DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9146]

RIN 1545–BD35

Section 179 Elections

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains temporary regulations relating to the election to expense the cost of property subject to section 179 of the Internal Revenue Code. The regulations reflect changes to the law made by section 202 of the Jobs and Growth Tax Relief Reconciliation Act of 2003. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

DATES: *Effective Dates:* These regulations are effective August 4, 2004.

Applicability Dates: For dates of applicability, *see* § 1.179–6T.

FOR FURTHER INFORMATION CONTACT: Winston H. Douglas, (202) 622–3110 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These temporary regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545–1201. Responses to this collection of information are required to obtain a benefit.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

For further information concerning this collection of information, where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, Federal tax returns and tax return information are confidential pursuant to 26 U.S.C. 6103.

Background

This document contains amendments to 26 CFR part 1 to provide regulations under section 179 of the Internal Revenue Code (Code). These amendments reflect the changes to the law made by section 202 of the Jobs and Growth Tax Relief Reconciliation Act of 2003, Public Law 108–27 (117 Stat. 752).

Prior to the enactment of the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA) (117 Stat. 752), section 179 provided that, in lieu of depreciation under section 168 (MACRS depreciation) for taxable years beginning in 2003 and thereafter, a taxpayer with a sufficiently small amount of current year investment in section 179 property could elect to deduct up to $25,000 of the cost of section 179 property placed in service by the taxpayer for the taxable year. In general, section 179 property was defined as depreciable tangible personal property that was purchased for use in the active conduct of a trade or business. The $25,000 amount was reduced (but not below zero) by the amount by which the cost of section 179 property placed in service by the taxpayer during the taxable year exceeded $200,000. The election under section 179 generally was made on the taxpayer's original Federal tax return for the taxable year to which the election related, required specific information to be provided at the time the election was made, and could only be revoked with the consent of the Commissioner of Internal Revenue.

The changes made to section 179 by section 202 of JGTRRA are applicable for section 179 property placed in service by a taxpayer in taxable years beginning after 2002 and before 2006. Section 202 of JGTRRA expands the definition of section 179 property to include off-the-shelf computer software (a category of intangible property) and increases the $25,000 and $200,000 amounts to $100,000 and $400,000, respectively. In addition, the $100,000 and $400,000 amounts are indexed annually for inflation for taxable years beginning after 2003 and before 2006. JGTRRA also modifies section 179 to provide that any election or specification for taxable years beginning after 2002 and before 2006 may be revoked by the taxpayer with respect to any section 179 property, and that such revocation, once made, shall be irrevocable. The conference agreement (H.R. Conf. Rep. No. 108–126, at 35 (2003)) states that a taxpayer may make or revoke an expensing election on an amended Federal tax return without the consent of the Commissioner.

Explanation of Provisions

For taxable years beginning after 2002 and before 2006, the regulations reflect the change to section 179(d)(1) by including off-the-shelf computer software in the definition of section 179 property, and the changes to sections 179(b)(1) and (2) by increasing the respective amounts to $100,000 and $400,000. The regulations also provide guidance for making and revoking elections under section 179 for those taxable years. Several examples are provided to illustrate how taxpayers may make and revoke their section 179 elections. Additionally, each year the IRS will publish the annual inflation indexed amounts for sections 179(b)(1) and (2). For the inflation indexed amounts for taxable years beginning in 2004, *see* Rev. Proc. 2003–85, 2003–49 I.R.B. 1184.

Making or Revoking Section 179 Elections on Amended Federal Tax Returns

Prior to the enactment of JGTRRA, an election to expense the cost of property under section 179 generally was made on the taxpayer's original federal tax return for the taxable year to which the election applied. An election could only be revoked with the consent of the Commissioner. The section 179 regulations (pre-JGTRRA) provided that a revocation of an election would only be granted in extraordinary circumstances.

