

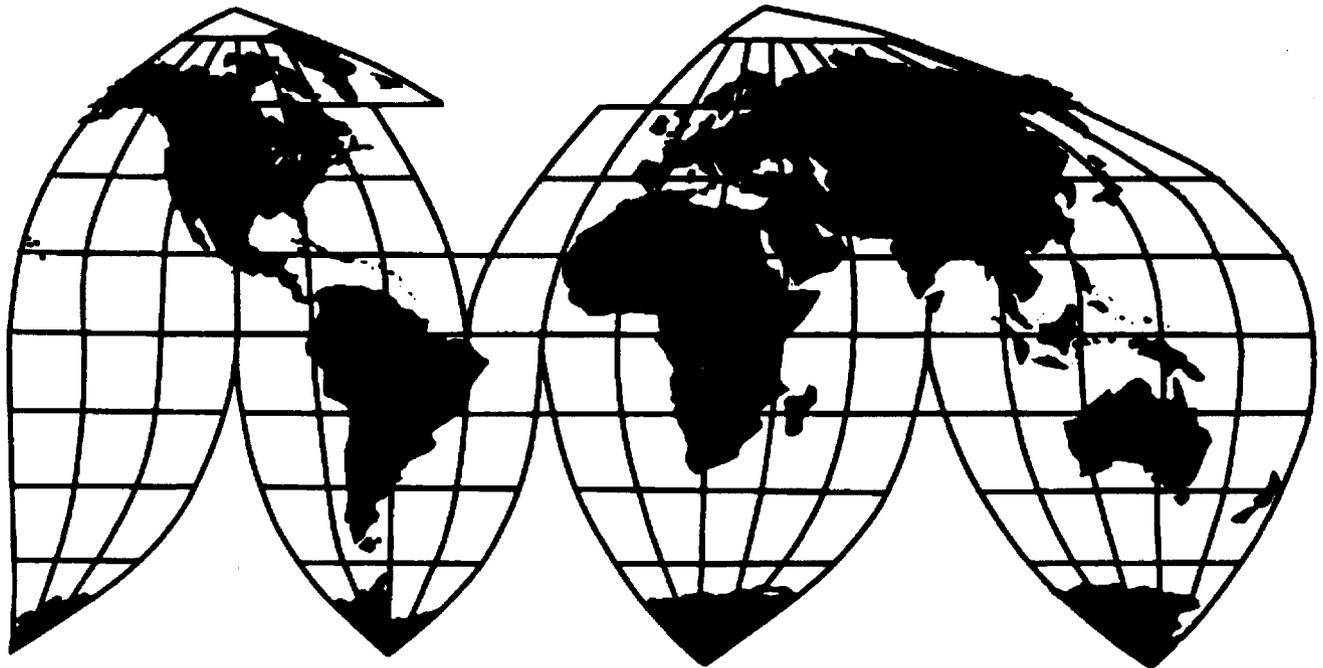
Certain Closet Flange Rings

Investigation No. 337-TA-442

Publication 3497

March 2002

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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U.S. International Trade Commission

Washington, DC 20436

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Certain Closet Flange Rings

Investigation No. 337-TA-442



Publication 3497

March 2002

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of

CERTAIN CLOSET FLANGE RINGS

Investigation No. 337-TA-442

OFFICE
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NOTICE OF COMMISSION DETERMINATION NOT TO REVIEW AN INITIAL
DETERMINATION GRANTING A MOTION FOR SUMMARY DETERMINATION AND
TERMINATING THE INVESTIGATION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the initial determination ("ID") of the presiding administrative law judge ("ALJ") on June 5, 2001, granting a motion for summary determination of non-infringement and terminating the above-captioned investigation with a finding of no violation of section 337 of the Tariff Act of 1930.

FOR FURTHER INFORMATION CONTACT: Timothy P. Monaghan, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-3152.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on December 14, 2000, based on a complainant by Pasco Specialty & Manufacturing Co. ("Pasco"). *65 Fed. Reg. 80454*. The sole respondent named in the investigation is Jones Stephens Corporation ("Jones Stephens"). The complaint alleges that respondent Jones Stephens has violated section 337 by importing certain closet flange rings which induce or contribute to the infringement of claims 1-5, 7-9, 11-14 of U.S. Letters Patent 5,890,239 ("the '239 patent"), entitled "Method of Reseating a Toilet."

