FLORIDA DEPARTMENT OF FINANCIAL SERVICES

Division of State Fire Marshal
Bureau of Fire Prevention

FEASIBILITY ASSESSMENT REGARDING PROPOSED NEGOTIATED RULEMAKING FOR CHAPTER 633, F.S.

Assessment By Jeff A. Blair
Florida State University

jblair@mailer.fsu.edu

Website: consensus.fsu.edu
I. INTRODUCTION AND OVERVIEW

In December 2002, the Division of State Fire Marshal (DSFM) asked the Florida Conflict Resolution Consortium (CRC), based at Florida State University, to conduct a feasibility assessment for utilizing negotiated rulemaking\(^1\) as a means for rule development pursuant to the Chapter 633, F.S. In particular, the Department asked the CRC to explore with affected interests the feasibility of a negotiated rulemaking to clarify provisions in a 2002 amendment relative to “appropriate training” as related to servicing fire extinguisher and preengineered systems pursuant to §633.061 F.S.\(^2\) and to explore such other regulatory issues that stakeholders identify for rulemaking and/or a negotiated process.

The CRC’s South Florida Director, Jeff Blair, conducted this independent feasibility assessment by conducting phone interviews with various interest groups and reviewing relevant documentation for consideration by the DSFM which clarifies provisions of Chapter 633, F.S.

The State Fire Marshal has authority to adopt rules pursuant to ss.120.536(1) and 120.54 to implement the provisions of this chapter (633) conferring powers or duties upon the department…

(b) Installation and maintenance of fire alarm systems and fire protection systems, including fire suppression systems, fire-extinguishing equipment, and fire sprinkler systems;

(c)1. Servicing, repairing, recharging, testing, marking, inspecting, installing, maintaining, and tagging of fire extinguishers, preengineered systems, and individually designed fire protection systems;

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\(^1\) Negotiated rulemaking is a tool the legislature has authorized for use in agency rulemaking (Ch.120.54(2)(d) F.S.). The Department is the third state agency to actively consider its use. This tool has been successfully used by other states and by federal agencies as a cost-effective approach to rule development which requires the voluntary participation of the affected interests. As defined in Chapter 120, “negotiated rulemaking is a process that uses a committee of designated representatives to draft a mutually acceptable proposed rule.” (See Appendices for the negotiated rulemaking statutory and rule language and for a description of the negotiated rulemaking process.)

\(^2\) That language is as follows: 633.061 Fire suppression equipment (1)—“A licensee who receives appropriate training shall not be prohibited by a manufacturer from servicing any particular brand of fire extinguisher or preengineered system”.

CRC Feasibility Assessment Report for DSFM Rulemaking on Ch. 633
The training and licensing of persons engaged in the business of servicing, repairing, recharging, testing, marking, inspecting, installing, maintaining, and tagging fire extinguishers, preengineered systems, and individually designed fire protection systems; ...

This report is based on interviews with the affected interests and a review of documentation. **We have concluded that the key interests—with the exception of the Fire Equipment Manufacturers’ Association—affect ed by the new "appropriate training" statutory language are willing to participate in a negotiation over rule language to clarify the provisions. We believe that a negotiated rulemaking procedure focusing on the 2002 provisions of Ch. 633.061 F.S. relating to clarifying “appropriate training” as it relates to “servicing” fire extinguisher and preengineered systems is a viable option and path, albeit not the recommended path, to seeking resolution of the issues and the promulgation of a rule.**

Prior to preceding with the negotiation process, there are however, several issues that should be considered. The Fire Equipment Manufacturers’ Association (FEMA) as an association, is not willing to participate in a formal negotiation process with other interests due to a lack of consensus within the Association. As such, other parties that share their interests and issues will be required to negotiate in the place of FEMA. These parties would need to be some of the larger distributors who are part of a manufacturer’s distributorship network and that also perform in-house servicing of the systems in question. The interview assessment reveals that there are a couple of parties who due to the nature of their business would be willing and capable of performing this function without compromising their own interests.

