer"

In the proposed rule, the Commission broadened the TDDRA's definition of "customer"[397] to cover any person who is billed for a telephone-billed purchase, whether or not that person placed the call or received the goods or services in question. This would give these persons the billing error rights accorded to other "customers" under the statute. The Commission has decided to adopt this definition as proposed.

(d) Section 308.7(a)(4): Definition of "Preexisting Agreement"

The Commission sought comment as to whether the term "preexisting agreement," as used in section 304(1)(A) of the TDDRA[398] should have the same meaning as "presubscription or comparable arrangement," defined in § 308.2(e) of the proposed rule.[399] PPI commented that a reasonable person would understand the two terms to have the same meaning.[400] MCI replied that the two terms appear to be used interchangeably in the Act, and that there is nothing in the Act that would require these terms to have different meanings. To avoid the confusion that could arise if the terms were given different meanings, MCI urged the Commission to find that the term "preexisting agreement" means "presubscription or comparable arrangement," as defined by the FCC.[401]

The Commission agrees that the terms "preexisting agreement" and "presubscription or comparable arrangement," as used in the TDDRA, are synonymous and, thus, has tied the definition of the former term to the latter. As explained in part II.A.3, *supra*, the definition of "presubscription or comparable arrangement," in § 308.2(e) of this Rule, is identical to the FCC's definition of that term.

(e) Section 308.7(a)(5): Definition of "Providing Carrier"

The proposed rule defined a "providing carrier" as "a local exchange or interexchange common carrier providing telephone services (other than local exchange services) to a vendor for a telephone-billed purchase that is the subject of a *billing error*. "[402] (Emphasis added). PPI commented that by changing the term "billing error complaint" (the term used in the Act's definition) to "billing error," the Commission made "a slight and subtle difference, but one which could be interpreted to assume each complaint is correct."[403] The proposed rule used the broader term "billing error" rather than "billing error complaint" to clarify that a "billing error" need not involve a "complaint," *i.e.*, an expression of customer dissatisfaction. An inquiry by the customer may also be a "billing error" (*e.g.*, a customer request for additional clarification regarding a pay-per-call charge appearing on the customer's billing statement).[404]

Nonetheless, to avoid possible confusion, the Commission has decided to change the definition of "providing carrier" to refer instead to "a telephone-billed purchase that is the subject of a billing error complaint or inquiry." This also is consistent with the use of the phrase "billing error complaints or inquiries" in the definition of "billing entity," § 308.7(a)(1).

(f) Section 308.7(a)(6): Definition of "Telephone—Billed Purchase"

The term "telephone-billed purchase" is defined in the final Rule as it is in the TDDRA.[405] It applies to any purchase involving the use of a telephone that is consummated solely as a result of the completion of the call or the subsequent entry of a number or access code using a rotary or touch tone telephone, or by comparable action. The term does not apply to any purchase by a caller pursuant to a preexisting agreement (such as presubscription) with the vendor, nor to any service that the FCC determines by rule is closely related to the provision of telephone service and is subject to billing dispute resolution procedures required by Federal or state law. Also exempt are sales transactions that are otherwise subject to billing dispute resolution procedures required

[392] Comments 10 (NARUC) at 7; 40 (NACAA) at 13; 42 (NAAG) at 18–26.
[393] Comments 10 (NARUC) at 7; 42 (NAAG) at 18.
[394] Tr. at 269, 278.
[395] Tr. at 269, 275–76, 280.
[396] Tr. at 277.
[397] 15 U.S.C. 5724(6).
[398] 15 U.S.C. 5724(1)(A).
[399] 58 FR at 13383 (question 33).
[400] Comment 37 (PPI) at 50.
[401] Comment 32 (MCI) at 2–3.
[402] 58 FR at 13388.
[403] Comment 37 (PPI) at 22.
[404] See the discussion of § 308.7(a)(2)(ii), above.
[405] 15 U.S.C. 5724(1).

by Federal law (*e.g.*, credit card purchases under the FCBA).

(g) Section 308.7(a)(7): Definition of "Vendor"

"Vendor" is defined as it is in the TDDRA.[406] The term applies to the person who sells the goods or services that are the subject of the telephone/billed purchase.

2. Section 308.7(b): Initiation of Billing Review

Section 308.7(b) describes how a customer shall initiate a billing review of a telephone-billed purchase. In general, a customer must provide the billing entity with notice of a billing error within 60 days after the billing entity sends the customer the billing statement on which the questioned charge first appears.[407] Comments submitted by NACAA, NAAG and Sprint suggest that there are certain situations in which a customer might need more than 60 days to assert a billing error claim. NACAA commented that because some goods or services are not provided immediately when calls are made (such as prizes and vouchers for future travel), it sometimes is not apparent to the customer that there is a problem until after 60 days have elapsed.[408] NAAG recommended that the time frame in which to initiate a billing review be expanded to 90 days, and that the Rule clarify that "if a 'service' includes the subsequent delivery of a prize, award or other product, that a consumer has 90 days to complain from the date that the goods or services arrive or are supposed to arrive."[409]

Sprint stated that situations in which the customer might need more than 60 days are rare. However, it commented that a longer period of time might be justified where customers can prove they were told by the vendor to allow more than 60 days for delivery of the specific goods or services.[410]

The Commission believes the situations cited by NACAA, NAAG and Sprint are covered by the Rule.[411] Where the customer's "billing error" involves a charge billed by a pay-per-call service for goods or services that were delivered after the customers received the billing statement, the 60-day notification period does not begin to run until the goods or services are delivered. This includes any gift or award that was promised to the customer for entering into the transaction. If the complete goods or services bargained for are never delivered, the 60-day period begins to run on the date the customer was told or led to believe the goods or services were to be delivered, if that date is later than the date the billing statement was transmitted to the customer. In either case, the customer would have at least 60 days from the date the customer was on notice of the problem in which to assert the billing error.

The Rule does not require a customer to give written notice to initiate a billing review. The NPR solicited comment as to whether written notification should be required.[412] The majority of commenters were not in favor of such a requirement, stating that consumers should have the option to call or write.[413] NCL's comment was representative of this group, contending that to require written notification would be unnecessarily restrictive, as most telephone subscribers are accustomed to dealing with their telephone companies over the phone.[414] PPI suggested that the administrative cost attendant to requiring written notification would outweigh any possible benefits.[415]

The telephone companies were the most adamant in their opposition to requiring written notification.[416] USTA commented that the current procedures used by most local telephone companies do not require their customers to reduce billing complaints to writing. As a result, consumers are able to receive prompt responses to their complaints or inquiries. USTA maintained that these procedures have been shown to work and, thus, should be allowed to continue.[417]

A number of information providers supported requiring customers to submit written notification. Fun Lines expressed concern that the proposed billing error resolution procedures would serve as an incentive to billing entities to credit customers' accounts for disputed amounts and charge the amounts back to the vendors, which would then foster consumer abuse of the dispute resolution procedures. To dissuade such abuse, Fun Lines proposed that written notice be required to initiate a billing review.[418] Another organization of information providers, AIP, commented that written notice of a billing error should be required "for clarity of record-keeping."[419]

Two commenters offered proposals where the written notice requirement would be triggered only if the billing error dispute exceeded a defined threshold. ICN observed that requiring written notice to initiate a billing review might be warranted where the disputed charge exceeds a certain dollar amount, such as $75.[420] VRS, a third-party biller, proposed a two-stage error resolution process: in the initial stage, oral notice would be sufficient to assert a billing error; if the initial call did not result in resolution of the dispute, the customer would then have to submit written notification to continue the dispute resolution process.[421]

Because of the breadth of the opposition to requiring written notice and the value to consumers in being able to communicate billing error complaints and inquiries quickly and easily, the Commission has decided against requiring written notice to initiate a billing review. Thus, the final Rule permits billing entities to decide for themselves whether to require written notice.

3. Section 308.7(c): Disclosure of the Method of Providing Notice

Section 308.7(c) remains unchanged. It requires the billing entity to disclose on or with each billing statement the method, or methods (*e.g.*, by letter or by telephone), by which the customer may provide notice of a billing error. If the billing entity allows oral notice to be given, it must disclose the presumption that applies if a dispute arises concerning the sufficiency of the customer's oral communication to initiate a billing review.

4. Section 308.7(d): Response to Customer Notice

Section 308.7(d) explains the procedure a billing entity must follow to respond to a customer's billing error notice. The proposed rule, § 308.7(d)(1), required the billing entity to acknowledge the customer's notice *in*

[406] 15 U.S.C. 5724(5).

[407] The 60-day limitation to initiate a billing review shall have no effect on the time in which a person may file a complaint with the FCC against carriers for the recovery of damages or overcharges under the Federal Communications Act, 47 U.S.C. 415.

[408] Comment 40 (NACAA) at 13.

[409] Comment 42 (NAAG) at 30–31.

[410] Comment 81 (Sprint) at 14.

[411] This issue was addressed in footnote 2 of the proposed rule. 58 FR at 13388. To emphasize the point, The Commission has incorporated that footnote into the body of the text of § 308.7(b) of the final Rule.

[412] 58 FR at 13384 (question 35.a).

[413] *See, e.g.*, Comments 21 (NCL) at 19; 31 (CA) at 11; 37 (PPI) at 51; 40 (NACAA) at 13; 81 (Sprint) 12.

[414] Comment 21 (NCL) at 19.

[415] Comment 37 (PPI) at 51.

[416] Comments 16 (USTA) at 7; 18 (Bell Atlantic) at 5; 29 (Ameritech) at 4–5; 57 (US West) at 8; 62 (AT&T), Attachment A at iii; 81 (Sprint) at 12.

[417] Comment 16 (USTA) at 7.

[418] Comment 5 (Fun Lines) at 2.

[419] Comment 35 (AIP) at 13.

[420] Comment 61 (ICN) at 10.

[421] Comment 23 (VRS) at 11.

writing within 30 days after receiving the customer's notice *unless* the billing entity resolved its dispute with the customer within that 30 days by taking the action set forth in § 308.7(d)(2). The Commission asked for comments as to whether billing entities should have to provide written acknowledgment.[422] CA responded in the affirmative, commenting that there is no way of ensuring that the customer receives acknowledgement of his or her billing error notice.[423] NACAA agreed, stating that if the customer is to be permitted to give oral notice of a billing error, the billing entity's acknowledgement must be in writing.[424] Fun Lines commented that billing entities should be subject to written notification requirements just as credit card issuers are under the FCBA.[425]

A number of commenters expressed opposition to requiring written acknowledgement.[426] MCI, AT&T and USTA commented that the telecommunications industry is accustomed to responding to customers telephonically and is not equipped to handle large amounts of written communications. They voiced support for permitting the industry to maintain the *status quo*.[427] While objecting to requiring written acknowledgement, Sprint noted that "the customer will receive written notification through his or her regularly rendered billing statements."[428] Indeed, one reason the Commission views the written acknowledgement requirement as not being burdensome to billing entities is because it may be satisfied by a notation on the customer's billing statement (*e.g.*, "Your dispute is acknowledged.").

One commenter, AT&T proposed that billing entities be given 45 days in which to acknowledge a customer's billing error notice. AT&T explained that in instances where its customers call the local exchange carrier ("LEC") for a billing adjustment, the LEC must relay the customer dispute to AT&T before it can begin to investigate. According to AT&T, this is done by memorandum, which AT&T often receives as much as two weeks after the customer has notified the LEC of the billing dispute. Thus, AT&T claims it would not, in many instances, be able to resolve the customer's dispute within the initial 30 days, thus necessitating its sending the customer a written acknowledgement, a requirement it would like to avoid.[429]

The Commission believes that a 30-day written acknowledgement requirement would not disadvantage interexchange carriers ("IXCs") in the manner AT&T described. Section 308.7(o) of the Rule, discussed below in greater detail, will require a LEC in the situation AT&T described to either: (1) Promptly provide the customer with the name, address, and telephone number of the billing entity responsible for receiving and responding to customer billing error notices; or (2) relay the customer's billing error notice to the responsible billing entity within 15 days after receiving it. Moreover, the 30-day time frame for acknowledging the customer's notice would not begin in such situations until the responsible billing entity actually received the notice. Thus, AT&T and similarly-situated IXCs would have as much time to resolve customer's billing error disputes as other billing entities.

Nevertheless, the Commission seeks to avoid imposing additional paperwork requirements on billing entities where possible. For this reason, the final Rule affords billing entities 40 days in which to provide written acknowledgement of a customer's billing error notice. The Commission has determined that the additional 10 days will give the billing entity, in almost all instances, sufficient time to send the written acknowledgement on or with the customer's next regularly scheduled billing statement and, thus, avoid the expense of a separate mailing for the acknowledgement.

Under § 308.7(d)(2) of the Rule, the billing entity may resolve its dispute with the customer in one of two ways: (1) It may simply credit the customer's account in the amount disputed without conducting further investigation; or (2) it may elect to investigate the matter and, based on the results of its investigation, make any appropriate adjustments in the customer's account. If the billing entity opts to credit the customer's account without investigation, and a providing carrier or vendor are also parties to the transaction, the billing entity must tell the customer that its crediting of the customer's account may result in efforts by the vendor, its agent, or the providing carrier (whichever applies) to collect the disputed charge. This disclosure is not required, however, if the vendor, its agent, or the providing carrier will not attempt to collect the disputed charge. The burden is on the billing entity to ensure either that this disclosure is given or no secondary collection efforts are undertaken.

Section 308.7(d)(2)(i) of the proposed rule would have required the billing entity to provide the customer with the name, mailing address, and business telephone number of the other parties to the transaction.[430] Several commenters objected to this requirement. Nynex and Bell Atlantic stated that the LECs do not have this information for vendors because the LEC's have no direct relationship with vendors.[431] They have only the program name of the pay-per-call service, which is supplied by the IXC.[432] Bell Atlantic commented that it would be a significant burden to have to distribute lists to its 5,000 service representatives showing the vendors for thousands of pay-per-call telephone numbers and, furthermore, these lists would change daily as carriers assigned numbers to new providers or reassigned numbers from one provider to another.[433] AT&T recommended that the rule be modified to require that billing entities provide this information only upon customer request.[434]

In response to these concerns, the Commission has modified § 308.7(d)(2)(i) of the final Rule to permit the billing entity the option of providing the customer with identifying information about the providing carrier and vendor, as applicable, or providing the customer with a local or toll-free telephone number where the customer can obtain the information directly. This information need only be disclosed if the billing entity's crediting of the customer's account will result in an attempt by the vendor or providing carrier to collect the disputed charge.

Under § 308.7(d)(2)(ii), if the billing entity decides to investigate a billing error dispute, it must contact any parties whose input is needed to reasonably determine whether a billing error occurred as alleged by the customer. If the results of the investigation lead it to conclude that a billing error occurred as alleged, it must credit the customer's account for any disputed amount. If the billing entity determines as a result of the investigation that no billing error occurred, or that a different billing error occurred from that asserted by the customer, the billing entity must explain to the customer the reasons for

[422] 58 FR at 13384 (question 35.b).

[423] Comment 31 (CA) at 12.

[424] Comment 40 (NACAA) at 13.

[425] Comment 5 (Fun Lines) at 2.

[426] Comments 18 (Bell Atlantic) at 5; 33 (ITA) at 9; 37 (PPI) at 51; 44 (Southwestern) at 5; 50 (BellSouth) at 11; 55 (GTE) at 8–11; 62 (AT&T), Attachment A at iii; 63 (NAIS) at 43–44; 81 (Sprint) at 12–13.

[427] Tr. at 212–15.

[428] Comment 81 (Sprint) at 12.

[429] Comment 62 (AT&T) at 2–3.

[430] 58 FR at 13389.

[431] Comments 15 (Nynex) at 4–5; 18 (Bell Atlantic) at 4–5.

[432] Comment 15 (Nynex) at 4–5.

[433] Comment 18 (Bell Atlantic) a 4–5.

[434] Comment 62 (AT&T) at 6.

that determination and make any appropriate adjustments to the customer's account. The billing entity need only provide the customer with a written explanation, including copies of supporting documents, if the customer requests it.

Section 308.7(d)(3) requires a billing entity to complete the steps required by § 308.7(d)(2) within two complete billing cycles after receiving the customer's billing error notice, which in no event may be more than 90 days. If a billing entity were to comply with § 308.7(d)(2)(i)—*i.e.*, to correct the customer's bill and credit his account—within 40 days after receiving the customer's billing error notice, no written communication of any kind would need to be provided to the customer. This provision was received favorably by the telephone companies,[435] while the information providers expressed concern that it might encourage the telephone companies to credit customers' accounts for disputed amounts that might very well be legitimate charges.[436] The Commission believes that the billing review procedures of § 308.7(d) strike a reasonable balance among the consumer's interest in having billing errors resolved quickly and efficiently, the billing entity's interest in being able to operate free of undue administrative burdens, and the information provider's interest in receiving fair compensation for pay-per-call services provided to the public.

Section 308.7(d)(3)(i) provides that if a billing entity determines that any disputed amount is in error, it must notify the providing carrier and vendor of its disposition of the billing error and the reasons for its action. Under § 308.7(d)(3)(ii), if the billing entity determines that any portion of the disputed amount should be sustained, it must promptly notify the customer in writing of the time when payment of that amount is due.

The proposed rule would have required the billing entity to give the customer at least 20 days from the date of notice to pay this sustained amount.[437] A number of commenters opposed the 20-day requirement as unreasonable and unnecessary.[438] USTA commented that the LECs should be permitted to include disputed amounts determined not to be in error in their next bill cycle for payment within the normal time set by state regulation. It stated that the "time provided by specific state regulation for telephone bill payment is likely to be reasonable, and is likely to have been subject to a preexisting determination generally to the effect that the period set would not impose harsh conditions on the customer."[439] In response to these comments, the Commission has modified § 308.7(d)(3)(ii) of the final Rule to permit the billing entity to require payment of disputed amounts determined not to be in error within the number of days the customer is ordinarily allowed by custom, contract, or state law to pay undisputed amounts, but in no case less than 10 days.

Under § 308.7(d)(3)(ii), the billing entity also must notify the customer in writing that failure to pay the disputed amount determined not to be in error may be reported to a credit reporting agency, or may subject the customer to collection action. This section of the final Rule has been changed to state that if there is no possibility that either event will occur, the notice need not, and indeed should not, be sent. For example, if a third-party biller does not report delinquent customers to credit reporting agencies and takes no action to collect unpaid pay-per-call charges *and*, by contract or for policy reasons, forbids its clients to undertake such actions, no such notice should be sent to the customer. If only one of the events was operational (*e.g.*, the third-party biller does not report to credit reporting agencies but does undertake collection activity), the notice should mention only the possibility of that particular event occurring.

5. Section 308.7(e): Withdrawal of Billing Error Notice

Under § 308.7(e) of the proposed rule, a billing entity would not have had to proceed with the billing review procedures if the customer agreed, before the notification requirements of § 308.7(d) were triggered, that the billing statement was correct.[440] AT&T observed that customers may not always be willing to expressly admit that no billing error occurred, even when they have indicated they no longer intend to pursue a billing dispute.[441] The final Rule addresses this problem by permitting the billing entity to dispense with the billing review if the customer agrees that the billing statement was correct or if the customer agrees to withdraw voluntarily the billing error notice. This may be achieved by the customer's clear affirmation that he or she does not wish the billing entity to pursue further investigation of the dispute.

6. Section 308.7(f): Limitation on Responsibility for Billing Error

Section 308.7(f) limits the billing entity's obligation to respond to a customer's billing error complaint to the procedures set forth in § 308.7(d). Once the billing entity follows the prescribed procedures, it will not have to continue to respond in the same manner to subsequent assertions by the customer of the same billing error. The Commission is adopting this section as proposed.

7. Section 308.7(g): Customer's Right to Withhold Disputed Amount; Limitation on Collection Action

Section 308.7(g) sets forth the customer's right to withhold payment of any disputed amount after having provided notice of a billing error. No one may try to collect this amount from the customer until the billing entity has completed its billing review and given the customer as much time to make payment as the billing entity ordinarily affords for undisputed charges. The billing entity may continue to display the disputed charge on the customer's billing statement during the billing review, so long as the statement discloses that payment of the disputed amount is not required. There is no restriction on the billing entity's right to collect any undisputed charges on the customer's bill. The Commission is adopting this section as proposed.

8. Section 308.7(h): Prohibition on Charges

Section 308.7(h) of the proposed rule provided that if a billing error is determined to have occurred, whether as alleged by the customer or in a different amount or manner, no charge may be imposed on the customer related to the billing review. The proposed rule also provided that if it is determined that no billing error occurred, any charges imposed on the customer must be reasonable and not have the effect of discouraging customers from asserting their billing error rights. The Commission solicited comment on whether there should be an absolute prohibition on charging for billing error investigations.[442]

The Commission received one comment in favor of permitting billing entities to charge for billing error investigation. AIP commented that it should be permissible for a billing entity

[435] See, *e.g.*, Comment 13 (NTCA) at 4–5.

[436] Comments 5 (Fun Lines) at 2–3; 63 (NAIS) at 46–47; Tr. at 224.

[437] 58 FR at 13389.

[438] Comments 15 (Nynex) at 5–6; 16 (USTA) at 15–16; 35 (AIP) at 13–14; 50 (BellSouth) at 11.

[439] Comment 16 (USTA) at 15–16.

[440] 58 FR at 13389.

[441] Comment 62 (AT&T) at 7.

[442] 58 FR at 13384 (question 36).

to impose a reasonable charge "unless the error ultimately found is a 'material' error."[443] One commenter suggested that the Rule should be silent on the issue.[444] Several commenters were adamantly opposed to allowing billing entities to impose any charge for a billing review. NACAA and NAAG contended that allowing any charges for conducting a billing review would only discourage consumers from exercising their rights.[445] VRS agreed and observed that vendors could recoup their investigation costs through adjustments to their overall pricing structure.[446] NCL stated that unless there is an absolute prohibition on such charges, billing entities are likely to abuse the privilege and coerce customers into accepting inaccurate or excessive charges for pay-per-call services.[447] At the public workshop conference, Commission staff asked whether industry members felt they needed to have the right to charge customers for investigating billing errors that are determined not be valid. There was no response in support of permitting such charges.[448]

On balance, the Commission has concluded that the imposition of any charges for billing error investigations could deter consumers from the assertion of legitimate disputes. Therefore, the final Rule prohibits billing entities from imposing any charges in connection with a billing review.

9. Section 308.7(i): Restrictions on Credit Reporting

Section 308.7(i) of the final Rule is identical to the proposed rule except for the modification to § 308.7(i)(1), relating to the time allowed the customer to pay any disputed amount found not to be in error. The modification conforms this provision to the change in § 308.7(d)(3)(ii), discussed above.

Section 308.7(i) forbids anyone from reporting or threatening to report negative information related to the customer's withholding payment of the disputed amount until the billing review is completed and the customer has been given as much time to make payment as the billing entity ordinarily affords for undisputed charges. If, before this time expires, the customer reasserts his dispute with respect to the same billing error, no one may report the customer's account as delinquent without also reporting that the customer disputes the delinquent amount. Additionally, any person reporting such a delinquency must notify the customer in writing of the name and address of each person to whom it reported the delinquency. Any subsequent resolution of the dispute would have to be reported in writing to anyone to whom the delinquency was reported initially.

One commenter objected to what it perceived to be the Rule's allowing a customer to perpetuate a billing error dispute indefinitely. PPI stated that the Rule would permit a persistent consumer to "repeatedly seek review of a claim and thus save himself from having a bad credit report."[449] In fact, the only protection this provision gives a customer who reasserts a billing error is to inform the credit reporting agency or other party who receives notice of the customer's delinquency that the customer disputes a matter with respect to that delinquency. Except for the aforementioned restrictions on credit reporting, any interested party may pursue all of its other normal collection procedures (including involuntary blocking of the customer's access to future pay-per-call services) if a disputed charge remains unpaid after the billing entity has completed the billing review and determined that no billing error occurred.

10. Section 308.7(j): Forfeiture of Right to Collect Disputed Amount

Section 308.7(j) requires a billing entity, providing carrier, or vendor to forfeit the amount of any telephone-billed purchase (up to $50 per transaction) if it fails to comply with the Rule's billing error resolution requirements. The penalty applies only to the person or persons who failed to comply. The provision does not prevent any other interested party from pursuing collection of any legitimate amount to which it is entitled. For example, a billing entity's failure to respond properly to a customer's billing error notice would not result in forfeiture of the vendor's right to pursue independent collection of the charge.

AIP commented that the penalty should apply only if the failure to comply was "material,"[450] whereas NACAA believes the provision should compel the billing entity, providing carrier, and vendor, and their agents, to forfeit the right to collect from customers any charges involving violations of the TDDRA.[451] The purpose of the forfeiture penalty is to enforce compliance with the billing and collection provisions of the Rule, including those provisions some might consider to be technical in nature. There are other provisions of the Rule that should serve to deter the types of practices the TDDRA was enacted to prevent.[452] Therefore, the Commission has decided to issue this provision of the Rule as initially proposed.

11. Section 308.7(k): Notification of Returns and Crediting of Refunds

Section 308.7(k) prescribes the procedure a vendor who is not billing entity must follow after agreeing to give a customer a refund or credit for returned goods or a forgiven debt. Within seven days after the vendor agrees to give the customer a cash refund, the vendor must send the refund directly to the customer's address, and must also notify the appropriate billing entity that the refund has been given. The proposed rule did not provide for notice of the refund to be sent to the billing entity. However, AT&T commented that the addition was advisable to prevent the customer from receiving an adjustment from both the vendor and the billing entity.[453] The Commission agrees.

If the vendor agrees to credit the customer's account for the returned property or forgiven debt, the vendor has seven days in which to send a credit statement to the billing entity through the vendor's normal channels for billing telephone-billed purchases. Within seven days after receiving the credit statement, the billing entity must credit the customer's account for the amount of the refund. The proposed rule gave the billing entity only three days to effect the credit. Two commenters noted that the billing entity responsible for responding to and handling billing error disputes, *e.g.*, an IXC, might not be the billing entity that originally billed the customer for the charge, *e.g.*, a LEC. If the vendor sent the credit statement to the IXC, the IXC might not be able to relay the credit statement to the LEC in sufficient time to ensure that the customer's account was credited within three days.[454] Therefore, the final Rule gives the billing entity seven days in which to credit the customer's account.[455]

[443] Comment 35 (AIP) at 14.

[444] Comment 37 (PPI) at 52.

[445] Comment 40 (NACAA) at 14; 42 (NAAG) at 31.

[446] Comment 23 (VRS) at 13.

[447] Comment 21 (NCL) at 19–20.

[448] Tr. at 229. Although AIP, in its comments filed with the Commission, had expressed support for permitting such charges in certain situtations, it was silent on the issue at the conference.

[449] Comment 37 (PPI) at 23.

[450] Comment 35 (AIP) at 14.

[451] Comment 40 (NACAA) at 15.

[452] *See, e.g.*, § 308.5(k), making pay-per-call service providers liable for refunds to consumers who have been billed for services found to have violated any provision of this Rule or any other Federal law.

[453] Comment 62 (AT&T) at 6.

[454] Comments 55 (GTE) at 11; 62 (AT&T) at 7.

[455] AIP commented that the Rule does not provide vendors sufficient time to perform the required

12. Section 308.7(l): Customer's Right to Assert Claims or Defenses

Section 308.7(l) makes any billing entity or providing carrier who attempts to collect charges from a customer for a disputed telephone-billed purchase subject to any claims or defenses that the customer may lawfully assert against the vendor with respect to that purchase. The provision remains unchanged from the proposed rule. The customer's rights under this provision are not dependent on the customer's assertion of a billing error pursuant to § 308.7(b). However, the customer must first have made a good faith attempt to settle the dispute with the vendor, or the providing carrier (other than the billing entity) if the vendor is not readily accessible. Any determination of what claims or defenses are valid as to the vendor must be made under state or other applicable law. The billing entity or providing carrier cannot be liable under this provision for any amount greater than the amount of the telephone-billed purchase, plus any related charges for which the customer has been billed.

13. Section 308.7(m): Retaliatory Actions Prohibited

Section 308.7(m) makes it unlawful to accelerate the customer's debt or to restrict to terminate the customer's access to pay-per-call services to penalize the customer for exercising in good faith any billing error rights accorded by these regulations. This does not constitute an absolute prohibition on all actions that might effectively limit a customer's access to pay-per-call services. For example, if a vendor or providing carrier regularly suspends a customer's access to pay-per-call services when that customer's outstanding debt exceeds a certain dollar amount, that vendor or providing carrier would not be prohibited from applying any disputed amount towards that outstanding debt. Moreover, this provision does not preclude a billing entity, providing carrier, or vendor from blocking or ordering the blocking of pay-per-call services to subscribers who have incurred, but not paid, legitimate pay-per-call charges.[456] Furthermore, a billing entity, providing carrier, or vendor will not have violated this section if it took adverse action against the customer with respect to a telephone-billed purchase without knowing that the customer had asserted a billing error related to that purchase.[457] The determining factor in each instance is whether the action was motivated, or reasonably appears to have been motivated, by a desire to retaliate against the customer for asserting his or her billing error rights.

14 Section 308.7(n): Notice of Billing Error Rights

Section 308.7(n) requires a billing entity to provide its customers with written notice of their pay-per-call billing rights at least once per calendar year. If the billing entity is not a common carrier, it must follow the procedures set forth in § 308.7(n)(1)(i), and send the notice to each customer (whether that customer is an old, current, or new customer) with the first billing statement for a telephone-billed purchase mailed or delivered to that customer after the effective date of the regulations. Thereafter, the billing entity must ensure that the customer receives the notice at least once during each subsequent calendar year in which that customer receives a bill for a telephone-billed purchase.

Billing entities that are common carriers have the option of sending the annual statement to only those customers whom they have billed for a telephone-billed purchase, or they may elect to send the annual statement to all of their customers who receive telephone service of any kind. If they choose the former approach, they must follow the procedure set forth in § 308.7(n)(1)(i). If they opt for the latter, they must comply with § 308.7(n)(1)(ii), which requires the billing entity to send the annual statement to all of its customers within 60 days after the effective date of the regulations. The billing entity must then send the notice at least once each following year to all of its customers at intervals of not less than six months nor more than 18 months.

The proposed rule would have prescribed the precise language that billing entities must disclose in the notices.[458] Two commenters suggested that the billing entity should have the flexibility to fashion its own notice, so the material information might be arranged and disclosed in a more cost-effective manner.[459] The Commission, on reconsideration, has modified the final Rule to specify the information that must be disclosed without mandating specific language.

The annual statement must inform the customer how to initiate a billing review. The presumption set forth in § 308.7(c) of the Rule need only be disclosed if the customer is permitted to provide oral notice. The annual statement must also describe the procedure the billing entity must follow to respond to a billing error notice and to investigate the alleged billing error. Additionally, the annual statement must disclose the customer's right to withhold payment of any disputed amount and the restrictions placed on collection and adverse reporting of the disputed amount. Finally, the statement must tell the customer about the forfeiture penalty.

Instead of sending the annual statement, the billing entity may choose to send an abridged pay-per-call billing rights summary to its customers with each billing statement. Like the annual statement, the alternative summary statement must inform the customer how to initiate a billing review, including the presumption applying to oral notice, if such notice is permitted. However, the summary notice need not explain the procedure the billing entity must follow to respond to and investigate a billing error complaint. Also, the alternative summary must contain a statement (which may be abridged) of the customer's rights with respect to the collection of any disputed amount. It need not mention the forfeiture penalty.

Section 308.7(n)(3), which sets forth general requirements concerning the billing error rights notices, has been added to the final Rule. If the billing entity elects to send an annual statement, it must be provided on a separate statement that the customer may keep. A portion of the customer's billing statement containing the disclosures is permissible under this section if that portion can be easily detached (*e.g.*, with perforations) and kept, and the statement advises the customer to do so.

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tasks, contending that vendors should have as much time to give credits and refunds as customers have to assert a billing error, 60 days. Comment 35 (AIP) at 14–15. The Commission believes, however, this fails to take into consideration that § 308.7(k) only applies where the vendor has already made the determination to give a refund or credit to the customer. The time requirements are similar to those prescribed under the FCBA for credit card purchases, through which many merchants also process a large number of transactions.

[456] MCI proposed that § 308.7(m) state expressly that blocking for nonpayment of legitimate pay-per-call charges is not precluded by this section. Comment 32 (MCI) at 6–7. However, stating this in the Rule might dilute the principal message of this provision, which is that a customer should not be subjected to any adverse action solely because of that customer's good faith exercise of his or her billing error rights under this Rule. The Commission believes that the issue is addressed satisfactorily by discussion in this Statement of Basis and Purpose.

[457] BellSouth expressed concern that a LEC that acts as a collection agent for an IXC that performed its won billing might not be aware of a pending dispute. Comment 50 (BellSouth) at 12.

[458] 58 FR at 13378, 13390.

[459] Comments 32 (MCI) at 7–12; 50 (BellSouth) at 13.

If the alternative summary statement is used and is disclosed on each copy of the customer's billing statement, it need not be in a form that the customer may keep. If the disclosures are made on the back of the statement, the front of the statement must include a clear and conspicuous reference to the disclosures on the back.

One commenter proposed that billing entities be permitted to include additional information on the billing rights notice.[460] Section 308.7(n)(3)(iii) permits such information to be disclosed on the notice, but it must not confuse or mislead the customer or obscure or detract from the required disclosures, which must appear separately and above any other information.

15. Section 308.7(o): Multiple Billing Entities

Section 308.7(o) explains the responsibilities of multiple billing entities involved in a telephone-billed purchase. It remains unchanged from the proposed rule. This provision gives these billing entities the flexibility to decide among themselves the one that will be responsible for making any disclosures and for complying with the other requirements of the Rule.

The Commission received several comments seeking clarification of the role of the LEC under this provision where that company renders bills for pay-per-call services but the responsibility for handling billing complaints and inquiries resides with the IXC.[461] The Rule provides that if the LEC receives notice of a billing error from a customer, the LEC must either identify for the customer the proper party to whom the notice should be sent or the LEC may accept the billing error notice on behalf of the IXC, in which case it must transmit the notice to the IXC within 15 days. The LEC would have no further responsibility with respect to the billing error dispute, even if the customer persisted in attempting to have the LEC credit his or her account. However, nothing in this section would preclude the LEC from crediting the customer's account in that situation. If the IXC objects to the LEC doing so, it must resort to the terms of its contract with the LEC for relief.

16. Section 308.7(p): Multiple Customers

Section 308.7(p) provides that disclosures may be made to any customer primarily liable on a joint account. It remains unchanged from the proposed rule.

17. Other Questions

The proposed rule did not contain any provision requiring billing entities, providing carriers, or vendors to maintain records with respect to the billing and collection of pay-per-call services. The NPR solicited comment on whether such a requirement is needed.[462] Many commenters noted that common carriers are required by the FCC to keep call detail records for 18 months. These records identify the name, address, and telephone number of the caller, the telephone number called, and the date, time, and length of the call.[463] Sprint commented, "These records provide the back-up for the services provided by common carriers acting as billing entities and/or providing carriers in any pay-per-call service transaction."[464] NTCA noted that state laws already require LECs "to respond to consumer complaints within designated time frames, to resolve complaints and to provide consumers back-up records to resolve billing disputes."[465] The common carriers maintained that these records are sufficient to demonstrate compliance with the billing and collection procedures of the Rule, and that a separate FTC record retention provision is not needed.[466] They recommended, however, that should the FTC decide to implement a record retention provision, it should mirror the FCC rule.[467]

The consumer groups and regulatory agencies commented in support of some form of recordkeeping provision, as did IIA, a trade association of information providers. NACAA, asserting that such records are vital to law enforcement officials, recommended that billing entities be required to keep records for at least as long as the applicable statute of limitations.[468] CA and IIA believe that billing entities should be subject to the same record retention provisions as found in the TILA and FCBA.[469] Regulation Z (which implements the TILA and FCBA) requires creditors generally to maintain evidence of compliance for two years.[470] The value of implementing such a provision is questionable when common carriers already are required by the FCC to keep records for 18 months.

In fact, at least some of the parties potentially affected by a recordkeeping provision currently keep records for longer than 18 months. USTA said this is true for some of its members, and that one member (BellSouth) keeps records for 3–10 years.[471] ITA, a third-party biller, stated it has kept billing records for as long as it has been in operation, approximately two years.[472] TPI, an information provider and service bureau, said it has kept its records for all of the four years it has been in operation.[473]

Finally, the record shows that the state regulatory agencies have had no difficulties obtaining relevant records in connection with their investigations of pay-per-call services, except in certain atypical situations.[474] Therefore, the Commission has concluded that there is insufficient evidence at the present time to support the need for a specific recordkeeping provision with respect to the billing and collection procedures of the Rule.

