NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
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1985

Federal Register

12–5–00
Vol. 65 No. 234
Pages 75853–76114

Tuesday
Dec. 5, 2000

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Rules and Regulations

Federal Register
Vol. 65, No. 234
Tuesday, December 5, 2000

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

RIN 3150–AG66

List of Approved Spent Fuel Storage Casks: TN–32 Revision

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations by revising the Transnuclear, Inc. TN–32 cask system listing within the ''List of Approved Spent Fuel Storage Casks'' to include Amendment No. 1 to the Certificate of Compliance (CoC). This amendment will allow holders of power reactor operating licenses to store spent fuel in the cask under the revised conditions. The changes proposed for Amendment No. 1 to the TN–32 CoC include the addition of the B&W/FCF 17 x 17 Mark BW assembly to the Technical Specification for ''Fuel to be stored in the TN–32 Cask,'' with revised bounding characteristics, and (2) a revised TS for ''Site Specific Parameters and Analysis,'' to allow analysis of verification of allowable seismic loads.

DATES: The final rule is effective February 20, 2001, unless significant adverse comments are received by January 4, 2001. If the rule is withdrawn, timely notice will be published in the **Federal Register**.

ADDRESSES: Submit comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attn: Rulemakings and Adjudications Staff. Deliver comments to 11555 Rockville Pike, Rockville, MD, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

You may also provide comments via the NRC's interactive rulemaking website (http://ruleforum.llnl.gov). This site provides the capability to upload comments as files (any format) if your web browser supports that function. For information about the interactive rulemaking site, contact Ms. Carol Gallagher (301) 415–5905; e-mail CAG@nrc.gov.

Certain documents related to this rule, including comments received by the NRC, may be examined at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. These documents also may be viewed and downloaded electronically via the rulemaking website.

Documents created or received at the NRC after November 1, 1999, are also available electronically at the NRC's Public Electronic Reading Room on the Internet at http://www.nrc.gov/NRC/ADAMS/index.html. From this site, the public can gain entry into the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. For more information, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by email to pdr@nrc.gov.

FOR FURTHER INFORMATION CONTACT: Roger W. Broseus, telephone (301) 415–7608, e-mail rwb@nrc.gov, of the Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

Background

Section 218(a) of the Nuclear Waste Policy Act of 1982, as amended (NWPA), requires that ''[t]he Secretary [of the Department of Energy (DOE)] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.'' Section 133 of the NWPA states, in part, that ''[t]he Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under Section 218(a) for use at the site of any civilian nuclear power reactor.''

To implement this mandate, the NRC approved dry storage of spent nuclear fuel in NRC-approved casks under a general license by publishing a final rule in 10 CFR Part 72 entitled ''General License for Storage of Spent Fuel at Power Reactor Sites'' (55 FR 29181; July 18, 1990). This rule also established a new Subpart L within 10 CFR Part 72, entitled ''Approval of Spent Fuel Storage Casks,'' containing procedures and criteria for obtaining NRC approval of spent fuel storage cask designs. The NRC subsequently issued a final rule on March 20, 2000 (65 FR 14790) that approved the TN–32 cask design and added it to the list of NRC-approved cask designs in § 72.214 as Certificate of Compliance Number (CoC No.) 1021.

Discussion

On April 23, 1999, and February 29, 2000, the certificate holder (Transnuclear, Inc.) submitted applications to the NRC to amend the Certificate of Compliance (CoC, No. 1021) to allow holders of power reactor operating licenses to store spent fuel in the cask under revised conditions. The changes requested include: (1) Addition of B&W/FCF 17 x 17 Mark BW assembly to Technical Specification (TS) 2.1, ''Fuel to be stored in the TN–32 Cask,'' with revised bounding characteristics, and (2) revision of the TS 4.3.3, ''Site Specific Parameters and Analysis'' to allow analysis of verification of allowable seismic loads. No other changes to the TN–32 cask system design were requested in this application. The NRC staff performed a detailed safety evaluation of the proposed CoC amendment request and found that the proposed changes do not reduce the safety margin. In addition, the NRC staff has determined that the changes do not pose any increased risk to public health and safety.

This direct final rule revises the TN–32 cask design listing in § 72.214 by adding Amendment No. 1 to CoC No. 1021. The amendment consists of two changes to the TSs. The first allows the storage of an additional type of spent fuel in the TN–32 cask system, with its bounding characteristics. The second changes the site-specific seismic horizontal and vertical acceleration limits from discrete values to two equations. The latter change increases a general licensee's flexibility by making the technical specification more performance based. The particular TSs being changed are identified in the NRC Staff's Safety Evaluation Report (SER) for Amendment No. 1.

The amended TN–32 cask system, when used under the conditions specified in the CoC, the Technical Specifications, and NRC regulations, will meet the requirements of Part 72; thus, adequate protection of public health and safety will continue to be ensured.

CoC No. 1021, the revised TSs, the underlying SER for Amendment No. 1, and the Environmental Assessment are available for inspection at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. Single copies of the CoC may be obtained from Roger W. Broseus, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 415–7608, email rwb@nrc.gov. An electronic copy of the proposed CoC and preliminary SER can be found in the NRC's Public Electronic Reading Room on the Internet at http://www.nrc.gov/NRC/ADAMS/index.html.

Discussion of Amendments by Section

Section 72.214 List of Approved Spent Fuel Storage Casks

Certificate No. 1021 is revised by adding the effective date of the initial certificate and the effective date of Amendment Number 1. In addition, two technical specifications are modified. The first allows the storage of an additional type of spent fuel in the TN–32 cask system with its bounding characteristics. The second changes the site-specific seismic horizontal and vertical acceleration limits from discrete values to two equations. The latter change increases a general licensee's flexibility by making the technical specification more performance based.

Procedural Background

This rule is limited to the changes contained in Amendment 1 to CoC No. 1021 and does not include other aspects of the TN–32 cask system design. The NRC is using the ''direct final rule procedure'' to promulgate this amendment because it represents a limited and routine change to an existing CoC that is expected to be noncontroversial; adequate protection of public health and safety continues to be ensured. This amendment is not considered to be a significant amendment by the NRC staff. The amendment to the rule will become effective on February 20, 2001. However, if the NRC receives significant adverse comments by January 4, 2001, then the NRC will publish a document that withdraws this action and will address the comments received in response to the amendment. These comments will be addressed in a subsequent final rule. The NRC will not initiate a second comment period on this action.

Agreement State Compatibility

Under the ''Policy Statement on Adequacy and Compatibility of Agreement State Programs'' approved by the Commission on June 30, 1997, and published in the **Federal Register** on September 3, 1997 (62 FR 46517), this rule is classified as compatibility Category ''NRC.'' Compatibility is not required for Category ''NRC'' regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the Atomic Energy Act of 1954, as amended (AEA), or the provisions of the Title 10 of the Code of Federal Regulations. Although an Agreement State may not adopt program elements reserved to NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with the particular State's administrative procedure laws, but does not confer regulatory authority on the State.

Plain Language

The Presidential Memorandum dated June 1, 1998, entitled ''Plain Language in Government Writing,'' directed that the Government's writing be in plain language. The NRC requests comments on this direct final rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the address listed under the heading ADDRESSES above.

Finding of No Significant Environmental Impact: Availability

Under the National Environmental Policy Act of 1969, as amended, and the NRC regulations in Subpart A of 10 CFR Part 51, the NRC has determined that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required. The rule will amend the CoC for the TN–32 cask system within the list of approved spent fuel storage casks that power reactor licensees can use to store spent fuel at reactor sites under a general license. This amendment will allow holders of power reactor operating licenses to store spent fuel in the cask under revised conditions. The changes proposed for Amendment No. 1 to the TN–32 CoC include: (1) Addition of B&W/FCF 17 x 17 Mark BW assembly to TS 2.1, ''Fuel to be stored in the TN–32 Cask,'' with revised bounding characteristics, and (2) revised TS 4.3.3, ''Site Specific Parameters and Analysis'' to allow analysis of allowable seismic loads. The environmental assessment and finding of no significant impact on which this determination is based are available for inspection at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. Electronic copies the environmental assessment and finding of no significant impact can be found in the NRC's Public Electronic Reading Room on the Internet at http://www.nrc.gov/NRC/ADAMS/index.html; single copies are available from Roger W. Broseus, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 415–7608, email rwb@nrc.gov.

Paperwork Reduction Act Statement

This direct final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget, Approval Number 3150–0132.

Public Protection Notification

If a means used to impose an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

Voluntary Consensus Standards

The National Technology Transfer Act of 1995 (Pub. L. 104–113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this direct final rule, the NRC will revise the TN–32 cask system design listed in § 72.214 (List of approved spent fuel storage casks). This action does not constitute the establishment of a standard that establishes generally applicable requirements.

Regulatory Analysis

On July 18, 1990 (55 FR 29181), the Nuclear Regulatory Commission (NRC) issued an amendment to 10 CFR Part 72 to provide for the storage of spent nuclear fuel under a general license in cask designs approved by the NRC. Any nuclear power reactor licensee can use

NRC-approved cask designs to store spent nuclear fuel if it notifies the NRC in advance, spent fuel is stored under the conditions specified in the cask's Certificate of Compliance (CoC), and the conditions of the general license are met. A list of NRC-approved cask designs is contained in § 72.214. On March 20, 2000 (65 FR 14790), the NRC issued an amendment to Part 72 that approved the TN–32 cask design by adding it to the list of NRC-approved cask designs in § 72.214. On April 23, 1999, and February 29, 2000, the certificate holder (Transnuclear, Inc.) submitted applications to the NRC to amend the Certificate of Compliance (CoC, No. 1021) to allow holders of power reactor operating licenses to store spent fuel in the cask under revised conditions. The changes requested include: (1) addition of B&W/FCF 17 x 17 Mark BW assembly to TS 2.1, ''Fuel to be stored in the TN–32 Cask,'' with revised bounding characteristics and (2) revision of TS 4.3.3, ''Site Specific Parameters and Analysis'' to allow analysis of verification of allowable seismic loads.

This rule will permit the changes requested by the certificate holder. The alternative to this action is to withhold approval of this amended cask system design and issue an exemption to each general license. This alternative would cost both the NRC and the utilities more time and money because each utility would have to pursue an exemption.

Approval of the direct final rule will eliminate the above described problem and is consistent with previous NRC actions. Further, the direct final rule will have no adverse effect on public health and safety. This direct final rule has no significant identifiable impact or benefit on other Government agencies. Based on the above discussion of the benefits and impacts of the alternatives, the NRC concludes that the requirements of the direct final rule are commensurate with the NRC's responsibilities for public health and safety and the common defense and security. No other available alternative is believed to be as satisfactory, and thus, this action is recommended.

Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs, Office of Management and Budget.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the NRC certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This direct final rule affects only the licensing and operation of nuclear power plants, independent spent fuel storage facilities, and Transnuclear, Inc. The companies that own these plants do not fall within the scope of the definition of ''small entities'' set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121.

Backfit Analysis

The NRC has determined that the backfit rule (10 CFR 50.109 or 10 CFR 72.62) does not apply to this direct final rule because this amendment does not involve any provisions that would impose backfits as defined. Therefore, a backfit analysis is not required.

List of Subjects In 10 CFR Part 72

Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Reporting and recordkeeping requirements, Security measures, Spent fuel.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553; the NRC is adopting the following amendments to 10 CFR Part 72.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

1. The authority citation for Part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 10d—48b, sec. 7902, 10b Stat. 31b3 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c),(d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2244, (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

2. In § 72.214, Certificate of Compliance 1021 is revised to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate Number: 1021

Initial Certificate Effective Date: April 19, 2000

Amendment Number 1 Effective Date: February 20, 2001

SAR Submitted by: Transnuclear, Inc.

SAR Title: Final Safety Analysis Report for the TN–32 Dry Storage Cask

Docket Number: 72–1021

Certificate Expiration Date: April 19, 2020

Model Number: TN–32, TN–32A, TN–32B

* * * * *

Dated at Rockville, Maryland, this 16th day of November, 2000.

For the Nuclear Regulatory Commission.

William D. Travers,

Executive Director for Operations.

[FR Doc. 00–30906 Filed 12–4–00; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 3

[Docket No. 00–28]

RIN 1557–AB14

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 225

[Regulation H and Y; Docket No. R–1087]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 325

RIN 3064–AC46

Risk-Based Capital Guidelines; Market Risk Measure; Securities Borrowing Transactions

AGENCIES: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; and Federal Deposit Insurance Corporation.

ACTION: Interim rule with request for comment.

SUMMARY: The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC) (collectively, the Agencies) are issuing an interim rule with a request for comment that amends their market risk rules to revise the capital treatment for cash collateral that is posted in connection with certain securities borrowing transactions. The effect of the interim rule is to more appropriately align the capital requirements for these transactions with the risk involved and to provide a capital treatment for U.S. banking organizations that is more in line with the capital treatment applied to their domestic and foreign competitors.

DATES: This interim rule is effective January 4, 2001. U.S. banking organizations may apply the provisions of this interim rule beginning December 5, 2000. Comments must be received by January 19, 2001.

ADDRESSES: Comments should be directed to:

OCC: Written comments may be submitted electronically to regs.comments@occ.treas.gov or by mail to Docket No. 00–28, Office of the Comptroller of the Currency, Public Information Room, 250 E Street, SW, Mail Stop 1–5, Washington, DC 20219. Comments will be available for inspection and photocopying at that address.

Board: Comments, which should refer to Docket No. R–1087, may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW, Washington, DC 20551, or mailed electronically to regs.comments@federalreserve.gov. Comments addressed to Ms. Johnson may be delivered to the Board's mailroom between 8:45 a.m. and 5:15 p.m., and to the security control room outside of those hours. Both the mailroom and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, NW. Comments may be inspected in Room MP–500 between 9 a.m. and 5 p.m. weekdays pursuant to § 261.12, except as provided in § 261.14 of the Board's Rules Regarding Availability of Information, 12 CFR 261.12 and 261.14.

FDIC: Written comments should be addressed to Robert E. Feldman, Executive Secretary, Attention: Comments/OES, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429. Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. (Fax number: (202) 898–3838; Internet address: comments@fdic.gov). Comments may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, NW, Washington, DC, between 9 a.m. and 4:30 p.m. on business days.

FOR FURTHER INFORMATION CONTACT:

OCC: Roger Tufts, Senior Economic Advisor, Capital Policy (202) 874–5070, or Ron Shimabukuro, Senior Attorney, Legislative and Regulatory Activities Division (202) 874–5090, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219.

Board: Norah Barger, Assistant Director (202/452–2402), or David Adkins, Supervisory Financial Analyst (202/452–5259), Division of Banking Supervision and Regulation. For the hearing impaired *only,* Telecommunication Device for the Deaf (TDD), Janice Simms (202/872–4984), Board of Governors of the Federal Reserve System, 20th and C Streets, NW, Washington, DC 20551.

FDIC: Stephen G. Pfeifer, Examination Specialist (202/898–8904), Accounting Section, Division of Supervision; Michael B. Phillips, Counsel, (202/898–3581), Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION: Securities borrowing transactions were not specifically addressed in the July 1988 agreement entitled ''International Convergence of Capital Measurement and Capital Standards'' (Basel Accord), nor in the risk-based capital guidelines adopted by the Agencies in 1989.[1] At that time, the involvement of U.S. banking organizations in corporate debt and equity securities trading activities was limited. However, in recent years, U.S. banking organizations have experienced a rapid growth of such activities, and it is recognized that securities borrowing transactions serve an important function in the operation of securities markets. Securities borrowings are used in conjunction with short sales, securities fails (securities sold but not made available for delivery on the settlement date), and option and arbitrage positions. Securities are also borrowed in order to be pledged against public fund deposits. Securities borrowing enhances market efficiency and provides an important source of liquidity to the securities markets.

In a typical securities borrowing transaction, a party (for example, a banking organization) needing to borrow securities obtains the securities from a securities lender and posts collateral in the form of cash or highly marketable securities with the securities lender (or an agent acting on behalf of the securities lender) in an amount that fully covers the value of the securities borrowed plus an additional margin, usually ranging from two to five percent. In accordance with U.S. generally accepted accounting principles, cash collateral posted with the securities lender is treated as a receivable on the books of the securities borrower (that is, it is treated as a cash loan from the securities borrower to the securities lender, who is the obligor). Under the existing capital rules, the securities borrower must hold capital against the full amount of this receivable, *i.e.,* the collateral posted. The borrowed securities generally remain on the balance sheet of the securities lender, and, therefore, no additional capital charge is incurred by

[1] The Basel Accord was developed by the Basel Committee on Banking Supervision and endorsed by the central bank governors of the Group of Ten (G–10) countries. The Basel Accord provides a framework for assessing the capital adequacy of a depository institution by risk weighting its assets and off-balance sheet exposures primarily based on credit risk. The Basel Committee on Banking Supervision consists of representatives of the supervisory authorities and central banks from the Group of Ten countries (Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, United Kingdom, United States), and Luxembourg.

the securities borrower. Where a securities borrower posts collateral in the form of securities that continue to be carried on the borrower's books, the only capital charge incurred by the borrower under the present guidelines is that associated with a direct holding of the securities.

The Agencies recognize that securities borrowing is a long-established financial activity that historically has resulted in an exceedingly low level of losses. Applying a standard 100 percent risk weight to the full amount of the cash collateral posted to support such borrowings, the Agencies further recognize, results in a capital charge that is inordinately high, not only in light of the risk involved in the transactions, but also in comparison to the capital required by other U.S. and non-U.S. regulators of financial firms for the same transactions. Further, under the current capital rules, a banking organization incurs no incremental capital charge when it borrows securities and posts securities to collateralize the borrowing, even though it is at risk for the amount by which the collateral exceeds the value of the securities borrowed.

The Agencies are issuing an interim rule that better reflects the low risk of securities borrowing and the posting of cash collateral in connection with such transactions and brings the capital requirements for U.S. banking organizations into better alignment with the capital requirements of other U.S. and non-U.S. regulators of financial institutions.

Specifically, the Agencies are adopting an interim rule that permits banking organizations under the market risk rules to exclude from risk-weighted assets receivables arising from the posting of cash collateral associated with securities borrowing transactions to the extent such receivables are collateralized by the market value of the securities borrowed, subject to the following conditions:

1. The transaction is based on securities includable in the trading book that are liquid and readily marketable;
2. The transaction is marked to market daily;
3. The transaction is subject to daily margin maintenance requirements, and;
4. The transaction is a securities contract for the purposes of section 555 of the Bankruptcy Code (11 U.S.C. 555), a qualified financial contract for the purpose of section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions for the purposes of sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR Part 231).

Under this treatment, the amount of the receivable created in connection with the posting of cash collateral in a securities borrowing transaction that would be excluded from the securities borrower's adjusted risk-weighted assets is limited to the portion that is collateralized by the market value of the securities borrowed. The uncollateralized portion, which equals the difference between the amount of cash collateral that the securities borrower posts in support of the borrowing and the current market value of the securities borrowed, would be assigned to the risk weight appropriate to the obligor.

The Agencies note that the Basel Accord is currently under revision. These revisions could result in a more risk-sensitive treatment for securities borrowing transactions. Accordingly, banking organizations should be aware that this capital treatment under the market risk rules is subject to change pending the outcome of the Basel revisions, which may call for higher capital charges for securities borrowing and similar transactions.

The Agencies welcome comment on all aspects of this interim rule. In particular, the Agencies request industry views on the capital treatment of the posting of securities collateral associated with securities borrowing transactions. Under the current capital rules and the interim rule, the posting of securities collateral will continue to not incur a capital charge even though the securities borrower is at risk (as it is where cash is posted as collateral) for the amount by which the securities collateral exceeds the value of the securities borrowed. The Agencies recognize that a strong case can be made for achieving a greater consistency between the treatment of the posting of cash collateral and the posting of securities collateral by requiring a capital charge on the amount by which the market value of the securities posted as collateral exceeds the market value of securities borrowed. This could be accomplished under the present capital framework, for example, by requiring the difference in the market value of the securities posted as collateral and that of the securities borrowed to be treated as a securities lending transaction. Under such a treatment, the difference would be converted at 100 percent to an on-balance sheet credit equivalent amount and risk-weighted according to the obligor. Industry views are sought on whether the Agencies should seek to further equalize the capital treatment of cash and securities collateral posted in support of a securities borrowing transaction.

In addition, the Agencies are specifically interested in whether this revision to the calculation of the capital requirement for securities borrowing transactions should be limited only to those banking organizations that have implemented the market risk rules. Under the interim rule, no reduction in the capital requirement for these securities borrowing transactions is available to banking organizations that have not implemented an approved value-at-risk model. Accordingly, comment is sought on whether the capital treatment of securities borrowing should be modified within the non-trading portion of the risk-based capital calculation.

Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, the Agencies have determined that this interim rule would not have a significant impact on a substantial number of small entities in accord with the spirit and purposes of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Accordingly, a regulatory flexibility analysis is not required. The interim rule would reduce regulatory burden. The rule will only affect banking organizations that operate under the market risk rules which limits the applicability of the rule to organizations with significant trading operations. The rule will reduce regulatory burden for banking organizations that engage in securities borrowing transactions.

Administrative Procedure Act

Pursuant to section 553 of the Administrative Procedure Act, 5 U.S.C. 553, the Agencies find good cause for issuing this interim rule in advance of the receipt of comments from interested parties. Currently, U.S. banking organizations are at a competitive disadvantage versus certain foreign organizations because of differing capital treatment for securities borrowing transactions. The Agencies find that it is contrary to the public interest for U.S. banking organizations to be subject to more stringent rules (resulting in higher regulatory capital requirements) than direct competitor institutions outside of the U.S. that have capital charges determined from rules that are consistent with the interim rule. This rule relieves a restriction on banking organizations and fosters consistency among international institutions prior to year-end, but does not raise safety and soundness concerns.

The Agencies are seeking public comment on the interim rule.

Paperwork Reduction Act

The Agencies have determined that this interim rule does not involve a collection of information pursuant to the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

OCC Unfunded Mandates Reform Act of 1995 Determinations

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. As discussed in the preamble, this interim rule is limited to banking organizations subject to the market risk rules and to securities borrowing transactions collateralized with cash. The OCC, therefore, has determined that the interim rule will not result in expenditures by State, local, or tribal governments, or by the private sector of $100 million or more. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects

12 CFR Part 3

Administrative practice and procedure, Capital, National banks, Reporting and recordkeeping requirements, Risk.

12 CFR Part 208

Accounting, Agriculture, Banks, banking, Confidential business information, Crime, Currency, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Securities.

12 CFR Part 225

Administrative practice and procedure, Banks, banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

12 CFR Part 325

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Capital adequacy, Reporting and recordkeeping requirements, Savings associations, State non-member banks.

Department of Treasury

Office of the Comptroller of the Currency

12 CFR Chapter 1

Authority and Issuance

For the reasons set out in the joint preamble, part 3 of chapter I of title 12 of the Code of Federal Regulations is amended as follows:

PART 3—MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

1. The authority citation for part 3 continues to read as follows:

Authority: 12 U.S.C. 93a, 161, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907 and 3909.

2. In appendix A to part 3, in section 3:

a. Revise paragraph (a)(4) introductory text; and

b. Add a new footnote 12a.

Appendix A To Part 3—Risked-Based Capital Guidelines

* * * * *

Section 3. Risk Categories/Weights for On-Balance Sheet Assets and Off-Balance Sheet Items

* * * * *

(a) * * *

(4) *100 percent risk weight.* All other assets not specified above,[12a] including:

[12a] A bank subject to the market risk capital requirements pursuant to appendix B of this part 3 may calculate the capital requirement for qualifying securities borrowing transactions pursuant to section 3(a)(1)(ii) of appendix B of this part 3.

* * * * *

3. In appendix B to part 3, in section 3, revise paragraph (a)(1) to read as follows:

Appendix B to Part 3—Risk-Based Capital Guidelines; Market Risk Adjustment

(a) * * *

(1) *Adjusted risk-weighted assets.* (i) *Covered positions.* Calculate adjusted risk-weighted assets, which equal risk-weighted assets (as determined in accordance with appendix A of this part), excluding the risk-weighted amount of all covered positions (except foreign exchange positions outside the trading account and over-the-counter derivatives positions).[7]

(ii) *Securities borrowing transactions.* In calculating adjusted risk-weighted assets, a bank also may exclude a receivable that results from the bank's posting of cash collateral in a securities borrowing transaction to the extent that the receivable is collateralized by the market value of the borrowed securities and subject to the following conditions:

(A) The borrowed securities must be includable in the trading account and must be liquid and readily marketable;

(B) The borrowed securities must be marked to market daily;

(C) The receivable must be subject to a daily margining requirement; and

(D) The securities borrowing transaction must be a securities contract for purposes of section 555 of the Bankruptcy Code (11 U.S.C. 555741(7)), a qualified financial contract for purposes of section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions, for purposes of sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407) or Regulation EE (12 CFR Part 231).

* * * * *

[7] Foreign exchange positions outside the trading account and all over-the-counter derivative positions, whether or not in the trading account, must be included in adjusted risk-weighted assets as determined in appendix A of this part 3.

Dated: November 20, 2000.

John D. Hawke, Jr.,

Comptroller of the Currency.

Federal Reserve System

12 CFR Chapter 11

Authority and Issuance

For the reasons set forth in the joint preamble, part 208 of chapter II of title 12 of the Code of Federal Regulations is amended as set forth below:

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM (REGULATION H)

1. The authority citation for part 208 continues to read as follows:

Authority: 12 U.S.C. 24, 36, 92a, 93a, 248(a), 248(c), 321–338a, 371d, 461, 481–486, 601, 611, 1814, 1816, 1818, 1820(d)(9), 1823(j), 1828(o), 1831, 1831o, 1831p–1, 1831r–1, 1835a, 1882, 2901–2907, 3105, 3310, 3331–3351, and 3906–3909; 15 U.S.C. 78b, 78l(b), 78l(g), 78l(i), 78o–4(c)(5), 78q, 78q–1, and 78w, 6801, and 6805; 31 U.S.C. 5318; 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

2. In appendix E to part 208, under section 3, paragraph (a)(1) is revised to read as follows:

Appendix E to part 208—Capital Adequacy Guidelines for State Member Banks; Market Risk Measure

* * * * *

Section 3 Adjustments to the Risk-Based Capital Ratio Calculations

(a) * * *

(1) *Adjusted risk-weighted assets.* Calcuate adjusted risk-weighted assets, which equals risk-weighted assets (as determined in accordance with appendix A of this part), excluding the risk-weighted amounts of all covered positions (except foreign exchange positions outside the trading account and over-the counter derivative positions) [7] and receivables arising from the posting of cash collateral that is associated with securities borrowing transactions to the extent the receivables are collateralized by the market value of the borrowed securities, provided that the following conditions are met:

(i) The transaction is based on securities includable in the trading book that are liquid and readily marketable,

(ii) The transaction is marked to market daily,

(iii) The transaction is subject to daily margin maintenance requirements,

(iv) The transaction is a securities contract for the purposes of section 555 of the Bankruptcy Code (11 U.S.C. 555), a qualified financial contract for the purposes of section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions for the purposes of sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR part 231).

* * * * *

[7] Foreign exchange positions outside the trading account and all over-the-counter derivative positions, whether or not in the trading account, must be included in the adjusted risk weighted assets asdetermined in appendix A of this part.

* * * * *

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

1. The authority citation for part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3907. and 3909; 15 U.S.C. 6801 and 6805.

2. In appendix E to part 225, under section 3, paragraph (a)(1) is revised to read as follows:

Appendix E to Part 225—Capital Adequacy Guidelines for Bank Holding Companies; Market Risk Measure

* * * * *

Section 3. Adjustments to the Risk-Based Capital Ratio Calculations

(a) * * *

(1) *Adjusted risk-weighted assets.* Calculate adjusted risk-weighted assets, which equals risk-weighted assets (as determined in accordance with appendix A of this part), excluding the risk-weighted amounts of all covered positions (except foreign exchange positions outside the trading account and over-the-counter derivative positions) [7] and receivables arising from the posting of cash collateral that is associated with securities borrowing transactions to the extent the receivables are collateralized by the market value of the borrowed securities, provided that the following conditions are met:

(i) The transaction is based on securities includable in the trading book that are liquid and readily marketable,

(ii) The transaction is marked to market daily,

(iii) The transaction is subject to daily margin maintenance requirements,

(iv) The transaction is a securities contract for the purposes of section 555 of the Bankruptcy Code (11 U.S.C. 555), a qualified financial contract for the purposes of section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions for the purposes of sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR Part 231).

* * * * *

[7] Foreign exchange positions outside the trading account and all over-the-counter derivative positions, whether or not in the trading account, must be included in the adjusted risk weighted assets as determined in appendix A of this part.

By order of the Board of Governors of the Federal Reserve System, November 24, 2000.

Jennifer J. Johnson,

Secretary of the Board.

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the joint preamble, part 325 of chapter III of title 12 of the Code of Federal Regulations is amended as follows:

PART 325—CAPITAL MAINTENANCE

1. The authority citation for part 325 continues to read as follows:

Authority: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, 2386 (12 U.S.C. 1828 note).

2. In appendix C to part 325, under section 3, paragraph (a)(1) is revised to read as follows:

Appendix C to Part 325—Risk-Based Capital for State Non-Member Banks: Market Risk

* * * * *

Section 3. Adjustments to the Risk-Based Capital Ratio Calculations

(a) * * *

* * * * *

(1) *Adjusted risk-weighted assets.* Calculate adjusted risk-weighted assets, which equals risk-weighted assets (as determined in accordance with appendix A of this part), excluding the risk-weighted amounts of all covered positions (except foreign exchange positions outside the trading account and over-the-counter derivative positions) [7] and receivables arising from the posting of cash collateral that is associated with securities borrowing transactions to the extent the receivables are collateralized by the market value of the borrowed securities, provided that the following conditions are met:

(i) The transaction is based on securities includable in the trading book that are liquid and readily marketable,

(ii) The transaction is marked to market daily,

(iii) The transaction is subject to daily margin maintenance requirements,

(iv) The transaction is a securities contract for the purposes of section 555 of the Bankruptcy Code (11 U.S.C. 555), a qualified financial contract for the purposes of section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions for the purposes of sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR Part 231).

* * * * *

[7] Foreign exchange positions outside the trading account and all over-the-counter derivative positions, whether or not in the trading account, must be included in the adjusted risk weighted assets as determined in appendix A of this part.

Dated at Washington, DC, this 21st day of November, 2000.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

James D. LaPierre,

Deputy Executive Secretary.

[FR Doc. 00–30748 Filed 12–4–00; 8:45 am]

BILLING CODE 4810–33–P 6210–01–P 6714–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 8

[Docket No. 00–31]

RIN 1557–AB72

Assessment of Fees; National Banks; District of Columbia Banks

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is amending the assessment formula it uses to assess independent trust banks. A trust bank is considered independent for purposes of this regulation if it specializes in trust activities and is not affiliated with a

full-service national bank. Under the revised rate structure, all independent trust banks will be assessed based on balance sheet assets plus a minimum fee as provided by the OCC in the annual Notice of Comptroller of the Currency Fees (Notice of Fees). Independent trust banks with assets under management in excess of $1 billion would pay an additional amount based on a declining marginal rate, which also will be provided in the Notice of Fees.

EFFECTIVE DATE: December 31, 2000.

FOR FURTHER INFORMATION CONTACT: Mitchell E. Plave, Senior Attorney, Legislative and Regulatory Activities Division, (202) 874–5090; or Karen McCluskey, National Bank Examiner, Asset Management Division, (202) 874–7276.

SUPPLEMENTARY INFORMATION:

Background

The OCC charters, regulates, and supervises approximately 2300 national banks and 58 Federal branches and agencies of foreign banks in the United States, accounting for nearly 60 percent of the nation's banking assets. Its mission is to ensure a safe, sound, and competitive national banking system that supports the citizens, communities, and economy of the United States.

The OCC funds the activities it undertakes to carry out this mission through assessments on national banks and Federal branches and agencies of foreign banks. The National Bank Act authorizes the OCC to collect these assessments, stating, in relevant part:

> The Comptroller of the Currency may impose and collects assessments, fees, or other charges as necessary or appropriate to carry out the responsibilities of the office of the Comptroller. Such assessments, fees, and other charges shall be set to meet the Comptroller's expenses in carrying out authorized activities.

12 U.S.C. 482 (Supp. 2000).

This provision authorizes the OCC to adjust its assessment formula so that banks, or categories of banks, pay an assessment that appropriately apportions to them the OCC's overall expenses of carrying out the agency's activities. Therefore the OCC currently assesses national banks and Federal branches and agencies according to a formula based on several factors, including a bank's size, condition, and whether it is the ''lead'' bank or ''non-lead'' bank among national banks in a holding company.[1] The OCC also has reserved in its assessment regulation (12 CFR part 8) the authority to assess a fee for certain special examinations and investigations and for examining the fiduciary activities of national banks. 12 CFR 8.6(a). In recent years, however, the OCC stopped separately charging national banks for the expenses of examining and supervising fiduciary activities.

Since the OCC eliminated those separate fees, the number, size, and complexity of the activities of independent trust banks have increased and their balance sheet assets increasingly do not reflect the ongoing scope or complexity of their activity, nor the extent of the OCC's responsibilities with respect to them. For example, although trust assets managed by a bank are not shown on the bank's balance sheet, the bank's fiduciary activities are subject to extensive regulatory standards under 12 CFR part 9 as well as under state laws that are made applicable to national bank fiduciary activities by 12 U.S.C. 92a. The OCC evaluates the bank's adherence to those standards as part of our examination, supervision, and regulation of the bank.

On March 21, 2000, we published a notice of proposed rulemaking in the **Federal Register** (65 FR 15111) to amend the OCC's assessment regulation to revise the formula for independent trust banks. The purpose of the proposal was to adjust the OCC's assessment structure to better reflect the full extent of the OCC's activities in the examination, supervision, and regulation of those banks. For the reasons discussed below, we are adopting the rule as proposed with changes to clarify the definition of ''affiliated'' and to address situations in which a large trust bank becomes affiliated with a small full-service national bank. We also have updated our anticipated flat minimum fee and rate schedules applicable to managed assets to reflect more recent data concerning the OCC's activities, as discussed more fully below.

Proposed Rule and Comments Received

We proposed to amend 12 CFR 8.6 to give the OCC the flexibility to increase assessments on independent trust banks by applying either a managed assets component or a flat fee, depending on the amount of assets a particular bank has under management. Under the proposed rule, the managed assets component and flat fee were assessed on independent trust banks in addition to the assessment calculated on book assets under 12 CFR 8.2.

The OCC received 18 comments on the proposal. The comments included 16 from trust banks and 2 from bank trade associations. While many of the commenters objected to paying increased assessments, the commenters also recognized that the OCC must recover its expenses through assessments. Several commenters recommended specific changes to the proposal or asked for clarifications. The following is a more detailed discussion of the issues raised by the proposal, the comments we received concerning those issues, and the OCC's responses to the comments.

Scope of the rule. The proposal did not include additional assessments for full-service national banks or trust banks that are affiliated with a full-service national bank. Four commenters suggested that we apply the proposal to all trust banks, not only those affiliated with a full-service national bank.

In the case of a full-service national bank that exercises trust powers, however, since the bank also conducts substantial non-fiduciary activities, the balance sheet assets approach of the general assessment schedule continues to be a fair yardstick for determining the bank's assessments. Similarly, when a full-service bank opts as a matter of corporate form to use a separate charter to conduct its trust business, the OCC is able to supervise, examine, and regulate those activities on a coordinated basis with its activities with respect to the affiliated full-service bank. Thus, in this situation, since the activities of the two charters will be evaluated in combination, the balance sheet assets approach for determining assessments continues to be a fair basis of measurement.

Independent trust banks that are not affiliated with a full-service national bank present a distinguishable situation because their balance sheet assets do not constitute a fair yardstick of the complexity of their operations or the extent of the OCC's activities related to their operations. Therefore, except as noted below in the discussion of the test for affiliation, the OCC has decided to confine the scope of the rule to independent trust banks.

Test for affiliation. The proposal defined an ''independent trust bank'' as a national bank that ''has trust powers, does not primarily offer full-service banking, and is not *affiliated* with a full service national bank'' (emphasis

[1] A ''lead bank'' is the largest national bank controlled by a company, based on a comparison of the total assets held by each national bank controlled by that company as reported in each bank's most recent Consolidated Report of Condition (Including Domestic and Foreign Subsidiaries) (Call Report). 12 CFR 8.2(a)(6)(ii)(A).

added).[2] It did not, however, define ''affiliated.'' Two commenters asked that we clarify the meaning of the term ''affiliated.''

The final rule states that a trust bank is ''affiliated'' with another entity for assessment purposes if it meets the criteria for affiliation found in the OCC's trust regulation (12 CFR part 9), which incorporates the definition of ''affiliate'' found in section 2 of the Banking Act of 1933, 12 U.S.C. 221a(b). Generally speaking, a trust bank is deemed ''affiliated'' with a full-service national bank under that section if the full-service bank owns more than 50% of the voting stock of the trust bank or controls the election of a majority of the trust bank's directors, or if the trust bank is controlled by shareholders that own at least 50% of the full-service bank or control the election of a majority of the full-service bank's directors. Given that this is the test already used in the OCC's trust regulation, affected institutions should be familiar with its application.

The final rule also adds a provision, in new § 8.6(c)(2), to address situations in which an independent trust bank affiliates with a comparatively small full-service national bank for the purpose of evading the assessment regulation. The final rule preserves the authority of the OCC in those instances to assess a trust bank that is affiliated with a full-service national bank as if the trust bank were independent. This change is consistent with one of the underlying premises of the rulemaking, namely, that assessments paid by full-service national banks that are affiliated with trust banks are adequate to meet the OCC's expenses in carrying out our authorized activities.

Distinguishing discretionary from non-discretionary assets. Under the proposal, independent trust banks with assets under management in excess of $1 billion would pay a managed assets component that would be calculated by multiplying the amount of assets under management by a factor to be supplied by the OCC in the annual Notice of Fees pursuant to 12 CFR 8.8. ''Assets under management'' are those assets reported by national banks on Schedule A, Line 18 of the Annual Report of Trust Assets (FFIEC Form 001).

The proposal asked for comment on whether we should distinguish for assessment purposes between assets over which the bank has investment discretion (discretionary assets) and those that it holds without discretion (non-discretionary assets), for example in a custodial capacity. Two commenters stated that they can differentiate such assets and that the OCC should make that distinction. A third commenter, a large independent trust bank with a considerable amount of assets under management, rejected the assumption underlying the question. This commenter disagreed with the implication that it takes more time or resources to supervise discretionary assets and rejected the concept of making the distinction.

After considering these views, we have concluded that making this distinction between discretionary and non-discretionary assets is inappropriate because it is inconsistent with the way the OCC examines trust banks. The OCC examines trust banks based on lines of business and areas of risk rather than on the discretionary/non-discretionary asset distinction. Making the distinction between discretionary and non-discretionary assets for assessment purposes would not reflect this risk-focused examination approach. One additional basis for rejecting the distinction is that, depending on the nature of the product or services, it can be difficult for trust banks to fit assets neatly in one category or the other. Indeed, there is a large ''gray'' area in making this distinction, which supports a risk-focused supervisory approach rather than one based on the label applied to the assets.

Basis for the flat fee and managed asset rates. The proposal stated the flat fee and managed asset rate tiers were being proposed to better align the OCC's assessment structure with the OCC's responsibilities regarding independent trust banks. One commenter opined that the ''assets under management'' approach fails to take into account economies of scale or relative risks of off-balance sheet activities or the OCC's ratings of individual banks.

The OCC notes that the proposal does reflect economies of scale. As is explained further in the discussion of the final rule, all independent trust banks will pay a minimum flat fee. In addition to the minimum flat fee, independent trust banks with assets under management in excess of $1 billion will be assessed according to a declining marginal rate to reflect the economies of scale noted by the commenter. For institutions with $1 billion or less in assets under management, we have identified no additional economy of scale when analyzing the expenses of supervising these institutions. Accordingly, the final rule retains the approach of assessing these institutions by a minimum flat fee that is set at a level consistent with the OCC's expenses.

Application of assessment to de novo banks. The proposal did not distinguish the assessment of *de novo* independent trust banks from those already established. Six commenters suggested that the OCC assess ''start-up'' independent trust banks at a reduced rate or phase in the fees over a few years. These banks asserted that our proposed flat fee will be burdensome for them.

We believe that it would be inappropriate to charge *de novo* institutions less. While we recognize that newly formed trust banks typically will not be immediately profitable, they nevertheless require considerable supervisory attention as they set up systems and procedures and learn the compliance requirements. In addition, *de novo* national trust banks are often not new to trust business—they are often formed when an institution transfers its existing trust business into a national bank charter. For these reasons, the OCC believes that it is appropriate to treat *de novo* trust banks in the same manner as all other *de novo* national banks are treated.

Billable hours. The proposed rule did not include a billable hours component, although it did invite comment on whether the OCC should adopt a billable hours approach to assessing independent trust banks. Five commenters were of the view that a system of assessments for independent trust banks with $1 billion or less in managed assets based on billable hours would be more ''fair'' than a flat fee, because it would ensure that the assessment was directly linked to the amount of effort required of the OCC in any given assessment period.

After a careful consideration of the comments received, we have declined to adopt a billable hours approach. Based on experience gained previously with a billable hours system, we have concluded that such a system can have an adverse impact on the examiner/banker relationship. In addition, given the variability in scheduling examinations, a billable hours approach could result in assessments that vary from year to year for any given institution, thereby making it difficult for banks to anticipate expenses.

Final Rule

For the reasons discussed above, the OCC adopts the rule as proposed, with two changes. The first change, as described previously, is to clarify the meaning of ''affiliate'' for purposes of the assessment rule. The second is to address affiliations created for the

[2] *See Charters,* Corporate Manual, Office of the Comptroller of the Currency at 19–20 (1998) (describing trust banks).

purpose of evading the assessment regulation.

While the actual assessment rates will be set in the Notice of Fees, we have revised our projected fee schedule to include an additional marginal rate. Under the final rule, the OCC will assess all independent trust banks a minimum flat fee. Independent trust banks with assets under management in excess of $1 billion will pay an additional amount, calculated by multiplying assets under management by a declining marginal rate. That calculation will yield the managed assets component of the assessment for these banks. In either case, the trust bank will also be assessed an amount based on its book assets.

In the proposal, we set out estimated rates and fees that reflected the data we had at the time. These rates and fees have been adjusted in the final rule to reflect more recent data. Using these more recent data, we now anticipate that a bank having assets under management in excess of $1 billion would, in the upcoming year, calculate each of its semiannual assessments by multiplying the first $1 billion in assets under management by 0.00001875 [3], assets under management over $1 billion up to $10 billion by 0.00000375, assets under management over $10 billion up to $100 billion by 0.000000625, and assets under management over $100 billion by .0000004. The product then would be added to the assessment calculated under section 8.2 that is based on book assets.

For independent trust banks that have $1 billion or less in trust assets, the OCC will assess a flat fee that reflects the minimum expenses of regulating and supervising any independent trust bank, regardless of size. We expect that the fee due with each of the semiannual assessments for the upcoming year will be $18,750, in addition to the amount calculated under the formula based on balance sheet assets. The actual fees and rates used to calculate assessments of independent trust banks will be published in the Notice of Fees. Future rates and fees may be adjusted to reflect the OCC's latest expense data and the appropriate allocation of those expenses to national banks.

Regulatory Flexibility Act

An agency must prepare a Regulatory Flexibility Analysis if a rule it proposes will have a ''significant economic impact'' on a ''substantial number of small entities.'' 5 U.S.C. 603, 605. If, after an analysis of a rule, an agency determines that the rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) provides that the head of the agency may so certify. The OCC has reviewed the impact this final rule will have on small independent trust banks. Based on that review, the OCC certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The basis for this conclusion is that the rule will apply to a very small portion of national banks. For purposes of this Regulatory Flexibility Analysis and regulation, the OCC defines ''small independent trust banks'' to be those banks with less than $100 million in total assets, including managed assets.[4] Using this definition, the final rule will affect only seven small entities, representing less than 1% of all national banks. The OCC does not believe this to be a substantial number of small entities.

Executive Order 12866

The OCC has determined that this final rule is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that the final rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, this rulemaking requires no further analysis under the Unfunded Mandates Act.

List of Subjects in 12 CFR Part 8

National banks.

Authority and Issuance

For the reasons set forth in the preamble, the OCC proposes to amend part 8 of chapter I of title 12 of the Code of Federal Regulations as follows:

PART 8—ASSESSMENT OF FEES; NATIONAL BANKS; DISTRICT OF COLUMBIA BANKS

1. The authority citation for Part 8 continues to read as follows:

Authority: 12 U.S.C. 93a, 481, 482, and 3102 and 3108; 15 U.S.C. 78c and 781; and 26 D.C. Code 102.

2. In § 8.6, the section heading is revised and a new paragraph (c) is added to read as follows:

§ 8.6 Fees and assessments for examinations and investigations; independent trust banks.

* * * * *

(c) *Additional assessments on trust banks.* (1) *Independent trust banks.* The assessment of independent trust banks will include a managed asset component, in addition to the assessment calculated according to § 8.2 of this part, as follows:

(i) *Minimum fee.* All independent trust banks will pay a minimum fee, to be provided in the Notice of Comptroller of the currency Fees.

(ii) *Additional amount for independent trust banks with managed assets in excess of $1 billion.* Independent trust banks with managed assets in excess of $1billion will pay an amount that exceeds the minimum fee. The amount to be paid will be calculated by multiplying the amount of trust assets under management by a rate or rates provided by the OCC in the Notice of Comptroller of the Currency Fees.

(2) *Trust banks affiliated with full-service national banks.* The OCC will assess a trust bank in accordance with paragraph (c)(1) of this section, notwithstanding that the bank is affiliated with a full-service national bank, if the OCC concludes that the affiliation is intended to evade the assessment regulation.

(3) *Definitions.* For purposes of this paragraph (c) of this section, the following definitions apply:

(i) *Affiliate* has the same meaning as this term has in 12 U.S.C. 221a(b);

(ii) *Independent trust bank* is a national bank that has trust powers, does not primarily offer full-service banking, and is not affiliated with a full-service national bank; and

[3] This rate will yield $18,750 on a semi-annual basis, which is the same as the minimum flat fee for independent trust banks with $1 billion or less in managed assets.

[4] The OCC is using this definition for the sole purose of this preliminary regulatory flexibility analysis after consulting with the Small Business Administration's Office of Advocacy. The OTS, in its assessment regulation, also consulted with the Office of Advocacy and defined ''small savings associations'' as those with less than $100 million in total assets, including off-balance sheet assets. *See* Assessments and Fees, 63 FR 43642, 43646 (1998).

(iii) *Trust assets* are those assets reported on Schedule A, Line 18 of the Annual Report of Trust Assets (FFIEC Form 001). The form is available by mail from the Office of the Comptroller of the Currency, Asset Management Division, 250 E Street, SW., Washington, DC 20219.

Dated: October 20, 2000.

John D. Hawke, Jr.,

Comptroller of the Currency.

[FR Doc. 00–30843 Filed 12–4–00; 8:45 am]

BILLING CODE 4810–33–P

POSTAL SERVICE

39 CFR Part 111

Nonmailable Written, Printed, and Graphic Matter

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This final rule amends Part C030 of the Domestic Mail Manual (DMM) to provide for changes to the standards concerning written, printed, and graphic matter as a result of a recent Department of Justice opinion concerning lottery material.

EFFECTIVE DATE: December 14, 2000.

FOR FURTHER INFORMATION CONTACT: Jerome M. Lease (703) 292–4184.

SUPPLEMENTARY INFORMATION: As the result of an inquiry from the Postal Service, the Department of Justice has issued an opinion stating that the statute prohibiting the mailing of truthful advertising concerning lawful gambling activity, whether state-run or private, is no longer enforceable. The Attorney General has notified Congress that it will no longer enforce the criminal lottery statute (18 U.S.C. Section 1302) against gambling advertisement mailers, so long as the activity advertised is legal and the mailing does not provide any entry materials.

The Attorney General's opinion is based upon a decision of the Supreme Court issued in June 1999, which struck down similar prohibitions against truthful broadcast advertising for lawful gambling activity.

Accordingly, the Domestic Mail Manual (DMM) is revised to conform to the Attorney General's new guidance. The changes mean that:

1. Mailers may now mail advertisements for casinos and state-run or private lotteries (so long as that lottery is legal).

2. Newspapers and other publications that are mailed may run advertisements for lawful gambling activity without risking their authorizations to mail at periodicals rates.

3. The Postal Service may actively solicit advertising mail from licensed casinos and others lawfully conducting gambling activity.

The following prohibitions will still apply:

1. No mailing is acceptable if it provides entry materials or instrumentalities (lottery or raffle tickets, for instance) through the mail.

2. Mailing gambling proceeds, instrumentalities, or other means of participation continue to violate the criminal statute.

The changes announced in this document are effective on December 14, 2000, and also will be published in Postal Bulletin 22039 (12–14–00). These revisions to the DMM will be included in the printed version of DMM Issue 56, scheduled for January 2001 (pending a decision about the R2000–1 omnibus rate case). These amendments are being published without provision for public comment because the changes are required by law.

For the reasons discussed above, the Postal Service hereby adopts the following amendments to the Domestic Mail Manual (DMM) which is incorporated by reference in the Code of Federal Regulations (see 39 CFR part 111).

List of Subjects in 39 CFR Part 111

Postal Service.

PART 111—[AMENDED]

1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 3001–3011, 3201–3219, 3403–3406, 3621, 3626, 5001.

2. Revise part C030 of the DMM to include the following revisions:

C CHARACTERISTICS AND CONTENT

C000 General Information

* * * * *

C030 Nonmailable Written, Printed, and Graphic Matter

* * * * *

C031 Written, Printed, and Graphic Matter Generally

* * * * *

3.0 LOTTERY MATTER (18 USC 1302)

* * * * *

[Revise 3.2 to read as follows:]

3.2 Unlawful Mail Matter

Unlawful matter includes any letter, newspaper, periodical, parcel, stamped card or postcard, circular, or other matter permitting or facilitating participation in a lottery; any lottery ticket or part thereof or substitute; and any form of payment for a lottery ticket or share.

3.3 Fishing Contests, Indian Gaming Regulatory Act, Lotteries

[Remove item b. Redesignate items c and d as b and c, respectively. Revise newly redesignated item c to read as follows:]

* * * * *

c. An advertisement, list of prizes, or other information on a lottery not prohibited by the state where it is conducted.

* * * * *

An appropriate amendment to 39 CFR part 111 to reflect these changes will be published.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 00–30810 Filed 12–4–00; 8:45 am]

BILLING CODE 7710–12–U

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1504 and 1552

[FRL–6912–2]

Acquisition Regulation: Business Ownership Representation

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is amending the EPA Acquisition Regulation (EPAAR) to add a new clause that will provide the Agency with information regarding its contract awards. This new clause requests the successful awardee of an EPA contract to voluntarily identify the specific racial/ethnic category that best represents the ownership of its business. The information provided by the clause will not be used for the establishment of a set-aside or quota. The information will be used for general statistical purposes or for the purpose of focusing future outreach initiatives to those businesses owned by racial/ethnic groups who are unaware of EPA contracting opportunities.

DATES: This rule is effective January 4, 2001.

FOR FURTHER INFORMATION CONTACT: Leigh Pomponio, U.S. Environmental Protection Agency, Office of Acquisition Management (3802R), 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460, Telephone: (202) 564–4364.

SUPPLEMENTARY INFORMATION:

A. Background Information

A new Environmental Protection Agency Acquisition Regulation clause has been developed to provide statistical data concerning EPA awards made to businesses owned by various racial/ethnic groups, regardless of size or disadvantaged status. The new clause will be incorporated into all EPA solicitations and contracts expected to exceed the simplified acquisition threshold ($100,000). The clause asks EPA contract recipients to voluntarily identify the specific racial/ethnic category that best represents the ownership of its business. The statistics generated by the clause will help EPA target future outreach initiatives to both large and small business owners who are unaware of EPA contracting opportunities. Possible outreach initiatives may consist of workshops, seminars or conferences and may include presentations on how to do business with EPA or how the Government contracting process works. Such outreach efforts will not be limited to target audiences, but will be open to the general public. Further, the information provided by the clause will not be used to establish a set-aside or a quota.

Currently, statistical data is available to identify the types of small businesses receiving EPA awards. There is no mechanism for obtaining similar information for large businesses. The Federal Acquisition Regulation clause at 52.219–1 (Alt II) permits the Department of Defense, the National Aeronautics and Space Administration, and the U.S. Coast Guard to gather ethnic and minority ownership information. However, the Federal Acquisition Regulation clause at 52.219–1(ALT II) only pertains to offerors who represent themselves as small disadvantaged business concerns, as defined in Title 13 of the Code of Federal Regulations, section 124.1002.

The business ownership racial/ethnic groups in this new clause are similar to the categories listed in the Office of Management and Budget Statistical Policy Directive No. 15, Race and Ethnic Standards of Federal Statistics and Administrative Reporting. The clause contains minor variations to enable EPA to compare collected data to data published by the US Census Bureau. As Census Bureau data becomes compliant with the Office of Management and Budget Statistical Policy Directive No. 15, EPA will adjust the clause accordingly.

The Civilian Agency Acquisition Council (CAAC) was consulted regarding the development of this clause, and did not voice any objections.

The comment period for the proposed rule extended from June 23, 2000, to August 22, 2000, and yielded one external comment. A Summary and Analysis of Comments document containing the EPA response is included in the docket for this rule and is available by contacting Leigh Pomponio at (202) 564–4364 or E-mail: *pomponio.leigh@epa.gov.*

In response to the external comment, EPA has made three minor changes to the proposed rule to better describe: (1) Why EPA needs the new clause, (2) the information requirements of the new clause, and (3) statistical evidence to support that there is not an impact on a substantial number of small entities.

While we recognize that statistical data may be available for small businesses, there is no mechanism for obtaining similar data for large businesses. The intent of the new clause is to provide statistical data on whether businesses owned by various racial and ethnic groups are represented in Agency contract awards. Such data will help EPA target audiences for its outreach initiatives.

B. Executive Order 12866

This final rule is not a significant regulatory action for the purposes of Executive Order 12866. Therefore, no review was required by the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB).

C. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2030–0041. EPA utilizes outside contractors for the performance of many critical activities. EPA encourages full participation in its contractor selection process and would like to make information about contracting opportunities readily available to the contracting community. By collecting business ownership data, EPA will be able to analyze the data and make business decisions relative to outreach activities. The information collected will not be used to make award decisions. Responses to the collection will be voluntary, and a response is not required to obtain or retain a benefit. Responses will be treated as Confidential Business Information (CBI). CBI is protected from public release in accordance with the Agency's confidentiality regulation, 40 CFR 2.201 *et seq.*

The burden of responding under this rule is estimated to average 3 minutes per response. The estimated number of respondents, based upon average annual awards, is 240. The frequency of responses is 1 per respondent. Therefore, the estimated total annual hour burden for all respondents is 12 hours (3 x 240 x 1 divided by 60). There are no estimated total annualized capital and operating and maintenance cost burden associated with this rule. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search the data sources; to complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9, and 48 CFR Chapter 15. EPA is amending the table in 48 CFR Chapter 15, of currently approved ICR control numbers issued by OMB for various regulations, to list the information requirements contained in this final rule.

D. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impact of this rule on small entities, small entity is defined as: (1) A small business that meets the definition of a small business found in the Small Business

Act and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, the Agency certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The impact on small entities will not be significant. This final rule is voluntary and will have no effect on the evaluation criteria for award. As noted in the Information Collection Request **Federal Register** (65 FR 47985, August 4, 2000) document and the *Paperwork Reduction Act* discussion above, contractors will require only a minimal amount of time (three minutes per respondent) to complete the clause. Therefore, to the extent that this does result in some contractor-incurred costs, EPA anticipates that these will be de minimus. Further, because the clause will only be applicable over the simplified acquisition threshold ($100,000), this final rule will not have an impact on a substantial number of small entities. It is noted that, historically, small businesses do not receive a large percentage of EPA contracts which exceed the simplified acquisition threshold ($100,000). In fiscal year 1999, 137 small businesses received EPA awards over $100,000. This represents only 17.5% of the agency's total contract awards which exceeded $10,000 in fiscal year 1999. It is anticipated that this percentage will remain the same or be minimally higher for fiscal year 2000.

E. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess their regulatory actions on State, local, and Tribal governments, and the private sector. This final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in aggregate, or the private sector in any one year. Any private sector costs for this action relate to paperwork requirements and associated expenditures that are far below the level established for UMRA applicability. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

F. Executive Order 13045

Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions on environmental health or safety risks that have a disproportionate effect on children.

G. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian Tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay for the direct compliance costs incurred by the Tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected Tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

This rule does not significantly or uniquely affect the communities of Indian Tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

H. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rule does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

I. Executive Order 13132

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule amends the EPA Acquisition Regulation relating to internal agency procedures addressing business ownership categories of contractors who receive EPA awards. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

J. Submission to Congress and the General Accounting Office

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Authority: The provisions of this regulation are issued under 5 U.S.C. 301; section 205(c), 63 Stat. 390, as amended 40 U.S.C. 486(c).

List of Subjects in 48 CFR Parts 1504 and 1552

Government procurement.

Therefore, 48 CFR Chapter 15 is amended as set forth below:

1. The authority citation for Parts 1504 and 1552 is revised to read as follows:

Authority: 5 U.S.C. 301; Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); 41 U.S.C. 418b.

2. Part 1504 is amended by adding subpart 1504.6 as follows:

PART 1504—ADMINISTRATIVE MATTERS

Subpart 1504.6—Contract Reporting

1504.670 Business Ownership Representation.

Contracting officers shall insert the clause at 1552.204–70, Business Ownership Representation, in solicitations and contracts with an estimated dollar value greater than the simplified acquisition threshold. Completion of the clause by the successful awardee is voluntary.

3. Subpart 1552.2 is amended by adding 1552.204–70 as follows:

1552.204–70 Business Ownership Representation.

As prescribed in 1504.670, insert the following clause in solicitations and contracts:

Business Ownership Representation (JAN 2001)

The successful awardee should check one or more of the categories below that represents its business ownership and return this information to the contracting officer within ten (10) calendar days after award. Completion of this clause by the successful awardee is voluntary.

''Ownership,'' as used in this clause, means: (a) At least 51 percent of the concern is owned by one or more individuals from a category listed below; or, in the case of any publicly owned business, at least 51 percent of the stock of the concern is owned by one or more such individuals; and (b) The management and daily business operations of the concern are controlled by one or more such individuals.

Ethnicity

[ ] Hispanic or Latino.
[ ] Not Hispanic or Latino.

Race

[ ] American Indian, Eskimo, or Aleut.
[ ] Asian or Pacific Islander.
[ ] Black or African American.
[ ] White.

(End of clause)

Dated: November 29, 2000.

Judy S. Davis,

Acting Director, Office of Acquisition Management.

[FR Doc. 00–30911 Filed 12–4–00; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[I.D. 102600E]

Fraser River Sockeye and Pink Salmon Fisheries; Inseason Orders

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Inseason orders.

SUMMARY: NMFS publishes the Fraser River salmon inseason orders regulating salmon fisheries in U.S. waters. The orders were issued by the Fraser River Panel (Panel) of the Pacific Salmon Commission (Commission) and subsequently approved and issued by NMFS during the 2000 sockeye and pink salmon fisheries within the U.S. Fraser River Panel Area. These orders established fishing times, areas, and types of gear for U.S. treaty Indian and all–citizen fisheries during the period the Commission exercised jurisdiction over these fisheries. Due to the frequency with which inseason orders are issued, publication of individual orders is impracticable. The 2000 orders are therefore being published in this document to avoid fragmentation.

DATES: Each of the following inseason actions was effective upon the dates and times as specified at 50 CFR 300.97(b)(1). Comments will be accepted through December 20, 2000.

ADDRESSES: Comments may be mailed to Donna Darm, Acting Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way N.E., BIN C15700–Bldg. 1, Seattle, WA 98115–0070. Information relevant to this document is available for public review during business hours at the office of the Regional Administrator, Northwest Region, NMFS.