Another option is to contact individual manufacturers and determine their willingness to participate on behalf of the industry. The flaw with this option is that typically most or all of the larger manufacturers would want to participate in the formal negotiation process for fear that the committee member representing manufacturers would not fairly represent all of their competitors. Additionally, including all of the manufacturers in the process would skew the stakeholder representation, and therefore is not viable. For the above described reasons, the Association would be the better option.
In addition, the alternative strategy of facilitated rule development (Chapter 120.54 (2)(c) ...) should be considered by the agency. Based on findings from the assessment, all of the stakeholders with the exception of FEMA are willing to participate in developing rule language to clarify Ch. 633.061. Further, it appears that there are interests that share the concerns of FEMA and in the process of representing their own interests would protect the critical interests of the Association (FEMA) adequately. In addition, it is likely that FEMA and/or individual manufacturers would be willing to participate in this less formal rule development process since they would not be required to vote on final language.

In light of FEMA’s decision to decline participation in the proposed negotiated rulemaking process, the facilitated rule development option would allow the Agency to develop rule language that has considered and responded to all of the comments and concerns expressed by all of the stakeholders affected by the scope of the proposed rule amendments to Ch. 633.061 F.S. The facilitated process should be iterative in nature by building on comments presented at each workshop and attempting to develop consensus to the greatest degree possible on the proposed changes. Based on the above findings, I have concluded that the facilitated rule development option is the most viable option available and is the recommended path of action.

The one critical prerequisite to this option is that the Agency must be willing to articulate a commitment to developing a rule on this issue. This will ensure that all of the affected interests including manufacturers will have the motivation to participate in the process.
II. THE FEASIBILITY ASSESSMENT PROCESS

The CRC’s objective was to conduct a time and resource-effective feasibility assessment for utilizing negotiated rulemaking as set forth in Chapter 120.54(2)(d) Florida Statutes, for rules published by the Department pursuant to Chapter 633, Florida Statutes, needed in conjunction with the operation of Division of State Fire Marshal.

Jeff Blair from the CRC met initially with DSFM administrators to discuss the process for moving forward with the feasibility assessment and to clarify the agency's interest and stake in the issues. He conducted phone interviews with testing laboratories, fire equipment manufacturers, fire equipment installers, fire equipment distributors, fire equipment dealers, fire marshal inspectors, parts house retailers, the Florida Restaurant Association, and educational training developers/trainers interests.

A. The Assessment/Facilitation Team

This assessment was conducted by the Florida Conflict Resolution Consortium, a publicly supported center based at Florida State University. The Consortium's mission is to bring Floridians together to learn to transform unproductive conflict into cost-effective, sustainable solutions. The assessment was conducted by Jeff Blair, South Florida Regional Coordinator for the Florida Conflict Resolution Consortium. (See Appendix #1 for more information on the team).

B. Interview Participants

In conducting the assessment, the team sought individual and group interviews with those representing testing laboratories, fire equipment manufacturers, fire equipment installers, fire equipment distributors, fire equipment dealers, fire marshal inspectors, parts house retailers, the Florida Restaurant Association, educational training development interests, and with the Agency's interests. Below is a list of persons participating in the interview process and their affiliations.
1. **Testing Laboratory’s Interests**
   Kenneth Zastrow, Underwriters Laboratories Inc.
   John Wiggins, Underwriters Laboratories Inc.

2. **Fire Equipment Manufacturers Interests**
   Mike Laderoute, MLJ Associates Inc, representing Fire Equipment Manufacturers’ Association
   Susan Young, Fire Equipment Manufacturers’ Association

3. **Fire Equipment Installers Interests**
   Mike Couts, Advanced Fire Systems
   Judy Lane, West Volusia Fire Equipment

4. **Fire Equipment Distributors Interests**
   Norb Makowka, National Association of Fire Equipment Distributors

5. **Fire Equipment Dealers Interests**
   Jonn Gioseffi, Broward Fire Equipment and Service, Inc.
   Mike Willis, Florida Fire Equipment Dealers’ Association
   Fred Martin, Florida Fire Equipment Dealers’ Association

6. **Fire Marshal Inspectors Interests**
   Don Goff, Florida Fire Marshal’s Inspectors Association
   Buddy Dewar, representing Florida Fire Marshal’s Inspectors Association and Florida Fire Sprinklers Association
   Chuck Ackers, Florida Fire Marshal’s Inspectors Association

7. **Parts House Retailers Interests**
   Jack Dick, Heiser Logistics

8. **Florida Restaurant Association Interests**
   Richard Turner, Florida Restaurant Association
   Karen Phillips, Florida United Business Association
9. **Educational Training Development Interests**  
William Richards, State Fire College

10. **State Agency Interests**  
Jim Goodloe, Bureau Chief, Division of State Fire Marshal  
Gabe Mazzeo, legal department, Division of State Fire Marshal

* Some of the Dealer and Service Interests Interviewed have Interests in Both Interest Groups.