The Commission also solicited data concerning the practices of third-party billers. Specifically, the Commission asked whether the Rule should include additional protections for consumers who deal with third-party billers.[475] Only a few commenters responded. The gist of these comments was that third-party billers should be subject to the same requirements as other billing entities—no more, no less.[476] Therefore, the Commission has determined that there is insufficient evidence to justify imposing any additional requirements on third-party billers.

18. Relation to State Laws

Section 302(a) of the TDDRA[477] provides that no person subject to the provisions of Title III (Billing and Collection) of the final Rule shall be exempt from complying with the laws of any state with respect to telephone billing practices, except, and only, to the extent that those laws are inconsistent with any provision of Title III. The Commission is given the authority to determine whether such inconsistencies exist. A billing entity, providing carrier, vendor, state, or other interested party may petition the

[460] Comment 32 (MCI) at 9–10.

[461] Comments 18 (Bell Atlantic) at 4; 37 (PPI) at 24; 63 (NAIS) at 48.

[462] 58 FR at 13384 (question 37).

[463] Comments 18 (Bell Atlantic) at 7; 81 (Sprint) at 10, citing 47 CFR 42.6.

[464] Comment 81 (Sprint) at 10.

[465] Comment 13 (NTCA) at 7.

[466] *See, e.g.*, Comment 16 (USTA) at 12.

[467] Comments 81 (Sprint) at 10; 60 (Pilgrim) at 18.

[468] Comment 40 (NACAA) at 14.

[469] Comments 31 (CA) at 12; 52 (IIA) at 35.

[470] 12 CFR 226.25.

[471] Tr. at 468.

[472] Tr. at 465.

[473] Tr. at 470.

[474] Tr. at 484–85.

[475] 58 FR at 13384 (question 39).

[476] Comments 23 (VRS) at 14; 31 (CA) at 12; 33 (ITA) at 7.

[477] 15 U.S.C. 5722(a).

Commission to determine whether a state law requirement is inconsistent.

Section 302(b) of the TDDRA [478] provides that the Commission shall by regulation exempt from Title III any class of telephone-billed purchase transactions within any state if it determines that under the law of that state, that class of transactions is subject to requirements substantially similar to those imposed under the Act, or that such state law gives greater protection to consumers, and that there is adequate provision for enforcement. Any state may apply to the Commission to exempt a class of transactions within that state from the requirements of the Federal law and the corresponding provisions of this Rule.

A petition for the Commission to determine whether a state law requirement is inconsistent , or an application for an exemption of a class of transactions, shall be in writing and addressed to the Secretary, Federal Trade Commission, Washington, DC 20580.

G. Section 308.8: Severability

This section of the final Rule states the Commission's intent that if any Rule provision is stayed or held invalid, the other provisions will remain in effect.

H. Section 308.9: Rulemaking Review

This section of the Rule, which was not included in the proposal set forth in the NPR, states the Commission's intention to undertake a review of the Rule, no later than four years after its effective date, in order to evaluate its operation.

III. Regulatory Flexibility Act

In publishing the proposed regulations, the Commission certified, subject to subsequent public comment, that the proposed regulations, if promulgated, would not have a significant economic impact on a substantial number of small entities and, therefore, that the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), requiring the initial regulatory analysis, did not apply.[479] The Commission noted that any economic costs imposed on small entities by the proposed regulations were, in many instances, specifically imposed by statute. Where they were not, efforts had been made to minimize any unforeseen burden on small entities (for example, by making the proposed rule's requirements flexible). The Commission determined, on the basis of the information available to the staff at that time, that the proposed regulations would result in few, if any, independent additional costs. The Commission nonetheless requested comment on the effects of the proposed regulations on costs, profitability, competitiveness, and employment in small entities, in order not to overlook any substantial economic impact that would warrant a final regulatory flexibility analysis.[480]

The information and comments received by the Commission did not provide sufficient reliable statistical or analytical data to quantify precisely the effect, differential or otherwise, of the proposed regulations on small entities versus its effect on all entities that may be subject to these regulations. While virtually all of the comments made general reference to the economic effects of the proposed regulations, only two comments addressed the Commission's request for comments on the effect of the proposed regulations with specific regard to small entities. One commenter, not citing any particular provision of the proposed regulations, simply urged that the Commission's rules take into account the higher costs for small IXC's to acquire 900 numbers than to acquire such service through other exchanges.[481] The second commenter, representing nearly 500 small local exchange carriers, believed that § 308.7(o) of the proposed regulations, regarding procedures for responding to billing error notices, would have a favorable impact on administrative and customer complaint costs shouldered by their small member companies that provide billing services to pay-per-call providers.[482] As the commenter noted, the Commission's rule would permit billing entities to decide between or among themselves who among them should be responsible for making required disclosures, investigating complaints, or complying with other requirements of the Rule when more than one billing entity may be involved in a telephone-billed purchase.

Accordingly, the Commission has determined that the public comments and information before the Commission do not alter the conclusion that the Commission's Rule would not have a sufficiently significant economic impact on a substantial number of small entities to warrant a final regulatory flexibility analysis under the Regulatory Flexibility Act. This notice serves as certification to that effect to the Small Business Administration.

IV. Paperwork Reduction Act

The NPR solicited comments on the need for and scope of possible recordkeeping requirements in provisions governing Commission access to information (§ 308.6) and billing and collection for pay-per-call services (§ 308.7).[483] Such requirements, if adopted, would constitute "collections of information" as defined under the Paperwork Reduction Act.[484] As discussed elsewhere in this Statement of Basis and Purpose, the Commission has determined, on the basis of public comments, not to include such requirements in its final Rule. Accordingly, the requirements of the Paperwork Reduction Act are not applicable.

V. Effective Date

One commenter stated that members of the pay-per-call industry will need a certain amount of time to make changes in their business practices to reflect the new requirements of the final Rule.[485] Specifically, Fun Lines claimed that it can take up to four months to remove or change existing pay-per-call advertisements, since the layout and printing of certain periodicals often is completed months in advance. Fun Lines requested adequate time to make these changes.

The Commission agrees that there should be a period of time between the date this Rule is prescribed and its effective date. The Commission believes that three months is an adequate amount of time to address the industry's needs in this regard.[486] Accordingly, the effective date for this Rule is November 1, 1993.

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[478] 15 U.S.C. 5722(a).

[479] 58 FR at 13379.

[480] *Id.*; *see also id.* at 13384 (question 42).

[481] Comment 60 (Pilgrim) at 22–23. This rulemaking does not reach whether such cost differentials are just or reasonable or warrant investigation, as the commenter also urged the Commission and the FCC to address.

[482] Comment 13 (NTCA) at 2–4; *see also* comment 16 (USTA) at 4–5. While USTA did not comment on the effect of the proposed regulations specifically as to small entities, USTA notes that its membership consists of over 1,000 local exchange carriers offering about 99% of the nation's local telephone lines, and that the overwhelming majority of these carriers are small telephone companies with fewer than 10,000 telephone lines, with some of these companies having fewer than 50 such lines.

[483] 58 FR at 13384 (questions 32 and 34).

[484] 44 U.S.C. 3501–3520. *See* 44 U.S.C. 3502; 5 CFR 1320.7.

[485] Comment 5 (Fun Lines) at 2.

[486] Three months is consistent with the lead time allowed before the effective date in other Commission rulemakings. *E.g.*, Rules for Using Energy Costs and Consumption Information Used in Labeling and Advertising for Consumer Appliances under the Energy Policy and Conservation Act; Ranges of Comparability for Refrigerators, Refrigerator-freezers, and Freezers, 58 FR 3224 (Jan. 8, 1993); Labeling and Advertising of Home Insulation, 44 FR 50218 (Aug. 27, 1979).

List of Subjects in 16 CFR Part 308

Advertising, 900 telephone numbers, Pay-per-call services, Telephone, Trade practices.

For the reasons set forth in the preamble, title 16 of the Code of Federal Regulations is amended by adding part 308 to read as follows:

PART 308—TRADE REGULATION RULE PURSUANT TO THE TELEPHONE DISCLOSURE AND DISPUTE RESOLUTION ACT OF 1992

Sec.

308.1 Scope of regulations in this part.
308.2 Definitions.
308.3 Advertising of pay-per-call services.
308.4 Special rule for infrequent publications.
308.5 Pay-per-call service standards.
308.6 Access to information.
308.7 Billing and collection for pay-per-call services.
308.8 Severability.
308.9 Rulemaking review.

Authority: Pub. L. 102–556, 106 Stat. 4181 (15 U.S.C. 5701, et seq.)

§ 308.1 Scope of regulations in this part.

This rule implements titles II and III of the Telephone Disclosure and Dispute Resolution Act of 1992, to be codified in relevant part at 15 U.S.C. 5711–14, 5721–24.

§ 308.2 Definitions.

(a) *Bona fide educational service* means any pay-per-call service dedicated to providing information or instruction relating to education, subjects of academic study, or other related areas of school study.

(b) *Commission* means the Federal Trade Commission.

(c) *Pay-per-call service* has the meaning provided in section 228 of the Communications Act of 1934, 47 U.S.C. 228.[1]

(d) *Person* means any individual, partnership, corporation, association, government or governmental subdivision or agency, or other entity.

(e) (1) *Presubscription or comparable arrangement* means a contractual agreement in which

(i) The service provider clearly and conspicuously discloses to the consumer all material terms and conditions associated with the use of the service, including the service provider's name and address, a business telephone number which the consumer may use to obtain additional information or to register a complaint, and the rates for the service;

(ii) The service provider agrees to notify the consumer of any future rate changes;

(iii) The consumer agrees to utilize the service on the terms and conditions disclosed by the service provider; and

(iv) The service provider requires the use of an identification number or other means to prevent unauthorized access to the service by nonsubscribers.

(2) Disclosure of a credit card or charge card number, along with authorization to bill that number, made during the course of a call to a pay-per-call service shall constitute a presubscription or comparable arrangement if the credit or charge card is subject to the dispute resolution requirements of the Fair Credit Billing Act and the Truth in Lending Act, as amended. No other action taken by the consumer during the course of a call to a pay-per-call service can be construed as creating a presubscription or comparable arrangement.

(f) *Program-length commercial* means any commercial or other advertisement fifteen (15) minutes in length or longer or intended to fill a television or radio broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer.

(g) *Provider of pay-per-call services* means any person who sells or offers to sell a pay-per-call service. A person who provides only transmission services or billing and collection services shall not be considered a provider of pay-per-call services.

(h) *Reasonably understandable volume* means at an audible level that renders the message intelligible to the receiving audience, and, in any event, at least the same audible level as that principally used in the advertisement or the pay-per-call service.

(i) *Service bureau* means any person, other than a common carrier, who provides, among other things, access to telephone service and voice storage to pay-per-call service providers.

(j) *Slow and deliberate manner* means at a rate that renders the message intelligible to the receiving audience, and, in any event, at a cadence or rate no faster than that principally used in the advertisement or the pay-per-call service.

(k) *Sweepstakes*, including games of chance, means a game or promotional mechanism that involves the elements of a prize and chance and does not require consideration.

§ 308.3 Advertising of pay-per-call Services.

(a) *General requirements.* The following requirements apply to disclosures required in advertisements under §§ 308.3(b)–(d), and (f):

(1) The disclosures shall be made in the same language as that principally used in the advertisement.

(2) Television video and print disclosures shall be of a color or shade that readily contrasts with the background of the advertisement.

(3) In print advertisements, disclosures shall be parallel with the base of the advertisement.

(4) Audio disclosures, whether in television or radio, shall be delivered in a slow and deliberate manner and in a reasonably understandable volume.

(5) Nothing contrary to, inconsistent with, or in mitigation of, the required disclosures shall be used in any advertisement in any medium; nor shall any audio, video or print technique be used that is likely to detract significantly from the communication of the disclosures.

(6) In any program-length commercial, required disclosures shall be made at least three times (unless more frequent disclosure is otherwise required) near the beginning, middle and end of the commercial.

(b) *Cost of the call.* (1) The provider of pay-per-call services shall clearly and conspicuously disclose the cost of the call, in Arabic numerals, in any advertisement for the pay-per-call service, as follows:

(i) If there is a flat fee for the call, the advertisement shall state the total cost of the call.

(ii) If the call is billed on a time-sensitive basis, the advertisement shall state the cost per minute and any minimum charges. If the length of the program can be determined in advance, the advertisement shall also state the maximum charge that could be incurred if the caller listens to the complete program.

(iii) If the call is billed on a variable rate basis, the advertisement shall state,

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[1] Section 228 of the Communications Act of 1934 states:

(1) The term *pay-per-call services* means any service—

(A) In which any person provides or purports to provide—

(i) Audio information or audio entertainment produced or packaged by such person;

(ii) Access to simultaneous voice conversation services; or

(iii) Any service, including the provision of a product, the charges for which are assessed on the basis of the completion of the call;

(B) For which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call; and

(C) Which is accessed through use of a 900 telephone number or other prefix or area code designated by the (Federal Communications) Commission in accordance with subsection (b)(5) (47 U.S.C. 228(b)(5)).

(2) Such term does not include directory services provided by a common carrier or its affiliate or by a local exchange carrier or its affiliate, or any service the charge for which is tariffed, or any service for which users are assessed charges only after entering into a presubscription or comparable arrangement with the provider of such service.

in accordance with §§ 308.3(b)(1)(i) and (ii), the cost of the initial portion of the call, any minimum charges, and the range of rates that may be charged depending on the options chosen by the caller.

(iv) The advertisement shall disclose any other fees that will be charged for the service.

(v) if the caller may be transferred to another pay-per-call service, the advertisement shall disclose the cost of the other call, in accordance with §§ 308.3(b)(1)(i), (ii), (iii), and (iv).

(2) For purposes of § 308.3(b), disclosures shall be made "clearly and conspicuously" as set forth in § 308.3(a) and as follows:

(i) In a television or videotape advertisement, the video disclosure shall appear adjacent to each video presentation of the pay-per-call number. However, in an advertisement displaying more than one pay-per-call number with the same cost, the video disclosure need only appear adjacent to the largest presentation of the pay-per-call number. Each letter or numeral of the video disclosure shall be, at a minimum, one-half the size of each letter or numeral of the pay-per-call number to which the disclosure is adjacent. In addition, the video disclosure shall appear on the screen for the duration of the presentation of the pay-per-call number. An audio disclosure shall be made at least once, simultaneously with a video presentation of the disclosure. However, no audio presentation of the disclosure is required in: (A) An advertisement fifteen (15) seconds or less in length in which the pay-per-call number is not presented in the audio portion, or (B) an advertisement in which there is no audio presentation of information regarding the pay-per-call service, including the pay-per-call number. In an advertisement in which the pay-per-call number is presented *only* in the audio portion, the cost of the call shall be delivered immediately following the first and last delivery of the pay-per-call number, except that in a program-length commercial, the disclosure shall be delivered immediately following each delivery of the pay-per-call number.

(ii) In a print advertisement, the disclosure shall be placed adjacent to each presentation of the pay-per-call number. However, in an advertisement displaying more than one pay-per-call number with the same cost, the disclosure need only appear adjacent to the largest presentation of the pay-per-call number. Each letter or numeral of the disclosure shall be, at a minimum, one-half the size of each letter or numeral of the pay-per-call number to which the disclosure is adjacent.

(iii) In a radio advertisement, the disclosure shall be made at least once, and shall be delivered immediately following the first delivery of the pay-per-call number. In a program-length commercial, the disclosure shall be delivered immediately following each delivery of the pay-per-call number.

(c) *Sweepstakes; games of chance.* (1) The provider of pay-per-call services that advertises a prize or award or a service or product at no cost or for a reduced cost, to be awarded to the winner of any sweepstakes, including games of chance, shall clearly and conspicuously disclose in the advertisement the odds of being able to receive the prize, award, service, or product at no cost or reduced cost. If the odds are not calculable in advance, the advertisement shall disclose the factors used in calculating the odds. Either the advertisement or the preamble required by § 308.5(a) for such service shall clearly and conspicuously disclose that no call to the pay-per-call service is required to participate, and shall also disclose the existence of a free alternative method of entry, and either instructions on how to enter, or a local or toll-free telephone number or address to which consumers may call or write for information on how to enter the sweepstakes. Any description or characterization of the prize, award, service, or product that is being offered at no cost or reduced cost shall be truthful and accurate.

(2) For purposes of § 308.3(c), disclosures shall be made "clearly and conspicuously" as set forth in § 308.3(a) and as follows:

(i) In a television or videotape advertisement, the disclosures may be made in either the audio or video portion of the advertisement. If the disclosures are made in the video portion, they shall appear on the screen in sufficient size and for sufficient time to allow consumers to read and comprehend the disclosures.

(ii) In a print advertisement, the disclosures shall appear in a sufficient size and prominence and such location to be readily noticeable, readable and comprehensible.

(d) *Federal programs.* (1) The provider of pay-per-call services that advertises a pay-per-call service that is not operated or expressly authorized by a Federal agency, but that provides information on a Federal program, shall clearly and conspicuously disclose in the advertisement that the pay-per-call service is not authorized, endorsed, or approved by any Federal agency. Advertisements providing information on a Federal program shall include, but not be limited to, advertisements that contain a seal, insignia, trade or brand name, or any other term or symbol that reasonably could be interpreted or construed as implying any Federal government connection, approval, or endorsement.

(2) For purposes of § 308.3(d), disclosures shall be made "clearly and conspicuously" as set forth in § 308.3(a) and as follows:

(i) In a television or videotape advertisement, the disclosure may be made in either the audio or video portion of the advertisement. If the disclosure is made in the video portion, it shall appear on the screen in sufficient size and for sufficient time to allow consumers to read and comprehend the disclosure. The disclosure shall begin within the first fifteen (15) seconds of the advertisement.

(ii) In a print advertisement, the disclosure shall appear in a sufficient size and prominence and such location to be readily noticeable, readable and comprehensible. The disclosure shall appear in the top one-third of the advertisement.

(iii) In a radio advertisement, the disclosure shall begin within the first fifteen (15) seconds of the advertisement.

(e) *Prohibition on advertising to children.* (1) The provider of pay-per-call services shall not direct advertisements for such pay-per-call services to children under the age of 12, unless the service is a bona fide educational service.

(2) For the purposes of this regulation, advertisements directed to children under 12 shall include: any pay-per-call advertisement appearing during or immediately adjacent to programming for which competent and reliable audience composition data demonstrate that more than 50% of the audience is composed of children under 12, and any pay-per-call advertisement appearing in a periodical for which competent and reliable readership data demonstrate that more than 50% of the readership is composed of children under 12.

(3) For the purposes of this regulation, if competent and reliable audience composition or readership data does not demonstrate that more than 50% of the audience or readership is composed of children under 12, then the Commission shall consider the following criteria in determining whether an advertisement is directed to children under 12:

(i) Whether the advertisement appears in a publication directed to children under 12, including, but not limited to, books, magazines and comic books;

(ii) Whether the advertisement appears during or immediately adjacent to television programs directed to children under 12, including, but not limited to, children's programming as defined by the Federal Communications Commission, animated programs, and after-school programs;

(iii) Whether the advertisement appears on a television station or channel directed to children under 12;

(iv) Whether the advertisement is broadcast during or immediately adjacent to radio programs directed to children under 12, or broadcast on a radio station directed to children under 12;

(v) Whether the advertisement appears on the same video as a commercially-prepared video directed to children under 12, or preceding a movie directed to children under 12 shown in a movie theater;

(vi) Whether the advertisement or promotion appears on product packaging directed to children under 12; and

(vii) Whether the advertisement, regardless of when or where it appears, is directed to children under 12 in light of its subject matter, visual content, age of models, language, characters, tone, message, or the like.

(f) *Advertising to individuals under the age of 18.* (1) The provider of pay-per-call services shall ensure that any pay-per-call advertisement directed primarily to individuals under the age of 18 shall contain a clear and conspicuous disclosure that all individuals under the age of 18 must have the permission of such individual's parent or legal guardian prior to calling such pay-per-call service.

(2) For purposes of § 308.3(f), disclosures shall be made "clearly and conspicuously" as set forth in § 308.3(a) and as follows:

(i) In a television or videotape advertisement, each letter or numeral of the video disclosure shall be, at a minimum, one-half the size of each letter or numeral of the largest presentation of the pay-per-call number. The video disclosure shall appear on the screen for sufficient time to allow consumers to read and comprehend the disclosure. An audio disclosure shall be made at least once, simultaneously with a video presentation of the disclosure. However, no audio presentation of the disclosure is required in: (A) An advertisement fifteen (15) seconds or less in length in which the pay-per-call number is not presented in the audio portion, or (B) an advertisement in which there is no audio presentation of information regarding the pay-per-call service, including the pay-per-call number.

(ii) In a print advertisement, each letter or numeral of the disclosure shall be, at a minimum, one-half the size of each letter or numeral of the largest presentation of the pay-per-call number.

(3) For the purposes of this regulation, advertisements directed primarily to individuals under 18 shall include: Any pay-per-call advertisement appearing during or immediately adjacent to programming for which competent and reliable audience composition data demonstrate that more than 50% of the audience is composed of individuals under 18, and any pay-per-call advertisement appearing in a periodical for which competent and reliable readership data demonstrate that more than 50% of the readership is composed of individuals under 18.

(4) For the purposes of this regulation, if competent and reliable audience composition or readership data does not demonstrate that more than 50% of the audience or readership is composed of individuals under 18, then the Commission shall consider the following criteria in determining whether an advertisement is directed primarily to individuals under 18:

(i) Whether the advertisement appears in publications directed primarily to individuals under 18, including, but not limited to, books, magazines and comic books;

(ii) Whether the advertisement appears during or immediately adjacent to television programs directed primarily to individuals under 18, including, but not limited to, mid-afternoon weekday television shows;

(iii) Whether the advertisement is broadcast on radio stations that are directed primarily to individuals under 18;

(iv) Whether the advertisement appears on a cable or broadcast television station directed primarily to individuals under 18;

(v) Whether the advertisement appears on the same video as a commercially-prepared video directed primarily to individuals under 18, or preceding a movie directed primarily to individuals under 18 shown in a movie theater; and

(vi) Whether the advertisement, regardless of when or where it appears, is directed primarily to individuals under 18 in light of its subject matter, visual content, age of models, language, characters, tone, massage, or the like.

(g) *Electronic tones in advertisements.* The provider of pay-per-call services is prohibited from using advertisements that emit electronic tones that can automatically dial a pay-per-call service.

(h) *Telephone solicitations.* The provider of pay-per-call services shall ensure that any telephone message that solicits calls to the pay-per-call service discloses the cost of the call in a slow and deliberate manner and in a reasonably understandable volume, in accordance with §§ 308.3(b)(1)(i)-(v).

(i) *Referral to toll-free telephone numbers.* The provider of pay-per-call services is prohibited from referring in advertisements to an 800 telephone number, or any other telephone number advertised as or widely understood to be toll-free, if that number violates the prohibition concerning toll-free numbers set forth in § 308.5(i).

§ 308.4 Special rule for infrequent publications.

(a) The provider of any pay-per-call service that advertises a pay-per-call service in a publication that meets the requirements set forth in § 308.4(c) may include in such advertisement, in lieu of the cost disclosures required by § 308.3(b), a clear and conspicuous disclosure that a call to the advertised pay-per-call service may result in a substantial charge.

(b) The provider of any pay-per-call service that places an alphabetical listing in a publication that meets the requirements set forth in § 308.4(c) is not required to make any of the disclosures required by §§ 308.3 (b), (c), (d) and (f) in the alphabetical listing, provided that such listing does not contain any information except the name, address and telephone number of the pay-per-call provider.

(c) The publication referred to in § 308.4(a) and (b) must be:

(1) Widely distributed;

(2) Printed annually or less frequently; and

(3) One that has an established policy of not publishing specific prices in advertisements.

§ 308.5 Pay-per-call service standards.

(a) *Preamble message.* The provider of pay-per-call services shall include, in each pay-per-call message, an introductory disclosure message ("preamble") in the same language as that principally used in the pay-per-call message, that clearly, in a slow and deliberate manner and in a reasonably understandable volume:

(1) Identifies the name of the provider of the pay-per-call service and describes the service being provided;

(2) Specifies the cost of the service as follows:

(i) If there is a flat fee for the call, the preamble shall state the total cost of the call;

(ii) If the call is billed on a time-sensitive basis, the preamble shall state

the cost per minute and any minimum charges; if the length of the program can be determined in advance, the preamble shall also state the maximum charge that could be incurred if the caller listens to the complete program;

(iii) If the call is billed on a variable rate basis, the preamble shall state, in accordance with §§ 308.5(a)(2)(i) and (ii), the cost of the initial portion of the call, any minimum charges, and the range of rates that may be charged depending on the options chosen by the caller;

(iv) Any other fees that will be charged for the service shall be disclosed, as well as fees for any other pay-per-call service to which the caller may be transferred;

(3) Informs the caller that charges for the call begin, and that to avoid charges the call must be terminated, three seconds after a clearly discernible signal or tone indicating the end of the preamble;

(4) Informs the caller that anyone under the age of 18 must have the permission of parent or legal guardian in order to complete the call; and

(5) Informs the caller, in the case of a pay-per-call service that is not operated or expressly authorized by a Federal agency but that provides information on a Federal program, or that uses a trade or brand name or any other term that reasonably could be interpreted or construed as implying any Federal government connection, approval or endorsement, that the pay-per-call service is not authorized, endorsed, or approved by any Federal agency.

(b) *No charge to caller for preamble message.* The provider of pay-per-call services is prohibited from charging a caller any amount whatsoever for such a service if the caller hangs up at any time prior to three seconds after the signal or tone indicating the end of the preamble described in § 308.5(a). However, the three-second delay, and the message concerning such delay described in § 308.5(a)(3), is not required if the provider of pay-per-call services offers the caller an affirmative means (such as pressing a key on a telephone keypad) of indicating a decision to incur the charges.

(c) *Nominal cost calls.* The preamble described in § 308.5(a) is not required when the entire cost of the pay-per-call service, whether billed as a flat rate or on a time sensitive basis, is $2.00 or less.

(d) *Data service calls.* The preamble described in § 308.5(a) is not required when the entire call consists of the non-verbal transmission of information.

(e) *Bypass mechanism.* The provider of pay-per-call services that offers to frequent callers or regular subscribers to such services the option of activating a bypass mechanism to avoid listening to the preamble during subsequent calls shall not be deemed to be in violation of § 308.5(a), *provided that* any such bypass mechanism shall be disabled for a period of no less than 30 days immediately after the institution of an increase in the price for the service or a change in the nature of the service offered.

(f) *Billing limitations.* The provider of pay-per-call services is prohibited from billing consumers in excess of the amount described in the preamble for those services and from billing for any services provided in violation of any section of this rule.

(g) *Stopping the assessment of time-based charges.* The provider of pay-per-call services shall stop the assessment of time-based charges immediately upon disconnection by the caller.

(h) *Prohibition on services to children.* The provider of pay-per-call services shall not direct such services to children under the age of 12, unless such service is a bona fide educational service. The Commission shall consider the following criteria in determining whether a pay-per-call service is directed to children under 12:

(1) Whether the pay-per-call service is advertised in the manner set forth in §§ 308.3(e)(2) and (3); and

(2) Whether the pay-per-call service, regardless of when or where it is advertised, is directed to children under 12, in light of its subject matter, content, language, featured personality, characters, tone, message, or the like.

(i) *Prohibition concerning toll-free numbers.* Any person is prohibited from using an 800 number or other telephone number advertised as or widely understood to be toll-free in a manner that would result in:

(1) The calling party being assessed, by virtue of completing the call, a charge for the call;

(2) The calling party being connected to an access number for, or otherwise transferred to, a pay-per-call service;

(3) The calling party being charged for information conveyed during the call unless the calling party has a presubscription or comparable arrangement to be charged for the information; or

(4) The calling party being called back collect for the provision of audio or data information services, simultaneous voice conversation services, or products.

(j) *Disclosure requirements for billing statements.* The provider of pay-per-call services shall ensure that any billing statement for such provider's charges shall:

(1) Display any charges for pay-per-call services in a portion of the consumer's bill that is identified as not being related to local and long distance telephone charges;

(2) For each charge so displayed, specify the type of service, the amount of the charge, and the date, time, and, for calls billed on a time-sensitive basis, the duration of the call; and

(3) Display the local or toll-free telephone number where consumers can obtain answers to their questions and information on their rights and obligations with regard to their use of pay-per-call services, and can obtain the name and mailing address of the provider of pay-per-call services.

(k) *Refunds to consumers.* The provider of pay-per-call services shall be liable for refunds or credits to consumers who have been billed for pay-per-call services, and who have paid the charges for such services, pursuant to pay-per-call programs that have been found to have violated any provision of this rule or any other Federal rule or law.

(l) *Service bureau liability.* A service bureau shall be liable for violations of the rule by pay-per-call services using its call processing facilities where it knew or should have known of the violation.

§ 308.6 Access to information.

Any common carrier that provides telecommunication services to any provider of pay-per-call services shall make available to the Commission, upon written request, any records and financial information maintained by such carrier relating to the arrangements (other than for the provision of local exchange service) between such carrier and any provider of pay-per-call services.

§ 308.7 Billing and collection for pay-per-call services.

(a) *Definitions.* For the purposes of this section, the following definitions shall apply:

(1) *Billing entity* means any person who transmits a billing statement to a customer for a telephone-billed purchase, or any person who assumes responsibility for receiving and responding to billing error complaints or inquiries.

(2) *Billing error* means any of the following:

(i) A reflection on a billing statement of a telephone-billed purchase that was not made by the customer nor made from the telephone of the customer who was billed for the purchase or, if made,

was not in the amount reflected on such statement.

(ii) A reflection on a billing statement of a telephone-billed purchase for which the customer requests additional clarification, including documentary evidence thereof.

(iii) A reflection on a billing statement of a telephone-billed purchase that was not accepted by the customer or not provided to the customer in accordance with the stated terms of the transaction.

(iv) A reflection on a billing statement of a telephone-billed purchase for a call made to an 800 or other toll free telephone number.

(v) The failure to reflect properly on a billing statement a payment made by the customer or a credit issued to the customer with respect to a telephone-billed purchase.

(vi) A computation error or similar error of an accounting nature on a billing statement of a telephone-billed purchase.

(vii) Failure to transmit a billing statement for a telephone-billed purchase to a customer's last known address if that address was furnished by the customer at least twenty days before the end of the billing cycle for which the statement was required.

(viii) A reflection on a billing statement of a telephone-billed purchase that is not identified in accordance with the requirements of § 308.5(j).

(3) *Customer* means any person who acquires or attempts to acquire goods or services in a telephone-billed purchase, or who receives a billing statement for a telephone-billed purchase charged to a telephone number assigned to that person by a providing carrier.

(4) *Preexisting agreement* means a "presubscription or comparable arrangement," as that term is defined in § 308.2(e).

(5) *Providing carrier* means a local exchange or interexchange common carrier providing telephone services (other than local exchange services) to a vendor for a telephone-billed purchase that is the subject of a billing error complaint or inquiry.

(6) *Telephone-billed purchase* means any purchase that is completed solely as a consequence of the completion of the call or a subsequent dialing, touch tone entry, or comparable action of the caller. Such term does not include:

(i) A purchase by a caller pursuant to a preexisting agreement with a vendor;

(ii) Local exchange telephone services or interexchange telephone services or any service that the Federal Communications Commission determines by rule—

(A) Is closely related to the provision of local exchange telephone services or interexchange telephone services; and

(B) Is subject to billing dispute resolution procedures required by Federal or state statute or regulation; or

(iii) The purchase of goods or services that is otherwise subject to billing dispute resolution procedures required by Federal statute or regulation.

(7) *Vendor* means any person who, through the use of the telephone, offers goods or services for a telephone-billed purchase.

(b) *Initiation of billing review.* A customer may initiate a billing review with respect to a telephone-billed purchase by providing the billing entity with notice of a billing error no later than 60 days after the billing entity transmitted the first billing statement that contains a charge for such telephone-billed purchase. If the billing error is the reflection on a billing statement of a telephone-billed purchase not provided to the customer in accordance with the stated terms of the transaction, the 60-day period shall begin to run from the date the goods or services are delivered or, if not delivered, should have been delivered, if such date is later than the date the billing statement was transmitted. A billing error notice shall:

(1) Set forth or otherwise enable the billing entity to identify the customer's name and the telephone number to which the charge was billed;

(2) Indicate the customer's belief that the statement contains a billing error and the type, date, and amount of such; and

(3) Set forth the reasons for the customer's belief, to the extent possible, that the statement contains a billing error.

(c) *Disclosure of method of providing notice; presumption if oral notice is permitted.* A billing entity shall clearly and conspicuously[2] disclose on each billing statement or on other material accompanying the billing statement the method (oral or written) by which the customer may provide notice to initiate review of a billing error in the manner set forth in § 308.7(b). If oral notice is permitted, any customer who orally communicates an allegation of a billing error to a billing entity shall be presumed to have properly initiated a billing review in accordance with the requirements of § 308.7(b).

(d) *Response to customer notice.* A billing entity that receives notice of a billing error as described in § 308.7(b) shall:

(1) Send a written acknowledgement to the customer including a statement that any disputed amount need not be paid pending investigation of the billing error. This shall be done no later than forty (40) days after receiving the notice, unless the action required by § 308.7(d)(2) is taken within such 40-day period; and

(2)(i) Correct the billing error and credit the customer's account for any disputed amount and any related charges, and notify the customer of the correction. The billing entity also shall disclose to the customer that collection efforts may occur despite the credit, and shall provide the names, mailing addresses, and business telephone numbers of the vendor and providing carrier, as applicable, that are the subject of the telephone-billed purchase, or provide the customer with a local or toll-free telephone number that the customer may call to obtain this information directly. However, the billing entity is not required to make the disclosure concerning collection efforts if the vendor, its agent, or the providing carrier, as applicable, will not collect or attempt to collect the disputed charge; or

(ii) Transmit an explanation to the customer, after conducting a reasonable investigation (including, where appropriate, contacting the vendor or providing carrier),[3] setting forth the reasons why it has determined that no billing error occurred or that a different billing error occurred from that asserted, make any appropriate adjustments to the customer's account, and, if the customer so requests, provide a written explanation and copies of documentary evidence of the customer's indebtedness.

(3) The action required by § 308.7(d)(2) shall be taken no later than two complete billing cycles of the billing entity (in no event later than ninety (90) days) after receiving the

[2] The standard for "clear and conspicuous" as used in this section shall be the standard enunciated by the Board of Governors of the Federal Reserve System in its Official Staff Commentary on Regulation Z, which requires simply that the disclosures be in a reasonably understandable form. *See* 12 CFR part 226, Supplement I, Comment 226.5(a)(1)–1.

[3] If a customer submits a billing error notice alleging either the nondelivery of goods or services or that information appearing on a billing statement has been reported incorrectly to the billing entity, the billing entity shall not deny the assertion unless it conducts a reasonable investigation and determines that the goods or services were actually delivered as agreed or that the information was correct. There shall be a rebuttable presumption that goods or services were actually delivered to the extent that a vendor or providing carrier produces documents prepared and maintained in the ordinary course of business showing the date on, and the place to, which the goods or services were transmitted or delivered.

notice of the billing error and before taking any action to collect the disputed amount, or any part thereof. After complying with § 308.7(d)(2), the billing entity shall:

(i) If it is determined that any disputed amount is in error, promptly notify the appropriate providing carrier or vendor, as applicable, of its disposition of the customer's billing error and the reasons therefor; and

(ii) Promptly notify the customer in writing of the time when payment is due of any portion of the disputed amount determined not to be in error, which time shall be the longer of ten (10) days or the number of days the customer is ordinarily allowed (whether by custom, contract or state law) to pay undisputed amounts, and that failure to pay such amount may be reported to a credit reporting agency or subject the customer to a collection action, if that in fact may happen.

(e) *Withdrawal of billing error notice.* A billing entity need not comply with the requirements of § 308.7(d) if the customer has, after giving notice of a billing error and before the expiration of the time limits specified therein, agreed that the billing statement was correct or agreed to withdraw voluntarily the billing error notice.

(f) *Limitation on responsibility for billing error.* After complying with the provisions of § 308.7(d), a billing entity has no further responsibility under that section if the customer continues to make substantially the same allegation with respect to a billing error.

(g) *Customer's right to withhold disputed amount; limitation on collection action.* Once the customer has submitted notice of a billing error to a billing entity, the customer need not pay, and the billing entity, providing carrier, or vendor may not try to collect, any portion of any required payment that the customer reasonably believes is related to the disputed amount until the billing entity receiving the notice has complied with the requirements of § 308.7(d). The billing entity, providing carrier, or vendor are not prohibited from taking any action to collect any undisputed portion of the bill, or from reflecting a disputed amount and related charges on a billing statement, provided that the billing statement clearly states that payment of any disputed amount or related charges is not required pending the billing entity's compliance with § 308.7(d).