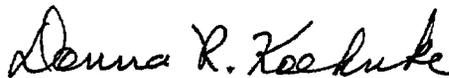
On April 23, 2001, pursuant to Commission rule 210.18, Jones Stephens filed a motion for summary determination of non-infringement and requested that the investigation be terminated with a finding of no violation of section 337. On June 5, 2001, the ALJ issued an ID (Order No. 7) granting respondent Jones Stephens' motion for summary determination of non-infringement and terminating the investigation.

On June 12, 2001, complainant Pasco filed a petition for review of the ID. On June 15, 2001, respondent Jones Stephens and the Commission's investigative attorney filed responses in opposition to the petition for review.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, and section 210.42 of Rules of Practice and Procedure, 19 C.F.R. § 210.42.

Copies of the public version of the ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS-ON-LINE) at <http://dockets.usitc.gov/eol/public>.

By order of the Commission.

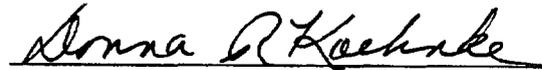


Donna R. Koehnke
Secretary

Issued: June 25, 2001

PUBLIC CERTIFICATE OF SERVICE

I, Donna R. Koehnke, hereby certify that the attached Notice Of Commission Determination Not To Review An Initial Determination Granting A Motion For Summary Determination and Terminating The Investigation was served upon, and the following parties via first class mail and air mail where necessary on June 25, 2001.



Donna R. Koehnke, Secretary
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PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

Certain Closet Flange Rings

Inv. No. 337-TA-442

REC'D JUN 14 15 11

ORDER NO. 7: INITIAL DETERMINATION GRANTING MOTION FOR SUMMARY DETERMINATION AND TERMINATING INVESTIGATION

(June 5, 2001)

The complaint, as supplemented herein, alleges violations of section 337 of the Tariff Act of 1930 ("Section 337") in the importation into the United States, the sale for importation, or the sale within the U.S. after importation of certain closet flange rings by reason of infringement of claims 1-5, 7-9, 11-14 of U.S. Patent 5,890,239. Claims 1, 8 and 13 are the only independent asserted claims. The '239 patent covers a method for reseating a toilet when a portion of the closet bolt flange has broken away. RESPONDENT, Jones Stephens Corporation ("Jones Stephens"), does not itself install the accused model C85-000 closet flange ring. Instead, it sells this model which COMPLAINANT, Pasco Specialty & Manufacturing Co. ("Pasco"), alleges constitutes both inducement of infringement, as provided under 35 U.S.C. 271(b) and contributory infringement, as provided under 35 U.S.C. 271(c). Additionally, Pasco contends that the installation by the ultimate end users of the C85-000 constitutes infringement of the '239 patent.

On April 23, 2001, pursuant to Commission Rule 210.18, Jones Stephens filed [442-1] a motion for summary determination of non-infringement, requesting that the investigation be terminated upon a finding of no violation of Section 337. According to Jones Stephens, a summary determination of no infringement is appropriate because: (1) the asserted method claims cannot be infringed by the accused product because Pasco's asserted claims all teach the use of a member which is "completely flat", and the accused product is not "completely flat"¹ and (2) Pasco cannot rely on the doctrine of equivalents with regard to the "completely flat" claim limitation, because it was added during patent prosecution to define over prior art.² See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd., 234 F.3d 558 (Fed. Cir. 2000) (en banc); Karsten Mfg. Corp. v. Cleveland Golf Co., 242 F.3d 1376, 1381 (Fed. Cir. 2001) (noting that "a claim element that has been narrowed by amendment for reasons related to patentability is not entitled to any scope of equivalency").

With respect to the claims themselves, Jones Stephens argues that Pasco has failed to come forward with *any* specific evidence of an end user of the accused product allegedly practicing the patented method. See Pasco's Response to Jones Stephens Statement of Proposed Uncontested Facts, No. 15 (deeming uncontested Jones Stephens' factual assertion that

¹ Although Pasco contests the proper construction of "completely flat," Pasco admits that "...the mounting legs or 'ears' [of the flange ring] are not precisely coplanar" with the remainder of the flange ring." See Pasco's Response to Jones Stephens Statement of Proposed Uncontested Facts, No. 19.

² In response to the Respondent's Request for Admission No. 6, Pasco admitted that "[t]he term 'completely flat' was added to the claims of the Hite Application by attorney Thomas to distinguish the claimed invention from the prior art patents cited and relied upon by the Examiner". See Respondent's Exhibit 5; see also Pasco's Response to Jones Stephens Statement of Proposed Uncontested Facts, No. 24.

"Complainant has no present knowledge or information of any actual infringement of U.S. Patent No. 5,890,239 ... by an end user of a Jones Stephens C85-000 flange ring"). Given the absence of direct infringement, Jones Stephens asserts that no finding of inducement of infringement or contributory infringement can be found.

