

please provide specific examples and suggestions for improvement.):

1. Does the ROP provide adequate assurance that plants are being operated safely?

2. Does the ROP provide sufficient regulatory attention to utilities with performance problems?

3. Does the ROP reduce unnecessary regulatory burden on licensees?

4. Does the ROP improve the efficiency, effectiveness, and realism of the regulatory process, focusing NRC resources on those issues with the most safety significance?

5. Has the public information associated with the ROP been appropriate to keep the public informed, in a timely and understandable fashion, of NRC activities related to plant safety?

(Examples: NRC plant performance web page, Plant Performance Indicators, NRC Inspection Reports, Assessment Letters, ROP guidance documents and implementation procedures, the NRC ROP website, press releases)

6. Does the ROP increase the predictability, consistency, clarity and objectivity of the NRC's oversight activities?

7. Has the public been afforded adequate opportunity to provide input/comments and involvement in the ROP development process?

8. Has NRC been responsive to input/comments provided by the public regarding the ROP development process?

9. Please provide any additional (brief) information or issues related to the reactor oversight process.

II. *Questions related to specific ROP program areas* (As appropriate, please provide specific examples and suggestions for improvement.):

1. Do the performance indicators or other aspects of the ROP create unintended consequences? (Please comment on the potential of unintended consequences associated with the counting of manual scrams in the Initiating Event Cornerstone Performance Indicators.)

2. Do any aspects of the ROP inappropriately increase regulatory burden? (Please comment on any unnecessary overlap between ROP reporting requirements with those associated with INPO, WANO, or the Maintenance Rule.)

3. Is the Significance Determination Process (SDP) usable and does it produce consistent and accurate results?

4. Are there areas of unnecessary overlap between the inspection program and the performance indicators?

5. Does the ROP assessment program provide timely, consistent, and relevant assessment information?

6. Has the NRC implemented the ROP as defined by program documents?

7. Please provide any additional (brief) information or comments on other program areas related to the reactor oversight process. Other areas of interest may be: the treatment of cross-cutting issues in the ROP, the risk-based evaluation process associated with determining event response, and the reduced subjectivity and elevated threshold for documenting issues in inspection reports.

Dated at Rockville, Maryland, this 8th day of December 2000.

For the Nuclear Regulatory Commission.

**William M. Dean,**

*Chief, Inspection Program Branch, Division of Inspection Program Management, Office of Nuclear Reactor Regulation.*

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## OFFICE OF MANAGEMENT AND BUDGET

### Proposed Revision to OMB Guidance on Implementation of FAIR Act

**AGENCY:** Office of Management and Budget, Executive Office of the President.

**ACTION:** Proposed Revision to OMB Guidance on the Implementation of the FAIR Act.

**SUMMARY:** The Office of Management and Budget (OMB) publishes a request for agency and public comments on a proposed technical change to the OMB Circular A-76 Revised Supplemental Handbook to clarify the scope of the challenge-and-appeals process that is available under the Federal Activities Inventory Reform Act of 1998 (Pub. L. 105-270) (the "FAIR Act"). The FAIR Act requires each Federal agency to submit to OMB, annually, a "list" (inventory) of all its activities that "are not inherently governmental functions" (i.e., activities that are "commercial" in nature) and that are performed by Federal employees. Under the FAIR Act, OMB reviews each agency's list and consults with the agency regarding its content. Upon the completion of this review and consultation, the agency transmits a copy of the inventory to Congress and makes the inventory available to the public. An "interested party," as defined by the FAIR Act, may then submit to the agency a challenge (and, if that is denied, an appeal) "of an omission of a particular activity from, or an inclusion of a particular activity on," the agency's inventory. The agency must respond to the challenge (and appeal), and the agency must notify Congress of

any changes to the inventory and must make them publicly available.

In June 1999, OMB issued guidance on the FAIR Act, through revisions to OMB's Circular A-76 and its Revised Supplemental Handbook. 64 FR 33927 (June 24, 1999). This guidance addressed, among other things, the scope of the FAIR Act's challenge-and-appeal process. Recently, OMB issued a revision to its FAIR Act guidance, regarding the timetable for the FAIR Act's challenge-and-appeal process. 65 FR 54568 (September 8, 2000).