Small business taxpayers are often unaware of the advantages or disadvantages of section 179 expensing. Some taxpayers may not have been aware of the section 179 election until after filing an original Federal tax return. In addition, making the section 179 election is not always to a taxpayer's advantage. For example, the section 179 election may prevent the taxpayer from fully using exemptions and deductions, reduce a taxpayer's coverage under the social security system, and make various tax credits unusable. *See* Internal Revenue Service, Publication 946, ''How to Depreciate Property (For use in preparing 2003 Returns)'', p. 14, and ''General Explanations of the Administration's Fiscal Year 2004 Revenue Proposals'', Department of the Treasury, p. 23 (February 2003).

Permitting taxpayers to make or revoke section 179 elections on amended Federal tax returns without the consent of the Commissioner reflects Congress's intent ''that the process of making and revoking section 179 elections should be made simpler and more efficient for taxpayers.'' H.R. Rep. No. 108–94, at 25 and 26 (2003) and S. Prt. No. 108–26, at 10 (2003). Such a process will provide flexibility to small business taxpayers in determining whether the section 179 election is to their advantage or disadvantage.

Section 1.179–5T(c)(1) establishes the time period during which a taxpayer may make or revoke a section 179 election on an amended Federal tax return.

Section 1.179–5T(c)(2) provides that a section 179 election made on an amended Federal tax return must specify the item of section 179 property to which the election applies and the portion of the cost of each such item to be taken into account under section 179. Further, if a taxpayer elected to expense only a portion of the cost basis of an item of section 179 property for a particular taxable year (or did not elect to expense any portion of the cost basis of an item of section 179 property), § 1.179–5T(c)(2) allows the taxpayer to file an amended Federal tax return and expense any portion of the cost basis of an item of section 179 property that was not expensed pursuant to a prior section 179 election. Any such increase in the amount expensed under section 179 is not deemed to be a revocation of the prior election for that particular taxable year.

Section 1.179–5T(c)(3) provides that any election under section 179, or specification of such election, for any taxable year beginning after 2002 and before 2006 for any item of section 179 property may be revoked by the taxpayer on an amended Federal tax return without the Commissioner's consent and that such revocation, once made, is irrevocable. For this purpose, a specification refers to both the selected specific item of section 179 property subject to a section 179 election and a selected dollar amount allocable to the specific item of section 179 property. In addition, § 1.179–5T(c)(3) describes the circumstances under which partial and entire revocations of elections and specifications occur. Section 1.179–5T(c)(3) also discusses the effect of a revocation of an election under section 179 or a revocation of any specification of such election.

Section 1.179–5T(c)(4) sets forth examples illustrating the rules of paragraphs (c)(1), (2), and (3).

Section 1.179–6T provides the applicability dates for the provisions of §§ 1.179–2T, 1.179–4T, and 1.179–5T.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the cross-reference notice of proposed rulemaking published in the proposed rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Winston H. Douglas, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.179–0 is amended as follows:
■ 1. Paragraphs (b)(1) and (b)(2) of § 1.179–2 are revised.
■ 2. Section 1.179–2T is added.
■ 3. Paragraph (a) of § 1.179–4 is revised.
■ 4. Section 1.179–4T is added.
■ 5. Paragraph (c) of § 1.179–5 is added.
■ 6. Section 1.179–5T is added.
■ 7. Section 1.179–6T is added.

The revisions and additions read as follows:

§ 1.179–0 Table of contents for section 179 expensing rules.

* * * * *

§ 1.179–2 Limitations on amount subject to section 179 election.

* * * * *
(b) * * *
(1) [Reserved].
(2) [Reserved].
* * * * *

§ 1.179–2T Limitations on amount subject to section 179 election (temporary).

(a) [Reserved].
(b) Dollar Limitation.
(1) In general.
(2) Excess section 179 property.
(3) through (d) [Reserved].
* * * * *

§ 1.179–4 Definitions.

(a) Section 179 property [Reserved].
* * * * *

§ 1.179–4T Definitions.