FOR FURTHER INFORMATION CONTACT: William L. Robinson, 206–526–6140.

SUPPLEMENTARY INFORMATION: The treaty between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon was signed at Ottawa on January 28, 1985, and subsequently was given effect in the United States by the Pacific Salmon Treaty Act (Act) at 16 U.S.C. 3631–3644.

Under authority of the Act, Federal regulations at 50 CFR part 300 subpart F provide a framework for implementation of certain regulations of the Commission and inseason orders of the Commission's Panel for U.S. sockeye and pink salmon fisheries in the Fraser River Panel Area.

The regulations close the Fraser River Panel Area (U.S.) to U.S. sockeye and pink salmon fishing unless opened by Panel orders or by inseason regulations published by NMFS that give effect to Panel orders. During the fishing season, NMFS may issue regulations that establish fishing times and areas consistent with the Commission agreements and inseason orders of the Panel. Such orders must be consistent with domestic legal obligations. The Regional Administrator, Northwest Region, NMFS, issues the inseason orders. Official notification of these inseason actions of NMFS is provided by two telephone hotline numbers described at 50 CFR 300.97(b)(1).

Inseason orders must be published in the **Federal Register** as soon as practicable after they are issued. Due to the frequency with which inseason orders are issued, publication of individual orders is impractical. Therefore, the 2000 orders are therefore being published in this document to avoid fragmentation.

The following inseason orders were adopted by the Panel and issued for U.S. fisheries by NMFS during the 2000 fishing season. The times listed are local times, and the areas designated are Puget Sound Management and Catch Reporting Areas as defined in the Washington State Administrative Code at Chapter 220–22.

Order No. 2000–1: Issued 5 p.m., July 21, 2000

Treaty Indian Fishery

Areas 4B, 5 and 6C: Open for drift gillnets from 6 p.m. July 21, 2000, to 12 noon July 26, 2000.

Order No. 2000–2: Issued 1 p.m. July 25, 2000

Treaty Indian Fishery

Areas 4B, 5, and 6C: Open for drift gillnets from 12 noon July 26, 2000, to 12 noon July 29, 2000.

Areas 6,7 and 7A: Open for net fishing from 4 a.m. to 8 p.m. on July 26, 2000.

All Citizen Fishery

Areas 7 and 7A: Purse seine fishery open from 6 a.m. to 3 p.m. on July 27, 2000. Drift gillnet fishery open from 3 p.m. to 11:59 p.m. on July 27, 2000. Reef net fishery open from 5 a.m. to 9 p.m. on July 29, 2000.

Order No. 2000–3: Issued 4 p.m., July 25, 2000, and supersedes all previous inseason orders

Treaty Indian Fishery

Areas 4B, 5, and 6C: Drift gillnet open from 12 noon July 26, 2000, to 12 noon July 29, 2000.

Areas 6, 7 and 7A: Open for net fishing from 4 a.m. July 26, 2000, to 8 a.m. July 27, 2000.

All Citizen Fishery

Areas 7 and 7A: Drift gillnet fishery open 8 a.m. to 11:59 p.m. July 27, 2000. Purse seine fishery open 5 a.m. to 9 p.m. July 28, 2000. Reef net fishery open from 5 a.m. to 9 p.m. on July 29, 2000, and July 30, 2000.

Order No. 2000–4: Issued 4 p.m. August 2, 2000, and supersedes all previous inseason orders

All Citizen Fishery

Areas 7 and 7A: Purse seine fishery open from 5 a.m. to 9 p.m. August 3, 2000, and from 5 a.m. to 9 p.m. August 4, 2000. Drift gillnet fishery open from 7:15 a.m. to 11:59 p.m. August 3, 2000, and from 7:15 a.m. to 11:59 p.m. August 4, 2000.

Order No. 2000–5: Issued at 4:00 p.m., August 5, 2000

Treaty Indian Fishery

Areas 4B, 5 and 6C: Open for drift gillnets from 6 p.m. August 5 to 6:00 p.m. August 7, 2000.

Areas 6, 7 and 7A: Open for net fishing from 12:00 noon August 6, 2000, to 6:00 p.m. August 7, 2000.

Order No. 2000–6: Issued at 4:00 p.m. August 8, 2000

All Citizen Fishery

Areas 7 and 7A: Reef net fishery open from 6:00 a.m. to 6:00 p.m. August 9, 2000. Purse seine fishery open from 6:00 a.m. to 6:00 p.m. August 10, 2000. Drift gillnet fishery open from 8:00 a.m. to 8:00 p.m. on August 10, 2000.

Order No. 2000–7: Issued at 4:00 p.m. August 15, 2000

All Citizen Fishery

Areas 7 and 7A south and east of a line from Iwersen's Dock on Point Roberts to Georgina Point Light at the entrance to Active Pass in British Columbia: Purse seine fishery open from 6:00 a.m. to 6:00 p.m. on August 16, 2000. Drift gillnet fishery open from 8:00 a.m. to 8:00 p.m. August 16, 2000.

Order No. 8–2000: Issued at 4:00 p.m. August 22, 2000

United States Fraser River Panel Area Waters

Areas 4B, 5 and 6C, relinquish regulatory control effective August 27, 2000.

Areas 6 and 7 and Area 7A south and east of a line from Iwerson's Dock on Point Roberts to Georgina Point Light at the entrance to Active Pass in British Columbia, relinquish regulatory control effective August 27, 2000.

Classification

Because these fisheries have been closed, NMFS has determined that good cause exists for this notification to be issued without affording a prior opportunity for public comment because such notification would be unnecessary, impracticable, and contrary to the public interest.

This action is authorized by 50 CFR 300.97, and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 3636(b).

Dated: November 28, 2000.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 00–30818 Filed 12–4–00; 8:45 am]

BILLING CODE: 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[I.D. 111400A]

Atlantic Highly Migratory Species (HMS) Fisheries; Large Coastal, Pelagic, and Small Coastal Shark Species

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Fishing season notification.

SUMMARY: NMFS notifies eligible participants of the opening and closing of fishing seasons for Atlantic large coastal sharks (LCS), small coastal sharks (SCS), and pelagic sharks.

DATES: The fishery opening for LCS is effective January 1, 2001; the LCS closure is effective from 11:30 p.m. local time March 24, 2001, through June 30, 2001. The fishery opening for SCS and pelagic sharks is January 1, 2001; no closure dates for these fisheries are included in this document.

FOR FURTHER INFORMATION CONTACT: Margo Schulze-Haugen or Karyl Brewster-Geisz, 301-713-2347; fax 301-713-1917.

SUPPLEMENTARY INFORMATION: The Atlantic shark fishery is managed under the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP), and its implementing regulations found at 50 CFR part 635 issued under authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

On June 30, 1999, NMFS received a Court Order from Judge Steven D. Merryday enjoining NMFS from enforcing the 1999 regulations, 64 FR 29090 (May 28, 1999), regarding Atlantic shark commercial catch quotas and fish-counting methods (including the counting of dead discards and state commercial landings after Federal closures) that are different from the quotas and fish counting methods prescribed by the 1997 Atlantic shark regulations, 62 FR 16648 (April 7, 1997). On June 12, 2000, the Court issued another order permitting NMFS to implement and enforce the 1999 prohibited species provisions. NMFS and plaintiffs recently reached settlement in this litigation; NMFS intends to publish an emergency rule consistent with the settlement agreement once the Court stipulates to the settlement agreement.

As such, the annual 2001 LCS quota continues at the 1997 level of 1,285 mt dw for all species of LCS, (Table 1 of appendix A to part 635), with no minimum size on ridgeback LCS. The SCS and pelagic shark quotas also remain at the annual 1997 levels, of 1,760 and 580 mt dw, respectively. The prohibited species provisions will be enforced. A list of prohibited shark species can be found in Table 1 of Appendix A to part 635, part D. The limited access provisions for commercial harvests still apply, including trip limits for directed and incidental shark permit holders.

The first semiannual fishing season of the 2001 fishing year for the commercial fishery for LCS in the western north Atlantic Ocean, including the Gulf of Mexico and the Caribbean Sea, will open January 1, 2001. In 1998, 1999, and 2000, the first semiannual fishing season remained open until March 31 of each year. In all three years, the semiannual quota was exceeded. Catch rate data from the first semiannual fishing season from 1998 and 1999 for LCS species indicate that approximately 70 percent of the LCS quota had been taken by the end of February of each year. In 2000, catch rate data indicate that approximately 55 percent of the LCS quota had been taken by the end of February. In addition, catch rate data in all three years indicate that catch rates increase through the month of March. Accordingly, the Assistant Administrator for Fisheries (AA) has determined, based on these catch rates and the available quota, that the quota for the 2001 first semiannual season for LCS in or from the western north Atlantic Ocean, including the Gulf of Mexico and Caribbean Sea, will be attained as of March 24, 2001. The LCS fishery will close March 24, 2001, at 11:30 p.m. local time.

During a closure, retention of, fishing for, possessing or selling LCS are prohibited for persons fishing aboard vessels issued a limited access permit under 50 CFR 635.4. The sale, purchase, trade, or barter of carcasses and/or fins of LCS harvested by a person aboard a vessel that has been issued a permit under 50 CFR 635.4 are prohibited, except for those that were harvested, offloaded, and sold, traded, or bartered prior to the closure and were held in storage by a dealer or processor.

The first semiannual quota for SCS is 880 mt dw. The first semiannual quota for pelagic sharks is 290 mt dw. When quotas are projected to be reached for these fisheries, the AA will file notification of closure at the Office of the Federal Register at least 14 days before the effective date.

Those vessels that have not been issued a limited access permit under 50 CFR 635.4 may not sell sharks and are subject to the recreational retention limits and size limits specified at 50 CFR 635.22(c) and 635.20(d), respectively. The recreational fishery is not affected by any closure in the commercial fishery.

Classification

This action is taken under 50 CFR part 635 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 29, 2000.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 00–30821 Filed 12–4–00; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register

Vol. 65, No. 234

Tuesday, December 5, 2000

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

RIN 3150—AG66

List of Approved Spent Fuel Storage Casks: TN–32 Revision

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations revising the Transnuclear, Inc. TN–32 cask system listing within the ''List of Approved Spent Fuel Storage Casks'' to include Amendment No. 1 to the Certificate of Compliance (CoC). This amendment will allow holders of power reactor operating licenses to store spent fuel in the cask under the revised conditions. The changes proposed for Amendment No. 1 to the TN–32 CoC include the addition of the B&W/FCF 17 x 17 Mark BW assembly to the Technical Specification for ''Fuel to be stored in the TN–32 Cask,'' with revised bounding characteristics, and (2) a revised TS for ''Site Specific Parameters and Analysis,'' to allow analysis of verification of allowable seismic loads.

DATES: Comments on the proposed rule must be received on or before January 4, 2001.

ADDRESSES: Submit comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attn: Rulemakings and Adjudications Staff.

Deliver comments to 11555 Rockville Pike, Rockville, MD, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

You may also provide comments via the NRC's interactive rulemaking website (http://ruleforum.llnl.gov). This site provides the capability to upload comments as files (any format) if your web browser supports that function. For information about the interactive rulemaking site, contact Ms. Carol Gallagher (301) 415–5905; e-mail CAG@nrc.gov.

Certain documents related to this rule, including comments received, may be examined at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. These documents also may be viewed and downloaded electronically via the rulemaking website.

Documents created or received at the NRC after November 1, 1999, are also available electronically at the NRC's Public Electronic Reading Room on the Internet at http://www.nrc.gov/NRC/ADAMS/index.html. From this site, the public can gain entry into the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. For more information, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by email to pdr@nrc.gov.

FOR FURTHER INFORMATION CONTACT: Roger W. Broseus, telephone (301) 415–7608, e-mail rwb@nrc.gov of the Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION: For additional information, see the Direct Final Rule published in the final rules section of this **Federal Register**.

Procedural Background

The NRC is also publishing this amendment as a direct final rule because it represents a limited and routine change to an existing CoC that is expected to be noncontroversial; adequate protection of public health and safety continues to be ensured. This amendment is not considered to be a significant amendment by the NRC staff. The direct final rule will become effective on February 20, 2001. However, if the NRC receives significant adverse comments on the direct final rule by January 4, 2001, then the NRC will publish a notice to withdraw the direct final rule. If the direct final rule is withdrawn, the NRC will address the comments received in response to the proposed revisions in a subsequent final rule. Absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period for this action if the direct final rule is withdrawn.

List of Subjects in 10 CFR Part 72

Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Reporting and recordkeeping requirements, Security measures, Spent fuel.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553; the NRC is proposing to adopt the following amendments to 10 CFR Part 72.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

1. The authority citation for Part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 10d–48b, sec. 7902, 10b Stat. 31b3 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c),(d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2244 (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

2. In § 72.214, Certificate of Compliance 1021 is revised to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate Number: 1021

Initial Certificate Effective Date: April 19, 2000
Amendment Number 1 Effective Date: February 20, 2001
SAR Submitted by: Transnuclear, Inc.
SAR Title: Final Safety Analysis Report for the TN–32 Dry Storage Cask
Docket Number: 72–1021
Certificate Expiration Date: April 19, 2020
Model Number: TN–32, TN–32A, TN–32B

* * * * *

Dated at Rockville, Maryland, this 16th day of November, 2000.

For the Nuclear Regulatory Commission.

William D. Travers,

Executive Director for Operations.

[FR Doc. 00–30907 Filed 12–4–00; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 5

[Docket No. 00–32]

RIN 1557–AB92

Operating Subsidiaries of Federal Branches and Agencies

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Proposed rule.

SUMMARY: Consistent with the principle of national treatment for foreign banks operating in the United States established by the International Banking Act of 1978, the Office of the Comptroller of the Currency (OCC) proposes to enable a Federal branch or agency to establish or maintain an operating subsidiary in generally the same manner that a national bank may establish or control an operating subsidiary.

DATES: Comments must be received by February 5, 2001.

ADDRESSES: Please direct comments to: Office of the Comptroller of the Currency, Public Information Room, 250 E Street, SW, Mail Stop 1–5, Washington, DC, 20219, Attention: Docket No. 00–32. In addition, comments may be sent by facsimile transmission to fax number 202–874–5274, or by electronic mail to *regs.comments@occ.treas.gov*. Comments may be inspected and photocopied at the OCC's Public Reference Room, 250 E. Street, SW, Washington, DC, between 9 a.m. and 4:30 p.m. on business days. You can make an appointment to inspect the comments by calling 202–874–5043.

FOR FURTHER INFORMATION CONTACT: Martha Clarke, Senior Attorney, International Activities Division, 202–874–0680; Stuart Feldstein, Assistant Director, Legislative and Regulatory Activities Division, 202–874–5090; Heidi M. Thomas, Senior Attorney, Legislative and Regulatory Activities Division, 202–874–5090, or Carlos Hernandez, Senior International Advisor, International Banking and Finance Division, 202–874–4730.

SUPPLEMENTARY INFORMATION:

Background

The International Banking Act of 1978 (12 U.S.C. 3101 et seq.) (the IBA) applies the national treatment principle to the regulation of foreign bank activities in the United States. Specifically, under the national treatment principle established by the IBA, the operations of a foreign bank conducted through a Federal branch or agency shall be conducted with the same rights, privileges, conditions, and limitations that apply to a national bank operating at the same location, subject to the OCC's regulations.[1] 12 U.S.C. 3102(b). For example, the powers of national banks that are set forth in the National Bank Act, such as lending money and engaging in certain securities and insurance sales activities, are not expressly repeated in the IBA but are provided to Federal branches and agencies by operation of section 3102(b).

Congress has subsequently enacted other legislation that confirms that the IBA need not be amended each time there is a change to the banking laws that affects national banks, unless the IBA prohibits or limits that specific activity. For example, when Congress authorized broader leasing authority for national banks in 1987, Federal branches and agencies could avail themselves of this authority by operation of section 3102(b) of the IBA. Thus, it is not necessary to amend the IBA to authorize Federal branches and agencies to take advantage of powers authorized for national banks. Consistent with these principles, this proposal provides that a Federal branch or agency may establish an operating subsidiary to the same extent as a similarly situated national bank.

Description of the Proposal

12 CFR 5.34 sets forth application or notice procedures for national banks engaging in activities through an operating subsidiary and lists the activities that qualify for the notice procedures. The proposal provides that § 5.34 applies to a Federal branch or agency that seeks to establish or maintain any subsidiary that a national bank would be authorized to establish or control under § 5.34. The procedures of § 5.34 apply to the Federal branch or agency with certain modifications that reflect the differences in the nature of Federal branches and agencies compared to national banks.

Section 5.34(e)(5)(iv) provides that a national bank that is well capitalized and well managed may acquire or establish an operating subsidiary, or perform a new activity in an existing operating subsidiary, by filing a notice with the OCC within 10 days after acquiring or establishing the subsidiary, or commencing the activity, if the activities are listed in § 5.34(e)(5)(v). National banks that do not meet the well capitalized and well managed criteria also may acquire or establish an operating subsidiary by filing an application with, and receiving approval from, the OCC. 12 CFR 5.34(e)(5)(i). Finally, § 5.34(e)(5)(vi) provides that a national bank may acquire or establish an operating subsidiary without filing an application or providing notice to the OCC, if the bank is adequately capitalized or well capitalized and the activities of the new subsidiary meet certain conditions.

Under the proposal, a Federal branch or agency is considered well capitalized for purposes of § 5.34 if it meets the definition of ''well capitalized'' that the OCC uses when authorizing an extended examination cycle for certain Federal branches and agencies. *See* 12 CFR 4.7(b)(1)(iii).[2] Section 4.7(b)(1)(iii) requires that: a foreign bank's most recently reported capital adequacy position consists of, or is equivalent to, Tier 1 and total risk-based capital ratios of at least 6 percent and 10 percent, respectively, on a consolidated basis; or the Federal branch or agency has maintained on a daily basis, over the past three quarters, eligible assets in an amount not less than 108 percent of the preceding quarter's average third party liabilities (determined consistent with applicable Federal and state law), and

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[1] *See Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 615 (D.C. Cir. 1983) (confirming the OCC's interpretation of how the national treatment principle applies).

[2] 12 CFR 4.7 generally provides that the OCC may conduct a full-scope, on-site examination of certain well capitalized and well managed Federal branches and agencies at least once during each 18-month period, rather than each 12-month period. The FRB applies the same capital and management requirements when determining whether a State branch or agency will be subject to the 18-month examination schedule. 12 CFR 211.26(c)(2).

sufficient liquidity is currently available to meet obligations to third parties.

Under the proposal, a Federal branch or agency is well managed if: the Federal branch or agency has a composite Risk Management, Operational Controls, Compliance, and Asset Quality (ROCA) supervisory rating of 1 or 2 at its most recent examination; or in the case of a Federal branch or agency that has not been examined, the Federal branch or agency has and uses managerial resources that the OCC determines are satisfactory.

The OCC will apply other relevant regulatory standards to Federal branches and agencies that establish and maintain operating subsidiaries as appropriate in light of the differences in corporate structure between national banks and Federal branches and agencies. For example, current § 5.34(e)(4) requires that pertinent book figures of the parent bank and its operating subsidiary to be combined for the purpose of applying statutory limitations when combination is needed to effect the intent of the statute, *e.g.,* for purposes of the statutory dividend restrictions, lending limits, or investments in bank premises. See 12 U.S.C. 56, 60, 84, and 371d. Any limitation or restriction based on the capital of a national bank (*e.g.,* the lending limit at 12 U.S.C. 84) refers, as applied to a Federal branch or agency, to the dollar equivalent of the capital of the foreign bank. See 12 U.S.C. 3102(b). For purposes of determining compliance with the limitation or restriction, pertinent book figures of the Federal branch or agency and its operating subsidiary shall be combined. If the foreign bank has more than one Federal branch or agency, pertinent book figures of all its Federal branches and agencies and their operating subsidiaries shall be combined.

Comment Solicitation

The OCC requests comment on all aspects of this proposal.

The OCC requests comment on whether the proposal is written clearly and is easy to understand. On June 1, 1998, the President issued a Memorandum directing each agency in the Executive branch to write its rules in plain language. This directive applies to all new proposed and final rulemaking documents issued on or after January 1, 1999. In addition, Public Law 106–102 requires each Federal agency to use plain language in all proposed and final rules published after January 1, 2000. The OCC invites comment on how to make this rule clearer. For example, you may wish to discuss:

(1) Whether we have organized the material to suit your needs;

(2) Whether the requirements of the rule are clear; or

(3) Whether there is something else we could do to make the rule easier to understand.

Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, the Comptroller of the Currency certifies that this proposal will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that the proposal will not result in expenditures by State, local, or tribal governments or by the private sector of $100 million or more. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

Executive Order 12866 Determination

The Comptroller of the Currency has determined that this rule does not constitute a ''significant regulatory action'' for the purposes of Executive Order 12866.

Paperwork Reduction Act

Respondents are not required to respond to these collections of information unless they display a currently valid Office of Management and Budget (OMB) control number.

The collection of information requirements contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Alexander Hunt, Desk Officer, Office of Management and Budget, Paperwork Reduction Project (1557–0215), Washington, DC 20503, with copies to the Jessie Dunaway, Legislative and Regulatory Activities Division (1557–0215, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219.

The collection of information requirements in this proposal are found in 12 CFR 5.34. The likely respondents are Federal branches and agencies of foreign banks.

Estimated average annual burden hours per Federal branch and agency respondent: 1 hour

Estimated number of Federal branch and agency respondents: 20

Estimated total annual reporting burden: 20 hours

The OCC invites comment on:

(1) Whether the collections of information contained in this notice of proposed rulemaking are necessary for the proper performance of the agency's functions, including whether the information has practical utility;

(2) The accuracy of the estimate of the burden of the proposed information collections;

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

(4) Ways to minimize the burden of the information collections on respondents, including the use of automated collection techniques or other forms of information technology; and

(5) Estimates of capital or start-up costs and costs of operation, maintenance, and purchases of services to provide information.

List of Subjects in 12 CFR Part 5

Administrative practice and procedure, National banks, Reporting and recordkeeping requirements, Securities.

Authority and Issuance

For the reasons set forth in the preamble, the OCC proposes to amend part 5 of chapter I of Title 12 of the Code of Federal Regulations as follows:

PART 5—RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES

1. The authority citation for part 5 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.*, 93a; and section 5136A of the Revised Statutes (12 U.S.C. 24a).

2. In § 5.34:

A. Revise paragraph (c); and

B. Revise paragraphs (d)(2) and (d)(3) to read as follows:

§ 5.34 Operating subsidiaries.

* * * * *

(c) *Scope*. This section sets forth authorized activities and application or notice procedures for national banks engaging in activities through an operating subsidiary. The procedures in this section do not apply to financial subsidiaries authorized under § 5.39. This section applies to a Federal branch or agency that establishes or maintains any subsidiary that a national bank is authorized to establish or control under this section.

(d) * * *

(2) *Well capitalized* means the capital level described in 12 CFR 6.4(b)(1) or, in the case of a Federal branch or agency, the capital level required by 12 CFR 4.7(b)(1)(iii).

(3) *Well managed* means, unless otherwise determined in writing by the OCC:

(i) In the case of a national bank:

(A) The national bank has received a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System in connection with its most recent examination; or

(B) In the case of any national bank that has not been examined, the existence and use of managerial resources that the OCC determines are satisfactory.

(ii) In the case of a Federal branch or agency:

(A) The Federal branch or agency has received a composite ROCA supervisory rating (which rates risk management, operational controls, compliance, and asset quality) of 1 or 2 at its most recent examination; or

(B) In the case of a Federal branch or agency that has not been examined, the existence and use of managerial resources that the OCC determines are satisfactory.

* * * * *

Dated: November 28, 2000.

John D. Hawke, Jr.,

Comptroller of the Currency.

[FR Doc. 00–30885 Filed 12–4–00; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 5 and 9

[Docket No. 00–30]

RIN 1557–AB79

Fiduciary Activities of National Banks

AGENCY: Office of the Comptroller of the Currency.

ACTION: Notice of proposed rulemaking; advance notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC), through a Notice of Proposed Rulemaking (NPRM), is proposing to amend its regulations to codify OCC interpretations on national bank multi-state trust operations. The purpose of these changes is to provide enhanced guidance to national banks engaging in fiduciary activities. The OCC also is inviting comment, through an advance notice of proposed rulemaking (ANPR), on whether uniform standards of care generally applicable to national bank trustees' administration of private trusts and investment of private trust property should be established. The purpose of the ANPR is to determine the extent to which national banks that engage in fiduciary activities in more than one state experience problems in their administration as a result of complying with more than one state's laws and, if problems exist, to invite comment on ways in which the OCC could address these problems.

DATES: Comments must be received by February 5, 2001.

ADDRESSES: Send your comments to: Office of the Comptroller of the Currency, Public Information Room, 250 E Street, SW, Mail Stop 1–5, Washington, DC 20219, Attention: Docket No. 00–30. Comments will be available for public inspection and photocopying at the same location. In addition, you may send comments by fax to (202) 874–5274, or by electronic mail to regs.comments@occ.treas.gov.

FOR FURTHER INFORMATION CONTACT: For questions concerning the NPRM, contact Lisa Lintecum, Director, or Joel Miller, Senior Advisor, Asset Management, (202) 874–4447; Richard Cleva, Senior Counsel, Bank Activities and Structure, (202) 874–5300; Michele Meyer, Senior Attorney, Legislative and Regulatory Activities Division, (202) 874–5090; or William Dehnke, Assistant Director, Securities and Corporate Practices Division, (202) 874–5210.

SUPPLEMENTARY INFORMATION: This rulemaking consists of two parts. First, the OCC, through an NPRM, proposes to codify recent OCC interpretations in which we analyzed the extent to which a national bank may, in states other than its home state, (a) have trust offices or trust representative offices, (b) engage in fiduciary activities, and (c) market its fiduciary services to customers. Second, we invite comments, through an ANPR, on whether the OCC should propose to add a new section to part 9 that would establish national standards for the conduct of fiduciary activities by national banks. These ideas are explained more fully below.

NPRM: Codification of OCC Interpretations

The OCC has issued three interpretive letters [1] addressing multi-state fiduciary activities. In IL 695, we concluded that a national bank with its main office in one state may act in a fiduciary capacity in any other state that permits its own in-state fiduciaries to act in that capacity, including at trust offices in other states. In IL 866 and IL 872, we further clarified that a national bank that acts in a fiduciary capacity in one state may market its fiduciary services to customers in other states, solicit business from them, and act as fiduciary for customers located in other states. The proposal codifies these interpretations, which affect several sections in part 9, as explained in the following discussion.

Definitions (Revised § 9.2)

The second sentence in current § 9.2(g) provides that the extent of fiduciary powers is the same for out-of-state national banks as in-state national banks. This sentence is unnecessary in light of proposed new § 9.7, which sets forth the rules concerning multi-state fiduciary operations, and the proposal removes it.

Proposed §§ 9.2(j) and (k) define ''trust office'' and ''trust representative office,'' respectively. These terms are used in proposed new § 9.7. A ''trust office'' is defined as an office of a national bank, other than a main office or a branch, at which the bank acts in a fiduciary capacity. A trust representative office is an office of a national bank, other than a main office, branch, or trust office, at which the bank performs activities ancillary to its fiduciary business, but does not act in a fiduciary capacity. These ancillary activities might include, for instance, advertising, marketing, and soliciting for fiduciary business; contacting existing or potential customers, answering questions, and providing information about matters related to their accounts; acting as a liaison between the trust office and the customer (*e.g.,* forwarding requests for distribution or changes in investment objectives, or forwarding forms and funds received from the customer); or simply inspecting or maintaining custody of fiduciary assets.

Neither a trust office nor trust representative office is a branch for purposes of the McFadden Act, 12

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[1] OCC Interpretive Letter No. 872 (Oct. 28, 1999) (IL 872); OCC Interpretive Letter No. 866 (Oct. 8, 1999) (IL 866); and OCC Interpretive Letter No. 695 (Dec. 8, 1995), *reprinted in* [1995–1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81.010 (IL 695).

U.S.C. 36, which governs the location of national bank branches. In order to be considered a branch under the McFadden Act, a bank facility must perform at least one of the core banking functions of receiving deposits, paying checks, or lending money. 12 U.S.C. 36(j). The locational limitations of 12 U.S.C. 36 are not intended to reach all activities in which national banks are authorized to engage, but only core banking functions. *See Clarke* v. *Securities Industry Association,* 479 U.S. 388 (1987) (considering securities brokerage powers). Proposed §§ 9.2(j) and (k) therefore state that a trust office or a trust representative office is not a branch unless it is also an office at which deposits are received, or checks paid, or money lent.

Approval Requirements (Revised § 9.3)

Current § 9.3(a) provides that ''a national bank may not exercise fiduciary powers unless it obtains prior approval from the OCC to the extent required under 12 CFR 5.26.'' Section 5.26(e)(5) currently provides that a national bank that has obtained the OCC's approval to exercise fiduciary powers does not need to obtain further approval to ''commence fiduciary activities'' in a state in addition to the state(s) described in the application for which it received OCC approval to exercise fiduciary powers. Instead, the bank is required only to provide written notice to the OCC within ten days after commencing expanded fiduciary activities.

As discussed in greater detail in the next section, proposed new § 9.7 codifies recent OCC interpretations clarifying national banks' authority to engage in multi-state fiduciary operations. Among other things, those interpretations, and new § 9.7, distinguish between acting in a fiduciary capacity and conducting other activities ancillary to the bank's fiduciary business. The proposal adds a new paragraph (b) to § 9.3 to clarify that a bank that has received OCC approval to exercise fiduciary powers does not need prior OCC approval each time it seeks to act in a fiduciary capacity in a new state or to conduct, in a new state, activities that are ancillary to its fiduciary business. Instead, paragraph (b) directs the bank to follow the notice procedures in § 5.26(e)(5). Current paragraph (b), which addresses the procedures for organizing a limited purpose trust bank, is redesignated as paragraph (c).

Multi-State Fiduciary Operations (New § 9.7)

The statutory authority for national banks to exercise fiduciary power is contained in 12 U.S.C. §§ 92a(a) and (b). Under section 92a(a), the Comptroller may permit national banks, when not in contravention of State or local law, to exercise eight expressly identified fiduciary powers and to act in any other fiduciary capacity in which State banks, trust companies, or other corporations that come into competition with national banks are permitted to act under the laws of the State in which the national bank is located. Under section 92a(b), whenever state law permits state institutions that compete with national banks to exercise any of the fiduciary powers listed in section 92a(a), a national bank's exercise of those powers is deemed not to be in contravention of State or local law under section 92a.

Sections 92a(a) and (b) do not expressly address the extent to which a national bank may conduct a multi-state fiduciary business. The OCC, however, has issued several interpretive letters that address multi-state fiduciary activities. In IL 695, we concluded that a national bank with its main office in one state may have trust offices in another state. We also concluded that the bank may engage in (a) any of the eight fiduciary capacities listed in 12 U.S.C. 92a(a), unless the state prohibits its own state banks, trust companies, and other corporations that compete with national banks in that state from acting in that capacity; and (b) any other fiduciary capacity the state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state. This conclusion applies even in a state that has laws prohibiting or restricting out-of-state fiduciaries from providing fiduciary services or having trust offices within their state. As explained in the interpretive letter, section 92a(b) makes it clear that, if a state permits its own state institutions to exercise certain fiduciary powers, then national banks are authorized to exercise those fiduciary powers in that state.

Proposed § 9.7(a) codifies this interpretation. Pursuant to that section, a national bank may act in any of the eight fiduciary capacities listed in the statute in any state in which a national bank ''is located,'' which we have interpreted for purposes of section 92a as the state in which a national bank acts in a fiduciary capacity. It may also act in any other fiduciary capacity that the state permits for its own state institutions, ''when not in contravention of State or local law.'' Thus, a national bank may act in any of the eight capacities listed in the statute unless the state affirmatively prohibits that activity for national banks and for its own institutions. If state law is silent on any of these eight capacities, it is permitted for a national bank by virtue of the direct grant of authority in section 92a(a). Further, if a state permits its own state institutions to exercise additional fiduciary powers, then national banks are authorized to exercise those fiduciary powers in that state. The state may not limit them, because the terms of section 92a(b) expressly deem the fiduciary powers that a state permits to its own institutions not to be in contravention of state law. Thus, under proposed § 9.7(a)(2), a national bank acting in a fiduciary capacity in a particular state may act in each of the eight fiduciary capacities listed in section 92a(a) (unless the state expressly prohibits the capacity for its own state institutions) and in any other fiduciary capacities permitted for state banks, trust companies, or other corporations that compete with national banks.

In IL 866 and IL 872, the OCC clarified that a national bank that acts in a fiduciary capacity in a given state under the authority of section 92a is authorized to market its services to customers in other states, to solicit business from them, and to act as fiduciary for customers located in other states.[2] A state may not prohibit or restrict out-of-state national banks from marketing to, or performing fiduciary functions for, customers in that state. Therefore, proposed § 9.7(b) provides that a national bank may market its fiduciary services to, and act as fiduciary for, customers located in any state and provides that the bank may use a trust representative office for these purposes. Proposed § 9.7(c) expressly authorizes a national bank with fiduciary powers to establish a trust office or trust representative office in any state. IL 866 and IL 872 also addressed where a national bank is deemed to be ''acting in a fiduciary capacity'' for purposes of section 92a. As explained in those letters, in order to determine in which state a bank ''acts in

[2] This approach is consistent with that taken by the Office of Thrift Supervision, as summarized in its letter dated August 8, 1996, from Carolyn J. Buck, Chief Counsel, *reprinted in* [1995–1996 Transfer Binder] Fed. Banking L. Rep. (CCH) § 83–102 (in which the OST concluded (1) that, for trust pruposes, a savings associaiton will not be deemed located in a state where its only trust-related activities are marketing its trust services and performing incidental duties pursuant to its appointment as testamentary trustee holding read estate (2) federal law would prreempt state laws that prohibit or restrict an out-of-state federal shift engaging in the state.

a fiduciary capacity'' for section 92a purposes, one looks to the state in which the bank performs key fiduciary functions. These key activities include executing the documents that create the fiduciary relationship, accepting the fiduciary appointment, and making decisions regarding the investment or distribution of fiduciary assets. Proposed § 9.7(d) codifies this position and further provides that if these key fiduciary activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes will be the state that the bank and customer designate from among those states. We invite comment on ways to simplify the determination of where a bank with multi-state operations is acting in a fiduciary capacity.

The state in which the bank acts in a fiduciary capacity for an account, in turn, determines—with respect to that account—which state laws apply in the provisions of section 92a that refer to state law.[3] Thus, if a national bank acts in a fiduciary capacity in State A for a customer located in State B, the bank looks to the laws of State A in applying the provisions of section 92a that refer to state law. These include not only state laws affecting permissible fiduciary capacities (referred to in sections 92a(a) and (b)) but also state laws used in setting operational requirements for national banks as corporate fiduciaries (referred to in sections 92a(f), (g) & (i)) and those that grant state banking authorities limited access to OCC examination reports relating to national bank trust departments (referred to in section 92a(c)). Therefore, proposed § 9.7(e) clarifies that the references in section 92a to state law mean the law of the state in which the bank acts in a fiduciary capacity. The laws of other states where the bank is not acting in a fiduciary capacity, including states in which the bank's customers may reside or in which trust assets may be located, are not made applicable to national banks by section 92a.

Deposit of Securities With State Authorities (Revised § 9.14)

Under section 92a(f) of the statute and current § 9.14 of our regulations, a national bank must comply with state laws that require corporations that act in a fiduciary capacity to deposit securities with state authorities for the protection of private or court trusts. The proposal makes a technical amendment to § 9.14 to conform to the terminology used in proposed § 9.7. Instead of saying that a bank ''administers trust assets'' in paragraph (b) of that section, the proposed language states that a bank ''acts in a fiduciary capacity.'' No substantive change is intended by this amendment.

The proposal also adds a second sentence to § 9.14(b) to clarify how a bank, which conducts fiduciary operations on a multi-state basis pursuant to proposed § 9.7, should compute the amount of deposit required by a state law that requires a deposit of securities on a basis other than assets (such as an amount equal to a percentage of capital). In such a state, the bank may compute the amount of deposit required on a pro-rated basis, according to the proportion of fiduciary assets for which the bank is acting in a fiduciary capacity at offices located in that state.

Fiduciary Powers (Revised § 5.26)

Consistent with the proposed changes discussed above, the proposal also would amend 12 CFR 5.26(e) to clarify that a national bank that plans to act in a fiduciary capacity in a state in addition to the state described in the application for fiduciary powers that the OCC has approved need only give after-the-fact notice of having commenced acting in a fiduciary capacity in a new state. The proposal revises current § 5.26(e)(5) so that it reflects the distinction between acting in a fiduciary capacity and conducting activities ancillary to the bank's fiduciary business. The ten-day, after the fact notice requirement would apply only to acting in a fiduciary capacity.

ANPR: Uniform Standards Governing Fiduciary Activities

Twelve U.S.C. 92a, which authorizes national banks to act as fiduciaries, also governs the exercise of their fiduciary powers in certain respects. For example, the statute requires national banks to segregate the assets they hold in a fiduciary capacity from the ''general assets'' of the bank and to keep separate records of the transactions they engage in as fiduciary.[4] The statute does not set out general standards of care that apply to national banks acting in a fiduciary capacity; however, it expressly authorizes the OCC to issue regulations to enforce compliance with section 92a and ''the proper exercise of the powers'' that the statute grants.[5] Thus, the statutory scheme governing national bank fiduciary powers specifically permits the Comptroller to promulgate regulations necessary to the proper exercise of national bank fiduciary powers and to address any areas unique to national banks.[6]

Trustees are responsible for performing a core set of fundamental duties when exercising the powers permitted under section 92a. These include the duty to administer the trust according to its terms; the duty of loyalty; the duty to be impartial where there is more than one beneficiary of a trust; the duty to be prudent with trust assets; and so on. These duties are embodied in most state trust codes, but the precise formulation and the elements of the applicable standards vary from state to state, causing a national bank that conducts an interstate fiduciary business to continually monitor the differing state laws and to develop different plans for compliance in each state where it operates.

One example of where state laws may differ is the investment management standard that applies to trustees. Trustees have always had the duty to manage trust assets prudently. In the first half of the twentieth century, most states enacted lists of specific types of investments that trustees were permitted to make, and trustees were required to assess the prudence of each individual investment in isolation. More recently, however, many states have applied a ''prudent investor'' rule, which focuses on the need to manage risk in the portfolio by balancing the role of a single asset or group of assets against that of the overall portfolio. Examples of other areas where the applicable standards might vary from one jurisdiction to another include the laws governing reasonableness of compensation of trustees; duties regarding trust accounting; the

[3] This is to be contrasted with the laws governing the trust itself, which are determined by the trust instrument and, in some instances, by choice-of-law rules. For example, if a national bank is acting in a fiduciary capacity in State A and is a trustee for a trust for which the trust instrument says the laws of State B govern, then the laws governing the administration of the trust (for example, the standard of care to be applied) will be those of State B.

[4] 12 U.S.C. 92(a).

[5] 12 U.S.C. 92a(j). *See also id.* at 93a.

Section 92a(j) states ''The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section *and the proper exercise of the powers granted therein*.'' (Emphasis added.)

[6] The view that fiduciary rules applicable to a national bank fiduciary may be affected by Federal law is supported by the legislative history of section 92a. When Congress enacted the precursor to section 92a in 1913, it authorized the Federal Reserve Board (which regulated national bank fiduciary activities until 1962, when Congress transferred that authority to the OCC) to grant national banks that right to act in a fiduciary capacity ''under such rules and regulations as the board may prescribe.'' Pub. L. 63–43 11(k), 30 Stat. 251 (1913).

termination, modification, or reform of a trust; records retention; and purchases by a bank, in its capacity as trustee, of shares of proprietary mutual funds.

The lack of uniformity in applicable fiduciary standards may become more burdensome in light of the increase in national banks' interstate fiduciary operations following the enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and in light of new technologies that greatly facilitate the marketing and delivery of fiduciary services to customers nationwide. National banks not only have trust customers and conduct fiduciary activities in many different states, but they also act as trustee for trusts governed by the laws of many different states.

For these reasons, in addition to inviting comments on the proposed amendments to part 9 as discussed in the previous portion of this notice, the OCC invites comments on whether we should adopt uniform standards of care governing fiduciary activities of national banks. The OCC is not proposing specific standards at this point; rather, we seek the views of interested persons on the need for such standards and, if there is a need, on what the standards should contain.

The OCC contemplates that any uniform standards would apply only to private trusts. As under current law, we envision that the uniform federal standard could be modified by the terms of the trust, but not by contrary or inconsistent state law.

The OCC invites comments on whether uniform, national standards in the areas noted (or other areas) would promote the efficient exercise of a national bank's fiduciary powers, consistent with the fulfillment of its fiduciary obligations. Specifically, the OCC seeks comments on the following:

- Does compliance with multiple state laws that establish separate fiduciary standards of care present a significant burden? If so, please identify the principal sources of that burden.
- How would a bank's administration of trusts or estates differ if there were a federal law creating a uniform standard of care?
- If the OCC were to adopt uniform standards, should those standards be modeled after the Uniform Trust Act prepared by the National Conference of Commissioners on Uniform State Laws? If so, which sections should we adopt?
- What other sources should the OCC rely upon in developing uniform, nationwide standards of care?
- Do most states already have substantially similar laws governing trust administration and investment of trust assets? Is adoption of the model uniform laws by additional states likely?
- What effect have the OCC's recent opinions on the applicability of state law to interstate fiduciary activities had on national banks' interstate fiduciary business?
- How could a federal standard work when there are specific state statutes (such as those governing the investment by trustees in proprietary mutual funds) that make investment explicitly subject to state laws?
- How should the OCC resolve issues that arise about the meaning or applicability of any uniform standards it issues? What would be the effect of a uniform standard on the common law that has developed over time in connection with state fiduciary standards?
- If uniform standards are adopted, how should the OCC manage the transition from the existing regulatory structure? Should new standards be applied only to fiduciary relationships formed after a date certain?
- Could uniform standards impose unanticipated burdens on national banks? If so, what would those burdens be? What could the OCC do to reduce the burden?
- Even if a uniform national approach to fiduciary standards proves beneficial over time, a change in applicable fiduciary standards may create near-term uncertainty about what rules govern national banks' fiduciary activities. What could the OCC do to reduce uncertainty, and any accompanying litigation risk, that may result from our adoption of uniform standards?
- Should the OCC adopt a uniform federal choice of law rule for determining what law governs the fiduciary relationship in the absence of a provision in the trust instrument specifying the governing law? This would address questions of applicable law that are not resolved by operation of section 92a.

This ANPR reflects our ongoing commitment to review and reevaluate our regulations periodically to ensure that they encourage national banks' efficiency and competitiveness, consistent with safety and soundness and fair treatment of bank customers. Based on the comments we receive, we may propose specific revisions to our rules for comment in a later rulemaking.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

Pursuant to section 605(b) of the RFA, the OCC hereby certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities. The NPRM codifies caselaw and OCC interpretations, but adds no new requirements. Similarly, the ANPR merely invites comments on whether uniform federal standards would be appropriate. Accordingly, a regulatory flexibility analysis is not needed.

Executive Order 12866

The OCC has determined that this rulemaking is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that the agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. For the reasons outlined above, the OCC has determined that this rulemaking will not result in expenditures by state, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed any regulatory alternatives.

Executive Order 13132

Executive Order 13132 requires Federal agencies, including the OCC, to certify their compliance with that Order when they transmit to the Office of Management and Budget any draft final regulation that has Federalism implications. Under the Order, a regulation has Federalism implications if it has ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' In the case of a regulation that has Federalism implications and that preempts State law, the Order imposes certain consultation requirements with State and local officials; requires publication in the preamble of a federalism summary impact statement; and requires the OCC to make available to the Director of the Office of Management and Budget any written communications submitted to us by State and local officials. By the terms of the Order, these requirements apply to the extent that they are practicable and permitted by law and, to that extent, must be satisfied before the OCC promulgates a final regulation.

Certain provisions of this proposal and advance notice, including uniform federal standards if they were to be adopted, may have Federalism implications, as that term is used in the Order, or may be found by a Federal court to preempt state law. Therefore, before promulgating a final regulation based on this proposal, the OCC will, to the extent practicable and permitted by law, seek consultation with State and local officials, include a Federalism summary impact statement in the preamble to the final rule, and make available to the Director of OMB any written communications we receive from State or local officials.

List of Subjects in 12 CFR Parts 5 and 9

Banks, banking, Insurance, National banks, Trusts and trustees.

Authority and Issuance

For the reasons set forth in the preamble, part 5 and part 9 of chapter I of title 12 of the Code of Federal Regulations are proposed to be amended as follows:

PART 5—RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES

1. The authority citation for part 5 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.*, 93a; and section 5136A of the Revised Statutes (12 U.S.C. 24a).

Subpart B—Initial Activities

2. Paragraph (e)(5) of § 5.26 is revised to read as follows:

§ 5.26 Fiduciary powers.

* * * * *

(e) * * *

(5) *Notice of fiduciary activities in additional states.* No further application under this section is required when a national bank with existing OCC approval to exercise fiduciary powers plans to act in a fiduciary capacity, or to conduct activities ancillary to its fiduciary business, in a state in addition to the state described in the application for fiduciary powers that the OCC has approved. Instead, unless the bank provides notice through other means (such as a merger application), the bank shall provide written notice to the OCC no later than ten days after it begins to act in a fiduciary capacity in the new state. The written notice must identify the new state or states involved, identify the fiduciary activities to be conducted, and describe the extent to which the activities differ materially from the fiduciary activities that the bank was previously authorized to conduct.

* * * * *

PART 9—FIDUCIARY ACTIVITIES OF NATIONAL BANKS

1. The authority citation for part 9 continues to read as follows:

Authority: 12 U.S.C. 24(Seventh), 92a, and 93a; 15 U.S.C. 78q, 78q–1, and 78w.

2. Section 9.2 is revised by removing the second sentence in paragraph (g) and adding new paragraphs (j) and (k) as follows:

§ 9.2 Definitions.

* * * * *

(j) *Trust office* means an office of a national bank, other than a main office or a branch, at which the bank acts in a fiduciary capacity. Pursuant to 12 U.S.C. 36(j), a trust office is not a ''branch'' for purposes of 12 U.S.C. 36, unless it is also an office at which deposits are received, or checks paid, or money lent.

(k) *Trust representative office* means an office of a national bank, other than a main office, branch, or trust office, at which the bank performs activities ancillary to its fiduciary business, but does not act in a fiduciary capacity. Examples of ancillary activities include advertising, marketing, and soliciting for fiduciary business; contacting existing or potential customers, answering questions, and providing information about matters related to their accounts; acting as a liaison between the trust office and the customer (*e.g.,* forwarding requests for distribution or changes in investment objectives, or forwarding forms and funds received from the customer); or inspecting or maintaining custody of fiduciary assets. Pursuant to 12 U.S.C. 36(j), a trust representative office is not a ''branch'' for purposes of 12 U.S.C. 36, unless it is also an office at which deposits are received, or checks paid, or money lent.

3. Section 9.3 is amended by revising paragraph (b) and adding paragraph (c) to read as follows:

§ 9.3 Approval requirements.

(b) A national bank that has obtained the OCC's approval to exercise fiduciary powers is not required to obtain the OCC's prior approval to act in a fiduciary capacity in a new state or to conduct, in a new state, activities that are ancillary to its fiduciary business. Instead, the national bank must follow the notice procedures prescribed by 12 CFR 5.26(e).

(c) A person seeking approval to organize a special-purpose national bank limited to fiduciary powers shall file an application with the OCC pursuant to 12 CFR 5.20.

4. A new § 9.7 is added to read as follows:

§ 9.7 Multi-state fiduciary operations.

(a) *Acting in a fiduciary capacity in more than one state.* A national bank with fiduciary powers may act in a fiduciary capacity in different states. In each state in which a national bank acts in a fiduciary capacity, the bank may act in:

(1) Any of the eight fiduciary capacities listed in 12 U.S.C. 92a(a), unless the state prohibits its own state banks, trust companies, and other corporations that compete with national banks in that state from acting in that capacity; and

(2) Any other fiduciary capacity the state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state.

(b) *Serving customers in more than one state.* While acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to, and act as fiduciary for, customers located in any state. The bank may use a trust representative office for this purpose.

(c) *Offices in more than one state.* A national bank with fiduciary powers may establish trust offices or trust representative offices in any state.

(d) *Acting in a fiduciary capacity.* For each fiduciary relationship, a national bank acts in a fiduciary capacity in a state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, or makes discretionary decisions regarding the investment or distribution of fiduciary assets. If these activities take place in more than one state, then the state in which the bank acts in a fiduciary capacity for section 92a purposes will be the state that the bank and customer designate from among those states.

(e) *Application of state law.* (1) *State laws used in section 92a.* The state trust laws that apply to a national bank's fiduciary activities by operation of the provisions of 12 U.S.C. 92a that refer to state law are the laws of the state in which the bank acts in a fiduciary capacity.

(2) *Other state laws.* Section 92a specifically identifies which state laws regulating the operations of bank trust departments, trust companies, or other corporate fiduciaries are applicable to national banks. Other state laws regulating such operations are not applicable to national banks.

5. Section 9.14(b) is revised to read as follows:

§ 9.14 Deposit of securities with state authorities

* * * * *

(b) *Acting in a fiduciary capacity in more than one state.* If a national bank acts in a fiduciary capacity in more than one state, the bank may compute the amount of securities that are required to be deposited for each state on the basis of the amount of assets for which the bank is acting in a fiduciary capacity at offices located in that state. If state law requires a deposit of securities on a basis other than assets (*e.g.,* a requirement to deposit a fixed amount or an amount equal to a percentage of capital), the bank may compute the amount of deposit required in that state on a pro-rated basis, according to the proportion of fiduciary assets for which the bank is acting in a fiduciary capacity at offices located in that state.

Dated: October 31, 2000.

John D. Hawke, Jr.,

Comptroller of the Currency.

[FR Doc. 00–30844 Filed 12–4–00; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–118–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330 and A340 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Airbus Model A330 and A340 series airplanes. This proposal would require identifying the part and serial numbers of the pressure reducing valve on each air pressurization unit, testing pressure reducing valves and air pressurization units having affected serial numbers, and replacing faulty valves or units with new parts. This action is necessary to prevent the simultaneous failure of two air pressurization units, which could result in loss of three hydraulic circuits and consequent reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by January 4, 2001.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2000–NM–118–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: 9-anm-nprmcomment@faa.gov. Comments sent via fax or the Internet must contain ''Docket No. 2000–NM–118–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in the proposed rule may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Norman B. Martenson, Manager, International Branch, ANM–116, FAA, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2110; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (*e.g.,* reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 2000–NM–118–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2000–NM–118–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified the FAA that an unsafe condition may exist on certain Airbus Model A330 and A340 series airplanes. The DGAC advises that air pressurization units (''Pressurization Units, Air'' or ''PUA'') have failed on three Model A330 series airplanes. Two potential failure modes, linked to defects in the seal quality of the internal pressure reducing valve, have been identified on these air pressurization units. The simultaneous failure of two units could result in the loss of three hydraulic circuits and consequent reduced controllability of the airplane.

Similar Model

The same air pressurization units are installed on Model A330 and A340 series airplanes. Therefore, Model A340 series airplanes are also subject to the unsafe condition identified by this proposed AD.

Explanation of Relevant Service Information

Airbus has issued Service Bulletins A330–29A3073 and A340–29A4058, both Revision 01, including Appendix 01, dated April 10, 2000. The service bulletins describe procedures for a one-time special detailed visual inspection to identify the part and serial numbers of the pressure reducing valve on each air pressurization unit, testing affected valves and units, repairing a faulty valve by replacing either the valve or the entire unit with a new part, and reidentifying functional air pressurization units. These procedures are intended to detect air pressurization units that might contain defective pressure reducing valves. Replacing defective valves or units improves the reliability of the reservoir's pressurization system. Accomplishment of the actions specified in the service bulletins is intended to adequately address the identified unsafe condition. The DGAC classified these service bulletins as mandatory and issued French airworthiness directives 2000–138–118(B) and 2000–139–143(B), both dated March 22, 2000, in order to ensure the continued airworthiness of these airplanes in France.

The Airbus service bulletins refer to Le Bozec Filtration & Systems Service Bulletin 4020Q8–29–03, dated December 17, 1999, as an additional source of service information for accomplishment of the actions specified by this proposed AD.

FAA's Conclusions

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in the service bulletins described previously. The actions would be required to be accomplished in accordance with the service bulletin described previously.

Cost Impact

The FAA estimates that 5 airplanes of U.S. registry would be affected by this proposed AD. It would take approximately 1 work hour per airplane to inspect it, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of this proposed AD on U.S. operators is estimated to be $60 per airplane. However, the FAA has been advised that all affected airplanes currently on the U.S. Register are in compliance with the actions of this proposed AD.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Airbus Industrie: Docket 2000–NM–118–AD.

Applicability: Model A330 and A340 series airplanes, certificated in any category; fitted with any air pressurization unit (''Pressurization Unit, Air'' or ''PUA'') having part number (P/N) 4020 Q8–3.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent the simultaneous failure of two air pressurization units, which could result in loss of three hydraulic circuits and consequent reduced controllability of the airplane, accomplish the following:

Inspection

(a) Within 500 flight hours after the effective date of this AD, perform a one-time detailed visual inspection to determine the P/N and serial number (S/N) of the pressure reducing valve on each air pressurization unit, per Airbus Service Bulletin A330–29A3073 (for Model A330 series airplanes) or A340–29A4058 (for Model A340 series airplanes), both Revision 01, including Appendix 01, dated April 10, 2000; as applicable.

(1) If no P/N or S/N is identified as affected equipment per the applicable service bulletin, you have fulfilled the requirements of this AD.

(2) If any P/N or S/N is identified as affected equipment per the applicable service bulletin: Prior to further flight, perform applicable tests and repairs in accordance with the applicable service bulletin.

Note 2: For the purposes of this AD, a detailed visual inspection is defined as: ''An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

Note 3: An inspection per Airbus Service Bulletin A330–29A3073, dated January 18, 2000 (for Model A330 series airplanes), or A340–29A4058, dated January 20, 2000 (for Model A340 series airplanes), is acceptable for compliance with the requirements of paragraph (a) of this AD.

Note 4: The Airbus service bulletins refer to Le Bozec Filtration & Systems Service Bulletin 4020Q8–29–03, dated December 17, 1999, as an additional source of service information for accomplishment of the actions specified by this AD.

Spares

(b) As of the effective date of this AD, you may not install any air pressurization unit having P/N 4020 Q8–3 on any airplane, unless all actions have been accomplished for that part in accordance with the requirements of this AD.

Alternative Methods of Compliance

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 5: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

Special Flight Permits

(d) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Note 6: The subject of this AD is addressed in French airworthiness directives 2000–138–118(B) and 2000–139–143(B), both dated March 22, 2000.

Issued in Renton, Washington, on November 29, 2000.

Donald L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00–30951 Filed 12–4–00; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–224–AD]

RIN 2120–AA64

Airworthiness Directives; British Aerospace (Jetstream) Model 4101 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the supersedure of an existing airworthiness directive (AD), applicable to all British Aerospace (Jetstream) Model 4101 airplanes, that currently requires repetitive inspections to detect loose or migrated levers of the elevator cable tension regulators, and replacement of the regulator assembly with a new assembly, if necessary. This action would require modification of the elevator cable tension regulator lever assembly, terminating the repetitive inspections. The proposal is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified by the proposed AD are intended to prevent the elevator cable tension regulator from becoming detached from the splined shaft of the assembly, which could result in difficulty adjusting the elevators, leading to reduced controllability of the airplane.

DATES: Comments must be received by January 4, 2001.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2000–NM–224–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: 9-anm-nprmcomment@faa.gov. Comments sent via fax or the Internet must contain ''Docket No. 2000–NM–224–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in the proposed AD may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, ANM–116, FAA, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (e.g., reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2000–NM–224–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No.

2000–NM–224–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

On December 17, 1999, the FAA issued AD 99–26–18, amendment 39–11478 (64 FR 72531, December 28, 1999) applicable to all British Aerospace (Jetstream) Model 4101 airplanes, to require repetitive inspections to detect loose or migrated levers of the elevator cable tension regulators, and replacement of the regulator assembly with a new assembly, if necessary. That action was prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The requirements of that AD are intended to detect and correct loose or migrated regulator levers of the elevator cable tension regulators, which could result in reduced controllability of the airplane.

Actions Since Issuance of Previous Rule

In the preamble to AD 99–26–18, the FAA indicated that the action required by that AD was considered ''interim action'' until final action was identified, at which time further rulemaking might be considered. Since the issuance of AD 99–26–18, British Aerospace has issued Jetstream Service Bulletin J41–27–059, dated May 31, 2000, which describes procedures for modification of the elevator cable tension regulator assembly, which eliminates the need for repetitive inspections of the regulator assembly. The modification involves removing the existing bolt, nut, cotter pin, and washers and installing a new locking clip, sleeves, bolt, nut, cotter pin, and washers. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition.

Jetstream Service Bulletin J41–27–059 refers to Pacific Scientific Service Bulletin 25–1128, dated April 15, 2000, as an additional source of service information for accomplishment of the modification of the elevator cable tension regulators. Pacific Scientific Company has designed a secondary locking clip, which, when installed under the bolt, will prevent the elevator cable tension regulator from becoming detached from the splined shaft of the regulator assembly.

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, has classified the Jetstream service bulletin as mandatory and issued British airworthiness directive 006–05–2000 in order to assure the continued airworthiness of these airplanes in the United Kingdom.

FAA's Conclusions

This airplane model is manufactured in the United Kingdom and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. The FAA has examined the findings of the CAA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed AD

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would supersede AD 99–26–18 to continue to require inspection of the elevator cable tension regulator lever assembly and to require modification of the elevator cable tension regulators. The modification would be required to be accomplished in accordance with Jetstream Service Bulletin J41–27–059.

Cost Impact

There are approximately 57 airplanes of U.S. registry that would be affected by this proposed AD. The repetitive inspection that is currently required by AD 99–26–18 takes approximately 2 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the currently required actions on U.S. operators is estimated to be $120 per airplane, per inspection cycle.

The modification that is proposed in this AD would take approximately 6 work hours per airplane to accomplish at an average labor rate of $60 per work hour. There would be no charge for required parts. Based on these figures, the cost impact of the proposed requirements of this AD on U.S. operators is estimated to be $20,520, or $360 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Regulatory Impact

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–11478 (64 FR 72531, December 28, 1999), and by adding a new airworthiness directive (AD), to read as follows:

British Aerospace Regional Aircraft [Formerly Jetstream Aircraft Limited British Aerospace (Commercial Aircraft) Limited]: Docket 2000–NM–224–AD. Supersedes AD 99–26–18, Amendment 39–11478.

Applicability: All Model Jetstream 4101 airplanes, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (e) of this AD.

The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent the elevator cable tension regulators from becoming detached from the splined shaft of the assembly, which could result in difficulty adjusting the elevators, leading to reduced controllability of the airplane, accomplish the following:

Restatement of Certain Actions Required by AD 99–26–18

Inspection

(a) Within 7 weeks after February 1, 2000 (the effective date of AD 99–26–18, amendment 39–11478), perform a detailed visual inspection of the elevator cable tension regulator lever assembly to detect discrepancies (including looseness and migration along the splines of the elevator cable tension regulator assembly), in accordance with Jetstream Alert Service Bulletin J41–A–27–053, dated September 14, 1999. Repeat the inspection thereafter at intervals not to exceed 1,500 flight hours until accomplishment of paragraph (c) of this AD.

Note 2: For the purposes of this AD, a detailed visual inspection is defined as: ''An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required.''

New Actions Required by This AD

Modification

(b) If any discrepancy is detected during any inspection required by paragraph (a) of this AD: Prior to further flight, perform the requirements of paragraph (c) of this AD.

(c) Except as required by paragraph (b) of this AD: Within 12 months after the effective date of this AD, modify the elevator cable tension regulators in accordance with Jetstream Service Bulletin J41–27–059, dated May 31, 2000.

(d) As of the effective date of this AD, no person shall install any elevator cable tension regulator lever assembly, unless that assembly has been modified in accordance with the requirements of paragraph (c) of this AD.