OMB is requesting public and agency comment on a further revision to OMB's guidance on the FAIR Act. The purpose of the proposed revision is to provide additional clarification regarding the scope of the statutory challenge-and-appeal process. Although Congress in the FAIR Act clearly defined the scope of that process, and OMB provided guidance on this point in June 1999, the General Accounting Office in a recent report found that a significant number of "interested parties" submitted challenges and appeals (regarding the 1999 FAIR Act inventories) on matters for which Congress had not authorized challenges and appeals. OMB hopes, by providing additional clarification, to eliminate any confusion that may still exist about the scope of the challenge-and-appeal process that Congress established in the FAIR Act.

**DATES:** Agency and public comments on the proposed change are due to OMB not later than January 16, 2001.

**ADDRESSES:** Address all comments to the Office of Federal Procurement Policy, NEOB, Room 9013, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503, FAX Number (202) 395-5105.

**FOR FURTHER INFORMATION CONTACT:** Mr. David C. Childs, Office of Federal Procurement Policy, NEOB, Room 9013, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503, Telephone No. (202) 395-6104.

**Availability:** Copies of the OMB Circular A-76, its Revised Supplemental Handbook, currently applicable Transmittal Memoranda and additional information regarding the FAIR Act and its implementation may be obtained at the OMB home page. The online address (URL) <http://www.whitehouse.gov/OMB/procurement/fair-index.html>. Paper copies of this information can also be obtained by contacting the Office of Federal Procurement Policy, NEOB, Room 9013, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503, Telephone No. (202) 395-7579.

**SUPPLEMENTARY INFORMATION:****1. Background—The FAIR Act and OMB's Implementation Guidance**

The Federal Activities Inventory Reform Act of 1998 (Pub. L. 105-270) (the "FAIR Act") was enacted into law in October 1998. Section 2 of the FAIR Act requires each Federal agency to submit to OMB, annually, a "list" (inventory) of all its activities that "are not inherently governmental functions" (i.e., activities that are "commercial" in nature) and that are performed by Federal employees. Under the FAIR Act, OMB reviews each agency's inventory of commercial activities and consults with the agency regarding its content. Upon the completion of this review and consultation, each agency transmits a copy of its FAIR Act inventory to Congress and also makes the inventory available to the public. Section 3 of the FAIR Act establishes a challenge-and-appeal process under which an "interested party" may submit to the respective agency a challenge to "an omission of a particular activity from, or an inclusion of a particular activity on," the agency's FAIR Act inventory of commercial activities. Under the FAIR Act, challenges to an agency's FAIR Act list may be submitted by "interested parties," which the Act defines to be, basically, federal employees (and their representatives) and existing and prospective federal contractors (and their representatives). The agency must respond to the challenge. If the agency provides an "adverse" response, the interested party may file an appeal, to which the agency must also respond. At the end of the process, the agency must notify Congress of any changes that it has made to its FAIR Act inventory and must make the changes available to the public.

In March 1999, OMB requested public and agency comment on proposed guidance for implementing the FAIR Act. 64 FR 10031 (March 1, 1999). The proposed guidance consisted of revisions to OMB Circular A-76 ("Performance of Commercial Activities") and the Circular's Revised Supplemental Handbook, and it addressed a number of issues involving the FAIR Act, including the statute's challenge-and-appeal process. In June 1999, OMB issued final guidance for implementing the FAIR Act. 64 FR 33927 (June 24, 1999). Among other things, the final guidance addressed the scope of the FAIR Act's challenge-and-appeals process. The OMB guidance was based on the FAIR Act itself, which as noted above provides that a challenge may be submitted regarding "an omission of a particular activity from, or

an inclusion of a particular activity on," the agency's FAIR Act inventory. In its June 1999 guidance (64 FR 33930), OMB stated in Paragraph G.2 ("Challenges and Appeals") of Appendix 2 that:

"Under Section 3 of the FAIR Act, an agency's decision to include or exclude a particular activity from the Commercial Activities Inventory is subject to administrative challenge and, then, possible appeal by an "interested party."

In the June 1999 guidance, OMB also went on to provide additional explanation, in Paragraph G.3, regarding the scope of the challenge-and-appeal process (64 FR 33930):

"An interested party may submit to an executive agency an initial challenge to the inclusion or exclusion of an activity within 30 calendar days after publication of OMB's **Federal Register** notice stating that the inventory is available. The challenge must set forth the activity being challenged with as much specificity as possible, and the reasons for the interested party's belief that the particular activity should be reclassified as inherently Governmental (and therefore be deleted from the inventory) or as commercial (and therefore be added to the inventory) in accordance with OFPP Policy Letter 92-1 on inherently Governmental functions (see Appendix 5) or as established by precedent (such as when other agencies have contracted for the activity or undergone competitions for this or similar activities)."