(a) Section 179 property.
(b) through (f) [Reserved].

§ 1.179–5 Time and manner of making election.

* * * * *

(c) Section 179 property placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006.

§ 1.179–5T Time and manner of making election.

(a) and (b) [Reserved].
(c) Section 179 property placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006.
* * * * *

§ 1.179–6T Effective dates.

(a) In general.
(b) Section 179 property placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006.

■ **Par. 3.** Section 1.179–2 is amended by revising paragraphs (b)(1) and (b)(2)(ii) to read as follows:

§ 1.179–2 Limitations on amount subject to section 179 election.

* * * * *
(b) * * *
(1) [Reserved]. For further guidance, *see* § 1.179–2T(b)(1).
(2) * * *
(i) * * *
(ii) [Reserved]. For further guidance, see § 1.179–2T(b)(2)(ii).
* * * * *

■ **Par. 4.** Section 1.179–2T is added to read as follows:

§ 1.179–2T Limitations on amount subject to section 179 election (temporary).

(a) [Reserved]. For further guidance, *see* § 1.179–2(a).

(b) *Dollar limitation*—(1) *In general.* The aggregate cost of section 179 property that a taxpayer may elect to expense under section 179 for any taxable year beginning in 2003 and thereafter is $25,000 ($100,000 in the case of taxable years beginning after 2002 and before 2006 under section 179(b)(1), indexed annually for inflation under section179(b)(5) for taxable years beginning after 2003 and before 2006), reduced (but not below zero) by the amount of any excess section 179 property (described in paragraph (b)(2) of this section) placed in service during the taxable year.

(b)(2) and (b)(2)(i) [Reserved]. For further guidance, *see* § 1.179–2(b)(2) and (b)(2)(i).

(ii) $200,000 ($400,000 in the case of taxable years beginning after 2002 and before 2006 under section 179(b)(2), indexed annually for inflation under section 179(b)(5) for taxable years beginning after 2003 and before 2006).

(b)(3) through (d) [Reserved]. For further guidance, *see* § 1.179–2(b)(3) through (d).

■ **Par. 5.** Section 1.179–4 is amended by revising paragraph (a) to reads as follows:

§ 1.179–4 Definitions.

* * * * *

(a) [Reserved]. For further guidance, *see* § 1.179–4T(a).

* * * * *

■ **Par. 6.** Section 1.179–4T is added to read as follows:

§ 1.179–4T Definitions (temporary).

The following definitions apply for purposes of section 179, §§ 1.179–1 through 1.179–6, and § 1.179–2T, 5T, and 6T:

(a) *Section 179 property.* The term *section 179 property* means any tangible property described in section 179(d)(1) that is acquired by purchase for use in the active conduct of the taxpayer's trade or business (as described in § 1.179–2(c)(6)). For taxable years beginning after 2002 and before 2006, the term *section 179 property* includes computer software described in section 179(d)(1) that is placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006 and is acquired by purchase for use in the active conduct of the taxpayer's trade or business (as described in § 1.179–2(c)(6)). For purposes of this paragraph (a), the term *trade or business* has the same meaning as in section 162 and the regulations thereunder.

(b) through (f) [Reserved]. For further guidance, *see* § 1.179–4(b) through (f).

■ **Par. 7.** Section 1.179–5 is amended by adding paragraph (c) to read as follows:

§ 1.179–5 Time and manner of making election.

* * * * *

(c) *Section 179 property placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006.* [Reserved]. For further guidance, see § 1.179–5T(c).

■ **Par. 8.** Section 1.179–5T is added to read as follows:

§ 1.179–5T Time and manner of making election (temporary).

(a)and (b) [Reserved]. For further guidance, see § 1.179–5(a) and (b).