Commission Investigative Staff ("Staff"), filed its response to the motion on May 3, 2001. Staff supports a summary determination of non-infringement and the termination of the investigation. Staff contends that the relevant fact is really undisputed and that once the claim construction dispute over the term "completely flat ... member" is resolved (in favor of Jones Stephens), as a matter of law, the issue of infringement is then ripe for decision. Staff asserts that the claim, "completely flat . . . member" should be given its ordinary, plain meaning. Such, Staff further argues, would result in a conclusion that the entire flange ring must be flat. As to the accused device itself, Staff maintains that the undisputed fact is that Respondent's flange ring has "radially projecting ear tabs that are offset from the plane of the rest of the ring", and therefore does not literally satisfy the "completely flat ... member" limitation asserted in Pasco's patent claims. Staff Response at 2. As to Jones Stephens' argument that a non-infringement summary determination should be made based on the absence of evidence of direct infringement, the Staff agrees such a determination is appropriate *if* Pasco fails to come forward with any such evidence in response to the summary determination motion. See Commission Rule 210.18(c) (requiring a party opposing a summary determination motion to set forth specific facts and supporting evidence showing that a genuine issue of fact for the evidentiary hearing exists).

In opposition to the motion, Pasco argues that Jones Stephens is guilty of inducement of infringement and contributory infringement regardless of the absence of direct

evidence of infringement of the method claims. Citing Water Tech. Corp. v. Calco Ltd., 850 F.2d 660 (Fed. Cir. 1988), Pasco argues that circumstantial evidence suffices, and that Jones Stephens' sale of the C85-000 flange ring for repair use satisfies the standard. As to whether the flange ring itself precludes a finding of infringement because of the "completely flat ... member" claim term, Pasco initially questions whether this portion of the preamble of Claims 1 and 8 even constitutes a limitation. Pasco also disputes the claim construction advanced by Jones Stephens and Staff arguing that raised ear tabs on the C85-000 are not part of the "member" referred to in the patent. Further, because its patent does not require the "member" to have outwardly projecting tabs or ears of any sort, Pasco contends that any elevation in accused device should not be considered. See Tate Access Floors, Inc. v. Maxcess Tech. Inc., 222 F.3d 958 (Fed. Cir. 2000). Regarding the prosecution history estoppel contention of Jones Stephen and Staff, Pasco contends that its "completely flat" amendment during prosecution did not concern "any appendage that might or might not project radially from the completely flat, rigid member arcuately curved to conform to the outer circumference of the drain." Pasco Response at 12. Taking the position that the C85-000 satisfies the "completely flat" limitation either literally or under the doctrine of equivalents, Pasco insists that installation of the C85-000 infringes the '239 patent.

On May 10, 2001, Jones Stephens moved [442-2] for leave, hereby granted, to file a reply in support of its motion for summary determination. Focusing on statements made by Pasco's expert, its Regional Sales Director, John W. Baumgart, during a recent deposition and because of his qualifications, Jones Stephens contends that Baumgart's statements cannot be relied upon as basis for opposing the motion for summary determination. Citing his deposition, Jones Stephens argues that Baumgart is not qualified as an expert, that any fact testimony from him lacks

foundation because of his lack of experience with the accused product, that, as an employee of Pasco, Baumgart is biased. Finally, Jones Stephens argues that Baumgart's expert report and declaration reflect the words of Pasco's counsel rather than his own.

On May 16, 2001, Pasco filed for leave to respond to Jones Stephen's reply, leave hereby granted. Pasco contends that Jones Stephens' attempt to discredit or disqualify Baumgart as an expert is unfounded and reflects factual disputes that should not be decided on summary determination. Pasco also offers corrections to Baumgart's deposition transcript made prior to his signing the transcript noting that Jones Stephens had relied on an unsigned, preliminary transcript.

Pursuant to Commission Rule 210.18, summary determination "... shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law." Here, the parties have submitted the relevant evidence for consideration, including physical exhibits, discovery responses, affidavits and deposition testimony.