Earlier this year, OMB requested public and agency comment on revisions to the June 1999 OMB guidance, focusing on the timetable for the FAIR Act challenge-and-appeal process. 65 FR 25966 (May 4, 2000). In response to concerns that the timetable for the 1999 challenge-and-appeal process had not provided sufficient time for interested parties to submit challenges and for agencies to respond to them, OMB proposed to revise the 30-day and 28-day time periods (for submitting and responding to challenges) by converting them from calendar days to working days. OMB recently finalized this revision to the guidance. 65 FR 54568 (September 8, 2000).

**2. GAO's Report on the FAIR Act Challenge-and-Appeal Process**

Most recently, on September 29, 2000, the General Accounting Office (GAO) issued a report that evaluated the history of the challenges and appeals that "interested parties" submitted for the Federal Government's FAIR Act inventories for 1999. GAO Report No. GGD/NSIAD-00-244, B-283779, "Competitive Contracting: Agencies Upheld Few Challenges and Appeals Under the FAIR Act" (September 2000),

available at [www.gao.gov](http://www.gao.gov). As explained above, the FAIR Act allows challenges and appeals to be filed by federal employees (and their representatives) and by existing and prospective federal contractors (and their representatives), who challenge "an omission of a particular activity from, or an inclusion of a particular activity on," the agency's FAIR Act inventory of commercial activities. In its report, GAO analyzed the challenges and appeals that were filed in connection with the 1999 FAIR Act inventories of the 24 agencies that are subject to the Chief Financial Officers Act (the 14 Cabinet Departments and 11 other major agencies).

In its analysis, GAO distinguished between "employee challenges" and "industry challenges." According to GAO (p. 3), "almost all of the employees' challenges and appeals were within the provisions of the act, because they concerned the inclusion of activities that the employees contended should have been omitted because they were inherently governmental." The industry challenges presented a different picture. According to GAO (pp. 2-3), "Many of the issues that industry raised in their challenges and appeals went beyond the provisions of the FAIR Act, because they concerned issues other than the inclusion or omission of an activity from an agency's inventory." As GAO later explained (p. 9), "About one-third of industry's challenges cited the omission of activities from agencies' inventories, with many of the remainder citing issues that went beyond the provisions of the FAIR Act because they did not involve either the inclusion of an activity on or its omission from an inventory." GAO outlined the issues that industry raised, which "did not meet the challenge provisions of the FAIR Act" (p. 11):

"The remaining issues raised by industry did not meet the challenge provisions of the FAIR Act. As shown in table 4, these issues included (1) the agency's use of OMB's reason codes for categorizing commercial activities; (2) the format of the agency's inventory; (3) the agency's use of OMB's function codes; and (4) a general dissatisfaction with OMB guidance or the act, or agency compliance with either."

Since such challenges were outside the scope of the challenge-and-appeal process that Congress had established, these challenges were unsuccessful. As GAO noted (p. 14), "Because most of industry's challenges and appeals did not involve either the inclusion, or omission of, an activity from an agency's inventory, agencies dismissed them."

### 3. The Proposed Revision to OMB's FAIR Act Guidance

As GAO noted in its report, most of the "employee challenges" to the 1999 FAIR Act inventories were within the scope of the statutory challenge-and-appeal process, but only one-third of the "industry challenges" fell within the scope of the statute. In light of the experience gained during the 1999 challenge-and-appeal process, including the agencies' denials of those challenges that "did not meet the challenge provisions of the FAIR Act" (GAO Report, p. 11), it would be reasonable to expect that "interested parties" have now developed a better understanding of what matters may, and may not, be raised during the challenge-and-appeal process that Congress established in the FAIR Act.

As was noted above, and in GAO's report, the FAIR Act itself provides the operative test: Section 3 of the FAIR Act states an interested party may submit challenges and appeals to "an omission of a particular activity from, or an inclusion of a particular activity on," the agency's FAIR Act inventory of commercial activities. In accordance with this test, OMB in its June 1999 guidance stated that "an agency's decision to include or exclude a particular activity from the Commercial Activity Inventory is subject to administrative challenge and, then possible appeal by an 'interested party,'" and OMB further stated that the challenge "must set forth the activity being challenged with as much specificity as possible, and the reasons for the interested party's belief that the particular activity should be reclassified as inherently Governmental (and therefore be deleted from the inventory) or as commercial (and therefore be added to the inventory)." (Paragraphs G.2 and G.3 of Appendix 2 of the Revised Supplemental Handbook for Circular A-76.)