(c) *Section 179 property placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006*—(1) *In general.* For any taxable year beginning after 2002 and before 2006, a taxpayer is permitted to make or revoke an election under section 179 without the consent of the Commissioner on an amended Federal tax return for that taxable year. This amended return must be filed within the time prescribed by law for filing an amended return for such taxable year.

(2) *Election*—(i) *In general.* For any taxable year beginning after 2002 and before 2006, a taxpayer is permitted to make an election under section 179 on an amended Federal tax return for that taxable year without the consent of the Commissioner. Thus, the election under section 179 and § 1.179–1 to claim a section 179 expense deduction for section 179 property may be made on an amended Federal tax return for the taxable year to which the election applies. The amended Federal tax return must include the adjustment to taxable income for the section 179 election and any collateral adjustments to taxable income or to the tax liability (for example, the amount of depreciation allowed or allowable in that taxable year for the item of section 179 property to which the election pertains). Such adjustments must also be made on amended Federal tax returns for any affected succeeding taxable years.

(ii) *Specifications of election.* Any election under section 179 must specify the items of section 179 property and the portion of the cost of each such item to be taken into account under section 179(a). Any election under section 179 must comply with the specification requirements of section 179(c)(1)(A), § 1.179–1(b), and § 1.179–5(a). If a taxpayer elects to expense only a portion of the cost basis of an item of section 179 property for a taxable year beginning after 2002 and before 2006 (or did not elect to expense any portion of the cost basis of the item of section 179 property), the taxpayer is permitted to file an amended Federal tax return for that particular taxable year and increase the portion of the cost of the item of section 179 property to be taken into account under section 179(a) (or elect to expense any portion of the cost basis of the item of section 179 property if no prior election was made) without the consent of the Commissioner. Any such increase in the amount expensed under section 179 is not deemed to be a revocation of the prior election for that particular taxable year.

(3) *Revocation*—(i) *In general.* Section 179(c)(2) permits the revocation of an entire election or specification, or a portion of the selected dollar amount of a specification. The term *specification* in section 179(c)(2) refers to both the selected specific item of section 179 property subject to a section 179 election and the selected dollar amount allocable to the specific item of section 179 property. Any portion of the cost basis of an item of section 179 property subject to an election under section 179 for a taxable year beginning after 2002 and before 2006 may be revoked by the taxpayer without the consent of the Commissioner by filing an amended Federal tax return for that particular taxable year. The amended Federal tax return must include the adjustment to taxable income for the section 179 revocation and any collateral adjustments to taxable income or to the tax liability (for example, allowable depreciation in that taxable year for the item of section 179 property to which the revocation pertains). Such adjustments must also be made on amended Federal tax returns for any affected succeeding taxable years. Reducing or eliminating a specified dollar amount for any item of section 179 property with respect to any taxable year beginning after 2002 and before 2006 results in a revocation of that specified dollar amount.

(ii) *Effect of revocation.* Such revocation, once made, shall be irrevocable. If the selected dollar amount reflects the entire cost of the item of section 179 property subject to the section 179 election, a revocation of the entire selected dollar amount is treated as a revocation of the section 179 election for that item of section 179 property and the taxpayer is unable to make a new section 179 election with respect to that item of property. If the selected dollar amount is a portion of the cost of the item of section 179 property, revocation of a selected dollar amount shall be treated as a revocation of only that selected dollar amount. The revoked dollars cannot be the subject of a new section 179 election for the same item of property.

(4) *Examples.* The following examples illustrate the rules of this paragraph (c):