Alternative Methods of Compliance

(e) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

Special Flight Permits

(f) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Note 4: The subject of this AD is addressed in British airworthiness directive 006–05–2000.

Issued in Renton, Washington, on November 29, 2000.

Donald L. Riggin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00–30950 Filed 12–4–00; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–275–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–400 and 767 Series Airplanes Equipped With General Electric CF6–80C2 Series Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 747–400 and 767 series airplanes. This proposal would require modification of the core cowl assemblies of the engines. This action is necessary to prevent failure of the core cowl latches during an engine fire, and consequent in-flight separation of an engine core cowl and its strut fire barrier from the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by January 19, 2001.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2000–NM–275–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: 9-anm-nprmcomment@faa.gov. Comments sent via fax or the Internet must contain ''Docket No. 2000–NM–275–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Sulmo Mariano, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2686; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (*e.g.*, reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2000–NM–275–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2000–NM–275–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA received a report indicating an in-flight engine fire occurred on a Model 747–400 series airplane powered by General Electric CF6–80C2 series engines. The fire was caused by a fuel leak in the Integrated Drive Generator fuel/oil heat exchanger and was ignited by fuel vapors coming in contact with the hot turbine case. The fire was located directly under the core cowls and caused significant damage to the cowls, which weakened the aluminum structure supporting the steel latches that hold the core cowls closed. Opening of the core cowls during an engine fire breaches the engine fire containment design features and could allow the engine fire to spread to the strut and wing. (Model 767 series airplanes powered by General Electric CF6–80C2 series engines have a similar design.) Such conditions, if not corrected, could result in separation of an engine core cowl and its strut fire barrier from the airplane.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Service Bulletins 747–71–2285 (for Model 747–400 series airplanes) and 767–71–0088 (for Model 767 series airplanes), both dated October 8, 1998, which describe procedures for modification of the left- and right-hand core cowl assemblies of the engines. The modification includes, but is not limited to, replacement of the aluminum forward and extension frames located between the forward hinge and the latch in each core cowl with inconel frames that provide fireproof reinforcement to the core cowl latches. The Boeing service bulletins reference ROHR Service Bulletin TBC/80C2–NAC–71–028, dated August 1, 1998, as an additional source of service information for accomplishment of the modification. Accomplishment of the actions specified in the service bulletins is intended to adequately address the identified unsafe condition.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require accomplishment of the actions specified in the service bulletins described previously, except as discussed below.

Difference Between Service Bulletins and This Proposed AD

Operators should note that this proposed AD would require modification of the core cowl assemblies of the engines to be accomplished within 24 months after the effective date of this AD. The service bulletins recommend that this modification should be accomplished ''as soon as manpower and facilities are available.'' But in developing an appropriate compliance time for the proposed modification, the FAA considered not only the manufacturer's recommendation and the degree of urgency associated with addressing the subject unsafe condition, but also the average utilization of the affected fleet and the time necessary to perform the modification. The FAA has determined that 24 months represents an appropriate interval of time allowable wherein the modification can be accomplished during scheduled airplane maintenance and an ample number of required parts will be available for modification of the U.S. fleet within the proposed compliance period. The FAA also finds that such a compliance time will not adversely affect the safety of the affected airplanes.

Cost Impact

There are approximately 563 airplanes of the affected design in the worldwide fleet.

The FAA estimates that 14 Model 747–400 series airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 168 work hours (42 per engine) per airplane to accomplish the proposed modification, and that the average labor rate is $60 per work hour. Required parts would cost approximately $84,732 ($21,183 per engine) per airplane. Based on these figures, the cost impact of the modification proposed by this AD on U.S. operators is estimated to be $1,327,368, or $94,812 per airplane.

The FAA estimates that 64 Model 767 series airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 84 work hours (42 per engine) per airplane to accomplish the proposed modification, and that the average labor rate is $60 per work hour. Required parts would cost approximately $42,366 ($21,183 per engine) per airplane. Based on these figures, the cost impact of the modification proposed by this AD on U.S. operators is estimated to be $3,033,984 or $47,406 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this proposed AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation

Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Boeing: Docket 2000–NM–275–AD.

Applicability: Model 747–400 and 767 series airplanes equipped with General Electric CF6–80C2 series engines, certificated in any category; as listed in Boeing Service Bulletins 747–71–2285 or 767–71–0088, both dated October 8, 1998.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance per paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the core cowl latches during an engine fire, and consequent in-flight separation of an engine core cowl and its strut fire barrier from the airplane, accomplish the following:

Modification

(a) Within 24 months after the effective date of this AD: Modify the left- and right-hand core cowl assemblies of the engines per the Accomplishment Instructions of Boeing Service Bulletin 747–71–2285 (for Model 747–400 series airplanes) or 767–71–0088 (for Model 767 series airplanes), both dated October 8, 1998.

Note 2: The Boeing service bulletins reference ROHR Service Bulletin TBC/80C2–NAC–71–028, dated August 1, 1998, as an additional source of service information for accomplishment of the modification.

Spares

(b) As of 6 months after the effective date of this AD, no one may install an aluminum core cowl assembly, part number 224–2301–513 (left-hand) or 224–2302–539 (right-hand), on any airplane.

Alternative Methods of Compliance

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA. Operators shall submit their requests through an appropriate FAA Principal Operations Inspector or Principal Maintenance Inspector, as applicable, who may add comments and then send it to the Manager, Seattle ACO.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permit

(d) Special flight permits may be issued per §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on November 29, 2000.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00–30949 Filed 12–4–00; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–CE–28–AD]

RIN 2120–AA64

Airworthiness Directives; Fairchild Aircraft, Inc. Models SA226 and SA227 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); Reopening of the comment period.

SUMMARY: This document proposes to revise an earlier proposed airworthiness directive (AD) that would apply to certain Fairchild Aircraft SA226 and SA227 series airplanes. The earlier NPRM would have required you to replace the brake shuttle valves with parts of improved design and install a shield over the hydraulic lines. The earlier NPRM resulted from a report of a wheel brake system malfunction caused by a faulty brake shuttle valve on an affected airplane. Evaluation of the public comments on the NPRM reveals the need to also include airplanes that have an anti-skid system in the Applicability of the proposed AD. In addition, we are proposing a requirement of replacing the rubber fuel hose with a metal device for the SA226 series airplanes. Since these actions impose an additional burden over that proposed in the NPRM, we are reopening the comment period to allow the public the chance to comment on these additional actions.

DATES: The Federal Aviation Administration (FAA) must receive comments on or before January 11, 2001.

ADDRESSES: Submit comments in triplicate to FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2000–CE–28–AD, 901 Locust, Room 506, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

Service information that applies to the proposed AD may be obtained from Fairchild Aircraft, Inc., P.O. Box 790490, San Antonio, Texas 78279–0490; telephone: (210) 824–9421; facsimile: (210) 820–8609. This information also may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Werner Koch, Aerospace Engineer, FAA, Airplane Certification Office, 2601 Meacham Boulevard, Fort Worth, Texas 76193–0150; telephone: (817) 222–5133; facsimile: (817) 222–5960.

SUPPLEMENTARY INFORMATION:

Comments Invited

How Do I Comment on the Proposed AD?

The FAA invites comments on this proposed rule. You may submit whatever written data, views, or arguments you choose. You need to include the rule's docket number and submit your comments in triplicate to the address specified under the caption **ADDRESSES**. The FAA will consider all comments received on or before the closing date. We may amend the proposed rule in light of comments received. Factual information that supports your ideas and suggestions is extremely helpful in evaluating the effectiveness of the proposed AD action and determining whether we need to take additional rulemaking action.

Are There Any Specific Portions of the Proposed AD I Should Pay Attention to?

The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of the proposed rule that might suggest a need to modify the rule. You may examine all comments we receive before and after the closing date of the rule in the Rules Docket. We will file a report in the Rules Docket that summarizes each FAA contact with the public that concerns the substantive parts of the proposed AD.

We are re-examining the writing style we currently use in regulatory documents, in response to the Presidential memorandum of June 1, 1998. That memorandum requires federal agencies to communicate more clearly with the public. We are interested in your comments on whether the style of this document is clearer, and any other suggestions you might have to improve the clarity of FAA communications that affect you. You can get more information about the Presidential memorandum and the plain language initiative at http://www.plainlanguage.gov.

How Can I Be Sure FAA Receives My Comment?

If you want us to acknowledge the receipt of your comments, you must include a self-addressed, stamped postcard. On the postcard, write ''Comments to Docket No. 2000–CE–28–AD.'' We will date stamp and mail the postcard back to you.

Discussion

What Events Have Caused This Proposed AD?

The FAA received a report of an accident involving a Fairchild Model SA226–TC airplane where the flight crew lost control of the airplane at low altitude during the final approach for landing. Prior to the accident, the flight crew reported a loss of hydraulic pressure and a fire on the left side of the airplane.

Investigation of this accident indicates the following:

—The flight crew applied right rudder power during the takeoff roll to compensate for a dragging and overheated left wheel brake and then raised the landing gear into the wheel wells;

—The overheated left wheel brake ignited the tires and the hydraulic fluid; and

—The resultant fire burned the rubber fuel crossover hose and resulted in fuel leakage with a consequent fuel fire.

The accident investigation shows that the brake shuttle valve may have caused the left wheel brake to drag and overheat.

What Are the Consequences if the Condition Is Not Corrected?

Original design brake shuttle valves, if not replaced with improved design valves, could cause the wheel brakes to drag and overheat. This could result in hydraulic or fuel line damage if the overheated brake assembly is retracted into the main wheel wells. A consequent fire could occur if the hydraulic or fuel lines ruptured.

Has FAA Taken Any Action to This Point?

We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Fairchild Aircraft SA226 and SA227 series airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on August 3, 2000 (65 FR 47701). The NPRM proposed to replace each brake shuttle valve with a part number (P/N) MS28767–4 brake shuttle valve and install a shield over the hydraulic lines.

Was the Public Invited To Comment?

The FAA encouraged interested persons to participate in the making of this amendment. The following presents the comments received on the proposal and FAA's response to each comment:

Comment Issue No. 1: Make the AD Apply to Airplanes Equipped With Anti-Skid Systems

What Is the Commenter's Concern?

One commenter recommends that the proposed AD apply to certain SA226 and SA227 series airplane regardless of whether they are equipped with anti-skid systems. The NPRM proposed to exempt those airplanes with an anti-skid system installed. The commenter states that the related service bulletins recommend the installation of Kevlar blankets around the hydraulic lines for all airplanes so airplanes with anti-skid systems should be included in order to protect the hydraulic lines.

What Is FAA's Response to the Concern?

After re-evaluating all information related to this issue, we concur that the AD action should also apply to airplanes equipped with anti-skid systems.

We are incorporating this change into the proposed rule.

Comment Issue No. 2: Remove all Reference to ''Parking Brake Shuttle Valves'' From the AD

What Is the Commenter's Concern?

One commenter requests that FAA remove all reference to ''parking brake shuttle valves'' from the proposed AD because SA226 and SA227 series airplanes do not have such equipment.

What Is FAA's Response to the Concern?

The FAA concurs. The correct terminology is ''brake shuttle valves.''

We are incorporating this change into the proposed rule.

Other Information Since Issuance of the NPRM

Is There Additional Information Available on This Subject?

Fairchild Aircraft Service Bulletin No. 226–26–003 specifies replacing the rubber fuel hose with a metal device. When we issued the NPRM, parts were not available for this replacement. Since that time, Fairchild has stocked enough parts for this replacement.

We will now address the fuel hose replacement in the proposed AD.

The FAA's Determination

What Has FAA Decided?

After careful review of all available information related to the subject presented above, we have determined that:

—The AD action should also affect airplanes equipped with anti-skid systems;

—The requirement of replacing the rubber fuel hose with a metal device for the SA226 series airplanes should be added to the proposed AD; and

—AD action should be taken to correct potential brake shuttle valve problems, which could cause the brake assembly to drag and overheat. Hydraulic or fuel line damage could then occur if the overheated brake assembly is retracted into the main wheel well, with a consequent fire if the hydraulic or fuel lines ruptured.

The Supplemental NPRM

How Will the Changes to the NPRM Impact the Public?

Proposing that the NPRM apply to airplanes equipped with anti-skid systems and proposing to require replacement of the rubber fuel hose with a metal device on SA226 series airplanes present actions that go beyond the scope of what was already proposed. Therefore, we are issuing a supplemental NPRM and reopening the comment period to allow the public additional time to comment on the proposed AD.

What Are the Provisions of the Supplemental NPRM?

The proposed AD would require you to:

—Replace the brake shuttle valves with parts of improved design (except on airplanes with an anti-skid/power brake system);

—Install a shield over the hydraulic lines; and

—Replace the rubber fuel hose with a metal device on the SA226 series airplanes.

What Document Should I Use To Accomplish These Actions?

Accomplishment of the proposed actions would be in accordance with the following, as applicable:

Affected pages	Revision level	Date
—Fairchild Aircraft Service Bulletin No. 226–26–003, which incorporates the following pages		
1, 2, 4, 6, 8, 9, 10, 11, and 14	Original Issue	March 1, 2000.
3, 5, 12, and 13	Revision 1	June 27, 2000.
7 and 15	Revision 2	October 2, 2000.
—Fairchild Aircraft Service Bulletin No. 227–26–002, which incorporates the following pages		
1, 2, 8, and 9	Original Issue	March 1, 2000.
7	Revision 1	June 27, 2000.
3, 4, 5, and 6	Revision 2	October 2, 2000.

Cost Impact

How Many Airplanes Would the Proposed AD Impact?

The FAA estimates that 2,344 airplanes in the U.S. registry would be affected by the proposed AD.

What Would Be the Cost Impact of the Proposed AD on Owners/Operators of the Affected Airplanes?

We estimate the following costs to accomplish the proposed installations and replacement.

Labor cost	Parts cost	Total cost per airplane
For SA226 Series Airplanes		
65 workhours × \$60 per hour = \$3,900	\$3,431 per airplane	\$7,331 per airplane.
For SA227 Series Airplanes		
55 workhours × \$60 per hour = \$3,300	\$1,369 per airplane	\$4,669 per airplane.

Compliance Time of the Proposed AD

What Is the Compliance Time of the Proposed AD?

The compliance time of this proposed AD is at whichever of the following that occurs later:

—Within 500 hours time-in-service (TIS) after the effective date of this proposed AD; or

—Within 6 months after the effective date of this proposed AD.

Why Is the Compliance Time of the Proposed AD Presented in Both Hours TIS and Calendar Time?

The affected airplanes are used in both general aviation and commuter operations. Those commuter operators may accumulate 500 hours TIS on the airplane in less than 2 months and many owners have numerous affected airplanes in their fleets. We have determined that the dual compliance time:

—Gives all owners/operators of the affected airplanes adequate time to schedule and accomplish the actions in this proposed AD; and

—Assures that the unsafe condition referenced in this AD will be corrected within a reasonable time period without inadvertently grounding any of the affected airplanes.

Regulatory Impact

Would This Proposed AD Impact Various Entities?

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposed rule would not have federalism implications under Executive Order 13132.

Would This Proposed AD Involve a Significant Rule or Regulatory Action?

The FAA has determined that the proposed action (1) is not a ‘‘significant regulatory action’’ under Executive Order 12866; (2) is not a ‘‘significant rule’’ under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if adopted, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. We have placed a copy of the draft regulatory evaluation prepared for this action in the Rules Docket. You may obtain a copy of it at the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. FAA amends § 39.13 by adding a new AD to read as follows:

Fairchild Aircraft, Inc.: Docket No. 2000–CE–28–AD

(a) *What airplanes are affected by this AD?* The following airplane models and serial numbers that are certificated in any category;

Model	Serial Nos.
SA226–T	T201 through T248
SA226–T(A)	T(A)249 through T(A)–291
SA226–T(B)	T(B) 276 and T(B) 292 through T(B) 417
SA226–AT	AT001 through AT074
SA226–TC	TC201 through TC419
SA227–TT	TT421 through TT555
SA227–TT(300)	TT447, TT465, TT471, TT483, TT512, TT518, TT521, TT527, TT529, and 536
SA227–AT	AT421, AT423 through AT631, and AT695
SA227–AC	AC406, AC415, AC416, and AC420 through AC599

(b) *Who must comply with this AD?* Anyone who wishes to operate any of the above airplanes must comply with this AD. The AD applies to any airplane with or without an anti-skid/power brake system installed.

(c) *What problem does this AD address?* The actions specified by this AD are intended to correct potential brake shuttle valve problems, which could cause the brake assembly to drag and overheat. Hydraulic or fuel line damage could then occur if the overheated brake assembly is retracted into the main wheel well, with a consequent fire if the hydraulic or fuel lines ruptured.

(d) *What actions must I accomplish to address this problem?* To address this problem, you must accomplish the following:

Actions	Compliance	Procedures
(1) For all affected airplanes except those equipped with an anti-skid/power brake system, replace each brake shuttle valve with part number (P/N) MS28767–4 brake shuttle valve (or FAA-approved equivalent part number).	Within 500 hours time-in-service (TIS) after the effective date of this AD or within 6 months after the effective date of this AD, whichever occurs later.	In accordance with the ACCOMPLISHMENT INSTRUCTIONS section of Fairchild Aircraft Service Bulletin No. 226–26–003, or Fairchild Aircraft Service Bulletin No. 227–26–002, as applicable.
(2) For all affected airplanes, install a shield over the hydraulic lines.	Within 500 hours time-in-service (TIS) after the effective date of this AD or within 6 months after the effective date of this AD, whichever occurs later.	In accordance with the ACCOMPLISHMENT INSTRUCTIONS section of Fairchild Aircraft Service Bulletin No. 226–26–003, or Fairchild Aircraft Service Bulletin No. 227–26–002, as applicable.
(3) For all airplane models within the SA226 series, replace the rubber fuel hose with a metal device.	Within 500 hours time-in-service (TIS) after the effective date of this AD or within 6 months after the effective date of this AD, whichever occurs later.	In accordance with the ACCOMPLISHMENT INSTRUCTIONS section of Fairchild Aircraft Service Bulletin No. 226–26–003.
(4) Do not install any brake shuttle valve that is not a P/N MS28767–4 brake shuttle valve (or FAA-approved equivalent part number) or a fuel hose that is made out of rubber.	As of the effective date of this AD	Not Applicable.

(e) *Can I utilize different revisions to the affected service bulletins?* The service bulletins required to accomplish this action incorporate the following pages:

Affected pages	Revision level	Date
(1) Fairchild Aircraft Service Bulletin No. 226–26–003		
1, 2, 4, 6, 8, 9, 10, 11, and 14	Original Issue	March 1, 2000.
3, 5, 12, and 13	Revision 1	June 27, 2000.
7 and 15	Revision 2	October 2, 2000.
(2) Fairchild Aircraft Service Bulletin No. 227–26–002		
1, 2, 8, and 9	Original Issue	March 1, 2000.
7	Revision 1	June 27, 2000.
3, 4, 5, and 6	Revision 2	October 2, 2000.

(f) *Can I comply with this AD in any other way?* You may use an alternative method of compliance or adjust the compliance time if:

(1) Your alternative method of compliance provides an equivalent level of safety; and

(2) The Manager, Fort Worth Airplane Certification Office, approves your alternative. Submit your request through an FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager.

Note: This AD applies to each airplane identified in paragraph (a) of this AD, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (f) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if you have not eliminated the unsafe condition, specific actions you propose to address it.

(g) *Where can I get information about any already-approved alternative methods of compliance?* Contact the Fort Worth Airplane Certification Office, 2601 Meacham Boulevard, Fort Worth, Texas 76193–0150; telephone: (817) 222–5133; facsimile: (817) 222–5960.

(h) *What if I need to fly the airplane to another location to comply with this AD?* The FAA can issue a special flight permit under §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate your airplane to a location where you can accomplish the requirements of this AD.

(i) *How do I get copies of the documents referenced in this AD?* You may obtain copies of the documents referenced in this AD from Fairchild Aircraft, Inc., P.O. Box 790490, San Antonio, Texas 78279–0490. You may examine these documents at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106.

Issued in Kansas City, Missouri, on November 28, 2000.

William J. Timberlake,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00–30948 Filed 12–4–00; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 91–CE–87–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Inc. Models DHC–6–1, DHC–6–100, DHC–6–200, and DHC–6–300 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Proposed rule; withdrawal.

SUMMARY: This document withdraws a supplemental notice of proposed rulemaking (NPRM) that would have applied to all Bombardier Inc. Models DHC–6–1, DHC–6–100, DHC–6–200, and DHC–6–300 airplanes. The NPRM would have superseded both AD 80–13–11 R2 and AD 80–03–08, which currently require repetitive inspections of the flight control rods for cracks on the above-referenced airplanes, with replacement of any cracked flight control rods. The NPRM would have required replacement of these flight control rods with improved design parts and would have reduced the need for the number of repetitions of the inspections. After evaluating all the comments received on the proposal, we have determined that, since the need for repetitive inspections is not eliminated by the replacements, the requirements of the current AD's should stand. We have not received any recent service problems regarding this subject on the affected airplanes. For these reasons, we are withdrawing the supplemental NPRM.

ADDRESSES: You may look at information related to this action at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 91–CE–87–AD, 901 Locust, Room 506, Kansas City, Missouri 64106, between 8 a.m. and 4 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Jon Hjelm, Aerospace Engineer, FAA, New York Aircraft Certification Office, 10 Fifth Street, 3rd Floor, Valley Stream, New York 11581; telephone (516) 256–7523; facsimile (516) 568–2716.

SUPPLEMENTARY INFORMATION:

Discussion

What Action Has FAA Taken to Date?

We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all Bombardier Inc. Models DHC–6–1, DHC–6–100, DHC–6–200, and DHC–6–300 airplanes. The proposal was published in the **Federal Register** as a supplemental NPRM on April 1, 1997 (62 FR 15443).

The NPRM proposed to supersede both AD 80–13–11 R2 and AD 80–03–08, which currently require repetitive inspections of the flight control rods for cracks on the above-referenced airplanes, with replacement of any cracked flight control rods. The NPRM would have required replacement of these flight control rods with improved design parts and would have reduced the need for the number of repetitions of the inspections.

Was the Public Invited To Comment?

The FAA invited interested persons to participate in the making of this amendment. The comments, in most part, reflect the public's desire to have FAA withdraw the proposal and let the current AD's stand. The reason for this is because the need for repetitive inspections is not eliminated by replacing flight control rods with improved design parts.

The FAA's Determination

What Is FAA's Final Determination on This Issue?

After re-evaluating all information related to this subject, we have determined that:

—The unsafe condition is currently addressed through AD 80–13–11 R2 and AD 80–03–08;

—Because we have not received any recent service problems regarding this subject on the affected airplanes, there is no need for the supplemental NPRM, Docket No. 91–CE–87–AD; and

—We should withdraw the supplemental NPRM.

Withdrawal of this action does not prevent us from taking or commit us to any future action.

Regulatory Impact

Does This Proposed AD Withdrawal Involve a Significant Rule or Regulatory Action?

Since this action only withdraws a proposed AD, it is not an AD and, therefore, is not covered under Executive Order 12866, the Regulatory Flexibility Act, or DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979).

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Withdrawal

Accordingly, FAA withdraws the supplemental notice of proposed rulemaking, Docket No. 91–CE–87–AD, published in the **Federal Register** on April 1, 1997 (62 FR 15443).

Issued in Kansas City, Missouri, on November 28, 2000.

William J. Timberlake,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00–30947 Filed 12–4–00; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. 94P–0036]

Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims; Reopening of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; reopening of the comment period.

SUMMARY: The Food and Drug Administration (FDA) is reopening to January 19, 2001, the comment period for a document published in the **Federal Register** of November 17, 1999 (64 FR 62746). In that document, FDA proposed to amend its regulations on nutrition labeling to require that the amount of *trans* fatty acids present in a food, including dietary supplements, be included in the amount and percent Daily Value declared for saturated fatty acids. FDA also proposed that, wherever saturated fat limits are placed on nutrient content claims, health claims, or disclosure or disqualifying levels, the amount of *trans* fatty acids be limited as well. Finally, FDA proposed to define the nutrient content claim ''*trans* fat free.'' FDA is taking this action in response to comments on the November 17, 1999, proposal to ensure that interested parties have an adequate opportunity to comment on the issue of whether the agency should define the nutrient content claims ''reduced *trans* fat'' and ''reduced saturated and *trans* fats.''

DATES: Submit written comments on nutrient content claims for ''reduced *trans* fat'' and ''reduced saturated and *trans* fats'' by January 19, 2001.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. You may also send comments to the Dockets Management Branch at the following e-mail address: FDADockets@oc.fda.gov or via the Internet at http://www.accessdata.fda.gov/scripts/oc/dockets/comments/commentdocket.cfm.

FOR FURTHER INFORMATION CONTACT: Susan Thompson, Center for Food Safety and Applied Nutrition (HFS–832), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–205–5587.

SUPPLEMENTARY INFORMATION:

I. Reopening of Comment Period

In the **Federal Register** of November 17, 1999 (64 FR 62746), FDA (we) proposed to amend our regulations on nutrition labeling to require that the amount of *trans* fatty acids present in a food, including dietary supplements, be included in the amount and percent Daily Value declared for saturated fatty acids. We also proposed that, wherever saturated fat limits are placed on nutrient content claims, health claims, or disclosure or disqualifying levels, the amount of *trans* fatty acids be limited as well. Finally, we proposed to define the nutrient content claim ''*trans* fat free.'' In that document, we requested comments on the proposal by February 15, 2000. In the **Federal Register** of February 16, 2000 (65 FR 7806), we extended the comment period to April 17, 2000.

Ten comments responding to the proposal (see Docket 94P–0036, Comment numbers 1776, 2113, 2117, 2125, 2128, 2133, 2135, 2138, 2139, and EMC 475) requested that the final rule define the nutrient content claim ''reduced *trans* fat.'' We had not proposed a definition for this claim, and had suggested that persons who believe that such a claim is useful could petition the agency under § 101.69 (21 CFR 101.69) (64 FR 62746 at 62760). Other comments (see Docket 94P–0036, Comment numbers 2136 and 2139) suggested a criterion (i.e., 25 percent less saturated fat and *trans* fat combined) for the claim ''reduced saturated fat'' that we believe may be more appropriate as a criterion for the claim ''reduced saturated and *trans* fats.''

We have considered these comments and believe that some members of the public may not have anticipated these issues and thus did not address them in comments. To ensure that all interested parties have had an opportunity to comment on whether the final rule should define the claims ''reduced *trans* fat'' and ''reduced saturated and *trans* fats,'' we are reopening the comment period for the November 17, 1999, proposed rule for a period of 45 days. Comments submitted during this period are to be limited to those that directly address the two claims identified above. We are not requesting comments on any other issue, and we do not intend to consider such comments if submitted.

II. How to Submit Comments

Interested persons may submit to the Dockets Management Branch (address above) written comments by January 19, 2001. You may also send comments to the Dockets Management Branch at the following e-mail address: FDADockets@oc.fda.gov, or via the Internet at http://www.accessdata.fda.gov/scripts/oc/dockets/comments/commentdocket.cfm. You must submit two copies of comments, identified with the docket number found in brackets in the heading of this document, except that you may submit one copy if you are an individual. You may review received comments in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: November 29, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00–30827 Filed 12–4–00; 8:45 am]

BILLING CODE 4160–01–F

NATIONAL INDIAN GAMING COMMISSION

25 CFR Part 580

[RIN 3141–AA04]

Environment, Public Health and Safety

AGENCY: National Indian Gaming Commission.

ACTION: Proposed rule: Notice of extension of time.

SUMMARY: On July 24, 2000, the National Indian Gaming Commission (Commission) issued a Proposed Rule (65 FR 45558, July 24, 2000) promulgating draft regulations to provide for adequate protection of the environment, public health and safety under the Indian Gaming Regulatory Act (Act). The date for filing comments is being extended.

DATES: Comments shall be filed on or before January 19, 2001.

ADDRESSES: Comments may be mailed to: Environment, Public Health and Safety Comments, National Indian Gaming Commission, 1441 L Street, N.W., Suite 9100, Washington, D.C. 20005, delivered to that address between 8:30 a.m. and 5:30 p.m., Monday through Friday, or faxed to 202/632–7066 (this is not a toll-free number). Comments received may be inspected between 9:00 a.m. and noon, and between 2:00 p.m. and 5:00 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Christine Nagle at 202/632–7003; fax 202/632–7066 (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION: The Indian Gaming Regulatory Act (IGRA, or the Act), enacted on October 17, 1988, established the National Indian Gaming Commission (Commission). Under the Act, the Commission is charged with ensuring that tribal gaming facilities are constructed, maintained and operated in a manner, which adequately protects the environment and the public health and safety. The proposed regulations establish a process for carrying out this Commission responsibility. The Commissioners have been requested to allow additional time for preparation of comments on the proposed regulations. The Commission has determined that these regulations are of such significance that interested parties should be given additional time to determine and present their views.

Montie R. Deer,

Chairman, National Indian Gaming Commission.

[FR Doc. 00–30851 Filed 12–4–00; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

[WV–087–FOR]

West Virginia Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing.

SUMMARY: OSM is announcing receipt of a proposed amendment to the West Virginia regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The program amendment adds new West Virginia regulations at 199 CSR 1 concerning Surface Mine Blasting Rule. The amendments are intended to improve the operational effectiveness of the West Virginia program.

DATES: If you submit written comments, they must be received on or before 4:00 p.m. (local time), on January 4, 2001. If requested, a public hearing on the proposed amendments will be held at 1:00 p.m. (local time), on January 2, 2001. Requests to speak at the hearing must be received by 4:00 p.m. (local time), on December 20, 2000.

ADDRESSES: Mail or hand-deliver your written comments and requests to speak at the hearing to Mr. Roger W. Calhoun, Director, Charleston Field Office at the address listed below.

You may review copies of the West Virginia program, the proposed amendment, a listing of any scheduled hearings, and all written comments received in response to this document at the addresses below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the proposed amendment by contacting OSM's Charleston Field Office.

Mr. Roger W. Calhoun, Director, Charleston Field Office, Office of Surface Mining Reclamation and Enforcement, 1027 Virginia Street, East, Charleston, West Virginia 25301 Telephone: (304) 347–7158. E-mail: chfo@osmre.gov

West Virginia Division of Environmental Protection, 10 McJunkin Road, Nitro, West Virginia 25143, Telephone: (304) 759–0515. The proposed amendment will be posted at the Division's Internet page: *http://www.dep.state.wv.us*

In addition, you may review copies of the proposed amendment during regular business hours at the following locations:

Office of Surface Mining Reclamation and Enforcement, Morgantown Area Office, 75 High Street, Room 229, P.O. Box 886, Morgantown, West Virginia 26507, Telephone: (304) 291–4004

Office of Surface Mining Reclamation and Enforcement, Beckley Area Office, 323 Harper Park Drive, Suite 3, Beckley, West Virginia 25801, Telephone: (304) 255–5265.

FOR FURTHER INFORMATION CONTACT: Mr. Roger W. Calhoun, Director, Charleston Field Office; Telephone: (304) 347–7158.

SUPPLEMENTARY INFORMATION:

I. Background on the West Virginia Program

On January 21, 1981, the Secretary of the Interior conditionally approved the West Virginia program. You can find background information on the West Virginia program, including the Secretary's findings, the disposition of comments, and the conditions of approval in the January 21, 1981, **Federal Register** (46 FR 5915–5956). You can find later actions concerning the conditions of approval and program amendments at 30 CFR 948.10, 948.12, 948.13, 948.15, and 948.16.

II. Discussion of the Proposed Amendment

By letter dated October 30, 2000 (Administrative Record Number WV–1187), the WVDEP submitted an amendment to its program. The amendment concerns the addition to the West Virginia regulations of new Title 199, Series 1, entitled Surface Mine Blasting Rule. These regulations consist of new blasting provisions and blasting provisions that have been relocated or derived from previously approved West Virginia blasting provisions. We have identified in brackets in the proposed amendment below, those instances where the State has indicated that specific provisions have been relocated or derived from previously approved blasting provisions. On November 12, 1999 (Administrative Record Number WV–1143), we approved, with certain exceptions, revisions to the West Virginia Code (W. Va. Code) concerning blasting (64 FR 61507–61518). The current amendment is intended to revise the States blasting rules to implement the approved blasting statutes.

The new blasting regulations are presented below.

199 CSR 1

Title 199

Legislative Rule

Division of Environmental Protection

Series 1

Surface Mining Blasting Rule

Section 199–1–1. General

1.1. Scope.—This rule establishes general and specific rules for overseeing and regulating blasting on all surface mining operations; implementing and overseeing the pre-blast survey process; inspection and monitoring of blasting operations; seismograph use; warning methods; site specific limitations for type, size, timing and frequency of blasts; public notice requirements; maintaining and operating a system to receive and address questions, concerns and complaints relating to mining operations; setting the qualifications for individuals and firms performing pre-blast surveys; establishing the education, training, examination and certification of blasters; disciplinary procedures for blasters; and administering a claims process, including arbitration, for property damage caused by blasting.

1.2. Applicability.—This rule applies to all surface mining operations and surface disturbances associated with underground mining operations in the State of West Virginia.

1.3. Authority.—W. Va. Code Sections 22–1–3, 22–3A–4, 22–1–5. *et seq.*

1.4. Filing Date.

1.5. Effective Date.

1.6. Incorporation by Reference.—Federal Counterpart Regulations—30 CFR 850.

1.7. Repeal of Former Rule.—This rule repeals and replaces 38CSR2C—Standards for Certification of Blasters—Surface Coal Mines, effective May 1, 1995, filed April 26, 1995.

Section 199–1–2

Definitions.—As used in this rule unless used in a context that clearly requires a different meaning the term:

2.1. Active Blasting Experience means experience gained by a person who has worked on a blasting crew, supervised a blasting crew, or worked on a drilling crew which performed blasting operations. Two hundred forty working days constitutes one year of experience. Experience may only be gained by ''first-hand'' participation in activities associated with the storing, handling, transportation and use of explosives or the immediate supervision of those activities within surface coal mines, and the surface areas of underground coal mines. Experience should be related to surface mine blasting; Provided, that other related blasting experience (quarrying operations, etc.) may be accepted by the director on a case-by-case basis as qualifying experience. [This provision was relocated from CSR 38–2C–2.1]

2.2. Air Blast means an airborne shock wave resulting from the detonation of explosives.

2.3. Adjuster means an outside party that is assigned to investigate, document, evaluate and make recommendations on a reported loss.

2.4. Arbitrator means an impartial individual appointed by the Office of Environmental Protection with the authority to settle the disputes between property owners and mine operators as they relate to allegations of blasting damage.

2.5. Arbitration means the referral of a dispute to a neutral or impartial person for total or partial determination. It is intended to be inexpensive, prompt and fair to the parties.

2.6. Blast means any planned or unplanned detonation(s) of an explosive(s) being initiated simultaneously by a single energy source. [This provision was relocated from CSR 38–2C–2.2.]

2.7. Blast Site means the area where explosive materials is handled during loading including the perimeter formed by the loaded blast holes and 50 feet in all directions from loaded holes.

2.8. Blaster means a qualified person in charge of and responsible for the design, loading and firing of a blast. This must be an individual who is certified by the Office of Explosives and Blasting.

2.9. Blasting Complaint means a communication to the Office of Explosives and Blasting from a member of the public expressing concern, aggravation, fear or indications of blasting damage. A blasting complaint may or may not initially indicate damage.

2.10. Blasting Claim means an allegation by the property owner of blasting related damage to property.

2.11. Blasting Log means a written record containing all pertinent information about a specific blast as may be required by law or rule.

2.12. Blasting Vibration means the temporary ground movement produced by a blast that can vary in both intensity and duration.

2.13. Caused By Blasting means that there is direct, consistent and conclusive evidence or information that the alleged damage was definitely caused by blasting from the mine site in question.

2.14. Certified Blaster means a person who has taken and passed the examination described in this rule, and has been issued a certification card by the Office of Explosives and Blasting. [This provision was relocated from CSR 38–2C–2.3.]

2.15. Certified Examiner/Inspector means a person employed by the Office of Explosives and Blasting who administers training or examinations to applicants for certification as certified blasters, or who inspects surface mining operations and who has taken and passed the examination described in of this rule. [This provision was relocated from CSR 38–2C–2.4.]

2.16. Claimant means the property owner who makes a blasting damage claim.

2.17. Claims Administrator means the individual, firm or organization that manages the blasting damage claims program for the Office of Explosives and Blasting.

2.18. Construction Blasting means blasting to develop haulroads, mine access roads, coal preparation plants, drainage structures, or underground coal mine sites and shall not include production blasting.

2.19. Detonation means a chemical reaction resulting in a rapid release of energy. [This provision was relocated from CSR 38–2C–2.5]

2.20. Director means the director of the Division of Environmental Protection or the director's authorized agent.

2.21. Division means the Division of Environmental Protection.

2.22. Explosives means any chemical compound, mixture or device, the primary or common purpose of which is to function by explosion; including, but not limited to, water gel, slurries, emulsion, dynamites, permissibles, pellet powder, blasting caps, cast primers and boosters, detonating cord, detonating cord delay connectors, and blasting agents. [This provision was relocated from CSR 38–2C–2.6]

2.23. Fly Rock means rock and/or earth propelled from the blast area through the air or along the ground by the force of the detonated explosives.

2.24. Loss Reserve means the total amount of money indicated in a given loss to include the estimated value (repairs or replacement costs), and the costs to administer and adjust that loss.

2.25. Loss Value means the amount of money indicated in a given loss to include costs of repairs or replacement costs.

2.26. Not Caused By Blasting means that there is direct, consistent, and conclusive evidence or information that blasting from the mine site in question was definitely not at fault for the alleged property damage.

2.27. Office means the Office of Explosives and Blasting.

2.28. Operator means any person who is granted or who should obtain a permit to engage in any activity covered by W. Va. Code Section 22.

2.29. Possible Caused By Blasting means the physical damage in question is not entirely consistent with blasting induced property damage, but that blasting cannot be ruled out as a casual factor.

2.30. Pre-Blast Survey means the written documentation of the existing condition of a given structure near an area where blasting is to be conducted. The purpose of the survey is to note the pre-blasting condition of the structure and note any observable defects or damage.

2.31. Probably Caused By Blasting means that there is physical damage present at the site in question that is entirely consistent with blasting induced property damage, and said damage can be attributed to a specific mine site and/or blast event(s).

2.32. Probably Not Caused By Blasting means that there is substantial, but not conclusive information that the alleged damage was caused by something other than blasting.

2.33. Production Blasting means blasting that removes the overburden to expose underlying coal seams and shall not include construction blasting.

2.34. Protected Structure means any of the following structures that are situated outside the permit area: an occupied dwelling, a temporarily unoccupied dwelling which has been occupied within the past ninety (90) days, a public building, a habitable building for commercial purposes, a school, a church, a community or institutional building, a public park or a water well. [This provision was relocated and modified from CSR 38–2–2.98.]

2.35. Supervised a Blasting Crew means that a person assumed responsibility for the conduct of a blasting crew(s) and that the crew(s) reported directly to that person. [This provision was relocated from CSR 38–2C–2.7.]

2.36. Surface Mine and Surface Area of Underground Mines means all areas except underground workings surface mined or being surface mined, including adjacent areas ancillary to the operations, i.e., preparation and processing plants, storage areas, shops, haulageways, roads, and trails, which are covered by the provisions of W. Va. Code Section 22–3–1 *et seq.*, and rules promulgated under that article. [This provision was relocated from CSR 38–2C–2.8.]

2.37. Worked on a Drilling Crew means that a person has directly participated in the loading, connecting, and preparation of blast holes and has detonated blasts. [This provision was relocated from CSR 38–2C–2.9.]

2.38. Worked on a Blasting Crew means that a person has first-hand experience in storing, handling, transporting, and using explosives. [This provision was relocated from CSR 38–2C.2.10.]

Section 199–1–3. Blasting

3.1. General Requirements. Each operator shall comply with all applicable state and federal laws in the use of explosives. A blaster certified by the office shall be responsible for all blasting operations including the transportation, storage and use of explosives within the permit area in accordance with the blasting plan. [This provision was relocated from CSR 38–2–6.1.]

3.2. Blasting Plans.

3.2.a. As required by statute, all surface mining operations that propose blasting shall include a blasting plan. The blasting plan shall explain how the applicant will comply with the blasting requirements of W. Va. Code Section 22–3–1 *et seq.*, and this rule. This plan shall include, at a minimum, information setting forth the limitations the operator will meet with regard to ground vibration and airblast, the basis for those limitations, and the methods to be applied in preventing the adverse effects of blasting operations. [This provision was relocated and modified from CSR 38–2–6.2.]

3.2.b. The blasting plans referred to in paragraph 3.2.a. of this rule will be reviewed for administrative and technical completeness by the office. The person conducting the review shall be experienced in common blasting practices utilized on surface mining operations. The reviewer will take into consideration past operational history of the applicant, the geological formation the blasting operations will take place in, and the proximity of individual dwellings or communities to the blasting operations.

3.2.c. The blasting plan shall also contain an inspection and monitoring procedure to insure that all blasting operations are conducted to eliminate, to the maximum extent technically feasible, adverse impacts to the surrounding environment and surrounding occupied dwellings.

3.2.d. For operations where a notice of violation (NOV) or cessation order (CO) has been issued; the office shall review the blasting plan within thirty (30) days of final disposition of the NOV or CO. This review will focus on the specific circumstances that led to the enforcement action. If necessary the blasting plan will be modified to insure all precautions are being taken to safely conduct blasting operations.

3.3. Public Notice of Blasting Operations. [Subsection CSR 199–1–3.3 was relocated and modified from CSR 38–2.6.3.a.]

3.3.a. At least ten (10) days but not more than thirty (30) days prior to any blasting operations which detonate five (5) pounds or more of explosives at any given time, the operator shall publish a blasting schedule in a newspaper of general circulation in all the counties of the proposed area. Copies of the schedule described in subdivision 3.6.a. of this rule shall be distributed by Certified Mail to local governments, public utilities and each resident within seven tenths (0.7 mi.) of a mile of the blasting site in accordance with W. Va. Code Section 22–3–13a(a)(1 and 2). The operator shall republish and redistribute the schedule at least every twelve (12) months and revise, republish and redistribute the schedule at least ten (10) days but not more than thirty (30) days prior to blasting whenever the area covered by the schedule changes or actual time periods for blasting significantly differ from that set forth in the prior schedule. The blasting schedule described in subdivision 3.6.a. shall contain at a minimum the following:

3.3.a.1. Name, address and phone number of the operator;

3.3.a.2. Identification of the specific areas in which blasting will take place;

3.3.a.3. Dates and times when explosives will be detonated;

3.3.a.4. Methods to be used to control access to the blasting area; and

3.3.a.5. Types and patterns of audible warning and all clear signals to be used before and after blasting.

3.4. Surface blasting activities incident to underground coal mining are not subject to the requirements of subdivision 3.3.a of this rule so long as all local governments and residents or owners of dwellings or structures located within one-half (½) mile of the blast site are notified in writing by the operator of proposed times and locations of the blasting operation. Such notice of times that blasting is to be conducted may be announced weekly, but in no case less than twenty-four (24) hours before the blasting will occur. [This provision was relocated from CSR 38–2–6.3.b.]

3.5. Blast Record. [Subsection CSR 199–1–3.5 was relocated from CSR 38–2–6.4.]

3.5.a. A blasting log book formatted in a manner prescribed by the director shall be kept current daily and made available for inspection at the site by the director and upon written request by the public.

3.5.b. The blasting log shall be retained by the operator for three (3) years.

3.5.c. The blasting log shall, at a minimum, contain the following information:

3.5.c.1. Name of permittee, operator or other person conducting the blast;

3.5.c.2. Location, date and time of blast;

3.5.c.3. Name, signature and certification number of blaster-in-charge;

3.5.c.4. Identification of nearest structure not owned or leased by the operator and direction and distance, in feet, to such structure;

3.5.c.5. Weather conditions;

3.5.c.6. Type of material blasted;

3.5.c.7. Number of holes, burden, and spacing;

3.5.c.8. Diameter and depth of holes;

3.5.c.9. Types of explosives used;

3.5.c.10. Weight of explosives used per hole;

3.5.c.11. Total weight of explosives used;

3.5.c.12. Maximum weight of explosives detonated within any eight (8) millisecond period;

3.5.c.13. Method of firing and type of circuit;

3.5.c.14. Type and length of stemming;

3.5.c.15. If mats or other protections were used;

3.5.c.16. Type of delay detonator used and delay periods used;

3.5.c.17. Seismograph records and air blast records shall include but not be limited to:

3.5.c.17.A. Seismograph and air blast reading, including exact location, date, and time of reading and its distance from the blast;

3.5.c.17.B. Name of person and firm taking the readings;

3.5.c.17.C. Name of person and firm analyzing the record, where analysis is necessary; and

3.5.c.17.D. Type of instrument, sensitivity and calibration signal or certification of annual calibration.

3.5.c.18. Shot location;

3.5.c.19. Sketch of delay pattern to include the entire blast pattern and all decks; and

3.5.c.20. Reasons and conditions for unscheduled blasts.

3.6. Blasting Procedures. [Subsection 199–1–3.6. was relocated and modified from CSR 38–2–6.5.]

3.6.a. All blasting shall be conducted during daytime hours, between sunrise and sunset; provided, that the director may specify more restrictive time periods based on public requests or other consideration, including the proximity to residential areas. No blasting shall be conducted on Sunday. Provided, however, the director may grant approval of a request for Sunday blasting if the operator demonstrates to the satisfaction of the director that the blasting is necessary and there has been an opportunity for a public hearing. Blasting shall not be conducted at times different from those announced in the blasting schedule except in emergency situations where rain, lightning, or other atmospheric conditions, or operator or public safety requires unscheduled detonations. Blasting shall be conducted in such a way so as to prevent injury to persons, damage to public or private property outside the permit area, adverse impacts on any underground mine, and change in the course, channel, or availability of surface or groundwater outside the permit area.

3.6.b. Safety Precautions:

3.6.b.1. Three (3) minutes prior to blasting, a warning signal audible to a range of one-half (1/2) mile from the blast site will be given. This preblast warning shall consist of three (3) short warning signals of five (5) seconds duration with five (5) seconds between each signal. One (1) long warning signal of twenty (20) seconds duration shall be the ''all clear'' signal. Each person in the permit area, and each person who resides or regularly works within one-half (1/2) mile of the permit area shall be notified of the meaning of these signals;

3.6.b.2. All approaches to the blast area shall be guarded against unauthorized entry prior to and immediately after blasting;

3.6.b.3. All charged holes shall be guarded and posted against unauthorized entry; and

3.6.b.4. The certified blaster shall be accompanied by at least one other person at the time of firing of the blast.

3.6.c. Airblast Limits.

3.6.c.1. Airblast shall not exceed the maximum limits listed below at the location of any dwelling, public buildings, school, church, or community or institutional building outside the permit area.

Lower Frequency Limit of Measuring System in Hz (+ 3 dB)—Maximum Level, in db

0.1 Hz or lower—flat response (Only when approved by the Director)—134 peak.
2 Hz or lower—flat response133 peak.
6 Hz or lower—flat response 129 peak.
C-weighted—slow response (Only when approved by the Director)—105 peak dBC.

3.6.c.2. If necessary to prevent damage, the director may specify lower maximum allowable airblast levels for use in the vicinity of a specific blasting operation.

3.6.c.3. Monitoring. The operator shall conduct periodic monitoring to ensure compliance with the airblast standards. The director may require airblast measurement of any or all blasts and may specify the locations at which such measurements are taken. The air blast measuring systems used shall have an upper-end flat-frequency response of at least 200 Hz.

3.6.d. Flyrock, including blasted material, shall not be cast from the blasting site more than half way to the nearest dwelling or other occupied structure, beyond the area of control specified in subdivision 3.6.e of this rule, or in no case beyond the bounds of the permit area.

3.6.e. Access to the blast area shall be controlled against the entrance of livestock or unauthorized personnel during blasting and for a period thereafter until an authorized person has reasonably determined:

3.6.e.1. That no unusual circumstances exist such as imminent slides or undetonated charges, etc.; and

3.6.e.2. That access to and travel in or through the area can be safely resumed. from 38–2–6.5

3.6.f. At the request of the director, the operator shall monitor air blast levels using an instrument with an upper-end flat-frequency response of at least 200 Hz.

3.6.g. Blast Design.

3.6.g.1. An anticipated blast design shall be submitted if blasting operations will be conducted within:

3.6.g.1.A. 1,000 feet of any building used as a dwelling, public building, school, church, or community or institutional building outside the permit area; or

3.6.g.1.B. 500 feet of an active or abandoned underground mine.

3.6.g.2. The blast design may be presented as part of a permit application or at a time, before the blast as approved by the director.

3.6.g.3. The blast design shall contain sketches of the drill patterns, delay periods, and decking and shall indicate the type and amount of explosives to be used, critical dimensions, and the location and general description of structures, including protected structures, to be protected, as well as a discussion of design factors to be used, which protect the public and meet the applicable airblast, flyrock, and ground-vibration standards.

3.6.g.4. The blast design shall be prepared and signed by a certified blaster.

3.6.g.5. The director may require changes to the design submitted. [This provision was relocated from CSR 38–2–6.5.g.]

3.6.h. No blasting within five hundred (500) feet of an underground mine not totally abandoned shall be permitted except with the concurrence of the office, the operator of the underground mine and the Mine Safety and Health Administration. The director may prohibit blasting on specific areas where it is deemed necessary for the protection of public or private property, or the general welfare and safety of the public. [This provision was relocated from CSR 38–2–6.5.h.]

3.6.i. The operator may use the following scaled distance formulas to determine the allowable maximum weight of explosives (lbs.) to be detonated in any eight millisecond period without seismic monitoring:

Formula and Distance in Feet From the Blasting Site to the Nearest Protected Structure

W = (D/50)2—0—300 feet
W = (D/55)2—301—5,000 feet
W = (D/65)2—5,001 feet or greater

W = Weight of explosives in pounds
D = Distance to the nearest structure

[This provision was relocated from CSR 38–2–6.5.i.]

3.6.j. The scaled distance formulas need not be used if a seismograph measurement at the nearest protected structure is recorded and maintained for every blast. The peak particle velocity in inches per second in any one of the three mutually perpendicular directions shall not exceed the following values at any protected structure:

Seismograph Measurement and Distance to the Nearest Protected Structure

1.25—0—300 feet
1.0—301—5,000 feet
0.75—5,001 feet or greater

[This provision was relocated from CSR 38–2–6.5.j.]

3.6.k. The director may require a seismograph recording of any or all blasts based on the physical conditions of the site in order to prevent injury to persons or damage to property. [This provision was relocated from CSR 38–2–6.5.k.]

3.6.l. The maximum allowable ground vibration as provided in subdivisions 3.6.i and 3.6.j of this subsection shall be reduced by the director, if determined necessary to provide damage protection. [This provision was relocated from CSR 38–2–6.5.l.]

3.6.m. The maximum airblast and ground-vibration standards of subdivisions 3.6.c and 3.6.j of this subsection shall not apply at the following locations:

3.6.m.1. Structures owned by the permittee and not leased to another person; and

3.6.m.2. Structures owned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the director before blasting. [This provision was relocated from CSR 38–2–6.5.m.]

3.7. Blasting Control for Other Structures. [Subsection CSR 199–1–3.7. was relocated from CSR 38–2–6.6.]

3.7.a. All other structures in the vicinity of the blasting area which are not defined as protected structures in subsection 2.24 of this rule shall be protected from damage by establishment of a maximum allowable limit on ground vibration, specified by the operator in the blasting plan and approved by the director.

3.7.b. The plan submitted under this subsection shall not reduce the level of protection for other structures otherwise provided for in this rule.

3.8. Certified Blasting Personnel.—Each person responsible for blasting operations shall be certified. Each certified blaster shall have proof of certification either on his person or on file at the permit area during blasting operations. Certified blasters shall be familiar with the blasting plan and blasting related performance standards for the operation at which they are working. [This provision was relocated from CSR 38–2–6.7.]

3.9. Pre-blast Surveys. [This provision is new. Many of the previously approved pre-blast survey requirements and specifications are now included in statute at W. Va. Code 22–3–13a.]

3.9.a. Qualifications for Individuals and Firms Performing Pre-blast Surveys.—Individuals must comply with the following:

3.9.a.1. Individuals must be approved by the office to administer pre-blast surveys.

3.9.a.2. The office shall develop a list of individuals who have exhibited ability by past experience to perform pre-blast surveys. Provided, however, attending a training course administered by the office on pre-blast surveys shall meet the previous experience requirements.

3.9.a.3. Every three (3) years after meeting initial qualifications for performing pre-blast surveys, individuals must meet the requirements of subparagraphs 3.9.a.1. (or submit written qualifications of previous experience performing pre-blast surveys) of this rule.

3.9.b. Pre-blast Survey Review.

3.9.b.1. Pre-blast surveys shall be submitted to the office on forms prescribed by the director in accordance with W. Va. Code Section 22–3–13a.

3.9.b.2. The office shall review each pre-blast survey as to form and completeness only, and notify the operator of any deficiencies within 15 days.

3.9.b.3. At the time the pre-blast survey is accepted by the DEP, the DEP shall forward a copy to the homeowner or resident.

3.9.b.4. The Office of Explosives and Blasting shall develop a procedure for assuring surveys shall remain confidential.

3.9.b.5. The DEP shall make available informational materials educating citizens about pre-blast surveys and blasting.

Section 199–1–4. Certification of Blasters.

4.1. Requirements for Certification.—In every surface mine and surface area of an underground mine when blasting operations are being conducted, a certified blaster shall be responsible for the storage, handling, transportation, and use of explosives for each and every blast, and for conducting the blasting operations in accordance with the blasting plans approved in a permit issued pursuant to W. Va. Code Section 22–3–1 et seq., and the rules promulgated under that article. [This provision is relocated and modified from CSR 38–2–6–1 and 38–2C–3.1.]

4.2. Qualifications for Certification.—Each applicant for certification shall have had at least one (1) year active blasting experience within the past five (5) years, and have demonstrated a working knowledge of and skills of the storage, handling, transportation, and use of explosives, and a knowledge of all state and federal laws pertaining thereto, by successfully taking and passing the examination for certification required by subsection 6.2 of this rule. [This provision is derived from W. Va. Code 22–3C–3.2.]

4.3. Application for Certification.—Prior to taking the examination for certification, a person must submit an application along with a fifty dollar ($50.00) application fee to the office to take the examination on forms prescribed by the director. Upon receipt of an application for examination, the director shall, after determining that the applicant meets the experience requirements of subsection 4.2 of this rule, notify the applicant of the date, time, and location of the scheduled examination. [This provision was derived from W. Va. Code 22–3C–3.3.]

Section 199–1–5. Training.—

The office will administer a training program to assist applicants for blaster certification or re-certification in acquiring the knowledge and skills required for certification. The training requirements shall include, at a minimum, those subject areas set forth in subdivisions 6.1.a through 6.1.k of subsection 6.1 of this rule, and paragraphs 6.2.a.1 through 6.2.a.11 of subsection 6.2 of this rule.

In lieu of completing the training program, the applicant for certification or re-certification may complete a self-study course using the study guide and other materials available from the office. [CSR 199–1–5 was relocated and modified from CSR 38–2C–4.]

Section 199–1–6.

Examination for Certification of Examiner/Inspector and Certified Blaster. [This entire section was relocated and modified from CSR 38–2C–5.1.]

6.1. Examinations for Certified Blaster Examiners/Inspectors.—All persons employed by the office, whose duties include training, examining, and certification of blasters and/or inspecting blasting operations shall be a certified examiner/inspector. Certification under the provisions of this subsection does not constitute certification under the provisions of subsection 6.2 of this rule; however, certification under subsection 6.2 of this rule is sufficient for certification under this subsection. The examination for certified examiner/inspector shall at a minimum tests the applicant's knowledge of the information presented in the Study guide for West Virginia Surface Mine Blasters, and shall consist of three parts;

6.1.a. Part 1.—A written multiple choice examination covering:

6.1.a.1. Types of explosives and their properties, to include selection of appropriate explosives;

6.1.a.2. Blasting equipment and accessories, to include blasting machines;

6.1.a.3. Blast dimensions and calculations, to include geologic and topographic considerations, blast hole design, flyrock control, secondary blasting, and blast plans;

6.1.a.4. Delay systems, to include pattern design, field layout, and initiation systems;

6.1.a.5. Timing;

6.1.a.6. Blast vibration and vibration control, to include airblast, monitoring techniques, and use of preblast surveys;

6.1.a.7. Loading and detonating, to include priming, scheduling, site control warning signals, and unpredictable hazards;

6.1.a.8. Storage and transportation of explosives;

6.1.a.9. Record keeping and reporting;

6.1.a.10. Current state and federal laws and regulations relating to the storage, handling, transportation, and use of explosives; the training and certification of blasting personnel, and blasting signs; and

6.1.a.11. Responsibilities of a certified blaster.

6.1.b. Part 2.—A written simulation whereby the applicant must correctly and properly complete a blasting log.

6.1.c. Part 3.—A hands-on simulation whereby the applicant must demonstrate the ability to properly connect a blast, simulate a selected initiation system, and simulate detonating a blast.

6.1.d. A score of 70 percent (70%) for part 1, and satisfactorily completion of parts 2 and 3 are required for successful passage of the examination. An individual who fails to achieve a passing score may retake the examination subject to the discretion of the director.

6.2. Examination for Certified Blaster. [This provision was relocated from CSR 38–2C–5.2.]—The examination for certified blaster shall include information presented in the study Guide for West Virginia Surface Mine Blasters, and shall consist of three (3) parts:

6.2.a. Part 1.—A written multiple choice examination covering:

6.2.a.1. Types of explosives and their properties, to include selection of appropriate explosive(s);

6.2.a.2. Blasting equipment and accessories, to include blasting machines;

6.2.a3. Blast dimensions and calculations, to include geologic and topographic considerations, blast hole design, flyrock control, secondary blasting, and blast plans;

6.2.a.4. Delay systems, to include pattern design, field layout, and initiation systems;

6.2.a.5. Timing;

6.2.a.6. Blast vibration and vibration control, to include airblast, monitoring techniques, and use of preblast surveys;

6.2.a.7. Loading and detonating, to include priming, scheduling, site control, warning signals, and unpredictable hazards;

6.2.a.8. Storage and transportation of explosives;

6.2.a.9. Record keeping and reporting;

6.2.a.10. Current state and federal laws and regulations relating to the handling, storage, transportation, and use of explosives; the training and certification of blasting personnel, and blasting signs; and

6.2.a.11. Responsibilities of a certified blaster.

6.2.a.b. Part 2.—A simulation examination whereby the applicant must correctly and properly complete a blasting log.

6.2.c. Part 3—A hands-on simulation whereby the applicant must demonstrate the ability to properly connect a blast, simulate a selected initiation system, and simulate detonating a blast.

6.2.d. A score of 80 percent (80%) for a part 1, and a ''passing grade'' on parts 2 and 3, which are graded on a pass/fail basis, are required for successful passage of the examination.

6.3. Notification of Score.—The office will notify all persons of their scores within thirty (30) days of completing the examination. A person who fails to achieve a passing score of any of the three (3) parts of the examination, may apply, after thirty (30) days of receipt of his or her examination results, to retake the entire examination or any portions that the individual failed to pass.

Any person who fails to pass the exam on the second attempt must certify that he/she has taken or retaken the training course described in section 4 of this rule prior to applying for another examination. [This provision is relocated from CSR 38–2C–5.3]

Section 199–1–7

Approval of Certification.

Upon determination that an applicant for certification has satisfactorily passed the examination, the director shall, within thirty (30) days of the examination date, issue a certification card to the applicant. [This provision was relocated from CSR 38–2C–6.]

Section 199–1–8

Conditions or Practice Prohibiting Certification.

[This provision was relocated from CSR 38–2C–7.]—The Director shall not issue a blaster certification to persons who:

8.1. Are currently addicted to alcohol, narcotics or other dangerous drugs;

8.2. Have exhibited a pattern of conduct inconsistent with the acceptance of responsibility for blasting operations; or

8.3. Are convicted felons. [This provision was relocated from CSR 38–2C–7.]

Section 199–1–9

Re-certification Requirements for Certified Blaster.