(h) *Prohibition on charges for initiating billing review.* A billing entity, providing carrier, or vendor may not impose on the customer any charge related to the billing review, including charges for documentation or investigation.

(i) *Restrictions on credit reporting—*(1) *Adverse credit reports prohibited.* Once the customer has submitted notice of a billing error to a billing entity, a billing entity, providing carrier, vendor, or other agent may not report or threaten directly or indirectly to report adverse information to any person because of the customer's withholding payment of the disputed amount or related charges, until the billing entity has met the requirements of § 308.7(d) and allowed the customer as many days thereafter to make payment as prescribed by § 308.7(d)(3)(ii).

(2) *Reports on continuing disputes.* If a billing entity receives further notice from a customer within the time allowed for payment under § 308.7(i)(1) that any portion of the billing error is still in dispute, a billing entity, providing carrier, vendor, or other agent may not report to any person that the customer's account is delinquent because of the customer's failure to pay that disputed amount unless the billing entity, providing carrier, vendor, or other agent also reports that the amount is in dispute and notifies the customer in writing of the name and address of each person to whom the vendor, billing entity, providing carrier, or other agent has reported the account as delinquent.

(3) *Reporting of dispute resolutions required.* A billing entity, providing carrier, vendor, or other agent shall report in writing any subsequent resolution of any matter reported pursuant to § 308.7(i)(2) to all persons to whom such matter was initially reported.

(j) *Forfeiture of right to collect disputed amount.* Any billing entity, providing carrier, vendor, or other agent who fails to comply with the requirements of §§ 308.7(c), (d), (g), (h), or (i) forfeits any right to collect from the customer the amount indicated by the customer, under § 308.7(b)(2), to be in error, and any late charges or other related charges thereon, up to $50 per transaction.

(k) *Prompt notification of returns and crediting of refunds.* When a vendor other than the billing entity accepts the return of property or forgives a debt for services in connection with a telephone-billed purchase, the vendor shall, within seven (7) business days from accepting the return or forgiving the debt, either:

(1) Mail or deliver a cash refund directly to the customer's address, and notify the appropriate billing entity that the customer has been given a refund, or

(2) Transmit a credit statement to the billing entity through the vendor's normal channels for billing telephone-billed purchases. The billing entity shall, within seven (7) business days after receiving a credit statement, credit the customer's account with the amount of the refund.

(l) *Right of customer to assert claims or defenses.* Any billing entity or providing carrier who seeks to collect charges from a customer for a telephone-billed purchase that is the subject of a dispute between the customer and the vendor shall be subject to all claims (other than tort claims) and defenses arising out of the transaction and relating to the failure to resolve the dispute that the customer could assert against the vendor, if the customer has made a good faith attempt to resolve the dispute with the vendor or providing carrier (other than the billing entity). The billing entity or providing carrier shall not be liable under this paragraph for any amount greater than the amount billed to the customer for the purchase (including any related charges).

(m) *Retaliatory actions prohibited.* A billing entity, providing carrier, vendor, or other agent may not accelerate any part of the customer's indebtedness or restrict or terminate the customer's access to pay-per-call services solely because the customer has exercised in good faith rights provided by this section.

(n) *Notice of billing error rights.*—(1) *Annual statement.* (i) A billing entity shall mail or deliver to each customer, with the first billing statement for a telephone-billed purchase mailed or delivered after the effective date of these regulations, a statement of the customer's billing rights with respect to telephone-billed purchases. Thereafter the billing entity shall mail or deliver the billing rights statement at least once per calendar year to each customer to whom it has mailed or delivered a billing statement for a telephone-billed purchase during the previous twelve months. The billing rights statement shall disclose that the rights and obligations of the customer and the billing entity, set forth therein, are provided under the federal Telephone Disclosure and Dispute Resolution Act. The statement shall describe the procedure that the customer must follow to notify the billing entity of a billing error and the steps that the billing entity must take in response to the customer's notice. If the customer is permitted to provide oral notice of a billing error, the statement shall disclose that a customer who orally communicates an allegation of a billing error is presumed to have provided

sufficient notice to initiate a billing review. The statement shall also disclose the customer's right to withhold payment of any disputed amount, and that any action to collect any disputed amount will be suspended, pending completion of the billing review. The statement shall further disclose the customer's rights and obligations if the billing entity determines that no billing error occurred, including what action the billing entity may take if the customer continues to withhold payment of the disputed amount. Additionally, the statement shall inform the customer of the billing entity's obligation to forfeit any disputed amount (up to $50 per transaction) if the billing entity fails to follow the billing and collection procedures prescribed by § 308.7 of this rule.

(ii) A billing entity that is a common carrier may comply with § 308.7(n)(1)(i) by, within 60 days after the effective date of these regulations, mailing or delivering the billing rights statement to all of its customers and, thereafter, mailing or delivering the billing rights statement at least once per calendar year, at intervals of not less than 6 months nor more than 18 months, to all of its customers.

(2) *Alternative summary statement.* As an alternative to § 308.7(n)(1), a billing entity may mail or deliver, on or with each billing statement, a statement that sets forth the procedure that a customer must follow to notify the billing entity of a billing error. The statement shall also disclose the customer's right to withhold payment of any disputed amount, and that any action to collect any disputed amount will be suspended, pending completion of the billing review.

(3) *General disclosure requirements.* (i) The disclosures required by § 308.7(n)(1) shall be made clearly and conspicuously on a separate statement that the customer may keep.

(ii) The disclosures required by § 308.7(n)(2) shall be made clearly and conspicuously and may be made on a separate statement or on the customer's billing statement. If any of the disclosures are provided on the back of the billing statement, the billing entity shall include a reference to those disclosures on the front of the statement.

(iii) At the billing entity's option, additional information or explanations may be supplied with the disclosures required by § 308.7(n), but none shall be stated, utilized, or placed so as to mislead or confuse the customer or contradict, obscure, or detract attention from the information required to be disclosed. The disclosures required by § 308.7(n) shall appear separately and above any other disclosures.

(o) *Multiple billing entities.* If a telephone-billed purchase involves more than one billing entity, only one set of disclosures need by given, and the billing entities shall agree among themselves which billing entity must comply with the requirements that this regulation imposes on any or all of them. The billing entity designated to receive and respond to billing errors shall remain the only billing entity responsible for complying with the terms of § 308.7(d). If a billing entity other than the one designated to receive and respond to billing errors receives notice of a billing error as described in § 308.7(b), that billing entity shall either: (1) Promptly transmit to the customer the name, mailing address, and business telephone number of the billing entity designated to receive and respond to billing errors; or (2) transmit the billing error notice within fifteen (15) days to the billing entity designated to receive and respond to billing errors. The time requirements in § 308.7(d) shall not begin to run until the billing entity designated to receive and respond to billing errors receives notice of the billing error, either from the customer or from the billing entity to whom the customer transmitted the notice.

(p) *Multiple customers.* If there is more than one customer involved in a telephone-billed purchase, the disclosures may be made to any customer who is primarily liable on the account.

§ 308.8 Severability.

The provisions of this rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

§ 308.9 Rulemaking review.

No later than four years after the effective date of this Rule, the Commission shall initiate a rulemaking review proceeding to evaluate the operation of the rule.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 93–18459 Filed 8–6–93; 8:45 am]

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federal register

Monday
August 9, 1993

Part III

Department of Agriculture

Agricultural Marketing Service

7 CFR Parts 29, 52, 55, 58, 59, 61, 70, 90–159, 180

Agency Reorganization of Analytical Testing Services; Rules

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 29, 52, 55, 58, 59, 61, 70, 90–159, 180

[CS–91–009]

RIN 0581–AA51

Agency Reorganization of Analytical Testing Services

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: On January 15, 1989, the Agricultural Marketing Service (AMS) of the Department of Agriculture consolidated and transferred functions related to analytical laboratory testing services performed on various agricultural products to its Science Division (formerly Commodities Scientific Support Division). This rule revises AMS regulations by establishing a new subchapter E in title 7 and by amending and transferring regulations concerning laboratory services and the Plant Variety Protection Act to the new subchapter. The regulations are also revised by adding provisions for statistical science support services and residue monitoring operations to the new subchapter E. The fees charged for testing and related services under the various Science Division programs are amended to reflect additional costs associated with the services. As a result of these amendments, AMS regulations related to analytical testing and laboratory services will be consolidated and the entire program will be administered by the Science Division.

EFFECTIVE DATE: August 9, 1993.

FOR FURTHER INFORMATION CONTACT: Dr. Craig A. Reed, Director, Science Division, Agricultural Marketing Service, U.S. Department of Agriculture, PO Box 96456, room 3507 South Agriculture Building, Washington, DC 20090–6456, Telephone (202) 720–5231.

SUPPLEMENTARY INFORMATION:

I. Executive Order 12291 and Secretary's Memorandum No. 1512–1; Executive Order 12778

This final rule has been reviewed under Executive Order 12291 and the USDA procedures established in Departmental Regulation 1512–1. The Agency has determined that this action is non-major and will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; significant adverse affects 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. Further, the fee increases only reflect an increase in costs to the applicants that utilize certain laboratory services.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This action is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

II. Effect on Small Entities

The Administrator, Agricultural Marketing Service, has determined that this action will not have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act (5 U.S.C. 601–612). The fees provided for in this document merely reflect a minimal increase in the costs currently borne by those entities which utilize certain laboratory services. In addition to reorganizing AMS analytical testing services under the new Science Division, this rule provides for uniform laboratory test fees for the same type of analysis performed in different commodities and their related products.

III. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) the reporting and recordkeeping included in 7 CFR part 96 have been previously approved by the Office of Management and Budget (OMB) and have been assigned OMB control number 0581–0008. The forms included in 7 CFR part 97 have been approved by the Office of Management and Budget and have been assigned OMB control number 0581–0055.

IV. Background Information

AMS provides voluntary and mandatory analytical laboratory testing, licensure of chemists and analysts, and quality assurance oversight services to private and government applicants in accordance with applicable authorities. Prior to January 15, 1989, laboratory services and technical support were provided by various AMS Divisions—Cotton, Poultry, Fruit and Vegetable, Tobacco, Dairy, and Livestock and Seed. The laboratory testing programs operated independently under the divisions according to the respective division's rules published in title 7 of the Code of Federal Regulations.

In August 1987, the AMS Administrator established a task force composed of members from the various divisions. The task force reviewed and evaluated existing AMS laboratory and technical support programs to identify organizational alternatives that could improve the quality, efficiency, and cost-effectiveness of services.

Based on task force findings and recommendations, the AMS Administrator proposed to reorganize and consolidate the field laboratory structure under the Science Division (formerly the Commodities Scientific Support Division). On October 28, 1988, the Assistant Secretary for Administration approved the proposal. On January 15, 1989, the Administrator announced the transfer of functions to the Science Division (SD).

Presently, regulations pertaining to analytical testing programs appear in chapter I, subchapters A and C of the regulations under the former divisions' sections. Due to the reorganization and consolidation of the field laboratory structure of AMS, and the transfer of functions and responsibilities to Science Division, a new subchapter E, Commodity Laboratory Testing Programs, is established to implement the changes. In addition, laboratory testing fees and hourly rates currently specified in parts 52, 55, 58, and 70 are revised, consolidated, and published in a new part 91. Fees pertaining to cottonseed grading and certification in current part 61 remain in new part 96 pertaining to cottonseed because cottonseed grade determination is a direct result of laboratory analysis performed by USDA licensed chemists in their individual laboratories. Fees charged under the Plant Variety Protection program in current part 180 remain in new part 97 which pertains to nonlaboratory services under the Plant Variety Protection program. Since the hourly rate for the laboratory services provided herein may change from time to time, by consolidating the majority of these fees in part 91, the Agency only needs to amend one part instead of several different parts of the CFR each time the rate for such laboratory test services is revised. This consolidation also results in greater fee uniformity for identical tests and eases the administration of laboratory services and oversight.

New part 90 contains the introduction to subchapter E and provides an overview of the functions and responsibilities of the Science Division. In addition, part 90 contains the good

laboratory practice and general quality assurance requirements for laboratory service programs of laboratories certified and approved by the Science Division. Part 91, in addition to laboratory testing fees, contains general administrative provisions and definitions.

Part 92 pertaining to tobacco contains definitions, the location of the Science Division laboratory, specific pesticide residues tests, and other types of laboratory testing services. Part 93 contains definitions, locations of Science Division laboratories, references for analytical methods, and available laboratory tests, and special analyses performed on processed fruits and vegetables. Part 93 is divided into three subparts in order to separate the analytical testing and laboratory services for fruits and vegetables performed at the multidisciplinary Science Division Midwestern laboratory in Chicago, Illinois, and the specialty Science Division laboratories located throughout the southern United States. Subpart A of part 93 describes the analytical services performed at Science Division's Citrus Laboratory in Winterhaven, Florida. Laboratory analyses are conducted at this specialty laboratory primarily to determine if citrus products produced in Florida satisfy quality and grade standards set forth in the Florida Citrus Code. Analyses of citrus juice and citrus products from other countries and other locations within the United States are also available. Subpart B of part 93 describes the laboratory analyses available for different types of food products, including processed fruits and vegetables and beverage products. The Midwestern Laboratory in Chicago conducts the majority of analyses for these food products to derive their grade and quality, and to determine compliance of the product with applicable government specifications. Subpart C of part 93 describes the analytical services and the quality control sample program conducted at Science Division's nine aflatoxin laboratories located in Georgia, Virginia, North Carolina, Alabama, and Oklahoma. These specialty laboratories primarily determine the aflatoxin content for peanuts, peanut products and tree nuts. In addition, some of the laboratories offer physical and chemical composition analyses for oilseeds or oilseed products.

Part 94 contains definitions, locations of the Science Division laboratories, references for the majority of analytical methods, available laboratory analyses that are applicable to assure food safety, and the identity and quality of egg products or poultry products. Subpart A of this part describes the mandatory egg product samples that are analyzed for the Poultry Division by appropriated and annually designated funds. Subpart B of this part describes the voluntary egg product samples that are analyzed for a fee at a previously ascertained analysis time, and the current hourly rate. Subpart C of this part is reserved for the Salmonella Laboratory Recognition Program.

Part 95, Processed Dairy Products, contains definitions, the location of the Science Division laboratory, references for analytical testing methods, and available laboratory analyses to determine the United States grade standards, wholesomeness and quality of processed dairy products. Laboratory analyses that are applicable to determine compliance with government specifications and tolerances for residues also are specified. In addition, part 95 outlines the laboratory quality assurance programs for dairy products that are administered by the Science Division. These programs involve annual on-site laboratory reviews to assess continued conformance with method and equipment requirements of USDA approved procedures, and to assess the analysts' current proficiency in performing analyses of dairy products with quality control check samples.

Part 96 contains definitions, regulations regarding the issuance of licenses, and the conditions for renewal of licenses for chemists in analyzing and performing official grade determination of cottonseed. Part 96 includes user fees for grading, the official certification for cottonseed, the cottonseed chemist license examination fee, and the annual chemist license renewal fee. In addition, part 96 includes procedure for issuance of the certificates and recordkeeping responsibilities of cottonseed chemists, grounds for suspension of chemists' licenses, and the procedures for official cottonseed grade determinations using individually determined composition factors.

Part 97 contains all the regulations of the Plant Variety Protection (PVP) Office in Beltsville, Maryland. Part 97 results from the AMS transferral of the PVP Office from the Livestock and Seeds Division to the Science Division. The existing PVP regulations in part 180 of former subchapter H are removed in their entirety and are redesignated and moved to part 97 of new subchapter E. Except for changes in applicable words from the masculine to neuter gender, no text nor fee schedule changes are made.

Part 98 contains definitions, locations of the Science Division laboratories, references for the majority of analytical methods, quality assurance programs and the available laboratory analyses for meats and meat products, that are often specified by purchase contracts, to be performed for the Department of Defense (DOD), Defense Personnel Support Center (DPSC), or for city or state government parties through the inspection service of the AMS Livestock and Seed Division. Part 98 is divided into two subparts: subpart A of this part pertains to meat and meat product procurement testing for school lunch, defense, prison and other feeding programs, and subpart B of this part describes the Science Division's certification program for private United States laboratories conducting the examination of horsemeat for trichinae parasites in exported products to the European Community.

Part 99 contains statistical terms and provisions pertaining to the Statistical Science Program within the AMS Science Division. The Statistical Science staff, comprised of specialists in Washington, DC and Kansas City, Missouri, provides technical consulting and advising services for the AMS commodity divisions, and data processing and statistical support for applied research, for the standardization of inspection equipment. This branch also renders advice and answers concerning sampling problems through the application of mathematical statistics and computing. Together with other divisions of AMS, the branch establishes uniform testing procedures and develops rapid identification methods for hazardous substances which present an environmental and human health risk.

Part 100 contains administrative details of the Science Division's National Laboratory Accreditation Program once it is implemented. Laboratories are required to meet established criteria for accreditation in chemical residue testing of agricultural products and minimum requirements for facility, equipment, methodology and quality controls. In addition, analysts in such laboratories are required to demonstrate sustained acceptable performance through regular testing of interlaboratory proficiency check samples at different chemical residue levels. Part 100 also includes fees for laboratory accreditation to offset the costs of the National Laboratory Accreditation Program (NLAP).

Part 101 is reserved for regulations pertaining to Science Division's Pesticide Data Program (PDP). The Program is currently staffed by Science Division employees in Washington, DC and Manassas, Virginia.

Part 110 is reserved for Science Division's recordkeeping program for restricted use pesticides by certified applicators. Parts 102–109 and parts 111–159 is reserved for the future SD programs.

V. Basis for Fee and Hourly Analysis Rate Changes

Fees and hourly analysis rates which are presently in effect are inadequate to recover the current cost of providing the laboratory services and technical support to the AMS Divisions—Poultry, Fruit and Vegetable, Dairy, and Livestock and Seed and to other applicants of the services. The Agricultural Marketing Act of 1946, 7 U.S.C. 1621–1627, provides that reasonable fees be collected from the user of program services to cover as nearly as practicable the costs of services rendered. This rule amends the current hourly analytical testing rates to a consolidated and single rate of $34.20 per hour for the users of the laboratory services to cover costs associated with improvements in operation of the programs, replacements of outdated essential laboratory equipment, and increases in those costs due to raises in salaries of Federal employees as well as other increases affecting Federal employees, such as costs for travel and benefits.

Cost analysis studies have revealed that since the last fee change on October 19, 1992, as published in the **Federal Register** at 57 FR 47566, the current hourly rate of $32.11 for the voluntary laboratory testing of eggs and poultry products is inadequate to cover expenses. Analysis of costs have shown that since the last fee change on April 17, 1989, as published in the **Federal Register** at 54 FR 15167, the current hourly rate of $28.00 for the laboratory testing of dairy and meat products is also inadequate to cover expenses. In addition, the current hourly rate of $25.00 for analysis and testing of fruits and vegetables, as published on November 19, 1990, in the **Federal Register** at 55 FR 48102, is insufficient to recover this program's costs. The major increase in expenses is the result of salary increases effective each January for Federal employees that have increased General Schedule (GS) salaries by 11.9 percent since Fiscal Year 1989. Furthermore, the program's cost for the retirement system and health insurance of Federal employees has increased by over 13 percent. There have also been expenditures for new laboratory equipment and facilities. The Agency has determined that due to the aforementioned increases in operating costs of the programs, the two Science Division regional laboratories (Eastern and Midwestern) will incur a $304,900 loss in fiscal year 1992. Therefore, the Agency is revising the above mentioned hourly rates to $34.20. This hourly fee for laboratory service was established by distributing the annual operating expenditures for the laboratories over the total bench hours of service required to perform the analytical tests. The laboratory program costs do not include premium pay or service performed in the laboratories on Federal legal holidays. Hence, the rate for appeal, Federal holidays, and overtime laboratory service is 1½ times the base, or $51.30 per hour. These fees would meet the expenses of the Science Division laboratory service programs.

VI. Programs Without Consolidated Fees and Charges

Certain programs administrated by Science Division do not have a consolidated fee schedule because the laboratory fees and charges are set by agreement, the scientific programs are not a laboratory based service, or the costs are covered by allocated funds. The analyses for citrus juices and certain citrus products (part 93, subpart C) are performed in the Science Division laboratory in Winter Haven, Florida, for the State of Florida. The costs of analytical testing are covered by a Florida State Cooperative Agreement. The fees for imported tobacco pesticide residue determinations (part 92) are set annually and covered by a Memorandum of Understanding with the AMS Tobacco Division. The Science Division costs for the mandatory analyses of egg product samples (part 94, subpart A) are covered by designated funds of the Poultry Division which are appropriated annually. The cost of administering the USDA licensing program for cottonseed oil chemists is covered by license application and annual license renewal fees, as well as a unit fee assessed on each official certificate for cottonseed quality analyses and grade determination. These fees are specified in part 96. The Plant Variety Protection (PVP) schedule of fees remain with the PVP regulations in part 97. The PVP fees are assessed to certify the novelty and distinctiveness of sexually reproduced plant varieties. The costs of scheduled laboratory analyses and nonscheduled laboratory analyses for meats and related meat food products, that are listed in subpart A of part 98, are paid to the Science Division by a reimbursable agreement with the Livestock and Meat Standardization Branch of the Livestock and Seed Division. The fee charged to certify or to renew certification for each laboratory or analyst performing trichina testing on horsemeat for export to European Community countries is set annually by agreement between the Science Division and the United States Horsemeat Association in Fort Worth, Texas. Since the fee is based on actual costs that are part of the agreement, it does not need appear in subpart B of part 98. The costs of the Science Division Statistical Science support services for AMS commodity divisions are covered by the Agency's administrative overhead funds. The fees and charges for statistical science service to applicants outside AMS do not appear in part 99 because they are set by agreement with the applicant on an individual project and on a cost reimbursement basis. The fees and charges associated with the National Laboratory Accreditation Program will appear in part 100 and are aligned with the actual costs of administering this program when available. The costs for the Pesticide Data Program (PDP) in part 101 and the Recordkeeping Program for Restricted Use Pesticides by Certified Applicators (part 110) are covered by appropriated and annually designated funds.

VII. Basis for Proposed Fee Changes Related to Cottonseed Grading and Quality Certification

Cottonseed inspection, grading, and certification is conducted pursuant to authority in the Agricultural Marketing Act of 1946. The regulations concerning cottonseed may be found in 7 CFR part 61. The Act provides that reasonable fees be collected from users of the program services to cover, as nearly as practicable, the cost of services rendered. Since the last fee change on January 27, 1988, program operating costs have increased, but revenues from assessed user fees for cottonseed grading have remained the same.

The majority of funds under the cottonseed grading program are obtained from a unit fee assessment for official grade certificates. A portion of the certificate fees is used to recover the expenses of official cottonseed sampling and the remainder is used to meet the costs of supervision of the licensed chemists. Since Fiscal Year (FY) 1989 was a short year of 8½ months for the newly formed Science Division, with $5,609.25 total revenue generated for the cottonseed grading program, all fee increases are based on the income shortfalls after October 1, 1989. The travel expenditures for reviewing the performance of licensed cottonseed chemists, the support service charges, and the cost of preparing and fumigating check samples for proficiency testing have increased since the last increase in

cottonseed grading user fees. The Federal General Schedule salaries and civil service employee benefits have also increased. There are additional contractual costs for samplers oversight, sample selection and shipments. The Agency has determined that due to the aforementioned increases in program operating costs, the program will incur a $49,024 loss in FY 1993. This warrants a unit cost increase per certificate to provide sufficient revenue to balance the expenses of the service. Therefore, the Agency will revise the certificate fee charged for official analysis and cottonseed grade determination from $1.35 per certificate, issued by the chemist, to $3.00. The application fee for a chemist's license will be raised from $360.00 to $1,100.00 for the examination, while the fee for renewal of the license will be increased from $125.00 to $275.00. These substantial increases in licensing fees are also necessary, in part, because of the additional travel costs associated with the relocation of the supervisor of the licensed chemists from the vicinity of the cottonseed laboratories to Washington, DC. The new fees serve to meet the financial obligations of keeping the licensed cottonseed chemist program active.

VIII. Summary and Analysis of Proposal

A proposed rule was published in the Federal Register (58 FR 13130–13171) on March 9, 1993, providing for a 30 day comment period ending April 8, 1993. One comment letter from a national trade association was received. The association opposed the reorganization of the analytical testing services of the Agricultural Marketing Service, USDA. The trade organization expressed concern that the proposed fee increases for the cottonseed certificates and the chemists' licenses (initial and renewal) are not reasonable considering an average inflation rate and the salary increases since the last increase in cottonseed grading user fees in 53 FR 2213 on January 27, 1988. The Agency agrees that salary increases alone would not justify the fee increases. However, there were several other contributing factors that need to be considered as a total expenditure to arrive at the revised fees. These factors include substantial increases in costs for proficiency sample preparation and for fumigating seed. Aluminum phosphide is now used to fumigate cottonseed in place of methyl bromide. This is because aluminum phosphide is much more effective as a fumigant since phosphine gas (hydrogen phosphide) generated from it kills all life stages of pink bollworm (*Pectinophora* spp.) infestation which must be eliminated in order to ship the seed. In addition, since the U.S. Environmental Protection Agency has proposed to classify methyl bromide as a class I ozone-depleting substance, production and consumption of this substance would terminate in the year 2000 (58 FR 15014–15049, March 18, 1993). As a consequence, fumigation costs have risen from $100 to $859 per application. There has been an added contractual cost for the oversight service related to the 56 licensed cottonseed samplers. In FY 1993 there were 27,853 official certificates issued at $1.35 each, accounting for a revenue of $37,602. The outlay for cottonseed sampling supervision for FY 1993 was $15,483, which is 41.2% of the revenue from certificate issuance. There have also been large increases in transportation and shipment costs, travel expenses, mailing and supply expenditures, and support service costs.

For FY 1993 the cottonseed grading program expects to incur total expenses of approximately $89,001 and receive approximately $39,977 in income, leaving an estimated shortfall of $49,024. The new certificate fee of $3.00 for cottonseed grading was determined by distributing the projected FY 1994 net operating costs of $84,425 over 28,000, which is the estimated number of official certificates to be issued for the 1994 season. The projected FY 1994 net operating costs were derived by subtracting the anticipated revenue of $5,225 for 19 chemist license renewals at the new charge of $275 from the expected total expenses of $89,650. In arriving at the new license renewal fee, travel costs, which averaged $3,552 over the last 3 years, were taken into consideration. For new licenses, the $1,100 cottonseed chemist licensing exam fee includes the travel costs for the SD examiner and the expenses for preparing and delivering cottonseed exam samples. Since the Agency needs to have sufficient funds to pay its expenses for the cottonseed grading program, which are incurred on a continuous basis, the revised fees reflecting the current costs associated with the program are determined to be reasonable and acceptable fees. It should be added that the costs for cottonseed grading are voluntary and the secretary is authorized by statute to recover the costs of the services. The fees are needed to continue to provide cottonseed quality grading services at the levels desired by the industry.

IX. Amendments

This rule amends parts 29, 52, 55, 58, 59, 61, and 70 to conform with the changes resulting from the AMS reorganization and reassignment of functions in January 1989. Accordingly, subchapter H, part 180, Plant Variety Protection is deleted in its entirety.

X. Discussion of Changes of Regulations

Section 29.500 of part 29 for subchapter A is revised. The following sections of part 52, part 55, part 58, part 59, part 61 and part 70 of the regulations for subchapter C either will be revised or will be removed: §§ 52.2, 52.47, 55.20 (b), (d), 55.510(d), 55.550, 58.44, 58.101, 58.126, 59.580, 61.2, 61.6, 61.8, 61.10 to 61.24, 61.44, 61.45, 61.46, 61.101, 61.102, 61.103, 61.104, 70.72 and 70.73. All sections of part 180 for subchapter H are removed. The following parts either will be added or will be reserved in the new subchapter E, chapter I of title 7 of the CFR: 90 (in part reserved), 91, 92, 93, 94 (includes reserved § 94.200), 95, 96, 97, 98 (in part reserved), 99 (reserved except for § 99.3), 100 (reserved except for § 100.3), 101 (reserved except for § 101.3), 102 to 109 (reserved), 110 (reserved for separate rulemaking except § 110.9), and 111 to 159 (reserved).

To identify those sections of the current regulations that are redesignated without amending into the new subchapter E, chapter I of this title, the following redistribution table is provided as a reference aid:

REDISTRIBUTION TABLE

Current section(s)	Redesignated section(s)
61.22	96.18.
61.101	96.25.
180.24	97.24.
180.122	97.122.
180.131	97.131.
180.142	97.142.
180.144	97.144.
180.155 to 180.158	97.155 to 97.158.
180.176	97.176.
180.206	97.206.
180.208	97.208.
180.222	97.222.
180.800	97.800.

To identify those sections of the current regulations that are amended or repealed for subchapters A or C, chapter I of this title, the following revision table is provided as a reference aid:

REVISION TABLE

Section(s)	Proposed action
29.500	Amend heading and text.
52.2	Amend; remove terms.
52.47	Remove in its entirety.
55.20 (b)	Amend text.
55.20 (d)	Remove in its entirety.

REVISION TABLE—Continued

Section(s)	Proposed action
55.510 (d) ..	Amend text.
55.550	Remove in its entirety.
58.44	Remove in its entirety.
58.101	Amend text.
58.126	Amend; remove paragraph (e)(5)(ii) and redesignate paragraph (e)(5)(iii) as (e)(5)(ii).
59.580	Amend wording.
61.2	Amend wording.
61.6	Amend wording.
61.8	Amend wording.
61.104	Amend wording.
70.72	Amend wording.
70.73	Remove in its entirety.

To identify those sections of the current regulations that are amended and transferred into the new subchapter E, chapter I of this title, the following distribution table is provided as a reference aid:

DISTRIBUTION TABLE

Current section(s)	Amended and redesignated section(s)
61.10 to 61.13	96.3 to 96.6.
61.14 to 61.16	96.9 to 96.11.
61.17 to 61.19	96.13 to 96.15.
61.20	96.7 (a), (b), (c) and 96.16.
61.21	96.7 (d) and 96.17.
61.23	96.12.
61.24	96.19.
61.44 to 61.46	96.20 to 96.22.
61.102 to 61.103	96.26 to 96.27.
180.1 to 180.23	97.2 to 97.23.
180.100 to 180.121 ...	97.100 to 97.121.
180.130	97.130.
180.132 to 180.141 ...	97.132 to 97.141.
180.143	97.143.
180.150 to 180.154 ...	97.150 to 97.154.
180.175	97.175.
180.177 to 180.205 ...	97.177 to 97.205.
180.207	97.207.
180.209 to 180.221 ...	97.209 to 97.221.
180.300 to 180.700 ...	97.300 to 97.700.

To identify those sections that are reserved or added as regulations in the new subchapter E, chapter I of title 7 of the Code of Federal Regulations, the following table, noting the final actions, is provided as a reference aid:

TABLE OF NEW REGULATIONS

Added section(s)	Final action
90.1 to 90.3; 90.101 to 90.103.	New additions.
90.4 to 90.100; 90.104 to 90.200.	Reserved.
91.1 to 91.45; 92.1 to 92.6.	New additions.
93.1 to 93.5; 93.10 to 93.14.	New additions.
93.100 to 93.105; 94.1 to 94.5.	New additions.

TABLE OF NEW REGULATIONS—Continued

Added section(s)	Final action
94.100 to 94.104; 94.300 to 94.304.	New additions.
94.200	Reserved.
95.1 to 95.6; 96.1; 96.2; 96.8.	New additions.
96.23; 96.24; 96.28; 96.29.	New additions.
97.1; 98.1 to 98.5; 98.100 to 98.101.	New additions.
98.102 to 98.600; 99.1 to 99.2.	Reserved.
99.4 to 99.999	Reserved.
99.3; 100.3; 101.3; 110.9	New additions.
100.1 to 100.2; 100.4 to 100.999.	Reserved.
101.1 to 101.2; 101.4 to 101.999.	Reserved.
110.1 to 110.8	Addition under separate rulemaking.
Parts 111 to 159	Reserved parts.

XI. Need for Immediate Action

This final rule, as hereinafter set forth, finalizes the provisions of the March 9 proposal. Pursuant to 5 U.S.C. 533, good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** since the fee increases contained herein are needed to adequately fund the various services provided. A comment period was included in the proposed rule with one written comment received. A detailed explanation to the remark is provided above and the proposed rule is adopted as a final rule. No useful purpose would be served by a ruling delay.

List of Subjects

7 CFR Part 29

Administrative practice and procedure, Advisory committees, Government publications, Imports, Pesticides and pests, Reporting and recordkeeping requirements, Tobacco.

7 CFR Part 52

Food grades and standards, Food labeling, Frozen foods, Fruit juices, Fruits, Reporting and recordkeeping requirements, Vegetables.

7 CFR Part 55

Eggs and egg products, Food grades and standards, Food labeling, Reporting and recordkeeping requirements.

7 CFR Part 58

Food grades and standards, Dairy products, Food labeling, Reporting and recordkeeping requirements.

7 CFR Part 59

Eggs and egg products, Exports, Food grades and standards, Food labeling, Imports, Polychlorinated biphenyls (PCB's), Reporting and recordkeeping requirements.

7 CFR Part 61

Cottonseeds, Reporting and recordkeeping requirements.

7 CFR Part 70

Food grades and standards, Food labeling, Poultry and poultry products, Rabbits and rabbit products, Reporting and recordkeeping requirements.

7 CFR Part 90

Agricultural commodities, Laboratories, Reporting and recordkeeping requirements.

7 CFR Part 91

Administrative practice and procedure, Agricultural commodities, Fees and charges, Laboratories.

7 CFR Part 92

Laboratories, Pesticides and pests, Tobacco.

7 CFR Part 93

Citrus fruits, Fruit juices, Fruits, Laboratories, Nuts, Vegetables.

7 CFR Part 94

Eggs and egg products, Laboratories, Poultry and poultry products.

7 CFR Part 95

Dairy products, Laboratories, Milk.

7 CFR Part 96

Administrative practice and procedure, Cottonseeds, Chemist's licensure, Laboratories, Reporting and recordkeeping requirements.

7 CFR Part 97

Administrative practice and procedure, Plant variety and protection, Novel seed variety certification.

7 CFR Part 98

Meat and meat products, Laboratories.

7 CFR Part 99

Agricultural commodities, Statistics.

7 CFR Part 100

Agricultural commodities, Laboratories.

7 CFR Part 101

Agricultural commodities, Pesticides and pests.

7 CFR Part 110

Pesticides and pests, Reporting and recordkeeping requirements.

7 CFR Part 180

Administrative practice and procedure, Labeling, Plants.

For the reasons set out in the preamble, AMS amends title 7, chapter I, Code of Federal Regulations as follows:

PART 29—TOBACCO INSPECTION

Subpart B—Regulations

1. The authority citation for subpart B of part 29 continues to read as follows:

Authority: 7 U.S.C. 511m and 511r.

§29.500 [Amended]

2. Section 29.500 is amended as follows:

a. The heading for § 29.500 is revised to read as follows:

§29.500 Fees and charges for inspection and acceptance of imported tobacco.

b. In § 29.500, paragraphs (b) and (c) are amended by removing (both times that it appears) the word "testing" and replacing with the word "accepting."

PART 52—PROCESSED FRUITS AND VEGETABLES, PROCESSED PRODUCTS THEREOF, AND CERTAIN OTHER PROCESSED FOOD PRODUCTS

1. The authority citation for part 52 is revised to read as follows:

Authority: 7 U.S.C. 1622, 1624.

§52.2 [Amended]

2. Section 52.2 is amended by removing the definition of the term "Commodities Scientific Support Division (CSSD)."

§52.47 [Removed]

3. Section 52.47 is removed.

PART 55—VOLUNTARY INSPECTION OF EGG PRODUCTS AND GRADING

1. The authority citation for part 55 is revised to read as follows:

Authority: 7 U.S.C. 1621–1627.

§55.20 [Amended]

2. Section 55.20 is amended by removing in paragraph (b) the phrase "and laboratory analysis" and paragraph (d) is removed.

§55.510 [Amended]

3. In § 55.510, paragraph (d) is amended by removing (both times that it appears) the phrase "laboratory analysis,".

§55.550 [Removed]

4. Section 55.550 is removed.

PART 58—GRADING AND INSPECTION, GENERAL SPECIFICATIONS FOR APPROVED PLANTS AND STANDARDS FOR GRADES OF DAIRY PRODUCTS

1. The authority citation for part 58 continues to read as follows:

Authority: Secs. 202–208, 60 Stat. 1087, as amended; 7 U.S.C. 1621–1627, unless otherwise noted.

§58.44 [Removed]

2. Section 58.44 is removed.

§58.101 [Amended]

3. In § 58.101, paragraph (c) is amended by removing (the first time it appears) the phrase "the Administrator" and replacing with the phrase "the AMS Science Division Director".