Example 1. Taxpayer, a sole proprietor, owns and operates a jewelry store. During 2003, Taxpayer purchased and placed in service two items of section 179 property—a cash register costing $4,000 (5-year MACRS property) and office furniture costing $10,000 (7-year MACRS property). On his 2003 Federal tax return filed on April 15, 2004, Taxpayer elected to expense under section 179 the full cost of the cash register and, with respect to the office furniture, claimed the depreciation allowable. In November 2004, Taxpayer determines it would have been more advantageous to have made an election under section 179 to expense the full cost of the office furniture rather than the cash register. Pursuant to paragraph (c)(1) of this section, Taxpayer is permitted to file an amended Federal tax return for 2003 revoking the section 179 election for the cash register, claiming the depreciation allowable in 2003 for the cash register, and making an election to expense under section 179 the cost of the office furniture. The amended return must include an adjustment for the depreciation previously claimed in 2003 for the office furniture, an adjustment for the depreciation allowable in 2003 for the cash register, and any other collateral adjustments to taxable income or to the tax liability. In addition, once Taxpayer revokes the section 179 election for the entire cost basis of the cash register, Taxpayer can no longer expense under section 179 any portion of the cost of the cash register.

Example 2. Taxpayer, a sole proprietor, owns and operates a machine shop that does specialized repair work on industrial equipment. During 2003, Taxpayer purchased and placed in service one item of section 179 property—a milling machine costing $135,000. On Taxpayer's 2003 Federal tax return filed on April 15, 2004, Taxpayer elected to expense under section 179 $5,000 of the cost of the milling machine and claimed allowable depreciation on the remaining cost. Subsequently, Taxpayer determines it would have been to Taxpayer's advantage to have elected to expense $100,000 of the cost of the milling machine on Taxpayer's 2003 Federal tax return. In November 2004, Taxpayer files an amended Federal tax return for 2003, increasing the amount of the cost of the milling machine that is to be taken into account under section 179(a) to $100,000, decreasing the depreciation allowable in 2003 for the milling machine, and making any other collateral adjustments to taxable income or to the tax liability. Pursuant to paragraph (c)(2)(ii) of this section, increasing the amount of the cost of the milling machine to be taken into account under section 179(a) supplements the portion of the cost of the milling machine that was already taken into account by the original section 179 election made on the 2003 Federal tax return and no revocation of any specification with respect to the milling machine has occurred.

Example 3. Taxpayer, a sole proprietor, owns and operates a real estate brokerage business located in a rented storefront office. During 2003, Taxpayer purchases and places in service two items of section 179 property—a laptop computer costing $2,500 and a desktop computer costing $1,500. On Taxpayer's 2003 Federal tax return filed on April 15, 2004, Taxpayer elected to expense under section 179 the full cost of the laptop computer and the full cost of the desktop computer. Subsequently, Taxpayer determines it would have been to Taxpayer's advantage to have originally elected to expense under section 179 only $1,500 of the cost of the laptop computer on Taxpayer's 2003 Federal tax return. In November 2004, Taxpayer files an amended Federal tax return for 2003 reducing the amount of the cost of the laptop computer that was taken into account under section 179(a) to $1,500, claiming the depreciation allowable in 2003 on the remaining cost of $1,000 for that item, and making any other collateral adjustments to taxable income or to the tax liability. Pursuant to paragraph (c)(3)(ii) of this section, the $1,000 reduction represents a revocation of a portion of the selected dollar amount and no portion of those revoked dollars may be the subject of a new section 179 election for the laptop computer.

Example 4. Taxpayer, a sole proprietor, owns and operates a furniture making business. During 2003, Taxpayer purchases and places in service one item of section 179 property—an industrial-grade cabinet table saw costing $5,000. On Taxpayer's 2003 Federal tax return filed on April 15, 2004, Taxpayer elected to expense under section 179 $3,000 of the cost of the saw and, with respect to the remaining $2,000 of the cost of the saw, claimed the depreciation allowable. In November 2004, Taxpayer files an amended Federal tax return for 2003 revoking the selected $3,000 amount for the saw, claiming the depreciation allowable in 2003 on the $3,000 cost of the saw, and making any other collateral adjustments to taxable income or to the tax liability. Subsequently, in December 2004, Taxpayer files a second amended Federal tax return for 2003 selecting a new dollar amount of $2,000 for the saw, including an adjustment for the depreciation previously claimed in 2003 on the $2,000, and making any other collateral adjustments to taxable income or to the tax liability. Pursuant to paragraph (c)(2)(ii) of this section, Taxpayer is permitted to select a new selected dollar amount to expense under section 179 encompassing all or a part of the initially non-elected portion of the cost of the elected item of section 179 property. However, no portion of the revoked $3,000 may be the subject of a new section 179 dollar amount selection for the saw. In December 2005, Taxpayer files a third amended Federal tax return for 2003 revoking the entire selected $2,000 amount with respect to the saw, claiming the depreciation allowable in 2003 for the $2,000, and making any other collateral adjustments to taxable income or to the tax liability. Because Taxpayer elected to expense, and subsequently revoke, the entire cost basis of the saw, the section 179 election for the saw has been revoked and Taxpayer is unable to make a new section 179 election with respect to the saw.