9.1. Re-certification of Blasters.—A certified blaster must be re-certified every three (3) years. Each applicant for re-certification must be currently and must document that he or she satisfactorily meets the experience requirements of subsection 4.2 of this rule and has retaken the training course described in section 4 of this rule within the past twelve (12) months prior to application. The application for re-certification must be submitted on forms prescribed by the director along with a thirty dollar (30.00) reapplication fee. [This provision was relocated and modified from CSR 38–2C–8.1.]

9.2. Refresher Training Course/Self-Study Course.—An applicant who does not meet the experience requirements of subsection 3.8 of this rule must take the refresher training course, or complete the self-study course described in section 5 of this rule, and must take and pass the examination required in subsection 6.2 of this rule. [This provision was relocated form CSR 38–2C–8.2.]

Section 199–1–10

Presentation of Certificate; Transfer; and Delegation of Authority

10.1. Upon request by the director, a certified blaster shall exhibit his or her blaster certification card. [This provision was derived from W. Va. Code 22–3C–9.1.]

10.2. The certified blaster shall take all reasonable care to protect his or her certification card from loss or unauthorized duplication, and shall immediately report any such loss or duplication to the office. [This provision was derived from W. Va. Code 22–3C–9.2.]

10.3. Blaster's certifications may not be transferred or assigned. [This provision was derived from W. Va. Code 22–3C–9.3.]

10.4. Certified blasters shall not delegate their authority or responsibility to any individual who is not a certified blaster. [This provision was derived form W. Va. Code 22–3C–9.4.].

Section 199–1–11

Violations by a Certified Blaster.

The director may issue a notice of violation against a certified blaster who is in violation of any of the following:

11.1. Failure to comply with any order issued by the director;

11.2. Illegal use of drugs or narcotics, or any use of alcohol in the work place;

11.3. Violations of federal laws or regulations governing the purchase, use, handling, transportation, storage, or detonation of explosives;

11.4. False swearing in order to obtain a blaster's certification card; or

11.5. Any illegal or improper action taken by a certified blaster which may or has led to injury or death at a blast site. [Relocated from CSR 38–2C–10.1.]

Section 199–1–12

Penalties.

[Section 199–1–12 was relocated from CSR 38–2C–11.]

12.1. Suspension.—Upon service of a written notice of violation by the director to a certified blaster, the director may also, based on clear and convincing evidence of a violation, issue an order suspending his or her certification. Prior to the issuance of such an order, the certified blaster shall be granted a hearing before the director to show cause why his or her certification should not be suspended.

The period of suspension will be conditioned upon the time period for completion of remedial measures to abate the violation as specified in the notice of violation. The director may also require retraining or reexamination as a condition for reinstatement of certification.

12.2. Revocation.—If the remedial action required to abate a notice of violation issued by the director to a certified blaster is not taken within the specified time period for abatement, the director may revoke the blaster's certification and require the blaster to relinquish his or her certification card. Revocation will occur if the certified blaster fails to retrain or fails to take and pass reexamination as a requirement for remedial action as described in subsection 12.1 of this rule.

12.3. Civil and Criminal Penalties—Any certified blaster is subject to the individual civil and criminal penalties provided for in W. Va. Code Section 22–3–17.

Section 199–1–13

Hearings and Appeals.—Any certified blaster who is served a notice of violation, suspension order, revocation order, or civil and criminal sanctions is entitled to the rights of hearings and appeals as provided for in W. Va. Code section 22–3–16 and 17. [This section was relocated from CSR 38–2C–12.]

Section 199–1–14. Blasting Crew

Persons who are not certified and who are assigned to a blasting crew, or assist in the use of explosives, shall receive directions and on-the-job training from a certified blaster. [This section was relocated from CSR 38–2C–13.]

Section 199–1–15

Reciprocity With Other States.

The director may enter into a reciprocal agreement with other states wherein persons holding a valid certification in that state may apply for certification in West Virginia, and upon approval by the director, be certified without undergoing the training or examination requirements set forth in this rule. [This section was relocated from CSR 38–2C–14.]

Section 199–1–16

Blasting Damage Claim [This section is new.]

16.1. Damage to Surface Structures.—A claim of damage to surface structures from blasting will be the result of one or more of the following:

16.1.a. Fly Rock.—Fly rock damage is based on the presence of debris from the blast site and the presence of impact damage;

16.1.b. Air Blast.—Air blast damage is characterized by broken or cracked window glass; and

16.1.c. Blasting Vibration Damage.—Blasting vibration damage is investigated by experienced and specially trained personnel to accurately determine the presence of such damage. Examples are explained in, but not limited to, the American Insurance Association publication, Blasting Damage, A Guide for Adjusters and Engineers.

16.2. Filing a Claim.

16.2.a. It is the responsibility of the property owner to notify the office of the alleged blasting damage. An inspector will be assigned to conduct a field investigation to determine the initial merit of the damage. An investigation will include the following:

16.2.a.1. Inspector will contact property owner within one (1) business day of receiving the complaint to schedule a visit to the property where the alleged blasting damage occurred and interview the property owner;

16.2.a.2. Inspector will visit the blasting site to determine if the operator and blaster are in compliance with state blasting requirements; and

16.2.a.3. Inspector will make written documentation on the investigation that describes the nature and extent of alleged damage, taking into consideration the damage that is accurately indicated on a pre-blast survey, damage where there has been no blasting conducted by the operator or other reliable indicators that the alleged damage actually pre-dated the blasting. Inspector will make one of the following determinations:

16.2.a.3.A. A definite determination that the merit of the alleged blasting damage can be made. Inspector will notify the claims administrator and supply such information that the claims administrator needs to sufficiently document the claim;

16.2.a.3.B. A definite determination that the merit of the alleged blasting damage cannot be made. Inspector will notify the claims administrator and supply such information that the claims administrator needs to sufficiently document the claim;

16.2.a.3.C. Inspector will inform the property owner of the following four resolution options available for the alleged blasting damage:

16.2.a.3.C.1. Withdraw the claim, with no further action required by the office;

16.2.a.3.C.2. File a claim with the operator or the operator's general liability insurance carrier;

16.2.a.3.C.3. File a claim with the homeowner's insurance carrier; or 16.2.a.3.C.4. Submit to the office's claims process.

16.2.a.3.D. If the property owner declines Part 16.2.a.3.C.4. of this rule, the office's involvement will be concluded.

16.2.a.4. Once a determination is made as to the merit of a claim, the office shall offer a chance to meet between the claimant and the permittee to attempt to resolve the issue.

16.3. The claims administrator will be responsible for the following:

16.3.a. Sending notice to the respective operator of the damage claim;

16.3.b. Making an initial assignment of the damage claim to a qualified claims adjuster within one business day;

16.3.c. Making an initial monetary determination of loss reserve of the respective claim; and

16.3.d. Providing the relevant claims information to the arbitrator assigned to that claim.

16.4. The adjuster will be responsible for the following:

16.4.a. Contacting the property owner and physically visiting the blasting damage site within three (3) business days of the initial assignment;

16.4.b. Documenting the alleged blasting damage through accepted methods such as photographs, video tapes, written descriptions, and diagrams;

16.4.c. Reviewing such available supporting information such as blasting logs, seismograph records and pre-blasting surveys;

16.4.d. Making a determination for the need for additional assistance from structural engineers, building contractors, and blasting consultants. The claims administrator will be the approving authority for the assignment of such specialists;

16.4.e. Making a determination as to the merit of the alleged blasting damage claim.

16.4.f. Making an initial monetary determination of the loss value of the respective claim.

16.4.f.1. The adjuster will use the following ratings in the determination of the merit of the alleged blasting damage claim:

16.4.f.1.A. Caused by blasting;

16.4.f.1.B. Probably caused by blasting;

16.4.f.1.C. Possibly caused by blasting;

16.4.f.1.D. Probably not caused by blasting; or

16.4.f.1.E. Not caused by blasting.

16.4.f.2. The merit-rating factors include, but are not limited to the following:

16.4.f.2.A. The claimant is the property owner;

16.4.f.2.B. Correlation of alleged damage event to a specific blast and mine;

16.4.f.2.C. Correlation of alleged damage event to a large, unusual, or problem shot;

16.4.f.2.D. Proximity to the blast site;

16.4.f.2.E. Timeliness of first notice of loss;

16.4.f.2.F. Damage that is not indicated on the pre-blast survey;

16.4.f.2.G. Lack of any other issues or grievances besides blasting;

16.4.f.2.H. Age and physical condition of the structure in question;

16.4.f.2.I. Presence of seismographic records close to the structure in question;

16.4.f.2.J. History of previous blasting in the immediate area;

16.4.f.2.K. Property that has been undermined; and

16.4.f.2.L. An area with a history of geological abnormalities.

16.4.g. Recommendations as to the equitable resolution of the claim; and

16.4.h. Completing report and sending to the claims administrator.

Section 199–1–17

Arbitration for Blasting Damage Claims. [This section is new.]

17.1. Listing of Arbitrators.—The office shall maintain and make available to the claimant and the operator a listing of persons willing and qualified to serve as arbitrators. The listing shall identify those persons who are qualified and willing to serve, included but not limited to, those willing to serve on a volunteer (i.e., without compensation) basis. The office shall establish a pool of arbitrators sufficient to handle the claims process. Once a year the Environmental Advocate, and industry representatives (selected by the West Virginia Mining and

Reclamation Association and the West Virginia Coal Association) may move to strike up to twenty-five percent (25%) of the list. The Environmental Advocate is required to seek citizen input. It is anticipated that the office will recommend the roster be maintained by the American Arbitration Association from which the parties will choose the arbitrator.

17.2. Selection of Arbitrator.—The parties may choose their own arbitrator by agreement, who may or may not be a person on the listing of arbitrators as defined in subsection 17.1 of this rule. In the absence of such agreement, the director will provide the parties with a listing of arbitrators and permit each of the parties to eliminate, in rotation, names from the list until one name remains. That person shall serve as the arbitrator.

17.3. Provision for Preliminary Information to the Arbitrator.—The arbitrator may require the parties to provide pertinent information to the arbitrator and to the other parties prior to the arbitration session. Such information may include, but is not limited to:

17.3.a. The pre-blast survey, shot logs, and other documents deemed necessary by the arbitrator to determine the merits and value, if any, of the blasting damage claim; and

17.3.b. A confidential statement summarizing a party's position on the issues and what relief, if any, should be awarded.

17.4. Demand for Arbitration and Timeframes for Arbitration.—On forms to be provided by the office when notifying the parties of its initial claim determination and the right to demand arbitration, a party seeking arbitration shall serve the other party by certified mail a written demand for arbitration within fifteen (15) days of receipt of the initial claim determination. An arbitrator shall be chosen within fifteen (15) days of receipt. Unless otherwise agreed by the parties and the arbitrator, the arbitration shall be conducted within thirty (30) days after the appointment of the arbitrator. Arbitration shall be completed within thirty (30) days after the first arbitration session, unless changed by agreement of the parties and the arbitrator. The arbitrator is empowered to set the date and time of all arbitration sessions.

17.5. Place of Arbitration.—The parties may by agreement select the place of arbitration and arrange for paying any associated costs. If the place of arbitration is determined by agreement, the place must be identified to the arbitrator upon the arbitrator's appointment. The office shall upon reasonable request by the parties make available its state office for the arbitration. In the event the parties cannot agree on the place of arbitration, the arbitrator is empowered to do so.

17.6. Confidentiality of the Arbitration Process.—Arbitration shall be regarded as confidential. The arbitrator shall maintain and preserve the confidentiality of all arbitration proceedings and records. An arbitrator may not be subpoenaed or called to testify, or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute arbitrated.

17.7. Presentations to the Arbitrator.—Unless otherwise directed by the arbitrator:

17.7.a. Witnesses for the claimant will be the claimant, any one other person designated by the claimant, and the claimant's representative; and witnesses for the operator will be a company officer, its engineer or blaster, and its representative. If the claimant does not have a representative and requests representation, the Office of Explosives and Blasting, through the Office of the Environmental Advocate, shall provide a representative throughout the arbitration process, which representative shall not necessarily be an attorney-at-law.

17.8. Arbitration Award, Fees, Costs and Expenses.—If parties agree on settlement after entering into arbitration, parties may request their settlement be declared the official award by the arbitrator. Within thirty (30) days after the arbitration process is closed or terminated, the arbitrator shall issue a decision upholding, upholding in part, or overruling the initial claim determination made by the representatives of the Office of Explosives and Blasting. If the initial claim determination was in favor of the claimant, the operator requests arbitration and the claim determination is upheld or upheld in part, the operator shall pay the costs of the proceeding, as well as reasonable representation fees and costs of the claimant not to exceed one thousand dollars ($1,000.00). Otherwise, the parties are equally responsible for the cost of the proceeding and are responsible for their own fees and costs.

17.9. Binding Nature of the Award.—By requesting arbitration, the results of such arbitration are intended to be final and binding. As such they are not appealable to the West Virginia Supreme Court of Appeals, the circuit courts, or any other tribunal. The office shall provide written notice to the claimant of the binding nature of the arbitration award and shall secure from the claimant a written acknowledgement that the claimant understands the final nature of the award and agrees to be bound by it.

17.10. Payment of the Award.—Should an award be made against the operator on an arbitrated claim, the operator shall pay the full amount of the award within thirty (30) days of the final determination and award. If the operator fails to pay the award within thirty (30) days, the director may issue a cessation order pursuant to W. Va. Code Section 22–3–16 for all sites operated by the operator.

Section 199–1–18

Explosive Material Fee [This section is new.]

18.1. Assessment Fee on Blasting Material.—Pursuant to W. Va. Code Section 22–3A–7 and Section 22–5B–2a–2, there is hereby assessed a fee of one-quarter cent ($.0025) per pound on explosive material used for any purpose on surface mining operations. Provided, That the operators exempted from the application of Chapter 5B, Article 2A shall pay one-eighth ($.00125) cent per pound on explosive material.

18.2. Remittance of Fee.—Within thirty (30) days of the end of each previous quarter after the effective date of this rule, the operator shall remit to the office the amount of the fee calculated by multiplying one-quarter cent ($.0025) or one-eighth cent ($.00125) for operators exempt from the application of Chapter 5B, Article 2A, times the number of pounds of explosive material used during the preceding quarter for any purpose on the surface mining operations: Provided, That, the materials are measured by the pound. Copies of the delivery records and inventories shall be submitted with the fee to verify the accuracy of the fee calculation.

18.3. Dedication of the Fee.—The office shall deposit all moneys received from the explosive material fees into a special revenue fund to be known as the ''mountaintop removal fund'' within the state treasury. These moneys shall be expended by the Office of Explosives and Blasting and the Office of Coalfield Community Development, created by W. Va. Code Section 5B–2A–1, in the performance of their respective duties: Provided, However, that no explosive material fees collected from underground or surface mining operations specifically exempted from application of Chapter 5B, Article 2A, may be expended to fund the Office of Coalfield Community Development. All such fees shall be reserved and expended exclusively to fund the Office of Explosives and Blasting.

18.4. Expenditures.—Direct expenditures from the fees collected are not authorized, but shall be appropriated by the legislature.

18.5. Sufficiency of Fees.—After one year of collection of the explosive material fees and expenditure of the appropriations therefrom, the office shall report to the legislature whether the fees have provided sufficient revenue to fund the operation of both the Office of Explosives and Blasting and the Office of Coalfield Community Development.

18.6 The director is authorized, through the Treasurer's Office to invest the mountaintop removal fund with all interest earnings accrued to be returned to and be made part of the fund.

Section 199–1–19

Noncompliance. [This section is new.]

Failure to timely comply with the fee requirements of W. Va. Code Section 22–3A and this rule may result in permit suspension or revocation in accordance with W. Va. Code Section 22–3–17.

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSM is seeking comments, on whether the proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendment is deemed adequate, it will become part of the West Virginia program.

Written Comments

If you submit written or electronic comments on the proposed amendment during the 30-day comment period, they should be specific, should be confined to issues pertinent to the notice, and should explain the reason for your recommendation(s). We may not be able to consider or include in the Administrative Record comments delivered to an address other than the one listed above (see ADDRESSES).

Electronic Comments

Please submit Internet comments as an ASCII, Word Perfect, or Word file avoiding the use of special characters and any form of encryption. Please also include ''Attn: SPATS NO. WV–087–FOR'' and your name and return address in your Internet message. If you do not receive a confirmation that we have received your Internet message, contact the Charleston Field office at (304) 347–7158.

Availability of Comments

Our practice is to make comments, including names and home addresses of respondents, available for public review during our regular business hours at the OSM Administrative Record Room (see ADDRESSES). Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Public Hearing

If you wish to speak at the public hearing, you should contact the person listed under FOR FURTHER INFORMATION CONTACT by 4:00 p.m. (local time), on December 20, 2000. The location and time of the hearing will be arranged with those persons requesting the hearing. If no one requests an opportunity to speak at the public hearing, the hearing will not be held.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who testifies at a public hearing provide us with a written copy of his or her testimony. The public hearing will continue on the specified date until all persons scheduled to speak have been heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after all persons scheduled to speak and persons present in the audience who wish to speak have been heard.

Any disabled individual who has need for a special accommodation to attend a public hearing should contact the individual listed under FOR FURTHER INFORMATION CONTACT.

Public Meeting

If only one person requests an opportunity to speak at a hearing, a public meeting, rather than a public hearing, may be held. If you wish to meet with OSM representatives to discuss the proposed amendment, you may request a meeting by contacting the person listed under FOR FURTHER INFORMATION CONTACT. All such meetings will be open to the public and, if possible, notices of meetings will be posted at the locations listed under ADDRESSES. A written summary of each meeting will be made a part of the Administrative Record.

IV. Procedural Determinations

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart federal regulation.

Executive Order 13132—Federalism

This rule does not have federalism implications. SMCRA delineates the roles of the federal and state governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to ''establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'' Section 503(a)(1) of SMCRA requires that state laws regulating surface coal mining and reclamation operations be ''in accordance with'' the requirements of SMCRA, and section 503(a)(7) requires that state programs contain rules and regulations ''consistent with'' regulations issued by the Secretary pursuant to SMCRA.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of state regulatory programs and program amendments since each such program is drafted and promulgated by a specific state, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed state regulatory programs and program amendments submitted by the states must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

Section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that a decision on a proposed state regulatory program provision does not constitute a major federal action within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(2)(C)). A determination has been made that such decisions are categorically excluded from the NEPA process (516 DM 8.4.A).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The state submittal which is the subject of this rule is based upon counterpart federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the state. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart federal regulation.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million.

b. Will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the state submittal which is the subject of this rule is based upon counterpart federal regulations for which an analysis was prepared and a determination made that the federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose a cost of $100 million or more in any given year on any governmental entity or the private sector.

List of Subjects in 30 CFR Part 948

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 24, 2000.

Allen D. Klein,

Regional Director, Appalachian Regional Coordinating Center.

[FR Doc. 00–30870 Filed 12–4–00; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 311

[OSD Administrative Instruction 81]

Privacy Act; Implementation

AGENCY: Office of the Secretary.

ACTION: Proposed rule.

SUMMARY: The Office of the Secretary is proposing to add an exemption rule for a Privacy Act system of records. The exemption is intended to increase the value of the system of records and to protect the privacy of individuals identified in the system of records.

DATES: Comments must be received on or before February 5, 2001 to be considered by this agency.

ADDRESSES: Send comments to the OSD Privacy Act Officer, Washington Headquarter Services, Correspondence and Directives Division, Records Management Division, 1155 Defense Pentagon, Washington, DC 20301–1155.

FOR FURTHER INFORMATION CONTACT: Mr. David Bosworth at (703) 601–4725.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

It has been determined that this Privacy Act rule for the Department of Defense does not constitute 'significant regulatory action'. Analysis of the rule indicates that it does not have an annual effect on the economy of $100 million or more; does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; does not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866 (1993).

Regulatory Flexibility Act

It has been determined that this Privacy Act rule for the Department of Defense does not have significant economic impact on a substantial number of small entities because it is concerned only with the administration of Privacy Act systems of records within the Department of Defense.

Paperwork Reduction Act

It has been determined that this Privacy Act rule for the Department of Defense imposes no information requirements beyond the Department of Defense and that the information collected within the Department of Defense is necessary and consistent with 5 U.S.C. 552a, known as the Privacy Act of 1974.

List of Subjects in 32 CFR Part 311

Privacy.

1. The authority citation for 32 CFR part 311 continues to read as follows:

Authority: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

2. Section 311.8 is amended by adding paragraph (c)(7) to read as follows:

§ 311.8 Procedures for exemptions.

* * * * *

(c) * * *

(7) System identifier and name: DGC 20, DoD Presidential Appointee Vetting File.

(i) Exemption: Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source. Portions of this system of records that may be exempt pursuant to 5 U.S.C. 552a(k)(5) are subsections (d)(1) through (d)(5).

(ii) **Authority:** 5 U.S.C. 552a(k)(5).

(iii) Reason: From (d)(1) through (d)(5) because the agency is required to protect the confidentiality of sources who furnished information to the government under an expressed promise of confidentiality or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. This confidentiality is needed to maintain the Government's continued access to information from persons who otherwise might refuse to give it.

* * * * *

Dated: November 22, 2000.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense .

[FR Doc. 00–30472 Filed 12–4–00; 8:45 am]

BILLING CODE 5001–10–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SW–FRL–6904–3]

Hazardous Waste Management System; Proposed Exclusion for Identification and Listing Hazardous Waste

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule and request for comment.

SUMMARY: The EPA (also, ''the Agency'' or ''we'' in this preamble) is proposing to grant a petition submitted by Heritage Environmental Services, LLC (Heritage) to exclude (or ''delist'') treated Electric Arc Furnace Dust (EAFD) produced at Nucor Steel, Division of Nucor Corporation (Nucor) located in Crawfordsville, Indiana from the lists of hazardous wastes contained in Subpart D of Part 261.

The Agency has tentatively decided to grant the exclusion based on an evaluation of waste-specific information provided by Heritage. This proposed decision, if finalized, conditionally excludes the petitioned waste from the requirements of hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA).

We conclude that Heritage's petitioned waste is nonhazardous with respect to the original listing criteria.

DATES: *Comments*. We will accept public comments on this proposed decision until January 19, 2000. We will stamp comments postmarked after the close of the comment period as ''late.'' These ''late'' comments may not be considered in formulating a final decision.

Request for Public Hearing. Your request for a hearing must reach EPA by December 20, 2000. The request must contain the information prescribed in § 260.20(d).

ADDRESSES: *Comments.* Please send two copies of your comments to Todd Ramaly, Waste Management Branch (DW–8J), Environmental Protection Agency, 77 W. Jackson Blvd., Chicago, IL, 60604.

Request for Public Hearing. Any person may request a hearing on this proposed decision by filing a request with Robert Springer, Director, Waste, Pesticides and Toxics Division (D–8J), Environmental Protection Agency, 77 W. Jackson Blvd., Chicago, IL, 60604.

Docket. The RCRA regulatory docket for this proposed rule is located at the U.S. EPA Region 5, 77 W. Jackson Blvd., Chicago, IL 60604, and is available for viewing from 8 a.m. to 4 p.m., Monday through Friday, excluding federal holidays. Call Todd Ramaly at (312) 353–9317 for appointments. The public may copy material from the regulatory docket at $0.15 per page.

FOR FURTHER INFORMATION CONTACT: For technical information concerning this document, contact Todd Ramaly at the address above or at 312–353–9317.

SUPPLEMENTARY INFORMATION: The information in this section is organized as follows:

I. Overview Information

A. What Action Is EPA Proposing?

The EPA is proposing to grant Heritage's petition to have treated EAFD from the production of steel at Nucor excluded, or delisted, from the definition of a hazardous waste. Heritage petitioned EPA to exclude, or delist, the EAFD because Heritage believes that the petitioned waste does not meet the RCRA criteria for which EPA originally listed the waste. Heritage also believes there are no additional constituents or factors which could cause the waste to be hazardous.

Based on our review described below, we agree with the petitioner that the waste is nonhazardous with respect to the original listing criteria. Furthermore, EPA finds no additional constituents or factors which would cause the waste to be hazardous. If our review had found that the waste remained hazardous based on the factors for which we originally listed the waste, we would have proposed to deny the petition.

B. Why Is EPA Proposing To Approve This Delisting?

We believe that the petitioned waste does not meet the criteria for which the waste was originally listed and does not contain other constituents at levels which would cause it to be hazardous, and therefore, should be delisted. Our tentative decision to delist waste treated by Heritage at Nucor's Crawfordsville facility is based on the description of the process which generates the waste and the analytical data submitted to support today's proposed rule.

In reviewing this petition, we considered the original listing criteria and the additional factors required by the Hazardous and Solid Waste Amendments of 1984 (HSWA). See 222 of HSWA, 42 U.S.C. 6921(f), and 40 CFR Part 260.22 (d)(2) through (4). We evaluated the petitioned waste against the listing criteria and factors cited in §§ 261.11(a)(2) and (3).

We also evaluated the waste for other factors or criteria which could cause the waste to be hazardous. These factors included: (1) Whether the waste is considered acutely toxic; (2) the toxicity of the constituents; (3) the concentration of the constituents in the waste; (4) the tendency of the hazardous constituents to migrate and to bioaccumulate; (5) persistence of the constituents in the environment once released from the waste; (6) plausible and specific types of management of the petitioned waste; (7) the quantity of waste produced; and (8) waste variability.

C. How Will Heritage Manage the Waste If It Is Delisted?

If the petitioned waste is delisted, Heritage must dispose of it in a Subtitle D landfill licensed or permitted by a State to manage industrial waste. Heritage may also dispose of the delisted waste in a permitted Subtitle C landfill.

D. When Would EPA Finalize the Proposed Delisting Exclusion?

HSWA specifically requires the EPA to provide notice and an opportunity for comment before granting or denying a final exclusion. Thus, EPA will not make a final decision or grant an exclusion until it has addressed all timely public comments (including any at public hearings,) on today's proposal.

Since this rule would reduce the existing requirements for a person generating hazardous wastes, the regulated community does not need a six-month period to come into compliance in accordance with Section 3010 of RCRA as amended by HSWA. Therefore, the exclusion would become effective upon finalization.

E. How Would This Action Affect the States?

Because EPA is issuing today's exclusion under the federal RCRA delisting program, only states subject to federal RCRA delisting provisions would be affected. This exclusion may not be effective in states having a dual system that includes federal RCRA requirements and their own requirements, or in states which have received our authorization to make their own delisting decisions.

EPA allows states to impose their own non-RCRA regulatory requirements that are more stringent than EPA's, under section 3009 of RCRA. These more stringent requirements may include a provision that prohibits a federally issued exclusion from taking effect in the state. Because a dual system (that is, both federal (RCRA) and state (non-RCRA) programs) may regulate a petitioner's waste, we urge the petitioners to contact the state regulatory authority to establish the status of their waste under the state law.

EPA has also authorized some states to administer a delisting program in place of the federal program, that is, to make state delisting decisions. Therefore, this exclusion does not apply in those authorized states. If Heritage transports the petitioned waste to or manages the waste in any state with delisting authorization, Heritage must obtain delisting authorization from that state before it can manage the waste as nonhazardous in the state.

II. Background

A. What Is the History of the Delisting Program?

The EPA published an amended list of hazardous wastes from nonspecific and specific sources on January 16, 1981, as part of its final and interim final regulations implementing Section 3001 of RCRA. The EPA has amended this list several times and published it in 40 CFR 261.31 and 261.32.

We list these wastes as hazardous because: (1) They typically and frequently exhibit one or more of the characteristics of hazardous wastes identified in Subpart C of Part 261 (that is, ignitability, corrosivity, reactivity, and toxicity) or (2) they meet the criteria for listing contained in §§ 261.11(a)(2) or (3).

Individual waste streams may vary depending on raw materials, industrial processes, and other factors. Thus, while a waste described in these regulations generally is hazardous, a specific waste from an individual facility that meets the listing description may not be.

For this reason, 40 CFR 260.20 and 260.22 provide an exclusion procedure, called delisting, which allows a person to demonstrate that EPA should not regulate a specific waste from a particular generating facility as a hazardous waste.

B. What Is a Delisting Petition, and What Does It Require of a Petitioner?

A delisting petition is a request from a facility to EPA or an authorized state to exclude wastes from the list of hazardous wastes. In a delisting petition, the petitioner must show that the waste generated at a particular facility do not meet any of the criteria for listed wastes. The criteria for which EPA lists a waste are in 40 CFR 261.11 and in the background documents for the listed wastes.

In addition, a petitioner must demonstrate that the waste does not exhibit any of the hazardous waste characteristics and must present sufficient information for us to decide whether factors other than those for which the waste was listed warrant retaining it as a hazardous waste. (See § 260.22, 42 U.S.C. 6921(f) and the background documents for a listed waste.)

A generator remains obligated under RCRA to confirm that its waste remains nonhazardous.

C. What Factors Must EPA Consider in Deciding Whether To Grant a Delisting Petition?

Besides considering the criteria in 40 CFR 260.22(a), 42 U.S.C. 6921(f), and in the background documents for the listed wastes, EPA must consider any factors (including additional constituents) other than those for which we listed the waste if these additional factors could cause the waste to be hazardous. (See The Hazardous and Solid Waste Amendments (HSWA) of 1984.)

EPA must also consider as a hazardous waste, mixtures containing listed hazardous wastes and wastes derived from treatment of listed hazardous waste. See 40 CFR 261.3(a)(2)(iv) and (c)(2)(i), called the "mixture" and "derived-from" rules, respectively. These wastes are also eligible for exclusion but remain hazardous wastes until excluded.

III. EPA's Evaluation of the Waste Information and Data

A. What Wastes Did Heritage Petition EPA To Delist?

August 3, 1999, Heritage petitioned EPA to exclude an annual volume of 30,000 cubic yards of K061 EAFD generated at Nucor Steel Corporation located in Crawfordsville, Indiana from the list of hazardous wastes contained in 40 CFR 261.32. K061 is defined as "emission control dust/sludge from the primary production of steel in electric arc furnaces." The EPA reviews a petitioner's estimated volume and, on occasion, has requested a petitioner to re-evaluate the estimated waste generation rate. EPA accepts Heritage's estimate of annual volume of waste.

B. What Information and Analyses Did Heritage Submit To Support This Petition?

To support its petition, Heritage submitted (1) descriptions and schematic diagrams of the EAFD treatment system; (2) analyses for antimony, arsenic, barium, beryllium, cadmium, chromium, lead, mercury, nickel, selenium, silver, thallium, vanadium, and zinc (a) for total concentration, (b) by the Toxicity Characteristic Leaching Procedure (TCLP), SW–846 Method 1311, (c) by the Multiple Extraction Procedure (MEP), SW–846 Method 1312, and (d) using the TCLP and MEP procedures while substituting neutral and basic extraction fluids for the acidic extraction fluids specified in the method; (3) total constituent analyses for sulfide, and cyanide; (4) total constituent analyses for semivolatile organic compounds (SVOCs); (5) total constituent analyses for volatile organic compounds (VOCs); (6) total polychlorinated biphenyls (PCBs); and (7) total oil & grease.

C. How Is the Petitioned Waste Generated?

The treated EAFD proposed for exclusion has been generated at Nucor since the facility began steel manufacturing in 1989. Carbon and stainless steel are manufactured from scrap metal using two electric arc furnaces. The exhaust from the furnaces is conveyed via a capture system designed to capture emissions from the furnaces and the associated building. Larger particles are removed in a dropout chamber while the capture system conveys the smaller particles for capture in air pollution control devices (*i.e.,* baghouses). EAFD captured in the baghouses is conveyed by a screw conveyor system to two aboveground, cone bottom silos that accumulate the dust prior to introduction into the treatment process. The EAFD is conveyed from the accumulation silos either by screw conveyor or by gravity, to the treatment equipment.

The computer controlled treatment system weighs a predetermined amount of EAFD into a mixing device. Treatment reagents are added proportionally in sequential manner to the mixing device. The mixing device thoroughly blends the EAFD and the treatment reagents in precise amounts based on certain dust characteristics. Once the mixing operation is completed, the waste is conveyed to a dump truck for transportation to a landfill.

D. How Did Heritage Sample and Analyze the Data in This Petition?

In consultation with EPA Region 5, Heritage developed a list of analytical constituents based on a review of the EAFD and the treatment process. Three randomly collected composite samples of treated carbon steel EAFD were collected for testing each week over a four week period for a total of twelve samples during an initial round of sampling. Each composite sample was comprised of four grab samples that were collected immediately after loading from a roll-off box containing treated EAFD. Heritage conducted a second round of random sampling over a four week period similar to the first round with the exception of stainless steel. A total of eight samples were collected during the second round of sampling and analysis. Treated stainless steel samples were collected on two days when the facility was generating EAFD from stainless steel production. Treated stainless steel samples were randomly collected during the two days of stainless steel production.

To quantify the total constituent and extraction fluid concentrations, Heritage used the following SW–846 Methods: 7041/6010 for antimony; 6010B for arsenic, barium, beryllium, cadmium, chromium, lead, nickel, selenium, silver, thallium, vanadium, and zinc; 7470 for mercury; 9012 for total cyanide; 9034 for total sulfide; 8082 for PCBs; 8260 for volatile organic compounds, 8270 for semivolatile organic compounds, and 413.1 for Oil & Grease.

During the initial round of sampling and analysis, Heritage demonstrated that the treated EAFD was stable when using the TCLP. During the second round of sampling and analysis, Heritage demonstrated that the treated EAFD is stable over a range of pH values (acidic, neutral, and basic). In addition to the TCLP, Heritage analyzed the second round of samples using a modified TCLP procedure, in which the prescribed TCLP extraction fluid was substituted with (1) a neutral extraction fluid of reagent water (ASTM Type II water) adjusted to pH 6.5 ± 0.05 using 1 N NaOH and (2) a basic extraction fluid consisting of reagent water to which high calcium hydrated lime was added to reach a pH of 12.0 ± 0.05. Heritage removed dissolved oxygen from both the neutral and basic extraction fluids to less than 0.5 ppm by the addition of a stoichiometric amount of sodium hydrosulfite. Heritage believes it is appropriate to test stabilized waste using an oxygen depleted extraction fluid because it believes that the environment of a solid waste landfill is anaerobic or oxygen depleted. Furthermore, to more closely simulate the anaerobic environment of the landfill, Heritage performed the extraction procedure with zero headspace in the extraction vessel and performed the filtration step under a nitrogen blanket. Heritage submitted documentation to U.S. EPA supporting Heritage's belief that solid waste landfills are oxygen depleted. Heritage also submitted a summary of dissolved oxygen data for leachate from their two landfills in support of their assertion that the landfill environment is anaerobic. Heritage believes that the oxygen depleted environment of the buried waste in combination with appropriate stabilization reagents inhibits the mobilization of metallic species.

Heritage analyzed four samples following the Multiple Extraction Procedure (MEP), SW 846 method 1320, but substituting the TCLP procedure, Method 1311 for the EP Tox test, Method 1310. Heritage also analyzed four additional samples following the MEP method, but using a neutral extraction fluid for all ten extractions.

E. What Were the Results of Heritage's Analysis?

Table 1 presents the maximum total and leachate concentrations for 14 metals, total cyanide, and total sulfide. The concentrations of metals in the extract are the maximum obtained in any of the three extraction fluids (acidic, neutral, and basic).

Heritage analyzed one sample of petitioned waste for 57 volatile organic compounds, 72 semi-volatile organic compounds, and eight Arochlor mixtures of PCBs. There were no detections of these organic constituents in the treated EAFD samples. EPA does not generally verify submitted test data before proposing delisting decisions. The sworn affidavit submitted with the petition binds the petitioner to present truthful and accurate results. Heritage submitted a signed Certification of Accuracy and Responsibility statement presented in 40 CFR 260.22(i)(12).

F. How Did EPA Evaluate the Risk of Delisting This Waste?

For this delisting determination, we used information gathered to identify plausible exposure routes (i.e., ground water, surface water, air) for hazardous constituents present in the petitioned waste. We used a fate and transport model to predict the release of hazardous constituents from the petitioned waste once it is disposed to evaluate the potential impact of the petitioned waste on human health and the environment. To accomplish this, we used a Windows based software tool, the Delisting Risk Assessment Software Program (DRAS), to estimate the potential releases of waste constituents and to predict the risk associated with those releases using several EPA models including the EPACMTP (EPA's Composite Model for leachate migration with Transformation Products) fate and transport model for groundwater releases. For a detailed description of the DRAS program and the EPACMTP model, see 65 FR 58015, September 27, 2000. A technical support document for the DRAS program is available in the public docket.

Revisions have been made to the DRAS program in order to improve the modeling which are being implemented for the first time in a draft exclusion. Specifically, the groundwater inhalation pathway was revised to reflect recent advances in modeling household inhalation from home water use (e.g., showering). The basis for estimating the concentration of constituents in the indoor air is based on the mass transfer of constituent from water to shower air. The initial version of DRAS used a fate and transport model described in T.E. McKone and K.T. Bogen's 1992 Uncertainties in Health-Risk Assessment: An Integrated Case Study Based on Tetrachloroethylene in California Groundwater, *Regulatory Toxicology and Pharmacology, 15: 86–103,* which predicted the highest waste concentration emitted from the water into the air during a given water use period (e.g., 10-minute shower). This method was revised to more accurately predict the average concentration occurring during the exposure event.

The revised model used in this analysis is based on the equations presented in T.E. McKone's 1987 Human Exposure to Volatile Organic Compounds in Household Tap Water: The Indoor Inhalation Pathway, *Environmental Science and Technology, 21(12): 1194–1201.* The shower model estimates the change in the shower (or bathroom or household) air concentration based on the mass of constituent lost by the water (fraction emitted or emission rate) and the air exchange rate between the various model compartments (shower, the rest of the bathroom, and the rest of the house). The resulting differential equations were solved using finite difference numerical integration. The average air concentration in the shower and bathroom are obtained by averaging the concentrations obtained for each time step over the duration of the exposure event (shower and bathroom use). These concentrations and the durations of daily exposure are used to estimate risk from inhalation exposures to residential use of groundwater. Further, improvements were made to more accurately reflect the transfer efficiency of the waste constituent from the groundwater to the air compartment. The fraction emitted from the bathroom or household water use is a function of the input transfer efficiency (or maximum fraction emitted) and the driving force for mass transfer (the differential between air saturation concentration at air/water interface and bulk air concentration). For example, in the shower compartment, the constituent emission rate is estimated from the change in the shower water concentration as the water falls through the air. The shower emissions can be modeled based on falling droplets as a means of estimating the surface-area-to-volume ratio for mass transfer and the residence time of the water in the shower compartment, assuming the constituent concentration in the gas phase is constant over the time frame of the droplet fall. By assuming the drops fall at terminal velocity, the surface-area-to-volume ratio and the residence time can be determined based solely on droplet size. A droplet size of approximately 1 mm (0.1 cm) was selected. The terminal velocity for the selected droplet size is approximately 400 cm/s. The fraction of constituent emitted from a water droplet at any given time can then be calculated.

The equations used to predict surface volatilization from a landfill have been modified to more accurately reflect true waste concentration releases. The previous version of DRAS used Farmer's equation to estimate the emission rate of volatiles from the surface of the landfill. Farmer's equation assumes that the emission originates as volatiles in liquids trapped in the pore spaces between solid particles of waste. The volatiles evaporate from the liquid and are emitted from the landfill following gaseous diffusion through the solid waste particles and soil cover to the surface of the landfill. Farmer's equation requires the mole fraction of a given volatile constituent in the liquid in order to calculate the emission. The previous version of DRAS used the TCLP value of a volatile constituent in the waste to approximate the mole fraction of a given constituent in the pore liquid. Since the TCLP test includes a 20-fold dilution, the calculation might underestimate the available concentration of volatiles in freshly deposited waste. The DRAS has been revised to use Shen's modification of Farmer's equation, described in U.S. EPA Office of Air Quality Planning and Standards' 1984 Evaluation and Selection of Models for Estimating Air Emissions from Hazardous Waste Treatment, Storage, and Disposal Facilities, EPA–450/3–84–020. Shen took the simplified version of Farmer's equation for vapor flux from a soil surface and converted it to an emission rate by multiplying it by the exposed landfill area. Shen's modification uses the total waste constituent concentration (weight fraction in the bulk waste) to approximate the mole fraction of that constituent in the liquid phase.

In estimating the amount of a given waste constituent that is released to surface water and eventually becomes freely dissolved in the water column, previous delisting petitions and the earlier version of the DRAS used the maximum observed TCLP concentration in waste as the total amount of the waste constituent available for erosion. Further, the former method assumed that all of the constituent mass that reached the stream, based on TCLP, became dissolved in the aqueous phase. Assuming complete conversion to a dissolved state is overly conservative and not in agreement with recent Agency methodology. In the revised DRAS, the total waste constituent concentration is used to estimate the constituent mass that reaches the stream. The portion of the waste constituent that becomes freely dissolved is determined by an estimate of partitioning between suspended solids and the aqueous phase. This methodology is described in U.S. EPA's 1998 Human Health Risk Assessment Protocol for Hazardous Waste Combustion Facilities, Volume One. Peer Review Draft, EPA530–D–98–001A.

Recent developments in mercury partitioning described in the Mercury Report to Congress, Volume III: Fate and Transport of Mercury in the Environment, EPA–452/R–97–005, led to another revision to the surface water pathway. The DRAS was modified to account for bioaccumulation of methyl mercury as a result of the release of mercury into the surface water column. The primary human health hazard posed by the release of mercury into surface water is through bioaccumulation of methyl mercury in fish followed by human consumption of the contaminated fish. Biological processes in surface water cause the conversion, or methylation, of elemental mercury to methyl mercury. In accordance with the Human Health Risk Assessment Protocol for Hazardous Waste Combustion Facilities, Volume One. Peer Review Draft, 15% of mercury in the water column is assumed to be converted to methyl mercury. This fraction is then used, along with the current bioaccummulation factor, to determine the predicted concentration of methyl mercury in fish tissue.

The maximum allowable leachate concentrations and the point of exposure (POE) concentrations of concern in groundwater are also presented in Table 1. For inorganic constituents, the maximum reported leachate concentrations for metals in the treated EAFD were well below the health-based levels of concern used in decision-making for delisting. No organic constituents were detected. We believe that it is inappropriate to evaluate non-detectable concentrations of a constituent of concern in our modeling efforts if the non-detectable value was obtained using the appropriate analytical method. For constituents which are not detected in the extract but are detected as a total concentration, the DRAS model requires that the detection level be entered along with the other data. For these constituents, the DRAS uses one-half of the detection level to calculate risk.

G. What Other Factors Did EPA Consider in Its Evaluation?

We also considered the applicability of ground-water monitoring data during the evaluation of delisting petitions. In this case, we determined that it would be inappropriate to request ground-water monitoring data because the waste is currently disposed off-site. For a petitioner using off-site management, EPA believes that, in most cases, the ground water monitoring data would not be meaningful. Most commercial land disposal facilities accept waste from numerous generators. Any ground water contamination or leachate would be characteristic of the total volume of waste disposed of at the site. In most cases, EPA believes that it would be impossible to isolate ground water impacts associated with any one waste disposed of in a commercial landfill. Therefore, we did not request ground water monitoring data from Heritage. Potential impacts of the petitioned waste via air emission and storm water run-off are also addressed in the DRAS.

H. What Did EPA Conclude About Heritage's Analysis?

After reviewing Heritage's petition, the EPA concludes that (1) no hazardous constituents are likely to be present above health based levels of concern in the waste generated at Nucor Steel; and (2) the petitioned waste does not exhibit any of the characteristics of ignitability, corrosivity, reactivity, or toxicity. See 40 CFR 261.21, 261.22, 261.23, and 261.24, respectively.

The total cumulative risk posed by the waste is approximately 1.6×10^{-5}. Although this value exceeds the Region 5 Delisting Program's target risk level of

1×10^{-6} for delisting hazardous waste, EPA believes that this risk is acceptable because the estimated risk is almost entirely associated with a single contaminant/pathway which may be evaluated in more than one way. Furthermore, EPA has considered cancer risks in the range of 1×10^{-4} to 1×10^{-6} to be acceptable in other programs and the Region 5 Delisting Program has considered risks in this range acceptable if there are reasons to do so.

In this case, exposure to carcinogenic arsenic through ingestion of contaminated drinking water accounted for almost all of the risk estimated from disposal of the petitioned waste at a Subtitle D landfill. If the POE target concentration was set at the Safe Drinking Water Act (SDWA) Maximum Contaminant Level (MCL), the maximum allowable waste leachate concentration would be 0.96 mg/L TCLP arsenic, over 60 times higher than the maximum observed leachate concentration in the waste. EPA's July 1996 Soil Screening Guidance: User's Guide, EPA/540/R–96/018, states that acceptable levels of contaminants in soils for the ground-water pathway could be derived from SDWA Maximum Contaminant Level Goals or MCLs. Given that the difference between the MCL for arsenic and the health-based POE concentration is three orders of magnitude and that, according to EPA's May 2000 Technical Fact Sheet: Proposed Rule for Arsenic in Drinking Water and Clarifications to Compliance and New Source Contaminants Monitoring, EPA 815–F–00–011, naturally occurring levels of arsenic are often higher than these levels, we believe that some allowance can be exercised in setting the allowable level for arsenic in the leachate. EPA proposes to set the allowable arsenic leachate level at a concentration which corresponds to a total waste cancer risk of 1×10^{-4} (which is still within the generally acceptable range of 1Qtimes10 $^{-4}$ to $\times10^{-6}$). Delisting levels for constituents other than arsenic will still be set at concentrations corresponding to the original Region 5 target of 1×10^{-6}. By this method, the delisting level for leachable arsenic in this proposed exclusion will be set at a value which corresponds to a POE concentration of approximately one-tenth of the existing MCL. The EPA has recently proposed to lower the arsenic MCL to one-tenth its current value and thus, if finalized, it would correspond well with the delisting level we are setting.

The aggregate hazard index for this waste is estimated to be 0.965, which does not exceed the EPA Region 5 Delisting Program's target of 1.0. The majority of this aggregate hazard index, 0.774, occurs as a result of migration of mercury to surface water followed by ingestion of fish by humans. For this reason, a delisting level for total mercury in the waste will also be imposed. All other delisting levels imposed in this exclusion are based on the concentration of constituents in leachate.

I. What Is EPA's Final Evaluation of This Delisting Petition?

We have reviewed the sampling procedures used by Heritage and have determined they satisfy EPA criteria for collecting representative samples of the treated EAFD. The descriptions of the hazardous waste treatment process and the analytical data, together with the proposed verification testing requirements, provide a reasonable basis for EPA to grant the exclusion. We believe the data submitted in support of the petition show that the waste will not pose a threat when disposed of in a Subtitle D landfill. We therefore, propose to grant Heritage an exclusion for the EAFD generated at Nucor.

If we finalize this proposed exclusion, the Agency will no longer regulate the petitioned waste under 40 CFR Parts 262 through 268 and the permitting standards of Part 270.

IV. Conditions for Exclusion

A. What Are the Maximum Allowable Concentrations of Hazardous Constituents in the Waste?

The following table summarizes delisting levels for Nucor's waste. The EPA calculated maximum allowable concentrations in the extract for detected constituents using the DRAS program. The allowable leachate concentrations were derived either from the health-based calculation within the DRAS program, from MCLs, treatment technique (TT), or toxicity characteristic values, whichever resulted in a lower delisting level, with the exception of arsenic as discussed in Section III. H. of this preamble. In addition, the concentration of total mercury in the waste shall not exceed 1 mg/kg.

TABLE 1.—CONSTITUENT CONCENTRATIONS AND DRAS MAXIMUM ALLOWABLE LEACHATE AND POINT OF EXPOSURE LEVELS

Constituent	Maximum [1] Observed Total Concentration (mg/kg)	Maximum [1] Observed Leachate Concentration (mg/L TCLP)	Maximum Allowable Leachate Concentration (mg/L TCLP)	Maximum Allowable Point of Exposure Concentration (mg/L in groundwater)
Antimony	<25	0.0082	[2] 0.206	[2] 0.006
Arsenic	30	0.015	0.0936	0.005
Barium	56	0.83	[2] 55.7	[2] 2.0
Beryllium	10	<0.002	[2] 0.416	[2] 0.004
Cadmium	130	<0.001	[2] 0.15	[2] 0.005
Chromium	2,880	0.11	[2] 1.55	[2] 0.1
Lead	4,600	2.4	[3] 5	[2] 0.015
Mercury	0.72	<0.002	[2] 0.149	[2] 0.002
Nickel	130	<0.020	28.3	0.753
Selenium	8.8	0.056	[2] 0.58	[2] 0.05
Silver	47	0.023	3.84	0.187
Thallium	<30	<0.05	[2] 0.088	[2] 0.002
Vanadium	160	<0.01	21.1	0.263
Zinc	240,000	2.7	280	11.25
Cyanide	<0.23	NR	NA	[2] 0.2

TABLE 1.—CONSTITUENT CONCENTRATIONS AND DRAS MAXIMUM ALLOWABLE LEACHATE AND POINT OF EXPOSURE LEVELS—Continued

Constituent	Maximum [1] Observed Total Concentration (mg/kg)	Maximum [1] Observed Leachate Concentration (mg/L TCLP)	Maximum Allowable Leachate Concentration (mg/L TCLP)	Maximum Allowable Point of Exposure Concentration (mg/L in groundwater)
Sulfide	31	NR	NA	NA

[1] These levels represent the highest constituent concentration found in any sample and are not necessarily the specific levels found in any one sample.
[2] The concentration is based on the MCL or TT action level.
[3] The concentration is based on the toxicity characteristic level in 40 CFR 261.24.
< The constituent was not detected at the stated concentration.
NA Not applicable
NR Analysis not run.

B. How Frequently Must Heritage Test the Waste?

Heritage must demonstrate on a monthly basis that the constituents of concern in the petitioned waste do not exceed the levels of concern in section IV.A. above. Heritage must collect two representative samples of the treated EAFD per month and analyze the samples using a) the TCLP method, b) the TCLP procedure with an extraction fluid of pH 12 ± 0.05 standard units and c) SW–846 Method 7470 for mercury. The alkaline extraction fluid will consist of reagent water to which high calcium hydrated lime is added to reach a pH of 12.0 ± 0.05. Appropriate detection levels and quality control procedures are required.

C. What Must Heritage Do if the Process Changes?

If Nucor significantly changes the manufacturing process or Heritage significantly changes the treatment process or the chemicals used in the treatment process, Heritage may not handle the EAFD generated from the new process under this exclusion until it has demonstrated to the EPA that the waste meets the levels set in Section IV.A and that no new hazardous constituents listed in Appendix VIII of 40 CFR Part 261 have been introduced. Heritage must manage wastes generated after the process change as hazardous waste until Heritage has received written approval from EPA.

D. What Data Must Heritage Submit?

Heritage must submit an annual summary of the data obtained through monthly verification testing to U.S. EPA Region 5, Waste Management Branch (DW–8J), 77 W. Jackson Blvd., Chicago, IL 60604, by February 1 of each year for the prior calendar year. Heritage must compile, summarize, and maintain on site for a minimum of five years records of operating conditions and analytical data. Heritage must make these records available for inspection. All data must be accompanied by a signed copy of the certification statement in 40 CFR 260.22(i)(12).

E. What Happens if Heritage Fails To Meet the Conditions of the Exclusion?

If Heritage violates the terms and conditions established in the exclusion, the Agency may start procedures to withdraw the exclusion.

If the monthly testing of the waste does not meet the delisting levels described in Section IV.A above, Heritage must notify the Agency according to Section IV.D. The exclusion will be suspended and the waste managed as hazardous until Heritage has received written approval for the exclusion from the Agency. Heritage may provide sampling results that support the continuation of the delisting exclusion.

The EPA has the authority under RCRA and the Administrative Procedures Act, 5 U.S.C. 551 (1978) *et seq.* (APA), to reopen a delisting decision if we receive new information indicating that the conditions of this exclusion have been violated.

V. Regulatory Impact

Under Executive Order 12866, EPA must conduct an ''assessment of the potential costs and benefits'' for all ''significant'' regulatory actions.

The proposal to grant an exclusion is not significant, since its effect, if promulgated, would be to reduce the overall costs and economic impact of EPA's hazardous waste management regulations. This reduction would be achieved by excluding waste generated at a specific facility from EPA's lists of hazardous wastes, thus enabling a facility to manage its waste as nonhazardous.

Because there is no additional impact from today's proposed rule, this proposal would not be a significant regulation, and no cost/benefit assessment is required. The Office of Management and Budget (OMB) has also exempted this rule from the requirement for OMB review under Section (6) of Executive Order 12866.

VI. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis which describes the impact of the rule on small entities (that is, small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required, however, if the Administrator or delegated representative certifies that the rule will not have any impact on small entities.

This rule, if promulgated, will not have an adverse economic impact on small entities since its effect would be to reduce the overall costs of EPA's hazardous waste regulations and would be limited to one facility. Accordingly, the Agency certifies that this proposed regulation, if promulgated, will not have a significant economic impact on a substantial number of small entities. This regulation, therefore, does not require a regulatory flexibility analysis.

VII. Paperwork Reduction Act

Information collection and record-keeping requirements associated with this proposed rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511, 44 U.S.C. 3501 *et seq.*) and have been assigned OMB Control Number 2050–0053.

VIII. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, which was signed into law on March 22, 1995, EPA generally must prepare a written statement for rules with federal mandates that may result in estimated costs to state, local, and tribal governments in the aggregate, or to the private sector, of $100 million or more in any one year.

When such a statement is required for EPA rules, under section 205 of the UMRA EPA must identify and consider alternatives, including the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. EPA must select that alternative, unless the Administrator explains in the final rule why it was not selected or it is inconsistent with law.

Before EPA establishes regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, EPA must develop under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, giving them meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising them on compliance with the regulatory requirements.

The UMRA generally defines a federal mandate for regulatory purposes as one that imposes an enforceable duty upon state, local, or tribal governments or the private sector.

The EPA finds that today's delisting decision is deregulatory in nature and does not impose any enforceable duty on any state, local, or tribal governments or the private sector. In addition, the proposed delisting decision does not establish any regulatory requirements for small governments and so does not require a small government agency plan under UMRA section 203.

IX. Executive Order 12875

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a state, local, or tribal government, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected state, local, and tribal governments, the nature of their concerns, copies of written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of state, local, and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.'' Today's rule does not create a mandate on state, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

X. Executive Order 13045

The Executive Order 13045 is entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This order applies to any rule that EPA determines (1) is economically significant as defined under Executive Order 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This proposed rule is not subject to Executive Order 13045 because this is not an economically significant regulatory action as defined by Executive Order 12866.

XI. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly affects or uniquely affects communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments.

If the mandate is unfunded, EPA must provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation.

In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments ''to meaningful and timely input'' in the development of regulatory policies on matters that significantly or uniquely affect their communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

XII. National Technology Transfer and Advancement Act

Under Section 12(d) of the National Technology Transfer and Advancement Act, the Agency is directed to use voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law or otherwise impractical.

Voluntary consensus standards are technical standards (for example, materials specifications, test methods, sampling procedures, business practices, *etc.*) that are developed or adopted by voluntary consensus standard bodies. Where EPA does not use available and potentially applicable voluntary consensus standards, the Act requires the Agency to provide Congress, through the OMB, an explanation of the reasons for not using such standards.

This rule does not establish any new technical standards, and thus the Agency has no need to consider the use of voluntary consensus standards in developing this final rule.

List of Subjects in 40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

Authority: Sec. 3001(f) RCRA, 42 U.S.C. 6921(f).

Dated: November 8, 2000.

Willie H. Harris,

Acting Director, Waste, Pesticides and Toxics Division.

For the reasons set out in the preamble, 40 CFR Part 261 is proposed to be amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for Part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, and 6938.

Appendix IX of Part 261—[Amended]

2. In Table 2 of Appendix IX of Part 261 add the following waste stream in alphabetical order by facility to read as follows:

Appendix IX to Part 261—Wastes Excluded Under §§ 260.20 and 260.22

* * * * *

TABLE 2.—WASTES EXCLUDED FROM SPECIFIC SOURCES

Facility	Address	Waste description
*	* *	* * * *
Heritage Environmental Services, LLC., at Nucor Steel.	Crawfordsville, Indiana	Treated electric arc furnace dust (EAFD), K061, that is generated by Heritage Environmental Services, LLC (Heritage) and Nucor Steel, Division of Nucor, Corporation (Nucor) at Nucor's Crawfordsville, Indiana plant at a maximum annual rate of 30,000 cubic yards per year and disposed of in a Subtitle D landfill, after (insert publication date of the final rule). (1) *Delisting Levels:* (A) The constituent concentrations measured in either of the extracts specified in Paragraph (2) may not exceed the following levels (mg/L): Antimony—0.206; Arsenic—0.0936; Barium—55.7; Beryllium—0.416; Cadmium—0.15; Chromium (total)—1.55; Lead—5.0; Mercury—0.149; Nickel—28.30; Selenium—0.58; Silver—3.84; Thallium—0.088; Vanadium—21.1; Zinc—280.0. (B) Total mercury may not exceed 1 mg/kg. (2) *Verification Testing:* On a monthly basis, Heritage or Nucor must analyze two samples of the waste using the TCLP method, the TCLP procedure with an extraction fluid of pH 12 $\pm$ 0.05 standard units and SW–846 Method 7470 for mercury. The constituent concentrations measured must be less than the delisting levels established in Paragraph (1). (3) *Changes in Operating Conditions:* If Nucor significantly changes the manufacturing process or chemicals used in the manufacturing process or Heritage significantly changes the treatment process or the chemicals used in the treatment process, Heritage or Nucor must notify the EPA of the changes in writing. Heritage and Nucor must handle wastes generated after the process change as hazardous until Heritage or Nucor has demonstrated that the wastes continue to meet the delisting levels set forth in Paragraph (1) and that no new hazardous constituents listed in Appendix VIII of Part 261 have been introduced and Heritage and Nucor have received written approval from EPA. (4) *Data Submittals:* Heritage must submit the data obtained through monthly verification testing or as required by other conditions of this rule to U.S. EPA Region 5, Waste Management Branch (DW–8J), 77 W. Jackson Blvd., Chicago, IL 60604 by February 1 of each calendar year for the prior calendar year. Heritage or Nucor must compile, summarize, and maintain on site for a minimum of five years records of operating conditions and analytical data. Heritage or Nucor must make these records available for inspection. All data must be accompanied by a signed copy of the certification statement in 40 CFR 260.22(i)(12). (5) *Reopener Language*—(A) If, anytime after disposal of the delisted waste, Heritage or Nucor possesses or is otherwise made aware of any data (including but not limited to leachate data or groundwater monitoring data) relevant to the delisted waste indicating that any constituent identified in Paragraph (1) is at a level in the leachate higher than the delisting level established in Paragraph (1), or is at a level in the groundwater higher than the maximum allowable point of exposure concentration predicted by the CMTP model, then Heritage or Nucor must report such data, in writing, to the Regional Administrator within 10 days of first possessing or being made aware of that data. (B) Based on the information described in paragraph (5)(A) and any other information received from any source, the Regional Administrator will make a preliminary determination as to whether the reported information requires Agency action to protect human health or the environment. Further action may include suspending, or revoking the exclusion, or other appropriate response necessary to protect human health and the environment. (C) If the Regional Administrator determines that the reported information does require Agency action, the Regional Administrator will notify Heritage and Nucor in writing of the actions the Regional Administrator believes are necessary to protect human health and the environment. The notice shall include a statement of the proposed action and a statement providing Heritage and Nucor with an opportunity to present information as to why the proposed Agency action is not necessary or to suggest an alternative action. Heritage and Nucor shall have 30 days from the date of the Regional Administrator's notice to present the information. (D) If after 30 days Heritage or Nucor presents no further information, the Regional Administrator will issue a final written determination describing the Agency actions that are necessary to protect human health or the environment. Any required action described in the Regional Administrator's determination shall become effective immediately, unless the Regional Administrator provides otherwise.