Analysis of an alleged infringement involves a two-step process: first, construction of the claims asserted to determine their meaning and scope, and second, comparison of the properly construed claims to the accused products. See Tanabe Seiyaku Co. v. U.S. Int'l Trade Comm'n, 109 F.3d 726 (Fed Cir.), cert. denied, 118 S.Ct. 624 (1997); Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed. Cir. 1995) (en banc), aff'd, 517 U.S. 370 (1996). When performing claim construction, the meaning and scope of patent claims should be determined with reference to the claim language, the specification, and the prosecution history. Claim language should be construed according to its usual meaning to one of ordinary skill in the art when such

construction is consistent with the specification. Multiform Dessicants, Inc. v. Medzam, Ltd., 133 F.3d 1473, 1477 (Fed. Cir. 1998). When acting as "his own lexicographer," a patentee may give terms an unusual meaning so long as the specification or prosecution history clearly conveys the atypical definition. Hoechst Celanese Corp. v. BP Chem. Ltd., 78 F.3d 1575, 1578 (Fed. Cir. 1996).

As an initial matter, the undersigned concludes that the "completely flat ... member" language set forth in the preamble of Claims 1 and 8³ constitutes a limitation on those claims, as this portion of the preamble clearly serves to define what is claimed, and is "necessary to give life, meaning, and vitality to the claim." See Pitney Bowes, Inc. v. Hewlett-Packard Co., 182 F.3d 1298, 1305 (Fed. Cir. 1999). The patent in its entirety reflects the significance of this claim term, and the prosecution history reflects the addition of this term to distinguish prior art, thereby also indicating the importance of the term. Because "completely flat ... member" is a limitation of all the asserted claims, *if* the accused C85-000 does not meet that limitation, it is undisputed that the sale or marketing of that product by Jones Stephens cannot constitute inducement to infringe or contributory infringement.

With respect to the construction of "completely flat," nothing in the record points to any unusual definition of this term by the patentee or any special meaning in the art. Even Pasco's expert offers no special meaning for the term in the field of plumbing. See Declaration of John W. Baumgart. And Pasco's own patent specification offers no definition for this term. Therefore, the term must be in accordance with its ordinary meaning. See Renishaw PLC v.

³ While the same claim term appears in independent Claim 13, it is not in the preamble.

Marpoß Societa per Azioni, 158 F.3d 1243 (Fed. Cir. 1998). Although the parties offer their respective dictionary definitions for these words, they all support a construction in accordance with ordinary usage; i.e. the claim limitation refers to a member having a wholly and entirely smooth, level surface. Pasco's proposed definition of "completely flat," allowing for small parts of the member to be offset from the plane of the major part of the member, improperly reads "completely" out of the term. As both the Respondent and the Staff argue, the addition of "completely" to overcome prior art during patent prosecution further supports an interpretation that the claims teach an absolutely flat member.

As to the proper construction of "member" in the claims, the parties disagree as to whether "member" should be interpreted to mean the entire closet flange ring, as asserted by Staff and Jones Stephens, or whether, as Pasco maintains, the "member" is exclusive of any radially projecting ears. The patent supports the former interpretation. The specification indicates that "member" refers to the ring in its entirety, including any fastening tabs or ears. See e.g. Col. 4, lines 16-19 ("... a flat, rigid member ... having a plurality of anchor fastening openings *therethrough* ...") (emphasis added); Col. 4, line 59 -- Col. 5, line 8. Although Pasco correctly points out that the projecting ears or tabs are not *required* by the asserted claims, as noted by the Staff, these passages of the specification indicate that "... when they are present, the projecting ear tabs are an integral part of the flat member, not a separate feature." And the undersigned so concludes.

Having construed the claim term as a matter of law, the second part of the infringement analysis requires application of the properly construed claim language to the C85-000. Pasco concedes that the mounting ears or tabs on the C85-000 "are not precisely coplanar

with" the remainder of the flange ring. See Pasco's Response to Jones Stephens Statement of Proposed Uncontested Facts, No. 19. Additionally, the fact that the tabs are not coplanar is easily established by examination of the C85-000, RPX1. Accordingly, there is no factual dispute that Model C85-000 is not flat because it includes non-coplanar mounting ears or tabs.

Given that the proper construction of "completely flat ... member" requires that the entire flange ring, including any fastening tabs, be entirely smooth and level, the accused product C85-000 does not literally satisfy this limitation contained in all the asserted claims. As argued by both Jones Stephens and the Staff, because of the prosecution history estoppel associated with the patentee's amendment of these claims and in order to overcome an objection by the examiner based on prior art, Pasco cannot rely on the doctrine of equivalents with regard to the limitation that the member be "completely flat". See Festo Corp. and Karsten Mfg. Corp., supra. Given that the C85-000 does not satisfy the "completely flat ... member" limitation of the asserted claims, and given that Pasco's allegations of inducement of infringement and contributory infringement rested on the premise that this limitation was satisfied by the C85-000, no inducement of infringement or contributory infringement can be found based on Jones Stephens' sale or marketing of the C85-000.