C. **Interview Questions**

♦ What interests do you represent?

♦ Is your interest represented by an association or organization; and if so, does it adequately/fairly represent your and the members interests?

♦ What other interests may be affected by this rulemaking?

♦ What are the key issues that need to be addressed in order to promulgate the proposed rule as directed by Statute relative to servicing fire extinguisher and preengineered systems?

♦ What are the obstacles to negotiating the rule?

♦ Is the interest you represent willing to participate and negotiate in good faith in a negotiated rulemaking to clarify appropriate training for servicing fire extinguisher and preengineered systems?

♦ Are you aware/understand Florida’s Sunshine laws and how that affects communication in the negotiation process? As a result, is there a person who could represent and negotiate for your interests? How will your interests be represented in the process?

♦ What other related issues or rules are of concern to you?
4. **Summary of Issues and Concerns Regarding "Fire Suppression Equipment" (Ch. 633.061(1)) under the Fire Prevention and Control Statute**

   **A. Scope of Issues to Address**

1) The assessment team noted that most of the interests indicated that the negotiation would have to carefully scope the issues for negotiation in order to address the lack of consensus on this issue on both the state and national levels.

2) Interested parties expressed the need to provide clarification to the statutory language by developing definitions on “appropriate training" and “servicing”. There is a clear consensus from most of the interests that clarification by rule is both necessary and desirable from the industry’s perspective.

3) Interests expressed a desire to address issues of “fairness relative to servicing equipment, enforceability, effective education and training, and liability concerns”.

4) Interests have expressed concern that current practices and realities allow for servicing of equipment and the purchasing of parts by individuals who may or may not be qualified. In light of this, interests felt it is desirable to reach industry-wide agreement on these issues.

5) Many of the interests expressed concern that the manufacturers would not be willing to participate in the process.

6) All of the parties expressed concern that the issue of manufactures exclusive distributorships would have to be considered a critical parameter in which to engage the issues relevant to the proposed rule.
B. Procedural Issues

1) All interests expressed similar concerns about getting all interests to the table interested in trying to negotiate solutions in good faith.

2) All of the interests indicated that this issue has both state and national implications and that an effort should be made to consider this as negotiations proceed.

3) For manufacturers interest, establishing fair and effective representation for the various companies was a concern.

IV. Feasibility Assessment

The elements of a feasibility assessment for negotiated rulemaking are dependent on whether the issues are clearly identified and the interests are capable of being represented in a negotiation process. In this context, the assessment below addresses the guidelines and criteria for negotiated rulemaking established by 1996 amendments to the Florida Administrative Procedure Act, Chapter 120.54(2)(d), F.S. (FAPA), and the Uniform Rules, Section 28-103.003, adopted by the Florida Administration Commission that guides agency implementation of the Chapter 120 provisions. (See Appendix #2)

A. Complexity of Rules and Potential Opposition

Within the range of defining the scope of “appropriate training and servicing“ of equipment, the interviews revealed a wide range of potential and complex interrelated topics, ranging from defining and agreeing on standards of fairness relative to servicing equipment to enforceability of standards to developing effective education and training to addressing various liability concerns.

Regarding the potential for opposition, the interviews revealed that matters of rule development under the Fire Prevention and Suppression Statute have been frequent subjects for rule challenges and judicial appeals.
It is our opinion that a negotiated rulemaking format to clarify “appropriate training” as it relates to “servicing” fire extinguisher and preengineered systems is consistent with these FAPA considerations.