TABLE 2.—WASTES EXCLUDED FROM SPECIFIC SOURCES—Continued

Facility	Address	Waste description
* * *	* *	* *

* * * * *

[FR Doc. 00–29647 Filed 12–4–00; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

INDIAN HEALTH SERVICE

42 CFR Part 36

Joint Tribal and Federal Self-Governance Negotiated Rulemaking Committee

AGENCY: Indian Health Service (IHS), Department of Health and Human Services (DHHS).

ACTION: Notice of intent to establish negotiated rulemaking committee.

SUMMARY: As required by section 3 of the Negotiated Rulemaking Act of 1990, 5 U.S.C. 564, the Department of Health and Human Services, (DHHS) is giving notice of the intent to establish a Joint Tribal and Federal Self-Governance Negotiated Rulemaking Committee (Committee) to negotiate and develop a proposed rule implementing Title V of the Tribal Self-Governance Amendments of 2000; Public Law 106–260, (the Act). DHHS invites any interested party to comment on the proposal to create this negotiated rulemaking committee and on the proposed membership of the committee, which is subject to the requirements of the Act. In addition, DHHS invites persons who believe that they will be significantly affected by the proposed rule to apply or nominate other persons for membership on the negotiated rulemaking committee.

DATES: Written comments concerning this notice must be received on or before January 4, 2001. Nominations or applications for membership on the committee may be made by submitting applications on or before January 4, 2001. Each application must contain the information described in the ''Application for Membership'' section below.

ADDRESSES: Please submit comments and applications to: Paula K. Williams, Director, Office of Tribal Self-Governance, Indian Health Service, 5600 Fishers Lane, Room 5A–55, Rockville, MD 20857. Comments and applications received will be available for inspection at the address above from 9:00 a.m. to 3:00 p.m., Monday through Friday, beginning approximately two weeks after publication of this notice.

FOR FURTHER INFORMATION CONTACT: Paula K. Williams, Director, Office of Tribal Self-Governance, Indian Health Service, at the address listed above, or by telephone at 301–443–7821. (This is not a toll free number).

SUPPLEMENTARY INFORMATION: Section 517 of Title V of the Act, requires the Secretary, not later than 90 days after the date of the enactment of the Act, to initiate procedures under the Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq.* to negotiate and promulgate the regulations necessary to carry out Title V. The Act calls for a negotiated rulemaking committee to be established pursuant to 5 U.S.C. 565, comprised only of Federal and tribal representatives, with a majority of the tribal government representatives representing Self-Governance tribes. The Committee will confer with and allow representatives of Indian tribes, inter-tribal consortiums, tribal organizations, and individual tribal members to actively participate in the rulemaking process. The Act also authorizes the Secretary to adapt negotiated rulemaking procedures to the unique context of Self-Governance and the government-to-government relationship between the United States and Indian tribes.

Copies of the Committee's charter will be filed with the appropriate committees of Congress and with the Library of Congress in accordance with section 9(c) of the Federal Advisory Committee Act, (FACA), 5 U.S.C. Appendix.

Scope of the Proposed Rule

The proposed rule generally will include provisions governing how DHHS/IHS carries out its responsibility to tribes under the Act and how tribes carry out their responsibility under the Act. Because of the detailed provisions contained in the Act, it is anticipated that regulations can be kept to a minimum. Examples of some areas where procedures may be required are for regulations waivers, appeals of rejection of final offers, or where regulations would be required, such as under sec. 507(a) which specifies that reporting requirements can only impose minimal burdens on a tribe and may only be imposed if they are contained in regulations developed under negotiated rulemaking. It is anticipated that the negotiated rulemaking committee will develop proposed regulations in any other areas that may be suggested during the process.

Interests Significantly Affected

A limited number of identifiable interests will be significantly affected by the rule. Those parties are Indian tribes, tribal organizations as defined in section 4(1) of the Indian Self-Determination and Education Assistance Act, and individual tribal members.

Proposed Agenda and Schedule for Publication of Proposed Rule

It is the Secretary's intent to publish the proposed rule for notice and comment no later than 1 year after the date of the enactment of the Act (August 18, 2000 + 1 year), as required by section 517(a)(2) of the Act.

The charter will specify that a minimum of three meetings will be held. The first meeting will serve as an organizational meeting to establish procedures, deadlines and a work schedule in order for the 12–month time period to be met.

Negotiated Procedures

The following procedures and guidelines will apply to the negotiated rulemaking committee, unless they are modified as a result of comments received on this notice or during the negotiation process.

The committee may use a neutral facilitator. The facilitator will not be involved with the substantive development or enforcement of the regulation. The facilitator's role is to help the negotiation process run smoothly, and help participants define and reach consensus.

The members of the committee, with the assistance of the facilitator, may adopt procedures for committee meetings which they consider most appropriate.

The goal of the negotiating process is for the committee to reach consensus on the proposed rule. Consensus means unanimous concurrence among the interests represented unless the committee agrees to define such term to mean general but not unanimous concurrence, or agrees upon another specified definition.

If the committee reaches consensus on the proposed rule, the committee shall transmit a report containing the proposed rule to the Secretary at the conclusion of negotiations. If the committee does not reach consensus on the proposed rule, it may transmit a report specifying any areas in which it did reach consensus, and any other recommendation it considers appropriate, including dissenting views of committee members. The DHHS, to the maximum extent consistent with its legal obligations, will use the consensus of the committee as the basis for a proposed rule for notice and comment. Parties to the negotiation may withdraw at anytime. If this happens, the remaining committee members will evaluate whether the committee should continue or be reconstituted.

Meetings will be held in the Washington, DC area, or in another location, at the convenience of the committee. DHHS will announce committee meetings in the **Federal Register**. These meetings will be open to the public.

Records of Meetings

In accordance with the requirements of the Federal Advisory Committee Act. 5 U.S.C. Appendix, DHHS will keep a record of all committee meetings.

Administrative Support

The Office of Tribal Self-Governance will provide funding for the costs of the committee, as well as administrative support and technical assistance, including logistical support services, for the activities of the committee.

Committee Membership

The Act requires that the committee be comprised only of Federal and tribal government representatives and that a majority of the tribal committee members be representatives from Self-Governance tribes. The Secretary has determined in accordance with 5 U.S.C. 565(b) that for the proper functioning of the committee and in order to achieve balanced membership and representation from all geographic regions that the committee membership not be limited to 25 members.

The following are the proposed members of the Joint Tribal and Federal Self-Governance Negotiated Rulemaking Committee:

Tribal Co-Chairman

Merle Boyd—Chairman, TSGAC, Second Chief, Sac and Fox Nation

Ron Allen—Alternative, Chairman/Executive Officer, Jamestown S'Klallam Indian Tribe

Self-Governance Tribes

1. Don Kashevaroff, Chairman of the Board, Alaska Native Tribal Health Consortium
2. Katherine Gotlieb, President/CEO, Southcentral Foundation
3. Valerie Davidson, General Counsel, Yukon-Kuskokwim Health Corporation
4. Carolyn Crowder, Alaska
5. Melanie Benjamin, Chief Executive, Mille Lacs Band of Ojibwe
6. Alvin Windy Boy, Sr., Councilman, Chippewa Cree Tribe of the Rocky Boy's Reservation, Rocky Boy Health Board
7. James T. Martin, Executive Director, United South & Eastern Tribes, Inc.
8. Merle Boyd, Second Chief, Sac and Fox Nation
9. Jefferson Keel, Lt. Governor, Chickasaw Nation
10. Wanda Stone, Chairperson, Kaw Nation
11. W. Ron Allen, Chairman/Executive Officer, Jamestown S'Klallam Indian Tribe
12. Willie Jones, Tribal Chairman, Lummi Indian Nation

Title I and Direct Service Tribes

1. Carol Anne Heart, Executive Director, Aberdeen Area Tribal Chairman's Health Board
2. Jim Hooper, Acting Executive Director, Ramah Navajo School Board
3. Jessica Berger, Health Director, Little River Band of Ottawa Indians
4. Gary Melbourne, Health Director, Fort Peck Tribal Health Department
5. Kelly Short-Slagley, Aqua Caliente Tribe, Vice President, Riverside-San Bernardino County Indian Health, Inc.
6. Albert Long, Navajo Nation, Department Director, Block Grants and Special Projects Department
7. William McKee, Individual Tribal Member
8. Garland Brunoe, Vice-Chairman, Confederated Tribes of Warm Springs
9. Bob Brobois, Secretary of Tribal Business, Spokane Tribe of Indians
10. Vernon James, Health Director, San Carlos Apache Tribe
11. Reuben Howard, Executive Director, Pasqua Yaqui Tribe

HHS/IHS Federal Team

1. Paula Williams—Lead Negotiator, Director, Office of Tribal Self-Governance, IHS
2. Leslie Morris—Alternate Lead Negotiator, Director, Division of Regulatory and Legal Affairs, IHS
3. Michael Mahsetky, Director, Legislative Affairs, IHS
4. Ronald C. Ferguson, Principal Engineer, Office of Environmental Health and Engineering, Office of Public Health, IHS
5. Duke McCloud, Senior Counsel, Office of General Counsel, DHHS
6. Eugenia Tyner-Dawson, Senior Advisor for Tribal Affairs, Office of Intergovernmental Affairs, DHHS
7. Katherine Hughes, Office of Grants Acquisition Management, DHHS

HHS/IHS Alternates

1. Kitty Marx, Senior Policy Analyst, Division of Regulatory and Legal Affairs, IHS
2. June Tracy, Legislative Specialist, Legislative Affairs, IHS
3. Eric Broderick, D.D.S., Principal Dental Consultant, IHS, Office of Public Health
4. Barbara Hudson, Senior Attorney, Office of General Counsel, DHHS
5. James Mason, Special Assistant to the Director, Office of Intergovernmental Affairs, DHHS

In addition to the tribal representatives identified above, DHHS solicits nominations of other tribal government representatives whose interest will be significantly affected by the rule.

Application for Membership

Each application or nomination for committee membership shall include:

1. Name, address, and telephone number of the nominee and the name of his or her tribe.
2. Evidence that the nominee is authorized to represent that tribe.
3. A written commitment from the nominee to actively participate in good faith in the development of the proposed rule.

The DHHS will give full consideration to all applications and nominations timely submitted.

Solicitation of Public Comments

Members of the public are invited to submit comments on this proposal to establish the Joint Tribal and Federal Self-Governance Negotiated Rulemaking Committee, as well as on the proposed membership of the committee.

November 6, 2000.

Michael H. Trujillo,

Assistant Surgeon General, Director, Indian Health Service, DHHS.

[FR Doc. 00–30698 Filed 12–4–00; 8:45 am]

BILLING CODE 4160–16–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 67

[Docket No. FEMA B–7407]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Proposed Rule.

SUMMARY: Technical information or comments are requested on the proposed base (1% annual chance) flood elevations and proposed base flood elevation modifications for the communities listed below. The base flood elevations and modified base flood elevations are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The comment period is ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community.

ADDRESSES: The proposed base flood elevations for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the following table.

FOR FURTHER INFORMATION CONTACT: Matthew B. Miller, P.E., Chief, Hazards Study Branch, Mitigation Directorate, 500 C Street SW., Washington, DC 20472, (202) 646–3461, or (e-mail) matt.miller@fema.gov.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency proposes to make determinations of base flood elevations and modified base flood elevations for each community listed below, in accordance with Section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed base flood and modified base flood elevations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Associate Director for Mitigation certifies that this proposed rule is exempt from the requirements of the Regulatory Flexibility Act because proposed or modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification. This proposed rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform. This proposed rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR Part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for Part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376, *§ 67.4*

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

State	City/town/county	Source of flooding	Location	#Depth in feet above ground. *Elevation in feet. (NGVD) Existing	Modified
Alaska	Shishmaref (City) Nome Division.	Chukchi Sea	Approximately 3,140 feet west of Old Gravel Airstrip along north shore of Sarichef Island.	None	[1] 8
			Approximately 400 feet east of Old Gravel Airstrip along north shore of Sarichef Island.	None	[1] 8
		Shishmaref Inlet	Approximately 1,100 feet east of Old Gravel Airstrip along south shore of Sarichef Island.	None	[1] 5
			Approximately 3,140 feet west of Old Gravel Airstrip along south shore of Sarichef Island.	None	[1] 8
Maps are available for inspection at the Shishmaref City Hall, Shishmaref, Alaska.					
Send comments to The Honorable Daniel Iyatunguk, Mayor, City of Shishmaref, P.O. Box 83, Shishmaref, Alaska 99772.					
Nevada	Washoe County (Unincorporated Areas).	Galena Creek	Approximately 12,000 feet downstream of Joy Lake Road.	None	#3
			Approximately 1,950 feet downstream of Joy Lake Road.	None	*5,840

State	City/town/county	Source of flooding	Location	#Depth in feet above ground. *Elevation in feet. (NGVD) Existing	Modified
			Approximately 1,000 feet upstream of Joy Lake Road.	None	*6,830
			At Mount Rose Highway	None	#2
		Jones Creek	At confluence with Galena Creek	None	#3
			At Callahan Ranch Road	None	*5,450
			Approximately 2,600 feet upstream of Bordeaux Drive.	None	*5,888
			At Mount Rose Highway	None	#1

Maps are available for inspection at Washoe County Engineering, 1001 E. 9th Street, Reno, Nevada.

Send comments to The Honorable Ted Short, Chairman, Washoe County Commission, 1001 E. 9th Street, Reno, Nevada 89512.

New Mexico	Red River (Town) Toas County.	Bitter Creek	Approximately 220 feet downstream of East River Street.	None	*8,654
			Approximately 760 feet upstream of East High Street.	None	*8,691
		Mallette Creek	Approximately 340 feet downstream of West Main Street.	None	*8,632
			Approximately 180 feet downstream of Mallette Canyon Park Road.	None	*8,656
	Red River (Town) Toas County.	Red River	Approximately 100 feet downstream of High Cost Trail.	None	*8,608
			Approximately 1,500 feet upstream of Fishing Pond Bridge.	None	*8,778

Maps are available for inspection at 100 East Main Street, Red River, New Mexico.

Send comments to The Honorable Craig Swaggerty, Mayor, Town of Red River, P.O. Box 1020, Red River, New Mexico 87558.

Oklahoma	Creek County (Unincorporated).	Polecat Creek	Just upstream of 33rd West Avenue	None	*663
			Approximately 4,000 feet upstream of Burlington Northern Railroad.	None	*667
		Rock Creek	At confluence of Polecat Creek	None	*666
			Approximately 1,100 feet downstream of Lake Sahoma Den Outlet.	None	*694
		Nickel Creek	Just upstream of 33rd West Avenue	None	*636
			Approximately 3,500 feet upstream of 66th Street.	None	*712

Maps are available for inspection at the County Courthouse, 317 East Lee, Sapulpa, Oklahoma.

Send comments to The Honorable Johnny Burke, Chairman, Creek County Board of Commissioners, 317 East Lee, Suite 103, Sapulpa, Oklahoma 74066.

Oklahoma	Jenks (City) Tulsa County.	Wilmott Creek	Northwest of intersection of 101st Street and Sunbelt Railway.	*614	*612
			Approximately 100 feet downstream of 91st Street.	*614	*613

Maps are available for inspection at 211 North Elm, Jenks, Oklahoma.

Send comments to The Honorable Mike Tucker, Mayor, City of Jenks, P.O. Box 2007, Jenks, Oklahoma 74037.

Oklahoma	Logan County (Unincorporated Areas).	Chisholm Creek	Approximately 2,200 feet downstream of Waterloo Road.	*1,014	*1,014
			Just downstream of Waterloo Road	*1,015	*1,016
		Coon Creek	Just upstream of Waterloo Road	None	*969
			Approximately 100 feet upstream of Waterloo Road.	None	*970

Maps are available for inspection at the Logan County Courthouse, 301 East Harrison, Guthrie, Oklahoma.

Send comments to The Honorable Joe Hall, Chairman, Logan County Board of Commissioners, 301 East Harrison, Guthrie, Oklahoma 73044.

Oklahoma (cont'd)	Muskogee County and Incorporated Areas.	Arkansas River (Lower Reach).	Just upstream of Interstate Highway 40	None	*476
			Approximately 4,000 feet downstream of U.S. Highway 64.	*481	*479
			Just north of U.S. Highway 64	*482	*480
			Approximately 3,500 feet downstream of Webbers Falls Lock and Dam.	None	*483
		Dirty Creek	Approximately 700 feet downstream of Route 100.	None	*485
			Approximately 500 feet upstream from intersection of Muskogee Turnpike and Interstate 40.	None	*487

State	City/town/county	Source of flooding	Location	#Depth in feet above ground. *Elevation in feet. (NGVD) Existing	Modified

Maps for the unincorporated areas of Muskogee County are available for inspection at the Muskogee County Courthouse, 1300 South Cherokee, Muskogee, Oklahoma.

Send comments to The Honorable Bruce Crittenden, Chairperson, Muskogee County Board of Commissioners, Muskogee County Courthouse, 1300 South Cherokee, Muskogee, Oklahoma 74403.

Maps for the Town of Webbers Falls are available for inspection at the Webbers Falls City Hall, 100 River Street, Webbers Falls, Oklahoma.

Send comments to The Honorable Jewell Horne, Mayor, Town of Webbers Falls, P.O. Box 216, Webbers Falls, Oklahoma 74470.

State	City/town/county	Source of flooding	Location	Existing	Modified
Oklahoma	Sapulpa (City) Creek County.	Nickel Creek	Approximately 3,000 feet downstream of Land Road.	None	*663
			Approximately 300 feet upstream of Tulsa Sapulpa Union Railroad.	None	*695
		Polecat Creek	Approximately 4,000 feet downstream of Hilton Road.	None	*649
			Approximately 8,000 feet upstream of Hilton Road.	*653	*654
			Just upstream of Route 117	*662	*662
			Just downstream of alternate Route 75	*667	*667
		Rock Creek	Approximately 3,300 feet upstream of the confluence with Polecat Creek.	*667	*667
			Just downstream of Old Highway 66	*676	*678
			Just downstream of Turner Turnpike	*682	*684

Maps are available for inspection at 425 East Dewey, Sapulpa, Oklahoma.

Send comments to The Honorable Brian Bingman, Mayor, City of Sapulpa, P.O. Box 1130, Sapulpa, Oklahoma 74067.

State	City/town/county	Source of flooding	Location	Existing	Modified
	Sequoyah County and Incorporated Areas.	Arkansas River	Just above Highway 40	*477	*476
			Approximately 4,200 feet upstream of Route 100—U.S. Highway 64.	None	*481
			Western corporate limits just south of the Union Pacific Railroad.	None	*481

Maps for the unincorporated areas of Sequoyah County are available for inspection at the Sequoyah County Courthouse, 120 East Chickasaw, Sallisaw, Oklahoma.

Send comments to The Honorable Cleon Harrell, Chairman, Sequoyah County Board of Commissioners, 117 South Oak Street, Sallisaw, Oklahoma 74037.

Maps for the Town of Gore are available for inspection at the Town Municipal Building, 8th and South Main Streets, Gore, Oklahoma 74435.

Send comments to The Honorable Bill Summers, Mayor, Town of Gore, P.O. Box 181, Gore, Oklahoma 74435.

State	City/town/county	Source of flooding	Location	Existing	Modified
Texas	Vernon (City) Wilbarger County.	Pease River Tributary 1	Approximately 100 feet downstream of Harrison Street.	None	+1,206
			Approximately 2,400 feet upsteram of Brewer Street.	None	+1,231
		Pease River Tributary 2	Approximately 100 feet downstream of the BN&SF Railroad.	None	+1,200
			Just upstream of U.S. Highway 287	None	+1,219

Maps are available for inspection at the City of Vernon City Hall, 1725 Wilbarger Street, Vernon, Texas.

Send comments to The Honorable Kelly Couch, Mayor, City of Vernon, 1725 Wilbarger Street, Vernon, Texas 76384.

[1] Mean Sea Level

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance.'')

Dated: November 27, 2000.

Michael J. Armstrong,

Associate Director for Mitigation.

[FR Doc. 00–30868 Filed 12–4–00; 8:45 am]

BILLING CODE 6718–04–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[I.D. 112700D]

Magnuson-Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits (EFPs)

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notification of a proposal for EFPs to conduct experimental fishing; request for comments.

SUMMARY: NMFS announces that the Administrator, Northeast Region, NMFS (Regional Administrator), has made a preliminary determination to issue EFPs that would allow two vessels to conduct fishing operations otherwise restricted by the regulations governing the fisheries of the Northeastern United States. The Manomet Center for Conservation Sciences (Manomet) submitted a complete application for the issuance of EFPs to two commercial fishing vessels, which warrants further consideration. The EFPs would allow two federally permitted groundfish vessels to conduct composite mesh selectivity studies with small-mesh codend covers to target mixed groundfish species--primarily yellowtail flounder, winter flounder (blackback), summer flounder (fluke), American plaice (dab) and cod, and may also allow access to seasonal area closures in the Gulf of Maine (GOM). The study is intended to determine the selective efficiency of each experimental codend and will attempt to correlate fish behavior with these findings. Regulations under the Magnuson-Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

DATES: Comments on this action must be received at the appropriate address or fax number (see **ADDRESSES**) on or before December 20, 2000.

ADDRESSES: Written comments should be sent to Patricia Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 1 Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on EFP Proposal.'' Comments may also be sent via facsimile (fax) to (978) 281-9135.

FOR FURTHER INFORMATION CONTACT: Bonnie Van Pelt, Fishery Management Specialist, 978-281-9244.

SUPPLEMENTARY INFORMATION: Manomet submitted an industry cooperative proposal on November 6, 2000, for two EFPs to conduct composite codend mesh selectivity studies to address bycatch and discard of incidental catch and sub-legal sized fish in the mixed-groundfish fisheries of the Northeast. The study would be conducted in that portion of the GOM/Georges Bank Regulated Mesh Area that extends east from the New Hampshire shoreline at 43° N. lat. to 43° N. lat./70° W. long., then following the 70° W. long. line south to the 42° N. lat. line, and then extending west to the Cape Cod shoreline.

This industry collaborative study involves Manomet, the Massachusetts Division of Marine Fisheries, and the Maine Department of Marine Resources as co-principal investigators, and proposes to field test two composite mesh combinations against two industry-standard codend mesh sizes as follows: (1) Two composite codends made of 6.5-inch (16.51-cm) square mesh on the top half, one with 6.5-inch (16.51-cm) diamond mesh on the bottom half and the other with 6-inch (15.24-cm) diamond mesh on the bottom half, and (2) Two industry-standard codends, one made entirely of 6-inch (15.24-cm) diamond mesh and one made entirely of 6.5-inch (16.51-cm) square mesh.

The purpose of the study is to compare the length frequencies (size classes) of the catch retained by the two industry-standard codends and the two composite mesh codend combinations. To accomplish this, 1-7/8 inch (4.78-cm) codends will be used to cover the four test codends in order to retain for analysis fish that pass through the larger-mesh codends. The catch data for each sample (tow) would be used to prepare species-specific mesh selectivity curves. That is, the research will determine the size of each fish species retained by each of the codends tested versus the fish that are excluded by the codends. Data would be pooled for each of the codends tested and the selective efficiency of each codend will be determined for each important target species. Manomet will also conduct a detailed behavioral analysis to ascertain the presence/absence of species-specific behavioral patterns that may explain observed differences in the selective efficiency of the experimental composite codend mesh.

The field trials would take place over a period of approximately 5 days, with a total sample size of 40 tows. The 40 tows will consist of 10 tows for each of four codend mesh sizes (standard and composite mesh), at eight tows per day. These commercial gear trials would operate in the designated study area outside the Western GOM Year Round Closure Area beginning in December 2000, until the 40 tows are obtained. However, the principal investigator may decide that access to the GOM seasonal closure areas is necessary to catch the desired species at the appropriate time, in order to achieve the optimal sample. This would only occur as a last resort, in the event that the required species cannot be caught outside of these areas. Should access to these areas be necessary, the GOM seasonal closures that may correspond in time and location with the proposed study are as follows: Rolling Closure Area I (March 1- March 31), Rolling Closure Area II (April 1- April 30), Rolling Closure Area III (May 1 - May 31), and Rolling Closure Area VI (February 1 - February 28).

The experimental sampling design (use of double codend) is intended to greatly minimize the number of tows necessary to yield the necessary amount of catch information; a minimum of 10 tows (1 hour in length) is required for satisfactory selectivity curve results. The target species are yellowtail flounder, winter flounder (blackback), summer flounder (fluke), American plaice (dab) and cod. The main incidental species are expected to be skates, smooth and spiny dogfish, sculpins, sea raven and sea robin. Any sub-legal sized fish would be processed by the researcher (e.g., measured) and returned immediately to the water. During the experimental trials, participating vessels would be instructed to conduct normal fishing operations. Therefore, the vessels may only retain fish for commercial sale in the amount allowed under their respective Federal fishery permits and Days-at-Sea allocations. Catch would be sampled on each trip by NMFS-certified observers and all data, including the weight and length of all fish caught, would be entered into NMFS logbooks and submitted to the Northeast Fisheries Science Center upon completion of a trip.

Manomet will train up to five commercial fishers as sea samplers for use during the course of this experiment. It is hoped that the newly trained sea samplers would be available to support other programs at the completion of the proposed experiment.

EFPs would be issued to two participating federally permitted Northeast multispecies vessels to exempt them from the gear restrictions and, if necessary, the GOM seasonal area closures of the Northeast Multispecies Fishery Management Plan, found at 50 CFR part 648, subpart F.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 28, 2000.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 00–30820 Filed 12–4–00; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 648

[Docket No. 001127331-0331-01; I.D. No. 102600B]

RIN 0648-AN69

Magnuson-Stevens Act Provisions; Foreign Fishing and Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; 2001 Specifications and Foreign Fishing Restrictions

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed 2001 initial specifications; request for comments.

SUMMARY: NMFS proposes initial specifications for the 2001 fishing year for Atlantic mackerel, squid, and butterfish (MSB). Regulations governing these fisheries require NMFS to publish specifications for the upcoming fishing year and to provide an opportunity for public comment. The intent of this action is to fulfill this requirement and to promote the development and conservation of the MSB resources. This action also proposes an inseason adjustment procedure for the 2001 mackerel joint venture processing (JVP) annual specifications and a proposal to allocate the domestic annual harvest (DAH) for Loligo squid into quarterly periods.

DATES: Public comments must be received no later than 5 p.m., eastern standard time, on January 4, 2001.

ADDRESSES: Comments on the proposed specifications should be sent to: Patricia A. Kurkul, Regional Administrator, Northeast Regional Office, NMFS, One Blackburn Drive, Gloucester, MA 01930-2298. Please mark the envelope, ‘‘Comments-2001 MSB Specifications.’’ Comments also may be sent via facsimile (fax) to 978-281-9135. Comments will not be accepted if submitted via e-mail or Internet.

Copies of supporting documents used by the Mid-Atlantic Fishery Management Council, including the Environmental Assessment and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA), are available from: Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19904-6790.

Send comments on any ambiguity or unnecessary complexity arising from the language used in this proposed rule to Patricia A. Kurkul, Regional Administrator.

FOR FURTHER INFORMATION CONTACT: Paul H. Jones, Fishery Policy Analyst (978)281-9273, fax 978-281-9135, e-mail paul.h.jones@noaa.gov.

SUPPLEMENTARY INFORMATION:

Regulations implementing the Fishery Management Plan for the Atlantic Mackerel, Squid, and Butterfish Fisheries (FMP), prepared by the Mid-Atlantic Fishery Management Council (Council), appear at 50 CFR part 648, subpart B. Regulations governing foreign fishing appear at 50 CFR part 600, subpart F. These regulations, at §§ 600.516(c) and 648.21, require that NMFS, based on the maximum optimum yield (Max OY) of each fishery as established by the regulations, annually publish a proposed rule specifying the initial amounts of the initial optimum yield (IOY), as well as the amounts for allowable biological catch (ABC), DAH, domestic annual processing (DAP), JVP, and total allowable levels of foreign fishing (TALFF) for the affected species managed under the FMP. The regulations also specify that there will be no JVP or TALFF specified for Loligo, Illex, or butterfish, except that a butterfish bycatch TALFF will be specified if TALFF is specified for Atlantic mackerel. Procedures for determining the initial annual amounts are found in § 648.21.

In addition to the annual specifications for each of the four species managed under the FMP, the Council recommended that, for several species managed by the Council, 2 percent of the 2001 total allowable landings (TAL) for each of these species be set aside for data collection purposes. Because no TAL is specified for Atlantic mackerel, squid, and butterfish, TAL is considered equivalent to IOY. The deduction would occur no later than December 31, 2000, upon notification to the Northeast Regional Administrator that the Council, in consultation with the Atlantic States Marine Fisheries Commission, has approved a specific data collection project that would use the set-aside allocation. If a project is not approved before December 31, 2000, then a set-aside deduction from the TAL would not occur. However, the set-aside recommendation cannot become effective until the Council adopts a framework measure, which in turn, is approved by NMFS, to establish the regulatory underpinnings of the process to allocate the set-aside.

Table 1 contains the proposed initial specifications for the 2001 Atlantic mackerel, *Loligo* and *Illex* squids, and butterfish fisheries.

TABLE 1. PROPOSED INITIAL ANNUAL SPECIFICATIONS, IN METRIC TONS (MT), FOR ATLANTIC MACKEREL, SQUID, AND BUTTERFISH FOR THE FISHING YEAR JANUARY 1 THROUGH DECEMBER 31, 2001.

Specifications	Squid		Atlantic Mackerel	Butterfish
	Loligo	Illex		
Max OY	26,000	24,000	N/A[1]	16,000
ABC	17,000	24,000	347,000	7,200
IOY	17,000[6]	24,000[6]	88,000[2,6]	5,900[6]
DAH	17,000	24,000	85,000[3]	5,897
DAP	17,000	24,000	50,000	5,897
JVP	0	0	20,000[4]	0

TABLE 1. PROPOSED INITIAL ANNUAL SPECIFICATIONS, IN METRIC TONS (MT), FOR ATLANTIC MACKEREL, SQUID, AND BUTTERFISH FOR THE FISHING YEAR JANUARY 1 THROUGH DECEMBER 31, 2001.—Continued

Specifications	Squid		Atlantic Mackerel	Butterfish
	Loligo	Illex		
TALFF	0	0	3,000	3[5]

[1] Not applicable.
[2] OY may be increased during the year, but the total ABC will not exceed 347,000 mt
[3] Includes 15,000 mt of Atlantic mackerel recreational allocation.
[4] JVP may be increased up to 30,000 mt at discretion of RA.
[5] Bycatch TALFF specified at § 648.21(b)(3)(ii).
[6] If a 2 percent research set-aside is deducted, the total IOY would be as follows: Atlantic mackerel - 86,240 mt, Loligo - 16,660 mt, Illex - 23,520 mt, and butterfish - 5,782 mt.

2001 Proposed Specifications

Atlantic Mackerel

Overfishing for Atlantic mackerel is defined by the FMP to occur when the catch associated with a threshold fishing mortality rate (F) of FMSY (the F that produces MSY (maximum sustainable yield)) is exceeded. When spawning stock biomass (SSB) is greater than 890,000 mt, the overfishing limit is FMSY (0.45), and the target F is 0.25. To avoid low levels of recruitment, the FMP adopted a control rule whereby the threshold F decreases linearly from 0.45 at 890,000 mt SSB to zero at 225,000 mt SSB (1/4 of the biomass level that would produce MSY on a continuing basis (B_{MSY})), and the target F decreases linearly from 0.25 at 890,000 mt SSB to zero at 450,000 mt SSB ($_{1/2}$ B_{MSY}). Annual quotas are specified that correspond to the target F resulting from this control rule.

Since SSB is currently above 890,000 mt, the target F for 2001 is 0.25. The yield associated with that target F at the estimated stock size is 369,000 mt. The ABC recommendation of 347,000 mt represents the F=0.25 yield estimate of 369,000 mt, minus the estimated Canadian catch of 22,000 mt. The proposed IOY for the 2001 Atlantic mackerel fishery is 88,000 mt, which is equal to the proposed DAH plus TALFF. The specification for DAH is computed by calculating the estimated recreational catch, the proposed DAP and JVP. The recreational catch component of DAH is estimated to be 15,000 mt. DAP and JVP components of DAH have historically been estimated using the Council's annual processor survey, which is intended to obtain estimates of processing capacity in the domestic and joint venture (JV) fisheries. However, for the years 1994 through 2001, response to this voluntary survey was low and did not contain projections from some large processors. The Council still believes, based on the best data available, that the capacity of the domestic fleet to harvest mackerel greatly exceeds the domestic processors capacity to process mackerel. Additionally, the Council generally agreed that JVs have had a positive impact on the development of the U.S. Atlantic mackerel fishery. This assertion led to the Council recommendation that JVP be set at 20,000 mt in 2001 (10,000 mt more than 1999 and 2000; 5,000 mt more than in 1998; and 5,000 mt less than in 1997).

The Council has recommended, and NMFS proposes, a specification of 20,000 mt of JVP for the 2001 fishery, with a possible increase to 30,000 mt later in the year. If additional applications for JVP are received, NMFS could increase this allocation to 30,000 mt by publishing notification in the **Federal Register**. The Council also recommended, and NMFS proposes, a DAP of 50,000 mt, yielding a DAH of 85,000 mt, which includes the 15,000-mt recreational catch component.

A TALFF of 3,000 mt is recommended by the Council and proposed by NMFS for the 2001 Atlantic mackerel fishery. Several foreign nations have expressed their interest in JVP, with two applications already submitted by Lithuania and the Russian Federation. TALFF, which is foreign fishing, rather than just processing by foreign vessels, would be authorized only if U.S. vessels are unable to deliver product to foreign JV catcher/processor vessels for a period of time due to events such as bad weather. The Council's intent is to encourage JV fisheries by allowing TALFF in special circumstances.

As authorized by §§ 600.501 and 600.520(b)(2)(ii), the Council also recommended, and NMFS proposes, that several special conditions be imposed on the 2001 Atlantic mackerel fishery, as follows: (1) JVs would be allowed south of 37° 30′ N. lat., but river herring bycatch may not exceed 0.25 percent of the over-the-side transfers of Atlantic mackerel; (2) directed foreign fishing for Atlantic mackerel would be prohibited south of 37° 30′ N. lat., north of 37° 30′ N. lat., directed foreign fishing for Atlantic mackerel would be prohibited landward of a line 20 nautical miles from shore and no bycatch TALFF of river herring is specified; (3) the Administrator, Northeast Region, NMFS (Regional Administrator) should ensure that impacts on marine mammals are reduced in the prosecution of the Atlantic mackerel fishery; (4) the mackerel optimum yield (OY) may be increased during the year, but the total should not exceed 347,000 mt; (5) applications from a particular nation for a Atlantic mackerel JV or TALFF allocation for 2001 may be based on an evaluation by the Regional Administrator of that nation's performances relative to purchase obligations for previous years; (6) no purchase ratios would be specified; upon approval of an application for TALFF, 50 percent of the foreign nation's TALFF allotment would be released; additional TALFF would be released only when the foreign participant has purchased 25 percent of the JVP allotment to that nation; (7) foreign fishing vessels (FFV) would be required to purchase JVP-caught fish from contracted U.S. vessels; if a FFV were engaged in directed fishing and is approached by a contracted U.S. vessel, the FFV would be required to cease directed fishing and take the transfer from the U.S. vessel as soon as practicable; (8) no in-season adjustment in TALFF (i.e., TALFF not to exceed 3,000 mt) would be authorized, unless the Regional Administrator, with concurrence of the Council, determined that it is appropriate to increase IOY to provide additional TALFF, but the TALFF should not exceed a cap of 5,000 mt; an (9) directed foreign fishing for Atlantic mackerel would be limited to the use of mid-water trawl gear.

Atlantic Squids

Loligo

The FMP defines overfishing for Loligo as occurring when the catch associated with a threshold of the fishing mortality that produces the maximum sustainable level of yield per recruit (F_{MAX}) is exceeded (F_{MAX} is a proxy for FMSY). When an estimate of F_{MSY} becomes available, it will replace the current overfishing proxy F_{MAX}. Max OY is specified as the catch associated with a F_{MAX}. In addition, the biomass target is specified as B_{MSY}.

The most recent stock assessment for *Loligo* (the 29th Northeast Regional Stock Assessment Workshop, August 1999 (SAW-29)) concluded that the stock is approaching an overfished condition and that overfishing is occurring. More recently, NMFS' Report to Congress: Status of Fisheries of the United States (October 1999) determined that the *Loligo* stock is overfished.

The Magnuson-Stevens Fishery Conservation and Management Act requires the Council to take remedial action to rebuild an overfished stock to a level that will produce B_{MSY}. The control rule in the FMP specifies that the target F must be reduced to zero if biomass falls below 50 percent of B_{MSY}. The target F increases linearly to 75 percent of F_{MSY} as biomass increases to B_{MSY}. However, projections made in SAW-29 indicate that the *Loligo* control rule appears to be overly conservative. The projections from SAW 29 indicated that the *Loligo* biomass could be rebuilt to levels approximating Bmsy in three years if fishing mortality was reduced to the target mortality rate specified in Amendment 8 of 75 percent of F_{MSY}. The yield associated with this fishing mortality rate (75 percent of F_{MSY}) in 2000, assuming status quo F in 1999, was estimated to be 11,732 mt in SAW 29. The current regulations still specify Max OY as the yield associated F_{MAX}, or 26,000 mt. In determining the specification of ABC for the year 2000, the Council considered advice offered by SAW 29 which indicated that the control rule adopted in Amendment 8 was too conservative. Model projections presented in the most recent assessment demonstrated that the stock could be rebuilt in a relatively short period of time, even at fishing mortality rates approaching F_{MSY}. Based on the SAW 29 projections, the Council chose to specify ABC as the yield associated with 90 percent F_{MSY} or 13,000 mt in 2000.

The most recent survey data for *Loligo* squid indicate that abundance of this species has increased significantly since the most recent assessment was conducted (i.e., SAW-29). Estimates of biomass based on NMFS' Northeast Fisheries Science Center (NEFSC) fall 1999 and spring 2000 survey indices for *Loligo* indicate that the stock is currently at or near Bmsy. In fact, the 1999 fall survey index was the sixth highest value observed in the time series since 1967 and the second highest since 1987. The 2000 spring survey index for *Loligo* was the tenth highest in the time series since 1968 and the fifth highest since 1987. Based on the assumption that the stock will be at or near B_{MSY} in 2001, the Council recommended that the 2001 quota be specified as the yield associated with 75 percent of F_{MSY}. The yield associated with 75 percent of F_{MSY} at B_{MSY} is 17,000 mt, based on projections in SAW-29. The establishment of quarterly allocation periods spreads F out over the fishing year and is expected to protect spawners. The current regulations still specify Max OY as the yield associated with F_{MAX}, or 26,000 mt.

Thus, the proposed Max OY for *Loligo* is 26,000 mt and the recommended ABC for the 2001 fishery is 17,000 mt. NMFS issued a notification in the **Federal Register** on October 10, 2000 (65 FR 60118), announcing an inseason action to adjust the 2000 annual specifications for *Loligo* squid, including ABC, IOY, DAH and DAP, from 13,000 mt to 15,000 mt. Therefore, the 2001 annual specifications represent an increase of 2,000 mt from the 2000 ABC of 15,000 mt. This ABC is based on the NEFSC fall 1999 and spring 2000 survey indices for *Loligo* and is determined to be a level that would allow the *Loligo* stock to rebuild to levels at or near BMSY within 3 to 5 years.

Distribution of Annual *Loligo* Quota into Four Quarters

The Council recommended, and NMFS proposes, an IOY of 17,000 mt for *Loligo* squid, which is equal to ABC. Management advice from SAW-29 made special note of the fact that yield from this fishery should be distributed throughout the fishing year. Given that the current permitted fleet historically has demonstrated the ability to land *Loligo* in excess of the quota specified for 2001, the Council recommends, and NMFS proposes, that the annual quota be subdivided into quarterly periods. The quota would be allocated to each period based on the proportion of landings occurring in each 4-month period from 1994-1998. The directed fishery would be closed in Quarters I-III when 80 percent of that period's allocation is harvested, with vessels restricted to a 2,500-lb (1,134-kg) *Loligo* trip limit until the end of the respective quarter. Additionally, when 95 percent of the total annual DAH has been harvested, the trip limit would be reduced to 2,500 lb (1,134 kg) of *Loligo* for the remainder of the year. When the 2,500-lb (1,134-kg) trip limit has been triggered, vessels will be prohibited from possessing or landing more than 2,500 lb in a single calendar day. Any quota overages in Quarter I would be deducted from the allocation in Quarter III, and any overage in Quarter II would be deducted from the allocation in Quarter IV. The quota allocation is shown in Table 2.

TABLE 2. *Loligo* QUARTERLY ALLOCATIONS.

Quarter	Percent	Metric Tons
I (Jan-Mar)	33.23	5,649
II (Apr-Jun)	17.61	2,994
III (Jul-Sep)	17.3	2,941
IV (Oct-Dec)	31.86	5,416
Total	100.00	17,000

In Amendment 5 to the FMP, the Council concluded that U.S. vessels have the capacity to, and will harvest the OY on an annual basis, so DAH equals OY. The Council also concluded that U.S. fish processors, on an annual basis, can process that portion of the OY that will be harvested by U.S. commercial fishing vessels, so DAP equals DAH, and JVP is zero. Since U.S. fishing vessels have the capacity to harvest, and are expected to attempt to harvest, the entire OY, there is no portion of the OY that can be made available for foreign fishing, making TALFF zero. These determinations were made in Amendment 5 to the FMP. The proposed values of IOY, DAH, and DAP are 17,000 mt for the 2001 *Loligo* fishery, and represent an increase of 2,000 mt from the final 2000 *Loligo* IOY/DAH/DAP specifications (NMFS issued a notification in the **Federal Register** on October 10, 2000 (65 FR 60118), announcing an inseason action to adjust the 2000 annual specifications for *Loligo* squid, including ABC, IOY, DAH and DAP, from 13,000 mt to 15,000 mt).

Illex

The approved overfishing definition for *Illex* states that overfishing for Illex occurs when the catch associated with a threshold fishing mortality rate of F_{MSY} is exceeded. Maximum OY is to be specified as the catch associated with a fishing mortality rate of F_{MSY}. In addition, the biomass target is specified as B_{MSY}. The minimum biomass threshold is specified as $_{1/2}$ B_{MSY}.

The most recent assessment of the Illex stock (SAW-29) concluded that the stock is not overfished and that overfishing is not occurring. The previous assessment, the 21st Northeast

Regional Stock Assessment (1996), had concluded that the U.S. *Illex* stock is fully exploited. Due to a lack of adequate data, the estimate of yield at F_{MSY} was not updated in SAW-29. However, an upper bound on annual F was computed for the U.S. Exclusive Economic Zone portion of the stock, based on a model that incorporated weekly landings and relative fishing effort and mean squid weights during 1994-1998. These estimates of F were well below the biological reference points. Current absolute stock size is unknown and no stock projections were done in SAW-29.

Since data limitations did not allow an update of yield estimates at the threshold and target F values, the Council recommended, and NMFS proposes, that the specification of Max OY and ABC be specified as 24,000 mt (the yield associated with F_{MSY}). Under this option, the directed fishery for *Illex* would remain open until 95 percent of the ABC is taken (22,800 mt). Once 95 percent of the ABC is estimated to have been taken, the directed fishery would be closed and a 5,000-lb (2,268-kg) trip limit would remain in effect for the remainder of the fishing year. Similar to *Loligo*, when a trip limit is in effect, vessels are prohibited from possessing or landing more than 5,000 lb (2,268 kg) in a single calendar day. Amendment 5 to the FMP eliminated the possibility of JVP and TALFF for the *Illex* fishery because of the domestic fishing industry's ability to harvest and to process the OY from this fishery.

Butterfish

The FMP set OY for butterfish at 16,000 mt. Based on the most current stock assessment, the Council recommends, and NMFS proposes, an ABC of 7,200 mt for the 2001 fishery. This represents no change in the specifications since 1996. Commercial landings of butterfish have been low at 2,798 mt, 1,964 mt, and 2,116 mt for the 1997 through 1999 fisheries, respectively. Lack of market demand and the difficulty in locating schools of market-sized fish have caused severe reductions in the supply of butterfish. Discard data from the offshore *Illex* fishery are lacking and high discard rates could be reducing potential yield.

The Council recommended, and NMFS proposes, an IOY for butterfish of 5,900 mt. The IOY is composed of a DAH of 5,897 mt and a bycatch TALFF that is equal to 0.08 percent of the allocated Atlantic mackerel TALFF. Amendment 5 eliminated the possibility of JVP or TALFF specifications for butterfish except for a bycatch TALFF specification if TALFF is specified for Atlantic mackerel. Since the Council has recommended TALFF for Atlantic mackerel, TALFF for butterfish is 3 mt. If the Regional Administrator, with concurrence of the Council, determines that it is appropriate to increase the current proposed TALFF of 3,000 mt for Atlantic mackerel up to a final 5,000 mt, then TALFF for butterfish would be increased from 3 mt to a final value of 4 mt.

Classification

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Council prepared an IRFA in section 5.0 of the RIR that describes the economic impacts this proposed rule, if adopted, would have on small entities. A summary of the analysis follows:

The IRFA describes the action, why it is being considered, and the legal basis for it. These are the same as appear at the beginning of this preamble and in the **SUMMARY** section of the preamble and are not repeated here.

The IRFA identifies the number of potential fishing vessels in the 2001 fisheries as 443 vessels fishing for *Loligo*, 77 vessels fishing for *Illex*, 443 vessels fishing for butterfish, and 1,980 vessels fishing for Atlantic mackerel. Many vessels participate in more than one of these fisheries; therefore, the numbers are not additive. The proposed ABC specifications of 347,000 mt and DAH of 85,000 mt for Atlantic mackerel, the DAH specifications of 24,000 mt for *Illex* squid, and the DAH specifications of 5,900 mt for butterfish, represent no constraint on vessels in these fisheries. The proposed specifications have not been achieved by landings for these species in recent years. Absent a constraint on the fisheries, no impacts on revenues are expected.

If the 2001 DAH specification of 17,000 mt for *Loligo* squid is not exceeded, the result would be a decrease in catch and revenue in the *Loligo* fishery relative to the 1999 landings and an increase from the average landings from 1996-1999 (i.e., if the status quo were maintained).

The first alternative action for Atlantic mackerel would be to set the 2001 specifications at the same level as 2000. Although it was rejected as inconsistent with the FMP because it would not meet the policy objectives of the Council relative to further development of the US domestic harvest of Atlantic mackerel, this alternative would place no constraints, and consequently no revenue impacts, on the fishery. The second alternative for mackerel was to set ABC at the long-term potential catch (LTPC), or 150,000 mt. This alternative was found inconsistent with the FMP because it would not allow for variations and contingencies in the status of the stock. For example, the current adult stock was recently estimated to exceed 2.1 million mt. The specification of ABC at LTPC would effectively result in an exploitation rate of only about 6 percent, well below the optimal level of exploitation. The level of foregone yield under this alternative was considered unacceptable and would not impact the IOY specifications. The third alternative considered for mackerel included the elimination of JVP, which would lower the specification of IOY to 68,000 mt, also far in excess of recent landings. These alternatives would not constrain the fishery and were determined to have no impact on revenues of participants in this fishery.

For *Loligo*, one alternative that was considered was to set the ABC, DAH, DAP, and IOY at 13,000 mt. This was the same level as 2000 until an inseason adjustment increased the ABC, DAH, DAP, and IOY to 15,000 mt (65 FR 60118, October 10, 2000). Under the scenario of a 13,000 mt DAH; if that value were not exceeded in 2001, 121 of the 443 impacted vessels would experience revenue reductions of greater than 5 percent. This would represent a 20.5-percent reduction in 1996-1999 average landings of 16,348 mt. The remaining 322 vessels would experience less than 5-percent reduction in revenue or an increase in revenue. A second alternative would set ABC, DAH, DAP, and IOY at 11,700 mt. This would represent a 28.4-percent reduction in 1996-1999 average landings. Under this scenario, 161 of the 443 impacted vessels would experience revenue reductions of greater than 5-percent. The remaining 282 vessels would experience less than a 5-percent reduction in revenue, or an increase in revenue.

For *Illex*, the first alternative that sets Max OY, ABC, IOY, DAH, and DAP of 30,000 mt and the second alternative that sets Max OY at 24,000 mt and ABC, IOY, DAH, and DAP at 19,000 mt far exceed recent landings in this fishery. Therefore, there would be no constraints, and, thus, no revenue reductions, associated with these specifications.

For butterfish, the Council considered a DAH, OY, and Max OY of 16,000 mt and a DAH and OY of 10,000 mt. These specifications would not constrain or impact the industry; however, they would lead to overfishing of the stock, and, thus, were rejected by the Council.

This rule does not duplicate, overlap, or conflict with other Federal rules.

There are no recordkeeping or reporting requirements associated with this rule.

A copy of the IRFA is available from the Council (see **ADDRESSES**).

The President has directed Federal agencies to use plain language in their communications with the public, including regulations. To comply with this directive, we seek public comment on any ambiguity or unnecessary complexity arising from the language used in this proposed rule. Such comments should be sent to Patricia A. Kurkul, the Regional Administrator (see **ADDRESSES**).

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: November 28, 2000.

William T. Hogarth,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 648.21, paragraph (e) is revised to read as follows:

§ 648.21 Procedures for determining initial annual amounts.

* * * * *

(e) *Distribution of annual Loligo squid commercial quota.* (1) Beginning January 1, 2001, a commercial quota will be allocated annually for *Loligo* squid into quarterly periods, based on the following percentages:

COMMERCIAL QUOTA

Quarter	Percent
I January-March	33.23
II April-June	17.61
III July-September	17.30
IV October-December	31.86

(2) Beginning January 1, 2001, any overages of commercial quota landed from Quarter I will be subtracted from Quarter III and any overages of commercial quota landed from Quarter II will be subtracted from Quarter IV.

* * * * *

3. In § 648.22, paragraph (a) is revised to read as follows:

§ 648.22 Closure of the fishery.

(a) *General.* NMFS shall close the directed mackerel fishery in the EEZ when U.S. fishermen have harvested 80 percent of the DAH of that fishery if such closure is necessary to prevent the DAH from being exceeded. The closure shall remain in effect for the remainder of the fishing year, with incidental catches allowed as specified in paragraph (c) of this section, until the entire DAH is attained. When the Regional Administrator projects that DAH will be attained for mackerel, NMFS will close the mackerel fishery in the EEZ, and the incidental catches specified for mackerel in paragraph (c) of this section will be prohibited. NMFS will close the directed fishery in the EEZ for *Loligo* when 80 percent is harvested in Quarters I, II and III, and when 95 percent of the total annual DAH has been harvested. The closure of the directed fishery will be in effect for the remainder of the fishing year, with incidental catches allowed as specified in paragraph (c) of this section. NMFS will close the directed fishery in the EEZ for *Illex* or butterfish when 95 percent of the DAH has been harvested. The closure of the directed fishery will be in effect for the remainder of the fishing year, with incidental catches allowed as specified in paragraph (c) of this section.

* * * * *

[FR Doc. 00–30819 Filed 12–4–00; 8:45 am]

BILLING CODE: 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 697

[Docket No. 001120327-0327-01; I.D. 091800H]

RIN 0648-AO58

American Lobster Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule.

SUMMARY: NMFS proposes regulations to modify the management measures applicable to the American lobster fishery. This action would exempt black sea bass fishers who concurrently hold limited access lobster and limited access black sea bass permits from the more restrictive gear requirements in the lobster regulations when fishing in Lobster Management Area (LMA) 5 if they elect to be restricted to the non-trap lobster allowance while targeting sea bass in LMA 5. This regulation also clarifies that lobster trap regulations do not affect trap gear requirements for fishermen who do not possess a limited access American lobster permit. The intent of these regulations is to relieve restrictions on fishers that were unintended, without compromising lobster conservation goals.

DATES: Comments on this proposed rule must be received at the appropriate address (see **ADDRESSES**) no later than 5 p.m., eastern standard time, on December 26, 2000.

ADDRESSES: Send written comments on this proposed rule to, and obtain copies of supporting documents that also include a Draft Environmental Assessment/Regulatory Impact Review (DEA/RIR) from, the Director, State, Federal and Constituent Programs Office, NMFS, One Blackburn Drive, Gloucester, MA 01930. Comments will not be accepted if submitted via e-mail or Internet. Comments regarding the collection of information requirements contained in the proposed rule should be sent to: the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (ATTN: NOAA Desk Officer).

FOR FURTHER INFORMATION CONTACT: Robert Ross, NMFS, Northeast Region, 978-281-9234.

SUPPLEMENTARY INFORMATION: NMFS proposes regulations to modify the Federal lobster conservation management measures issued as part of a Federal/state cooperative management effort under the authority of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA). Section 804(b) of ACFCMA authorizes NMFS to issue regulations governing fishing in the Exclusive Economic Zone (EEZ) that are compatible with the effective implementation of the Atlantic States Marine Fisheries Commission's American Lobster Interstate Fishery Management Plan and consistent with the national standards set forth in section 301 of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On December 6, 1999, NMFS, in an effort to end overfishing of the American lobster resource, published a final rule (64 FR 68228) creating seven LMAs; imposing trap limits (800 traps/vessel in LMA 5), trap tagging requirements, and a maximum trap size; increasing the lobster escape vent size; restricting lobster trap fishers to their annually selected LMAs; and establishing a harvest limit for non-trap vessels. A Final Environmental Impact

Statement/Regulatory Impact Review was prepared for the action and was published on May 28, 1999 (64 FR 29025).

The lobster management program uses a gear conservation and effort limitation strategy to control lobster mortality. Fishing effort is limited by limiting the access of new vessels to the fishery and the number and size of traps that may be fished per vessel. To enforce these measures, lobster traps must be tagged, and the tags must be traceable to the owner of each vessel. A minimum lobster size combined with a corresponding escape vent opening in traps helps control mortality on juvenile lobsters. A maximum trap size was imposed to preclude possible increases in trap efficiency. These measures are applied to all traps designed for, and capable of, catching lobster. NMFS does not consider traps targeting other species and fished by non-lobster permit holders to be ''designed for'' or ''capable of'' catching lobsters. This proposed rule would remove the present definition of trap and add a definition for lobster trap to in essence exclude those traps fished by vessels not eligible for limited access lobster permits (non-eligible vessels). Non-eligible vessels are prohibited from retaining, landing, or possessing American lobster.

The black sea bass fishery is managed under the Fishery Management Plan for Summer Flounder, Scup, and Black Sea Bass (FMP) developed by the Mid-Atlantic Fishery Management Council (Mid-Atlantic Council) under the Magnuson-Stevens Act. The black sea bass fishery was added to the FMP when Amendment 9 was approved and implemented in 1997 (61 FR 58461, November 15, 1996). Amendment 9 to the FMP established a limited access permit system for the entry of new vessels to the fishery.

Black sea bass (*Centropristis striata*) and American lobster (*Homarus americanus*) are often harvested using similarly configured fish traps or pots, although black sea bass traps are not usually baited. Black sea bass fishermen prefer to use as many as 1,500 traps/vessel but are now restricted by the lobster regulations under 50 CFR part 697 to 800 traps/vessel when fishing in LMA 5. Black sea bass fishermen also prefer to use traps with smaller escape vents than the lobster regulations allow. In the Mid-Atlantic where the two fisheries overlap considerably, the two management strategies come into conflict. Concerned about the impacts on commercial fishing enterprises from differing management systems, the Mid-Atlantic Council and the ASMFC requested that NMFS provide an exemption from the lobster gear requirements to black sea bass fishers when fishing in LMA 5. LMA 5, which is located in the Mid-Atlantic area, has historically represented less than 2 percent of the total annual lobster landings. The Mid-Atlantic Council and ASMFC recommended further that the non-trap lobster allowance that applies to non-trap lobster fishers be applied to exempted black sea bass fishers. As a result, NMFS prepared a DEA/RIR and this proposed rule to address this management issue.

This action would allow dual permit status vessels–vessels having limited access eligibility in the black sea bass and lobster fisheries– to elect to participate in a program that exempts them from the lobster gear restrictions while targeting black sea bass in LMA 5 but which limits them to the non-trap lobster allowance. The non-trap allowance is a landing limit of 100 lobsters per day and up to 500 lobsters per trip for trips 5 days or longer.

To participate in the proposed exemption, a vessel would obtain an ''Area 5 Trap Waiver'' category permit through the normal permitting process. A vessel with the waiver would be limited to the non-trap allowance and may only land lobsters in greater numbers by formally canceling the ''Area 5 Trap Waiver'' permit and switching to the commercial lobster category, again through the normal Federal permitting process. Cancellations of the ''Area 5 Trap Waiver'' permit would be treated administratively as a lobster permit category change and would not result in the loss of limited access eligibility in either the lobster or the black sea bass fisheries. Vessels would be required to comply with the regulations that are appropriate for the target fishery and with the category of permits presently issued.

The creation of this new permit category addresses a common problem in managing overlapping or mixed fisheries. Ideally, conservation restrictions should be tailored as closely as possible to the target fishery; for instance, lobster fishers would be required to comply with the lobster gear restrictions and black sea bass fishers with sea bass restrictions. In mixed fisheries, tailoring becomes more difficult because the least restricted fishery can be used as a loophole for the other; in this case, black sea bass traps can become a loophole in the lobster conservation program. This proposed rule isolates and prohibits the problematic trips, namely, those that would target lobster with black sea bass traps. Only incidental amounts of lobster could be retained from such trips.

NMFS has prepared a DEA/RIR that discusses the impacts of this proposed rule as well as the impacts of the reasonable alternatives. Because access to both the lobster and black sea bass fisheries is closed to new entrants, the universe of vessels that may be affected by this rule is estimated as the number of vessels from states bordering LMA 5 that are currently eligible to fish in both fisheries, or 204 vessels. Fewer vessels actually land both species in 1 year or have selected LMA 5 to fish in.

The impacts on the lobster resource, essential fish habitat, or protected resources from the exemption are expected to be neutral, while a positive economic benefit should accrue to some fishers. The exemption provides an opportunity for dual permit status vessel owners to maintain their limited access eligibility in the fisheries in which they have historically participated. Although there is an additional administrative burden imposed on NMFS and on those opting for this exemption, NMFS believes this is an important and necessary trade-off for enforceability and conservation effectiveness.

This alternative preserves the ability to fish in both fisheries in a single year under rules appropriate to the fisher's preferred target and without the loss of limited access status in either fishery. Detection of violations is simplified through the permit mechanism because an agent would need only to compare the observed landings with the rules associated with the permit.

Environmental benefits to marine habitat, mammals, and other protected species are generally considered to increase as the amount of gear in the water decreases. A change in the number of traps deployed as a result of this or of any alternative would depend on whether dual status vessels previously used separate traps for the lobster and black sea bass fisheries and on the individual decisions made by the affected fishers in reaction to the measures imposed. If a lobster/black sea bass vessel historically fished a separate set of traps for each fishery, the preferred alternative would potentially restore this dual ability, but would not allow simultaneous fishing of both types of traps. While data is not available on the number of dual status vessels fishing separate traps for each fishery, environmental impacts are expected to be neutral.

Classification

This proposed rule is published under the authority of the ACFCMA.

Paragraphs (A) and (B) of section 804(b)(1) of the ACFCMA authorize the Secretary of Commerce (Secretary) to issue regulations in the EEZ that are compatible with the effective implementation of a coastal fishery management plan and consistent with the national standards set forth in section 301 of the Magnuson-Stevens Act. This authority has been delegated to the Assistant Administrator for Fisheries, NOAA (AA). The AA has preliminarily determined that these actions are consistent with the national standards of the Magnuson-Stevens Act. The AA, before making the final determinations, will take into account the data, views, and comments received during the comment period.

An updated Biological Opinion under section 7 of the Endangered Species Act (ESA) was issued for the American Lobster fishery on December 17, 1998. A formal consultation concluded that the continued operation of the American lobster fishery operating under new measures implemented to reduce entanglements, ''may affect but is not likely to jeopardize the continued existence of the northern right whale, humpback whale, fin whale, blue whale, sperm whale, sei whale, leatherback sea turtle, and loggerhead sea turtle and is not likely to destroy or adversely modify critical habitat that has been designated for the northern right whale.''