Accordingly, the motion for summary determination is hereby granted, and this investigation terminated upon a finding of no violation of Section 337.

In light of the above ruling, the remaining grounds for summary determination and the parties' arguments regarding Baumgart's are not decided.

Pursuant to Commission Rule 210.42(h), this initial determination shall become the determination of the Commission unless a party files a petition for review pursuant to Commission

Rule 210.43(a) or the Commission, pursuant to Commission Rule 210.44, orders on its own motion a review of this initial determination or certain issues herein. See 19 C.F.R. §§ 210.42, 210.43, and 210.44.

Within seven days of the date of this document, each party shall submit to the office of the administrative law judge a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date.

Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.


Delbert R. Terrill, Jr.
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Donna R. Koehnke, hereby certify that the attached ORDER was served upon David O. Lloyd, Esq., Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on June 15, 2001.



Donna R. Koehnke, Secretary
U.S. International Trade Commission
500 E Street, S.W., Room 112A
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CERTAIN CLOSET FLANGE RINGS

337-TA-442

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Federal Register Notice

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-442]

Certain Closet Flange Rings; Notice of Commission Determination Not To Review an Initial Determination Granting a Motion for Summary Determination and Terminating the Investigation

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the initial determination ("ID") of the presiding administrative law judge ("ALJ") on June 5, 2001, granting a motion for summary determination of non-infringement and terminating the above-captioned investigation with a finding of no violation of section 337 of the Tariff Act of 1930.

FOR FURTHER INFORMATION CONTACT: Timothy P. Monaghan, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202-205-3152.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on December 14, 2000, based on a complainant by Pasco Specialty & Manufacturing Co. ("Pasco"), 65 FR 80454. The sole respondent named in the investigation is Jones Stephens Corporation ("Jones Stephens"). The complaint alleges that respondent Jones Stephens has violated section 337 by importing certain closet flange rings which induce or contribute to the infringement of claims 1-5, 7-9, 11-14 of U.S. Letters Patent 5,890,239 ("the '239 patent"), entitled "Method of Reseating a Toilet."

On April 23, 2001, pursuant to Commission rule 210.18, Jones Stephens filed a motion for summary determination of non-infringement and requested that the investigation be terminated with a finding of no violation of section 337. On June 5, 2001, the ALJ issued an ID (Order No. 7) granting respondent Jones Stephens' motion for summary determination of non-infringement and terminating the investigation.

On June 12, 2001, complainant Pasco filed a petition for review of the ID. On June 15, 2001, respondent Jones Stephens and the Commission's investigative attorney filed responses in opposition to the petition for review.

This action is taken under the authority of section 337 of the Tariff Act

of 1930, 19 U.S.C. 1337, and § 210.42 of rules of practice and procedure, 19 CFR § 210.42.

Copies of the public version of the ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202-205-2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS-ON-LINE) at <http://dockets.usitc.gov/eol/public>.

Issued: June 25, 2001.

By order of the Commission.

Donna R. Koehnke,
Secretary.

[FR Doc. 01-16302 Filed 6-27-01; 8:45 am]

BILLING CODE 7020-02-P

DEPARTMENT OF JUSTICE**Office of Justice Programs****Agency Information Collection Activities: Proposed Collection; Comment Request; Categorical Assistance Progress Report**

ACTION: Notice of information collection under review; (New collection) categorical assistance progress report.

The Department of Justice, Office of Justice Programs, has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. This proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until August 27, 2001.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Mike Quinn, 202-616-3508, Office of Administration, Office of Justice Programs, U.S. Department of Justice,

810 7th Street, NW., Washington, DC 20531.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information:

(1) *Type of information collection:* New collection.

(2) *The title of the form/collection:* Categorical Assistance Progress Report.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is OJP FORM 4587/1, Office of Justice Programs, United States Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Federal Government, State, Local or Tribal. *Other:* Individuals or households; not-for-profit institutions.

The Uniform Administrative Requirements for grants and Cooperative Agreements—28 CFR, part 66, and OMB Circular A-110—authorizes the Department of Justice to collect information from grantees to report on project activities and project accomplishments. Grantees that are recipients of discretionary grant (and some formula grant) programs are required by OJP program offices to submit Categorical Assistance Progress Reports on project activities and accomplishments. It is expected that reports will include data appropriate to this stage of project development and in sufficient detail to provide a clear idea and summary of work and accomplishments to date. Progress reports are primarily designed to aid grant managers in carrying out their responsibilities for monitoring grant-