OMB believes that it is in the interest of all affected parties—namely, the interested parties that may file challenges and appeals, and the agencies that must respond to them—to eliminate any remaining confusion that may still exist about the scope of the challenge-and-appeal process that Congress established in the FAIR Act. Accordingly, OMB proposes to revise its implementation guidance for the FAIR Act to provide additional clarification regarding what matters are, and are not, subject to challenge and appeal. Specifically, OMB proposes to revise the introductory paragraph of Paragraph G.2 of Appendix 2 to the Revised

Supplemental Handbook for Circular A-76 so that it reads as follows (the proposed new language is in italics):

2. Challenges and Appeals: Under Section 3 of the FAIR Act, an agency's decision to include or exclude a particular activity from the Commercial Activity Inventory is subject to administrative challenge and, then, possible appeal by an "interested party." *In other words, if an agency has not included an activity on its Inventory, then an "interested party" may submit a challenge and appeal contending that the activity is commercial and, therefore, should be added to the Inventory. Conversely, if an agency has included an activity on its Inventory, then an "interested party" may submit a challenge and appeal contending that the particular activity is inherently governmental and, therefore, should be deleted from the Inventory. The FAIR Act does not authorize any other types of challenges and appeals. Thus, for example, in the case of an activity that an agency has included in its Inventory, an "interested party" may not submit a challenge and appeal that agrees with the agency's decision that the activity is commercial but disagrees with how the agency has described the activity (with respect to, for example, the Function Codes and Reason Codes that the agency used in describing the activity).* Section 3(b) of the FAIR Act defines "interested party as . . ."

OMB requests comment on the proposed revisions.

Jacob J. Lew,  
Director.

#### Circular No. A-76 (Revised); Proposed Transmittal Memorandum No. 23

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Performance of Commercial Activities

This Transmittal Memorandum implements changes to the OMB Circular A-76 Revised Supplemental Handbook, in furtherance of the requirements of the Federal Activities Inventory Reform Act ("The FAIR Act"), Public Law 105-270. The March 1996 Revised Supplemental Handbook was issued through Transmittal Memorandum No. 15 (61 FR 14338). The March 1996 Revised Supplemental Handbook was further revised to implement the requirements of the FAIR Act through Transmittal Memorandum No. 20 (64 FR 33927) and Transmittal Memorandum No. 22 (65 FR 54568).

To clarify that the FAIR Act's administrative challenge and appeal process is limited to the inclusion or the omission of an activity on or off the list, the following change at Appendix 2, paragraph G. 2, of the

OMB Circular A-76 Supplemental Handbook is proposed (see italics):

"2. Challenges and Appeals: Under Section 3 of the FAIR Act, an agency's decision to include or exclude a particular activity from the Commercial Activity Inventory is subject to administrative challenge and, then possible appeal by an "interested party." *An agency's decision with regard to the application of appropriate Function Codes, Reason Codes and agency decisions regarding the aggregation or dis-aggregation of FTE for purposes of reporting commercial activities on the inventory are not subject to administrative challenge or appeal by an "interested party."* Section 3(b) of the FAIR Act defines "interested party as..."

This change is effective immediately. Current A-76 and FAIR Act implementation guidance can be accessed at OMB's homepage at <http://www.whitehouse.gov/OMB/procurement/fair-index.html>.

Jacob J. Lew,  
Director.

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### OFFICE OF MANAGEMENT AND BUDGET

#### Public Availability of Year 2000 Agency Inventories Under the Federal Activities Inventory Reform Act of 1998 (Public Law 105-270) ("FAIR Act")

**AGENCY:** Office of Management and Budget, Executive Office of the President.

**ACTION:** Notice of Public Availability of Commercial Activities Inventories.

**SUMMARY:** Year 2000 FAIR Act Commercial Activities Inventories are now available to the public from the agencies listed below. The Office of Federal Procurement Policy has prepared and is making available a summary FAIR Act User's Guide through its Internet site:

<http://www.whitehouse.gov/OMB/procurement/index.html>.

This User's Guide will help interested parties review Year 2000 FAIR Act inventories, and will also include the web-site addresses to access agency inventories.

The "Federal Activities Inventory Reform Act of 1998" (Public Law 105-270) ("FAIR Act") requires that OMB publish an announcement of public availability of agency Commercial Activities Inventories upon completion of OMB's review and consultation process concerning the content of the agencies' inventory submissions. OMB has completed this process for the agencies listed below. Further