As a result of entanglement events in 1999, including one mortality of a right whale, NMFS is currently revising the Atlantic Large Whale Take Reduction Plan (ALWTRP) to determine what changes or additional measures are necessary to meet the plan objectives. NMFS has re-initiated consultation on the lobster fishery to determine whether the revised ALWTRP will be an acceptable reasonable and prudent alternative to remove the likelihood of jeopardy to right whales caused by the lobster fishery.

As a result of the proposed measures, traps targeting black sea bass in the waters of LMA 5 could potentially increase to levels in place prior to the imposition of lobster trap limits. However, there have been no observed takes of ESA or Marine Mammal Protection Act listed species in the black sea bass trap fishery, and these measures are expected to affect only a small number of fishers. Therefore, this proposal would not change the basis of the Biological Opinion made on December 17, 1998, or affect any ongoing consultation for this fishery under section 7 of the ESA.

The proposed measures for a LMA 5 Black Sea Bass Trap Waiver fall within the scope of consultations on previous American lobster and Black Sea Bass FMP actions. Given the number of vessels affected by these proposed measures, the limited presence of protected species most susceptible to trap gear (i.e., right whales, humpback whales) in the area, and the application of ALWTRP measures to black sea bass trap fishers, none of the proposed measures is expected to result in the addition of adverse impacts that would change the basis for the determinations in those consultations. Should activities under this action change or new information become available that changes the basis for this determination, consultation will be re-initiated.

NMFS has prepared a DEA/RIR, supplemented by the preamble to this proposed rule that describes the impact this proposed rule, if adopted, would have on small entities. A copy of this analysis is available from NMFS (see ADDRESSES). All participants in the lobster and black sea bass fisheries are considered to be small entities.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. This certification is based on the analysis in the DEA/RIR, which takes into account the applicable criteria established by the agency for determining whether economic impacts on small entities are ''significant'' under the Regulatory Flexibility Act. The factual basis for the certification is as follows:

NMFS found no significant impact on small entities because the proposed rule would relieve a restriction on black sea bass fishers who concurrently hold limited access lobster and limited access black sea bass permits and are thus subject to the more restrictive gear requirements in the lobster regulations. The intent of these regulations is to relieve unintended restrictions without compromising lobster conservation goals. Participating vessels in the LMA 5 trap waiver program would be exempt from the 800 lobster traps per vessel limit and the trap tagging requirements, the maximum trap size requirement, and the increased lobster escape vent size requirement. Because of not being subject to the smaller vent size requirement, they would be able to harvest black sea bass and because of not being subject to the 800 traps/vessel limitation some may even catch a greater number of lobsters. Participating vessels would be allowed to land the non-trap allowance of lobster (100 lobsters per day and up to 500 lobsters per trip for trips of over 5 days). In addition, to the extent that a black sea bass vessel is relieved from the lobster gear restrictions, compliance costs reductions of up to $1180 per inshore vessel may be experienced. Eligible vessels will not have to incur the costs of converting black sea bass traps to conform to the lobster regulations, will not be forced to use less efficient lobster gear when targeting black sea bass, and will have greater flexibility to fish under regulations and possession limits appropriate to the target fishery. Eligible vessels will also not be forced to incur the cost of switching from trap gear to towed gear. While these savings are not considered substantial in terms of their proportion to overall operating costs per inshore vessel, each of these considerations will enable participating vessels to achieve higher levels of gross revenue. The prospects for higher gross revenue resulting from this regulatory action, as well as the ability to maintain and possibly improve the relative competitive position for each affected business, will result in a net improvement in distributive impacts of regulatory action.

The preferred alternative would also allow dual permit holders to retain their dual limited access status and to alternately fish in the black sea bass and lobster fisheries under appropriate regulations for each of those species. The need to permanently cancel access to one or the other limited access fisheries to avoid a conflicting regulatory regime would be eliminated, allowing fishers flexibility to adjust to changing economic conditions in one or the other fishery.

As a result, an initial regulatory flexibility analysis was not prepared.

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), unless that collection-of-information displays a currently valid Office of Management and Budget (OMB) control number.

This proposed rule contains collection-of-information requirements subject to the PRA. The following are the proposed new collection-of-information requirements and their respective estimated response times that have been submitted to OMB for approval:

1. Initiate a permit category change and select the LMA 5 Trap Waiver Permit category (15 minutes);

2. Return a suspended limited access lobster trap permit to NMFS (2 minutes); and

3. Initiate cancellation of a LMA 5 Trap Waiver Permit and re-activate a suspended limited access lobster trap permit (15 minutes).

The following collection-of-information requirements are being restated and have already been approved by OMB as shown: vessel permit applications approved under OMB control number 0648-0202 with the response times per application of 30 minutes for a new application, and 15 minutes for renewal applications, and a lobster trap tag requirement approved under OMB control number 0648–0351 with a response time of 1 minute per tag.

Public comment is sought regarding whether these proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information has practical utility; the accuracy of the burden estimates; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including information through the use of automated collection techniques or other forms of information technology.

Send comments regarding these burden estimates or any other aspect of the data requirements, including suggestions for reducing the burden, to NMFS and to the Office of Information and Regulatory Affairs (see **ADDRESSES**).

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

List of Subjects in 50 CFR Part 697

Fisheries, Fishing.

Dated: November 28, 2000.

Penelope D. Dalton,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 697 is proposed to be amended as follows:

PART 697—ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT

1. The authority citation for part 697 continues to read as follows:

Authority: 16 U.S.C. 5101 *et seq.*

Subpart A—General Provisions

2. In § 697.2, the definition of ''Trap'' is removed and a definition for ''Lobster trap'' is added to read as follows:

§ 697.2 Definitions.

* * * * *

Lobster trap means any structure or other device, other than a net, that is placed, or designed to be placed, on the ocean bottom and is designed for or is capable of, catching lobsters. Red crab fishing gear, fished deeper than 200 fathoms (365.8 m), and fishing gear fished by a vessel not issued a limited access lobster permit under § 697.4(a), are gear deemed not to be lobster traps for the purpose of this part, and are not subject to the provisions of this part.

* * * * *

3. In § 697.4, paragraph (d)(1) is revised and paragraph (p) is added to read as follows:

§ 697.4 Vessel permits and trap tags.

* * * * *

(d) * * * (1) Beginning fishing year 2000, any lobster trap fished in Federal waters must have a valid Federal lobster trap tag permanently attached to the trap bridge or central cross-member, unless exempt under § 697.26.

* * * * *

(p) *Permit category change*. A vessel permit category change may be issued by the Regional Administrator when requested in writing by the owner or by an authorized representative of a vessel meeting the eligibility requirements under § 697.26(a).

4. In § 697.7, paragraphs (c)(1)(vii) through (x) are revised to read as follows:

§ 697.7 Prohibitions.

* * * * *

(c) * * *

(1) * * *

(vii) Possess, deploy, fish with, haul, harvest lobster from, or carry aboard a vessel trap gear in excess of the trap limits specified in § 697.19 unless exempted pursuant to § 697.26.

(viii) Possess, deploy, haul, harvest lobster from, or carry aboard a vessel any trap gear that does not satisfy the requirements on gear identification and marking, escape vents, ghost panel and maximum trap size specified in § 697.21, unless such gear has been rendered unfishable, or unless exempted pursuant to § 697.26.

(ix) Possess, deploy, haul, harvest lobster from, or carry aboard a vessel any trap gear not tagged in accordance with the requirements in § 697.19, unless such gear has been rendered unfishable, or unless exempted pursuant to § 697.26.

(x) Fail to produce, or cause to be produced, lobster trap tags when requested by an authorized officer, unless exempted pursuant to § 697.26.

* * * * *

Subpart B—Management Measures

5. In § 697.19, paragraph (e) is added to read as follows:

§697.19 Trap limits and trap tag requirements for vessels fishing with traps.

* * * * *

(e) *Exemption*. Any vessel issued an Area 5 Trap Waiver permit under § 697.26(a) is exempt from the provisions of this section.

6. In § 697.21, paragraph (g) is added to read as follows:

§ 697.21 Gear identification and marking, escape vent, maximum trap size, and ghost panel requirements.

* * * * *

(g) *Exemption*. Any vessel issued a permit under § 697.26(a) is exempt from the provisions of this section.

7. A new § 697.26 is added to subpart B to read as follows:

§ 697.26 Lobster Management Area 5 Trap Waiver.

(a) *Eligibility*. Vessels eligible for limited access lobster permits under § 697.4(a)(1) and limited access black sea bass permits under § 648.4(a)(7)(i) of this title may request an Area 5 Trap Waiver Permit, under the procedures described in § 697.4.

(b) *Restrictions*. A vessel issued an Area 5 Trap Waiver permit under this section may engage in trap fishing for black sea bass in Lobster Management Area 5 and is exempt from the provisions of § 697.19 and § 697.21 if such fishing is conducted in accordance with all other provisions of this section except § 697.19 and § 697.21 and all other Federal and state laws and regulations applicable to lobster and black sea bass fishing.

(1) A vessel issued a permit under this section may retain, land and sell an incidental allowance of lobster equal to the non-trap harvest restrictions specified in § 697.17(a).

(2) A vessel issued a permit under this section may not possess on board or deploy bait or baited traps.

[FR Doc. 00–30822 Filed 12–4–00; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 65, No. 234

Tuesday, December 5, 2000

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Construction and Installation of Broadband Telecommunications Services in Rural America; Availability of Loan Funds

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of Funds Availability.

SUMMARY: The Rural Utilities Service (RUS) announces a new loan program and the availability of loan funds under this program to finance the construction and installation of broadband telecommunications services in rural America. The President of the United States and the United States Congress have made $100 million in treasury rate loan funds available, through a one-year Pilot Program, to encourage telecommunications carriers to provide broadband service to rural consumers where such service does not currently exist. This program will provide loan funds, on an expedited basis, to communities up to 20,000 inhabitants to ensure rural consumers enjoy the same quality and range of telecommunications services that are available in urban and suburban communities. Loan funds are available immediately and applications will be processed and approved on a first-come, first served basis throughout FY 2001 until the appropriation is utilized in its entirety.

DATES: Applications for loans will be accepted as of the date of this notice and will be accepted anytime on or before September 30, 2001; however, all applications must be postmarked no later than September 30, 2001. Applications will be processed and approved on a first-come, first-served basis until the $100 million appropriation is utilized in its entirety.

FOR FURTHER INFORMATION CONTACT: Roberta D. Purcell, Assistant Administrator, Telecommunications Program, Rural Utilities Service, STOP 1590, 1400 Independence Avenue, SW., Washington, DC 20250–1590, Telephone (202) 720–9554, Facsimile (202) 720–0810.

SUPPLEMENTARY INFORMATION:

General Information

For FY 2001, $100 million in loans will be made available for the construction and installation of facilities and for other costs as RUS deems necessary to provide broadband services in rural areas. The broadband pilot program is authorized by 7 U.S.C. 950 aaa.

Applications

Applications will be accepted as discussed previously in the ''Dates'' section. All interested parties are strongly encouraged to contact the Rural Utilities Service, USDA to discuss its financial needs and eligibility.

Use of Loan Funds

Loan funds may be used to finance the improvement, expansion, construction, and operation of systems or facilities to furnish or improve broadband service in rural areas.

Definition of Broadband Services

As used in this notice, the term broadband services means providing an information rate equivalent to at least 200 kilobits/second in the consumer's connection to the network, both from the provider to the consumer (downstream) and from the consumer to the provider (upstream).

Definition of Rural Area

As used in this notice, rural area means any area of the United States not included within the boundaries of any incorporated or unincorporated city, village, or borough having a population in excess of 20,000 inhabitants.

Loan Terms

For FY 2001, $100 million in loans will be made available to eligible applicants. The loans will bear interest at the comparable Treasury rate for comparable maturities not to exceed ten years.

Eligible Applicants

Loans may be made to legally organized entities providing, or proposing to provide, broadband services in rural areas. Eligible entities may be public bodies, cooperatives, nonprofits, and limited dividend or mutual associations and must be incorporated or a limited liability company.

RUS Findings

Feasibility of and security for the Loan. A borrower shall provide RUS with satisfactory evidence to enable the Administrator to determine that the security for the loan is reasonably adequate and that the loan will be repaid on time. Factors used in making this determination include, but are not limited to:

(1) Evidence of sufficient revenues from the borrower's system, in excess of operating expenditures (including maintenance and replacement), for full repayment of the loan with interest;

(2) Reasonable assurance of achieving market penetration projections upon which the loan is based;

(3) Adequate security for the loan;

(4) Appropriate financial controls included in the loan documents; and

(5) Other factors determined relevant by RUS.

Loan Application

RUS suggests that an application for a loan pursuant to this notice include a loan design that contains a forecast of service requirements and a narrative describing the planned construction and delivery of broadband services. The narrative should detail the purposes and amounts of the proposed project including construction, the proposed service area, and the basis for subscriber forecasts. Other items include:

(1) Certified financial statements, if available;

(2) 10 years of pro-forma financial information;

(3) An environmental report;

(4) Depreciation rates for the equipment being financed;

(5) A sketch or map showing existing and proposed service areas;

(6) A description of the current level of service available;

(7) All other required forms for Federal assistance; and

(8) If not a current RUS borrower, information on the owners and principal employees' relevant work experience that would ensure the success of the project.

Loan Security

Loans must be repaid according to their terms. RUS will require security to be provided for each loan. RUS generally obtains a lien on all the property financed by the loans. The borrower will need to provide adequate security and execute the appropriate legal documents.

Evaluation Criteria

Loan applications will be accepted as of the date of this notice and will be processed and approved on a first-come, first served basis throughout FY 2001 until the appropriation is utilized in its entirety provided that:

(1) The loan is for approved loan purposes for broadband telecommunications services in rural areas;

(2) The loan is deemed to be feasible and adequate security is provided;

(3) The system design is appropriate; and

(4) All other applicable Federal requirements are met.

Dated: November 27, 2000.

Christopher A. McLean,

Administrator, Rural Utilities Service.

[FR Doc. 00–30872 Filed 12–4–00; 8:45 am]

BILLING CODE 3410–15–P

BROADCASTING BOARD OF GOVERNORS

Sunshine Act Meeting

DATE AND TIME: December 12, 2000; 8:30 a.m.–4 p.m.

PLACE: Cohen Building, Room 3321, 330 Independence Ave., SW., Washington, DC 20237.

Closed Meeting

The members of the Broadcasting Board of Governors (BBG) will meet in closed session to review and discuss a number of issues relating to U.S. Government-funded non-military international broadcasting. They will address internal procedural, budgetary, and personnel issues, as well as sensitive foreign policy issues relating to potential options in the U.S. international broadcasting field. This meeting is closed because if open it likely would either disclose matters that would be properly classified to be kept secret in the interest of foreign policy under the appropriate executive order (5 U.S.C. 552b.(c)(1)) or would disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action. (5 U.S.C. 552b.(c)(9)(B)) In addition, part of the discussion will relate solely to the internal personnel and organizational issues of the BBG or the International Broadcasting Bureau. (5 U.S.C. 552b.(c)(2) and (6)).

CONTACT PERSON FOR MORE INFORMATION: Persons interested in obtaining more information should contact either Brenda Hardnett or Carol Booker at (202) 401–3736.

Dated: December 1, 2000.

Carol Booker,

Legal Counsel.

Certification

Based on the information provided to me, the meeting scheduled by the Broadcasting Board of Governors for December 12, 2000, may be closed to the public pursuant to sections (c)(1), (2), (6), and 9(B) of the Government in the Sunshine Act (5 U.S.C. 552b.).

Issues qualifying for closure of the meeting will be inextricably intertwined with issues which do not so qualify. During the course of the meeting there will be discussions relating to foreign policy options (c)(1), internal BBG or IBB personnel, budgetary, and organizational matters (c)(2), the performance or selection of personnel (c)(6), and options for negotiations or other sensitive discussions within the U.S. or abroad. (c)(9)(B).

Carol Booker,

BBG Legal Counsel.

[FR Doc. 00–31031 Filed 12–1–00; 2:29 pm]

BILLING CODE 8230–01–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–823–805]

Suspension Agreement on Silicomanganese from Ukraine; Preliminary Results of Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of the administrative review of the suspension agreement on silicomanganese from Ukraine.

SUMMARY: In response to a request from Eramet Marietta Inc. (petitioner), the Department of Commerce (''the Department'') is conducting an administrative review of the suspension agreement on silicomanganese from Ukraine (''the Agreement'') for the period November 1, 1998 through October 31, 1999, to review the current status of, and compliance with, the Agreement. For the reasons stated in this notice, the Department preliminarily determines that the Government of Ukraine (''the GOU'') is not in compliance with the Agreement. The preliminary results are listed in the section titled ''Preliminary Results of Review,'' infra. Interested parties are invited to comment on these preliminary results. Parties who submit comments are requested to submit with the argument: (1) A statement of the issues, and (2) a brief summary of the arguments.

EFFECTIVE DATE: December 5, 2000.

FOR FURTHER INFORMATION CONTACT: Jean Kemp or Carrie Blozy, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington D.C. 20230; telephone: (202) 482–4037 or (202) 482–0165, respectively.

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (''Act'') by the Uruguay Round Agreements Act (''URAA''). In addition, unless otherwise indicated, all citations to the Department's regulations are to 19 CFR Part 351 (2000).

Background

On October 31, 1994, the Department signed an agreement with the Government of Ukraine which suspended the antidumping investigation on silicomanganese from Ukraine. *See Silicomanganese from Ukraine; Suspension of Investigation*, 59 FR 60951 (November 29, 1994). In accordance with section 734(g) of the Act, on December 6, 1994, the Department published its final determination of sales at less than fair value in this case. *See Notice of Final Determination of Sales at Less Than Fair Value: Silicomanganese From Ukraine*, 59 FR 62711 (December 6, 1994).

On November 30, 1999, petitioner submitted a request for an administrative review pursuant to the notice of *Antidumping and Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 64 FR 62167 (November 16, 1999). On December 28, 1999, the Department initiated a review of the Agreement. *See Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews* (''*Initiation Notice*''), 64 FR 72644 (December 28, 1999).

On August 4, 2000, the Department extended the time limit for the preliminary results of review by 120 days. *See Notice of Extension of Time*

Limits for the Preliminary Results of Administrative Review of the Suspension Agreement on Silicomanganese From Ukraine, 65 FR 47959 (August 4, 2000). On October 6, 2000, petitioner submitted a letter to the Department requesting that the Department determine within the administrative review that the Government of Ukraine has violated the Agreement. On November 14, 2000, the Department placed on the record of this administrative review a copy of the public version of all sales reports filed by the GOU which cover the reporting periods during the period of review.

The Department is conducting this review in accordance with section 751(a)(1) of the Act.

Scope of Review

The merchandise covered by this agreement is silicomanganese. Silicomanganese, which is sometimes called ferrosilicon manganese, is a ferroalloy composed principally of manganese, silicon, and iron, and normally containing much smaller proportions of minor elements, such as carbon, phosphorous and sulfur. Silicomanganese generally contains by weight not less than 4 percent iron, more than 30 percent manganese, more than 8 percent silicon and not more than 3 percent phosphorous. All compositions, forms and sizes of silicomanganese are included within the scope of this agreement, including silicomanganese slag, fines and briquettes. Silicomanganese is used primarily in steel production as a source of both silicon and manganese. This agreement covers all silicomanganese, regardless of its tariff classification. Most silicomanganese is currently classifiable under subheading 7202.30.0000 of the Harmonized Tariff Schedule of the United States (''HTS''). Some silicomanganese may also currently be classifiable under HTS subheading 7202.99.5040. Although the HTS subheadings are provided for convenience and customs purposes, our written description of the scope is dispositive.

Period of Review

The period of review (''POR'') is November 1, 1998 through October 31, 1999.

Preliminary Results of Review

Section 751(a)(1)(C) of the Act specifies that the Department shall ''review the current status of, and compliance with, any agreement by reason of which an investigation was suspended.* * *'' In this case the Department and the GOU signed the Agreement suspending the antidumping duty investigation on silicomanganese from Ukraine on October 31, 1994. In order to effectively restrict the volume of exports of silicomanganese from Ukraine to the United States, the Agreement provides for the implementation by the GOU of certain provisions (Article VII). Moreover, Article IX of the Agreement (Monitoring) requires the GOU to ''provide to the Department such information as is necessary and appropriate to monitor the implementation of and compliance with the terms of {the} Agreement.'' One of the tools the Department uses to monitor the Agreement is sales reports filed by the GOU. Specifically, the GOU is required to collect and provide to the Department sales data on silicomanganese from Ukraine to the United States, in the home market, and to countries other than the United States in the format specified in Appendix B. Although the Agreement specifies that these sales reports are to be submitted to the Department on a semi-annual basis, subsequent to the signing of the Agreement the GOU agreed to submit the sales reports on a quarterly basis. *See* Paris Minutes, Memorandum of Consultations Regarding Administration of the Silicomanganese Suspension Agreement, (May 28, 1998), which are attached as exhibit 1 to petitioner's October 6, 2000 letter.

For the first three reporting periods of the POR, the GOU timely submitted their sales reports; however, to date, the GOU has not filed a sales report for the fourth reporting period of the POR.[1] In their October 6, 2000 letter, which was filed on the record of this administrative review, petitioner, arguing that the GOU has violated the Agreement and that the Agreement can no longer be effectively monitored, calls for the Department to cancel the Agreement, issue the antidumping duty order and take the other actions required by law when a suspension agreement has been violated. Specifically, as evidence that the GOU has violated the Agreement, petitioner cites the failure by the GOU to file a sales report for the last four reporting periods[2] as well as other alleged sales reporting and implementation violations, which were alleged in a February 3, 1998 letter to the Department, a copy of which is attached as an exhibit to the October 6, 2000 letter.

It is indisputable that the GOU failed to file a required sales report for the last period of the POR. Although parties may dispute whether this omission alone constitutes non-compliance with the Agreement, absent complete and verifiable information on sales of silicomanganese from Ukraine during the POR, the Department cannot conclusively determine whether the GOU has complied with the provisions of the Agreement restricting the price and volume of direct and indirect exports of silicomanganese from Ukraine to the United States over the POR. Therefore, we preliminarily determine that the GOU has not been in compliance with the Agreement during the POR. Nevertheless, at this time we are not reaching a determination on petitioner's allegation that the Agreement has been violated. As stated at the beginning of this section, the purpose of this administrative review is to ''review the current status of, and compliance with'' the Agreement. Consequently, within this administrative review, the Department will determine the status of the Agreement and whether the GOU was in compliance with the Agreement over the POR. If the Department makes a final determination of non-compliance, it will then be necessary to determine whether this non-compliance rises to the level of a violation as defined in Article XII of the Agreement.

Therefore, to provide all interested parties an opportunity to address our preliminary finding of non-compliance and whether such non-compliance constitutes a violation, we are extending the deadline for submission of factual information, other than the reports required under the Agreement, until 30 days after publication of this notice in the **Federal Register**.

Public Comment

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 60 days of the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. At the hearing, each party may make an affirmative presentation only on issues raised in that party's case brief, and may make rebuttal presentations only on arguments included in that party's rebuttal brief. *See* 19 C.F.R. 351.310(c).

Any hearing, if requested, will be held 67 days after the date of publication or the first business day thereafter. Case

[1] The report covering the period August 1, 1999 to October 31, 1999 was due on December 1, 1999.

[2] This includes three reporting periods outside of the POR.

briefs from interested parties may be submitted not later than 60 days after publication. Rebuttal briefs, limited to issues raised in case briefs, may be filed not later than five days after the date of filing of case briefs. If this review proceeds normally, the Department will publish the final results of this administrative review, including its analysis of issues raised in the case and rebuttal briefs, not later than 120 days after the date of publication of this notice.

This notice is published in accordance with sections 751(a) and 777(i) of the Act.

Dated: November 29, 2000.

Troy H. Cribb,

Assistant Secretary for Import Administration.

[FR Doc. 00–30955 Filed 12–4–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–810]

Stainless Steel Bar From India: Final Results of Antidumping Duty New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty new shipper review: stainless steel bar From India.

SUMMARY: On October 4, 2000, the Department of Commerce published the preliminary results of the new shipper review of the antidumping duty order on stainless steel bar from India. This review covers one manufacturer/exporter, Atlas Stainless Corporation. This review covers sales of the subject merchandise to the United States during the period February 1, 1999 through January 31, 2000. We gave interested parties an opportunity to comment on the preliminary results of review but received no comments. The final results do not differ from the preliminary results of review, in which we found that the respondent did not make sales in the United States at prices below normal value.

EFFECTIVE DATE: December 5, 2000.

FOR FURTHER INFORMATION CONTACT: Blanche Ziv or Ryan Langan, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–4207 or (202) 482–1279, respectively.

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (''the Act''), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to the Department of Commerce's (''the Department's'') regulations are to 19 CFR Part 351 (1999).

Background

On October 4, 2000, the Department published in the **Federal Register** the preliminary results of its new shipper review of stainless steel bar from India. *See Preliminary Results of the New Shipper Review,* 65 FR 59173 (October 4, 2000). We invited parties to comment on our preliminary results of review. We received no comments. The Department has now completed the new shipper review in accordance with section 751 of the Act.

Scope of Review

Imports covered by this review are shipments of stainless steel bar (''SSB''). SSB means articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons, or other convex polygons. SSB includes cold-finished SSBs that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.

Except as specified above, the term does not include stainless steel semi-finished products, cut length flat-rolled products (*i.e.,* cut length rolled products which if less than 4.75 mm in thickness have a width measuring at least 10 times the thickness, or if 4.75 mm or more in thickness having a width which exceeds 150 mm and measures at least twice the thickness), wire (*i.e.,* cold-formed products in coils, of any uniform solid cross section along their whole length, which do not conform to the definition of flat-rolled products), and angles, shapes and sections.

The SSB subject to these orders is currently classifiable under subheadings 7222.10.0005, 7222.10.0050, 7222.20.0005, 7222.20.0045, 7222.20.0075, and 7222.30.0000 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive.

Final Results of the Review

We received no comments from interested parties on our preliminary results. In addition, we have determined that no changes to our analysis are warranted for purposes of these final results. The weighted-average dumping margin for Atlas for the period February 1, 1999 through January 31, 2000, is as follows:

Manufacturer/exporter	Margin
Atlas Stainless Corporation (''Atlas'')	0.00%

Because the weighted-average dumping margin is zero, we will instruct the Customs Service to liquidate entries made during this review period without regard to antidumping duties for the subject merchandise that Atlas exported.

Cash-Deposit Requirements

The following deposit requirements shall be effective upon publication of this notice of final results of administrative review for all shipments of stainless steel bar from India, entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Act: (1) The cash-deposit rate for the reviewed company will be the rate indicated above; (2) for previously investigated or reviewed companies, the cash-deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this or any previous review or the original less-than-fair-value investigation, but the manufacturer is, the cash-deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash-deposit rate for all other manufacturers or exporters will continue to be 12.45 percent, the all-others rate.

These deposit requirements shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as the only reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing this determination in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.214.

Dated: November 28, 2000.

Troy H. Cribb,

Assistant Secretary for Import Administration.

[FR Doc. 00–30954 Filed 12–4–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–809]

Certain Stainless Steel Flanges From India

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Extension of time limit for final results of new shipper review.

SUMMARY: The Department of Commerce (the Department) is extending the time limit for the final results of a new shipper review of certain stainless steel flanges from India. This review covers one Indian exporter, Bhansali Ferromet Pvt. Ltd. (Bhansali), and the period August 1, 1998 through July 31, 1999.

EFFECTIVE DATE: December 5, 2000.

FOR FURTHER INFORMATION CONTACT: Thomas Killiam or Robert James, AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone: (202) 482–5222, or (202) 482–0649, respectively.

Applicable Statute

Unless otherwise indicated, all citations to the statute refer to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930, as amended (the Tariff Act) by the Uruguay Round Agreements Act. In addition, all citations to the Department's regulations are to the current regulations, codified at 19 CFR Part 351 (1999).

Background

Based on a request from Bhansali, and pursuant to section 351.214, the Department initiated a new shipper review of the antidumping duty order on certain stainless steel flanges from India, covering the period February 1, 1999 through February 29, 2000 (65 FR 8120, February 17, 2000). The final results are currently due no later than December 14, 2000. The deadline for the final results may be extended from 90 to 150 days after the issuance of the preliminary results, according to section 751(a)(2)(B)(iv) of the Tariff Act and 351.214(i)(2) of the Department's regulations.

Postponement of Final Results

The Department has determined that the issues of this case are extraordinarily complicated and it is not practicable to issue the final results of the new shipper review within the original time limit. *See* Memorandum from Richard A. Weible to Joseph A. Spetrini, Deputy Assistant Secretary, Enforcement Group III, November 22, 2000. Accordingly, the Department is extending the time limit for completion of the final results of this review until February 12, 2001, the first business day following the sixtieth day from the issuance of the preliminary results.

Dated: November 22, 2000.

Edward Yang,

Acting Deputy Assistant Secretary, AD/CVD Enforcement Group III.

[FR Doc. 00–30953 Filed 12–4–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free Trade Agreement (NAFTA), Article 1904 Binational Panel Reviews: Notice of Termination of Panel Review

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of Consent Motion to Terminate the Panel Review of the final antidumping duty administrative review made by the International Trade Administration, respecting Cut-to-Length Carbon Steel Plate From Canada (Secretariat File No. USA-CDA–99–1904–02).

SUMMARY: Pursuant to the Notice of Consent Motion to Terminate the Panel Review by the complainants, the panel review is terminated as of November 20, 2000. A panel has been appointed to this panel review. Pursuant to Rule 71(2) of the *Rules of Procedure for Article 1904 Binational Panel Review,* this panel review is terminated and the panelists are discharged.

FOR FURTHER INFORMATION CONTACT: Caratina L. Alston, United States Secretary, NAFTA Secretariat, Suite 2061, 14th and Constitution Avenue, Washington, D.C. 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free-Trade Agreement (''Agreement'') establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada and the Government of Mexico established *Rules of Procedure for Article 1904 Binational Panel Reviews* (''Rules''). These Rules were published in the **Federal Register** on February 23, 1994 (59 FR 8686). The panel review in this matter was requested and terminated pursuant to these Rules.

Dated: November 21, 2000.

Caratina L. Alston,

United States Secretary, NAFTA Secretariat.

[FR Doc. 00–30919 Filed 12–4–00; 8:45 am]

BILLING CODE 3510–GT–P/Z≤

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 072600B]

Marine Mammals; Permit Application No. 116-1591 for Public Display

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Receipt of application.

SUMMARY: Notice is hereby given that Sea World, Inc., 7007 Sea World Drive, Orlando, Florida 32821, has applied in due form for a permit to import one killer whale (Orcinus orca) for the purposes of public display.

DATES: Written or telefaxed comments must be received on or before January 4, 2001.

ADDRESSES: The application and related documents are available f or review upon written request or by appointment in the following office(s):

Permits and Documentation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910 (301/713-2289);

Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, California 90802, (562/980-4021).

Written comments or requests for a public hearing on this request should be submitted to the Chief, Permits and Documentation Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular permit request would be appropriate.

Comments may also be submitted by facsimile at (301) 713-0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period. Please note that comments will not be accepted by e-mail or other electronic media.

FOR FURTHER INFORMATION CONTACT: Jill Lewandowski,(301/713-2289).

SUPPLEMENTARY INFORMATION: The subject application for Permit No. 116-1591-00 is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

The applicant requests authorization to import one female, adult killer whale (*Orcinus orca*), identified as ''Bjossa'', from the Vancouver Aquarium Marine Science Center; British Columbia, Canada to the Sea World facility in San Diego, California. The applicant requests this import for the purpose of public display. The receiving facility, Sea World San Diego, 1720 South Shores Road, San Diego, California 92109 is: (1) open to the public on regularly scheduled basis with access that is not limited or restricted other than by charging for an admission fee; (2) offers an educational program based on professionally accepted standards of the AZA and the Alliance for Marine Mammal Parks and Aquariums; and (3) holds an Exhibitor's License, number 93-C-069, issued by the U.S. Department of Agriculture under the Animal Welfare Act.

In addition to determining whether the applicant meets the three public display criteria, NMFS must determine whether the applicant has demonstrated that the proposed activity is humane and does not represent any unnecessary risks to the health and welfare of marine mammals; that the proposed activity by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock; and that the applicant's expertise, facilities and resources are adequate to accomplish successfully the objectives and activities stated in the application.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: November 27, 2000.

Ann D. Terbush,

Chief, Permits and Documentation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 00–30817 Filed 12–4–00; 8:45 am]

BILLING CODE: 3510–22–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0134]

Proposed Collection; Comment Request Entitled Environmentally Sound Products

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Environmentally Sound Products. The clearance currently expires on March 31, 2001.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Comments may be submitted on or before February 5, 2001.

FOR FURTHER INFORMATION CONTACT: Laura Smith, Federal Acquisition Policy Division, GSA (202) 208–7279.

ADDRESSES: Comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, should be submitted to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat, 1800 F Street, NW, Room 4035, Washington, DC 20405.

SUPPLEMENTARY INFORMATION:

A. Purpose

This information collection complies with Section 6002 of the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6962). RCRA requires the Environmental Protection Agency (EPA) to designate items which are or can be produced with recovered materials. RCRA further requires agencies to develop affirmative procurement programs to ensure that items composed of recovered materials will be purchased to the maximum extent practicable. Affirmative procurement programs required under RCRA must contain, as a minimum (1) a recovered materials preference program and an agency promotion program for the preference program; (2) a program for requiring estimates of the total percentage of recovered materials used in the performance of a contract, certification of minimum recovered material content actually used, where appropriate, and reasonable verification procedures for estimates and certifications; and (3) annual review and monitoring of the effectiveness of an agency's affirmative procurement program.

The items for which EPA has designated minimum recovered material content standards are (1) construction products, (2) paper and paper products, (3) vehicular products, (4) landscaping products, (5) nonpaper office products, (6) park and recreation products, (7) transportation products, and (8) miscellaneous products. The FAR rule also permits agencies to obtain pre-award information from offerors regarding the content of items which the agency has designated as requiring minimum percentages of recovered materials. A complete list of EPA designated items is available at *http://www.epa.gov/cpg.*

In accordance with RCRA, the information collection applies to acquisitions requiring minimum percentages of recovered materials, when the price of the item exceeds $10,000 or when the aggregate amount paid for the item or functionally equivalent items in the preceding fiscal year was $10,000 or more.

Contracting officers use the information to verify offeror/contractor compliance with solicitation and contract requirements regarding the use of recovered materials. Additionally, agencies use the information in the annual review and monitoring of the effectiveness of the affirmative procurement programs required by RCRA.

B. Annual Reporting Burden

Respondents: 64,350.

Responses Per Respondent: 1.

Total Responses: 64,350.

Hours Per Response: 25 minutes.

Total Burden Hours: 26,800.

Obtaining Copies of Proposals: Requester may obtain a copy of the proposal from the General Services Administration, FAR Secretariat (MVRS), Room 4035, 1800 F Street, NW., Washington, DC 20405, telephone (202) 208–7312. Please cite OMB control No. 9000–0134, Environmentally Sound Products, in all correspondence.

Dated: November 28, 2000.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 00–30897 Filed 12–4–00; 8:45 am]

BILLING CODE 6820–34–U

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0066]

Proposed Collection; Comment Request Entitled Professional Employee Compensation Plan

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding a revision to an existing OMB clearance (9000–0066).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve a revision of a currently approved information collection requirement concerning Professional Employee Compensation Plan. The clearance currently expires on March 31, 2001.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Comments may be submitted on or before February 5, 2001.

ADDRESSES: Comments including suggestions for reducing this burden should be submitted to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (MVRS), 1800 F Street, NW, Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Linda Nelson, Federal Acquisition Policy Division, GSA (202) 501–1900.

SUPPLEMENTARY INFORMATION:

A. Purpose

48 CFR 22.1103 requires that all professional employees shall be compensated fairly and properly. Accordingly, a total compensation plan setting forth proposed salaries and fringe benefits for professional employees with supporting data must be submitted to the contracting officer for evaluation.

B. Annual Reporting Burden

Respondents: 6,193.
Responses Per Respondent: 1.
Total Responses: 6,193.
Hours Per Response: .5.
Total Burden Hours: 3,097.
Obtaining Copies of Proposals: Requester may obtain a copy of the proposal from the General Services Administration, FAR Secretariat (MVRS), Room 4035, 1800 F Street, Washington, DC 20405, telephone (202) 208–7312. Please cite OMB Control No. 9000–0066, Professional Compensation Plan, in all correspondence.

Dated: November 30, 2000.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

[FR Doc. 00–30898 Filed 12–4–00; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Record of Decision (ROD) on the Final Environmental Impact Statement (FEIS) on the Disposal and Reuse of the Military Ocean Terminal, Bayonne, New Jersey

AGENCY: Department of the Army, DoD.

ACTION: Record of Decision.

SUMMARY: The Department of the Army announces its ROD on the FEIS for the disposal and reuse of the Military Ocean Terminal, Bayonne (MOTBY). The closure of MOTBY was mandated in accordance with the Defense Base Closure and Realignment Act of 1990, Public Law 101–510, as amended.

The ROD allows the Army to initiate action to dispose of the excess/surplus property of MOTBY, in accordance with the Bayonne Local Redevelopment Authority Amended Reuse Plan.

ADDRESSES: A copy of the ROD may be obtained by contacting Dr. Susan Ivester Rees, U.S. Army Corps of Engineers, U.S. Army Engineer District, Mobile (CESAM–PD), 109 St. Joseph Street, Mobile, AL 36602.

FOR FURTHER INFORMATION CONTACT: Dr. Susan Ivester Rees at 334–694–4141 or by facsimile at 334–690–2727.

SUPPLEMENTARY INFORMATION: The FEIS analyzed three disposal alternatives with respect to the disposal and subsequent reuse of the 676-acre (440 land acres and 236 submerged land acres) comprising the MOTBY: (1) the no action alternative, under which the property would be maintained in a caretaker status after closure; (2) the unencumbered alternative, under which the Army would transfer the property without encumbrances, such as environmental restrictions and easements; and (3) the encumbered disposal alternative, under which the Army would transfer the property with various environmental restrictions and easements, limiting the future use of the property.

In the ROD, the Army concludes that the FEIS adequately addresses the impacts of property disposal and documents its decision to transfer the property as encumbered. Possible encumbrances include: Covenants and restrictions pertaining to asbestos-containing material, lead-based paint, floodplains, future remedial activities after transfer, wetlands, easements and rights-of-way.

Dated: November 29, 2000.

Raymond J. Fatz,

Deputy Assistant Secretary of the Army, (Environment, Safety and Occupational Health), OASA (I&E).

[FR Doc. 00–30952 Filed 12–4–00; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Acting Leader, Regulatory Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 4, 2001.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Lauren Wittenberg, Acting Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address *Lauren_Wittenberg@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: November 29, 2000.

William Burrow,

Acting Leader, Regulatory Information Management, Office of the Chief Information, Officer.

Office of Educational Research and Improvement.

Type of Review: New.

Title: International Association for the Evaluation of Educational Achievement (IEA) Progress in International Reading Literacy Study.

Frequency: One time.

Affected Public: Individuals or households; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden: Responses: 6,900, Burden Hours: 9,350.

Abstract: Information collected is used to assess the reading literacy skills, habits, and attitudes of approximately 6,000 4th-graders in 200 schools.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* or should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651. Requests may also be electronically mailed to the internet address OCIO_IMG_Issues@ed.gov or faxed to 202–708–9346. Please specify the complete title of the information collection when making your request. Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her internet address Kathy_Axt@ed.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 00–30853 Filed 12–4–00; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Office of Science; Office of Science Financial Assistance Program Notice 01–04; Division of Materials Sciences and Engineering, Robotics and Intelligent Machines (RIM) Program

AGENCY: Department of Energy.

ACTION: Notice inviting academic research grant applications.

SUMMARY: The Office of Basic Energy Sciences (BES) of the Office of Science (SC), U.S. Department of Energy (DOE), supports fundamental research in the natural sciences and engineering leading to new and improved energy technologies and to understanding and mitigating the environmental impacts of energy technologies. In keeping with its mission, the DOE hereby announces its interest in receiving grant applications for support under its Robotics and Intelligent Machines (RIM) Program. RIM is needed to develop cost-effective solutions to tasks relating to energy efficiency, safety, and security. Applications should be from investigators who are currently involved in basic research in this area, and should be submitted through an U.S. academic institution. The purpose of this program is to support fundamental research in Robotics and Intelligent Machines for the present and future needs of the Department of Energy.

Restrocted Eligibility: Eligibility is restricted to academic research institutions. This is required by the Fiscal Year 2001, Congressional Budget for the DOE Office of Science, where it is stated ''a new, university-based research effort in Robotics and Intelligent Machines will focus on sensors and sensor integration, remote operation and data acquisition, and controls.''

DATES: Potential applicants are strongly encouraged to submit a brief pre-application. DOE should receive all pre-applications, referencing Program Notice 01–04, by 4:30 P.M., E.S.T., January 2, 2001. A response to the pre-applications encouraging or discouraging a formal application will be communicated to the applicant within approximately thirty days of receipt. The deadline for receipt of formal applications is 4:30 P.M., E.S.T., March 20, 2001, in order to be accepted for programmatic and merit review and to permit timely consideration for award in Fiscal Year 2001.

ADDRESSES: All pre-applications, referencing Program Notice 01–04, should be sent to Dr. Robert Price, Division of Materials Sciences and Engineering, SC–131, Office of Science, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874–1290.

After receiving notification from DOE encouraging submission of a formal application, applicants should send formal applications to: U.S. Department of Energy, Office of Science, Grants and Contracts Division, SC–64, 19901 Germantown Road, Germantown, MD 20874–1290, ATTN: Program Notice 01–04. This above address must also be used when submitting applications by U.S. Postal Service Express, any commercial mail delivery service, or when hand carried by the applicant. An original and 11 copies of the application must be submitted.

FOR FURTHER INFORMATION CONTACT: Dr. Robert Price, Program Manager, Engineering Sciences Program, Division of Materials Sciences and Engineering, SC–131, Office of Science, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874–1290, Telephone: (301) 903–3565, Facsimile: (301) 903–9513 or Internet E-mail address: *bob.price@science.doe.gov.* The full text of Program Notice 01–04 is available via the World Wide Web at the following address: *http://www.sc.doe.gov/production/grants/grants.html.*

SUPPLEMENTARY INFORMATION: The emphasis of this program is on the engineering science developments that are needed for deployment of mobile intelligent machines with robust behavior and reduced complexity. Such systems are critically needed in a wide spectrum of settings in the Department of Energy, such as the extension of human capabilities to sense, perceive, and interact with phenomena at a distance or in hazardous or inaccessible locations along with improved information handling. Engineering science developments for the needs of improving the design and deployment of a team of mobile intelligent machines will be considered for funding under this program. Research topics include but are not limited to, scientifically ground breaking forefront investigations involving:

- Inherently distributed missions in dynamic, uncertain environments.
- Sensor integration for distributed RIM systems.
- Revolutionary collaborative research using remote and virtual systems.
- Intelligent machine concepts and controls methodologies for manipulative tasks.
- Improved operation and remote usage of SC strategic facilities to meet programmatic needs.

Additional information on RIM may be found by opening the following site on the World Wide Web: *http://www.rim.doe.gov/* or by doing a search on rim.doe.gov. If you are unable to get this information, contact Dr. Robert Price at 301–903–3565 or at his previously listed address and the information will be provided.

Program Funding

This is a new program and it is anticipated that approximately $2,000,000 will be available in FY 2001 for research in Robotics and Intelligent Machines. Multiple-year funding of grant awards is expected subject to satisfactory progress of the research, and the availability of funds. Awards are expected to range up to a maximum of $500,000 annually with terms from one to three years. The number of awards and range of funding will depend on the number and quality of applications received and selected for award. Award funds will be provided to the recipient organization for the purpose of supporting the research efforts and may include travel and lodging, faculty or student stipends, materials, services and equipment.

Applications

To minimize undue effort on the part of applicants and reviewers, interested parties are invited to submit pre-applications. The pre-applications will be reviewed relative to the scope and research needs of the Department of Energy. The brief pre-application must consist of a three to five page project description describing the research objectives and methods of accomplishment, along with an estimated budget and biographical information limited to two pages per Principal Investigator and co-Principal Investigator. The pre-applications will be reviewed by the programmatic research area program manager, to determine the relevance of the research to the DOE, appropriateness for support in Engineering research and the priority of research. Based on this review, DOE/RIM management will recommend formal submission of some of the applications to the Department. A telephone number, facsimile number, and e-mail address are required parts of the pre-application. Further instructions regarding the contents of pre-application and other pre-application guidelines can be found on the SC Grants and Contracts web site at: *http://www.sc.doe.gov/production/grants/preapp.html.*

Formal applications, when received, will be subjected to scientific merit review (peer review) and will be evaluated against the following evaluation criteria, listed in descending order of importance as codified at 10 CFR part 605.10(d).

1. Scientific and/or technical merit of the project;
2. Appropriateness of the proposed method or approach;
3. Competency of applicant's personnel and adequacy of proposed resources;
4. Reasonableness and appropriateness of the proposed budget.

The evaluation will include program policy factors such as the relevance of the proposed research to the terms of the announcement and an agency's programmatic needs and priority. Note, external peer reviewers are selected with regard to both their scientific expertise and the absence of conflict-of-interest issues. Non-federal reviewers will often be used, and submission of an application constitutes agreement that this is acceptable to the investigator(s) and the submitting institution. Other applications received by SC under its current competitive application mechanisms that meet the criteria outlined in this Notice may also be deemed appropriate for consideration under this announcement and may be funded under this program. General information about the development and submission of pre-applications, applications, eligibility, limitations, evaluation, and selection processes, and other policies and procedures are contained in the Application Guide for the Office of Science Financial Assistance Program and 10 CFR part 605. Electronic access to the latest version of SC's Financial Assistance Guide is possible via the Internet at the following web site address: *http://www.sc.doe.gov/production/grants/grants.html.*

Additional information regarding format, preparation and specific requirements may be found at web site address: *http://www.sc.doe.gov/production/bes/EPSCoR/APPLI1.HTM.*

The Catalog of Federal Domestic Assistance Number for this program is 81.049, and the solicitation control number is ERFAP 10 CFR part 605.

Issued in Washington, DC on November 29, 2000.

John Rodney Clark,

Associate Director of Science for Resource Management.

[FR Doc. 00–30926 Filed 12–4–00; 8:45 am]

BILLING CODE 6450–01–U

DEPARTMENT OF ENERGY

Bonneville Power Administration

Fourmile Hill Geothermal Development Project

AGENCY: Bonneville Power Administration (BPA), Department of Energy (DOE).

ACTION: Notice of availability of record of decision (ROD).

SUMMARY: This notice announces the availability of BPA's ROD to execute Power Purchase Agreements (PPAs) and Transmission Services Agreements (TSAs) with Calpine Siskiyou Geothermal Partners, L.P. to acquire and transmit output from the Fourmile Hill Geothermal Development Project (Project), relying on the Fourmile Hill Geothermal Development Project Final Environmental Impact Statement/ Environmental Impact Report (Project EIS) (DOE/EIS–0266, September 1998).

ADDRESSES: Copies of the ROD and Executive Summary of the Project EIS can be obtained by calling BPA's toll-free document request line: 1–800–622–4520. The ROD is also available on the internet at *www.efw.bpa.gov.*

FOR FURTHER INFORMATION, CONTACT: Kathy Fisher—KEW–4, Environmental Project Manager, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon, 97208–3621; telephone (503) 230–4375; fax (503) 230–5699; e-mail *kpfisher@bpa.gov.*

SUPPLEMENTARY INFORMATION: These PPAs and TSAs will allow BPA to (1) test the ability of geothermal energy in the Fourmile Hill area to provide a reliable, economical, and environmentally acceptable energy resource in the region; (2) assure consistency with BPA's statutory responsibilities; and (3) assure consistency with BPA's April 22, 1993, Resource Programs ROD.

The Bureau of Land Management (BLM) and the United States Forest Service (Forest Service) served as joint lead agencies under the National Environmental Policy Act in the preparation of the Project EIS and issued a ROD approving the Project on May 31, 2000. The Siskiyou County Air Pollution Control District served as the state lead agency under the California Environmental Quality Act and, similarly, posted notice of their approval of the Project on August 9, 2000. BPA, as a cooperating agency with BLM and the Forest Service, adopts the Project EIS and the entire Administrative Record, including the aforementioned decision documents and related post-Project EIS documentation, in this ROD. As detailed in the Final EIS, the proposed power plant and related facilities will be located in eastern Siskiyou and western Modoc Counties, California, on the Klamath and Modoc National Forests.

Issued in Portland, Oregon, on November 20, 2000.

Stephen J. Wright,

Acting Administrator and Chief Executive Officer.

[FR Doc. 00–30927 Filed 12–04–00; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Bonneville Power Administration

Grande Ronde and Imnaha Spring Chinook Project

AGENCY: Bonneville Power Administration (BPA), Department of Energy (DOE).

ACTION: Notice of floodplain and wetlands involvement.

SUMMARY: This notice announces BPA's proposal to construct new facilities and modify existing facilities for a conservation, integrated recovery production program for Imnaha, Lostine, and Upper Grande Ronde Rivers and Catherine Creek spring chinook salmon. The new and existing facilities would be and are located in Wallowa County, Oregon. In accordance with DOE regulations for compliance with floodplain and wetlands environmental review requirements, BPA will prepare a floodplain and wetlands assessment and will perform this proposed action in a manner so as to avoid or minimize potential harm to or within the affected floodplain and wetlands. The assessment will be included in the Environmental Assessment (EA) being prepared for the proposed project in accordance with the requirements of the National Environmental Policy Act (NEPA). A floodplain statement of findings will be included in any finding of no significant impact that may be issued following the completion of the EA.

DATE: Comments are due to the address below no later than December 20, 2000.

ADDRESSES: To comment, phone toll-free 1–800–622–4519, send an e-mail to the BPA Internet address *comment@bpa.gov*; or mail comments to Communications, Bonneville Power Administration—KC–7, P.O. Box 12999, Portland, Oregon 97212.

FOR FURTHER INFORMATION, CONTACT: Patricia R. Smith, KEC–4, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon, 97208–3621; phone number 503–230–7349; fax number 503–230–5699; e-mail address *prsmith@bpa.gov.*

SUPPLEMENTARY INFORMATION: The project would include the following types of activities that may involve work in wetlands and floodplains: construction of various buildings, raceways, rearing ponds, effluent facilities, and pipelines. Wetlands and floodplains that may be affected by the project are in Wallowa County, Oregon; Township 1 South, Range 48 East, Section 10; Township 2 South, Range 43 East, Section 3; and Township 3 South, Range 48 East, Section 22.

Maps and further information are available from BPA at the address above.

Issued in Portland, Oregon, on November 22, 2000.

Thomas C. McKinney,

NEPA Compliance Officer.

[FR Doc. 00–30928 Filed 12–04–00; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6911–9]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; National Emission Standards for Hazardous Air Pollutants From Wood Furniture Manufacturing Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: National Emissions Standards for Hazardous Air Pollutants From Wood Furniture Manufacturing Operations, (40 CFR part 63, subpart JJ), OMB number 2060–0324, Expiration Date February 28, 2001. The ICR describes the nature of the information collection and its expected burden and cost; where appropriate, it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 4, 2001.

ADDRESSES: Send comments, referencing EPA ICR number 1716.03, OMB number 2060–0324 to the following addresses: Sandy Farmer, U.S. Environmental Protection Agency, Collection Strategies Division (Mail Code 2822), 1200 Pennsylvania Avenue, NW, Washington, DC 20460; and to Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: For a copy of the ICR contact Sandy Farmer at EPA by phone at (202) 260–2740, by E-Mail at *Farmer.Sandy@epamail.epa.gov* or download off the Internet at *http://www.epa.gov/icr/icr.htm* and refer to EPA ICR No. 1716.03. For Technical questions about the ICR, contact Robert C. Marshall, Jr. (202) 564–7021.

SUPPLEMENTARY INFORMATION:

Title: National Emissions Standards for Hazardous Air Pollutants From Wood Furniture Manufacturing Operations, (40 CFR part 63, subpart JJ), OMB number 2060–0324, EPA ICR number 1716.03, expiration date February 28, 2001. This is a request for extension of a currently approved collection.

Abstract: Respondents to this information collection request are the owners and operators of both new and existing wood furniture manufacturing operations that are major sources of hazardous air pollutants. Respondents are required to submit both initial and regular semiannual compliance reports and to perform record keeping activities. The information is used to determine that all sources subject to the rule are complying with the standards. The information to be collected is mandatory under the rule. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15. The **Federal Register** document required under 5 CFR 1320.8(d), soliciting comments on this collection of information was published on August 17, 2000 (FR 50196); no comments were received.

Burden Statement: The annual public reporting and record keeping burden for this collection of information is estimated to average 2 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Wood Furniture Manufacturers.

Estimated Number of Respondents: 750.

Frequency of Response: On occasion, quarterly, semi-annually and annually.

Estimated Total Annual Hour Burden: 92,071 hours.

Estimated Total Annualized Capital, O&M Cost Burden: $40,500.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the addresses listed above. Please refer to EPA ICR number 1716.03, OMB number 2060–0324 in any correspondence.

Dated: November 28, 2000.

Oscar Morales,

Director, Collection Strategies Division.

[FR Doc. 00–30910 Filed 12–04–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6911–8]

Notification of Episodic Releases of Oil and Hazardous Substances; Request for Comment on Renewal Information Collection

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), this document announces that EPA is planning to submit the following continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB): Notification of Episodic Releases of Oil and Hazardous Substances (EPA ICR No. 1049.09, OMB No. 2050–0046). This is a request to renew an existing ICR that is currently approved. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the collection.

DATES: Comments must be submitted on or before February 5, 2001.

ADDRESSES: Comments submitted by regular U.S. Postal Service mail should be sent to: Docket Coordinator, Superfund Docket Office, Mail Code 5201G, U.S. Environmental Protection Agency Headquarters, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. To ensure proper receipt by EPA, it is imperative that you identify docket control number 102RQ–ER2 in the subject line on the first page of your comment. Comments may also be submitted electronically or in person. Please follow the detailed instructions for these submission methods as provided in unit III of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Lynn Beasley, (703) 603–9086. Facsimile number: (703) 603–9104. Electronic address: beasley.lynn@epa.gov. Comments should not be submitted to this contact person.

SUPPLEMENTARY INFORMATION:

I. Does This Notice Apply to Me?

You may be affected by this notice if you are the person in charge of a facility or vessel that releases hazardous substances into the environment or discharges oil into U.S. waters as specified in section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, and section 311 of the Clean Water Act (CWA), as amended. To determine if the facility or vessel you are in charge of is affected by this action, you should carefully examine the applicability provisions at 40 CFR parts 110, 117, and 302.

II. How Can I Get Additional Information or Copies of This Document or Other Support Documents?

A. By Phone, Fax, or E-mail

If you have any questions or need additional information about this notice or the information collection request (ICR) referenced, please contact Lynn Beasley, (703) 603–9086. Facsimile number: (703) 603–9104. Electronic address: beasley.lynn@epa.gov.

B. In Person

The official record for this notice, including the public version, and the referenced ICR have been established under docket control number 102RQ–ER2 (including comments and data submitted electronically, as described below). A public version of this record, including printed, paper versions of any electronic comments, which does not include any information claimed as Confidential Business Information (CBI), and the referenced ICR are available for inspection in the U.S. Environmental Protection Agency Superfund Docket Office, Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, VA. The Superfund Docket is open from 9 AM to 4 PM, Monday through Friday, excluding legal holidays. The telephone number of the Superfund Docket is (703) 603–9232.

C. By Internet

The referenced draft ICR and draft Paperwork Reduction Act Submission Form (OMB83–I) are available on the Internet at the following addresses: *http://www.epa.gov/superfund/resources/rq/icr00d1.pdf*, and *http://www.epa.gov/superfund/resources/rq/omb83ed1.pdf* or see the ''Renewal Information Collection Requests (ICRs)'' page for Reportable Quantities at: http://www.epa.gov/superfund/resources/rq/icr.htm.

III. How Can I Respond to This Notice?

A. How and to Whom Do I Submit the Comments?

You may submit comments through the mail, in person, or electronically. Be sure to identify the docket control number 102RQ–ER2 in your correspondence.

1. *By mail:* Submit written comments to: Docket Coordinator, Superfund Docket Office, Mail Code 5201G, U.S. Environmental Protection Agency Headquarters, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

2. *In person or by courier:* Deliver written comments to: U.S. Environmental Protection Agency Superfund Docket Office, Crystal Gateway I, First Floor, 1235 Jefferson Davis Highway, Arlington, VA. Telephone: (703) 603–9232.

3. *Electronically:* Submit your comments and/or data electronically by e-mail to: superfund.docket@epa.gov. Please note that you should not submit any information electronically that you consider to be CBI. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on standard computer disks in WordPerfect 6/7/8 or ASCII file format. All comments and data in electronic form must be identified by the docket control number 102RQ–ER2. Electronic comments on this notice may also be filed online at many Federal Depository Libraries.

B. How Should I Handle CBI Information That I Want to Submit to EPA?

You may claim information that you submit in response to this notice as CBI by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must also be submitted for inclusion in the public record. Information not marked confidential will be included in the public docket by EPA without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult with Lynn Beasley, (703) 603–9086. Facsimile number: (703) 603–9104. Electronic address: beasley.lynn@epa.gov.

C. What Information is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(a) of the Paperwork Reduction Act (PRA), EPA specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of EPA, including whether the information will have practical utility.

2. Evaluate the accuracy of EPA's estimates of the burdens of the proposed collections of information.

3. Enhance the quality, utility, and clarity of the information to be collected.

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

D. What Should I Consider When I Prepare My Comments for EPA?

EPA invites you to provide your views on the various options EPA proposes, new approaches EPA hasn't considered, the potential impacts of the various options (including possible unintended consequences), and any data or information that you would like EPA to consider during the development of the final action. You may find the following suggestions helpful for preparing your comments:

- Explain your views as clearly as possible.
- Describe any assumptions that you used.
- Provide technical information and/or data to support your views.
- If you estimate potential burden or costs, explain how you arrived at the estimate.
- Provide specific examples to illustrate your concerns.
- Offer alternative ways to improve the rule or collection activity.
- Make sure to submit your comments by the deadline in this notice.
- At the beginning of your comments (e.g., as part of the ''Subject'' heading), be sure to properly identify the document on which you are commenting. You can do this by providing the docket control number assigned to the notice, along with the name, date, and **Federal Register** citation, or by using the appropriate EPA ICR or the Office of Management and Budget (OMB) control number.

IV. To What Information Collection Activity or ICR Does This Notice Apply?

EPA is seeking comments on the following ICR:

Title: Notification of Episodic Releases of Oil and Hazardous Substances.

ICR numbers: EPA ICR No. 1049.09 OMB No. 2050–0046.

ICR status: The expiration date for this ICR was extended is currently scheduled to expire on February 28, 2001. An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's information collections appear on the collection instruments or instructions, in the **Federal Register** notices for related rulemakings and ICR notices, and, if the collection is contained in a regulation, in a table of OMB approval numbers in 40 CFR part 9.

Abstract: Section 103(a) of CERCLA, as amended, requires the person in charge of a facility or vessel to immediately notify the National Response Center (NRC) of a hazardous substance release into the environment if the amount of the release equals or exceeds the substance's reportable quantity (RQ) limit. The RQ of every hazardous substance can be found in Table 302.4 of 40 CFR 302.4.

Section 311 of the CWA, as amended, requires the person in charge of a vessel to immediately notify the NRC of an oil spill into U.S. navigable waters if the spill causes a sheen, violates applicable water quality standards, or causes a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

The reporting of a hazardous substance release that is above the substance's RQ allows the Federal government to determine whether a Federal response action is required to control or mitigate any potential adverse effects to public health or welfare or the environment. Likewise, the reporting of oil spills allows the Federal government to determine whether cleaning up the oil spill is necessary to mitigate or prevent damage to public health or welfare or the environment.