§58.126 [Amended]

4. Section 58.126 is amended by removing paragraph (e)(5)(ii) and redesignating paragraph (e)(5)(iii) as paragraph (e)(5)(ii).

PART 59—INSPECTION OF EGGS AND EGG PRODUCTS (EGG PRODUCTS INSPECTION ACT)

1. The authority citation for part 59 is revised to read as follows:

Authority: 21 U.S.C. 1031–1056.

§59.580 [Amended]

2. In § 59.580, paragraph (b) is amended by changing the phrase "the Administrator" to "the AMS Science Division Director", and paragraph (d) is amended by changing the phrase "USDA laboratory" to "AMS Science Division laboratory".

PART 61—COTTONSEED SOLD OR OFFERED FOR SALE FOR CRUSHING PURPOSES (INSPECTION, SAMPLING AND CERTIFICATION)

Subpart A—Regulations

1. The authority citation for subpart A of part 61 continues to read as follows:

Authority: Sec. 205, 60 Stat. 1090, as amended (7 U.S.C. 1624).

§61.2 [Amended]

2. In § 61.2, paragraph (n) is amended by removing the phrase "the Director" and replacing it with the phrase "the Science Division Director of the Agricultural Marketing Service".

§61.6 [Amended]

3. Section 61.6 is amended by removing the phrase "and licensed cottonseed chemists".

§61.8 [Amended]

4. In § 61.8, first sentence is amended by changing the phrase "any sample of cottonseed" to "any official sample of cottonseed".

§§61.10 to 61.24 [Removed]

5. Subpart A of part 61 is amended by removing the undesignated center heading "Licensed Cottonseed Chemists" and §§ 61.10 through 61.

§§61.44 to 61.46 [Removed]

6. Subpart A of part 61 is amended by removing §§ 61.44 through 61.46.

Subpart B—Standards for Grades of Cottonseed Sold or Offered for Sale for Crushing Purposes Within the United States

1. The authority citation for subpart B of part 61 continues to read as follows:

Authority: Secs. 203, 205, 60 Stat. 1087, 1090, as amended; 7 U.S.C. 1622, 1624.

§61.101 [Amended]

2. In § 61.101, introductory text, after the word "samples" the phrase "by licensed chemists" is added.

§61.104 [Amended]

3. Section 61.104 is amended as follows:

a. The heading for § 61.104 is revised to read as follows:

§61.104 Sampling and certification of samples and grades.

b. Section 61.104 is amended by removing the words "and the analysis" in the paragraph.

PART 70—VOLUNTARY GRADING OF POULTRY PRODUCTS AND RABBIT PRODUCTS AND U.S. CLASSES, STANDARDS, AND GRADES

1. The authority citation for part 70 is revised to read as follows:

Authority: 7 U.S.C. 1621–1627.

§70.72 [Amended]

2. Section 70.72 is amended as follows:

a. The heading for § 70.72 is revised to read as follows: "§ 70.72 Fees for appeal grading or examination or review of a grader's decision."

b. Section 70.72 is amended by removing in the paragraph (both times that it appears) the words "laboratory analysis,".

§70.73 [Removed]

3. Section 70.73 is removed.

Subchapter H and part 180—[Removed]

1. Subchapter H consisting of part 180 is removed in its entireties.

2. Subchapter E, consisting of parts 90 through 159, is added to read as set forth below:

SUBCHAPTER E—COMMODITY LABORATORY TESTING PROGRAMS

Table of Parts

Part

90 Introduction
91 Services and General Information
92 Tobacco
93 Processed Fruits and Vegetables
94 Poultry and Egg Products
95 Processed Dairy Products
96 Cottonseed Sold or Offered for Sale for Crushing Purposes (Chemical Analysis and United States Official Grade Certification)
97 Plant Variety and Protection
98 Meals, Ready-to-Eat (MRE's), Meats, and Meat Products
99 Statistical Science Program
100 National Laboratory Accreditation Program
101 Pesticide Data Program
102–109 [Reserved]
110 Recordkeeping on Restricted Use Pesticides by Certified Applicators; Surveys and Reports
111–159 [Reserved]

PART 90—INTRODUCTION

Subpart A—Scope of Subchapter

Sec.

90.1 General.

Subpart B—Subchapter Definitions

90.2 General terms defined.

Subpart C—Good Laboratory Practices for Commodity Laboratory Analyses

90.3 General.
90.4–90.100 [Reserved]

Subpart D—Quality Assurance

90.101 General.
90.102 Quality assurance review.
90.103 Maintenance of quality control records.
90.104–90.200 [Reserved]

Authority: Agricultural Marketing Act of 1946, secs. 203, 205, 60 Stat. 1087, as amended, 1090, as amended (7 U.S.C. 1622, 1624)

Subpart a—Scope of Subchapter

§ 90.1 General.

This subchapter sets forth the functions and responsibilities of the Science Division (SD) of the Agricultural Marketing Service (AMS) relating to:

(a) The performance of comprehensive analytical tests and laboratory determinations of agricultural commodities and processed products.

(b) The conduct of experiments and collaborative studies to validate new analytical procedures and improved methodologies in order to promote faster, more precise, or safer laboratory testing for agricultural commodities and processed products.

(c) The supervised issuance of external quality control or proficiency check samples to laboratories under the Science Division's direction or performance review in order to regularly spot check and assess that analytical or test data produced by each laboratory is reproducible, precise, and reliable for a specific test program.

(d) The granting of laboratory program accreditation or certification or approval for specialty testing of agricultural commodities and products.

(e) The licensing of chemists to analyze cottonseed in order to certify its quality and grade.

(f) The granting of certification to non-federal laboratories for testing for trichinae in horsemeat for export to the European Community (EC).

(g) The granting of acceptance of standardized methodology or new procedures for commodity testing.

(h) The auditing of the facilities, equipment, quality control procedures, standard methodologies, and good laboratory practices for a commodity testing program of a laboratory.

(i) The furnishing of consultation and centralized technical and statistical science support for marketing programs.

(j) The recommendation of statistical sampling plans.

(k) The examination of plants for novelty and distinctiveness in order to grant certificates of protection for new varieties of sexually reproduced plants, and the provision of other fee based services authorized by the Plant Variety Protection Act.

(l) The extension or coordination of research for the determination of a new chemical analyte or microorganism in a commodity product or food.

(m) The management of a pesticide residue monitoring program for agricultural commodities (especially fresh fruits and vegetables), currently referred to as the Pesticide Data Program.

(n) The analysis of imported flue-cured and burley tobacco for pesticide residues.

(o) The supervision and implementation of the State enforcement of the recordkeeping requirements for private applicators of restricted-use pesticides for agricultural production.

Subpart B—Subchapter Definitions

§ 90.2 General terms defined.

Words used in the regulations in this subchapter in the singular form will import the plural, and vice versa, as the case may demand. As used throughout the regulations in this subchapter and unless the context requires otherwise, the following terms will be construed to mean:

Act. The Agricultural Marketing Act of 1946 (Title II of the act of Congress approved August 14, 1946, 60 Stat. 1087–1091, as amended; 7 U.S.C. 1621–1627).

Administrator. The Administrator of the Agricultural Marketing Service, or any officer or employee of the Service, to whom authority has been delegated, or to whom authority may be delegated, to act in his or her stead.

Cooperative agreement. An agreement between the Agricultural Marketing Service and another Federal agency or a State agency, or other agency, organization or person that defines in the general terms the basis on which the parties concerned will cooperate to serve a mutual interest on an agricultural service project. The responsibilities for AMS and each cooperator are stated in the document along with the conditions as applicable.

Department. The United States Department of Agriculture.

Director. The Director of the Science Division, or any officer or employee of the Division to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in his or her stead.

Division. The Science Division (SD) of the Agricultural Marketing Service (AMS), which performs analytical testing services, issues licenses for cottonseed chemists, conducts quality assurance reviews and grants accreditation or certification for commodity testing programs of laboratories.

Laboratories. Division laboratories performing the analyses described in this subchapter.

Quality assurance. The assurance that there is accuracy of analytical data using proficiency check sample or analyte recovery techniques. In addition, the certainty that there is strict adherence by the analysts in following the quality control details in the recommended or official methods for reagents, laboratory apparatus and procedures. The overall objective of quality assurance, as a comprehensive program, is to ensure that all analytical data produced by the laboratory meets certain quality criteria and that all data produced is reproducible, precise, and accurate.

Quality control. The system of close examination of the critical details of an analytical procedure in order to have the proper equipment parameters, techniques, supplies and reagents to achieve a predetermined level of quality

data, with the performance of a particular laboratory analysis.

Secretary. The Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in his or her stead.

Service. The Agricultural Marketing Service of the United States Department of Agriculture.

Subpart C—Good Laboratory Practices for Commodity Laboratory Analyses

§ 90.3 General.

Laboratory service programs of laboratories certified and approved by the Science Division shall have good laboratory practice (GLP) requirements that are generalized in this subpart.

§§ 90.4–90.100 [Reserved]

Subpart D—Quality Assurance

§ 90.101 General.

Laboratory service programs of laboratories certified and approved by the Science Division shall have quality assurance requirements that are generalized in this subpart.

§ 90.102 Quality assurance review.

(a) Each laboratory performing tests and analysis under this subchapter will be subject to a quality assurance program evaluation at least annually, and more often if deemed necessary by the Director. Such evaluation will include:

(1) A review of the adequacy of quality control measures taken by the laboratory for the standardized method of analysis for a commodity and its related products;

(2) A review of the laboratory methodologies and procedures;

(3) A review of records for the calibration and maintenance of equipment;

(4) A review of records documenting sample handling;

(5) The evidence of quality control records;

(6) The evidence of correct reporting and determination of analytical data.

(b) A laboratory will receive a quality assurance report following the review. This evaluation will address any necessary improvements to the laboratory program(s) being examined.

§ 90.103 Maintenance of quality control records.

Quality control records pertaining, but not limited to the following areas, shall be retained by the laboratory for at least the 3 most recent years:

(a) Prepared solution standardizations;

(b) Recovery studies by known analyte additions;

(c) The purity checks of reagents and test materials;

(d) Apparatus and equipment calibrations;

(e) The quality examination and testing of materials;

(f) The mandatory participation in proficiency check sample testing or collaborative studies;

(g) Daily critical parameter checks of equipment, such as temperature readings;

(h) The equivalency tests of new procedures with standard methodologies.

§§ 90.104–90.200 [Reserved]

PART 91—SERVICES AND GENERAL INFORMATION

Subpart A—Administration

Sec.

91.1 General.
91.2 Definitions.
91.3 Authority.

Subpart B—General Services

91.4 Kinds of services.
91.5 Where services are offered.
91.6 Availability of services.

Subpart C—Application for Services

91.7 Nondiscrimination.
91.8 Who may apply.
91.9 How to make an application.
91.10 Information required in connection with an application.
91.11 Filing of an application.
91.12 Record of filing time and laboratory tests.
91.13 When an application may be rejected.
91.14 When an application may be withdrawn.

Subpart D—Laboratory Service

91.15 Basis of a laboratory service.
91.16 Order of a laboratory service.
91.17 Postponing a laboratory service.
91.18 Financial interest of a scientist.

Subpart E—Samples

91.19 General requirements of suitable samples.
91.20 Shipping.
91.21 Protecting samples.
91.22 Disposition of analyzed sample.

Subpart F—Method Manuals

91.23 Analytical methods.

Subpart G—Reporting

91.24 Reports of test results.
91.25 Certificate requirements.
91.26 Issuance of certificates.
91.27 Corrections to certificates prior to issuance.
91.28 Issuance of corrected certificates or amendments for analysis reports.
91.29 Issuance of duplicate certificates or reissuance of an analysis report.
91.30 Maintenance and retention of copies of certificates or analysis reports.

Subpart H—Appeal of Laboratory Services

91.31 When an appeal of a laboratory service may be requested.
91.32 Where to file for an appeal of a laboratory service and information required.
91.33 When an application for an appeal of a laboratory service may be withdrawn.
91.34 When an appeal of a laboratory service may be refused.
91.35 Who shall perform an appealed laboratory service.
91.36 Appeal laboratory certificate.

Subpart I—Fees and Charges

91.37 Fees for laboratory testing, analysis, and other services (general schedules).
91.38 Additional fees for appeal of analysis.
91.39 Special request fees for overtime and legal holiday service.
91.40 Fees for courier service and facsimile of the analysis report.
91.41 Charges for demonstrations and courses of instruction.
91.42 Billing.
91.43 Payment of fees and charges.
91.44 Charges on overdue accounts and issuance of delinquency notices.
91.45 Charges for laboratory services on a contract basis.

Authority: Agricultural Marketing Act of 1946, secs. 203, 205, 60 Stat. 1087, as amended, 1090, as amended (7 U.S.C. 1622, 1624).

Subpart A—Administration

§ 91.1 General.

This part consolidates the procedural and administrative rules of the Science Division of the Agricultural Marketing Service for conducting the analytical testing and laboratory audits with quality assurance reviews. It also contains the fees, charges and laboratories applicable to such services.

§ 91.2 Definitions.

Words used in the regulations in this part in the singular form will import the plural, and vice versa, as the case may demand. As used throughout the regulations in this part, unless the context requires otherwise, the following terms will be construed to mean:

Analyses. Microbiological, chemical, or physical tests performed on a commodity.

Applicant. Any person who requests services provided by the Division.

Legal holidays. Those days designated as legal public holidays specified by Congress in paragraph (a) of section 6103, title 5 of the United States Code and any other day declared to be a holiday by Federal Statute or Executive Order. Under section 6103 and

Executive Order 10357, as amended, if the specified legal public holiday falls on a Saturday, the preceding Friday shall be considered the holiday, or if the specified legal holiday falls on a Sunday, the following Monday shall be considered to be the holiday.

§ 91.3 Authority.

The Division Director is charged with the administration of this subchapter.

Subpart B—General Services

§ 91.4 Kinds of services.

(a) *Analytical tests.* Analytical laboratory testing services under the regulations consist of microbiological, chemical, and certain other analyses, requested by the applicant and performed on tobacco, seed, dairy, egg, fruit and vegetable, meat and poultry, and related processed products. Analyses are performed to determine if products meet Federal specifications or specifications defined in purchase contracts and cooperative agreements. Analyses are also performed on egg products as part of the mandatory Egg Products Inspection Program.

(b) *Examination and licensure.* The Division administers examinations and issues licenses to chemists to certify the grade of cottonseed.

(c) *Quality assurance reviews.* The Division performs on-site laboratory quality assurance reviews (both required and voluntary) to ensure that appropriate technical methods, equipment maintenance, and quality control procedures are being observed.

(d) *Consultation.* Technical advice, statistical science consultation, and quality assurance program assistance are provided by the Division for domestic and foreign laboratories.

§ 91.5 Where services are offered.

(a) Services are offered to applicants at the Science Division laboratories and facilities as listed below.

(1) *Science Division regional laboratories.* A variety of tests and laboratory analyses are available in two regional multi-disciplinary Science Division (SD) laboratories, and are located as follows:

(i) USDA, AMS, SD, Midwestern Laboratory, 3570 North Avondale Avenue, Chicago, IL 60618.

(ii) USDA, AMS, SD, Eastern Laboratory, 645 Cox Road, Gastonia, NC 28054.

(2) *Science Division aflatoxin laboratories.* The specialty laboratories performing aflatoxin testing on peanuts, peanut products, tree nuts and other commodities are located as follows:

(i) USDA, AMS, SD, 1411 Reeves Street, Mail: P.O. Box 1368, Dothan, AL 36302.

(ii) USDA, AMS, SD, 200 West Washington Street, Mail: P.O. Box 488, Ashburn, GA 31714.

(iii) USDA, AMS, SD, 2705 Taft Street, Albany, GA 31707.

(iv) USDA, AMS, SD, 301 West Pearl Street, Mail: P.O. Box 279, Aulander, NC 27805.

(v) USDA, AMS, SD, 610 North Main Street, Blakely, GA 31723.

(vi) USDA, AMS, SD, 42 North Ellis Street, Mail: P.O. Box 548, Camilla, GA 31730.

(vii) USDA, AMS, SD, 107 South Fourth Street, Madill, OK 73446.

(viii) USDA, AMS, SD, 715 North Main Street, Mail: P.O. Box 272, Dawson, GA 31742.

(ix) USDA, AMS, SD, 308 Culloden Street, Mail: P.O. Box 1130, Suffolk, VA 23434.

(3) *Citrus laboratory.* The Science Division Citrus Laboratory specializes in testing citrus juices and other citrus products and is located as follows: Science Division Citrus Laboratory, 111 Third Street, SW., suite 211, Winter Haven, FL 33880.

(4) *Divisional laboratories.* Laboratory services are available in all areas covered by cooperative agreements providing for this laboratory work and entered on behalf of the Department with cooperating Federal or State laboratory agencies pursuant to authority contained in Act(s) of Congress. Also, services may be provided in other areas not covered by a cooperative agreement if the Administrator determines that it is possible to provide laboratory services.

(5) *Other alternative laboratories.* Laboratory analyses may be conducted at alternative Science Division laboratories and can be reached from any commodity market in which a laboratory facility is located to the extent laboratory personnel is available.

(6) *The Plant Variety Protection (PVP) Office.* The PVP office and plant examination facility of the Science Division issues certificates of protection to developers of novel varieties of plants which reproduce sexually and is located as follows: USDA, AMS, Science Division, Plant Variety Protection Office, Room 500 National Agricultural Library Building, Beltsville, MD 20705.

(7) *Science Division headquarters offices.* The examination, licensure, quality assurance reviews, and consultation services are provided by headquarters staff located in Washington, DC.

(8) *Statistical Branch offices.* Statistical Science services are provided by Science Division (SD) offices located as follows:

(i) USDA, AMS, Science Division, Statistical Branch, Kansas City Technical Center, 10383 No. Executive Hills Blvd., Kansas City, MO 64153.

(ii) USDA, AMS, SD, Statistical Branch, 0611 So. Agriculture Bldg., 14th & Independence Avenue, SW., Washington, DC 20250.

(9) *Residue Branch offices.* Services afforded by the Recordkeeping Program for restricted use pesticides by certified applicators and services afforded by the Pesticide Data Program are provided by offices located as follows:

(i) USDA, AMS, Science Division, 8700 Centreville Rd., suite 200, Manassas, VA 22110.

(ii) USDA, AMS, Science Division, Office of Director, 3507 So. Agriculture Bldg., 14th & Independence Avenue, SW., Washington, DC 20250.

(b) The addresses of the various laboratories and offices appear in the pertinent parts of this subchapter. A prospective applicant may obtain a current listing of addresses and telephone numbers of Science Division laboratories, offices, and facilities by addressing an inquiry to the Director, Science Division, Agricultural Marketing Service, United States Department of Agriculture (USDA), PO Box 96456, Washington, DC 20090–6456.

§ 91.6 Availability of services.

(a) Services may be furnished whenever a Science Division staff is available and the facilities and conditions are satisfactory for the conduct of such service.

(b) Laboratories may provide limited service on Saturdays and Sundays at a premium fee. Weekend service may be obtained by contacting the laboratory director or supervisor.

(c) Holiday and overtime laboratory service may be obtained with a minimum 24 hour advance notice, at a premium fee, by any prospective applicant through the laboratory director or supervisor.

Subpart C—Application for Services

§ 91.7 Nondiscrimination.

All services under these regulations are provided to applicants without discrimination as to race, color, handicapped or disabled condition, religion, sex, age, or national origin.

§ 91.8 Who may apply.

An application for service may be made by any individual or interested

party including, but not limited to, the United States and any instrumentality or agency thereof, any State, county, municipality, or common carrier, and any authorized agent on behalf of the foregoing.

§91.9 How to make an application.

(a) *Voluntary.* An application for analysis and testing may be made by contacting the director or supervisor of the Science Division laboratory where the service is provided, or by contacting either the Laboratory Operations Coordination branch chief, or the Technical Services branch chief at Science Division Headquarters, Washington, DC. A list of the Science Division laboratories is included in § 91.5.

(b) *Mandatory.* In the case of mandatory analyses, such as those required to be performed on eggs and egg products, application for services may be submitted to the office or division which administers the program, or by contacting an inspector who is involved with the program.

§91.10 Information required in connection with an application.

(a) An application for laboratory service shall be made in the English language and may be made orally (in person or by telephone), in writing, or by facsimile. If an application for laboratory service is made orally, written confirmation may be required by the laboratory involved.

(b) In connection with each application for a laboratory service, information that may be necessary to perform analyses on the processed product(s) shall also be furnished. The information shall include, but is not limited to, the name of the product, name and address of the packer or plant where such product was packed, the location of the product, its lot or load number, codes or other identification marks, the number of containers, the type and size of the containers, the analytical test requested, and the size of the sample. In addition, information regarding analysis of the lot by any federal agency previous to the application and the purpose of the desired laboratory service may be requested.

§91.11 Filing of an application.

An application for a laboratory service shall be regarded as filed only when made in accordance with the regulations in this part.

§91.12 Record of filing time and laboratory tests.

A record showing the date of receipt for each application for a laboratory service or an appeal of a laboratory service shall be maintained. In addition, the requested laboratory analyses shall be recorded at the time of sample receipt.

§91.13 When an application may be rejected.

(a) An application for a laboratory service may be rejected by the Administrator when deemed appropriate as follows:

(1) For non-compliance by the applicant with the regulations in this part,

(2) For non-payment of previous laboratory services rendered,

(3) When the sample is not properly identified by a code or other marks,

(4) When the samples are received in an unsatisfactory condition and are rejected for analysis,

(5) When there is evidence or knowledge of tampering with the sample,

(6) When it appears that to perform the analytical testing or laboratory service specified in this part would not be to the best interests of the public welfare or of the Government, or

(7) When it appears to the Administrator that prior commitments of the Department necessitate rejection of the application.

(b) Each such applicant shall be promptly notified by registered mail of the reasons for the rejection.

(c) A written petition for reconsideration of such rejection may be filed by the applicant with the Administrator if postmarked or delivered within 10 days after the receipt of notice of the rejection. Such petition shall state specifically the errors alleged to have been made by the Administrator in rejecting the application. Within 20 days following the receipt of such a petition for reconsideration, the Administrator shall approve the application or notify the applicant by registered mail of the reasons for the rejection thereof.

§91.14 When an application may be withdrawn.

An application for a laboratory service may be withdrawn by the applicant at any time before the analytical testing is performed; *Provided,* That, the applicant shall pay, at the hourly rate prescribed in § 91.37, for the time incurred by the scientist or laboratory technician, in connection with such application and any travel expenses, telephone, facsimile, mailing, telegraph or other expenses, which have been incurred by the laboratory servicing office, in connection with such application.

Subpart D—Laboratory Service

§91.15 Basis of a laboratory service.

Analytical testing and laboratory determination for analyte or quality constituent shall be based upon the appropriate standards promulgated by the U.S. Department of Agriculture, applicable standards prescribed by the laws of the State where the particular product was produced, specifications of any governmental agency, written buyer and seller contract specifications, or any written specifications by an applicant which is approved by the Administrator; *Provided,* That, if such product is regulated pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), or the comparable laws of any State, such testing and determination shall be on the basis of the standards, if any, prescribed in, or pursuant to, the marketing order and/or agreement effective thereunder.

§91.16 Order of a laboratory service.

Laboratory service shall be performed, insofar as possible, in the order in which applications are made except that precedence may be given to any such applications which are made by the United States (including, but not being limited to, any instrumentality or agency thereof) and to any application for an appeal inspection.

§91.17 Postponing a laboratory service.

If the scientist determines that it is not possible to accurately analyze or make a laboratory determination of a sample immediately after receipt because standard materials, laboratory equipment and supplies need replacement, or for any other substantial reason, the scientist may postpone laboratory service for such period as may be necessary.

§91.18 Financial interest of a scientist.

No scientist shall perform a laboratory analysis on any product in which he is directly or indirectly financially interested.

Subpart E—Samples

§91.19 General requirements of suitable samples.

(a) Samples must be representative of the product tested and provided in sufficient quantity for the analyses requested.

(b) Each sample must be identified with the following information:

(1) Product type (specific description);

(2) Lot number or production date;

(3) Analyses desired;

(4) Date/time collected;

(5) Storage conditions prior to shipping;
(6) Name of applicant;
(7) Name of sampler;
(8) Any other information which is required by the specific program under which analysis or test is performed.

§ 91.20 Shipping.

(a) Samples must be submitted to the laboratory in a condition (including temperature) that does not compromise the quality and validity of analytical results.
(b) All samples must be submitted in sealed, leakproof containers.
(c) Containers for perishable refrigerated samples should contain ice or ice packs to maintain temperatures of 0° to 5° C, unless a different temperature is required for the sample to be tested.
(d) Containers for frozen samples should contain dry ice or other effective methods of maintaining samples in a frozen state.
(e) The applicant is responsible for providing shipping containers and paying shipping costs for fee basis tests.
(f) A courier charge may apply for the shipment of some samples.

§ 91.21 Protecting samples.

Laboratory personnel shall protect each sample from manipulation, substitution, and improper or careless handling which would deprive the sample of its representative character from the time of receipt in the laboratory until the analysis is completed and the sample has been discarded.

§ 91.22 Disposition of analyzed sample.

(a) Excess samples not used in analyses will be placed in proper storage for a maximum period of 30 days after reporting results of tests.
(b) Any sample of a processed commodity that has been used for a laboratory service may be returned to the applicant at his or her request and expense; otherwise, it shall be destroyed or disposed of to a charitable institution.

Subpart F—Method Manuals

§ 91.23 Analytical methods.

Most analyses are performed according to approved procedures described in manuals of standardized methodology. These standardized methods are the specific methods used. Alternatively, equivalent methods prescribed in cooperative agreements are used. The manuals of standard methods most often used by the Science Division laboratories are listed as follows:

(a) Edwards, P.R. and W.H. Ewing, Edwards and Ewing's Identification of Enterobacteriaceae, Elsevier Science Publishing Co., Inc., 52 Vanderbilt Avenue, New York, NY 10017.
(b) Manual of Analytical Methods for the Analysis of Pesticide Residues in Human and Environmental Samples, U.S. Environmental Protection Agency (EPA), Environmental Toxicology Division, Health Effects Research Laboratory (HERL), Alexander Drive and Highway 54, Mail Drop 51, Research Triangle Park, NC 27711.
(c) Official Analytical Methods of the American Spice Trade Association (ASTA), American Spice Trade Association, 580 Sylvan Avenue, P.O. Box 1267, Englewood Cliffs, NJ 07632.
(d) Approved Methods of the American Association of Cereal Chemists, American Association of Cereal Chemists, 3340 Pilot Knob Road, St. Paul, MN 55121–2097.
(e) Official Methods and Recommended Practices of the American Oil Chemists' Society (AOCS), American Oil Chemists' Society, 1608 Broadmoor Drive, P.O. Box 3489, Champaign, IL 61826–3489.
(f) Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC), Association of Official Analytical Chemists, suite 400, 2200 Wilson Boulevard, Arlington, VA 22201–3301.
(g) Standard Analytical Methods of the Member Companies of Corn Industries Research Foundation, Corn Refiners Association (CRA), suite 1120, 1100 Connecticut Avenue, NW, Washington, DC 20036.
(h) Standard Methods for the Examination of Dairy Products, American Public Health Association, 1015 Eighteenth Street, NW, Washington, DC 20036.
(i) Standard Methods for the Examination of Water and Wastewater, American Public Health Association (APHA), the American Water Works Association and the Water Pollution Control Federation, APHA, 1015 Eighteenth Street, NW, Washington, DC 20036.
(j) U.S. Army Individual Protection Directorate's Military Specifications, approved analytical test methods noted therein, U.S. Army Natick Research, Development and Engineering Center, Kansas Street, Natick, MA 01760–5017.
(k) U.S. Food and Drug Administration Bacteriological Analytical Manual (BAM), Association of Official Analytical Chemists, suite 400, 2200 Wilson Boulevard, Arlington, VA 22201–3301.
(l) U.S. Food and Drug Administration Pesticide Analytical Manuals (PAM), Volumes I and II, Food and Drug Administration, U.S. Department of Health and Human Services, 200 C Street, SW, Washington, DC 20204 (available from National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161).

Subpart G—Reporting

§ 91.24 Reports of test results.

(a) Results of analyses are provided, in writing, by facsimile or other electronic means to the applicant.
(b) Applicants may call the appropriate Science Division laboratory for interim or final results prior to issuance of the formal report. The advance results may be telegraphed, telephoned, or sent by facsimile to the applicant. Any additional expense for advance information shall be borne by the requesting party.
(c) A letter report in lieu of a certificate of analysis may be issued by a laboratory representative when such action appears to be more suitable than a certificate; *Provided,* That, issuance of such report is approved by the Division Director.

§ 91.25 Certificate requirements.

Certificates of analysis and other memoranda concerning laboratory service and the reporting of results should have the following requirements.
(a) Certificates of analysis shall be on standard printed forms approved by the Division Director;
(b) Shall be printed in English;
(c) Shall have results typewritten, computer generated, or handwritten in ink and shall be clearly legible;
(d) Shall show the results of laboratory tests in a uniform, accurate, and concise manner with abbreviations identified on the form;
(e) Shall show the information required by §§ 91.25–91.29; and
(f) Show only such other information and statements of fact as are provided in the instructions authorized by the Division Director.

§ 91.26 Issuance of certificates.

(a) The person signing and issuing the certificate of analysis shall be one of the following:
(1) The scientist who performed the analysis;
(2) Another technician of the laboratory facility, who has been given power of attorney by the scientist who performed the analytical testing and been authorized by the Division Director to affix the scientist's signature to a certificate. The power of attorney shall be on file with the employing office or laboratory of the Division;
(3) A person designated as the "laboratory director in charge," when

the certificate represents composite analyses by several technicians.

(b) The laboratory certificate shall be prepared in accordance with the facts set forth in the official memoranda made by the scientist or technicians in connection with the analysis.

(c) Whenever a certificate is signed by a person under a power of attorney, the certificate should so indicate. The signature of the holder of power shall appear under the name of the scientist who personally analyzed the sample, and whenever a certificate issued is signed by a scientist in charge, that title must appear in connection with the signature.

§ 91.27 Corrections to certificates prior to issuance.

(a) The accuracy of the statements and information shown on certificates of analysis must be verified by the individual whose name or signature, or both, is shown on the certificate or by the authorized agent who affixed the name or signature, or both. When a name or signature, or both, is affixed by an authorized agent, the initials of the agent shall appear directly below or following the name, or signature of the person. Errors found during this process shall be corrected according to this section.

(b) Only official personnel or their authorized agents may make corrections, additions, or other changes to certificates.

(c) No corrections, additions, or other changes shall be made which involve identification, quality, or quantity. If such errors are found, a new certificate shall be prepared and issued and the incorrect certificate marked "Void." Otherwise, errors may be corrected, provided there is evidence of satisfactory correction procedures as follows:

(1) The corrections are neat and legible;

(2) Each correction is initialed by the individual who corrects the certificate; and

(3) The corrections and initials are shown on the original and all copies.

§ 91.28 Issuance of corrected certificates or amendments for analysis reports.

(a) A corrected certificate of analysis or an amended letter report may be issued by the laboratory representative who issued the original certificate or report after distribution of the form if errors, such as incorrect dates, analytical results, or test determination statements, lot numbers, or errors in any other pertinent information require the issuance of a corrected certificate or an amended report.

(b) Whenever a corrected certificate or amended report is issued, such certificate or report shall supersede the original form which was issued in error. The superseded certificate or incorrect report shall become null and void after the issuance of the corrected certificate or the amended analysis report.

(c) The corrected certificates or amended reports shall show the following:

(1) The terms "Corrected Original" and "Corrected Copy;"

(2) A statement identifying the superseded certificate or incorrect letter report and the corrections;

(3) A new serial number or new date of issuance; and

(4) The same statements and information, including permissive statements, that were shown on the incorrect certificate or the incorrect report, along with the correct statement or information, shall be shown on the corrected form.

(d) If all copies of the incorrect certificate or incorrect report can be obtained, then the superseded form shall be marked "Void" when submitted.

(e) Corrected certificates or amended letter reports cannot be issued for a certificate that has been superseded by another certificate, or superseded on the basis of a subsequent analysis or an additional laboratory test determination.

§ 91.29 Issuance of duplicate certificates or reissuance of an analysis report.

(a) Upon request by an applicant, a duplicate certificate or an additional report may be issued for a lost, destroyed, or otherwise not obtainable original form.

(b) The duplicate certificate or the reissuance of an analysis report shall be at the expense of the applicant.

(c) Requests for duplicate certificates or additional analysis reports shall be filed as follows:

(1) In writing;

(2) By the applicant who requested the service covered by the lost, destroyed, or otherwise not obtainable original form; and

(3) With the office that issued the initial certificate or original laboratory analysis report.

(d) The duplicate certificates or reissued analysis reports shall show the following:

(1) The terms "Duplicate Original," and the copies shall show "Duplicate Copy."

(2) A statement that the certificate or letter report was issued in lieu of a lost or destroyed or otherwise not obtainable certificate or laboratory analysis report; and

(3) The same statements and information, including permissive statements, that were shown on the original certificate or the initial analysis report shall be shown on the duplicate form.

(e) Duplicate certificates or duplicate analysis reports shall be issued as promptly as possible and distributed as the original certificates or original analysis reports and their copies.

(f) Duplicate certificates shall not be issued for certificates that have been superseded.

§ 91.30 Maintenance and retention of copies of certificates or analysis reports.

(a) At least one copy of each certificate or analysis report shall be filed in the laboratory for a period of not less than 3 years either from the date of issuance of the document, from the date of voiding a certificate, or from the date last payment is made by the applicant for a reported laboratory determination, whichever is later.

(b) Whenever any document, because of its condition, becomes unsuitable for its intended or continued use, the laboratory personnel shall make a copy of the original document.

(c) True copies shall be retained as photocopies, microfilm, microfiche, or other accurate reproductions and durable forms of the original document. Where reduction techniques, such as microfilming are used, suitable reader and photocopying equipment shall be readily available. Such reproductions shall be treated and considered for all purposes as though they were the original documents.

(d) All documents required to be maintained under this part shall be kept confidential and shall be disclosed only to the applicants or other persons with the applicants' knowledge and permission. Only such information as the Administrator deems relevant shall be disclosed to the public without the applicants' permission, and then, only in a suit or administrative hearing brought at the direction, or on the request, of the Administrator, or to which the Administrator or any other officer of the United States is a party.

Subpart H—Appeal of Laboratory Services

§ 91.31 When an appeal of a laboratory service may be requested.

(a) An application for an appeal of a laboratory service may be made by any interested party who is dissatisfied with the results of an analysis as stated in a certificate or laboratory report, if the lot of the commodity can be positively identified by the laboratory service as

the lot from which originally drawn samples were previously analyzed.

(b) An application for an appeal of a laboratory service shall be made within thirty (30) days following the day on which the previous analysis was performed. However, upon approval by the Division Director, the filing time for an appeal application may be extended.

§ 91.32 Where to file for an appeal of a laboratory service and information required.

(a) Application for an appeal of a laboratory service may be filed with the supervisor in the office or laboratory facility that issued the certificate or laboratory report on which the appeal analysis covering the commodity product is requested.

(b) The application for an appeal of a laboratory service shall state the location of the lot of the commodity product and the reasons for the appeal; and date and serial number of the certificate covering the laboratory service of the commodity product on which the appeal is requested. In addition, such application shall be accompanied by the original and all available copies of the certificate or laboratory report.

(c) Application for an appeal of a laboratory service may be made orally (in person or by telephone), in writing, by facsimile, or by telegraph. If made orally, written confirmation shall be made promptly.

§ 91.33 When an application for an appeal of a laboratory service may be withdrawn.

An application for an appeal of a laboratory service may be withdrawn by the applicant at any time before the appealed laboratory service is performed; *Provided,* That, the applicant shall pay, at the hourly rate prescribed in § 91.37, for the time incurred by the laboratory personnel, any travel, telephone, telegraph, or other expenses which have been incurred by the laboratory service in connection with such application.

§ 91.34 When an appeal of a laboratory service may be refused.

An application for an appeal of a laboratory service may be refused if:

(a) The reasons for the appealed laboratory service are frivolous or not substantial;

(b) The quality or condition of the commodity product has undergone a material change since the laboratory service covering the commodity product on which the appealed laboratory service is requested;

(c) The lot in question is not, or cannot be made accessible for sampling;

(d) The lot relative to which the appealed laboratory service is requested cannot be positively identified as the lot from which samples were previously drawn and originally analyzed; or

(e) There is noncompliance with the regulations in this part. Such applicant shall be notified promptly of the reason for such refusal.

§ 91.35 Who shall perform an appealed laboratory service.