■ **Par. 9.** Section 1.179–6T is added to read as follows:

§ 1.179–6T Effective dates.

(a) *In general.* Except as provided in paragraph (b) of this section, the provisions of §§ 1.179–1 through 1.179–5 apply for property placed in service by the taxpayer in taxable years ending after January 25, 1993. However, a taxpayer may apply the provisions of §§ 1.179–1 through 1.179–5 to property placed in service by the taxpayer after December 31, 1986, in taxable years ending on or before January 25, 1993. Otherwise, for property placed in service by the taxpayer after December 31, 1986, in taxable years ending on or before January 25, 1993, the final regulations under section 179 as in effect for the year the property was placed in service apply, except to the extent modified by the changes made to section 179 by the Tax Reform Act of 1986 (100 Stat. 2085), the Technical and Miscellaneous Revenue Act of 1988 (102 Stat. 3342) and the Revenue Reconciliation Act of 1990 (104 Stat. 1388–400). For that property, a taxpayer may apply any reasonable method that clearly reflects income in applying the changes to section 179, provided the taxpayer consistently applies the method to the property.

(b) *Section 179 property placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006.* The provisions of § 1.179–2T, 1.179–4T, and 1.179–5T, reflecting changes made to section 179 by the Jobs and Growth Tax Relief Reconciliation Act of 2003 (117 Stat. 752), apply for property placed in service in taxable years beginning after 2002 and before 2006.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 10.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 11.** In § 602.101, paragraph (b) is amended by adding the following entries in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.179–2T	1545–1201
* * * * *	
1.179–5T	1545–1201
* * * * *	

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: July 21, 2004.

Gregory F. Jenner,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 04–17539 Filed 8–3–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. H–049D]

RIN 1218–AC05

Controlled Negative Pressure REDON Fit Testing Protocol

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Final rule.

SUMMARY: In this rulemaking, OSHA is approving an additional quantitative fit testing protocol, the controlled negative pressure (CNP) REDON fit testing protocol, for inclusion in Appendix A of its Respiratory Protection Standard. The protocol affects, in addition to general industry, OSHA respiratory protection standards for shipyard employment and construction. The Agency is adopting this protocol under the provisions contained in the Respiratory Protection Standard that allow individuals to submit evidence for including additional fit testing protocols in this standard.

The CNP REDON protocol requires the performance of three different test exercises followed by two redonnings of the respirator, while the CNP protocol approved previously by OSHA specifies eight test exercises, including one redonning of the respirator. In addition to amending the Standard to include the CNP REDON protocol, this rulemaking makes several editorial and non-substantive technical revisions to the Standard associated with the CNP REDON protocol and the previously approved CNP protocol.

DATES: The final rule becomes effective September 3, 2004.

ADDRESSES: In compliance with 28 U.S.C. 2212(a), the Agency designates the Associate Solicitor for Occupational Safety and Health, Office of the Solicitor, Room S–4004, U.S. Department of Labor, 200 Constitution Ave., NW, Washington, DC 20210, as the recipient of petitions for review of this rulemaking.