The hazardous substance and oil release information collected under CERCLA section 103(a) and CWA section 311 also is available to EPA program offices and other Federal agencies who use the information to evaluate the potential need for additional regulations, new permitting requirements for specific substances or sources, or improved emergency response planning. Release notification information, which is stored in the national Emergency Response Notification System (ERNS) data base, is available to State and local government authorities as well as the general public. State and local government authorities and the regulated community use release information for purposes of local emergency response planning. Members of the general public, who have access to release information through the Freedom of Information Act, may request release information for purposes of maintaining an awareness of what types of releases are occurring in different localities and what actions, if any, are being taken to protect public health and welfare and the environment. ERNS fact sheets, which provide summary and statistical information about hazardous substance and oil release notifications, also are available to the public.

V. What are EPA's Burden and Cost Estimates for This ICR?

Under the PRA, ''burden'' means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal Agency. For this collection, it includes the time needed to review instructions; develop, acquire, install, and use technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of this estimate, which is only briefly summarized in this notice. The annual public burden for this collection of information is estimated to average 4.1 hours per reportable hazardous substance release or oil spill. The following is a summary of the estimates taken from the ICR:

Respondents/affected entities: Entities potentially affected by this action are facilities or vessels that manufacture, process, transport, or otherwise use certain specified hazardous substances and oil.

Estimated total number of reportable releases of hazardous substances and oil per year: 29,204.

Frequency of response: When a reportable release occurs.

Estimated total annual burden hours: 119,737 hours.

Estimated total annual burden costs: $3,411,000.

VI. Are There Changes in the Estimates from the Last Approval?

In the renewal ICR, EPA will review the current burden and cost statement and adjust it accordingly. EPA does not expect the burden and cost statement in the renewal ICR to differ significantly from the burden and cost statement in the current ICR.

VII. What is the Next Step in the Process for This ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact Lynn Beasley, (703) 603–9086. Facsimile number: (703) 603–9104. Electronic address: beasley.lynn@epa.gov.

Dated: November 16, 2000.

Elaine F. Davies,

Acting Director, Office of Emergency and Remedial Response.

[FR Doc. 00–30913 Filed 12–4–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6911–6]

Protection of Stratospheric Ozone: Revocation of Refrigerant Reclaimer Certification

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of revocation.

SUMMARY: Through this action, EPA is announcing the revocation of 15 refrigerant reclaimers previously approved to reclaim used refrigerant for sale to a new owner in accordance with the regulations promulgated at 40 CFR 82.164.

The following nine reclaimers have received written notification, dated November 21, 2000, explaining the basis for EPA's decision to revoke their certification: Advanced Recovery Systems, Inc. located in Hernando, Florida; CFC (Charles Family Corporation) Reclamation located in North Kansas City, Missouri; CFC Recovery located in Utica, New York; Colorado Reclamation located in Commerce City, Colorado; Major Diversities, Inc. located in Arvada, Colorado; Polar Pacific, Inc. located in San Diego, California; SPW Engineering located in Arnold, Maryland; Tampa Bay Trane located in Tampa, Florida; and Trane Oregon located in Tigard, Oregon.

This action also acknowledges the voluntary withdrawal of six previously certified reclaimers. Reclaimers requesting to be removed from the list of EPA-certified reclaimers include the Alliance Recovery Services, Inc. located in LaPorte, Texas; Appliance Recycling Centers of America located in Minneapolis, Minnesota; E.I. du Pont de Nemours and Company located in Wilmington, Delaware; MRI Refrigerant Reclaim located in Niles, Illinois; The Reclaim Center located in Parker, Florida; and the Trane Company-Denver Sales District located in Denver, Colorado. These reclaimers have received written notification, dated November 21, 2000, informing them of EPA's action granting their request to voluntarily withdraw their certification.

The aforementioned reclaimers have either voluntarily withdrawn their certification or have not complied with the recordkeeping and reporting requirements established for all EPA-certified reclaimers pursuant to section 608 of the Clean Air Act Amendments (the Act). In accordance with those requirements, codified at 40 CFR 82.166(h), all reclaimers must annually report, within 30 days of the end of the

calendar year, the quantity of material sent to them for reclamation, the mass of refrigerant reclaimed, and the mass of waste products. EPA sent to each of the reclaimers an information collection request issued pursuant to section 114(a) of the Act, dated March 31, 2000, in which EPA requested that the reclaimers submit the required annual report. That information request indicated that failure to respond could result in revocation of their EPA certification.

In accordance with 40 CFR 82.164(g), EPA revoked the certifications of these reclaimers on November 21, 2000. Therefore, these businesses are no longer authorized to reclaim used refrigerant for sale to a new owner.

DATES: Advanced Recovery Systems, Inc.; Alliance Recovery Services, Inc.; Appliance Recycling Centers of America; CFC (Charles Family Corporation) Recovery; Colorado Reclamation; E.I. du Pont de Nemours and Company; Major Diversities, Inc; MRI Refrigerant Reclaim; Polar Pacific, Inc.; The Reclaim Center; SPW Engineering; Tampa Bay Trane; Trane Company-Denver Sales District; and Trane Oregon had their credentials as EPA-certified reclaimers revoked, effective November 21, 2000.

FOR FURTHER INFORMATION CONTACT: Julius Banks; Stratospheric Program Implementation Branch; Global Programs Division, Office of Atmospheric Programs, Office of Air and Radiation (6205–J); 1200 Pennsylvania Avenue, NW; Washington, DC 20460; (202) 564–9870. The Stratospheric Ozone Information Hotline, (800) 296–1996, can also be contacted for further information.

Dated: November 22, 2000.

Edward Callahan,

Acting Director, Office of Atmospheric Programs.

[FR Doc. 00–30914 Filed 12–4–00; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6911–7]

Science Advisory Board; Request for Nomination of Members and Consultants

The U.S. Environmental Protection Agency's Science Advisory Board (SAB), including the Clean Air Scientific Advisory Committee (CASAC) and the Advisory Council on Clean Air Compliance Analysis (Council), of the Environmental Protection Agency (EPA) is soliciting nominations for Members and Consultants (M/Cs). As part of this effort, the Agency is publishing this notice to describe the purpose of the SAB and to invite the public to nominate appropriately qualified candidates of any gender or ethnic background to fill upcoming vacancies. This process supplements other efforts to identify qualified candidates.

The SAB is composed of Non-Federal Government scientists and engineers who are employed on an intermittent basis to provide independent advice directly to the EPA Administrator on technical aspects of public health and environmental issues confronting the Agency. Members of the SAB are appointed by the Administrator—generally in October—to serve two years terms with some possibilities for reappointment. Consultants are appointed throughout the year, as the need arises, by the SAB Staff Director to serve renewable one-year terms and serve on SAB committees, as needed, to support the work of the Board. Many individuals serve as Consultants prior to serving as Members.

Any interested person or organization may nominate qualified persons to serve on the SAB. Nominees should be qualified by education, training, and experience to evaluate scientific, engineering and/or economics information on issues referred to and addressed by the Board. Successful candidates have distinguished themselves professionally and should be available to invest the time and effort to advance the cause of the supporting the use of good science through the efforts of the SAB.

Members and Consultants (M/Cs) most often serve in association with one of the following standing committees: Advisory Council on Clean Air Compliance Analysis, Clean Air Scientific Advisory Committee, Drinking Water Committee, Ecological Processes and Effects Committee, Environmental Economics Advisory Committee, Environmental Engineering Committee, Environmental Health Committee, Integrated Human Exposure Committee, Radiation Advisory Committee, and Research Strategies Advisory Committee.

M/Cs can expect to attend 1–6 meetings per year, based upon the activity of the committee on which they serve. M/Cs generally serve as Special Government Employees (SGEs) (40 CFR part 3, subpart F or EPA Ethics Advisory 88–6 dated 7/6/88) and receive compensation, in addition to reimbursement at the Federal government rate for travel and per diem expenses while serving on the SAB. Prior to their appointment, SGEs are required to complete an information package, including a Confidential Financial Disclosure Report.

Membership appointments associated with this solicitation will begin in the fall of 2001. While it is too early to know for certain what types of expertise will be needed, it is likely that at least some of the new members will have expertise in the following areas:

Air pollution effects on plant life.
Criteria air pollutants.
Dietary intake exposure.
Engineering options for risk reduction.
Environmental modeling.
Environmental microbiology.
General toxicology.
Landscape ecology.
Risk assessment modeling.

Nominees should be identified by name, occupation, position, address, telephone number, fax number, email address, and SAB committee of primary interest. Nominations should include a current resume that addresses the nominee's background, experience, qualifications, and specific areas of expertise.

Information on the nominees will be entered into the SAB's data base for potential M/Cs which will be consulted, as appropriate, when vacancies arise and/or when special expertise is needed for particular reviews. This request for nominations does not imply any commitment by the Agency to select individuals to serve as a M/C to the SAB from the responses received.

Nominations should be submitted to: Ms. Carolyn Osborne, Project Coordinator, Science Advisory Board (1400A), USEPA, 1200 Pennsylvania Avenue, Washington, DC 20460 Tel: (202) 564–4533 no later than February 1, 2001. Additional information concerning the Science Advisory Board, its structure, function, and composition, may be found on the SAB Website: *http://www.epa.gov/sab.*

Dated: November 24, 2000.

Donald G. Barnes,

Staff Director, Science Advisory Board.

[FR Doc. 00–30915 Filed 12–4–00; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Sunshine Act Meeting, Open Commission Meeting, Thursday, December 7, 2000

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, December 7, 2000, which is scheduled to commence at 9:30 a.m. in

Room TW–C305, at 445 12th Street, SW., Washington, DC.

Item No., Bureau, and Subject

1—Mass Media—Title: Applications of Anderson Broadcasting Company (Assignor) and Cumulus Licensing Corp. (Assignee); For Consent to the Assignment of the Licenses of KBMR(AM), Bismarck, ND, KXMR(AM), Bismarck, ND, KSSS(FM), Bismarck, ND, KAVG(FM), Beulah, ND, and KBKU(FM), Hettinger, ND. (File Nos. BAL/BALH/BAP–19991004AAY–ABC). Summary: The Commission will consider a Hearing Designation Order concerning applications for the assignment of licenses from Anderson Broadcasting Company to Cumulus Licensing Corp.

2—Mass Media—Title: Definition of Radio Markets. Summary: The Commission will consider a Notice of Proposed Rule Making concerning its methodology for defining radio markets, and other related policies for applying the radio multiple ownership rules.

3—Common Carrier—Title: Numbering Resource Optimization (CC Docket No. 99–200); and Petition for Declaratory Ruling and Request for Expedited Action on the July 15, 1997 Order of the Pennsylvania Public Utility Commission Regarding Area Codes 412, 610, 215, and 717 (CC Docket No. 96–98). Summary: The Commission will consider a Second Report and Order, Order on Reconsideration in CC Docket No. 96–98 and CC Docket No. 99–200, and a Second Further Notice of Proposed Rule Making in CC Docket No. 99–200 regarding plans for nationwide thousands-block number pooling and other strategies to ensure that the numbering resources of the North American Numbering Plan are used efficiently.

4—Office of Engineering and Technology—Title: Authorization and Use of Software Defined Radios (ET Docket No. 00–47). Summary: The Commission will consider a Notice of Proposed Rule Making concerning the authorization and sue of software defined radios.

Additional information concerning this meeting may be obtained from Maureen Peratino or David Fiske, Office of Media Relations, telephone number (202) 418–0500; TTY (202) 418–2555.

Copies of materials adopted at this meeting can be purchased from the FCC's duplicating contractor, International Transcription Services, Inc. (ITS, Inc.) at (202) 857–3800; fax (202) 857–3805 and 857–3184; or TTY (202) 293–8810. These copies are available in paper format and alternative media, including large print/type; digital disk; and audio tape. ITS may be reached by e-mail its_inc@ix.netcom.com. Their Internet address is *http://www.itsdocs.com/.*

This meeting can be viewed over George Mason University's Capitol Connection. The Capitol Connection can be viewed over George Mason University's Capitol Connection. The Capitol Connection also will carry the meeting live via the Internet. For information on these services call (703) 993–3100. The audio portion of the meeting will be broadcast live on the Internet via the FCC's Internet audio broadcast page at <http://www.fec.gov/realaudio/>. The meeting can also be heard via telephone, for a fee, from National Narrowcast Network, telephone (202) 966–2211 or fax (202) 966–1770. Audio and video tapes of this meeting can be purchased from Infocus, 341 Victory Drive, Herndon, VA 20170, telephone (703) 834–0100; fax number (703) 834–0111.

Federal Communications Commission.

Shirley Suggs,

Chief, Publications Branch.

[FR Doc. 00–31049 Filed 12–1–00; 2:44 pm]

BILLING CODE 6712–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

Agency Information Collection Activities: Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed revised information collections. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)), this notice seeks comments concerning FEMA's use of surveys to collect disaster related information. FEMA will use various modes of data collection including: mailed questionnaires, phone surveys, and computerized surveys. The survey respondents will include individual disaster applicants, state and local government officials, voluntary agency officials, and officials from other Federal agencies involved in delivering disaster assistance.

SUPPLEMENTARY INFORMATION: These surveys are conducted in response to Executive Order 12862 which requires that ''all executive departments and agencies that provide significant services directly to the public'' meet established customer service standards and to ''survey customers to determine the kind and quality of services they want and their level of satisfaction with existing services.''

Collection of Information

Title: FEMA Disaster Assistance and Operations Customer Satisfaction Surveys.

Type of Information Collection: Revision of a currently approved collection.

OMB Number: 3067–0256.

Abstract. The surveys provide FEMA with information about customer satisfaction and program effectiveness. The surveys help interpret the effects of disaster-related policy changes or innovations. The survey is also used to measure trends and patterns in customer satisfaction and program effectiveness over time. FEMA will use various modes of data collection including: mailed questionnaires, phone surveys, and computerized surveys. Phone surveys of individual applicants may be conducted daily and written surveys will be conducted after every presidentially declared disaster for individual assistance (the average number of declared disasters per year is 50). The survey respondents will include individual disaster applicants, state and local government officials, voluntary agency officials, and officials from other Federal agencies involved in delivering disaster assistance. FEMA will randomly sample individual disaster applicants and will survey the entire universe of state and local government officials, voluntary agency officials. Officials from other Federal agencies involved in delivering disaster assistance also will be surveyed.

Affected Public: Individuals or households, business or other for-profit institutions, not-for-profit institutions, Federal Government, state, local, or tribal government. It is important to note that FEMA does not solicit survey responses from businesses or other for-profit institutions, but it is possible that an individual applicant sampled will respond as a business owner.

Estimated Total Annual Burden Hours. 23,480. See calculations in table below.

Respondent group	Survey	Desired respondents per administrations (A)	Number of administration per year (B)	Burden hours per respondent (C)	Total annual burden hours (AXBXC)
Individual assistance applicants.	Disaster Assistance Customer Satisfaction Survey.	400	50	.25	5,000
	Inspection Services Survey	400	50	.25	5,000
	Teleregistration Survey (Proposed)	400	50	.25	5,000
	Helpline Survey (Proposed)	400	50	.25	5,000
	Preferences & Best Practices in the Delivery of Customer Service/Disaster Recovery Center Survey (Proposed).	400	10	.25	1,000
	Community Relations Survey (Proposed)	400	4	.25	400
Officials	Public Assistance Survey—30 per disaster, 2 responses per year.	60	60	.25	900
	Other Federal Agency Officials Survey (Proposed)—15 per disaster, 2 responses per year.	30	60	.25	450
	Voluntary Agencies Survey (Proposed)—10 per disaster, 4 responses per year.	40	60	.25	600
	Community Relations Survey (Proposed)	30	4	.25	30
Total				23,380	

Estimated Annual Cost To Respondents. We have estimated that it will cost each respondent $4.00 to complete each survey. The estimate is based on the respondent making $16.00 per hour (median household income of $34,076/2,080 hours per year). The estimated total annualized cost is $93,520.00 (23,380 respondents x $16.00 per hour x .25 hour).

Comments

Written comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) 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. Comments should be received on or before February 5, 2001.

ADDRESSES: Interested persons should submit written comments to Muriel B. Anderson, Chief, Records Management Branch, Program Services Division, Operations Support Directorate, Federal Emergency Management Agency, 500 C Street, SW., Room 316, Washington, DC 20472. Telephone number (202) 646–2625. FAX number (202) 646–3347. E-mail address: muriel.anderson@fema.gov.

FOR FURTHER INFORMATION CONTACT: Kedra Mitchell, Program Specialist, Federal Emergency Management Agency, Response and Recovery Directorate, Readiness Coordination Division, Strategic Planning & Evaluation Team, (202) 646–3381 for additional information. Contact Ms. Anderson at (202) 646–2625 for copies of the proposed collection of information.

Dated: November 28, 2000.

Reginald Trujillo,

Director, Program Services Division, Operations Support Directorate.

[FR Doc. 00–30867 Filed 12–4–00; 8:45 am]

BILLING CODE 6718–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Board of Governors of the Federal Reserve System

Background

On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act, as per 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320 Appendix A.1. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the OMB 83–Is and supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Request for Comment on Information Collection Proposal

The following information collection, which is being handled under this delegated authority, has received initial Board approval and is hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected; and

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments must be submitted on or before February 5, 2001.

ADDRESSES: Comments, which should refer to the OMB control number or agency form number, should be addressed to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551, or mailed electronically to *regs.comments@federalreserve.gov.* Comments addressed to Ms. Johnson may be delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m., and to the security control room outside of those hours. Both the mail room and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, NW. Comments received may be inspected in room M–P–500 between 9:00 a.m. and 5:00 p.m., except as provided in section 261.14 of the Board's Rules Regarding Availability of Information, 12 CFR 261.14(a).

A copy of the comments may also be submitted to the OMB desk officer for the Board: Alexander T. Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: A copy of the proposed form and instructions, the Paperwork Reduction Act Submission (OMB 83–I), supporting statement, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below. Mary M. West, Federal Reserve Board Clearance Officer (202–452–3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact Diane Jenkins (202–452–3544), Board of Governors of the Federal Reserve System, Washington, DC 20551.

Proposal to Approve Under OMB Delegated Authority the Extension for Three Years, Without Revision, of the Following Report

1. *Report title:* Money Market Mutual Fund Assets Report.

Agency form number: FR 2051a and b.

OMB control number: 7100–0012.

Frequency: weekly and monthly.

Reporters: money market mutual funds.

Annual reporting hours: 6,360 hours.

Estimated average hours per response: 3 minutes (FR 2051a), 12 minutes (FR 2051b).

Number of respondents: 1800 (FR 2051a), 700 (FR 2051b).

Small businesses are affected.

General description of report: This information collection is voluntary (12 U.S.C. 353 *et seq.*) and is given confidential treatment (5 U.S.C. 552(b)(4)).

Abstract: The weekly FR 2051a and the monthly FR 2051b reports cover total value of shares outstanding and investments of approximately 1,800 money market mutual funds. The data are used at the Board for constructing the monetary aggregates and for the analysis of current money market conditions and developments in the financial sector.

Board of Governors of the Federal Reserve System, November 29, 2000.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 00–30835 Filed 12–4–00; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 19, 2000.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President), 411 Locust Street, St. Louis, Missouri 63166–2034:

1. Hardin County Bancshares, Inc. Employee Stock Ownership Plan, and Eddie K. Whitlow, Savannah, Tennessee; as trustee for Hardin County Bancshares, Inc., Savannah, Tennessee, executor of the Isom G. Hinton Estate, and co-executor of the Hinton Family Partnership; to retain voting shares of Hardin County Bancshares, Inc., Savannah, Tennessee, and thereby indirectly retain voting shares of The Hardin County Bank, Savannah, Tennessee.

B. Federal Reserve Bank of Dallas (W. Arthur Tribble, Vice President), 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. Stewart Larkin Armstrong, San Antonio, Texas; to acquire additional voting shares of Kleberg and Company Bankers, Inc., Kingsville, Texas, and thereby indirectly acquire additional voting shares of Kleberg First National Bank, Kingsville, Texas.

Dated: Board of Governors of the Federal Reserve System, November 29, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–30833 Filed 12–4–00; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at www.ffiec.gov/nic/.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 29, 2000.

A. Federal Reserve Bank of Cleveland (Paul Kaboth, Banking Supervision)

1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. Fifth Third Bancorp, Cincinnati, Ohio; to merge with Capital Holdings, Inc., Sylvania, Ohio, and thereby indirectly acquire voting shares of Capital Bank, N.A., Sylvania, Ohio.

B. Federal Reserve Bank of Kansas City (D. Michael Manies, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198–0001:

1. Garden City Bancshares Acquisition Corporation, Garden City, Missouri; to become a bank holding company by acquiring 100 percent of the voting shares of Garden City Bancshares, Inc., Garden City, Missouri, and thereby indirectly acquire Garden City Bank, Garden City, Missouri.

Board of Governors of the Federal Reserve System, November 29, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–30832 Filed 12–4–00; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/.*

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 2, 2001.

A. Federal Reserve Bank of Atlanta (Cynthia C. Goodwin, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303–2713:

1. Milstar Financial, Inc., Miami Beach, Florida; to become a bank holding company by acquiring 46.04 percent of the voting shares of First Western Bank, Cooper City, Florida.

B. Federal Reserve Bank of Chicago (Phillip Jackson, Applications Officer) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. Comerica Incorporated, Detroit, Michigan; to merge with Imperial Bancorp, Inglewood, California, and thereby indirectly acquire voting shares of Imperial Bank, Inglewood, California. Comerica also has applied to acquire an option to acquire up to 19.9 percent of Imperial Bancorp.

Board of Governors of the Federal Reserve System, November 30, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–30902 Filed 12–4–00; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in Permissible Nonbanking Activities or to Acquire Companies That Are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center website at www.ffiec.gov/nic/.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 19, 2000.

A. Federal Reserve Bank of Chicago (Phillip Jackson, Applications Officer) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. National Australia Bank Limited, Melbourne, Australia; to acquire indirectly through Homeside Lending, Inc., Jacksonville, Florida, certain assets and assume certain liabilities of Charles F. Curry Company, Kansas City, Missouri, and to thereby engage in the nonbanking activities of extending credit and servicing loans and activities related to extending credit, pursuant to §§ 225.28(b)(1) and 225.28(b)(2) of Regulation Y.

Board of Governors of the Federal Reserve System, November 29, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–30834 Filed 12–4–00; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in Permissible Nonbanking Activities or to Acquire Companies That Are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/.*

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 2, 2001.

A. Federal Reserve Bank of Chicago (Phillip Jackson, Applications Officer) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *FBOP Corporation,* Oak Park, Illinois; to acquire 100 percent of the voting stock of PBOC Holdings, Inc., Los Angeles, California, and thereby indirectly acquire voting shares of Peoples Bank of California, Los Angeles, California, and thereby engage in operating a savings association, pursuant to § 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, November 30, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–30901 Filed 12–4–00; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Sunshine Meeting Act

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11 a.m., Monday, December 11, 2000.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Lynn S. Fox, Assistant to the Board; 202–452–3204.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at http://www.federalreserve.gov for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: December 1, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00–31103 Filed 12–1–00; 3:58 pm]

BILLING CODE 6210–01–M

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act Meeting

TIME AND DATES: 10:00 a.m. (EST) December 11, 2000.

PLACE: 4th Floor, Conference Room 4506, 1250 H Street, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of the minutes of the November 13, 2000, Board member meeting.

2. Thrift Savings Plan activity report by the Executive Director.

3. Review of KPMG Peat Marwick audit reports;

(a) ''Pension and Welfare Benefits Administration Review of the Policies and Procedures of the Federal Retirement Thrift Investment Board Administrative Staff''

(b) ''Pension and Welfare Benefits Administration Review of the Thrift Savings Plan C and F Fund Investment Management Operations at Barclays Global Investors, N.A.''

(c) ''Pension and Welfare Benefits Administration Review of the Thrift Savings Plan Billing Process at the United States Department of Agriculture, National Finance Center.''

FOR FURTHER INFORMATION CONTACT: Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: November 30, 2000.

Elizabeth S. Woodruff,

Ssecretary to the Board, Federal Retirement Thrift Investment Baord.

[FR Doc. 00–31014 Filed 12–1–00; 12:29 pm]

BILLING CODE 6760–01–M

GENERAL SERVICES ADMINISTRATION

Office of Communications; Cancellation of an Optional Form by Department of State

AGENCY: General Services Administration.

ACTION: Notice.

SUMMARY: The Department of State is cancelling the following Optional Form because of low usage:

OF 189, Travel Reimbursement Voucher

The form will be converted to a State Department form. You can request copies of the new form from: Department of State, IS/OIS/DIR, 2201 C Street, NW; Room B264NS, Washington, DC 20520–0264.

DATES: Effective December 5, 2000.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Williams, General Services Administration, (202) 501–0581.

Dated: October 25, 2000.

Barbara M. Williams,

Deputy Standard and Optional Forms Management Officer.

[FR Doc. 00–30900 Filed 12–4–00; 8:45 am]

BILLING CODE 6820–34–M

GENERAL SERVICES ADMINISTRATION

Travel and Transportation Policy Division; Construction Cancellation of a Standard Form

AGENCY: Office of Governmentwide Policy, General Services Administration.

ACTION: Notice.

SUMMARY: The General Services Administration, Office of Governmentwide Policy is cancelling the constructions of the following Standard Form because of low user demand:

SF 1169, U.S. Government Transportation Requests (2-part set) (identified by NSN 7540–00–634–4363) and (4-part set book) (identified by NSN 7540–00–634–4365). The 4-part single set version (identified by NAN 7540–00–985–8038) of this form is still available from FSS.

FOR FURTHER INFORMATION CONTACT: General Services Administration, Forms Management, (202) 501–0581.

DATES: Effective December 5, 2000.

Dated: October 30, 2000.

Barbara M. Williams,

Deputy Standard and Optional Forms Management Officer.

[FR Doc. 00–30899 Filed 12–4–00; 8:45 am]

BILLING CODE 6820–34–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of a Meeting of the National Bioethics Advisory Commission (NBAC)

SUMMARY: Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is given of a meeting of the National Bioethics Commission. The Commission will discuss its ongoing project ethical and policy issues in international research. Some Commission members may participate by telephone conference. The meeting is open to the public and opportunities for statements by the public will be provided on January 18 from 1:00–1:30 pm.

Dates/times	Location
January 18, 2001, 8:30 am–5 pm.	Sheraton Premiere at Tysons Corner, 8661 Leesburg Pike, Tysons Corner/Vienna, Virginia 22182
January 19, 2001, 8 am–12 pm.	Same Location as Above

SUPPLEMENTARY INFORMATION: The President established the National Bioethics Advisory Commission (NBAC) on October 3, 1999 by Executive Order 12975 as amended. The mission of the NBAC is to advise and make recommendations to the National Science and Technology Council, its Chair, the President, and other entities on bioethical issues arising from the research on human biology and behavior, and from the applications of that research.

Public Participation

The meeting is open to the public with attendance limited by the availability of space on a first come, first serve basis. Members of the public who wish to present oral statements should contact Ms. Jody Crank by telephone, fax machine, or mail as shown below as soon as possible, at least 4 days before the meeting. The Chair will reserve time for presentations by persons requesting to speak and asks that oral statements be limited to five minutes. The order of persons wanting to make a statement will be assigned in the order in which requests are received. Individuals unable to make oral presentations can mail or fax their written comments to the NBAC staff office at least five business days prior to the meeting for distribution to the Commission and inclusion in the public record. The Commission also accepts general comments at its website at bioethics.gov. Persons needing special assistance, such as sign language interpretation or other special accommodations, should contact NBAC staff at the address or telephone number listed below as soon as possible.

FOR FURTHER INFORMATION CONTACT: Ms. Jody Crank, National Bioethics Advisory Commission, 6705 Rockledge Drive, Suite 700, Bethesda, Maryland 20892–7979, telephone (301) 402–4242, fax number (301) 480–6900.

Dated: November 29, 2000.

Eric M. Meslin,

Executive Director, National Bioethics Advisory Commission.

[FR Doc. 00–30871 Filed 12–4–00; 8:45 am]

BILLING CODE 4167–01–U

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Injury Research Grant Review Committee: Conference Call Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following conference call committee meeting.

Name: Injury Research Grant Review Committee (IRGRC).

Time and Date: 1 p.m.–1:30 p.m., December 19, 2000.

Place: National Center for Injury Prevention and Control (NCIPC), CDC, Koger Center, Vanderbilt Building, 1st Floor, Conference Room 1006, 2939 Flowers Road, South, Atlanta, Georgia 30341. (Exit Chamblee-Tucker Road off I–85.)

Status: Open: 1:00 p.m.–1:10 p.m., December 19, 2000;

Closed: 1:10 p.m.–1:30 p.m., December 19, 2000.

Purpose: This committee is charged with advising the Secretary of Health and Human Services, the Assistant Secretary for Health, and the Director, CDC, regarding the scientific merit and technical feasibility of grant applications received from academic institutions and other public and private profit and nonprofit organizations, including State and local government agencies, to conduct specific injury research that focuses on prevention and control and to support injury prevention research centers.

Matters To Be Discussed: Agenda items include the purpose of the meeting and discussion and vote on site visits to be conducted by IRGRC. Beginning at 1:10 p.m., through 1:30 p.m., December 19, the Committee will discuss and vote on the preliminary evaluation (triage) conducted by IRGRC to determine if a grant application submitted in response to Program Announcement #01007 is of sufficient scientific and technical merit to warrant further review by IRGRC. This portion of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), title 5 U.S.C., and the Determination of the Associate Director for Management and Operations, CDC, pursuant to Pub. Law. 92–463.

This notice is published less than 15 days prior to the conference call due to administrative delay.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Richard W. Sattin, M.D., Acting Executive Secretary, IRGRC, NCIPC, CDC, 4770 Buford Highway, NE, M/S K58, Atlanta, Georgia 30341–3724, telephone 770/488–4330.

The Director, Management Analysis and Services Office, has been delegated the authority to sign Federal Register Notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: November 30, 2000.

Julia M. Fuller,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 00–30995 Filed 12–1–00; 11:39 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Notice of Allotment Percentages to States for Child Welfare Services State Grants

AGENCY: Administration for Children, Youth and Families, Administration for Children and Families, Department of Health and Human Services.

ACTION: Biennial publication of allotment percentages for States under the Title IV–B subpart 1, Child Welfare Services State Grants Program.

SUMMARY: As required by section 421(c) of the Social Security Act (42 U.S.C. 621(c)), the Department is publishing the allotment percentage for each State under the Title IV–B subpart 1, Child Welfare Services State Grants Program. Under section 421(a), the allotment percentages are one of the factors used in the computation of the Federal grants awarded under the Program.

EFFECTIVE DATE: The allotment percentages shall be effective for Fiscal Years 2002 and 2003.

FOR FURTHER INFORMATION CONTACT: Doris Lee, Office of Management Services, Administration for Children, Youth and Families, Administration for Children and Families, 330 C Street, SW., Washington, D.C. 20447.

SUPPLEMENTARY INFORMATION: The allotment percentage for each State is determined on the basis of paragraphs (b) and (c) of section 421 of the Act. These figures are available on the ACF homepage on the internet: *http://www.acf.dhhs.gov/programs/cb/.* The allotment percentage for each State is as follows:

State	Allotment percentage
Alabama	59.48
Alaska	48.91
Arizona	55.89
Arkansas	61.01
California	48.04
Colorado	45.34
Connecticut	31.28
Delaware	46.32
District of Columbia	30.47
Florida	50.80
Georgia	52.27
Hawaii	50.75
Idaho	59.88
Illinois	45.27
Indiana	54.08
Iowa	54.58
Kansas	52.98
Kentucky	59.13
Louisiana	59.38
Maine	56.91
Maryland	43.39
Massachusetts	38.66
Michigan	50.76
Minnesota	46.26
Mississippi	63.55
Missouri	53.49
Montana	61.15
Nebraska	52.59
Nevada	45.54
New Hampshire	45.92
New Jersey	37.46
New Mexico	61.30
New York	40.91
North Carolina	53.73
North Dakota	59.09
Ohio	52.15
Oklahoma	59.47
Oregon	52.39
Pennsylvania	49.81
Rhode Island	48.60
South Carolina	58.73
South Dakota	56.50
Tennessee	55.06
Texas	52.96
Utah	59.18
Vermont	54.70
Virginia	48.07
Washington	47.49
West Virginia	62.93
Wisconsin	52.03
Wyoming	54.03
American Samoa	70.00
Guam	70.00
N. Mariana Islands	70.00
Puerto Rico	70.00
Virgin Islands	70.00

Dated: November 27, 2000.

Patricia Montoya,

Commissioner, Administration for Children, Youth and Families.

[FR Doc. 00–30887 Filed 12–4–00; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 00N–1575]

Agency Information Collection Activities; Proposed Collection; Comment Request; Nutrition Labeling; Declaration of Caloric Amounts and Serving Sizes for Breath Mints

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on information collection requirements regarding the nutrition labeling of breath mints.

DATES: Submit written or electronic comments on the collection of information by February 5, 2001.

ADDRESSES: Submit electronic comments on the collection of information to http://www.accessdata.fda.gov/scripts/oc/dockets/edockethome.cfm. Submit written comments on the collection of information to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Peggy Schlosburg, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Nutrition Labeling; Declaration of Caloric Amounts and Serving Sizes for Breath Mints—21 CFR 101.9(b) and 101.9(c)(1) (OMB Control Number 0910–0364)—Extension

Section 403(q) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 343(q)) requires that the label or labeling of a food bear nutrition information, including information on: (1) The serving size and number of servings per container, and (2) the number of calories present in a serving of the food. Under FDA's nutrition labeling regulations in § 101.9(d)(3) (21 CFR 101.9(d)(3)), the nutrition facts panel of the food label must disclose the serving size of the food product and the number of servings in each package. Under § 101.9(c)(1), the nutrition facts panel must disclose the number of calories present in a serving of the food.

In the **Federal Register** of December 30, 1997 (62 FR 67775), FDA published a proposed rule to amend the nutrition labeling regulations by changing the label serving size for the product category ''Hard candies, breath mints'' to one unit. FDA proposed this change in response to a petition to provide a serving size for breath mints that more accurately reflects the amount customarily consumed per eating occasion. In a related issue, FDA also proposed to: (1) Modify the rounding rules for calories to allow the declaration of caloric amounts of less than 5 calories on the nutrition label, and (2) require that the number of calories declared on the nutrition label of a food product be consistent with any claims about caloric content that are made in its labeling. As a result of this proposed rule, manufacturers, packers, or distributors who make labeling claims that their products contain between 1 and 5 calories would be required to change the declaration of the amount of calories on the nutrition label. In addition, manufacturers of small breath mints would be required, under § 101.9(b), to change the serving size and, under § 101.9(c) and (d), to modify the amounts and Daily Values for nutrients listed in the nutrition label for their products. The proposal included burden estimates for the proposed changes and solicited public comment. In the interim, however, FDA is seeking an extension of OMB approval for the current regulations.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ADDITIONAL REPORTING BURDEN [1]

21 CFR Section	No. of Respondents	Total No. of Responses	Hours per Response	Total Operating Costs	Total Hours
101.9(b) and (c)(1)	4	30	1	$15,000	30

[1] There are no capital or maintenance costs associated with this collection of information.

The proposed modification of the rules for the declaration of the amount of calories and the proposed change of the label serving size on the nutrition facts panel would result in a one-time burden created by the need for firms to revise their labels. In addition to changing the statement of calories and the serving sizes, firms would have to recalculate the number of servings per container and any nutrient amounts and Daily Values affected by the change in serving size. Of those breath mints for which FDA has information regarding the size of the product, there are 4 firms producing 5 brands of small breath mints, or approximately 30 distinct small breath mint labels. These are the only firms that would be affected by this proposed rule. FDA estimates that these firms would require an average of 1 hour per label to comply with the requirements of a final rule based on this proposal. For breath mint products, the average administrative, redesign, and inventory disposal costs for a labeling change of this type, with a 1-year compliance period, would result in a one-time operating cost of $500 per label or a total estimated operating cost of $15,000.

Dated: November 28, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00–30828 Filed 12–4–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 00N–1283]

Agency Information Collection Activities; Announcement of OMB Approval; Reporting and Recordkeeping Requirements and Availability of Sample Electronic Products for Manufacturers and Distributors of Electronic Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Reporting and Recordkeeping Requirements and Availability of Sample Electronic Products for Manufacturers and Distributors of Electronic Products'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Peggy Schlosburg, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 13, 2000 (65 FR 55262), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0025. The approval expires on November 30, 2003. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets*.

Dated: November 28, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00–30830 Filed 12–4–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 00N–1311]

Agency Information Collection Activities; Announcement of OMB Approval; Export of Medical Devices—Foreign Letters of Approval

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Export of Medical Devices—Foreign Letters of Approval'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Peggy Schlosburg, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 12, 2000 (65 FR 55027), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0264. The approval expires on November 30, 2003. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets*.

Dated: November 28, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00–30831 Filed 12–4–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 00N–1060]

Agency Information Collection Activities; Announcement of OMB Approval; Adoption of FDA Food Code by Local, State, and Tribal Jurisdictions

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Adoption of FDA Food Code by Local, State, and Tribal Jurisdictions'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: JonnaLynn P. Capezzuto, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of August 3, 2000 (65 FR 47736), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–448. The approval expires on November 30, 2003. A copy of the supporting statement for this information collection is available on the Internet at http://www.fda.gov/ohrms/dockets.

Dated: November 28, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00–30874 Filed 12–4–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 00N–1440]

Agency Information Collection Activities; Submission for OMB Review; Comment Request; User Fee Cover Sheet

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that the proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments on the collection of information by January 4, 2001.

ADDRESSES: Submit written comments on the collection of information to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW., rm. 10235, Washington, DC 20503, Attn: Wendy Taylor, Desk Officer for FDA.

FOR FURTHER INFORMATION CONTACT: JonnaLynn P. Capezzuto, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

User Fee Cover Sheet; Form FDA 3397—(OMB Control Number 0910–0297)—Extension

Under sections 735 and 736 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 379g and 379h), the ''Prescription Drug User Fee Act of 1992'' (PDUFA) (Public Law 102–571), as amended by the Food and Drug Administration Modernization Act of 1997 (Public Law 105–115), FDA has the authority to assess and collect user fees for certain drug and biologics license applications and supplements. Under this authority, pharmaceutical companies pay a fee for certain new human drug applications, biologics license applications or supplements submitted to the agency for review. Because the submission of user fees concurrently with applications and supplements is required, review of an application cannot begin until the fee is submitted. Form FDA 3397 is the user fee cover sheet, which is designed to provide the minimum necessary information to determine whether a fee is required for review of an application, to determine the amount of the fee required, and to account for and track user fees. The form provides a cross-reference of the fee submitted for an application with the actual application by using a unique number tracking system. The information collected is used by FDA's Center for Drug Evaluation and Research (CDER) and Center for Biologics Evaluation and Research (CBER) to initiate the administrative screening of new drug applications, biologics license applications, and supplemental applications.

Respondents to this collection of information are new drug and biologics manufacturers. Based on FDA's data base system, there are an estimated 208 manufacturers of products subject to PDUFA. However, not all manufacturers will have any submissions in a given year and some may have multiple submissions. The total number of annual responses is based on the number of submissions received by FDA in fiscal year 1999. CDER estimates 2,478 annual responses that include the following: 125 new drug applications, 1,458 chemistry supplements, 755 labeling supplements, and 140 efficacy supplements. CBER estimates 443 annual responses that include the following: 8 biologics license applications, 396 manufacturing (chemistry) supplements, 29 labeling supplements, and 10 efficacy supplements. The estimated hours per response are based on past FDA experience with the various submissions, and range from 5 to 30 minutes. The hours per response are based on the average of these estimates.

In the **Federal Register** of August 18, 2000 (65 FR 50540), the agency requested comments on the proposed collections of information. No significant comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN [1]

Form	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
FDA 3397	208	14.4	2,921	.30	876

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: November 28, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00–30829 Filed 12–4–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Document Identifier: HCFA–1491, HCFA–382, and HCFA–R–207]

Agency Information Collection Activities: Submission For OMB Review; Comment Request

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, has submitted to the Office of Management and Budget (OMB) the following proposal for the collection of information. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

(1.) *Type of Information Collection Request:* Extension of a currently approved collection;

Title of Information Collection: Request for Medicare Payment—Ambulance and Supporting Regulations in 42 CFR Section 410.40 and 424.124;

Form No.: HCFA–1491 (OMB# 0938–0042);

Use: This form is used by physicians, suppliers, and beneficiaries to request payment of Part B Medicare services. It is used to apply for reimbursement for ambulance services.

Frequency: On occasion;

Affected Public: Business or other for-profit, Individuals or households, and Not-for-profit Institutions;

Number of Respondents: 9,301,183;

Total Annual Responses: 9,301,183;

Total Annual Hours: 390,418.

(2.)*Type of Information Collection Request:* Extension of a currently approved collection;

Title of Information Collection: ESRD Beneficiary Selection and Supporting Regulations Contained in 42 CFR 414.330;

Form No.: HCFA–382 (OMB# 0938–0372);

Use: ESRD facilities have each new home dialysis patient select one of two methods to handle Medicare reimbursement. The intermediaries pay for the beneficiaries selecting Method I and the carriers pay for the beneficiaries selecting Method II. This system was developed to avoid duplicate billing by both intermediaries and carriers.

Frequency: Other (One time only);

Affected Public: Individuals or households, business or other for-profit, and not-for-profit institutions;

Number of Respondents: 8,600;

Total Annual Responses: 8,600;

Total Annual Hours: 717.

(3.) *Type of Information Collection Request:* Revision of a currently approved collection;

Title of Information Collection: Evaluation of the State Medicaid Reform Demonstrations and Evaluation of the Medicaid Health Reform Demonstrations;

Form No.: HCFA–R–207 (OMB# 0938–0708);

Use: These evaluations investigate health care reform in ten states that have implemented demonstration programs using Section 1115 waivers. The surveys gather information to answer questions regarding access to health care, quality of care delivered, satisfaction with health services, and the use and cost of health services. During the extended period of authorization, the surveys will be administered to Medicaid eligibles, both demonstration participants and comparison group non-participants.;

Frequency: Other: One-time;

Affected Public: Individuals or Households;

Number of Respondents: 5,050;

Total Annual Responses: 5,050;

Total Annual Hours: 2,746.

To obtain copies of the supporting statement for the proposed paperwork collections referenced above, access HCFA's Web Site Address at http://www.hcfa.gov/regs/prdact95.htm, or E-mail your request, including your address and phone number, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB Desk Officer designated at the following address: OMB Human Resources and Housing Branch, Attention: Allison Eydt, New Executive Office Building, Room 10235, Washington, D.C. 20503.

Dated: November 20, 2000.

John P. Burke III,

HCFA Reports Clearance Officer, HCFA, Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards.

[FR Doc. 00–30840 Filed 12–4–00; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[HCFA–1162–N]

Medicare Program; Establishment of the Advisory Panel on Ambulatory Payment Classification Groups and Request for Nominations for Members

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice.

SUMMARY: This notice announces the establishment of the Advisory Panel on Ambulatory Payment Classification (APC) Groups and solicits nominations for members of the panel. The purpose of the panel is to review the APC groups and their associated weights and advise the Secretary and the Administrator of the Health Care Financing Administration (HCFA) concerning the clinical integrity of these groups and weights, which are major elements of the hospital outpatient prospective payment system (OPPS). This notice also announces that on November 21, 2000 the Secretary signed the charter establishing the panel. The charter will

terminate two years from the signing date unless renewed by the Secretary.

DATES: Nominations for members will be considered if we receive them at the appropriate address, as provided below, before 5 p.m. on December 26, 2000.

ADDRESSES: Mail written nominations for membership to the following address ONLY: Health Care Financing Administration, Department of Health and Human Services, Attention: HCFA–1162–N, P.O. Box 8013, Baltimore, MD 21244–8013.

If you prefer, you may deliver, by courier, your written nominations to one of the following addresses: Hubert H. Humphrey Building, Room 443–G, 200 Independence Avenue, SW., Washington, DC 20201, or Health Care Financing Administration, Room C5–14–03, Central Building, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Nominations mailed to those addresses designated for courier delivery may be delayed and could be considered late. Because of staffing and resource limitations, we cannot accept nominations by facsimile (FAX) or email transmission. Please refer to file code HCFA–1162–N on each nomination.

You may receive a copy of the Secretary's charter for the panel by mailing a written request to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: HCFA–1162–N, P.O. Box 8013, Baltimore, MD 21244–8013.

FOR FURTHER INFORMATION CONTACT: Paul Olenick, (410) 786–0282.

SUPPLEMENTARY INFORMATION:

I. Background

The requirement for the Secretary to consult with an outside Advisory Panel on Ambulatory Payment Classification (APC) Groups is set forth in section 1833(t)(9)(A) of the Social Security Act (the Act), as added by section 201(h) and redesignated by section 202(a)(2) of the Balanced Budget Refinement Act of 1999 (BBRA 1999). The Secretary signed the charter establishing the panel on November 21, 2000. The charter will terminate two years from the signing date unless renewed by the Secretary. The purpose of the panel is to review, and advise the Secretary and the Administrator of the Health Care Financing Administration (HCFA) concerning, the clinical integrity of the APC groups and associated weights. The panel consists of up to 15 members, selected by the Secretary or a designee, and a Chair, who is a government official appointed by the Secretary.

The panel meets once each calendar year in January or February so that we may consider its advice when we prepare the Annual Notice of Proposed Rulemaking for changes to the hospital outpatient prospective payment system (OPPS). The work of the panel is technical in nature and will concentrate on the operational aspects of the APC system. We will prepare the agenda for the panel's activities, which will set the boundaries for discussion, and will include issues such as the following:

- The determination as to whether selected procedures are similar both clinically and in terms of resource use.
- The assignment of new HCFA Common Procedure Coding System (HCPCS) codes to new or existing APCs.
- The reassignment of HCPCS codes to different APCs.
- The reconfiguring of existing APCs into new APCs.

The panel will not make policy recommendations and will not discuss items not on the agenda. Items that will not be considered for the agenda include the following, as well as other items that are determined by us to be outside the technical scope of the panel's activities:

- The conversion factor.
- The OPPS wage adjustments.
- The outlier or transitional corridor payments.
- The transitional pass-through payments for medical devices, drugs, and biologicals.

In order to obtain the broadest possible input for its work, the panel must consult with entities and organizations, such as the medical device and drug industries, with expert technical knowledge of the components of the APCs. The panel may use data collected or developed from entities and organizations other than the Department of Health and Human Services and HCFA in conducting its review.

We are requesting nominations for members to serve on the panel. Panel members serve without compensation, although travel, meals, lodging, and related expenses will be reimbursed in accordance with standard government travel regulations. We have a special interest in ensuring that women, minorities, and the physically challenged are adequately represented on the panel and encourage nominations of qualified candidates from those groups.

II. Criteria for Nominees

Nominees must be representatives of Medicare providers (including Community Mental Health Centers) subject to the OPPS, with technical and/or clinical expertise in any of the following areas:

- Hospital payment systems.
- Hospital medical care delivery systems.
- Outpatient payment requirements.
- Ambulatory payment classification groups.
- Use of, and payment for, drugs and medical devices in an outpatient setting.
- Provision of, and payment for, partial hospitalization services.
- Any other relevant expertise.

It is not necessary that any nominee possess expertise in all of the areas listed, but each must have a minimum of five years experience, and currently be employed full-time, in his or her area of expertise. Members of the panel serve overlapping four-year terms, contingent upon the rechartering of the panel.

Any interested person may nominate one or more qualified individuals. Self-nominations will also be accepted. Each nomination must include a letter of nomination, a curriculum vita of the nominee, and a statement from the nominee that the nominee is willing to serve on the panel.

Authority: Section 1833(t)(9)(A) of the Social Security Act (42 U.S.C. 1395(t)).

Dated: November 29, 2000.

Michael M. Hash,

Acting Administrator, Health, Care Financing Administration

[FR Doc. 00–30994 Filed 12–1–00; 12:21 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of Laboratories Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services notifies Federal agencies of the laboratories currently certified to meet standards of Subpart C of Mandatory Guidelines for Federal Workplace Drug Testing Programs (59 FR 29916, 29925). A similar notice listing all currently certified laboratories will be published during the first week of each month, and updated to include laboratories which subsequently apply for and complete the certification process. If any listed laboratory's certification is totally suspended or revoked, the laboratory will be omitted

from updated lists until such time as it is restored to full certification under the Guidelines.

If any laboratory has withdrawn from the National Laboratory Certification Program during the past month, it will be listed at the end, and will be omitted from the monthly listing thereafter.

This Notice is also available on the internet at the following website: *http://www.health.org/workplace*

FOR FURTHER INFORMATION CONTACT: Mrs. Giselle Hersh or Dr. Walter Vogl, Division of Workplace Programs, 5600 Fishers Lane, Rockwall 2 Building, Room 815, Rockville, Maryland 20857; Tel.: (301) 443–6014, Fax: (301) 443–3031.

Special Note: Please use the above address for all surface mail and correspondence. For all overnight mail service use the following address: Division of Workplace Programs, 5515 Security Lane, Room 815, Rockville, Maryland 20852.

SUPPLEMENTARY INFORMATION: Mandatory Guidelines for Federal Workplace Drug Testing were developed in accordance with Executive Order 12564 and section 503 of Pub. L. 100–71. Subpart C of the Guidelines, ''Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies,'' sets strict standards which laboratories must meet in order to conduct urine drug testing for Federal agencies. To become certified an applicant laboratory must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification a laboratory must participate in a quarterly performance testing program plus periodic, on-site inspections.

Laboratories which claim to be in the applicant stage of certification are not to be considered as meeting the minimum requirements expressed in the HHS Guidelines. A laboratory must have its letter of certification from SAMHSA, HHS (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with Subpart C of the Guidelines, the following laboratories meet the minimum standards set forth in the Guidelines:

ACL Laboratories, 8901 W. Lincoln Ave., West Allis, WI 53227, 414–328–7840/800–877–7016, (Formerly: Bayshore Clinical Laboratory).

Advanced Toxicology Network, 3560 Air Center Cove, Suite 101, Memphis, TN 38118, 901–794–5770/888–290–1150.

Aegis Analytical Laboratories, Inc., 345 Hill Ave., Nashville, TN 37210, 615–255–2400.

Alabama Reference Laboratories, Inc., 543 South Hull St., Montgomery, AL 36103, 800–541–4931/334–263–5745.

Alliance Laboratory Services, 3200 Burnet Ave., Cincinnati, OH 45229, 513–585–9000, (Formerly: Jewish Hospital of Cincinnati, Inc.).

American Medical Laboratories, Inc., 14225 Newbrook Dr., Chantilly, VA 20151 703–802–6900.

Associated Pathologists Laboratories, Inc., 4230 South Burnham Ave., Suite 250, Las Vegas, NV 89119–5412, 702–733–7866/800–433–2750.

Baptist Medical Center—Toxicology Laboratory, 9601 I–630, Exit 7, Little Rock, AR 72205–7299, 501–202–2783, (Formerly: Forensic Toxicology Laboratory Baptist Medical Center).

Clinical Laboratory Partners, LLC 129 East Cedar St. Newington, CT 06111, 860–696–8115, (Formerly: Hartford Hospital Toxicology Laboratory).

Clinical Reference Lab, 8433 Quivira Rd., Lenexa, KS 66215–2802, 800–445–6917.

Cox Health Systems, Department of Toxicology, 1423 North Jefferson Ave., Springfield, MO 65802, 800–876–3652/417–269–3093, (Formerly: Cox Medical Centers).

Dept. of the Navy, Navy Drug Screening Laboratory, Great Lakes, IL, Building 38–H, P. O. Box 88–6819, Great Lakes, IL 60088–6819, 847–688–2045/847–688–4171.

Diagnostic Services Inc., dba DSI, 12700 Westlinks Drive, Fort Myers, FL 33913, 941–561–8200/800–735–5416.

Doctors Laboratory, Inc., P.O. Box 2658, 2906 Julia Dr., Valdosta, GA, 31602 912–244–4468.

DrugProof, Division of Dynacare/Laboratory of Pathology, LLC 1229 Madison St., Suite 500, Nordstrom Medical Tower, Seattle, WA 98104, 206–386–2672/800–898–0180 (Formerly: Laboratory of Pathology of Seattle, Inc. DrugProof, Division of Laboratory of Pathology of Seattle, Inc.).

DrugScan, Inc., P.O. Box 2969, 1119 Mearns Rd., Warminster, PA 18974, 215–674–9310.

Dynacare Kasper Medical Laboratories*, 14940–123 Ave., Edmonton, Alberta, Canada T5V 1B4, 780–451–3702/800–661–9876.

ElSohly Laboratories, Inc., 5 Industrial Park Dr., Oxford, MS 38655, 662–236–2609.

Express Analytical Labs, 1301 18th Ave NW, Suite 110, Austin, MN 55912, 507–437–7322.

Gamma-Dynacare Medical Laboratories*, A Division of the Gamma-Dynacare Laboratory Partnership, 245 Pall Mall St., London, ONT, Canada N6A 1P4, 519–679–1630.

General Medical Laboratories, 36 South Brooks St., Madison, WI 53715, 608–267–6267.

Integrated Regional Laboratories, 5361 NW 33rd Avenue, Fort Lauderdale, FL 33309, 954–777–0018, 800–522–0232, (Formerly: Cedars Medical Center, Department of Pathology).

Kroll Laboratory Specialists, Inc., 1111 Newton St., Gretna, LA 70053, 504–361–8989/800–433–3823, (Formerly: Laboratory Specialists, Inc.).

LabOne, Inc., 10101 Renner Blvd., Lenexa, KS 66219, 913–888–3927/800–728–4064, (Formerly: Center for Laboratory Services, a Division of LabOne, Inc.).

Laboratory Corporation of America Holdings, 7207 N. Gessner Road, Houston, TX 77040, 713–856–8288/800–800–2387.

Laboratory Corporation of America Holdings, 1904 Alexander Drive, Research Triangle Park, NC 27709, 919–572–6900/800–833–3984, (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group).

Laboratory Corporation of America Holdings, 4022 Willow Lake Blvd., Memphis, TN 38118, 866–827–8042/800–233–6339, (Formerly: LabCorp Occupational Testing Services, Inc., MedExpress/National Laboratory Center).

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908–526–2400/800–437–4986, (Formerly: Roche Biomedical Laboratories, Inc.).

Marshfield Laboratories, Forensic Toxicology Laboratory, 1000 North Oak Ave., Marshfield, WI 54449, 715–389–3734/800–331–3734.

MAXXAM Analytics Inc.*, 5540 McAdam Rd., Mississauga, ON, Canada L4Z 1P1, 905–890–2555, (Formerly: NOVAMANN (Ontario) Inc.).

Medical College Hospitals Toxicology Laboratory, Department of Pathology, 3000 Arlington Ave., Toledo, OH 43699, 419–383–5213.

MedTox Laboratories, Inc., 402 W. County Rd. D, St. Paul, MN 55112, 651–636–7466/800–832–3244.

MetroLab-Legacy Laboratory Services, 1225 NE 2nd Ave., Portland, OR 97232, 503–413–5295/800–950–5295.

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, Minnesota 55417, 612–725–2088.

National Toxicology Laboratories, Inc., 1100 California Ave., Bakersfield, CA 93304, 661–322–4250/800–350–3515.

NWT Drug Testing, 1141 E. 3900 South, Salt Lake City, UT 84124, 801–293–2300/800–322–3361, (Formerly: NorthWest Toxicology, Inc.).

One Source Toxicology Laboratory, Inc., 1705 Center Street, Deer Park, TX 77536, 713–920–2559, (Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory).

Oregon Medical Laboratories, P.O. Box 972, 722 East 11th Ave., Eugene, OR 97440–0972, 541–687–2134.

Pacific Toxicology Laboratories, 6160 Variel Ave., Woodland Hills, CA 91367, 818–598–3110/800–328–6942, (Formerly: Centinela Hospital Airport Toxicology Laboratory).

Pathology Associates Medical Laboratories, 11604 E. Indiana Ave., Spokane, WA 99206, 509–926–2400/800–541–7891.

PharmChem Laboratories, Inc., 1505–A O'Brien Dr., Menlo Park, CA 94025, 650–328–6200/800–446–5177.

PharmChem Laboratories, Inc., Texas Division, 7606 Pebble Dr., Fort Worth, TX 76118, 817–215–8800, (Formerly: Harris Medical Laboratory).

Physicians Reference Laboratory, 7800 West 110th St., Overland Park, KS 66210, 913–339–0372/800–821–3627.

Poisonlab, Inc., 7272 Clairemont Mesa Blvd., San Diego, CA 92111, 858–279–2600/800–882–7272.

Quest Diagnostics Incorporated, 3175 Presidential Dr., Atlanta, GA 30340, 770–452–1590, (Formerly: SmithKline Beecham Clinical Laboratories, SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated, 4444 Giddings Road, Auburn Hills, MI 48326, 248–373–9120/800–444–0106, (Formerly: HealthCare/Preferred Laboratories, HealthCare/MetPath, CORNING Clinical Laboratories).

Quest Diagnostics Incorporated, 8000 Sovereign Row, Dallas, TX 75247, 214–638–1301, (Formerly: SmithKline Beecham Clinical Laboratories, SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated, 4770 Regent Blvd., Irving, TX 75063, 972–916–3376/800–526–0947, (Formerly: Damon Clinical Laboratories, Damon/MetPath, CORNING Clinical Laboratories).

Quest Diagnostics Incorporated, 801 East Dixie Ave., Suite 105A, Leesburg, FL 34748, 352–787–9006x4343, (Formerly: SmithKline Beecham Clinical Laboratories, Doctors & Physicians Laboratory).

Quest Diagnostics Incorporated, 400 Egypt Rd., Norristown, PA 19403, 610–631–4600/800–877–7484, (Formerly: SmithKline Beecham Clinical Laboratories, SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated, 506 E. State Pkwy., Schaumburg, IL 60173, 800–669–6995/847–885–2010, (Formerly: SmithKline Beecham Clinical Laboratories, International Toxicology Laboratories).

Quest Diagnostics Incorporated, 7470 Mission Valley Rd., San Diego, CA 92108–4406, 619–686–3200/800–446–4728, (Formerly: Nichols Institute, Nichols Institute Substance Abuse Testing (NISAT), CORNING Nichols Institute, CORNING Clinical Laboratories).

Quest Diagnostics Incorporated, One Malcolm Ave., Teterboro, NJ 07608, 201–393–5590, (Formerly: MetPath, Inc., CORNING MetPath Clinical Laboratories, CORNING Clinical Laboratory).

Quest Diagnostics Incorporated, 7600 Tyrone Ave., Van Nuys, CA 91405, 818–989–2520/800–877–2520, (Formerly: SmithKline Beecham Clinical Laboratories).

San Diego Reference Laboratory, 6122 Nancy Ridge Dr., San Diego, CA 92121, 800–677–7995/858–677–7970.

Scientific Testing Laboratories, Inc., 463 Southlake Blvd., Richmond, VA 23236, 804–378–9130.

Scott & White Drug Testing Laboratory, 600 S. 25th St., Temple, TX 76504, 254–771–8379/800–749–3788.

S.E.D. Medical Laboratories, 5601 Office Blvd., Albuquerque, NM 87109, 505–727–6300/800–999–5227.

South Bend Medical Foundation, Inc., 530 N. Lafayette Blvd., South Bend, IN 46601, 219–234–4176.

Southwest Laboratories, 2727 W. Baseline Rd., Tempe, AZ 85283, 602–438–8507/800–279–0027.

Sparrow Health System, Toxicology Testing Center, St. Lawrence Campus, 1210 W. Saginaw, Lansing, MI 48915, 517–377–0520, (Formerly: St. Lawrence Hospital & Healthcare System).

St. Anthony Hospital Toxicology Laboratory, 1000 N. Lee St., Oklahoma City, OK 73101, 405–272–7052.

Toxicology & Drug Monitoring Laboratory, University of Missouri Hospital & Clinics, 2703 Clark Lane, Suite B, Lower Level, Columbia, MO 65202, 573–882–1273.

Toxicology Testing Service, Inc., 5426 N.W. 79th Ave., Miami, FL 33166, 305–593–2260.

UNILAB, 18408 Oxnard St., Tarzana, CA 91356, 818–996–7300/800–339–4299, (Formerly: MetWest-BPL Toxicology Laboratory).