An appealed laboratory service shall be performed, whenever possible, by another individual or other individuals than the scientist(s) or the technician(s) that performed the original analytical determination.

§ 91.36 Appeal laboratory certificate.

(a) An appeal laboratory certificate shall be issued showing the results of such appealed analysis. This certificate shall supersede the laboratory certificate previously issued for the commodity product involved.

(b) Each appeal laboratory certificate shall clearly identify the number and date of the laboratory certificate which it supersedes. The superseded certificate shall become null and void upon the issuance of the appealed laboratory certificate and shall no longer represent the analytical results of the commodity product.

(c) The individual issuing an appeal laboratory certificate shall forward notice of such issuance to such persons as he or she considers necessary to prevent misuse of the superseded certificate if the original and all copies of such superseded certificate have not previously been delivered to the individual issuing the appeal certificate.

(d) The provisions in the regulations in this part concerning forms and certificates, issuance of certificates, and retention and disposition of certificates shall apply to appeal laboratory certificates, except that copies of such appeal certificates shall be furnished to all interested parties who received copies of the superseded certificate.

Subpart I—Fees and Charges

§ 91.37 Fees for laboratory testing, analysis, and other services (general schedules).

(a) The fees listed in the general schedules in this section for the individual laboratory analyses cover the costs of Science Division laboratory services, including issuance of certificates and personnel and overhead costs other than the commodity inspection fees referred to in §§ 52.42 through 52.46, 52.48 through 52.51, 55.510 through 55.530, 55.560 through 55.570, 58.38 through 58.43, 58.45 through 58.47, 70.71 through 70.72, and 70.75 through 70.78. The fees apply to all processed commodity products, except flue-cured and burley tobacco, citrus juices and certain citrus products. The laboratory fees are listed for single test analysis (unless specified) for processed fruits and vegetables (part 93), poultry and egg products (part 94), processed dairy products (part 95), and meat and meat products (part 98). The fees for chemical analysis of cottonseed associated with grading and novel variety seed certification under the Plant Variety Protection Act are specified in parts 96 and 97, respectively. Except as otherwise provided in this section, charges will be made for laboratory analysis at the hourly rate of $34.20 for the time required to perform the service. A minimum charge of one-half hour will be made for service pursuant to each request or certificate issued. The following times per single test on each schedule will apply.

General Schedules of Fees for Official Laboratory Test Services Performed at the AMS Science Division Laboratories for Processed Commodity Products

TABLE 1.—SINGLE TEST TIMES AND LABORATORY FEES FOR PROXIMATE ANALYSES

Type of analysis	Hours for single test	List fee
Ammonia, Ion Selective Electrode	2.25	$76.95
Ash, Total	1	34.20
Ash, Acid Insoluble	1.5	51.30
Fat, Acid Hydrolysis	1	34.20
Fat, Ether Extraction	1	34.20
Fat, Microwave—Solvent Extraction	1	34.20
Fat, Specific Gravity	1	34.20
Fiber, Crude	2	68.40
Moisture, Distillation	1	34.20
Moisture, Karl Fischer	1.5	51.30
Moisture, Oven	0.5	17.10
Protein, Kjeldahl	2	68.40
Salt, Back Titration	0.75	25.65
Salt, Potentiometric	0.5	17.10

TABLE 2.—SINGLE TEST TIMES AND LABORATORY FEES FOR LIPID RELATED ANALYSES

Type of analysis	Hours for single test	List fee
Acid degree value (dairy)	1	$34.20
Acidity, titratable	0.5	17.10
Carotene, spectrophotometric	2.5	85.50
Catalase test	0.5	17.10
Cholesterol	5	171.00

TABLE 2.—SINGLE TEST TIMES AND LABORATORY FEES FOR LIPID RELATED ANALYSES—Continued

Type of analysis	Hours for single test	List fee
Moisture and fat analyses are required to be analyzed at an additional cost as prerequisites to the cholesterol test:		
Color (honey)	0.5	17.10
Color, NEPA (eggs)	1	34.20
Consistency, Bostwick (cooked)	0.5	17.10
Consistency, Bostwick (uncooked)	0.5	17.10
Density (specific gravity)	0.5	17.10
Dispersibility (Moats-Dabbah method)	0.5	17.10
Fat stability, AOM	1	34.20
Peroxide value analysis is required as a prerequisite to the fat stability test at the additional fee:		
Fatty acid profile (AOAC–GC method)	4	136.80
Flash point test only	2	68.40
Free fatty acids	0.75	25.65
Meltability (process cheese)	0.5	17.10
Peroxidase test	0.5	17.10
Peroxide value	1.5	51.30
Smoke point test only	2	68.40
Smoke point and flash point	3.5	119.70
Solids, total (oven drying)	0.5	17.10
Soluble solids, refractometer	0.5	17.10

TABLE 3 —SINGLE TEST TIMES AND LABORATORY FEES FOR FOOD ADDITIVES (DIRECT AND INDIRECT)

Type of analysis	Hours for single test	List fee
Aflatoxin, (dairy, eggs)	3.5	$119.70
Alar or daminozide residue	6	205.20
Amitraz residue, GLC	6	205.20
Alcohol (qualitative)	2	68.40
Alkalinity of ash	4	136.80
Antibiotic (dry milk)	4	136.80
Ascorbates (qualitative—meats)	0.5	17.10
Ascorbic acid, titration	1.0	34.20
Ascorbic acid, spectrophotometric	1.0	34.20
Benzene, residual	2	68.40
Brix, direct percent sucrose	0.5	17.10
Brix, dilution	0.5	17.10
Butylated hydroxyanisole (BHA)	1.5	51.30
Butylated hydroxytoluene (BHT)	1.5	51.30
Caffeine, micro Bailey-Andrew	1.5	51.30
Caffeine, spectrophotometric	1	34.20
Calcium	1.5	51.30
Citric acid, GLC or HPLC	1.5	51.30
Chlorinated hydrocarbons:		
Pesticides and industrial chemicals—initial screen	4	136.80
Second column confirmation of analyte	1	34.20
Confirmation on mass spectrometer	2	68.40
Dextrin (qualitative)	0.5	17.10
Dextrin (quantitative)	3	102.60
Filth, heavy (dairy)	2.5	85.50
Filth, heavy (eggs)	4	136.80
Filth, light (eggs)	2.5	85.50
Filth, light and heavy (eggs extraneous)	6	205.20
Flavor	0.75	25.65
Fumigants:		
Initial screen—		
Dibromochloropropane (DBCP)	1	34.20
Ethylene dibromide	1	34.20
Methyl bromide	1	34.20
Confirmation on mass spectrometer—each individual fumigant residue	2	68.40
Glucose (qualitative)	0.75	25.65
Glucose (quantitative)	1.75	59.85
Glycerol (quantitative)	3	102.60
Gums	3	102.60
High sucrose content or avasucrol—percent sucrose (Holland eggs)	4	136.80
Hydrogen ion activity, pH	0.5	17.10
Mercury, cold vapor AA	2.5	85.50
Metals—other than mercury, each metal	2	68.40
Monosodium dihydrogen phosphate	4	136.80
Monosodium glutamate	4	136.80
Nitrites (qualitative)	0.5	17.10
Nitrites (quantitative)	3	102.60
Oxygen	0.5	17.10
Palatability and Odor:		
First Sample	0.75	25.65
Each additional sample	0.5	17.10
Phosphatase, residual	1	34.20
Phosphorus	2	68.40
Propylene glycol, codistillation: (qualitative)	2	68.40
Pyrethrin residue (dairy)	4	136.80
Scorched particles	0.5	17.10
Sodium, potentiometric	1	34.20
Sodium benzoate, HPLC	1.5	51.30
Sodium lauryl sulfate (SLS)	8	273.60
Sodium silicoaluminate (Zeolex)	2	68.40
Solubility index	0.75	25.65
Starch, direct acid hydrolysis	3	102.60
Sugar, polarimetric methods	1	34.20
Sugar profile, HPLC—This profile includes the following components: Dextrose, fructose, lactose, maltose and sucrose:		
One type sugar from HPLC profile	3	102.60

TABLE 3.—SINGLE TEST TIMES AND LABORATORY FEES FOR FOOD ADDITIVES (DIRECT AND INDIRECT)—Continued

Type of analysis	Hours for single test	List fee
Each additional type sugar	0.5	17.10
Sugars, non-reducing	3	102.60
Sugars, total as invert	2	68.40
Sulfites (qualitative)	0.75	25.65
Sulfur dioxide, Monier-Williams.	1.5	51.30
Sulfur dioxide, direct titration	1	34.20
Toluene, residual	2	68.40
Triethyl citrate, GC (quantitative)	1	34.20
Vitamin A	5	171.00
Vitamin D, HPLC (vitamins D_2 and D_3)	8.5	290.70
Whey protein nitrogen	2.5	85.50
Xanthydrol test for urea	1.5	51.30
This is an optional test to the extraneous materials isolation test.		

TABLE 4.—SINGLE TEST TIMES AND LABORATORY FEES FOR OTHER CHEMICAL AND PHYSICAL COMPONENT ANALYSES

Type of analysis	Hours for single test	List fee
Available carbon dioxide (baking powders)	4	$136.80
Complete Kohman analysis (dairy)	3	102.60
Jelly strength (bloom)	2.5	85.50
Methyl anthranilate	1	34.20
Grape juice absorbancy ratio	0.5	17.10
Net weight (per can)	0.5	17.10
Non-volatile methylene chloride extract	2.5	85.50
Particle size (ether wash)	0.5	17.10
Potassium iodide (table salt)	1.5	51.30
Quinic acid (cranberry juice)	1.75	59.85
Sieve or particle size	0.5	17.10
Water activity	4	136.80

TABLE 4.—SINGLE TEST TIMES AND LABORATORY FEES FOR OTHER CHEMICAL AND PHYSICAL COMPONENT ANALYSES—Continued

Type of analysis	Hours for single test	List fee
Water insoluble inorganic residues (WIIR)	2	68.40
Yellow onion test	0.75	25.65

TABLE 5.—SINGLE TEST TIMES AND LABORATORY FEES FOR MICROBIOLOGICAL ANALYSES

Type of analysis	Hours for single test	List fee
Aerobic (standard) plate count	0.5	$17.10
Anaerobic bacterial plate count	0.75	25.65
Bacterial direct microscopic count	1	34.20
Campylobacter jejuni	4	136.80
Coliform plate count, violet red bile agar: (Presumptive coliform plate count)	0.75	25.65
Coliforms, most probable number (MPN):[1]		
Step 1	0.75	25.65
Step 2	0.75	25.65
E. coli, presumptive MPN (additional fee)[2]	1.5	51.30
Enterococci count	3	102.60
Listeria monocytogenes confirmation analysis:[3]		
Step 1	1.5	51.30
Step 2	1.5	51.30
Step 3 (confirmation)	2.5	85.50
Proteolytic count	1	34.20
Psychrotrophic bacterial plate count	0.75	25.65
Salmonella (USDA culture method):[4]		
Step 1	1.5	51.30
Step 2	0.75	25.65
Step 3 (confirmation)	1.5	51.30
Serological typing (optional)	2.5	85.50
Salmonella (rapid methods):[5]		
Step 1	2.0	68.40
Step 2	0.75	25.65
Step 3 (confirmation)	1.5	51.30
Staphylococcus aureus, MPN: With coagulase positive confirmation	1.75	59.85

TABLE 5.—SINGLE TEST TIMES AND LABORATORY FEES FOR MICROBIOLOGICAL ANALYSES—Continued

Type of analysis	Hours for single test	List fee
Thermoduric bacterial plate count	0.75	25.65
Yeast and mold count	0.5	17.10
Yeast and mold differential plate count	0.75	25.65

[1] Coliform MPN analysis may be in two steps as follows: Step 1—presumptive test through lauryl sulfate tryptose broth; Step 2—confirmatory test through brilliant green lactose bile broth.

[2] Step 1 of the coliform MPN analysis is a prerequisite for the performance of the presumptive *E. coli* test. Prior enrichment in lauryl sulfate tryptose broth is required for optimal recovery of *E. coli* from inoculated and incubated EC broth (*Escherichia* coli broth). The *E. coli* test is performed through growth on eosin methylene blue agar. The fee stated for *E. coli* analysis is a supplementary charge to step 1 of coliform test.

[3] *Listeria* monocytogenes test using the USDA method may be in three steps as follows: Step 1—isolation by University of Vermont modified (UVM) broth and Fraser's broth enrichments and selective plating with Modified Oxford (MOX) agar; Presumptive Step 2—typical colonies inoculated from Horse Blood into brain heart infusion (BHI) broth and check for characteristic motility; Confirmatory Step 3—culture from BHI broth with typical motility is inoculated into the seven biochemical medias, BHI agar for oxidase and catalase tests, Motility test medium, and Christie-Atkins-Munch-Peterson (CAMP) test.

Listeria monocytogenes test using the FDA method may be in three steps as follows: Step 1—isolation by trypticase soy broth with 0.6% yeast extract (TSB–YE) broth enrichment and selective plating with Modified McBrides agar and Lithium chloride Phenylethanol Moxalactam (LPM) agar; Presumptive Step 2—typical colonies inoculated to trypticase soy agar with yeast extract (TSA–YE) with sheep blood plates to check for hemolysis followed by inoculations to BHI broth and TSA–YE plates to check for characteristic motility, gram stain and catalase test; Confirmatory Step 3—culture from BHI broth with typical motility for wet mount is inoculated into the required 10 biochemical medias, Sulfide-Indole-Motility (SIM) medium, and the CAMP test. Serology is checked using growth from TSA–YE plates.

Both methods for *Listeria* determination have the equivalent time needed for each step.

[4] *Salmonella* test may be in three steps as follows: Step 1—growth through differential agars; Step 2—growth and testing through triple sugar iron and lysine iron agars; Step 3—confirmatory test through biochemicals, and polyvalent serological testing with Poly "O" and Poly "H" antiserums. The serological typing of *Salmonella* is requested on occasion.

[5] *Salmonella* test may be in three steps as follows: Step 1—growth in enrichment broths and Elisa test or DNA hybridization system assay; Step 2—growth and testing through triple sugar iron and lysine iron agars; Step 3—confirmatory test through biochemicals, and polyvalent serological testing with Poly "O" and Poly "H" antiserums.

TABLE 6.—SINGLE TEST TIMES AND LABORATORY FEES FOR AFLATOXIN ANALYSES

Aflatoxin test by commodity	Hours for single test	Fee per single analysis	Fee per pair analyses [1]
Peanut Butter (TLC—CB)	1	$34.20	[2] NA
Corn (TLC—CB)	1	34.20	NA
Roasted Peanuts (TLC—BF)	1	34.20	NA
Brazil Nuts (TLC—BF)	2	68.40	NA
Pistachio Nuts (TLC—BF)	2	68.40	NA
Shelled Peanuts (TLC—BF)	NA	14.00	28.00
Shelled Peanuts (Aflatest)	NA	20.00	40.00
Shelled Peanuts (HPLC)	NA	50.00	100.00
Tree Nuts (TLC)	1	34.20	NA
Oilseed Meals (TLC)	1	34.20	NA
Edible Seeds (TLC)	1	34.20	NA
Dried Fruit (TLC)	1	34.20	NA
Small Grains (TLC)	1	34.20	NA
In-Shell Peanuts (TLC)	NA	14.00	28.00
Silage; Other Grains (TLC)	1	34.20	NA

[1] Aflatoxin testing of raw peanuts under Peanut Marketing Agreement for subsamples 1–AB, 2–AB, 3–AB, and 1–CD is $28.00 per pair of analyses using Thin-Layer Chromatography (TLC) and Best Foods (BF) extraction method. The BF method has been modified to incorporate a water slurry extraction procedure. The Contaminants Branch (CB) method is used on occasion as an alternative method for peanuts and peanut meal when doubt exists as to the effectiveness of the BF method in extracting aflatoxin from the sample or when background interferences exist that might mask TLC quantitation of aflatoxin. The cost per pair of analyses using Aflatest and High Pressure Liquid Chromatography (HPLC) is $40.00 and $100.00, respectively. Other aflatoxin analyses for fruits and vegetables are listed at Science Division's current hourly rate of $34.20.

[2] NA denotes not applicable.

TABLE 7.—MISCELLANEOUS CHARGES SUPPLEMENTAL TO THE SCIENCE DIVISION'S LABORATORY ANALYSIS FEES

Laboratory service description	Hours for single sample	List fee
Sample Grinding (Raw Peanuts)	0.25	$8.55
Sample Grinding (Canned Boned Poultry)	1	34.20
Sample Grinding (Meats, Meat Products, Meals, Ready-to-Eat):		
Per pouch or raw sample	0.25	8.55
Per tray pack	0.5	17.10
Compositing Multiple Subsamples for an Individual Test Sample Unit per subsample	0.25	8.55

TABLE 8.—ADDITIONAL CHARGES APPLICABLE TO THE SAMPLE RECEIPT AND ANALYSIS REPORT

Service description	List charge
Established Courier Expense at Albany, Georgia Laboratory.	$2.00
Courier Expense at Other AMS Laboratories: Mileage Charge Set at $0.30 Per Mile Roundtrip from Laboratory to Delivery Site.	Varies.

TABLE 8.—ADDITIONAL CHARGES APPLICABLE TO THE SAMPLE RECEIPT AND ANALYSIS REPORT

Service description	List charge
Facsimile Charge (Per Analysis Report).	$3.00 minimum up to first 3 pages, then $1.00 per page.
Additional Analysis Report or Extra Certificate (½ hour charge).	$17.10 per report or certificate reissued.

(b) The fee charge for any laboratory analysis not listed in paragraph (a) of this section, or for any other applicable services rendered in the laboratory, shall be based on the time required to perform such analysis or render such service. The standard hourly rate shall be $34.20.

(c) When a laboratory test service is provided for AMS by a commercial or State government laboratory, the applicant will be assessed a fee which covers the costs to AMS for the service provided.

§ 91.38 Additional fees for appeal of analysis.

(a) The appellant will be charged an additional fee at a rate of 1.5 times the standard rate stated in paragraph (a) of § 91.37 if, as a result of an authorized appeal analysis, it is determined that the original test results are correct. The appeal laboratory rate is $51.30 per analysis hour.

(b) The appeal fee will be waived if the appeal laboratory test discloses that an error was made in the original analysis.

§ 91.39 Special request fees for overtime and legal holiday service.

(a) Laboratory analyses initiated at the special request of the applicant to be rendered on Saturdays, Sundays, Federal holidays, and on an overtime basis will be charged at a rate of 1.5 times the standard rate stated in paragraph (a) of § 91.37. The premium laboratory rate for holiday and overtime service will be $51.30 per analysis hour.

(b) Information on legal holidays or what constitutes overtime service at a particular AMS laboratory is available from the laboratory supervisor.

§ 91.40 Fees for courier service and facsimile of the analysis report.

(a) The AMS peanut aflatoxin laboratory at Albany, Georgia, has a set courier charge of $2.00 per trip to retrieve the sample package. The mileage charge specified in Table 8 in § 91.37 of this part for courier service at other AMS laboratories is based on the shortest roundtrip route from laboratory to sample retrieval site.

(b) The faxing of laboratory analysis reports or certificates is an optional service offered at the fee specified in Table 8 in § 91.37 of this part.

§ 91.41 Charges for demonstrations and courses of instruction.

Charges, not in excess of the cost thereof and as approved by the Division Director, may be made for demonstrations, samples, or courses of instruction when such are furnished upon request.

§ 91.42 Billing.

(a) Each billing cycle will end on the 25th of the month. The applicant will be billed by the National Finance Center on the 1st day, following the end of the billing cycle in which voluntary laboratory services and other services were rendered at a particular Science Division laboratory.

(b) The total charge shall normally be stated directly on the analysis report or on a standardized certificate form for the laboratory analyses of a specific agricultural commodity and related commodity products.

(c) The actual bill for collection will be issued by the National Finance Center, Program Billings and Collection Section, PO Box 60950, New Orleans, Louisiana 70160.

§ 91.43 Payment of fees and charges.

(a) Fees and charges for services shall be paid by the applicant, by check or money order payable, to the "Agricultural Marketing Service, USDA" and sent to the office indicated on the bill.

(b) Fees and charges for services under a cooperative agreement with a State or other AMS Divisions will be paid in accordance with the terms of the cooperative agreement.

(c) As necessary, the Division Director may require that fees shall be paid in advance of the performance of the requested service. Any fees paid in excess of the amount due shall be used to offset future billings, unless a request for a refund is made by applicant.

§ 91.44 Charges on overdue accounts and issuance of delinquency notices.

(a) Accounts are considered overdue if payment is late with the National Finance Center (NFC). The timeliness of a payment will be based on the postmark date of the payment or the date of receipt by the NFC if no postmark date is present or legible. Bills are payable upon receipt and become delinquent 30 days from date of billing.

(b) Any amount due not paid by the due date will be increased by a late payment charge. The actual assessed rate applied to overdue accounts is set quarterly by the Department of the Treasury. This amount is one-twelfth of one year's late penalty interest rate computed at the prescribed rate.

(c) Overtime or holiday laboratory service will not be performed for any applicant with a notice of delinquency.

(d) Applicants with three notices of delinquency will be reviewed for possible termination of services. A deposit in advance sufficient to cover the fees and expenses for any subsequent service may be required of any person failing to pay in claim after issuance of such notice of delinquency.

(e) The Division Director will take such action as may be necessary to collect any delinquent amounts due.

§ 91.45 Charges for laboratory services on a contract basis.

(a) Irrespective of fees and charges prescribed in § 91.37, or in other sections of this subchapter E, the Division Director may enter into contracts with applicants to perform continuous laboratory services or other types of laboratory services pursuant to the regulations in this part and other requirements, as prescribed by the Division Director in such contract. In addition, the charges for such laboratory services, provided in such contracts, shall be on such basis as will reimburse the Agricultural Marketing Service of the Department for the full cost of rendering such laboratory services, including an appropriate overhead charge to cover administrative overhead expenses as may be determined by the Administrator.

(b) Irrespective of fees and charges prescribed in § 91.37, or in other sections of this subchapter E, the Division Director may enter into a written Memorandum of Understanding (MOU) or agreement with any administrative agency or governing party for the performance of laboratory services pursuant to said agreement or order on a basis that will reimburse the Agricultural Marketing Service of the Department for the full cost of rendering such laboratory service, including an appropriate overhead administrative overhead charge.

(c) The conditions and terms for renewal of such Memorandum of Understanding or agreement shall be specified in the contract.

PART 92—TOBACCO

Sec.

92.1 General.
92.2 Definitions.
92.3 Location for laboratory testing and kind of services available.
92.4 Approved forms for reporting analytical results.
92.5 Analytical methods.
92.6 Cost for pesticide analysis set by cooperative agreement.

Authority: 7 U.S.C. 511m and 7 U.S.C. 511r.

§ 92.1 General.

Analytical testing of imported flue-cured and burley tobacco is performed for maximum allowable pesticide residue levels. Domestic grown tobacco may also be analyzed for pesticide residues at the Science Division's Eastern Laboratory facility.

§ 92.2 Definitions.

Words used in the regulations in this part in the singular form will import the plural, and vice versa, as the case may demand. As used throughout the regulations in this part, unless the context requires otherwise, the following terms will be construed to mean:

Air-cured. Tobacco cured under natural atmospheric conditions. Artificial heat is sometimes used to control excess humidity during the curing period to prevent house-burn, barn-burn and pole-burn in damp weather. Air-cured tobacco should not carry the odor of smoke or fumes resulting from the application of artificial heat.

Burley. A thin to medium-bodied tobacco, usually a light tan to reddish-brown in color.

Burley, Type 93. That type of air-cured tobacco commonly known as foreign-grown Burley, produced in countries other than the United States.

Certificate of Analysis (Form CSSD-3). A legal document on which the test results for official samples will be certified by a Division chemist in charge of testing.

Cured. Tobacco dried of its sap by either natural or artificial processes.

2,4–D. The common abbreviation for the acid herbicide 2,4–Dichlorophenoxyacetic acid.

DBCP. The common abbreviation for the volatile fumigant pesticide 1,2–Dibromo-3-chloropropane.

DDE. The common abbreviation for the chlorinated pesticide Dichlorodiphenyldichloroethylene. Degradation product of DDT by loss of one molecule of hydrochloric acid or referred to as a dehydrohalogenation process.

DDT. The common abbreviation for Dichloro diphenyl trichloroethane or the common name for the chlorinated insecticide or contact poison 1,1–Bis(p-chlorophenyl)-2,2,2-trichloroethane.

Dicamba. The common name for the acid herbicide 2–Methoxy-3,6-dichlorobenzoic acid.

EDB. The common abbreviation for Ethylene dibromide or the common name for the volatile fumigant pesticide 1,2–Dibromoethane.

Flue-cured. Tobacco cured under artificial atmospheric conditions by a process of regulating the heat and ventilation without allowing smoke or fumes from the fuel to come in contact with the tobacco; or tobacco cured by some other process which accomplishes the same results.

Flue-cured, Type 92. That type of flue-cured tobacco commonly known as

Foreign-grown Flue-cured, produced in countries other than the United States.

Formothion. The common name for the organophosphorus pesticide S-(2-(Formylmethylamino)-2-oxoethyl) O-O-dimethyl phosphorodithioate.

HCB. The common abbreviation for the organochlorine pesticide Hexachlorobenzene.

Lot. A unit of shipment of tobacco encompassed by a single invoice. The lot may represent a pile, basket, bulk, hack, burden, or more than one bale, case, hogshead, tierce, package, or other definite package unit.

Maximum pesticide residue level. The maximum concentration of residue allowable for a specific pesticide or combination of pesticides, as set forth in § 29.427 by the Director of the Tobacco Division.

Pesticide. Any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.

Pesticide certification. A document issued by the Tobacco Division in a form approved by its Director, containing a certification by the importer that flue-cured and burley tobacco offered for importation does not exceed the maximum allowable residue levels of any pesticide that has been canceled, suspended, revoked, or otherwise prohibited under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

Pesticide test sample. An official sample or samples, collected from a lot of tobacco by the AMS Tobacco Division inspector for analysis by a certified chemist to ascertain the residue levels of pesticides that have been canceled, suspended, revoked, or otherwise prohibited under the FIFRA.

Sample Identification Form (Form TB–89). A document approved by the Director of the Tobacco Division that identifies and accompanies the sample to the testing facility.

2,4,5–T. The common abbreviation for the acid herbicide 2,4,5–Trichlorophenoxyacetic acid.

TDE. The common abbreviation for the chlorinated insecticide 1,1–Dichloro-2,2-bis(p-chlorophenyl)ethane.

Testing. The chemical analysis of a pesticide test sample to determine the presence and levels of pesticide residues.

Tobacco. Tobacco as it appears between the time it is cured and stripped from the stalk, or primed and cured, in whole leaf or strip form, and the time it enters into the different manufacturing processes. Conditioning, sweating, stemming, and threshing are not regarded as manufacturing processes. Tobacco, as used in this part does not include manufactured or semimanufactured products, stems, cuttings, clippings, trimmings, siftings, or dust.

§ 92.3 Location for laboratory testing and kind of services available.

(a) The analytical testing of imported Type 92 flue-cured tobacco samples and imported Type 93 burley tobacco samples for maximum pesticide residue level determinations is performed at the Science Division's Eastern Laboratory, and is located at: USDA, AMS, Science Division, Eastern Laboratory, 645 Cox Road, Gastonia, NC 28054.

(b) Domestic-grown tobacco and tobacco products may be analyzed for acid herbicides, chlorinated hydrocarbons, fumigants, and organophosphates at the Science Division facility in this section.

(c) The Division performs for the Tobacco Division the quantitative and confirmatory chemical residue analyses on pesticide test samples of imported tobacco for the following specific pesticides:

(1) Organochlorine pesticides such as Dichloro-diphenyldichloroethylene (DDE), Dichloro Diphenyl Trichloroethane (DDT), 1,1–Dichloro-2,2-bis (p-chlorophenyl)ethane (TDE), Toxaphene, Endrin, Aldrin, Dieldrin, Heptachlor, Methoxychlor, Chlordane, Heptachlor Epoxide, Hexachlorobenzene (HCB), Cypermethrin, and Permethrin.

(2) Organophosphorus pesticides such as Formothion.

(3) Fumigants such as Ethylene Dibromide (EDB) and Dibromochloropropane (DBCP).

(4) Acid herbicides such as 2,4-D, 2,4,5-T, and Dicamba.

§ 92.4 Approved forms for reporting analytical results.

(a) Form TB–89, "Imported Tobacco Pesticide Residue Analysis" certificate, is enclosed with and identifies the sample submitted to the laboratory.

(b) Test results of the pesticide analyses for tobacco shall be recorded on "Certificate of Analysis For Official Samples," Form CSSD–3, and shall be expressed in total parts per million, per gram sample for each particular pesticide residue found in the lot of tobacco. Form CSSD–3 is attached to Form TB–89 that is returned to the Tobacco Division. The analytical data on Form CSSD–3 substantiates the information placed on Form TB–89.

§ 92.5 Analytical methods.

Every chemist certified to analyze tobacco samples for pesticide residue contamination shall follow precisely the USDA developed analytical test methods and all successive official method updates, as approved by the Director, Science Division.

§ 92.6 Cost for pesticide analysis set by cooperative agreement.

The fee for the pesticide analysis of tobacco is set by the Tobacco Division, in conjunction with the Science Division, and appears at § 29.500 as part of Tobacco Division's fees for sampling and certification of imported flue-cured and burley tobacco. A Memorandum of Understanding (MOU) exists between the Tobacco Division and the Science Division for the testing of imported tobacco samples for pesticide residue contamination, and the corresponding agreement on the cost of analyses is specified in this document.

PART 93—PROCESSED FRUITS AND VEGETABLES

Subpart A—Citrus Juices and Certain Citrus Products

Sec.

93.1 General.
93.2 Definitions.
93.3 Analyses available and location of laboratory.
93.4 Analytical methods.
93.5 Fees for citrus product analyses set by cooperative agreement.

Subpart B—Processed Fruits and Vegetables, Processed Products Thereof, and Certain Other Processed Food Products

93.10 General.
93.11 Definitions.
93.12 Location of the laboratory for processed food products.
93.13 Analytical methods.
93.14 Fees for processed fruits and vegetables and related products.

Subpart C—Peanuts, Tree Nuts, Corn and Other Oilseeds

93.100 General.
93.101 Definitions.
93.102 Analyses available and locations of laboratories.
93.103 Analytical methods.
93.104 Fees for aflatoxin testing.
93.105 Fees for analytical testing of oilseeds.

Authority: Agricultural Marketing Act of 1946, secs. 203, 205, 60 Stat. 1087, as amended, 1090, as amended (7 U.S.C. 1622, 1624)

Subpart A—Citrus Juices and Certain Citrus Products

§ 93.1 General.

Domestic and imported citrus products are tested to determine whether quality and grade standards are satisfied as set forth in the Florida Citrus Code.

§ 93.2 Definitions.

Words used in the regulations in this subpart in the singular form will import the plural, and vice versa, as the case may demand. As used throughout the regulations in this subpart, unless the context requires otherwise, the following terms will be construed to mean:

Acid. The grams of total acidity, calculated as anhydrous citric acid, per 100 grams of juice or citrus product. Total acidity is determined by titration with standard sodium hydroxide solution, using phenolphthalein as indicator.

Brix or degrees Brix. The percent by weight total soluble solids of the juice or citrus product when tested with a Brix hydrometer calibrated at 20° C (68° F) and to which any applicable temperature correction has been made. The Brix or degrees Brix may be determined by any other method which gives equivalent results.

Brix/acid ratio. The ratio of the degrees Brix of the juice to the grams of anhydrous citric acid per 100 grams of the juice.

Brix value. The refractometric sucrose value of the juice or citrus product determined in accordance with the "International Scale of Refractive Indices of Sucrose Solutions" and to which the applicable correction for acid is added. The Brix value is determined in accordance with the refractometric method outlined in the Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC), Association of Official Analytical Chemists, suite 400, 2200 Wilson Boulevard, Arlington, VA 22201–3301.

Brix value/acid ratio. The ratio of the Brix value of the juice or citrus product, in degrees Brix, to the grams of anhydrous citric acid per 100 grams of juice or citrus product.

Citrus. All plants, edible parts and commodity products thereof, including pulp and juice of any orange, lemon, lime, grapefruit, mandarin, tangerine, kumquat or other tree or shrub in the genera *Citrus, Fortunella,* or *Poncirus* of the plant family Rutaceae.

Recoverable oil. The percent of oil by volume, determined by the Bromate titration method as described in the current edition of the AOAC.

§ 93.3 Analyses available and location of laboratory.

(a) Laboratory analyses of citrus juice and other citrus products are being performed at the following Science Division location: Science Division Citrus Laboratory, 111 Third Street, SW, suite 211, Winter Haven, FL 33880.

(b) Laboratory analyses of citrus fruit and products in Florida are available in order to determine if such commodities satisfy the quality and grade standards set forth in the Florida Citrus Code (Florida Statutes Pursuant to chapter 601). Such analyses include tests for acid as anhydrous citric acid, Brix, Brix-acid ratio, recoverable oil, and artificial coloring matter additive, as turmeric. The Florida Division of Fruit and Vegetable Inspection may also request analyses for arsenic metal, pulp wash (ultraviolet and fluorescence), standard plate count, yeast with mold count, and nutritive sweetening ingredients as sugars.

(c) Additional laboratory tests are available upon request at the Science Division Citrus Laboratory at Winter Haven, Florida. Such analyses include tests for vitamins, naringin, sodium benzoate, *Salmonella,* protein, salt, pesticide residues, sodium metal, ash, potassium metal, and coliforms for citrus products.

§ 93.4 Analytical methods.

(a) The majority of analytical methods for citrus products are found in the Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC).

(b) Other analytical methods for citrus products may be used as approved by the Director, Science Division.

§ 93.5 Fees for citrus product analyses set by cooperative agreement.

The fees for the analyses of fresh citrus juices and other citrus products shall be set by mutual agreement between the applicant, the State of Florida, and the Director, Science Division. A Memorandum of Understanding (MOU) or cooperative agreement exists presently with the AMS Science Division and the State of Florida, regarding the set hourly rate and the costs to perform individual tests on Florida citrus products, for the State.

Subpart B—Processed Fruits and Vegetables, Processed Products Thereof, and Certain Other Processed Food Products

§ 93.10 General.

Analytical testing is performed for certain types of food products, including processed fruits and vegetables, as part of the determination of their grade or conformance of the product with applicable analytical requirements.

§ 93.11 Definitions.

Words used in the regulations in this subpart in the singular form will import the plural, and vice versa, as the case may demand. As used throughout the regulations in this subpart, unless the context requires otherwise, the following terms will be construed to mean:

Processed product. Any fruit, vegetable, or other food product covered under the regulations in this subpart which has been preserved by any recognized commercial process, including, but not limited to, canning, freezing, dehydrating, drying, the addition of chemical substances, or by fermentation.

Quality. The inherent properties of any processed product which determine the relative degree of excellence or desirability of such product. This includes the effects of preparation and processing, and may or may not include the effects of packing media, or added ingredients.

§ 93.12 Location of the laboratory for processed food products.

(a) The Science Division Midwestern Laboratory conducts the majority of laboratory analyses for processed food products to assure uniformity of analytical requirements and conformance with applicable military, Federal, or State government specifications. The wide array of analyses for processed food products are performed at the following location: USDA, AMS, Science Division, Midwestern Laboratory, 3570 North Avondale Ave., Chicago, IL 60618.

(b) The analyses available for processed fruits and vegetables and related products include ash, oil or fat, crude fiber, moisture, protein, specific gravity, daminozide and amitraz residues, ascorbic acid, quinic acid, methyl anthranilate, caffeine, calcium, brix, citric acid, and chlorinated hydrocarbon residues. In addition, chemical and physical analyses include extraneous materials, fumigants, pH, heavy metals and minerals, color, sodium, sugar profile, sulfur dioxide, vitamin A, bloom, non-volatile methylene chloride extract, sieve or particle size, water activity, Water Insoluble Inorganic Residues (WIIR) test, yellow onion test, and carbohydrates. Microbiological analyses for fruits and vegetables include standard plate counts, anaerobic bacterial plate counts, direct microscopic counts, coliforms, presumptive *Escherichia* coli, *Staphylococcus* aureus, *Salmonella,* Enterococci, psychrotrophic bacteria, *Bacillus,* and yeast with mold differential counts.

§ 93.13 Analytical methods.

The majority of analytical methods used for performing official analyses for processed food products are found in the following manuals:

(a) Official Analytical Methods of the American Spice Trade Association (ASTA), American Spice Trade Association, 580 Sylvan Avenue, PO Box 1267, Englewood Cliffs, NJ 07632.