B. Can a balanced committee of interested persons who will negotiate in good faith be assembled?

Based on information and analysis of the interviews conducted and documents reviewed, it is our opinion that a balanced committee representing testing laboratories, fire equipment manufacturers, fire equipment installers, fire equipment distributors, fire equipment dealers, fire marshal inspectors, parts house retailers, the Florida Restaurant Association, educational training development interests, and with the Agency's interests can be convened. With respect to negotiated rulemaking for clarifying “appropriate training” as it relates to “servicing” fire extinguisher and preengineered systems, we are satisfied that the association’s committee members adequately represent dealers, distributors, end users, and fire marshal’s various interests, so long as there is recognition that more particularized interests—especially related to manufacturing companies issues—may emerge during detailed discussion of subject matter and issues.

The Chapter 120 procedure also provides for an opportunity after the Agency notices its proposal for negotiated rulemaking to review requests of individuals and organizations who do not believe their interests are adequately represented on the proposed committee. Further, the negotiated rulemaking process and sessions will be noticed and open to the public.
Although we will recommend a specific structure for representation in this report, we believe the agency ought to consider a team approach for each of the identified interests that may be involved in this negotiated rulemaking. Observations by interviewees indicated that committee members would like to have the use of consultants to provide them with technical assistance and feedback during and after the sessions.

**Based on information and analysis for all interviews, we conclude that the interested parties—with the exception of FEMA—and the agency are prepared to negotiate in good faith.**

**C. Agency Support and Commitment to the Process**

The agency has indicated its willingness to provide technical support and assistance to a negotiated rulemaking process for clarify “appropriate training” as it relates to “servicing” fire extinguisher and preengineered systems, and to use the committee consensus as the basis for its proposed rule.

The definition of "consensus" will be an important organizational groundrule decision to be made at the outset of the process. In the over sixty examples of negotiated rulemaking by other states and at the Federal level, consensus is understood as the concurrence among the interests represented on a negotiated rulemaking committee. There has been some variation in terms of whether formal votes are taken or agreement is determined informally, whether committee members all sign an agreement to signify the end product of the negotiations and whether the committee is aiming for agreement on specific rule language or agreement on general principles.

Agency representatives also indicated that selection of a negotiated rulemaking process for the rule clarifying “appropriate training” as it relates to “servicing” fire extinguisher and preengineered systems would not unreasonably delay implementing legislation, consistent with provisions of the Uniform Rule.
D. Willingness to Participate

All interests interviewed—with the exception of FEMA—expressed a positive degree of willingness to participate in negotiated rulemaking for the rule clarifying “appropriate training” as it relates to “servicing” fire extinguisher and preengineered systems” and would consider forming an appropriate negotiation team to effectively participate.

E. Suggested Structure for Negotiation

Our recommendation is that the agency consider appointing members for each of the interests (testing laboratories, fire equipment manufacturers, fire equipment installers, fire equipment distributors, fire equipment dealers, fire marshal inspectors, parts house retailers, the Florida Restaurant Association, educational training development interests, and the Agency) and work with the interests to identify those individuals who could serve on each team to best represent the broader interest. Further, it is recommended that consultants be identified to work with the interests committee members.

Following the notice of proposed negotiated rulemaking, we would recommend convening an organizational and orientation session to launch the negotiated rulemaking process that might include some orientation on interests-based negotiation and on rulemaking negotiations and should include objectives to agreeing on protocols and groundrules, on the scope of negotiation and the proposed schedule. The negotiation sessions should be designed to develop draft rule language within a reasonable amount of time. The interests are well briefed on relevant issues and this may enhance the ability to make progress and effectively use the time to craft creative solutions to different priorities and differences among the interests. The facilitator(s) should assist by drafting agendas, keeping meeting summaries, helping to develop text for negotiation and effectively moderating each of the negotiation sessions.
F. Committee Member Recommendation

Based on interviews with the interest groups we recommend the following members for participation on the negotiation committee:

**Fire Equipment Manufacturers Interests**
TBD

**Fire Equipment Installers Interests**
Jonn Gioseffi, Broward Fire Equipment and Service, Inc.

**Fire Equipment Distributors Interests**
Norb Makowka, National Association of Fire Equipment Distributors

**Fire Equipment Dealers Interests**
Mike Couts, Advanced Fire Systems

**Fire Marshal Inspectors Interests**
Don Goff, Florida Fire Marshal’s Inspectors Association

**Parts House Retailers Interests**
Jack Dick, Heiser Logistics

**Florida Restaurant Association Interests**
Richard Turner, Florida Restaurant Association

**State Agency Interests**
Jim Goodloe, Bureau Chief, Division of State Fire Marshal

VII. Conclusion

We have concluded that the key interests affected by the new "appropriate training and servicing" statutory language—with the exception of FEMA—are willing to participate in a negotiation over rule language to clarify the provisions. We believe that a negotiated rulemaking procedure focusing on the 2002 provisions of Ch. 633.061 F.S. relating clarifying “appropriate training” as it relates to “servicing” fire extinguisher and preengineered systems” is a viable option and path to seeking resolution of the issues and the promulgation of a rule.
APPENDIX # 1

Feasibility Assessment Team

WHAT IS THE CONSORTIUM?

"The purpose of the Consortium is to serve as a neutral resource to assist citizens and public and private interests in Florida to seek cost-effective solutions to public disputes and problems through the use of alternative dispute resolution and consensus building."

--F.S. 240.702

Our mission is to bring Floridians together to learn to transform unproductive conflict into cost-effective, sustainable solutions. The Consortium serves as a catalyst to create supportive policies and to help educate statewide on the appropriate use of mediation, facilitation and other collaborative problem-solving approaches to resolve a wide range of public policy issues.

With the support of Florida State University and the Florida Legislature, the Consortium provides dispute resolution service, education, training and research to build a broader understanding of the value of collaborative approaches and create a cadre of citizens, leaders, professionals and students skilled in using collaborative consensus building and conflict resolution processes.

The Consortium offers neutral technical assistance to a wide range of professionals, agency staff and private citizens and organizations engaged in public problems throughout Florida. We help to design and implement efforts for intergovernmental collaboration, community and public problem-solving, and land-use and environmental dispute resolution. We also provide referral services connecting stakeholders and potential users with trained dispute resolution professionals.
THE CONFLICT ASSESSMENT/FACILITATION TEAM

Robert M. Jones, director of the Florida Conflict Resolution Consortium, is an attorney and has served as mediator and facilitator of over 100 public policy disputes. He served for eight years as a senior program officer at the National Institute for Dispute Resolution and as chair of the Society for Professionals in Dispute Resolution’s Mediator Qualifications Commission.

Jeff Blair, South Florida Regional Director for the Florida Conflict Resolution Consortium. His work for the Consortium has included facilitation, process design, strategic planning, and consensus-building on multiple public policy initiatives. He has worked with state and local government representatives to design and implement collaborative approaches to planning, rule making, and dispute resolution with an emphasis on public participation in the design and implementation of policy. He has facilitated hundreds of rule development workshops and conducted negotiated rulemakings for various state agencies. In addition, he has taught numerous classes and trainings in various dispute resolution topics. For the past five years he has served as the Consortium's project director for the Florida Building Commission. Mr. Blair has provided facilitation, planning, and process design for numerous non-profit organizations since 1977.
APPENDIX #2—NEGOTIATED RULEMAKING PROCESS

I. AGENCY CONSIDERATION OF NEGOTIATED RULEMAKING

<table>
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<tr>
<th>Agency Evaluation</th>
<th>Feasibility Assessment</th>
<th>Notice of Proposed Negotiated Rulemaking</th>
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<tbody>
<tr>
<td>• Review of Considerations Ch. 120.54 (2)(d)F.S. and Uniform Rule 28-103.003</td>
<td>• Sponsored by the Agency, conducted by a neutral organization/mediator</td>
<td>• Agency decision on whether to use negotiated rulemaking in light of feasibility assessment.</td>
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<td></td>
<td>• Interviews with potential affected interests discussing the negotiated rulemaking process, possible issues, willingness to participate.</td>
<td>• Agency notice published including description of subject and scope; list of the rulemaking committee members, proposed schedule for completing work, and procedure for persons who believe their interests are not adequately represented may apply to participate on the committee and name of the</td>
</tr>
<tr>
<td></td>
<td>• Report to agency with recommendations on whether to process to use negotiated rulemaking and suggestions for how to structure the process.</td>
<td>• Agency responds in writing to requests with reasons for granting or denying the requests.</td>
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II. NEGOTIATED RULEMAKING