FOR FURTHER INFORMATION CONTACT: For technical inquiries, contact Mr. John E. Steelnack, Directorate of Standards and Guidance, Room N–3718, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210; telephone (202) 693–2289 or by facsimile (202) 693–1678. Copies of this **Federal Register** notice are available from the OSHA Office of Publications, Room N–3101, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington DC 20210; telephone (202) 693–1888. For an electronic copy of this notice, go to OSHA's Web site (*http://www.osha.gov*), and select ''**Federal Register**,'' ''Date of Publication,'' and then ''2004.''

SUPPLEMENTARY INFORMATION:

I. Background

The Respiratory Protection Standard includes the following three quantitative fit testing protocols: Generated-aerosol; ambient-aerosol condensation nuclei counter; and controlled negative pressure (CNP). Part II of Appendix A of the Respiratory Protection Standard specifies, in part, the procedure individuals must follow to submit new fit testing protocols for the Agency's consideration. The criteria OSHA uses for determining whether to propose adding a fit testing protocol to the Respiratory Protection Standard include: (1) A test report prepared by an independent government research laboratory (*e.g.*, Lawrence Livermore National Laboratory, Los Alamos National Laboratory, the National Institute for Standards and Technology) stating that the laboratory tested the protocol and found it to be accurate and reliable; or (2) an article published in a peer-reviewed industrial-hygiene journal describing the protocol, and explaining how test data support the accuracy and reliability of the protocol. When a protocol meets one of these criteria, the Agency conducts a notice-and-comment rulemaking under Section 6(b)(7) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655). As OSHA noted in the proposal, the CNP REDON protocol met the second of these criteria (68 FR 33887; June 6, 2003).

II. Summary and Explanation of the Final Standard

A. Introduction

With his letter submitting the CNP REDON protocol for review, Dr. Clifton D. Crutchfield included copies of two peer-reviewed articles from industrial-hygiene journals describing the accuracy and reliability of the proposed protocol (Exs. 2 and 3). In this submission, Dr. Crutchfield also described in detail the equipment and procedures required to administer the proposed protocol. According to this description, the proposed protocol is a variation of the CNP protocol developed by Dr. Crutchfield in the early 1990s, and which OSHA approved for inclusion in paragraphs (a) and (d) of Part I.C.4 of Appendix A when the Agency revised its Respiratory Protection Standard (63 FR 1152; January 8, 1998). Although the proposed protocol has the same fit-test requirements and uses the same test equipment as the CNP protocol previously approved by OSHA, it includes only three test exercises followed by two redonnings of the respirator instead of the eight test exercises and one respirator redonning required by the previously approved CNP protocol. The three test exercises, listed in order of administration, are normal breathing, bending over, and head shaking. The procedures for administering these three test exercises and the two respirator donnings to an employee, and for measuring respirator leakage during each test, are described below:

- Facing forward. In a normal standing position, without talking, the test subject must breathe normally for 30 seconds; then, while facing forward, he or she must hold his or her breath for 10 seconds for test measurement.
- Bending over. The test subject (*i.e.*, employee) must bend at the waist for 30 seconds as if he or she is going to touch his or her toes; then, while facing parallel to the floor, he or she must hold his or her breath for 10 seconds for test measurement.
- Head shaking. The test subject must shake his or her head back and forth vigorously several times while shouting for approximately three seconds; then, while facing forward, he or she must hold his or her breath for 10 seconds for test measurement.
- First redonning (REDON–1). The test subject must remove the respirator, loosen all facepiece straps, and then redon the respirator mask; after redonning the mask, he or she must face forward and hold his or her breath for 10 seconds for test measurement.
- Second redonning (REDON–2). The test subject must remove the respirator, loosen all facepiece straps, and then redon the respirator mask again; after redonning the mask, he or she must face forward and hold his or her breath for 10 seconds for test measurement. As noted earlier, Dr. Crutchfield submitted two peer-reviewed journal articles that