(b) Official Methods and Recommended Practices of the American Oil Chemists' Society (AOCS), American Oil Chemists' Society, 1608 Broadmoor Drive, PO Box 3489, Champaign, IL 61826–3489.

(c) Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC), Association of Official Analytical Chemists, suite 400, 2200 Wilson Boulevard, Arlington, VA 22201–3301,

(d) U.S. Army Individual Protection Directorate's Military Specifications, approved analytical test methods noted therein, U.S. Army Natick Research, Development and Engineering Center, Kansas Street, Natick, MA 01760–5017.

§ 93.14 Fees for processed fruits and vegetables and related products.

(a) The fee charged for any single laboratory analysis for processed fruits and vegetables is specified in the schedules of charges in paragraph (a) of § 91.37 of this subchapter.

(b) The hourly rate for any requested laboratory analysis not listed shall be the standard rate specified in § 91.37(b) of this subchapter.

Subpart C—Peanuts, Tree Nuts, Corn and Other Oilseeds

§ 93.100 General.

Chemical analyses are performed to detect the presence of aflatoxin in lots of shelled peanuts and peanut products, as well as in other nuts and agricultural products. In addition, proximate chemical analyses for quality determination are performed on oilseeds.

§ 93.101 Definitions.

Words used in the regulations in this subpart in the singular form will import the plural, and vice versa, as the case may demand. As used throughout the regulations in this subpart, unless the context requires otherwise, the following terms will be construed to mean:

Aflatoxin. A toxic metabolite produced by the molds *Aspergillus flavus* and *Aspergillus parasiticus*. The aflatoxin compounds fluoresce when viewed under UV light as follows: aflatoxin B_1 and derivatives with a blue fluorescence, aflatoxin B_2 with a blue-violet fluorescence, aflatoxin G_1 with a green fluorescence, aflatoxin G_2 with a green-blue fluorescence, aflatoxin M_1 with a blue-violet fluorescence, and aflatoxin M_2 with a violet fluorescence. These closely related molecular structures are referred to as aflatoxin B_1, B_2, G_1, G_2, M_1, M_2, GM_1, B_{2a}, G_{2a}, R_0, B_3, $1\text{–}OCH_3B_2$, and $1\text{–}CH_3G_2$.

Peanuts. The seeds of the legume *Arachis hypogaea*, and includes both inshell and shelled nuts.

Peanut Administrative Committee (PAC). The committee established under the U.S. Department of Agriculture Marketing Agreement for Peanuts, 7 CFR part 998, which administers the terms and provisions of this Agreement, including the aflatoxin control program for domestically produced raw peanuts, for peanut shellers.

Peanut Marketing Agreement. The agreement concerning the regulations and instructions set forth since July 12, 1965, by the Peanut Administrative Committee (30 FR 9402), for the marketing of peanuts entered into by handlers of domestically produced peanuts under the authority of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.).

Seed. Any vegetable or other agricultural plant ovule having an embryo that is capable of germinating to produce a plant.

§ 93.102 Analyses available and locations of laboratories.

(a) *Aflatoxin testing services.* The aflatoxin analyses for peanuts, other nuts, corn, and other oilseed products are performed at the following 9 locations for Science Division (SD) Aflatoxin Laboratories:

(1) USDA, AMS, SD, 1411 Reeves Street, Mail: P.O. Box 1368, Dothan, AL 36302.

(2) USDA, AMS, SD, 2705 Taft Street, Albany, GA 31707.

(3) USDA, AMS, SD, 610 North Main Street, Blakely, GA 31723.

(4) USDA, AMS, SD, 107 South Fourth Street, Madill, OK 73446.

(5) USDA, AMS, SD, 308 Culloden Street, Mail: P.O. Box 1130, Suffolk, VA 23434.

(6) USDA, AMS, SD, 200 West Washington Street, Mail: P.O. Box 488, Ashburn, GA 31714.

(7) USDA, AMS, SD, 301 West Pearl Street, Mail: P.O. Box 279, Aulander, NC 27805.

(8) USDA, AMS, SD, 42 North Ellis Street, Mail: P.O. Box 548, Camilla, GA 31730.

(9) USDA, AMS, SD, 715 North Main Street, Mail: P.O. Box 272, Dawson, GA 31742.

(b) *Peanuts, peanut products, and oilseed testing services.* (1) The Science Division Aflatoxin Laboratories at Dothan, Alabama and Albany and Blakely, Georgia will perform other analyses for peanuts, peanut products, and a variety of oilseeds. The analyses for oilseeds include testing for free fatty acids, ammonia, nitrogen or protein, moisture and volatile matter, foreign matter, and oil (fat) content.

(2) All of the analyses described in paragraph (b)(1) of this section performed on a single seed sample are billed at the rate of one hour per sample. Any single seed analysis performed on a single sample is billed at the rate of one-half hour per sample. The standard hourly rate shall be as specified in § 91.37, paragraph (b).

(c) *Vegetable oil testing services.* The analyses for vegetable oils are performed at the Science Division Midwestern Laboratory, as indicated in § 93.12, paragraph (a). The analyses for vegetable oils will include the flash point test, smoke point test, acid value, peroxide value, phosphorus in oil, and specific gravity. The fee charged for any single laboratory analysis for vegetable oils shall be obtained from the schedules of charges in paragraph (a) of § 91.37 of this subchapter.

§ 93.103 Analytical methods.

Official analyses for peanuts, nuts, corn, oilseeds, and related vegetable oils are found in the following manuals and forthcoming revisions:

(a) Analyst's Instruction for Aflatoxin (November 1991), SD Instruction No. 1, USDA, Agricultural Marketing Service, Science Division, South Agriculture Building, 14th & Independence Avenue, SW., P.O. Box 96456, Washington, DC 20090–6456.

(b) Official Methods and Recommended Practices of the American Oil Chemists' Society (AOCS), American Oil Chemists' Society, 1608 Broadmoor Drive, P.O. Box 3489, Champaign, IL 61826–3489.

(c) Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC), Association of Official Analytical Chemists, suite 400, 2200 Wilson Boulevard, Arlington, VA 22201–3301.

(d) Standard Analytical Methods of the Member Companies of Corn Industries Research Foundation, Corn Refiners Association (CRA), suite 1120, 1100 Connecticut Avenue, NW., Washington, DC 20036.

§ 93.104 Fees for aflatoxin testing.

(a) The fee charged for any single laboratory analysis for aflatoxins shall be obtained from the schedules of charges in paragraph (a) of § 91.37 of this subchapter.

(b) The charge for the aflatoxin testing of raw peanuts under the Peanut Marketing Agreement for subsamples 1–AB, 2–AB, 3–AB, and 1–CD is a set cost per pair of analyses and shall be set by cooperative agreement between the Peanut Administrative Committee and AMS Science Division.

(c) The charge for any requested laboratory analysis for aflatoxins not listed shall be based on the standard hourly rate specified in § 91.37(b) of this subchapter.

§ 93.105 Fees for analytical testing of oilseeds.

(a) The fee charged for any single laboratory analysis for oilseeds shall be obtained from the schedules of charges in paragraph (a) of § 91.37 of this subchapter.

(b) The charge for any requested laboratory analysis for oilseeds not listed shall be based on the standard hourly rate specified in § 91.37(b) of this subchapter.

PART 94—POULTRY AND EGG PRODUCTS

Subpart A—Mandatory Analyses of Egg Products

Sec.

94.1 General.
94.2 Definitions.
94.3 Analyses performed and locations of laboratories.
94.4 Analytical methods.
94.5 Charges for laboratory service.

Subpart B—Voluntary Analyses of Egg Products

94.100 General.
94.101 Definitions.
94.102 Analyses available.
94.103 Analytical methods.
94.104 Fees and charges.

Subpart C—Salmonella Laboratory Recognition Program

94.200 [Reserved]

Subpart D—Processed Poultry Products

94.300 General.
94.301 Definitions.
94.302 Analyses available and locations of laboratories.
94.303 Analytical methods.
94.304 Fees and charges.

Authority: Secs. 2–28 of the Egg Products Inspection Act (84 Stat. 1620–1635; 21 U.S.C. 1031–1056), Agricultural Marketing Act of 1946, Secs. 202–208 as amended (60 Stat. 1087–1091; 7 U.S.C. 1621–1627).

Subpart A—Mandatory Analyses of Egg Products

§ 94.1 General.

Microbiological, chemical, and physical analysis of liquid, frozen, and dried egg products is performed under authority of the Egg Products Inspection Act (21 U.S.C. 1031–1056).

§ 94.2 Definitions.

Words used in the regulations in this subpart in the singular form will import the plural, and vice versa, as the case may demand. As used throughout the regulations in this subpart, unless the context requires otherwise, the following terms will be construed to mean:

Egg. The shell egg of the domesticated chicken, turkey, duck, goose, or guinea. Some of the terms applicable to shell eggs are defined by the Poultry Division in § 59.5.

Egg product. Any dried, frozen, or liquid eggs, with or without added ingredients. However, products which contain eggs only in a relatively small proportion or historically have not been, in the judgment of the Secretary, considered by consumers as products of the egg food industry may be exempted by the Secretary under such conditions as may be prescribed to assure that the egg ingredients are not adulterated and such products are not represented as egg products. Some of the products exempted as not being egg products are specified by the Poultry Division in § 59.5.

Mandatory sample. An official sample of egg product(s) taken for testing under authority of the Egg Products Inspection Act (21 U.S.C. 1031–1056) for analysis by a U.S. Department of Agriculture, Agricultural Marketing Service, Science Division laboratory at government expense. A mandatory sample shall include an egg product sample to be analyzed for microbiological, chemical, or physical attributes.

Official plant. Any plant, as determined by the Secretary, at which the U.S. Department of Agriculture maintains inspection of the processing of egg products under the authority of the Egg Products Inspection Act.

Pasteurize. The subjecting of each particle of egg products to heat or other treatments to destroy harmful viable microorganisms by such processes as may be prescribed by the regulations in the EPIA.

Pesticide chemical, food additive, color additive, and raw agricultural commodity. These terms shall have the same meaning for purposes of this subpart as under sections 408, 409, and 706 of the Federal Food, Drug, and Cosmetic Act.

Plant. Any place of business where egg products are processed.

Processing. Manufacturing of egg products, including breaking eggs or filtering, mixing, blending, pasteurizing, stabilizing, cooling, freezing, drying, or packaging egg products at official plants.

§ 94.3 Analyses performed and locations of laboratories.

(a) Samples drawn by a USDA egg products inspector will be analyzed by Science Division personnel for microbiological, chemical, and physical attributes. The analytical results of these samples will be reported to the resident egg products inspector at the applicable plant on the official certificate.

(b) Mandatory egg product samples for *Salmonella* are required and are analyzed in Division laboratories to spot check and confirm the adequacy of Division approved and recognized laboratories for analyzing routine egg product samples for *Salmonella.*

(c) Mandatory egg product samples for chlorinated hydrocarbons are required and are submitted by the plant inspectors on a random basis. These samples screen for pesticide residues and industrial chemical contaminants in egg products.

(d) Samples are drawn by a USDA egg products inspector to determine potential adulteration. These egg product samples may be analyzed for extraneous material, color, color additive, pesticide, heavy metal, microorganism, dextrin, or other substance.

(e) The Science Division's Eastern Laboratory shall conduct the majority of laboratory analyses for egg products. The analyses for mandatory egg product samples are performed at the following USDA location: USDA, AMS, Science Division, Eastern Laboratory, 645 Cox Road, Gastonia, NC 28054.

§ 94.4 Analytical methods.

The majority of analytical methods used by the USDA laboratories to perform mandatory analyses for egg products are listed as follows:

(a) Edwards, P.R. and W.H. Ewing, Edwards and Ewing's Identification of Enterobacteriaceae, Elsevier Science Publishing Co., Inc., 52 Vanderbilt Avenue, New York, NY 10017.

(b) Manual of Analytical Methods for the Analysis of Pesticide Residues in Human and Environmental Samples, U.S. Environmental Protection Agency (EPA), Environmental Toxicology Division, Health Effects Research Laboratory (HERL), Alexander Drive and

Highway 54, Mail Drop 51, Research Triangle Park, NC 27711.

(c) Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC), Association of Official Analytical Chemists, suite 400, 2200 Wilson Boulevard, Arlington, VA 22201–3301.

(d) Standard Methods for the Examination of Dairy Products, American Public Health Association, 1015 Eighteenth Street, NW., Washington, DC 20036.

(e) Standard Methods for the Examination of Water and Wastewater, American Public Health Association (APHA), the American Water Works Association and the Water Pollution Control Federation, APHA, 1015 Eighteenth Street, NW., Washington, DC 20036.

(f) U.S. Food and Drug Administration Bacteriological Analytical Manual (BAM), Association of Official Analytical Chemists, suite 400, 2200 Wilson Boulevard, Arlington, VA 22201–3301.

(g) U.S. Food and Drug Administration Pesticide Analytical Manuals (PAM), Volumes I and II, Food and Drug Administration, U.S. Department of Health and Human Services, 200 C Street, SW., Washington, DC 20204 (available from National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161).

§ 94.5 Charges for laboratory service.

The costs for analysis of mandatory egg product samples at Science Division laboratories shall be paid by annually appropriated and designated funds allocated to the egg products inspection program. The costs for any other mandatory laboratory analyses and testing of an egg product's identity and condition, necessitated by the Egg Products Inspection Act, shall also be paid by such program funding.

Subpart B—Voluntary Analyses of Egg Products

§ 94.100 General.

Analyses for voluntary egg product samples may be requested to certify that specifications regarding stated identity, quality, and wholesomeness are met; to test routinely for the presence of *Salmonella;* and to ensure laboratory quality control with testing activities.

§ 94.101 Definitions.

Words used in the regulations in this subpart in the singular form will import the plural, and vice versa, as the case may demand. As used throughout the regulations in this part, unless the context requires otherwise, the following terms will be construed to mean:

Certification sample. An egg product sample submitted by an applicant for chemical, physical, or microbiological analyses and tests at a Science Division laboratory. This voluntary sample is analyzed or tested by the Division's analyst or scientist to certify that an egg product lot meets applicable specifications for identity, quality, and wholesomeness.

Surveillance sample. This is a 100 gram sample for *Salmonella* analysis that is drawn by the USDA egg product inspector from each lot of egg product processed at an official plant. This sample may be analyzed by a Science Division laboratory, or by a laboratory approved and recognized by the Division to analyze for *Salmonella* in egg products.

Unofficial sample. These samples of egg products are drawn by plant personnel upon the request of plant management. Analyses of these samples are usually conducted for the plant's refractometer correlation, bacteriological evaluation of production techniques, or quality control of procedures. Official plant or Science Division laboratories can analyze these samples.

§ 94.102 Analyses available.

A wide array of analyses for voluntary egg product samples is available. Voluntary egg product samples include surveillance, certification, and unofficial samples. The physical and chemical tests for voluntary egg products include analyses for total ash, fat by acid hydrolysis, moisture, salt, protein, beta-carotene, catalase, cholesterol, NEPA color, density, total solids, aflatoxin, daminozide and amitraz residues, BHA, BHT, alcohol, chlorinated hydrocarbon and fumigant residues, dextrin, heavy and light filth, glucose, glycerol and gums. In addition, egg products can be analyzed for high sucrose content, pH, heavy metals and minerals, monosodium dihydrogen phosphate, monosodium glutamate, nitrites, oxygen, palatability and odor, phosphorus, propylene glycol, SLS, and zeolex. There are also be tests for starch, total sugars, sugar profile, whey, standard plate count, direct microscopic count, *Campylobacter,* coliforms, presumptive *Escherichia* coli, *Listeria* monocytogenes, proteolytic count, psychrotrophic bacteria, *Salmonella, Staphylococcus,* thermoduric bacteria, and yeast with mold count.

§ 94.103 Analytical methods.

The analytical methods used by the Science Division laboratories to perform voluntary analyses for egg products shall be the same as listed in § 94.4.

§ 94.104 Fees and charges.

(a) The fee charged for any single laboratory analysis of voluntary egg product samples shall be obtained from the schedules of charges in paragraph (a) of § 91.37 of this subchapter.

(b) The charge for any requested laboratory analysis not listed shall be based on the standard hourly rate specified in § 91.37, paragraph (b).

Subpart C—Salmonella Laboratory Recognition Program

§ 94.200 [Reserved]

Subpart D—Processed Poultry Products

§ 94.300 General.

Laboratory services of processed poultry products are conducted to derive their analytical attributes used to determine the compliance of the product with applicable specifications.

§ 94.301 Definitions.

Words used in the regulations in this subpart in the singular form will import the plural, and vice versa, as the case may demand. As used throughout the regulations in this subpart, unless the context requires otherwise, the following terms will be construed to mean:

Dark meat. Refers to the skinless and deboned drumstick, thigh, and back portions of poultry.

Light meat. Refers to the skinless and deboned breast and wing portions of poultry.

Poultry. Any kind of domesticated bird, including, but not limited to, chicken, turkey, duck, goose, pigeon, and guinea.

Poultry product. Any ready-to-cook poultry carcass or part therefrom or any specified poultry food product.

§ 94.302 Analyses available and locations of laboratories.

(a) The Science Division laboratories will analyze processed poultry products for moisture, fat, salt, protein, nitrites, and added citric acid.

(b) Deboned poultry for roasting will have the individual dark meat, light meat, and skin portions tumbled separately in the natural juices prior to grinding. The skin, light meat, and dark meat portion weight percentages of the total product are determined. The ground skin, ground dark meat, and ground light meat portions will be analyzed separately for moisture, protein, salt, and fat. Moisture to protein ratios will be reported also for the individual portions of poultry.

(c) Canned boned poultry for a variety of USDA programs will be tested as a total can composite of the canned product for moisture, fat, salt, and protein analyses. Additional poultry commodities and related products for specific USDA sponsored programs will be tested for different chemical and physical attributes.

(d) Microbiological analyses, as the *Salmonella* determination, are available for poultry products.

(e) The majority of analyses for processed poultry products shall be performed at the Science Division Eastern Laboratory, as indicated in paragraph (e) of § 94.3.

§ 94.303 Analytical methods.

The analytical methods used by the USDA laboratories to perform analyses for processed poultry products are found in the latest edition of the Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC), Association of Official Analytical Chemists, Suite 400, 2200 Wilson Boulevard, Arlington, VA 22201–3301.

§ 94.304 Fees and charges.

(a) The fee charged for any single laboratory analysis of processed poultry products shall be obtained from the schedules of charges in paragraph (a) of § 91.37 of this subchapter.

(b) The laboratory analyses for processed poultry products shall result in an additional fee, found in Table 7 of § 91.37 of this subchapter, for sample preparation or grinding.

(c) The charge for any requested laboratory analysis of processed poultry products not listed shall be based on the standard hourly rate specified in § 91.37 (b) of this subchapter.

PART 95—PROCESSED DAIRY PRODUCTS

Sec.

95.1 General.
95.2 Definitions.
95.3 Analyses available and location of laboratory.
95.4 Analytical methods.
95.5 Quality assurance programs.
95.6 Fees and charges.

Authority: Agricultural Marketing Act of 1946, secs. 202–208, 60 Stat. 1087, as amended; 7 U.S.C. 1621–1627.

§ 95.1 General.

Analytical services of processed dairy products are conducted to derive their grade and quality, and to determine the compliance of the product with applicable specifications.

§ 95.2 Definitions.

Words used in the regulations in this part in the singular form will be deemed to import the plural, and vice versa, as the case may demand. As used throughout the regulations in this part, unless the context requires otherwise, the following terms will be construed, respectively to mean:

Approved laboratory. A laboratory in which the facilities and equipment used for official testing have been approved by the Science Division Director as being adequate to perform the necessary official tests in accordance with this part, or the Milk Marketing Administrator laboratories and Resident Grader Dairy laboratories granted approval by the Dairy Division Director.

Butter. The food product usually known as butter, as defined in the Butter Act of 1923 (Pub. L. 519 of the 67th Congress).

Cheese. The fresh or matured product obtained by draining after coagulation of milk, cream, skimmed or partly skimmed milk, or a combination of some or all these products.

Complete Kohman analysis. Analysis used for moisture, fat, and salt determinations in butter and margarine. A weighed portion is heated to drive off the moisture and then reweighed to determine the moisture content. The fat is extracted using ether, and the remaining solids are weighed to determine fat content. The solids are then dissolved, and the salt content is determined by titration with standard silver nitrate solution.

Concentrated milk, plain condensed milk or evaporated milk. The liquid food obtained by removing water partially from milk.

Corn-soya-milk. A blended and formulated food consisting of corn meal, soybean flour, and nonfat dry milk that is enriched with vitamins and minerals.

Curd. The coagulated portion of milk, used in making cheese, or one of the components of butter.

Cusum control chart. The cusum chart is a graphical presentation of a cusum value representing variability or cumulative deviation, of individual test results with the means of the analytical data, from all participating and approved laboratories in the quality control study. It can detect a subtle trend and bias with a reported result as it is occurring for a particular analysis of an individual laboratory.

Dairy products. Butter, cheese (whether natural or processed), skim milk, cream, whey or buttermilk (whether dry, evaporated, stabilized or condensed), frozen desserts and any other food product which is prepared or manufactured in whole or in part or fractions from any of the aforesaid products, as the Administrator may hereafter designate.

Dry milk. The pasteurized product resulting from the removal of water from milk which contains lactose, milk proteins, milk fat, and milk minerals in the same relative proportions as in the fresh milk from which it is made.

Percent curd. The percentage for the proteinaceous substance, referred to as curd, is obtained in butter by difference. The sum of the percentages for moisture, fat, and salt is subtracted from 100, giving the percent of curd.

Process cheese. The cheese made by comminuting and mixing, with the aid of heat, one or more cheeses of the same or two or more varieties, with the addition of an emulsifying agent.

Salt. Refined sodium chloride meeting the requirements of the Food Chemical Codex.

Sweetened condensed milk. The liquid or semi-liquid food made by evaporating a mixture of milk and refined sugar (sucrose) or any combination of refined sugar (sucrose) and refined corn sugar (dextrose).

§ 95.3 Analyses available and location of laboratory.

(a) Some of the wide array of analyses for each product available are listed by the category of processed dairy product as follows:

(1) *Dry milk and related products:* Aflatoxin M_1, alkalinity of ash, antibiotic, ash, bacterial direct microscopic count, coliform count, density, dispersibility, fat, flavor, fortified Vitamin A, *Listeria* monocytogenes, moisture, oxygen, phosphatase, protein, *Salmonella, scorched particles, solubility index, Staphylococcus,* titratable acidity, and whey protein nitrogen.

(2) *Condensed milk and related products:* Aflatoxins M_1 and M_2, chlordane residue, extraneous material, fat, *Listeria* monocytogenes, sugar (sucrose), and total solids.

(3) *Cheese and related products:* Aflatoxin M_1, ash, calcium, extraneous material, fat, meltability (process cheese), moisture, nitrite, pH, phosphatase, pyrethrin residue, *Salmonella*, salt, and *Staphylococcus* aureus.

(4) *Butter and related products*: Acid degree value, coliform count, complete Kohman analysis, copper content, curd, enterococci count, fat, free fatty acid, iron content, moisture, peroxide value, pH, phosphatase, presumptive *Escherichia* coli, proteolytic count, salt, and yeast and mold.

(5) *Corn-soya-milk*: Bostwick (cooked), Bostwick (uncooked), crude fiber, density, fat, flavor, moisture, protein, and sieve test.

(b) The Science Division Midwestern Laboratory conducts the majority of laboratory analyses for processed dairy products to derive their analytical requirements used to determine the compliance of the product with applicable Federal or State government specifications. The location of this laboratory is as follows: USDA, AMS, Science Division, Midwestern Laboratory, 3570 North Avondale Avenue, Chicago, IL 60618.

§ 95.4 Analytical methods.

The three analytical manuals used by the USDA laboratory to perform the majority of analyses for processed dairy products are listed as follows:

(a) Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC), Association of Official Analytical Chemists, suite 400, 2200 Wilson Boulevard, Arlington, VA 22201–3301.

(b) Standard Methods for the Examination of Dairy Products, American Public Health Association, 1015 Eighteenth Street, NW., Washington, DC 20036.

(c) U.S. Department of Agriculture's Instructions for Resident Grading Quality Control Service Programs and Laboratory Analysis, DA Instruction 918–RL, AMS, Dairy Division, Dairy Grading Section, PO Box 96456, Washington, DC 20090–6456.

§ 95.5 Quality assurance programs.

(a) Each month two different quality assurance (QA) check samples of nonfat dry milk will be sent by the Science Division (SD) to each applicable Dairy Division resident grader laboratory, as listed in the current edition of "Dairy Plants Surveyed and Approved for USDA Grading Service", USDA, AMS, Dairy Division, Washington, DC. Each month these approved resident grader laboratories will also receive a QA sample of butter from the SD Midwestern Laboratory. These QA dairy product samples shall be identified as proficiency check samples to the participants.

(b) The butter QA proficiency sample will be analyzed for fat, pH, salt, curd, and moisture. Both nonfat dry milk QA proficiency samples will be analyzed and evaluated for fat, moisture, titratable acidity, solubility index, scorched particles, Vitamin A, coliform, Standard Plate Count (SPC), Direct Microscopic Clump Count (DMCC), penicillin, whey protein nitrogen, flavor and grade.

(c) Each participating analyst will receive a monthly comparison of laboratory results in a report prepared by the director of the SD Midwestern Laboratory. All reported data will be statistically analyzed and individual laboratory outlier data will be highlighted in the report. The standard deviation and mean value of each statistically analyzed test result shall be included in the report. Copies of the report will be sent to the Dairy Division National Field office and the Dairy Division in Washington, DC.

(d) On-site laboratory reviews of the Dairy Division's resident grader laboratories shall be conducted. The purpose of the reviews by the Science Division is to assess continued conformance of each laboratory with method and equipment requirements of the USDA-approved procedures for testing of processed dairy products. During the visit, the reviewer completes a checklist on the procedures used, physical facilities, equipment, materials used, records kept, and quality assurance, as well as other areas of a laboratory's operation.

§ 95.6 Fees and charges.

(a) The fee charged for any single laboratory analysis of processed dairy products shall be obtained from the schedules of charges in paragraph (a) of § 91.37 of this subchapter.

(b) The charge for any requested laboratory analysis of processed dairy products not listed shall be based on the standard hourly rate specified in § 91.37, (b) of this subchapter.

PART 96—COTTONSEED SOLD OR OFFERED FOR SALE FOR CRUSHING PURPOSES (CHEMICAL ANALYSIS AND UNITED STATES OFFICIAL GRADE CERTIFICATION)

Subpart A—Cottonseed Chemists—Licensing Regulations

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Authority: Agricultural Marketing Act of 1946, secs. 203, 205, 60 Stat. 1087, 1090, as amended, (7 U.S.C. 1622, 1624).

Subpart A—Cottonseed Chemists—Licensing Regulations

Scope

§ 96.1 General.

Licenses are issued to chemists of laboratories involved in the grading of cottonseed. A chemist that has passed examinations for analyst proficiency and for official standards used for grading shall be issued a license to perform quality analyses for grade determinations of cottonseed.

Definitions

§ 96.2 Terms defined.

Words used in the regulations in this subpart in the singular form will import the plural, and vice versa, as the case may demand. As used throughout the regulations in this subpart, unless the context requires otherwise, the following terms will be construed to mean:

Blind check sample. A sample designated to check the routine analytical testing performance of the licensed USDA cottonseed chemist. The cottonseed is originally mixed in bulk quantities at a Division laboratory and packaged so that it is a representative portion for the samples forwarded to all chemists in a region under a certain number code. An oil mill representative and official cottonseed sampler repackage and identify the cottonseed as an official sample so that it would be blind or unknown as a check sample to the analyst.

Commercial laboratory. A chemical laboratory operated by an individual, firm, or corporation in which one or more persons are engaged in the chemical analysis of materials for the public.

Cotton gin. The machine or device used to separate the cotton fiber from the cottonseed.

Cottonseed. The word "cottonseed" as used in this part means the seed, after having been put through the usual and customary process known as cotton ginning, of any cotton produced within the continental United States.

Dispute. A disagreement between parties as to the true grade of a sample of cottonseed analyzed and graded by a licensed chemist.

License. A license issued under the Act by the Secretary.

Licensed cottonseed chemist. A person licensed under the Act by the Secretary to make quantitative and qualitative chemical analyses of official samples of cottonseed, according to the methods prescribed by the Director of the Division, and to certify the grade according to the official cottonseed standards of the United States.

Licensed cottonseed sampler. A person licensed by the Secretary to draw and to certify the authenticity of samples of cottonseed in accordance with the regulations in this subpart.

Lot. That parcel or quantity of cottonseed, offered for sale or tendered for delivery, or delivered on a sale or contract of sale, in freight cars, trucks, wagons, or otherwise in the quantities and within the time limits, prescribed from time to time by the Director of the AMS Cotton Division, for the drawing and preparation of official samples by licensed cottonseed samplers.

Official cottonseed standards. The official standards of the United States for the grading, sampling, and analyzing of cottonseed sold or offered for sale for crushing purposes, established May 23, 1932, and amendments thereto.

Official sample. A specimen of not less than 2 pounds of cottonseed, drawn and prepared by a licensed cottonseed sampler and certified as representative of a certain identified lot, in accordance with the regulations in this subpart.

Owner. A person who through financial interest owns or controls, or has the disposition of either cottonseed or of samples of cottonseed.

Society. The American Oil Chemists' Society (AOCS), P.O. Box 3489, 1608 Broadmoor Drive, Champaign, IL 61826–3489.

Supervisor of cottonseed chemists. An officer of the Science Division designated as such by the Director.

Licensed Cottonseed Chemists

§ 96.3 Application for license as cottonseed chemist; form.

(a) Application for a license to analyze and grade cottonseed shall be made to the Director on a form furnished for the purpose by the Science Division.

(b) Each application shall be in English, shall be signed by the applicant, and shall contain or be accompanied by satisfactory evidence:

(1) That the applicant is at least 25 years of age and that the applicant is an actual resident of the continental United States;

(2) That the applicant holds a degree in chemistry or chemical engineering from a recognized college or university, and has had not less than 3 years practical experience in laboratory work, in which the applicant shall have analyzed quantitatively and qualitatively samples of cottonseed; or in the absence of a degree from a recognized college or university, that the applicant has had at least 5 years practical laboratory experience, 3 years of which shall have been devoted chiefly to the analysis of samples of cottonseed;

(3) That the applicant has no financial interest, or is in the employ of anyone having a financial interest in any cottonseed oil mill or cotton ginning establishment;

(4) That the applicant agrees to comply with and abide by the terms of the Act and these regulations so far as they may relate to him or her;

(5) That the applicant is an independent analytical chemist or an employee of a commercial analytical laboratory; and

(6) That the applicant owns or will have the use of all of the apparatus specified in the regulations, established hereunder for the analysis and grading of cottonseed.

(c) Every chemist licensed hereunder to analyze cottonseed and to certify the grade thereof shall comply with the Society's official analytical test methods and other methods of analysis approved by the Director.

(d) The applicant shall furnish such additional information, as the Director shall at any time find to be necessary, to the consideration of the submitted application.

(e) Upon receipt of an incomplete or improperly executed application, the applicant will be notified of the deficiency in the application. If the application is not corrected and returned within 30 days following the date of notification, the application will be considered as having been abandoned.

§ 96.4 Examination of applicant.

Each applicant for a license as a chemist and each licensed chemist shall, when requested, submit to a practical examination and written test, to show an ability to analyze and grade cottonseed. These examinations can only be administered by the supervisor of cottonseed chemists. The chemist's failure to pass such tests may be considered sufficient ground for withholding the issuance of a license or of a renewal of a license.

§ 96.5 Period of license; renewals.

The period for which a license may be issued shall be from the first day of August, until, and including the 31st day of July, following. Renewals shall be for not more than 1 year beginning with the first day of August of each year, provided that licenses issued on and after June 1 of any year shall be for the period ending on July 31 of the following year.

§ 96.6 Conditions in licensing.

(a) It shall be a condition of the licensing of any person and of the retention by him or her of a license, that during the active cotton season each year, the licensee shall be engaged in or in connection with the grading of cottonseed; that each cottonseed sample offered for grading shall be analyzed and grade certified by the licensee, in accordance with the official cottonseed standards of the United States; and that the USDA license of the cottonseed chemist shall not be used or be allowed to be used for any improper purpose.

(b) A USDA licensed cottonseed chemist shall be required to participate in each quality assurance program and each collaborative study for the analytical testing of cottonseed as follows:

(1) The licensed chemist must participate in the American Oil Chemists' Society (AOCS) cottonseed series which requires the testing of 10 known cottonseed samples per year for foreign matter, moisture, free fatty acids, oil, and ammonia.

(2) The licensed chemist must analyze and issue a grade for 10 blind cottonseed check samples per year from the Science Division. These blind check samples will be submitted as "official" samples.

(3) The chemist shall participate in all collaborative cottonseed analytical method validation studies, initiated by the Division Director.

(c) Each licensed chemist shall keep his or her license conspicuously posted

at the place where he or she functions as a chemist, or in such other place as may be approved by the Division Director.

(d) Each licensed chemist must pay in a timely manner an annual licensing renewal fee and other charges and fees assessed by the Division, as listed in §§ 96.20 and 96.21. In the event the chemist fails to pay the annual license renewal fee by the 31st day of August, the chemist will be sent a written notice of a 7-day review by the Director for the suspension of his or her license.

§ 96.7 Sustained proficiency; suspension of license of cottonseed chemist.

(a) Sustained proficiency in the analysis of the two check sample series is required to maintain a license. If a licensed chemist fails to perform satisfactorily during a 1 year period on either the AOCS or the USDA check cottonseed series, the chemist shall be placed on probation for 1 year, providing that the person achieves a passing score (90 or higher) on a retake of the proficiency examination. In the event that the chemist fails the examination, he or she may be subject to an immediate suspension of the license.

(b) Failure to perform satisfactorily with either quality assurance program during a 1 year probationary period may also result in suspension of the license.

(c) Pending final action by the Director to suspend a license of a cottonseed chemist, a written notice of such suspension shall be given to the respective licensee, accompanied by a statement of the reasons therefore. Within 7 days after receipt of notice and statement of reasons by a licensee, an appeal may be filed in writing with the Director supported by any argument or evidence as to why the license should not be suspended. After expiration of the 7-day period and consideration of such argument and evidence, the Director shall take such action, as deemed appropriate, with respect to a suspension.

(d) Upon termination of service as a cottonseed chemist or suspension of such license, such licensee shall surrender the license immediately to the supervisor of the cottonseed chemists.

(e) The minimum period of license suspension for a cottonseed chemist shall be 1 year, after which the chemist may reapply and be reexamined for a USDA license.

(f) At the expiration of any period of suspension of such license, unless in the meantime it be revoked, the dates of the suspension period shall be endorsed thereon and returned to the licensed chemist to whom it was originally issued.

§ 96.8 Annual review of licensed chemist.

Each licensed chemist shall be subject to an annual on-site review, by the supervisor of the cottonseed chemists, to assess the chemist's continued conformance with procedure and equipment requirements of official analytical test methods.

§ 96.9 Fees for grading and certification.

Whenever any licensed chemist shall grade and/or certify any cottonseed or samples for a fee, the fee charged shall be reasonable, unconditional, nondiscriminatory, and shall be in accordance with a schedule previously submitted to and approved by the Division. The schedule shall include the certificate fee provided for in § 96.21.

§ 96.10 Records of analyses; inspection of certificate recordkeeping.

(a) Certificate recordkeeping responsibilities. The laboratory shall have an adequate system for the numbering and accounting of issued official cottonseed certificates. Provisions shall be made for consecutively numbering all cottonseed grade certificates issued and listing in a separate journal certificate numbers with the sample identification for accurate billing.

(b) Retention of records for inspection. Each licensed chemist, shall keep, or shall cause to be kept for him or her, for a period of at least 3 years after date of analysis, a record of the analysis of each individual sample of cottonseed graded by the licensee.

(c) Each licensed chemist shall permit any authorized officer or agent of the Department to inspect or examine, on any business day during normal business hours, books and records relating to analyses of cottonseed samples and issuance of cottonseed grade certificates under the Act and the regulations in this subpart.

§ 96.11 Official and unofficial samples; analyses; certificate.

(a) Each licensed cottonseed chemist shall designate a certificate number from a series of assigned numbers to each official sample of cottonseed as received and shall analyze and certify over his or her signature the grade of each sample or lot of cottonseed in the order of its receipt.

(b) Each such sample which is in proper condition for analysis under these regulations and which is accompanied by the certificate of a licensed cottonseed sampler certifying it to be an official sample that represents an identified lot of cottonseed shall be considered an official sample. In any case where the original sample is lost or destroyed before analysis, the duplicate thereof, retained by the licensed cottonseed sampler, as provided in § 61.34 of this subchapter, shall become the official sample. Each licensed chemist shall retain for at least 2 weeks a portion of each official sample first analyzed; and in any case where a review is requested under § 61.8 of this subchapter, such retained portion shall be considered an official sample for purposes of review analysis.