ORGANIZATIONAL MEETING

• Introduction of members and facilitator
• Orientation to regulatory negotiation
• Review, refinements and adoption of procedural guide-lines and protocols including defining consensus
• Agreement on substantive issues and negotiation plan, notice of meetings and deadlines

NEGOTIATIONS

• Review rulemaking issues
• Review information sources
• Review draft rules or proposals
• Establish committees as necessary
• Negotiate text or outline of proposed rule

RULEMAKING

• Negotiation concludes
  1) with consensus reached on language of rule- agency publishes consensus as draft rule
  2) with consensus reached on issues or outline- agency drafts proposed rule and publishes as a notice of proposed rulemaking
  3) with consensus not reached- agency proceeds with rulemaking using committee discussions as a guide; agency published notice of proposed rulemaking.
• Draft rule subject to public comments
• Committee notified of public comments and agency revises rule if necessary
• Agency publishes final rule.
Chapter 120.54 (2)(d) F.S.  
Negotiated Rulemaking

1) An agency may use negotiated Rulemaking in developing and adopting rules. The agency should consider the use of negotiated Rulemaking when complex rules are being drafted or strong opposition to the rules is anticipated. The agency should consider, but is not limited to considering, whether a balanced committee of interested persons who will negotiate in good faith can be assembled, whether the agency is willing to support the work of a negotiating committee, and whether the agency can use the group consensus as the basis for its proposed rule. Negotiated Rulemaking uses a committee of designated representatives to draft a mutually acceptable proposed rule.

2) An agency that chooses to use the negotiated rulemaking process described in this paragraph shall publish in the Florida Administrative Weekly a notice of negotiated rulemaking that includes a listing of the representative groups that will be invited to participate in the negotiated rulemaking process. Any person who believes that his or her interest is not adequately represented may apply to participate within 30 days after publication of the notice.

3) All meetings of the negotiating committee shall be noticed and open to the public pursuant to the provisions of this chapter. The negotiating committee shall be chaired by a neutral facilitator or mediator.

4) The agency's decision to use negotiated rulemaking, its selection of the Representative groups, and approval or denial of an application to participate in the negotiated rulemaking process are not agency action. Nothing in this subparagraph is intended to affect the rights of an affected person to challenge a proposed rule developed under this paragraph in accordance with s. 120.56(2).

Uniform Rule 28-103.003 Negotiated Rulemaking

(1) The agency may develop rules through negotiated rulemaking. Negotiated rulemaking is a process that uses a committee of designated representatives to draft a mutually acceptable proposed rule. The agency should consider the following factors in determining whether to use negotiated rulemaking:

(a) Whether there is a need for a rule;
(b) Whether there are identifiable multiple interests that will be affected by the rule;
(c) Whether a balanced committee of interested persons who are willing to negotiate in good faith and who can represent identified interests can be assembled;
(d) Whether there is a reasonable likelihood that a committee can reach a consensus within a fixed period of time;
(e) Whether negotiated rulemaking processes will unreasonably delay implementing legislation;
(f) Whether the agency has resources, including technical assistance, to commit to support negotiated rulemaking;

(g) Whether the agency will use the consensus of the committee as the basis for proposing a rule, consistent with its statutory responsibilities.

(2) When the agency chooses to use negotiated rulemaking, it shall publish a notice in the *Florida Administrative Weekly*. The notice shall include:

(a) An announcement that the agency intends to convene a negotiated rulemaking proceeding;
(b) A description of the subject and scope of the rule to be developed;
(c) In addition to the requirements of Section 120.54(2)(d)2., F.S., a list of the rulemaking committee members, including their addresses and telephone numbers;
(d) A schedule for completing the work of the committee;
(e) A statement of how persons who believe that their interests are not adequately represented may apply to participate on the committee.

(3) The agency shall respond in writing to requests for membership setting forth reasons for granting or denying the requests.

(4) The negotiating committee shall be chaired by a neutral facilitator or mediator. The facilitator/mediator shall serve subject to the approval of the committee.

(5) The negotiating committee shall report the results of its deliberations to the agency within the time frame specified in the notice of negotiated rulemaking.

*Specific Authority: 120.54 (5), F.S.*
*Law implemented 120.54(2)(d) F.S.*
*History-New 4-1-97*