(c) Each such sample which is: (1) Not sufficient for proper analysis as an official sample under these regulations, or

(2) Not accompanied by a certificate of a licensed cottonseed sampler, or

(3) Not believed to be samples of the same seed represented by an official sample (except duplicates or lost or destroyed official samples) shall be considered an unofficial sample and the licensed cottonseed chemist's certificate of the grade thereof shall be plainly marked: "Sample not official; grade applies to sample only." This paragraph shall not apply to mill control or crush samples.

§ 96.12 Unlicensed persons shall not analyze and certify the grade of official samples.

(a) No person shall in any way represent that he or she is a chemist licensed under the Act, unless that person holds a license issued under the Act. Title 18 U.S.C. 1001, Crimes and Criminal Procedures, makes it a criminal offense to knowingly and willfully make such false representations.

(b) Only licensed chemists shall analyze and certify the grade of official cottonseed samples.

§ 96.13 Grade certificate; form.

Each grade certificate issued under the Act by a licensed chemist shall be in a form, approved for the purpose by the Director and shall embody within its written or printed terms:

(a) The caption "Cottonseed Grade Certificate."

(b) The serial number assigned to it.

(c) The date and place of issuance.

(d) A statement certifying that the analysis of the cottonseed sample was made according to the methods approved by the Director of the Division and that the grade given is according to the official standards of the United States.

(e) A statement of the condition of the lot of cottonseed as reported by the sampler, and in cases where the sample was submitted by a licensed sampler,

the name and license number of the sampler.

(f) The identification of each lot of cottonseed by the marks and notations by which the seed was identified at the time the sample was taken, and the origin of the cottonseed by county and State.

(g) All analytical data required by the Director.

(h) The signature and license number of the chemist. In addition, the grade certificate may include any other matter consistent with the Act or the regulations in this part. Two copies of the grade certificate form shall be submitted to and approved by the Division, before use by a licensed chemist. A copy of each certificate shall be mailed to a designated office of the Division within 36 hours after its issuance.

§ 96.14 Reports of licensed chemists.

Each licensed chemist shall periodically, when requested by the Director, make reports on forms furnished for the purpose by the Division, concerning the activities as such licensed chemist.

§ 96.15 Information of violations.

Whenever any person licensed under this part becomes aware of information relating to the violation of the Act or these regulations, such person shall inform the Director of the Division of the alleged violations.

§ 96.16 Licensed chemists; suspension or revocation of license.

The Director may, without a hearing, suspend or revoke the license issued to a licensed chemist upon written request and a satisfactory statement of reasons submitted by such licensed chemist. Pending final action by the Secretary, the Director may, whenever such action is deemed necessary, suspend or revoke the license of any licensed chemist when such licensed chemist:

(a) Has ceased to perform services as such chemist;

(b) Has knowingly or carelessly analyzed cottonseed improperly;

(c) Has violated or evaded any provision of the Act or the regulations so far as they relate to the licensee;

(d) Has used the license or allowed it to be used for any fraudulent or improper purposes; or

(e) Has in any manner become incompetent or incapacitated to perform the duties of a licensed chemist.

In such cases the Director shall give written notice of the suspension or revocation to the licensed chemist, accompanied by a statement of the reasons therefor. Within 10 days after the receipt of the aforesaid notice and statement of reasons by such licensee, the individual may file an appeal, in writing, with the Secretary, supported by any argument or evidence that the licensee may wish to offer, as to why the license should not be suspended or revoked. After the expiration of the aforesaid 10-day period and consideration of such argument and evidence, the Secretary will take such action as is deemed appropriate with respect to such suspension or revocation. When no appeal is filed within the prescribed 10 days, the license shall be automatically suspended or revoked.

§ 96.17 Revoked license to be returned to Division.

If a license issued to a licensed chemist is revoked, such license shall be returned to the Division.

§ 96.18 Duplicate license.

Upon satisfactory proof of the loss or destruction of a license issued to a licensed chemist, a duplicate thereof may be issued under the same or a new number.

§ 96.19 Information on grading to be kept confidential.

Every person licensed under the Act as a licensed chemist shall keep confidential all information secured by the licensee, relative to cottonseed analyzed and graded by the licensee. The licensee shall not disclose such information to any person, except to the owner or custodian of the seed in question, or to an authorized agent of the Department.

Fees and Charges

§ 96.20 Fee for chemist's license.

(a) The fee for the examination of an applicant for a license as a chemist to analyze and certify the grade of cottonseed shall be $1100.00.

(b) The examination fee shall be paid at the time the application is filed or at a time prior to the administration of the examinations. This fee shall be paid regardless of the outcome of the licensing examinations. The examination fee shall be nonrefundable to the applicant; however, in the evident of death of the applicant prior to the examination, full payment of the fee may be returned to the applicant's beneficiary. If an application is filed with an insufficient fee, the application and fee submitted will be returned to the applicant.

(c) For each renewal of a chemist's license, the fee shall be $275.00.

§ 96.21 Fee for certificates to be paid by licensee to Service.

(a) To cover the cost of administering the regulations in this part, each licensed cottonseed chemist shall pay to the Service $3.00 for each certificate of the grade of cottonseed issued by the licensee.

(b) Upon receipt of a statement from the Service each month, showing the number of certificates issued by the licensee, such licensee will forward the appropriate remittance in the form of a check, draft, or money order payable to the "Agricultural Marketing Service, USDA."

§ 96.22 Fees for the review of grading of cottonseed.

For the review of the grading of any lot of cottonseed, the fee shall be $60.00. Remittance to cover such fee, in the form of a check, draft, or money order payable to the "Agricultural Marketing Service, USDA" shall accompany each application for review. For each such fee collected, $20.00 shall be disbursed to each of the two licensed chemists designated to make reanalysis of such seed.

Subpart B—Official Cottonseed Grade Calculations

§ 96.23 General.

Using methods prescribed by the Science Division, the licensed cottonseed chemist makes quantitative and qualitative chemical analyses, certificating the grade according to the official cottonseed standards of the United States.

§ 96.24 Definitions, cottonseed quality analysis terms.

Words used in the regulations in this subpart in the singular form will import the plural, and vice versa, as the case may demand. As used throughout the regulations in this subpart, unless the context requires otherwise, the following terms will be construed to mean:

Cottonseed quality analysis. In determining the quality of cottonseed, testing is performed by licensed chemists for total composition of oil, ammonia, moisture, free fatty acids, and foreign matter. These individual analytical factors of cottonseed samples are combined to form indexes of quantity and quality, which in turn are used to determine the official grade of cottonseed, in accordance with the United States Official Standards for Grades.

Foreign matter. The foreign matter in cottonseed includes boll portions, sand, dirt, stones or gravel, hulls, leaves, stems, unginned locks of cotton, lint

cotton, immature seeds, and any noncotton extraneous material.

Official grade. The official grade is the product of the quantity index times the quality index, and it is determined by a representative official sample of cottonseed, graded by a licensed chemist under the supervision of the United States Department of Agriculture. The base grade for cottonseed is 100.0.

Quality index. The quality index measures the deterioration of cottonseed in oil and meal and takes into account the excesses of moisture, foreign matter and free fatty acids.

Quantity index. The quantity index measures the oil and cake or meal in the cottonseed and takes into account variations in the quantity of oil and ammonia.

§ 96.25 Determination of grade.

The grade of cottonseed shall be determined from the analysis of samples, and it shall be the result, stated in the nearest whole or half numbers, obtained by multiplying a quantity index by a quality index and dividing the result by 100. The quantity index and the quality index shall be determined as hereinafter provided.

(a) The basis grade of cottonseed shall be grade 100.

(b) High grades of cottonseed shall be those grades above 100.

(c) Low grades of cottonseed shall be those grades below 100.

(d) Grades for American Pima cottonseed shall be suffixed by the designation "American Pima" or by the symbol "AP."

§ 96.26 Determination of quantity index.

The quantity index of cottonseed shall be determined as follows:

(a) For Upland cottonseed, the quantity index shall equal four times the percentage of oil, plus six times the percentage of ammonia, plus five.

(b) For American Pima cottonseed, the quantity index shall equal four times the percentage of oil, plus six times the percentage of ammonia, minus ten.

§ 96.27 Determination of quality index.

The quality index of cottonseed shall be an index of purity and soundness, and shall be determined as follows:

(a) *Prime quality cottonseed.* Cottonseed, that by analysis, contains not more than 1.0 percent of foreign matter, not more than 12.0 percent of moisture, and not more than 1.8 percent of free fatty acids in the oil in the seed, shall be known as prime quality cottonseed and shall have a quality index of 100.

(b) *Below prime quality cottonseed.* The quality index of cottonseed that, by analysis, contains foreign matter, moisture, or free fatty acids in the oil in the seed, in excess of the percentages prescribed in paragraph (a) of this section, shall be found by reducing the quality index of prime quality cottonseed as follows:

(1) Four-tenths of a unit for each 0.1 percent of free fatty acids in the oil, in the seed, in excess of 1.8 percent.

(2) One-tenth of a unit for each 0.1 percent of foreign matter in excess of 1.0 percent.

(3) One-tenth of a unit for each 0.1 percent of moisture in excess of 12.0 percent.

(c) *Off quality cottonseed.* Cottonseed that has been treated by either mechanical or chemical process other than the usual cleaning, drying, and ginning (except sterilization required by the United States Department of Agriculture for quarantine purposes) or that are fermented or hot, or that upon analysis are found to contain 12.5 percent or more of free fatty acids, in the oil, in the seed, or more than 10.0 percent of foreign matter, or more than 20.0 percent of moisture, or more than 25.0 percent of moisture and foreign matter combined, shall be designated as "off quality cottonseed."

(d) *Below grade cottonseed.* Cottonseed, the grade of which, when calculated according to § 96.25 is below grade 40.0, shall be designated as "below grade cottonseed," and a numerical grade shall not be indicated.

§ 96.28 Calculation of grades of official samples.

(a) Data on certificates of official cottonseed analyses shall be expressed as follows:

Foreign Matter to—0.1 percent
Oil to—0.1 percent
Ammonia to—0.01 percent
Free Fatty Acid, when 5% or under, to—0.1 percent
Free Fatty Acid, when over 5%, to—0.5 percent
Quantity Index to—0.01 percent
Quality Index to—0.1 percent

(b) Grade to whole or half units, whichever actual calculation is nearest shall be determined as follows:

(1) The calculation of grades shall be made by the method of disregarding the figures to the right of the second decimal place.

(2) Calculated grades ending with .2500 through .7499 will be considered to be in the .25 through .74 range, and will be reported to the nearest half grade.

(3) Calculated grades ending with .7500 through .2499 will be considered to be in the .75 through .24 range, and will be reported to the nearest whole grade.

§ 96.29 Analysis and certification of samples and grades.

The certification of samples of cottonseed, and the analysis and certification of grades of cottonseed shall be performed in accordance with methods, approved from time to time for the purposes by the Director, or a designated representative.

PART 97—PLANT VARIETY AND PROTECTION

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Authority: Secs. 6, 22, 23, 26, 31, 42 (b), 43, 56, 57, 91 (c), Plant Variety Protection Act, 84 Stat. 1542; 7 U.S.C. 2321, 2326, 2352, 2353, 2356, 2371, 2402 b, 2403, 2426, 2427, 2501 (c); 29 FR 16210, as amended, 37 FR 6327, 6505; 7 U.S.C. 2371.

Scope

§ 97.1 General.

Certificates of protection are issued by the Plant Variety Protection office for novel varieties of sexually reproduced plants. Each certificate of plant variety protection certifies that the breeder has the right, during the term of the protection, to prevent others from selling the variety, offering it for sale, reproducing it, importing or exporting it, or using it in producing a hybrid or different variety from it, as provided by the Act.

Definitions

§ 97.2 Meaning of words.

Words used in the regulations in this part in the singular form will import the plural, and vice versa, as the case may demand. The definitions of terms contained in the Act shall apply to such terms when used in this part. As used throughout the regulations in this part, unless the context requires otherwise, the following terms will be construed to mean:

Abandoned application. An application which has not been pursued to completion within the time allowed by the Office or has been voluntarily abandoned.

Act. The Plant Variety Protection Act (7 U.S.C. 2321 et seq.).

Administrator. The Administrator of the Agricultural Marketing Service of the U.S. Department of Agriculture, or any other officer or employee of the Department of Agriculture to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in his or her stead.

Applicant. The person who applied for a certificate of plant variety protection.

Application. An application for plant variety protection under the Act.

Assignee. A person to whom an owner assigns his/her rights in whole or in part.

Board. The Plant Variety Protection Board appointed by the Secretary.

Certificate. A certificate of plant variety protection issued under the Act by the Office.

Certified seed. Seed which has been determined by an official seed certifying agency to conform to standards of genetic purity and identity as to variety, which standards have been approved by the Secretary.

Commissioner. The Examiner in Chief of the Office.

Decision and order. Includes the Secretary's findings of fact; conclusions with respect to all material issues of fact and law, as well as the reasons or basis therefor; and order.

Examiner. An employee of the Plant Variety Protection Office who determines whether a certificate is entitled to be issued. The term shall, in all cases, include the Commissioner.

Foreign application. An application for plant variety protection filed in a foreign country.

Hearing Clerk. The Hearing Clerk, U.S. Department of Agriculture, Washington, DC.

Hearing Officer. An Administrative Law Judge, U.S. Department of Agriculture, or other officer or employee of the Department of Agriculture, duly assigned to preside at a hearing held pursuant to the rules of this part.

Hybrid. It shall be defined as set forth in the regulations under the Federal Seed Act (Secs. 201.2(y) of this chapter).

Office or Plant Variety Protection Office. The Plant Variety Protection Office, Science Division, AMS, USDA.

Official Journal. The "Official Journal of the Plant Variety Protection Office."

Owner. A breeder who developed or discovered a variety for which plant variety protection may be applied for under the Act, or a person to whom the rights to such variety have been assigned or transferred.

Person. An individual, partnership, corporation, association, government agency, or other business or governmental entity.

Secretary. The Secretary of Agriculture of the United States or any other officer or employee of the U.S. Department of Agriculture, to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated to act in his or her stead.

Seed certifying agency. It shall be defined as set forth in the Federal Seed Act (53 Stat. 1275).

Sale for other than seed purposes. The transfer of title to and possession of the seed by the owner to a grower or

other person, for reproduction for the owner, for testing, or for experimental use, and not for commercial sale of the seed or the reproduced seed for planting purposes.

Administration

§ 97.3 Plant Variety Protection Board.

(a) The Plant Variety Protection Board shall consist of 14 members appointed for a 2-year term. The Board shall be appointed every 2 years and shall consist of individuals who are experts in various areas of varietal development. The membership of the Board, which shall include farmer representation, shall be drawn approximately equally from the private or seed industry sector and from the government or public sector. No member shall be eligible to act on any matter involving any appeal or questions under section 44 of the Act, in which the member or his or her employer has a direct financial interest.

(b) The functions of the Board are to:

(1) Advise the Secretary concerning adoption of rules and regulations to facilitate the proper administration of the Act;

(2) Make advisory decisions on all appeals from the examiner or Commissioner;

(3) Advise the Secretary on the declaration of a protected variety open to use in the public interest; and

(4) Advise the Secretary on any other matters under the regulations in this part.

(c) The proceedings of the Board shall be conducted in accordance with the Federal Advisory Committee Act (Pub. L. 92–463), Administrative Regulations of the U.S. Department of Agriculture (7 CFR part 25), and such additional operating procedures as are adopted by members of the Board.

The Application

§ 97.5 General requirements.

(a) Protection under the Act shall be afforded only as follows:

(1) Nationals and residents of the United States shall be eligible to receive all of the protection under the Act.

(2) Nationals and residents of Member States of the International Union for the Protection of New Varieties of Plants shall be eligible to receive the same protection under the Act as is provided to nationals of the United States.

(3) Persons who are not entitled to protection under paragraph (a)(1) or (2) of this section, and who are nationals of a foreign state which is not a member of the International Union for the Protection of New Varieties of Plants, shall be entitled to only so much of the protection provided under the Act, as is afforded by such foreign state to nationals of the United States, for the same genus and species under the laws of such foreign state in effect at the time that the application for protection under the Act is filed, except where further protection under the Act must be provided in order to avoid the violation of a treaty to which the United States is a party.

(b) Applications for certificates shall be made to the Plant Variety Protection Office. An application shall consist of:

(1) A completed application form, except that the section specifying that seed of the variety shall be sold by variety name only, as a class of certified seed, need not be completed at the time of application.

(2) A completed set of the exhibits, as specified in the application form, unless the examiner waives submission of certain exhibits as unnecessary, based on other claims and evidence presented in connection with the application.

(3) Language and legibility: (i) Applications and exhibits must be in the English language and legibly written, typed or printed.

(ii) Any interlineation, erasure, cancellation, or other alteration must be made in permanent ink before the application is signed and shall be clearly initialed and dated by the applicant to indicate knowledge of such fact at the time of signing.

(4) To determine the extent of reciprocity of the protection to be provided under the Act, persons filing an application for plant variety protection in the United States under the provisions of paragraph (a)(3) of this section shall, upon request [1], furnish the Plant Variety Protection Office with a copy of the current plant variety protection laws and regulations for the country of which the applicant is a national, and an accurate English translation of such laws and regulations.

(c) Application and exhibit forms shall be issued by the Commissioner. (Copies of the forms may be obtained from the Plant Variety Protection Office, Science Division, AMS, USDA, room 500, National Agricultural Library Building, Beltsville, Maryland 20705.)

(d) Effective the date of these regulations and rules of practice, the signature of the applicant, or his or her agent or attorney on any affidavit or other statement filed pursuant to these regulations and rules constitutes a certification by the applicant. The signature certifies that all information relied on in any affidavit or statement filed in the course of the proceeding is knowingly correct and false claims have not been made to mislead.

§ 97.6 Application for certificate.

(a) An application for a plant variety protection certificate shall be signed by, or on behalf, of the applicant.

(b) The application shall state the full name, including the full first name and the middle initial or name, if any, and the capacity of the person executing it.

(c) The fees for filing an application, and search or examination, shall be submitted with the application in accordance with §§ 97.175 through 97.178.

(d) The applicant shall submit with the application at least 2,500 seeds of the viable basic seed required to reproduce the variety.

§ 97.7 Statement of an applicant.

(a) The applicant, by signing a completed application, states in accordance with section 42 of the Plant Variety Protection Act that:

(1) The applicant believes himself or herself, or his or her privies, to be the original and first breeder or discoverer of the variety for which a certificate is solicited;

(2) The applicant, or his or her privies, has sexually reproduced the variety;

(3) The applicant does not know and does not believe that the variety was ever a public variety before the date of determination;

(4) The applicant is a sole or joint owner of the variety;

(5) The variety was not a public variety more than 1 year prior to the effective filing date of the application;

(6) Before the date of determination of the variety by the owner, or his or her privies, or more than 1 year before the effective filing date of the application, the variety was not effectively available to workers in this country and adequately described by a publication reasonably deemed a part of the public technical knowledge in this country, which description must include a disclosure of the principal characteristics by which the variety is distinguished; and

(7) The applicant, or his or her privies, have not offered for sale or marketed the variety, with the agreement of the breeder, in a foreign state for longer than 6 years in the case of vines, forest trees, fruit trees, and ornamental trees, including, in each case, their rootstocks, or for longer than 4 years, in the case of all other plants.

[1] Copies and translations of foreign laws and regulations will be requested only if they are not in the files of the Plant Variety Protection Office. Applicants may learn whether such a request will be made by writing to the address given in paragraph (c) of this section or by calling (301) 344–2518.

(b) If the same variety has been marketed with the agreement of either the applicant or his or her privies, the applicant shall state the names of the countries in which the variety was marketed, and give the day, month, and year of first marketing in each country.

(c) When an applicant files an application, cross-references to other related applications may be made, when appropriate.

§ 97.8 Specimen requirements.

(a) The applicant may be required by the examiner to furnish representative specimens of the variety, or its flower, fruit, or seeds, in a quantity and at a specified stage of growth, as may be necessary to verify the statements in the application. Such specimens shall be packed and forwarded in conformity with instructions furnished by the examiner. If the applicant requests the examiner to inspect plants in the field before a final decision is made, all such inspection costs shall be borne by the applicant by payment of fees sufficient to reimburse the Office for all costs, including travel, per diem or subsistence, and salary.

(b) Plant specimens submitted in support of an application shall not be removed from the Office except by an employee of the Office or other person authorized by the Secretary.

(c) Plant specimens submitted to the Office shall, except as provided below, and upon request, be returned to the applicant at his or her expense after the specimens have served their intended purpose. The Commissioner, upon a finding of good cause, may require that certain specimens be retained in the Office for indefinite periods of time. Specimens which are not returned or not retained as provided above shall be destroyed.

§ 97.9 Drawings and photographs.

(a) Drawings or photographs submitted with an application shall disclose the distinctive characteristics of the variety.

(b) Drawings or photographs shall be in color when color is a distinguishing characteristic of the variety, and the color shall be described by use of Nickerson's or other recognized color chart.

(c) Drawings should be sent flat, or may be sent in a suitable mailing tube, in accordance with instructions furnished by the Commissioner.

(d) Drawings or photographs submitted with an application shall be retained by the Office as part of the application file.

§ 97.10 Parts of an application to be filed together.

All parts of an application, including exhibits, should be submitted to the Office together, otherwise, each part shall be accurately and clearly referenced to the application.

§ 97.11 Application accepted and filed when received.

(a) An application, if materially complete when initially submitted, shall be accepted and filed to await examination.

(b) If any part of an application is so incomplete, or so defective that it cannot be handled as a completed application for examination, as determined by the Commissioner, the applicant will be notified. The application will be held a maximum of 6 months for completion. Applications not completed at the end of the prescribed period will be considered abandoned. The application fee in such cases will not be refunded.

§ 97.12 Number and filing date of an application.

(a) Applications shall be numbered and dated in sequence in the order received in the Office. Applicants will be informed in writing as soon as practicable of the number and effective filing date of the application.

(b) An applicant may claim the benefit of the filing date of a prior foreign application in accordance with section 55 of the Act. A certified copy of the foreign application shall be filed upon request made by the examiner. If a foreign application is not in the English language, an English translation, certified as accurate by a sworn or official translator, shall be submitted with the application.

§ 97.13 When the owner is deceased or legally incapacitated.

In case of the death of the owner or if the owner is legally incapacitated, the legal representative (executor, administrator, or guardian) or heir or assignee of the deceased owner may sign as the applicant. If an applicant dies between the filing of his or her application and the granting of a certificate thereon, the certificate may be issued to the legal representative, heir, or assignee, upon proper intervention.

§ 97.14 Joint applicants.

(a) Joint owners shall file a joint application by signing as joint applicants.

(b) If an application for certificate is made by two or more persons as joint owners, when they were not in fact joint owners, the application shall be amended prior to issuance of a certificate by filing a corrected application, together with a written explanation signed by the original applicants. Such statement shall also be signed by the assignee, if any.

(c) If an application has been made by less than all the actual joint owners, the application shall be amended by filing a corrected application, together with a written explanation, signed by all of the joint owners. Such statement shall also be signed by the assignee, if any.

(d) If a joint owner refuses to join in an application or cannot be found after diligent effort, the remaining owner may file an application on behalf of him or herself and the missing owner. Such application shall be accompanied by a written explanation and shall state the last known address of the missing owner. Notice of the filing of the application shall be forwarded by the Office to the missing owner at the last known address. If such notice is returned to the Office undelivered, or if the address of the missing owner is unknown, notice of the filing of the application shall be published once in the Official Journal. Prior to the issuance of the certificate, a missing owner may join in an application by filing a written explanation. A certificate obtained by less than all of the joint owners under this paragraph conveys the same rights and privileges to said owners as though all of the original owners had joined in an application.

§ 97.15 Assigned novel varieties and certificates.

In case the whole or a part interest in a variety is assigned, the application shall be made by the owner or one of the persons identified in § 97.13. However, the certificate may be issued to the assignee, or jointly to the owner and the assignee, when a part interest in a variety is assigned.

§ 97.16 Amendment by applicant.

An application may be amended before or after the first examination and action by the Office, after the second or subsequent examination or reconsideration as specified in § 97.107, or when and as specifically required by the examiner. Such amendment may include a specification that seed of the variety be sold by variety name only as a class of certified seed, if not previously specified or if previously declined. Once an affirmative specification is made, no amendment to reverse such a specification will be permitted unless the variety has not been sold and labeled or publication made in any manner that the variety is

to be sold by variety name, only as a class of certified seed.

§ 97.17 Papers of completed application to be retained.

The papers submitted with a completed application shall be retained by the Office except as provided in § 97.23(c). After issuance of a certificate of protection the Office will furnish copies of the application and related papers to any person upon payment of the specified fee.

§ 97.18 Applications handled in confidence.

(a) Pending applications shall be handled in confidence. Except as provided below, no information may be given by the Office respecting the filing of an application, the pendency of any particular application, or the subject matter of any particular application. Also, nor will access be given to or copies furnished of any pending application or papers relating thereto, without written authority of the applicant, or his or her assignee or attorney or agent. Exceptions to the above may be made by the Commissioner in accordance with 5 U.S.C. 552 and § 1.4 of this title, and upon a finding that such action is necessary to the proper conduct of the affairs of the Office, or to carry out the provisions of any Act of Congress, or as provided in sections 56 or 57 of the Act and § 97.19.

(b) Abandoned applications shall not be open to public inspection. However, if an abandoned application is directly referred to in an issued certificate and is available, it may be inspected or copies obtained by any person on written request, and with written authority received from the applicant. Abandoned applications shall not be returned.

(c) Decisions of the Commissioner on abandoned applications not otherwise open to public inspection (see paragraph (b) of this section) may be published or made available for publication at the Commissioner's discretion. When it is proposed to release such a decision, the applicant shall be notified directly or through the attorney or agent of record, and a time, not less than 30 days, shall be set for presenting objections.

§ 97.19 Publication of pending applications.

Information relating to pending applications shall be published in the Official Journal periodically as determined by the Commissioner to be necessary in the public interest. With respect to each application, the Official Journal shall show the:

(a) Application number and date of filing;

(b) The name of the variety or temporary designation;

(c) The name of the kind of seed; and

(d) Whether the applicant specified that the variety is to be sold by variety name only as a class of certified seed, together with a limitation in the number of generations that it can be certified.

Additional information, such as the name and address of the applicant or a brief description of the novel features of the variety, may be published only upon request or approval received from the applicant, at the time the application is filed or at any time before the notice of allowance of a certificate is issued.

§ 97.20 Abandonment for failure to respond within the time limit.

(a) Except as otherwise provided in § 97.104, if an applicant fails to advance actively his or her application within 6 months after the date when the last request for action was mailed to the applicant by the Office, or within such longer time as may be fixed by the Commissioner, the application shall be deemed abandoned. The application fee in such cases will not be refunded.

(b) The submission of an amendment to the application, not responsive to the last request by the Office for action, and any proceedings relative thereto, shall not operate to save the application from abandonment.

(c) When the applicant makes a bona fide attempt to advance the application, and is in substantial compliance with the request for action, but has inadvertently failed to comply with some procedural requirement, opportunity to comply with the procedural requirement shall be given to the applicant before the application shall be deemed abandoned. The Commissioner may set a shortened period, not less than 30 days, to correct any deficiency in the application.

§ 97.21 Extension of time for a reply.

The time for reply by an applicant to a request by the Office for certain action, shall be extended by the Commissioner only for good and sufficient cause, and for a specified reasonable time. A request for extension shall be filed on or before the specified time for reply. In no case shall the mere filing of a request for extension require the granting of an extension or state the time for reply.

§ 97.22 Revival of an application abandoned for failure to reply.

An application abandoned for failure on the part of the applicant to advance actively his or her application to its completion, in accordance with the regulations in this part, may be revived as a pending application within 3 months of such abandonment, upon a finding by the Commissioner that the failure was inadvertent or unavoidable and without fraudulent intent. A request to revive an abandoned application shall be accompanied by a written statement showing the cause of the failure to respond, a response to the last request for action, and by the specified fee.

§ 97.23 Voluntary withdrawal and abandonment of an application.

(a) An application may be voluntarily withdrawn or abandoned by submitting to the Office a written request for withdrawal or abandonment, signed by the applicant or his or her attorney or agent of record, if any, or the assignee of record, if any.

(b) An application which has been voluntarily abandoned may be revived within 3 months of such abandonment by the payment of the prescribed fee and a showing that the abandonment occurred without fraudulent intent.

(c) An original application which has been voluntarily withdrawn shall be returned to the applicant and may be reconsidered only by refiling and payment of a new application fee.

§ 97.24 Assignee.

The assignee of record of the entire interest in an application is entitled to advance actively or abandon the application to the exclusion of the applicant.

Examinations, Allowances, and Denials

§ 97.100 Examination of applications.

(a) [Reserved]

(b) Examinations of applications shall include a review of all available documents, publications, or other material relating to varieties of the species involved in the application, except that if there are fundamental defects in the application, as determined by the examiner, the examination may be limited to an identification of such defects and notification to the applicant of needed corrective action. However, matters of form or procedure need not, but may, be raised by an examiner until a variety is found to be novel and entitled to protection.

§ 97.101 Notice of allowance.

If, on examination, it shall appear that the applicant is entitled to a certificate, a notice of allowance shall be sent to the applicant or his or her attorney or agent of record, if any, calling for the payment of the prescribed fee, which fee shall be paid within 1 month from the date of

the notice of allowance. Thereafter, a fee for delayed payment shall be made as required under § 97.175.

§ 97.102 Amendments after allowance.

Amendments to the application, after the notice of allowance is issued, may be made, if the certificate has not been issued.

§ 97.103 Issuance of a certificate.

(a) After the notice of allowance has been issued, the prescribed fee is received by the Office, and the applicant has clearly specified whether or not the variety shall be sold by variety name only as a class of certified seed, the certificate shall be promptly issued. Once an election is made and a certificate issued specifying that seed of the variety shall be sold by variety name only as a class of certified seed, no waiver of such rights shall be permitted by amendment of the certificate.

(b) The certificate shall be delivered or mailed to the owner.

§ 97.104 Application or certificate abandoned.

(a) Except as provided in paragraph (c) of this section, if the fee specified in the notice of allowance is not paid within 1 month from the date of the notice, the application shall be considered abandoned.

(b) Upon request by the Office, the owner shall replenish the viable basic seed sample of the novel variety. Upon request, the sample of seed which has been replaced shall be returned to the owner, otherwise it shall be destroyed. Failure to replenish viable basic seed within 3 months from the date of request shall result in the certificate being regarded as abandoned. No sooner than 1 year after the date of such request, notices of abandoned certificates shall be published in the Official Journal, indicating that the variety has become open for use by the public and, if previously specified to be sold by variety name as "certified seed only," that such restriction no longer applies.

(c) If the allowance fee, the viable basic seed sample or the fee for delayed payment are submitted within 9 months of the final due date, it may be accepted by the Commissioner as though no abandonment had occurred. For good cause, the Commissioner may extend for a reasonable time the period for submitting a viable basic seed sample before declaring the certificate abandoned.

(d) A certificate may be voluntarily abandoned by the applicant or his or her attorney or agent of record or the assignee of record by notifying the Commissioner in writing. Upon receipt of such notice, the Commissioner shall publish a notice in the Official Journal that the variety has become open for use by the public, and if previously specified to be sold by variety name as "certified seed only," that such restriction no longer applies.

§ 97.105 Denial of an application.

(a) If the variety is found by the examiner to be not novel, the application shall be denied.

(b) In denying an application for want of novelty, the examiner shall cite the reasons the application was denied. When a reason involves the citation of certain material which is complex, the particular part of the material relied on shall be designated as nearly as practicable. The pertinence of each reason, if not obvious, shall be clearly explained.

(c) If prior domestic certificates are cited as a reason for denial, their numbers and dates and the names of the owners shall be stated. If prior foreign certificates or rights are cited, as a reason for denial, their nationality or country, numbers and dates, and the names of the owners shall be stated, and such other data shall be furnished, as may be necessary to enable the applicant to identify the cited certificates or rights.

(d) If printed publications are cited as a reason for denial, the author (if any), title, date, pages or plates, and places of publication, or place where a copy can be found shall be given.

(e) When a denial is based on facts known to the examiner, and upon request by the applicant, the denial shall be supported by the affidavit of the examiner. Such affidavit shall be subject to contradiction or explanation by the affidavits of the applicant and other persons.

(f) Abandoned applications may not be cited as reasons for denial.

§ 97.106 Reply by applicant; request for reconsideration.

(a) After an adverse action by the examiner, the applicant may respond to the denial and may request a reconsideration, with or without amendment of his or her application. Any amendment shall be responsive to the reason or reasons for denial specified by the examiner.

(b) To obtain a reconsideration, the applicant shall submit a request for reconsideration in writing and shall specifically point out the alleged errors in the examiner's action. The applicant shall respond to each reason cited by the examiner as the basis for the adverse action. A request for reconsideration of a denial based on a faulty form or procedure may be held in abeyance by the Commissioner until the question of novelty is settled.

(c) An applicant's request for a reconsideration must be a bona fide attempt to advance the case to final action. A general allegation by the applicant that certain language which he or she cites in the application or amendment thereto establishes novelty without specifically explaining how the language distinguishes the alleged novel variety from the material cited by the examiner shall not be grounds for a reconsideration.

§ 97.107 Reconsideration and final action.

If, upon reconsideration, the application is denied by the Commissioner, the applicant shall be notified by the Commissioner of the reason or reasons for denial in the same manner as after the first examination. Any such denial shall be final unless appealed by the applicant to the Secretary within 60 days from the date of denial, in accordance with §§ 97.300–97.303. If the denial is sustained by the Secretary on appeal, the denial shall be final subject to appeal to the courts, as provided in § 97.500.

§ 97.108 Amendments after final action.

(a) After a final denial by the Commissioner, amendments to the application may be made to overcome the reason or reasons for denial. The acceptance or refusal of any such amendment by the Office and any proceedings relative thereto shall not relieve the applicant from the time limit set for an appeal or an abandonment for failure to reply.

(b) No amendment of the application can be made in an appeal proceeding. After decision on appeal, amendments can only be made to carry into effect a recommendation under § 97.302(b).

Correction of Errors in Certificate

§ 97.120 Corrected certificate—office mistake.

When a certificate is incorrect because of a mistake in the Office, the Commissioner may issue a corrected certificate stating the fact and nature of such mistake, under seal, without charge, to be issued to the owner and recorded in the records at the Office.

§ 97.121 Corrected certificate—applicant's mistake.

When a certificate is incorrect because of a mistake by the applicant of a clerical or typographical nature, or of minor character, or in the description of the variety (including, but not limited to, the use of a misleading variety name

or a name assigned to a different variety of the same species), and the mistake is found by the Commissioner to have occurred in good faith and does not require a further examination, the Commissioner may, upon payment of the required fee and return of the original certificate, correct the certificate by issuing a corrected certificate, in accordance with section 85 of the Act. If the mistake requires a reexamination, a correction of the certificate shall be dependent on the results of the reexamination.

Reissuance of Certificate

§97.122 Certified seed only election.

When an owner elects after a certificate is issued to sell the protected variety by variety name only as a class of certified seed, a new certificate may be issued upon return of the original certificate to the Office and payment of the appropriate fee.

Assignments and Recording

§97.130 Recording of assignments.

(a) Any assignment of an application for a certificate, or of a certificate of plant variety protection, or of any interest in a variety, or any license or grant and conveyance of any right to use of the variety, may be submitted for recording in the Office in accordance with section 101 of the Act (7 U.S.C. 2531).

(b) No instrument shall be recorded which is not in the English language or which does not identify the certificate or application to which it relates.

(c) An instrument relating to title of a certificate shall identify the certificate by number and date, the name of the owner, and the name of the novel variety as stated in the certificate. An instrument relating to title of an application shall identify an application by number and date of filing, the name of the owner, and the name of the novel variety as stated in the application.

(d) If an assignment is executed concurrently or subsequent to the filing of an application, but before its number and filing date are ascertained, the assignment shall identify the application by the date of the application, the name of the owner, and the name of the novel variety.

§97.131 Conditional assignments.

Assignments recorded in the Office are regarded as absolute assignments for Office purposes until canceled in writing by both parties to the assignment or by a decree of a court of competent jurisdiction. The Office shall not determine whether conditions precedent to the assignment, such as the payment of money, have been fulfilled.

§97.132 Assignment records open to public inspection.

(a) Assignment records relating to original or amended certificates shall be open to public inspection and copies of any recorded document may be obtained upon payment of the prescribed fee.

(b) Assignment records relating to any pending or abandoned application shall not be available for inspection except to the extent that pending applications are published as provided in section 57 of the Act and §97.19, or where necessary to carry out the provisions of any Act of Congress. Copies of assignment records and information on pending or abandoned applications shall be obtainable only upon written authority of the applicant or his or her assignee, or attorney or agent of record, or where necessary to carry out the provisions of any Act of Congress. An order for a copy of an assignment shall give the proper identification of the assignment.

Marking or Labeling Provisions

§97.140 After filing.

Upon filing an application for protection of a novel variety and payment of the prescribed fee, the owner, or his or her designee, may label the variety or containers of the seed of the variety or plants produced from such seed, substantially as follows: "Unauthorized Propagation Prohibited—(Unauthorized Seed Multiplication Prohibited)—U.S. Variety Protection Applied For."

§97.141 After issuance.

Upon issuance of a certificate, the owner of the novel variety, or his or her designee, may label the variety or containers of the seed of the variety or plants produced from such seed substantially as follows: "Unauthorized Propagation Prohibited—(Unauthorized Seed Multiplication Prohibited)—U.S. Protected Variety."

§97.142 For testing or increase.

An owner who contemplates filing an application and releases for testing or increase, seed of the variety or other sexually reproducible plant material produced from seed of the variety, may label such plant material or containers of the seed or plant substantially as follows: "Unauthorized Propagation Prohibited—For Testing (or Increase) Only."

§97.143 Certified seed only.

(a) Upon filing an application, or amendment thereto, specifying seed of the variety is to be sold by variety name only as a class of certified seed, the owner, or his or her designee, may label containers of seed of the variety substantially as follows: "Unauthorized Propagation Prohibited—U.S. Variety Protection Applied for Specifying That Seed of This Variety Is To Be Sold By Variety Name Only as a Class of Certified Seed."

(b) An owner who has received a certificate specifying that a variety is to be sold by variety name only, as a class of certified seed, may label containers of the seed of the variety substantially as follows: "Unauthorized Propagation Prohibited—To Be Sold By Variety Name Only as a Class of Certified Seed —U.S. Protected Variety."

§97.144 Additional marking or labeling.

Additional clarifying information that is not false or misleading may be used by the owner, in addition to the above markings or labeling.

Attorneys and Agents

§97.150 Right to be represented.

An applicant may actively advance an application or may be represented by an attorney or agent authorized in writing.

§97.151 Authorization.

Only attorneys or agents specified by the applicant shall be allowed to inspect papers or take action of any kind, on behalf of the applicant, in any pending application or proceedings.

§97.152 Revocation of authorization; withdrawal.

An authorization of an attorney or agent may be revoked by an applicant at any time, and an attorney or agent may withdraw, upon application to the Commissioner. When the authorization is so revoked, or the attorney or agent has so withdrawn, the Office shall inform the interested parties and shall thereafter communicate directly with the applicant, or with such other attorney or agent as the applicant may appoint. An assignment will not of itself operate as a revocation of authorization previously given, but the assignee of the entire interest may revoke previous authorizations and be represented by an attorney or agent of his or her own selection.

§97.153 Persons recognized.

Unless specifically authorized as provided in §97.151, no person shall be permitted to file or advance applications before the Office on behalf of another person.

§97.154 Government employees.

Officers and employees of the United States who are disqualified by statute

(18 U.S.C. 203 and 205) from practicing as attorneys or agents in proceedings or other matters before government departments or agencies, shall not be eligible to represent applicants, except officers and employees whose official duties require the preparation and prosecution of applications for certificates of variety protection.

§ 97.155 Signatures.

Every document filed by an attorney or agent representing an applicant or party to a proceeding in the Office shall bear the signature of such attorney or agent, except documents which are required to be signed by the applicant or party.

§ 97.156 Addresses.

Attorneys and agents practicing before the Plant Variety Protection Office shall notify the Office in writing of any change of address. The Office shall address letters to any person at the last address received.

§ 97.157 Professional conduct.

Attorneys and agents appearing before the Office shall conform to the standards of ethical and professional conduct, generally applicable to attorneys appearing before the courts of the United States.

§ 97.158 Advertising.

(a) The use of advertising, circulars, letters, cards, and similar material to solicit plant variety protection business, directly or indirectly, is forbidden as unprofessional conduct, and any person engaging in such solicitation, or associated with or employed by others who so solicit, shall be refused recognition to practice before the Office or may be suspended, excluded, or disbarred from further practice before the Office.

(b) The use of simple professional letterheads, calling cards, or office signs, simple announcements necessitated by opening an office, change of association, or change of address, distributed to clients and friends and insertion of listings in common form (not display) in a classified telephone or city directory, and listings and professional cards with biographical data in standard professional directories, shall not be considered a violation of this section.

Fees and Charges

§ 97.175 Fees and charges.

The following fees and charges apply to the services and actions specified below:

(a) Filing the application and notifying the public of filing—$275

(b) Search or examination—2,050

(c) Allowance and issuance of certificate and notifying public of issuance—275

(d) Revive an abandoned application—275

(e) Reproduction of records, drawings, certificates, exhibits, or printed material (copy per page of material)—1

(f) Authentication (each page)—1

(g) Correcting or reissuance of a certificate—275

(h) Recording assignments (per certificate/application)—25

(i) Copies of 8 x 10 photographs in color—25

(j) Additional fee for reconsideration—275

(k) Additional fee for late payment—25

(l) Additional fee for late replenishment of seed—25

(m) Appeal to Secretary (refundable if appeal overturns the Commissioner's decision)—2,600

(n) Field inspections by a representative of the Plant Variety Protection Office made at the request of the applicant shall be reimbursable in full (including travel, per diem or subsistence, and salary) in accordance with Standardized Government Travel Regulations.

(o) Any other service not covered above will be charged for at rates prescribed by the Commissioner, but in no event shall they exceed $40 per employee-hour.

§ 97.176 Fees payable in advance.

Fees and charges shall be paid at the time of making application or at the time of submitting a request for any action by the Office for which a fee or charge is payable and established in this part.

§ 97.177 Method of payment.

Checks or money orders shall be made payable to the Treasurer of the United States. Remittances from foreign countries must be payable and immediately negotiable in the United States for the full amount of the prescribed fee. Money sent by mail to the Office shall be sent at the sender's risk.

§ 97.178 Refunds.

Money paid by mistake or excess payments shall be refunded, but a mere change of plans after the payment of money, as when a party decides to withdraw an application or to withdraw an appeal, shall not entitle a party to a refund. However, the examination or search fee shall be refunded if an application is voluntarily abandoned pursuant to § 97.23(a) before a search or examination has begun. Amounts of $1 or less shall not be refunded unless specifically demanded.

§ 97.179 Copies and certified copies.

(a) Upon request, copies of applications, certificates, or of any records, books, papers, drawings, or photographs in the custody of the Office and which are open to the public, will be furnished to persons entitled thereto, upon payment of the prescribed fee.

(b) Upon request, copies will be authenticated by imprint of the seal of the Office and certified by the official, authorized by the Commissioner upon payment of the prescribed fee.

Availability of Office Records

§ 97.190 When open records are available.

Copies of records, which are open to the public and in the custody of the Office, may be examined in the Office during regular business hours upon approval by the Commissioner.

Protest Proceedings

§ 97.200 Protests to the grant of a certificate.

Opposition on the part of any person to the granting of a certificate shall be permitted while an application is pending and for a period not to exceed 5 years following the issuance of a certificate.

§ 97.201 Protest proceedings.

(a) Opposition shall be made by submitting in writing a petition for protest proceedings, which petition shall be supported by affidavits and shall show the reason or reasons for opposing the application or certificate. The petition and accompanying papers shall be filed in duplicate. If it appears to an examiner that a variety involved in a pending application or covered by a certificate may not be or may not have been entitled to protection under the Act, a protest proceeding may be permitted by the Commissioner.

(b) One copy of the petition and accompanying papers shall be served by the Office upon the applicant or owner, or his or her attorney or agent of record.

(c) An answer, by the applicant or owner of the certificate, or his or her assignee, in response to the petition, may be filed with the Commissioner within 60 days after service of the petition, upon such person. If no answer is filed within said period, the Commissioner shall decide the matter on the basis of the allegations set forth in the petition.

(d) If the petition and answer raise any issue of fact needing proof, the Commissioner shall afford each of the parties a period of 60 days in which to

file sworn statements or affidavits in support of their respective positions.

(e) As soon as practicable after the petition or the petition and answer are filed, or after the expiration of any period for filing sworn statements or affidavits, the Commissioner shall issue a decision as to whether the protests are upheld or denied. The Commissioner may, following the protest proceeding, cancel any certificate issued and may grant another certificate for the same novel variety to a person who proves to the satisfaction of the Commissioner, that he or she is the breeder or discoverer. The decision shall be served upon the parties in the manner provided in § 97.403.

Priority Contest

§ 97.205 Definition; when declared.

A priority contest may be instituted by the Secretary, on his or her own motion, or upon the request of any person who has applied for protection on the same variety, for which an adverse certificate has been issued, for the purpose of determining the question of priority between two or more parties claiming development or discovery of the same novel variety; *Provided, however,* That any person shall have forfeited his or her right to assert priority when an adverse certificate has been issued, if he or she fails to make a request for the institution of a priority contest within 1 year of the publication in the Official Journal of issuance of the adverse certificate by the Secretary, or if he or she fails to make the request within the period for taking action after refusal of the application on the basis of the adverse certificate.

§ 97.206 Preparation for priority contest between applicants.

(a) Before a priority contest will be handled by the Office, an examiner must determine that the same novel variety is involved in separate applications filed by two or more parties and apparently certifiable to each of the parties, subject to the determination of the question of priority.

(b) The fact that a certificate has been issued will not prevent a priority contest.

§ 97.207 Preparation of priority papers and declaration of priority contest.

(a) When a priority question is found to exist, the examiner shall forward the pertinent files to the Commissioner, together with a written statement showing the reason for the contest.

(b) The Commissioner shall institute and declare the priority contest by forwarding a notice to each of the applicants involved. Each notice shall include the name and residence of each of the other applicants or those of his or her attorney or agent, if any, and of any assignee, and will identify the application of each opposing party by number and filing date, or in the case of a certificate, by the number and date of the certificate. The notice shall specify the basis of the priority contest. The notice shall specify a time, not to exceed 2 months, for filing preliminary statements.

(c) When a notice is returned to the Office undelivered, or when one of the parties resides abroad and his or her agent in the United States is unknown, notice may be given once by publication in the Official Journal.

§ 97.208 Burden of proof.

The parties to a priority contest will be presumed to have developed their varieties in the chronological order of the filing dates of their applications for certificates involved in the priority contest, and the burden of proof will rest upon the party who last filed an application.

§ 97.209 Preliminary statement on novel variety developed in the United States.

(a) Each party to the priority contest is required to file on or before a date fixed by the Office, a concise preliminary statement giving the facts and dates relating to the development of his or her alleged novel variety. The preliminary statement must be signed by the owner; *Provided, however,* That in appropriate circumstances, as when the owner is dead or legally incapacitated, or a showing is made of inability to obtain a statement from the owner, the preliminary statement may be made by the assignee or by someone authorized or entitled to make the statement, having knowledge of the facts.

(b) Preliminary statements shall be filed with the Office in duplicate. A copy shall be forwarded to each opposing party by the Office as soon as practicable after both parties have filed their statements within the requisite period.

(c) In filing a preliminary statement each party must show the following information:

(1) The date upon which the first determination of the novel variety was made.

(2) The date upon which the first written description of the novel variety was made. If a written description of the novel variety has not been made prior to the filing date of the application, it must be so stated.

(3) The date of the first act or acts susceptible of proof (other than making a written description or disclosing the novel variety to another person), which, if proven, would establish determination of the novel variety, and a brief description of such act or acts. If there have been no such acts, it must be so stated.

(4) The date of the actual production of the novel variety. If the novel variety had not been actually produced before the filing date of the application, it must be so stated.

(d) When an allegation as to the first written description (paragraph (c)(2) of this section) is made, a copy of such written description shall be attached to the statement.

(e) If a party intends to rely on a prior application, domestic or foreign, the preliminary statement shall clearly identify such prior application. Copies of the cited application and related documents will be served by the Office, upon all interested parties to the contest. In the case of an application filed in a foreign country, English translations shall be served to all interested parties by the party relying on the application filed in the foreign country.

§ 97.210 Preliminary statement on novel variety developed in a foreign country.

When the novel variety was developed in a foreign country, the preliminary statement must show (a) the information specified in § 97.209 (c) through (e) and (b) whether, and if so, when and under what circumstances the novel variety was introduced into the United States by or on behalf of the party.

§ 97.211 Statements sealed before filing.

The preliminary statement shall be submitted in a sealed envelope bearing the name of the party filing it and the number and title of the priority contest as shown on the notice issued by the Office. The envelope should be enclosed in an outer mailing envelope marked "To Be Opened Only by the Commissioner."

§ 97.212 Correction of a statement on motion.

In case of material error arising through inadvertence or mistake, a preliminary statement may be corrected upon a satisfactory showing to the Commissioner that the correction is of material significance. Correction of the statement must be made as soon as practicable after the discovery of the error.

§ 97.213 Failure to file statements.

If any party to a priority contest fails to file a preliminary statement, he or she

shall be restricted to his or her earliest effective filing date.

§ 97.214 Access to preliminary statements.

The preliminary statements shall be open to the inspection of any party after the date set for the filing of preliminary statements (§ 97.207(b)), but shall not be open to inspection prior to that time.

§ 97.215 Dissolution at the request of the Commissioner.

If during a priority contest, information is submitted or found which, in the opinion of the Commissioner, may render the variety ineligible for a certificate, the priority contest may be suspended by the Commissioner and referred to an examiner for consideration of the matter. The parties will be notified of the reason for the suspension. Arguments of the parties regarding the suspension will be considered, if filed within 60 days of the notification. The suspension will then be continued, modified, or dismissed, in accordance with the determination by the Commissioner.

§ 97.216 Concession; abandonment.

(a) An applicant or a certificate holder involved in a priority contest may, at any time, file a written concession of priority, or abandonment of the certificate, signed by him or her. Upon the filing of such an instrument by any party, the decision shall be rendered against the interested party by the Commissioner.

(b) A concession of priority may not be made by an assignee of a part interest.

§ 97.217 Affidavits and exhibits.

Affidavits and exhibits, including official records and any special matter contained in a printed publication, pertinent to the issue involved in the contest, may be introduced as evidence in a priority contest by any party to the contest. In the case of official records and printed publications, the party introducing the evidence shall specify the record or the printed publication, the page or pages to be used, indicate generally its relevancy, and submit to the Commissioner the record or authenticated copy, or the printed publication, or a copy. Copies of affidavits and exhibits, including any record or publication, shall be served by the Commissioner on each of the other interested parties.

§ 97.218 Matters considered in determining a priority.

In determining priority, the Commissioner will consider only priority of development based on the evidence submitted. Questions of novelty generally will not be considered in the decision on priority. The Commissioner may refer proposed findings of fact, conclusions, and notice of priority to the Board for an advisory decision.

§ 97.219 Recommendation by the Commissioner.

The Commissioner may, either before or concurrently with a decision on the question of priority, but independently of such decision, direct the attention of the examiner to any matter not relating to priority which may come to the Commissioner's attention, and which in his or her opinion establishes the fact that there has been an irregularity which amounts to a bar to the granting of a certificate to either of the parties. The Commissioner may suspend the priority contest and remand the case to the examiner for further consideration of the matters, to which attention has been directed.

§ 97.220 Decision by the Commissioner.

(a) When a priority contest is concluded on the basis of preliminary statements, or proposed findings of fact, conclusions and notice of priority shall be issued by the Commissioner to the interested parties, giving them a specified period, not less than 30 days, to show cause why such proposed findings of fact, conclusions, and notice of priority should not be made final. Any response made during the specified period will be considered by the Commissioner. Additional affidavits or exhibits will not be considered, unless accompanied by a showing of good cause acceptable to the Commissioner. Thereafter, final findings of fact, conclusions, and notice of priority shall be issued by the Commissioner.

(b) The decision shall be entered by the Commissioner against a party whose preliminary statement alleges a date of determination later than the filing date of the other party's application.

§ 97.221 Status of claims of defeated applicant.

Whenever a final notice of priority has been issued by the Commissioner in a priority proceeding, and the time limit for an appeal from such decision has expired, the claim or claims constituting the issue of the priority stand finally disposed of without further action by the Commissioner.

§ 97.222 Second priority contest.

A second priority contest between the same parties shall not be entertained by the Commissioner for the same novel variety.

Appeal to the Secretary

§ 97.300 Petition to the Secretary.

(a) Petition may be made to the Secretary from any final action of the Commissioner denying an application or refusing to allow a certificate to be issued, or from any adverse decision of the Commissioner made under §§ 97.18(c), 97.107, 97.201(e), and 97.220.

(b) Any such petition shall contain a statement of the facts involved and the point or points to be reviewed, and the actions requested.

(c) A petition to the Secretary shall be filed in duplicate and accompanied by the prescribed fee (see § 97.175).

(d) Upon request, an opportunity to present data, views, and arguments orally, in an informal manner or in a formal hearing, shall be given to interested persons. If a formal hearing is requested, the proceeding shall be conducted in accordance with §§ 50.28 and 50.30 through 50.33 (§§ 50.28, 50.30 through 50.33 of this chapter) of the rules of practice under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621, *et seq.*).

(e) Except as otherwise provided in the rules in this part, any such petition not filed within 60 days from the action complained of shall be dismissed as untimely.

§ 97.301 Commissioner's answer.

(a) The Commissioner may, within such time as may be directed by the Secretary, furnish a written statement to the Secretary in answer to the appellant's petition, including such explanation of the reasons for the action as may be necessary and supplying a copy to the appellant.

(b) Within 20 days from the date of such answer, the appellant may file a reply statement directed only to such new points of argument as may be raised in the Commissioner's answer.

§ 97.302 Decision by the Secretary.

(a) The Secretary, after receiving the advice of the Board, may affirm or reverse the decision of the Commissioner, in whole or in part.

(b) Should the decision of the Secretary include an explicit statement that a certificate be allowed, based on an amended application, the applicant shall have the right to amend his or her application in conformity with such statement and such decision shall be binding on the Commissioner.

§ 97.303 Action following the decision.

(a) Copies of the decision of the Secretary shall be served upon the appellant and the Commissioner in the manner provided in § 97.403.

(b) When an appeal petition is dismissed, or when the time for appeal to the courts pursuant to the Act has expired and no such appeal or civil action has been filed, proceedings in the appeal shall be considered terminated as of the dismissal or expiration date, except in those cases in which the nature of the decision requires further action by the Commissioner. If the decision of the Secretary is appealed or a civil action has been filed pursuant to sections 71, 72, or 73 of the Act, the decision of the Secretary will be stayed pending the outcome of the court appeal or civil action.

General Procedures in Priority, Protest, or Appeal Proceedings

§97.400 Extensions of time.

Upon a showing of good cause, extensions of time not otherwise provided for may be granted by the Commissioner or, if an appeal has been filed by the Secretary for taking any action required in any priority, protest, or appeal proceeding.

§97.401 Miscellaneous provisions.

(a) Petitions for reconsideration or modification of the decision of the Commissioner in priority or protest proceedings shall be filed within 20 days after the date of the decision.

(b) The Commissioner may consider on petition any matter involving abuse of discretion in the exercise of an examiner's authority, or such other matters as may be deemed proper to consider. Any such petition, if not filed within 20 days from the decision complained of, may be dismissed as untimely.

§97.402 Service of papers.

(a) Every paper required to be served on opposing parties and filed in the Office in any priority, protest, or appeal proceeding, must be served by the Secretary in the manner provided in §97.403.

(b) The requirement in certain sections that a specified paper shall be served includes a requirement that all related supporting papers shall also be served. Proof of such service upon other parties to the proceeding must be made before the supporting papers will be considered by the Commissioner or Secretary.

§97.403 Manner of service.

Service of any paper under this part must be on the attorney or agent of the party if there be such, or on the party if there is no attorney or agent, and may be made in any of the following ways:

(a) By mailing a copy of the paper to the person served by certified mail, with the date of the return receipt controlling the date of service;

(b) By leaving a copy at the usual place of business of the person served with someone in his or her employ;

(c) When the person served has no usual place of business, by leaving a copy at his or her home with a member of the family over 14 years of age and of discretion; and

(d) Whenever it shall be found by the Commissioner or Secretary that none of the above modes of serving the paper is practicable, service may be by notice, published once in the Office Journal.

Review of Decisions by Court

§97.500 Appeal to U.S. Courts.

Any applicant dissatisfied with the decision of the Secretary on appeal may appeal to the U.S. Court of Customs and Patent Appeals or the U.S. Courts of Appeals, or institute a civil action in the U.S. District Court as set forth in sections 71, 72, and 73 of the Act. In such cases, the appellant or plaintiff shall give notice to the Secretary, state the reasons for appeal or civil action, and obtain a certified copy of the record. The certified copy of the record shall be forwarded to the Court by the Plant Variety Protection Office on order of, and at the expense of the appellant or plaintiff.

Cease and Desist Proceedings

§97.600 Rules of practice.

Any proceedings instituted under section 128 of the Act for false marking shall be conducted in accordance with §§202.10 through 202.29 of this chapter (rules of practice under the Federal Seed Act) (7 U.S.C. 1551 *et seq.*), except that all references in those rules and regulations to "Examiner" shall be construed to be an Administrative Law Judge, U.S. Department of Agriculture, and not an "Examiner" as defined in the regulations under the Plant Variety Protection Act.

Public Use Declaration

§97.700 Public interest in wide usage.

(a) If the Secretary has reason to believe that a protected variety should be declared open to use by the public in accordance with section 44 of the Act, the Secretary shall give the owner of the variety appropriate notice and an opportunity to present views orally or in writing, with regard to the necessity for such action to be taken in the public interest.

(b) Upon the expiration of the period for the presentation of views by the owner, as provided in paragraph (a) of this section, the Secretary shall refer the matter to the Plant Variety Protection Board for advice, including advice on any limitations or rate of remuneration.

(c) Upon receiving the advice of the Plant Variety Protection Board, the Secretary shall advise the owner of the variety, the members of the Plant Variety Protection Board, and the public, by issuance of a press release, of any decision based on the provisions of section 44 of the Act to declare a variety open to use by the public. Any decision not to declare a variety open to use by the public will be transmitted only to the owner of the variety and the members of the Plant Variety Protection Board.

Publication

§97.800 Publication of public variety descriptions.

Voluntary submissions of varietal descriptions of "public varieties" on forms obtainable from the Office will be accepted for publication in the Official Journal. Such publication shall not constitute recognition that the variety is, in fact, novel.

PART 98—MEALS, READY-TO-EAT (MRE's), MEATS, AND MEAT PRODUCTS

Subpart A–MRE's, Meats, and Related Meat Food Products

Sec.
98.1 General.
98.2 Definitions.
98.3 Analyses performed and locations of laboratories.
98.4 Analytical methods.
98.5 Fees and charges.

Subpart B—USDA Certification of Laboratories for the Testing of Trichinae in Horsemeat

98.100 General.
98.101 Definitions.
98.102–98.600 [Reserved].

Authority: Agricultural Marketing Act of 1946, secs. 203, 205, as amended; 60 Stat. 1087, 1090, as amended (7 U.S.C. 1622 and 1624).

Subpart A—MRE's, Meats, and Related Meat Food Products

§98.1 General.

Analytical services of meat and meat food products are performed for fat, moisture, salt, protein, and other content specifications.

§98.2 Definitions.

Words used in the regulations in this subpart in the singular form will import the plural, and vice versa, as the case may demand. As used throughout the regulations in this subpart, unless the context requires otherwise, the following terms will be construed to mean:

Lard (Edible). The fat rendered from clean and sound edible tissues from swine.

Meals, Ready-To-Eat (MRE). Meals, Ready-To-Eat are complete portions of one meal for one military person and are processed and packaged to destroy or retard the growth of spoilage-type microorganisms in order to extend product shelf life for 7 years. Composition analyses for MRE's are covered by the reimbursable agreement in the Memorandums of Understanding (MOU's) between AMS, USDA and the Defense Personnel Support Center, Department of Defense (DOD). These DOD, Defense Personnel Support Center (DPSC) contracts state certain military specifications for an acceptable one meal serving, retorted pouched or 18–24 serving hermetically-sealed tray packed meat, or meal product regarding satisfactory analyses for fat, salt, protein, moisture content, added stabilizer ingredient, and sometimes microbiological composition. MRE's are for use by the DOD, DPSC as a component of operational food rations, and as an item of general issue by the military.

Meat. This includes the edible part of the muscle of any cattle, sheep, swine, or goats, which is skeletal or which is found in the tongue, in the diaphragm, in the heart, or in the esophagus, and which is intended for human food, with or without the accompanying and overlying fat, and the portions of bone, skin, tendon, nerve, and blood vessels which normally accompany the muscle tissue, and which are not separated from it in the process of dressing. It does not include the muscle found in the lips, snout, or ears. This term, as applied to products of equines, shall have a meaning comparable to that provided in this paragraph with respect to cattle, sheep, swine, and goats.

Meat food product. Any article capable for use as human food (other than meat, prepared meat, or a meat by-product), which is derived or prepared wholly or in substantial part from meat or other portion of the carcass of any cattle, sheep, swine, or goats. An article exempted from definition as a meat food product by the Administrator, such as an organotherapeutic substance, meat juice, meat extract, and the like, which is used only for medicinal purposes and is advertised solely to the medical profession is not included.

Ready-to-eat. The term means consumers are likely to apply little or no additional heat to the fully-cooked and the fully-prepared food product before consumption.

Specifications. Descriptions with respect to the class, grade, other quality, quantity or condition of products, approved by the Administrator, and available for use by the industry regardless of the origin of the descriptions.

Tallow (Edible). The hard fat derived from USDA inspected and passed cattle, sheep, or goats.

Titer. The measure of the hardness or softness of the tested material as determined by the solidification point of fatty acids and expressed in degrees centigrade (°C).

§ 98.3 Analyses performed and locations of laboratories.

(a) Tables 1 through 4 list the special laboratory analyses rendered by the Science Division as a result of an agreement with the Livestock and Seed Division. The payment for such laboratory services rendered at the request of an individual or third party served shall be reimbursed pursuant to the terms as specified in the cooperative agreement.

TABLE 1.—SCHEDULE ANALYSIS

Identity	Analyses	Samples tested
Schedule BC (Beef Chunks, Canned).	Fat, salt	1
Schedule BJ (Beef with Natural Juices, Canned).	Fat	1
Schedule CS (Canned Meatball Stew).	Fat	3
Schedule GP (Frozen Ground Pork).	Fat	4
Schedule PJ (Pork with Natural Juices, Canned).	Fat	1
Schedule RB (Beef for Reprocessing).	Fat	4
Schedule RG (Beef Roasts and Ground Beef).	Fat	4
Schedule SB (Slab or Sliced Bacon).	Moisture, fat, salt.	1
Schedule WS (Beef or Wafer Steaks).	Fat	1

TABLE 2.—MICROBIOLOGICAL ANALYSIS

Type of analysis	Number of samples tested
Psychrotrophic Bacterial Plate Count	1

TABLE 3.—NONSCHEDULE ANALYSIS

Identity	Analyses	Samples tested
Fed Specification PP-B–2120B (Ground Beef Products).	Fat	4
Fed Specification PP-B–81J (Sliced Bacon).	Fat, salt, moisture.	1
Fed Specification PP-L–800E (Luncheon Meat, Canned).	Fat, salt	1
Ground Beef or Ground Pork.	Fat	4
Ground Beef or Ground Pork.	Fat	1
Pork Sausage	Fat, salt	4
Pork Sausage	Fat, moisture.	4
Pork Sausage	Fat	4
Mil-P–44131A (Pork Steaks, Flaked, Formed, Breaded).	Fat	4
Milwaukee Public Schools (Breaded/Unbreaded Meat).	Fat	4
Chili Con Carne Without Beans.	Fat	1
A-A–20047–B	Fat, protein	3
A-A–20136	salt	3
A-A–20148	Fat, salt	3
Mil-B–44133 (GL)	Fat, salt	3
Mil-B–44158A	Water activity.	6
Mil-C–44253	Fat, salt	3
Mil-H–44159B (GL)	Fat, salt	1
PP-F–02154 (Army GL).	Fat, salt, moisture.	1

TABLE 4.—LARD AND TALLOW ANALYSIS

Type of analysis	Number of samples tested
Fat Analysis Committee (FAC) Color	1
Free Fatty Acids	1
Insoluble Impurities	1
Moisture and Volatile Matter	1

TABLE 4.—LARD AND TALLOW ANALYSIS—Continued

Type of analysis	Number of samples tested
Specific Gravity	4 to 6
Titer Test	1
Unsaponifiable Material	1

(b) Meats, such as ground beef or ground pork, meat food products, and MRE's, not covered by an agreement with Livestock and Seed Division, are analyzed for fat, moisture, salt, sulfur dioxide, nitrites, sulfites, ascorbates, citric acid, protein, standard plate counts, and coliform counts, among other analyses. These food product analyses are performed at any one of the Science Division (SD) field laboratories as follows:

(1) USDA, AMS, Science Division, Midwestern Laboratory, 3570 North Avondale Avenue, Chicago, IL 60618.

(2) USDA, AMS, SD Aflatoxin Laboratory, 107 South 4th Street, Madill, OK 73446.

(3) USDA, AMS, SD, Eastern Laboratory, 645 Cox Road, Gastonia, NC 28054.

§98.4 Analytical methods.

(a) The majority of analytical methods used by the USDA laboratories to perform analyses of meat, meat food products and MRE's are listed as follows:

(1) Official Methods of Analysis of the Association of Official Analytical Chemists (AOAC), Association of Official Analytical Chemists, suite 400, 2200 Wilson Boulevard, Arlington, Va 22201–3301.

(2) U.S. Army Individual Protection Directorate's Military Specifications, approved analytical test methods noted therein, U.S. Army Natick Research, Development and Engineering Center, Kansas Street, Natick, MA 01760–5017.

(b) Additional analytical methods for these foods will be used, from time to time, as approved by the Director.

§98.5 Fees and charges.

(a) The fee charged for any single laboratory analysis of meat, meat food products, and MRE's, not covered by an agreement with Livestock and Seed Division, is specified in the schedules of charges in paragraph (a) of § 91.37 of this subchapter.

(b) The laboratory analyses of meat, meat food products, and MRE's, not covered by a cooperative agreement, shall result in an additional fee, found in Table 7 of § 91.37 of this subchapter, for sample preparation or grinding.

(c) The charge for any requested laboratory analysis of meat, meat food products, and MRE's not listed shall be based on the standard hourly rate specified in § 91.37, paragraph (b).

Subpart B—USDA Certification of Laboratories for the Testing of Trichinae in Horsemeat

§98.100 General.

A laboratory that has met the requirements for certification specified in this subpart shall receive an AMS Science Division certificate to approve its analysis for *Trichinella* spiralis in horsemeat. Certification would be granted to a qualified analyst or a laboratory based on having the proper training, facilities, and equipment. This AMS laboratory certification program will enable horsemeat exporters to comply with trichinae testing requirements of the European Community.

§98.101 Definitions.

Words used in the regulations in this part in the singular form will import the plural, and vice versa, as the case may demand. As used throughout the regulations in this part, unless the context requires otherwise, the following terms will be construed to mean:

European Community. The European Community (EC) consists of the initial 12 European countries and the updated and expanded membership of nations. The original EC members are Belgium, Britain, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal and Spain.

Horsemeat. That U.S. inspected and passed clean, wholesome muscle tissue of horses, which is skeletal or which is found in the tongue, in the diaphragm, in the heart, or in the esophagus, with or without the accompanying and overlying fat and the portions of sinews, nerves, and blood vessels, which normally accompany the muscle tissue and which are not separated from it in the process of dressing.

Trichinae. Round worms or nematodes of the genus *Trichinella*, which live as parasites in man, horses, rats, and other animals.

Trichinella spiralis. A small parasitic nematode worm which lives in the flesh of various animals, including the horse. When such infected meat is inadequately cooked and eaten by man, the live worm multiplies within the body and the larvae burrow their way into the muscles, causing a disease referred to as trichinosis.

§§98.102–98.600 [Reserved]

PART 99—STATISTICAL SCIENCE PROGRAM

Sec.

99.1 General. [Reserved]

99.2 Definitions. [Reserved]

99.3 Locations for statistical science services.

99.4–99.999 [Reserved]

Authority: Agricultural Marketing Act of 1946, secs. 203, 205, 60 Stat. 1087, 1090, as amended, (7 U.S.C. 1622, 1624); 104 Stat. 3562–3565 (7 U.S.C. 138, 138(a), 138(b), 138(c), 138(d), 138(e), 138(f), 138(g), 138(h), 138(i)).

§99.1 General. [Reserved]

§99.2 Definitions. [Reserved]

§99.3 Locations for statistical science services.

The Science Division (SD) statistical science services are performed at any one of the offices as follows:

(a) USDA, AMS, Science Division, Statistical Branch, Kansas City Technical Center, 10383 No. Executive Hills Blvd., Kansas City, MO 64153.

(b) USDA, AMS, SD, Statistical Branch, 0611 So. Agriculture Bldg., 14th & Independence Ave., SW., Washington, DC 20250.

§§99.4–99.999 [Reserved]

PART 100—NATIONAL LABORATORY ACCREDITATION PROGRAM

Sec.

100.1 General. [Reserved]

100.2 Definitions. [Reserved]

100.3 Location of administrative office.

100.4–100.999 [Reserved]

Authority: Agricultural Marketing Act of 1946, secs. 203, 205 60 Stat. 1087, 1090, as amended, (7 U.S.C. 1622, 1624); 104 Stat. 3562–3565 (7 U.S.C. 138, 138(a), 138(b), 138(c), 138(d), 138(e), 138(f), 138(g), 138(h), 138(i)).

§ 100.1 General. [Reserved]

§ 100.2 Definitions. [Reserved]

§ 100.3 Location of administrative office.

The Science Division (SD) office that administers the National Laboratory Accreditation Program is located as follows: USDA, AMS, Science Division, Office of Chief, Technical Services Branch, 3521 South Agriculture Bldg., 14th & Independence Ave., SW., Washington, DC 20250.

§§ 100.4–100.999 [Reserved]

PART 101—PESTICIDE DATA PROGRAM

Sec.

101.1 General. [Reserved]
101.2 Definitions. [Reserved]
101.3 Locations of administrative offices.
101.4–101.999 [Reserved]

Authority: 7 U.S.C. 1622, 1624.

§ 101.1 General. [Reserved]

§ 101.2 Definitions. [Reserved]

§ 101.3 Locations of administrative offices.

The Science Division (SD) offices that administer the Pesticide Data Program are located as follows:

(a) USDA, AMS, Science Division, 8700 Centreville Rd., suite 200, Manassas, Virginia 22110

(b) USDA, AMS, Science Division, Office of Director, 3507 So. Agriculture Bldg., 14th & Independence Ave., SW., Washington, DC 20250

§§ 101.4–101.999 [Reserved]

PARTS 102 THROUGH 109 [RESERVED]

PART 110—RECORDKEEPING ON RESTRICTED USE PESTICIDES BY CERTIFIED APPLICATORS; SURVEYS AND REPORTS

Sec.

110.1 Scope. [Reserved]
110.2 Definitions [Reserved]
110.3 Records, retention, and access to records. [Reserved]
110.4 Demonstration of compliance. [Reserved]
110.5 Availability of records to facilitate medical treatment. [Reserved]
110.6 Federal cooperation with States. [Reserved]
110.7 Penalties. [Reserved]
110.8 Rules of practice. [Reserved]
110.9 Locations of administrative offices.

Authority: 7 U.S.C. 136i–1; 7 U.S.C. 1624.

§ 110.1 Scope. [Reserved].

§ 110.2 Definitions. [Reserved]

§ 110.3 Records, retention, and access to records. [Reserved]

§ 110.4 Demonstration of compliance. [Reserved]

§ 110.5 Availability of records to facilitate medical treatment. [Reserved]

§ 110.6 Federal cooperation with States. [Reserved]

§ 110.7 Penalties. [Reserved]

§ 110.8 Rules of practice. [Reserved]

§ 110.9 Locations of administrative offices.

The Science Division (SD) offices that administer the Recordkeeping Program are located as follows:

(a) USDA, AMS, Science Division, 8700 Centreville Rd., suite 200, Manassas, Virginia 22110

(b) USDA, AMS, Science Division, Office of Director, 3507 So. Agriculture Bldg., 14th & Independence Ave., SW., Washington, DC 20250

PARTS 111 THROUGH 159 [RESERVED]

Dated: July 16, 1993.

Eugene Branstool,

Assistant Secretary,

Marketing and Inspection Services.

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