Universal Toxicology Laboratories, LLC, 9930 W. Highway 80, Midland, TX 79706, 915–561–8851/888–953–8851.

*The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. DHHS, with the DHHS' National Laboratory Certification Program (NLCP) contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do. Upon finding a Canadian laboratory to be qualified, the DHHS will recommend that DOT certify the laboratory (**Federal Register**, 16 July 1996) as meeting the minimum standards of the ''Mandatory Guidelines for Workplace Drug Testing'' (59 FR, 9 June 1994, Pages 29908–29931). After receiving the DOT certification, the laboratory will be included in the monthly list of DHHS certified laboratories and participate in the NLCP certification maintenance program.

Richard Kopanda,

Executive Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. 00–30854 Filed 12–4–00; 8:45 am]

BILLING CODE 4160–20–U

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Availability of a Draft Environmental Impact Statement and Receipt of an Application for an Incidental Take Permit for the Metro Air Park Project in the Natomas Basin, Sacramento County, California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of Availability.

SUMMARY: The Metro Air Park Property Owners Association (Association) has applied to the Fish and Wildlife Service (Service) for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The Association, a non-profit mutual benefit corporation, has applied on behalf of 138 individual property owners within the Metro Air Park 1,892-acre Special Planning Area who wish to pursue development of urban uses and rice farming on these lands. The development area is in the Natomas Basin, Sacramento County, California, with associated mitigation lands for Metro Air Park development within Sacramento and Sutter Counties, California. The proposed permit would authorize incidental take of three federally listed species. The proposed taking of these species would be incidental to the implementation of the Metro Air Park Habitat Conservation Plan (Plan), which provides for the development of the Metro Air Park industrial park project along with the continuation of rice farming activities. The proposed permit also would authorize future incidental take of 10 currently unlisted species, should any of them become listed under the Act during the life of the permit. The proposed permit duration is 50 years. The permit application, available for public review, includes the Plan which describes the proposed program and mitigation, and an accompanying Implementing Agreement.

The Service also announces the availability of a Draft Environmental Impact Statement for the incidental take permit application. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

Public Meeting: A public meeting will be held on January 8, 2001, from 7 p.m. to 9 p.m. at the County of Sacramento, Hearing Room 1, 700 H Street, Sacramento, California, 95814. For additional meeting information, contact Ms. Vicki Campbell, Chief, Conservation

Planning Division at (916) 414–6600. Oral and written comments will be received at the meeting.

DATES: Written comments should be received on or before February 6, 2001.

ADDRESSES: Comments should be addressed to the Field Supervisor, Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, W–2605, Sacramento, California 95825. Written comments may be sent by facsimile to (916) 414–6711.

FOR FURTHER INFORMATION CONTACT: Ms. Vicki Campbell, Chief, Conservation Planning Division, at the Sacramento Fish and Wildlife Office (see **ADDRESSES**); telephone: (916) 414–6600.

SUPPLEMENTARY INFORMATION:

Availability of Documents

Individuals wishing copies of the application, Draft Environmental Impact Statement, Plan, and Implementing Agreement should immediately contact the Service by telephone at (916) 414–6600 or by letter to the Sacramento Fish and Wildlife Office. Copies of the Draft Environmental Impact Statement, Plan, and Implementing Agreement also are available for public inspection, during regular business hours, at the Sacramento Fish and Wildlife Office; State Library, 914 Capitol Mall, Sacramento, CA; the State Library, 828 I Street, Sacramento, CA; and the State Library, 1620 W. El Camino Avenue, Sacramento, CA.

Background Information

Section 9 of the Act and Federal regulation prohibit the ''take'' of animal species listed as endangered or threatened. Take is defined under the Act as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect listed animal species, or attempt to engage in such conduct (16 U.S.C. 1538). However, under limited circumstances, the Service may issue permits to authorize ''incidental take'' of listed animal species. ''Incidental take'' is defined by the Act as take that is incidental to, and not the purpose of, carrying out of an otherwise lawful activity. Regulations governing permits for threatened species and endangered species, respectively, are at 50 CFR 17.32 and 50 CFR 17.22.

Background

The Association seeks a permit for take of the following federally listed species: the threatened giant garter snake (*Thamnophis gigas*), threatened Aleutian Canada goose (*Branta canadensis leucopareia*), and threatened valley elderberry longhorn beetle (*Desmocerus californicus dimorphus*). This take would be incidental to urban development of the Metro Air Park industrial park project and from rice farming activities within the 1,892-acre Special Planning Area and on 119 acres of lands outside the Special Planning Area in Sacramento County, California. The proposed permit would also authorize future incidental take of the currently unlisted Swainson's hawk (*Buteo swainsoni*), greater sandhill crane (*Grus canadensis tubida*), bank swallow (*Riparia riparia*), tricolored blackbird (*Agelaius tricolor*), northwestern pond turtle (*Clemmys marmorata marmorata*), white-faced ibis (*Plegadis chihi*), loggerhead shrike (*Lanius ludovicianus*), burrowing owl (*Athene cunicularia*), delta tule pea (*Lathyrus jepsonii* ssp. *jepsonii*), and Sanford's arrowhead (*Sagittaria sanfordii*) should any of these species become listed under the Act during the life of the permit. Collectively, the 13 listed and unlisted species are referred to as the ''covered species'' for the Association's Plan.

The Metro Air Park Special Planning Area comprises 1,892 acres within the Natomas Basin in Sacramento County, California. Agriculture is the dominant land use in the Natomas Basin and on the Metro Air Park site. The predominant crops are rice, corn, sugar beets, grain, tomatoes, and pasture. Natural and uncultivated vegetation types are interspersed throughout the agricultural areas of the Natomas Basin. Natural areas are found primarily along irrigation canals, drainage ditches, pastures, and uncultivated fields. The borders of drainage canals are often associated with narrow strips of emergent vegetation and/or wooded riparian areas.

Portions of the Natomas Basin that are within the jurisdiction of the City of Sacramento are included in the Natomas Basin Habitat Conservation Plan which was completed by the City of Sacramento in November, 1997. The Metro Air Park Project is described in the Natomas Basin Habitat Conservation Plan, but because the Metro Air Park Project is outside of the City limit lines, the project cannot be covered by the City's incidental take permit. Therefore, the Association is seeking a separate incidental take permit for the Metro Air Park project. Take could occur as a result of urban development of the Metro Air Park industrial park project and from rice farming activities.

Under the Plan, the Association proposes to minimize and mitigate the effects of urban development by participating in the basin-wide conservation program set up for the entire Natomas Basin which is described in the Natomas Basin Habitat Conservation Plan. The focus of this basin-wide conservation program is the preservation, enhancement, and restoration of ecological communities which support species associated with the wetland and upland habitats. Through the payment of development fees, one-half acre of mitigation land would be established for every acre of land developed within the Plan area. The mitigation land would be acquired and managed by the Natomas Basin Conservancy, a non-profit conservation organization established to implement the Natomas Basin Habitat Conservation Plan. Mitigation fee amounts and the mitigation strategy for the Plan would be subject to the same adjustments required under the Natomas Basin Habitat Conservation Plan. To mitigate for the loss of Swainson's hawk nest trees on-site, the Association will secure 200 contiguous acres, in perpetuity, and transfer the lands to the Natomas Basin Conservancy to manage them for the benefit of Swainson's hawk. The Plan also includes take avoidance and minimization measures that include the requirement for landowners to conduct pre-construction surveys for covered species and to carry out minimization measures prior to site development.

The Plan will be implemented by the Association with assistance from the County of Sacramento and environmental consultants. The Natomas Basin Conservancy will serve as the Plan Operator, receive mitigation fees from the County, and be responsible for using the fees to acquire and manage habitat lands in accordance with the Plan.

Funding for the Plan will be financed through a combination of development fees charged at the time grading permits are issued, Mello-Roos Community Facilities District bond proceeds, and Property Owners Assessments.

The Draft Environmental Impact Statement considers four alternatives, including the Proposed Action and the No-Action/No Take Alternative. Under the No-Action/No Take Alternative, no section 10(a)(1)(B) permit would be issued for take of listed species during urban development and other activities in the Plan area. Landowners within the Plan area would continue to apply for individual incidental take permits on a case-by-case basis.

The Increased Mitigation Ratio Alternative examines the environmental effects of applying a higher mitigation ratio for addressing impacts to the giant garter snake and the Swainson's hawk than is required under the Natomas Basin Habitat Conservation Plan and the proposed Plan. This alternative would require a site-specific analysis of habitat values in order to determine specific mitigation obligations.

The Reduced Development Alternative would result in reduced development of the Metro Air Park site. The 18-hole golf course situated on approximately 279 acres would be reduced to a 140-acre 9-hole golf course. This would reallocate 140 acres on-site for the creation of habitat as a mitigation area for covered species.

The analysis provided in the Draft Environmental Impact Statement is intended to accomplish the following: inform the public of the proposed action and alternatives; address public comments received during the scoping period; disclose the direct, indirect, and cumulative environmental effects of the proposed action and each of the alternatives; and indicate any irreversible commitment of resources that would result from implementation of the proposed action.

The Service invites the public to comment on the Plan and Draft Environmental Impact Statement during a 60-day public comment period. This notice is provided pursuant to section 10(a) of the Endangered Species Act and Service regulations for implementing the National Environmental Policy Act of 1969 (40 CFR 1506.6). The Service will evaluate the application, associated documents, and comments submitted thereon to prepare a Final Environmental Impact Statement. A permit decision will be made no sooner than 30 days after the publication of the Final Environmental Impact Statement.

Dated: November 28, 2000.

Elizabeth H. Stevens,

Deputy Manager, Region 1, California/Nevada Operations Office, Sacramento, California.

[FR Doc. 00–30837 Filed 12–4–00; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Notice of Acceptance of Retrocession of Jurisdiction for the Tulalip Tribes, Washington

AGENCY: Bureau of Indian Affairs.

ACTION: Notice.

SUMMARY: Pursuant to the authority vested in the Secretary of the Interior by Executive Order No. 11435 of November 21, 1968 (33 FR 17339) and redelegated to the Assistant Secretary—Indian Affairs by 209 DM 8, I hereby accept as of 12:01 PST, November 21, 2000 retrocession to the United States of partial criminal jurisdiction over the Tulalip Tribes, which was acquired by the state of Washington, pursuant to Public Law 83–280, 67 Stat. 588, 18 U.S.C. 1162, 28 U.S.C. 1360.

The retrocession herein accepted was offered by the Proclamation by the Governor of the state of Washington on January 14, 1997, and transmitted to the Secretary on February 18, 2000. By Resolution No. 96–0167 dated November 2, 1996, the Tulalip Tribes requested that the state of Washington retrocede partial criminal jurisdiction to the tribes.

FOR FURTHER INFORMATION CONTACT: Mr. Peter Maybee, Executive Officer, Bureau of Indian Affairs, Office of Law Enforcement Services, 1849 C Street, NW, Mailstop 2607–MIB, Washington, DC 20240, telephone nubmer (202) 208–5758.

Dated: November 29, 2000.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 00–30956 Filed 12–04–00; 8:45 am]

BILLING CODE 4310–02–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–230–1030–PB-01-24 1A; OMB Approval Number 1004–0001]

Notice of information Collection To Be Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The Bureau of Land Management (BLM) has submitted the proposed collection of information listed below to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). On August 22, 2000, the BLM published a notice in the **Federal Register** (65 FR 51017) requesting comment on this proposed collection. The comment period ended on October 23, 2000. The BLM received no comments from the public in response to that notice. Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the BLM information clearance officer at the telephone number listed below.

The OMB is required to respond to this request within 60 days but may respond after days. For maximum consideration your comments and suggestions on the requirement should be made within 30 days directly to the Office of Management and Budget, Interior Department Desk Officer, (1004–001), Office of Information and Regulatory Affairs, Washington, DC 20503. Please provide a copy of your comments to the Bureau Clearance Officer (WO–630), 1849 C St., NW., Mail Stop 401 LS, Washington, DC 20240.

Nature of Comments: We specifically request your comments on the following:

1. Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;
2. The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
3. The quality, utility and clarity of the information to be collected; and
4. How to minimize the burden of collecting the information on those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology.

Title: Free Use Application and Permit (43 CFR 3620, 5510).

OMB Approval Number: 1004–0001.

Bureau Form Number: Form 5510–1.

Abstract: The BLM uses this form to collect information from applicants for free permits for vegetative or mineral materials.

Frequency: Once, at time of application.

Description of Respondents: Respondents include the general public and not-for-profit organizations.

Estimated Completion Time: 30 minutes.

Annual Responses: 450.

Filing Fee Per Response: 0.

Annual Burden Hours: 225.

Bureau Clearance Officer: Michael Schwartz, (202) 452–5033.

Dated: November 13, 2000.

Michael Schwartz,

BLM Information Collection Clearance Officer.

[FR Doc. 00–30888 Filed 12–4–00; 8:45 am]

BILLING CODE 4310–84–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–220–1020–JH–01–24 1A; OMB Approval Number 1004–0019]

Notice of Information Collection To Be Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The Bureau of Land Management (BLM) has submitted the proposed collection of information listed below to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction

Act (44 U.S.C. 3501 *et seq.*). On August 22, 2000, the BLM published a notice in the **Federal Register** (65 FR 51017) requesting comment on this proposed collection. The comment period ended on October 23, 2000. The BLM received no comments from the public in response to that notice. Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the BLM information clearance officer at the telephone number listed below.

The OMB is required to respond to this request within 60 days but may respond after 30 days. For maximum consideration your comments and suggestions on the requirement should be made within 30 days directly to the Office of Management and Budget, Interior Department Desk Officer, (1004–0019), Office of Information and Regulatory Affairs, Washington, DC 205903. Please provide a copy of your comments to the Bureau Clearance Officer (WO–630), 1849 C St., NW., Mail Stop 401 LS, Washington, DC 20240.

Nature of Comments: We specifically request your comments on the following:

1. Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;
2. The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
3. The quality, utility and clarity of the information to be collected; and
4. How to minimize the burden of collecting the information on those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology.

Title: Range Improvement Permit (as required by 43 CFR 4120.3).

OMB Approval Number: 1004–0019.

Bureau Form Number: Form 4120–7.

Abstract: The form is used to apply for approval to install the improvement and documents the records for the service life of the improvement.

Frequency: On occasion.

Description of Respondents: Respondents are applicants requesting permission to construct range improvements on public lands.

Estimated Completion Time: 20 minutes.

Annual Responses: 60.

Filing Fee Per Response: 0.

Annual Burden Hours: 20.

Bureau Clearance Office: Michael Schwartz, (202) 452–5033.

Dated: November 13, 2000.

Michael Schwartz,

BLM Information Collection Clearance Officer.

[FR Doc. 00–30889 Filed 12–4–00; 8:45 am]

BILLING CODE 4310–84–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–230–1030–PB–01–24 1A]

OMB Approval Number 1004–0058; Notice of Information Collection To Be Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The Bureau of Land Management (BLM) has submitted the proposed collection of information listed below to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). On August 22, 2000, the BLM published a notice in the **Federal Register** (65 FR 51018) requesting comment on this proposed collection. The comment period ended on October 23, 2000. The BLM received no comments from the public in response to that notice. Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the BLM information clearance officer at the telephone number listed below.

The OMB is required to respond to this request within 60 days but may respond after 30 days. For maximum consideration your comments and suggestions on the requirement should be made within 30 days directly to the Office of Management and Budget, Interior Department Desk Officer, (1004–0058), Office of Information and Regulatory Affairs, Washington, DC 20503. Please provide a copy of your comments to the Bureau Clearance Officer (WO–630), 1849 C St., N.W., Mail Stop 401 LS, Washington, DC 20240.

Nature of Comments: We specifically request your comments on the following:

1. Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;
2. The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
3. The quality, utility and clarity of the information to be collected; and
4. How to minimize the burden of collecting the information on those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology.

Title: Timber Export Reporting and Substitution Determination (43 CFR 5424).

OMB Approval Number: 1004–0058.

Bureau Form Number: Form 5460–17.

Abstract: The BLM uses this form to determine if there was a substitution of Federal timber for exported private timber in violation of the Forest Resources Conservation and Shortage Act of 1990.

Frequency: On occasion and within 12 months of last export sale.

Description of Respondents: Respondents include Federal timber purchasers.

Estimated Completion Time: 1 hour.

Annual Responses: 25.

Filing Fee Per Response: 0.

Annual Burden Hours: 45.

Bureau Clearance Officer: Michael Schwartz, (202) 452–5033.

Dated: Dated: November 15, 2000.

Michael Schwartz,

BLM Information Collection Clearance Officer.

[FR Doc. 00–30890 Filed 12–4–00; 8:45 am]

BILLING CODE 4310–84–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–310–1310–01–24–1A–PB]

OMB Approval Number 1004–0132; Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The Bureau of Land Management (BLM) has submitted the proposed collection of information listed below to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 3501 *et seq.*). On August 18, 2000, the BLM published a notice in the **Federal Register** (65 FR 50557) requesting comments on the collection. The comment period ended October 17, 2000. No comments were received. Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the Bureau's Clearance Officer at the telephone number listed below.

OMB is required to respond to this request within 60 days but may respond after 30 days. For maximum consideration, your comments and suggestions on the requirement should be made within 30 days directly to the Office of Management and Budget, Interior Department Desk Officer (1004–0132), Office of Information and Regulatory Affairs, Washington, DC, 20503. Please provide a copy of your comments to the Bureau Clearance Officer (WO–630), 1849 C St., NW., Mail Stop 401 LS, Washington, DC 20240.

Nature of Comments: We specifically request your comments on the following:

1. Whether the collection of information is necessary for the proper functioning of the Bureau of Land Management, including whether the information will have practical utility;

2. The accuracy of BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;

3. The quality, utility and clarity of the information to be collected; and

4. How to minimize the burden of collecting the information on those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology.

Title: Geothermal Resources Operations (as required by 43 CFR 3260).

OMB Approval Number: 1004–0132.

Abstract: Data submitted by geothermal lessees and operators issued for agency approval of specific and/or additional operations on a well and to report the completion and/or progress of such additional work.

Bureau Form Numbers: 3260–2, 3260–3, 3260–5.

Frequency: Nonrecurring, on occasion, and monthly.

Description of Respondents: Lessees and operators of Federal geothermal leases and Indian geothermal contracts subject to BLM oversight.

Estimated Completion Time: 2 hours.

Annual Responses: 760.

Annual Burden Hours: 1,700.

Bureau Clearance Officer: Michael Schwartz, 202–452–5033.

Dated: November 8, 2000.

Michael Schwartz,

BLM Information Collection Clearance Officer.

[FR Doc. 00–30891 Filed 12–4–00; 8:45 am]

BILLING CODE 4310–84–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–310–1310–01–24 1A–PB]

OMB Approval Number 1004–0134; Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The Bureau of Land Management (BLM) has submitted the proposed collection of information listed below to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 3501 *et seq.*). On August 22, 2000, the BLM published a notice in the **Federal Register** (65 FR 51019) requesting comments on the collection. The comment period ended October 23, 2000. No comments were received. Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the BLM Clearance Officer at the telephone number listed below.

OMB is required to respond to this request within 60 days but may respond after 30 days. For maximum consideration your comments and suggestions on the requirement should be made within 30 days directly to the Office of Management and Budget, Interior Department Desk Officer (1004–0134), Office of Information and Regulatory Affairs, Washington, D.C., 20503. Please provide a copy of your comments to the Bureau Clearance Officer (WO–630), 1849 C St., N.W., Mail Stop 401 LS, Washington, D.C. 20240.

Nature of Comments: We specifically request your comments on the following:

1. Whether the collection of information is necessary for the proper functioning of the Bureau of Land Management, including whether the information will have practical utility;

2. The accuracy of BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;

3. The quality, utility and clarity of the information to be collected; and

4. How to minimize the burden of collecting the information on those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology.

Title: Onshore Oil and Gas Operations Nonform Items (as required by 43 CFR 3160).

OMB Approval Number: 1004–0134.

Abstract: Federal and Indian (except Osage) oil and gas operators and operating rights owners are required to retain and/or provide data so that proposed operations may be approved or compliance with granted approvals may be monitored.

Bureau Form Numbers: None.

Frequency: On occasion and nonrecurring.

Description of Respondents: Operators and operating rights owners of Federal and Indian (except Osage) oil and gas leases.

Estimated Completion Time:

Information collection (43 CFR)	Requirement	Hours per response	Burden hours	Respondents
3162.3–1(a)	Well-Spacing Program	.5	75	150
3162.3–1(e)	Drilling Plans	8	23,000	2,875
3162.6	Well Markers	.5	150	300
3162.5–2(b)	Direction Drilling	1	165	165 or 5% of wells
3162.4–2(a)	Drilling Tests, Logs, Surveys	1	330	330 or 10% of wells
3162.3–4(a)	Plug and Abandon for Water Injection.	1.5	1,800	1,200
3162.3–4(b)	Plug and Abandon for Water Source.	1.5	1,800	1,200
3162.7–1(d)	Additional Gas Flaring	1	400	400
3162.5–1(c)	Report of Spills, Discharges, or Other Undesirable Events.	2	400	200
3162.5–1(b)	Disposal of Produced Water	2	3,000	1,500
3162.5–1(d)	Contingency Plan	16	800	50
3162.4–1(a) and 3162.7–5(d)(1)	Schematic/Facility Diagrams	4	9,400	2,350
3162.7–1(b)	Approval and Reporting of Oil in Pits.	.5	260	520
3164.1 (Order No. 3)	Prepare Run Tickets	.2	18,000	90,000
3162.7–5(b)	Records on Seals	.2	18,000	90,000

Information collection (43 CFR)	Requirement	Hours per response	Burden hours	Respondents
3165.1(a)	Application for Suspension	8	800	100
3165.3(b)	State Director Review	16	1,600	100
3162.7–5(c)	Site Security	7	16,905	2,415
Totals			96,885	193,855

Annual Responses: 193,855.

Annual Burden Hours: 96,885.

Filing Fee Per Response: 0.

Bureau Clearance Officer: Michael Schwartz, (202) 452–5033.

Dated: November 14, 2000.

Michael Schwartz,

BLM Information Collection Clearance Officer.

[FR Doc. 00–30892 Filed 12–4–00; 8:45 am]

BILLING CODE 4310–84–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–310–1310–01–24 1A–PB]

OMB Approval Number 1004–0135; Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The Bureau of Land Management (BLM) has submitted the proposed collection of information listed below to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). On August 18, 2000, the BLM published a notice in the **Federal Register** (65 FR 50558) requesting comments on the collection. The comment period ended October 17, 2000. No comments were received. Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the BLM Clearance Officer at the telephone number listed below.

OMB is required to respond to this request within 60 days but may respond after 30 days. For maximum consideration your comments and suggestions on the requirement should be made within 30 days directly to the Office of Management and Budget, Interior Department Desk Officer (1004–0135), Office of Information and Regulatory Affairs, Washington, DC 20503. Please provide a copy of your comments to the Bureau Clearance Officer (WO–630), 1849 C St., NW., Mail Stop 401 LS, Washington, DC 20240.

Nature of Comments: We specifically request your comments on the following:

1. Whether the collection of information is necessary for the proper functioning of the Bureau of Land Management, including whether the information will have practical utility;
2. The accuracy of BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
3. The quality, utility and clarity of the information to be collected; and
4. How to minimize the burden of collecting the information of those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology.

Title: Sundry Notices and Reports on Wells (as required by 43 CFR 3162).

OMB Approval Number: 1004–0135.

Abstract: Data submitted by oil and gas operators are used for agency approval of specific additional operations on a well and to report the completion of such additional work.

Bureau Form Number: 3160–5.

Frequency: On occasion.

Description of Respondents: Operators and operating rights owners of Federal and Indian (except Osage) oil and gas leases.

Estimated Completion Time: 25 minutes.

Annual Responses: 34,000.

Annual Burden Hours: 14,166.

Filing Fee per Response: 0.

Bureau Clearance Officer: Michael Schwartz, (202) 452–5033.

Dated: November 8, 2000.

Michael Schwartz,

BLM Information Collection Clearance Officer.

[FR Doc. 00–30893 Filed 12–4–00; 8:45 am]

BILLING CODE 4310–84–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–310–1310–01–24–1A–PB]

OMB Approval Number 1004–0136; Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The Bureau of Land Management (BLM) has submitted the proposed collection of information listed below to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 3501 *et seq.*). On August 18, 2000, the BLM published a notice in the **Federal Register** (65 FR 50559) requesting comments on the collection. The comment period ended October 17, 2000. No comments were received. Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the BLM Clearance Officer at the telephone number listed below.

OMB is required to respond to this request within 60 days but may respond after 30 days. For maximum consideration your comments and suggestions on the requirement should be made within 30 days directly to the Office of Management and Budget, Interior Department Desk Officer (1004–0136), Office of Information and Regulatory Affairs, Washington, DC 20503. Please provide a copy of your comments to the Bureau Clearance Officer (WO–630), 1849 C St., NW., Mail Stop 401 LS, Washington, DC 20240.

Nature of Comments: We specifically request your comments on the following.

1. Whether the collection of information is necessary for the proper functioning of the Bureau of Land Management, including whether the information will have practical utility;
2. The accuracy of BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
3. The quality, utility and clarity of the information to be collected; and
4. How to minimize the burden of collecting the information on those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology.

Title: Application for Permit for Drill, Deepen, or Plug Back (as required by 43 CFR 3162).

OMB Approval Number: 1004–0136.

Abstract: Data submitted by oil and gas operators are used for agency approval of proposed drilling operations through review of technical and environmental factors.

Bureau Form Number: 3160–3.
Frequency: On occasion.
Description of Respondents; Oil and gas operators.
Estimated Completion Time: 30 minutes.
Annual Responses: 4,000.
Annual Burden Hours: 2,000.
Filing Fee Per Response: 0.
Bureau Clearance Officer: Michael Schwartz, (202) 452–5033.

Dated: November 18, 2000.

Michael Schwartz,
BLM Information Collection Clearance Officer.

[FR Doc. 00–30894 Filed 12–4–00; 8:45 am]

BILLING CODE 4310–84–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–310–1310–01–24–1A–PB]

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The Bureau of Land Management (BLM) has submitted the proposed collection of information listed below to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 3501 *et seq.*). On August 18, 2000, the BLM published a notice in the **Federal Register** (65 FR 50560) requesting comments on the collection. The comment period ended October 17, 2000. No comments were received. Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the BLM Clearance Office at the telephone number listed below.

OMB is required to respond to this request within 60 days but may respond after 30 days. For maximum consideration, your comments and suggestions on the requirement should be made within 30 days directly to the Office of Management and Budget, Interior Department Desk Officer (1004–0137), Office of Information and Regulatory Affairs, Washington, DC 20503. Please provide a copy of your comments to the Bureau Clearance Officer (WO–630), 1849 C St., NW., Mail Stop 401 LS, Washington, DC 20240.

Nature of Comments

We specifically request your comments on the following:

1. Whether the collection of information is necessary for the proper functioning of the Bureau of Land Management, including whether the information will have practical utility;
2. The accuracy of BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
3. The quality, utility and clarity of the information to be collected; and
4. How to minimize the burden of collecting the information on those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology.

Title: Well Completion or Recompletion Report and Log, (as required by 43 CFR Part 3160).
OMB Approval Number: 1004–0137.
Abstract: Data submitted by oil and gas operators is used for agency approval of specific additional operations on a well and to report the completion of such additional work.
Bureau Form Number: 3160–4.
Frequency: Nonrecurring.
Description of Respondents: Oil and gas operators.
Estimated Completion Time: 1 hour.
Annual Responses: 2,200.
Annual Burden Hours: 2,290.
Filing Fee Per Response: 0.
Bureau Clearance Officer: Michael Schwartz, (202) 452–5033.

Dated: November 18, 2000.

Michael Schwartz,
BLM Information Collection Clearance Officer.

[FR Doc. 00–30895 Filed 12–4–00; 8:45 am]

BILLING CODE 4310–84–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–310–0777–AE]

Notice of Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Northwest California Resource Advisory Council, Williams, California.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committees Act (Pub. L. 92–463) and the Federal Land Policy and Management Act (Pub. L. 94–579), the U.S. Bureau of Land Management's Northwest California Resource Advisory Council will meet Wednesday and Thursday, Jan. 24, and 25, 2001, for a business meeting and field tour. The meeting and tour are open to the public, but anyone participating in the tour must provide their own transportation and lunch.

SUPPLEMENTARY INFORMATION: The meeting begins at 10 a.m. Wednesday, Jan. 24, at Granzella's Inn, 391 Sixth St., Williams, California. The members will depart immediately for a tour of public lands managed by the BLM's Ukiah Field Office. Discussions will focus on cultural resources and Native American issues. On Thursday, Jan. 25, the council will convene a business meeting at 8 a.m. in the Conference Room at Granzella's Inn. Agenda items will include a report on the BLM's new mining regulations, a presentation on best management practices for water quality, a status report on a management feasibility study at Lake Berryessa, and reports from the managers of the BLM Arcata, Redding and Ukiah field offices.

Time will be set aside for public comments. Depending on the number of persons wishing to speak, a time limit may be established.

FOR ADDITIONAL INFORMATION: Contact Lynda J. Roush, BLM Arcata Field Manager, at (707) 825–2300.

Joseph J. Fontana,
Public Affairs Officer.

[FR Doc. 00–30838 Filed 12–4–00; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf (OCS), Gulf of Mexico (GOM) Region, Proposed Eastern GOM Sale 181

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of Availability of the Draft Environmental Impact Statement (EIS) and Public Hearings on Proposed Eastern GOM Sale 181.

SUMMARY: The MMS has prepared a draft EIS on a proposed OCS oil and gas lease sale in the Eastern GOM. This proposed sale is the only Eastern GOM sale scheduled during the current 5-Year Oil and Gas Leasing Program and the first proposed sale in the Eastern GOM since 1988.

You may obtain single copies of the draft EIS from the MMS, Gulf of Mexico OCS Region, Attention: Public Information Office (MS–5034), 1201 Elmwood Park Boulevard, Room 114, New Orleans, Louisiana 70123–2394, or by calling 1–800–200-GULF.

You may look at copies of the draft EIS in the following libraries:

Louisiana

Calcasieu Parish Library, 327 Broad Street, Lake Charles;
Cameron Parish Library, Marshall Street, Cameron;

Grand Isle Branch Library, Highway 1, Grand Isle;
Iberville Parish Library, 24605 J. Gerald Berret Boulevard, Plaquemine;
Jefferson Parish Regional Branch Library, 4747 West Napoleon Avenue, Metairie;
Jefferson Parish West Bank Outreach Branch Library, 2751 Manhattan Boulevard, Harvey;
Lafayette Public Library, 301 W. Congress Street, Lafayette;
Lafitte Branch Library, Route 1, Box 2, Lafitte;
Lafourche Parish Library, 303 West 5th Street, Thibodaux;
Louisiana State University Library, 760 Riverside Road, Baton Rouge;
Louisiana Tech University, Prescott Memorial Library, Everet Street, Ruston;
Loyola University, Government Documents Library, 6363 St. Charles Avenue, New Orleans;
LUMCON, Library, Star Route 541, Chauvin;
McNeese State University, Luther E. Frazar Memorial Library, Ryan Street, Lake Charles;
New Orleans Public Library, 219 Loyola Avenue, New Orleans;
Nicholls State University, Nicholls State Library, Leighton Drive, Thibodaux;
Plaquemines Parish Library, 203 Highway 11, South, Buras;
St. Bernard Parish Library, 1125 East Street, Bernard Highway, Chalmette;
St. Charles Parish Library, 105 Lakewood Drive, Luling;
St. John The Baptist Parish Library, 1334 West Airline Highway, LaPlace;
St. Mary Parish Library, 206 Iberia Street, Franklin;
St. Tammany Parish Library, Covington Branch, 310 West 21st Street, Covington;
St. Tammany Parish Library, Slidell Branch, 555 Robert Boulevard, Slidell;
Terrebonne Parish Library, 424 Roussell Street, Houma;
Tulane University, Howard Tilton Memorial Library, 7001 Freret Street, New Orleans;
University of New Orleans Library, Lakeshore Drive, New Orleans;
University of Southwestern Louisiana, Dupre Library, 302 East St. Mary Boulevard, Lafayette;
Vermilion Parish Library, Abbeville Branch, 200 North Street, Abbeville;

Mississippi

Eudora Welty Library, 300 North State Street, Jackson;
Gulf Coast Research Laboratory, Gunter Library, 703 East Beach Drive, Ocean Springs;
Hancock County Library System, 312 Highway 90, Bay St. Louis;
Harrison County Library, 14th and 21st Avenues, Gulfport;
Jackson George Regional Library System, 3214 Pascagoula Street, Pascagoula;

Alabama

Auburn University at Montgomery Library, 7300 University Drive, Montgomery;
Dauphin Island Sea Lab, Marine Environmental Science Consortium, Library, Bienville Boulevard, Dauphin Island;
Gulf Shores Public Library, Municipal Complex, Route 3, Gulf Shores;
Mobile Public Library, 701 Government Street, Mobile;
Montgomery Public Library, 445 South Lawrence Street, Montgomery;
Thomas B. Norton Public Library, 221 West 19th Avenue, Gulf Shores;
University of South Alabama, University Boulevard, Mobile;

Florida

Bay County Public Library, 25 West Government Street, Panama City;
Charlotte-Glades Regional Library System, 18400 Murdock Circle, Port Charlotte;
Collier County Public Library, 650 Central Avenue, Naples;
Environmental Library, Sarasota County, 7112 Curtis Avenue, Sarasota;
Florida A & M University, Coleman Memorial Library, Martin Luther King Boulevard, Tallahassee;
Florida Northwest Regional Library System, 25 West Government Street, Panama City;
Florida State University, Strozier Library, Call Street and Copeland Avenue, Tallahassee;
Fort Walton Beach Public Library, 105 Miracle Strip Parkway, Fort Walton Beach;
Leon County Public Library, 200 West Park Avenue, Tallahassee;
Marathon Public Library, 3152 Overseas Highway, Marathon;
Monroe County Public Library, 700 Fleming Street, Key West;
Port Charlotte Public Library, 2280 Aaron Street, Port Charlotte;
Selby Public Library, 1001 Boulevard of the Arts, Sarasota;
St. Petersburg Public Library, 3745 Avenue North, St. Petersburg;
Tampa-Hillsborough County Library, Documents Division, 900 North Ashley Drive, Tampa;
University of Florida Library, University Avenue, Gainesville;
University of Florida, Holland Law Library, Southwest 25th Street and 2nd Avenue, Gainesville;
University of West Florida Library, 1100 University Parkway, Pensacola;
West Florida Regional Library, 200 West Gregory Street, Pensacola.

There will be four public hearings held to receive comments on the draft EIS. The hearings will provide us with information that will help in the evaluation of the potential effects of the proposed lease sale.

January 8, 2001, 2 p.m. to 4 p.m., Minerals Management Service, Gulf of Mexico Region,1201 Elmwood Park Boulevard, New Orleans, Louisiana;

January 9, 2001, 6 p.m. to 9 p.m., New World Landing, 600 South Palafox, Pensacola, Florida;

January 10, 2001, 1 p.m. to 4 p.m. and 6 p.m. to 9 p.m., Tallahassee-Leon County Civic Center, Tallahassee, Florida; and

January 11, 2001, 6 p.m. to 9 p.m., Adams Mark Hotel, 64 South Water Street, Mobile, Alabama.

If you wish to testify at a hearing, you may register beginning 1 hour prior to the meeting. Speakers will be limited to 10 minutes. Each hearing will recess when all speakers have had an opportunity to testify. If there are no additional speakers, we will adjourn the hearing immediately after the recess. Written statements submitted at a hearing will be considered part of the hearing record. If you are unable to attend the hearing, you may submit written statements until January 23, 2001. Send written statements to the Regional Director, Gulf of Mexico OCS Region, MMS, 1201 Elmwood Park Boulevard, MS–5410, New Orleans, Louisiana 70123–2394. All comments are due by January 23, 2001.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record a respondent's identity, as allowable by law. If you wish to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Dated: November 9, 2000.

Carolita U. Kallaur,

Associate Director for Offshore Minerals Management.

[FR Doc. 00–30925 Filed 12–4–00; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Availability of Draft Director's Order Concerning National Park Service Policies and Procedures for Social Science

AGENCY: National Park Service, Interior.

ACTION: Notice of availability.

SUMMARY: The National Park Service (NPS) has prepared a Director's Order setting forth its policies and procedures related to social science. When adopted, the policies and procedures will apply to all units of the national park system.

DATES: Written comments will be accepted until January 15, 2001.

ADDRESSES: Draft Director's Order #78 is available on the Internet at *http://www.nps.gov/refdesk/DOrders/index.htm.* Requests for copies and written comments should be sent to Dr. Gary Machlis, NPS Visiting Chief Social Scientist, Social Science Program, National Park Service, 1849 C Street, NW (3127), Washington, DC 20240, or to his Internet address: gary__machlis@nps.gov.

FOR FURTHER INFORMATION CONTACT: Dr. Gary Machlis at *gary__machlis@nps.gov.*

SUPPLEMENTARY INFORMATION: The NPS is updating its current system of internal policies. When these documents contain new policy or procedural requirements that may affect parties outside the NPS, they are first made available for public review and comment before being adopted. This draft of Director's Order #78 covers social science topics such as permits, data collection and Paperwork Reduction Act compliance, ethical guidelines, and roles and responsibilities related to social science in the National Park Service.

Individual respondents may request that we withhold their home address from the administrative record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment.

Dated: November 27, 2000.

Michael Soukup,

Associate Director, Natural Resource Stewardship and Science.

[FR Doc. 00–30848 Filed 12–4–00; 8:45 am]

BILLING CODE 4321–70–M

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the National Museum of Health and Medicine, Armed Forces Institute of Pathology, Washington, DC

AGENCY: National Park Service

ACTION: Notice

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects in the possession of the National Museum of Health and Medicine, Armed Forces Institute of Pathology, Washington, DC.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 43 CFR 10.2 (c). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of these Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations within this notice.

A detailed assessment of the human remains was made by National Museum of Health and Medicine professional staff in consultation with representatives of the Cheyenne-Arapaho Tribes of Oklahoma and the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana.

In 1879, human remains representing one individual were sent to the Army Medical Museum (now the National Museum of Health and Medicine, Armed Forces Institute of Pathology) by U.S. Army Assistant Surgeon A. Girard following the removal of bone fragments from an individual during medical treatment. This individual has been identified as Black Horse, a Cheyenne man. No associated funerary objects are present.

Accession records from the National Museum of Health and Medicine, Armed Forces Institute of Pathology indicate that these human remains are those of Black Horse, a Cheyenne man. Early in 1879, Black Horse was wounded by a settler on the ''Niobrara'' (river) and subsequently captured with Little Wolf's band and treated by U.S. Army surgeons at Fort Keogh, Custer County, MT. Biological evidence of the human remains is consistent with the accession records.

On October 6, 2000, Gilbert Brady, Sr., as the great-grandson and authorized representative of the descendants of Black Horse, claimed Black Horse's remains as a lineal descendent, tracing his ancestry directly and without interruption by means of the traditional kinship system of the Northern Cheyenne. The Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana supports this claim.

Based on the above-mentioned information, officials of the National Museum of Health and Medicine, Armed Forces Institute of Pathology, have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of one individual of Native American ancestry. Officials of the National Museum of Health and Medicine, Armed Forces Institute of Pathology, have determined that, pursuant to 43 CFR 10.2 (b)(1), Gilbert Brady, Sr. can trace his ancestry directly and without interruption by means of the traditional kinship system of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana to the human remains of Black Horse. This notice has been sent to Gilbert Brady, Sr., Annie Brady, Anne Limberhand, Genevieve Bearquiver, and officials of the Cheyenne-Arapaho Tribes of Oklahoma and the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana. Any other individuals who believe themselves to be lineal descendants of Black Horse should contact Lenore Barbian, Ph.D., Anatomical Collections Manager, National Museum of Health and Medicine, Armed Forces Institute of Pathology, Walter Reed Army Medical Center, Building 54, Washington, DC 20306–6000, telephone (202) 782–2203, facsimile (202) 782–3573, before January 4, 2001. Repatriation of the human remains to Mr. Brady may begin after that date if no additional claimants come forward.

Dated: November 17, 2000.

John Robbins,

Assistant Director, Cultural Resources Stewardship and Partnerships.

[FR Doc. 00–30847 Filed 12–4–00 ; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

CORRECTION— Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the Anthropological Studies Center, Archaeological Collections Facility, Sonoma State University, Rohnert Park, CA; and in the Control of the California Department of Transportation, Sacramento, CA

AGENCY: National Park Service.

ACTION: Correction.

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects in the possession of the Anthropological Studies Center (ASC), Archaeological Collections Facility, Sonoma State University, Rohnert Park, CA; and in the control of the California Department of Transportation (CALTRANS), Sacramento, CA. **This notice corrects the contact address of the Notice of Inventory Completion published August 16, 2000. The last paragraph of the August 16, 2000 notice is corrected as follows:** This notice has been sent to officials of the Santa Rosa Indian Community of the Santa Rosa Rancheria, California. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains should contact Tina Biorn, Environmental Program, Department of Transportation, **P.O. Box 942094 (M.S. 19)**, Sacramento, CA 94274–0001, telephone (916) 653–0013, before August 16, 2000. Repatriation of the human remains to the Santa Rosa Indian Community of the Santa Rosa Rancheria, California may begin after that date if no additional claimants come forward.

Dated: November 17, 2000.

John Robbins,

Assistant Director, Cultural Resources Stewardship and Partnerships.

[FR Doc. 00–30846 Filed 12–4–00; 8:45 am]

BILLING CODE 4310–70–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–433]

Certain Safety Eyewear and Components Thereof; Notice of Commission Decision Not To Review an Initial Determination 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 presiding administrative law judge's (''ALJ's'') initial determination (''ID'') terminating the above-captioned investigation in its entirety based on a settlement agreement.

FOR FURTHER INFORMATION CONTACT: Gracemary Rizzo, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205–3117. 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).

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 1, 2000, based on a complaint filed by Bacou USA Safety, Inc. and Uvex Safety Manufacturing, Inc. (''complainants''), both of Smithfield, Rhode Island. The complaint named one respondent, Crews, Inc. of Memphis, Tennessee.

On October 23, 2000, complainants and respondent filed a joint motion to terminate the investigation on the basis of the settlement agreement under Commission rule 210.21(b).

On November 2, 2000, the Commission investigative attorney filed a response supporting the motion the joint motion. On November 3, 2000, the ALJ issued an ID (Order No. 37) granting the joint motion. No party petitioned for review of the ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42). Copies of the ALJ's 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.

Issued: November 28, 2000.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 00–30865 Filed 12–4–00; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Investigation No. 731–TA–864 (Final)

Certain Stainless Steel Butt-Weld Pipe Fittings From Germany

Determination

On the basis of the record [1] developed in the subject investigation, the United States International Trade Commission determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act), that imports of the subject merchandise from Germany were negligible for purposes of the Commission's analysis of material injury by reason of imports of certain stainless steel butt-weld pipe fittings from Germany but that there is a potential that such imports will imminently account for more than three percent of total imports. The Commission also determines that an industry in the United States is not threatened with material injury by reason of imports of certain stainless steel butt-weld pipe fittings from Germany, provided for in subheading 7307.23.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

Background

The Commission instituted this investigation effective December 29, 1999, following receipt of a petition filed with the Commission and the Department of Commerce by Alloy Piping Products, Inc., Shreveport, LA; Flowline Division of Markovitz Enterprises, Inc., New Castle, PA; Gerlin, Inc., Carol Stream, IL; and Taylor Forge Stainless, Inc., North Branch, NJ. The final phase of the investigation was scheduled by the Commission following notification of a preliminary determination by the Department of Commerce that imports of certain stainless steel butt-weld pipe

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

fittings from Germany were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of August 23, 2000 (65 FR 51328). The hearing was held in Washington, DC, on October 17, 2000, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on November 29, 2000. The views of the Commission are contained in USITC Publication 3372 (November 2000), entitled Certain Stainless Steel Butt-Weld Pipe Fittings from Germany: Investigation No. 731–TA–864 (Final).

Issued: November 29, 2000.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 00–30864 Filed 12–4–00; 8:45 am]

BILLING CODE 7020–02–U

INTERNATIONAL TRADE COMMISSION

[USITC SE–00–053]

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: International Trade Commission.

TIME AND DATE: December 12, 2000 at 11 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meeting: none.
2. Minutes.
3. Ratification List.
4. Inv. No. 731–TA–861 (Final) (Certain Expandable Polystyrene Resins from Indonesia)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on December 20, 2000.)
5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: November 30, 2000.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 00–31048 Filed 12–1–00; 2:39 pm]

BILLING CODE 7020–02–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By notice dated June 26, 2000, and published in the **Federal Register** on July 14, 2000, (65 FR 43785), American Radiolabeled Chemical, Inc., 11624 Bowling Green Drive, St. Louis, Missouri 63146, made application by letter to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Lysergic acid diethylamide (7315)	I
Phencyclidine (7471)	II
Hydromorphone (9150)	II

The firm plans to bulk manufacture small quantities of the listed controlled substances as radiolabeled compounds. No comments or objections have been received. DEA has considered the factors in title 21, United States Code, section 823(a) and determined that the registration of American Radiolabeled Chemical, Inc. to manufacture the listed controlled substances is consistent with the public interest at this time. DEA has investigated American Radiolabeled Chemical, Inc. on a regular basis to ensure that the company's continued registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security systems, audits of the company's records, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823 and 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic classes of controlled substances listed above is granted.

Dated: November 20, 2000.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 00–30936 Filed 12–4–00; 8:45 am]

BILLING CODE 4410–9–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By notice dated August 21, 2000, and published in the **Federal Register** on September 6, 2000, (65 FR 54067), Applied Science Labs, Division of Alltech Associates, Inc., 2701 Carolean Industrial Drive, P.O. Box 440, State College, Pennsylvania 16801, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Methcathinone (1237)	I
N-Ethylamphetamine (1475)	I
N,N-Dimethylamphetamine (1480)	I
4-Methylaminorex (cis isomer) (1590).	I
Lysergic acid dyethylamide (7315)	I
Mescaline (7381)	I
3,4-Methylenedioxyamphetamine (7400).	I
N-Hydroxy-3,4-methylenedioxyamphetamine (7402).	I
3,4-Methylenedioxy-N-ethylamphetamine (7404).	I
3,4-Methylenedioxymethamphetamine (7405).	I
N-Ethyl-1-phenylcyclohexylamine (7455).	I
1-(1-Phenylcyclohexyl)pyrrolidine (7458).	I
1-[1-(2-Thienyl)cyclohexyl]piperidine (7470).	I
Dihydromorphine (9145)	I
Normorphine (9313)	I
1-Phenylcyclohexylamine (7460)	II
Phencyclidine (7471)	II
Phenylacetone (8501)	II
1-Piperidinocyclohexanecarbonitrile (8603).	II
Cocaine (9041)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Benzoylecgonine (9180)	II
Morphine (9300)	II
Noroxymorphone (9668)	II

The firm plans to manufacture small quantities of the listed controlled substances for reference standards.

No comments or objections were received. DEA has considered the factors in title 21, United States Code, section 823(a) and determined that the registration of Applied Science Labs to manufacture the listed controlled substances is consistent with the public interest at this time. DEA has investigated Applied Science Labs on a regular basis to ensure that the company's continued registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security systems, audits of the company's records, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823 and 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic classes of controlled substances listed above is granted.

Dated: November 20, 2000.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 00–30935 Filed 12–4–00; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By notice dated August 14, 2000 and published in the **Federal Register** on August 23, 2000, (65 FR 51330), Applied Science Labs, Inc., A Division of Alltech Associates, Inc., 2701 Carolean Industrial Drive, P.O. Box 440, State College, Pennsylvania 16801, made application by renewal to the Drug Enforcement Administration to be registered as an importer of the basic classes of controlled substances listed below:

Drug	Schedule
Heroine (9200)	I
Cocaine (9041)	II
Codeine (9050)	II
Meperidine (9230)	II
Methadone (9250)	II
Morphine (9300)	II

The firm plans to import these controlled substances for the manufacture of reference standards.

No comments or objections have been received. DEA has considered the factors in title 21, United States Code, section 823(a) and determined that the registration of Applied Science Labs, Inc., to import the listed controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Applied Science Labs, Inc., on a regular basis to ensure that the company's continued registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security systems, audits of the company's records, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to section 1008(a) of the Controlled Substances Import and Export Act and in accordance with title 21, Code of Federal Regulations, § 1301.34, the above firm is granted registration as an importer of the basic classes of controlled substances listed above.

November 20, 2000.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 00–30938 Filed 12–4–00; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importation of Controlled Substances; Notice of Registration

By notice dated August 8, 2000, and published in the **Federal Register** on August 23, 2000 (65 FR 51331), Calbiochem-Novabiochem Corporation, 10394 Pacific Center Court, Attn: Receiving Inspector, San Diego, California 92121–4340, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the basic classes of controlled substances listed below:

Drug	Schedule
Tetrahydrocannabinols (7370)	I
Mescaline (7381)	I
Phencyclidine (7471)	II
Phenylaceton (8501)	II
Cocaine (9041)	II

The firm plans to import small quantities of the listed controlled substances to make reagents for distribution to the biomedical research community.

No comments or objections have been received. DEA has considered the factors in title 21, United States Code, section 823(a) and determined that the registration of Calbiochem-Novabiochem Corporation is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Calbiochem-Novabiochem Corporation on a regular basis to ensure that the company's continued registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security systems, audits of the company's records, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to section 1008(a) of the Controlled Substance Import and Export Act and in accordance with the Title 21, Code of Federal Regulations, § 1301.34, the above firm is granted registration as an importer of the basic classes of controlled substances listed above.

Dated: November 20, 2000.

John H. King,

Deputy Assistant Administrator, Office of Division Control, Drug Enforcement Administration.

[FR Doc. 00–30939 Filed 12–4–00; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated June 29, 2000, and published in the **Federal Register** on July 14, 2000, (65 FR 43785), Cambridge Isotope Lab, 50 Frontage Road, Andover, Massachusetts 01810, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Methaqualone (2565)	I
Dimethyltryptamine (7435)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Pentobarbital (2270)	II
Secobarbital (2315)	II
Phencyclidine (7471)	II
Phenylacetone (8501)	II
Cocaine (9041)	II
Codeine (9050)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Benzoylecgonine (9180)	II
Methadone (9250)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273).	II
Morphine (9300)	II
Fentanyl (9801)	II

The firm plans to manufacture small quantities of the listed controlled substances to produce isotope labeled standards for drug analysis.

No comments or objections have been received. DEA has considered the factors in Title 21, United States Code, section 823(a) and determined that the registration of Cambridge Isotope Lab to manufacture the listed controlled substances is consistent with the public interest at this time. DEA has investigated Cambridge Isotope Lab on a regular basis to ensure that its continued registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security systems, audits of the company's records, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823 and 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic classes of controlled substances listed above is granted.

Dated: November 20, 2000.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 00–30932 Filed 12–4–00; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated June 14, 2000, and published in the **Federal Register** on June 26, 2000, (65 FR 39430), Celgene Corporation, 7 Powder Horn Drive, Warren, New Jersey 07059, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of methylphenidate (1724), a basic class of controlled substance listed in Schedule II.

The firm plans to manufacture methylphenidate for product research and development.

No comments or objections have been received. DEA has considered the factors in Title 21, United States Code, section 823(a) and determined that the registration of Celgene Corporation to manufacture methylphenidate is consistent with the public interest at this time. DEA has investigated the Celgene Corporation on a regular basis to ensure that the company's continued registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security systems, audits of the company's records, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823 and 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic class of controlled substance listed above is granted.

Dated: October 10, 2000.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 00–30933 Filed 12–4–00; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By notice dated June 29, 2000, and published in the **Federal Register** on July 14, 2000, (65 FR 43785), Chattem Chemicals, Inc., 3801 St. Elmo Avenue, Building 18, Chattanooga, Tennessee 37409, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Amphetamine (1100)	II
Methamphetamine (1105)	II

No comments or objections have been received. The firm plans to bulk manufacture amphetamine and methamphetamine to produce products for distribution to its customers.

DEA has considered the factors in title 21, United States Code, section 823(a) and determined that the registration of Chattem Chemicals, Inc. to manufacture the listed controlled substances is consistent with the public interest at this time. DEA has investigated Chattem Chemicals, Inc. on a regular basis to ensure that the company's continued registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security systems, audits of the company's records, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823 and 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic classes of controlled substances listed above is granted.

Dated: November 20, 2000.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 00–30937 Filed 12–4–00; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

The Church of the Living Tree; Notice of Withdrawal of Denial of Application

On November 4, 1999, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA) issued an Order to Show Cause proposing to deny The Church of the Living Tree's application for registration as a manufacturer of the controlled substance marijuana. Effective August 18, 2000, the DEA Administrator, in his final order published in the **Federal Register**, 65 FR 50567, denied the application for registration, noting that The Church of the Living Tree had not responded to the Order to Show Cause.

By letter dated August 11, 2000, a representative of The Church of the Living Tree advised that he had in fact properly submitted a timely request for hearing. Photocopies of a United States Postal Service Receipt for Certified Mail and Domestic Return Receipt indicating delivery accompanied the letter.

Inasmuch as it appears that The Church of the Living Tree timely requested a hearing in this matter, the final order should not have issued. The Deputy Administrator of the Drug Enforcement Administration therefore orders that the final order published August 18, 2000, at 65 Fed. Reg. 50567 be, and it hereby is, rescinded, and this matter is hereby remanded to the Office of Administrative Law Judges, Drug Enforcement Administration, for further appropriate proceedings. This order is effective December 5, 2000.

Dated: November 21, 2000.

Julio F. Mercado,

Deputy Administrator.

[FR Doc. 00–30929 Filed 12–4–00; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application

Pursuant to § 1301.33(a) of title 21 of the Code of Federal Regulations (CFR), this is notice that on September 15, 2000, Knoll Pharmaceutical Company, 30 North Jefferson Road, Whippany, New Jersey 07981, made application by renewal to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Dihydromorphine (9145)	I
Hydromorphone (9150)	II

The firm plans to produce bulk product and finished dosage units for distribution to its customers.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than February 5, 2001.

Dated: November 20, 2000.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 00–30940 Filed 12–4–00; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 99–10]

Nicholas A. Sychak, d/b/a Medicap Pharmacy; Revocation of Registration

The Deputy Administrator, Drug Enforcement Administration (DEA), issued an Order to Show Cause dated December 14, 1998, to Nicholas A. Sychak d/b/a Medicap Pharmacy (Respondent), seeking to revoke the Replacement's DEA Certificate of Registration, BM2751736, pursuant to 21 U.S.C. 824(a)(4); and to deny any pending application for renewal of such registration pursuant to 21 U.S.C. 823(f) because the registration would be inconsistent with the public interest as defined by 21 U.S.C. 823(f). Specifically, the Order to Show Cause alleged that: (1) On June 20, 1996, DEA obtained information that Nicholas A. Sychak, R.Ph., the owner and operator of Medicap Pharmacy, ordered large quantities of various Schedule II through IV controlled substances and diverted these drugs to other individuals for no legitimate medical purpose; (2) Also on June 20, 1996, a cooperating individual provided DEA investigators with information that Mr. Sychak was a known source of supply for illegally diverted controlled substances, and that drug dealers and drug dependent individuals traveled to Medicap Pharmacy to purchase large quantities of controlled substances for sums ranging from several hundred to several thousand dollars per transaction; (3) On August 8, 1997, a confidential source, posing as a physician, telephoned Mr. Sychak and placed a fictitious prescription for sixty dosage units of hydrocodone, a Schedule II controlled substance, with no refills. Mr. Sychak was aware the individual calling in the prescription was not a physician, but nevertheless filled the prescription in exchange for cash. Mr. Sychak also authorized two refills for the prescription, even though prescriptions for Schedule II controlled substances may not be refilled; (4) Also on August 8, 1997, the confidential source placed another telephone call to Mr. Sychak, posing as another physician. When the confidential source later arrived at Medicap Pharmacy, Mr. Sychak directed that individual to exhaust the refills under the first physician's name before using a second physician's name to obtain additional prescriptions; (5) On August 22, 1997, a confidential source, acting in an undercover capacity, obtained the remaining unauthorized refill of the August 8, 1997, fraudulent hydrocodone prescription from Mr. Sychak, again in exchange for cash; (6) On September 5, 1997, a confidential source again posed as a physician and telephoned Mr. Sychak for a fictitious prescription for sixty dosage units of hydrocodone. The confidential source was also provided with a blank prescription bearing fictitious physician information. While on Medicap Pharmacy's premises, and within the presence of Mr. Sychak, the confidential source wrote out a prescription for sixty tablets of Percocet, a Schedule II controlled substance. Mr. Sychak admonished the confidential source for filling out the prescription in the pharmacy, but filled the prescription and also provided the confidential source with sixty hydrocodone tablets; (7) The DEA investigation revealed that from June 1995 through October 1997, Mr. Sychak and Medicap Pharmacy illegally dispensed more than 5,700 dosage units of Percocet to one individual. This individual presented forged prescriptions attributed to a physician and used the aliases ''Walter Kaczynski'' and ''Linda Kaczynski.'' DEA subsequently verified that the purported prescribing physician never issued the prescriptions; (8) The DEA investigation further revealed that Mr. Sychak and Medicap Pharmacy unlawfully dispensed a total of 5,255 dosage units of controlled substances to another individual between July 17, 1997, and December 30, 1997, pursuant to prescriptions purportedly issued by two different physicians. DEA subsequently verified that neither of these two physicians authorized the dispensing of these controlled substances; (9) The DEA investigation further revealed that between July 1997 and March 1998, Mr. Sychak and Medicap Pharmacy unlawfully dispensed a total of 7,225 dosage units of various controlled substances, plus 48 ounces of Hydromet syrup, to two individuals who utilized eight aliases on prescriptions attributed to one physician; (10) On April 24, 1998, a confidential source acting in an undercover capacity purchased two prescription vials containing seventy-five dosage units of hydrocodone each and one prescription vial containing seventy-five dosage units of Vicodin, a Schedule III controlled substance, without a prescription, from Mr. Sychak and Medicap Pharmacy in exchange for $277.00 in cash. These prescription vials listed three different aliases previously used by the confidential source. The DEA investigation subsequently revealed that Mr. Sychak created fraudulent records of this transaction by indicating that these drugs were dispensed to three different individuals; (11) On April 24, 1998, an additional confidential source illegally obtained from Mr. Sychak and Medicap Pharmacy two prescription vials containing seventy-five hydrocodone each and another vial containing sixty hydrocodone in exchange for $281.00 in cash. Mr. Sychak listed on the vials three different aliases previously used by the confidential source and created fraudulent dispensing records of this transaction; (12) On April 24, 1998, DEA agents and investigators executed a search warrant upon Mr. Sychak and Medicap Pharmacy. During the search, Mr. Sychak admitted that he sold controlled substances without prescriptions. Items seized pursuant to the search warrant included $14,906 in cash, eight dosage units of various Schedule III controlled substances that were found in Mr. Sychak's front pants pocket, and a loaded 9mm handgun; (13) In conjunction with the criminal diversion investigation of Medicap Pharmacy, DEA also conducted a financial investigation of Mr. Sychak and the pharmacy. As a result of this investigation, DEA investigators obtained a federal seizure warrant for the business bank account of Medicap Pharmacy, and pursuant to that warrant DEA seized $102,650.90; (14) On September 3, 1998, an undercover informant obtained 1,120 dosage units of Schedule III and IV controlled substances from Mr. Sychak and Medicap Pharmacy without a prescription and in exchange for $2,000.00 cash. On September 22, 1998, the undercover informant again obtained 1,120 dosage units of Schedule III and IV controlled substances from Mr. Sychak and Medicap Pharmacy without a prescription and in exchange for $2,000.00 cash; and (15) On November 5, 1996, Mr. Sychak inquired of DEA regarding the DEA registration and medical license status of a Pennsylvania medical practitioner. Although DEA personnel informed Mr. Sychak that the practitioner was not registered with DEA and did not possess a valid Pennsylvania medical license, Medicap Pharmacy nevertheless proceeded to fill approximately 111 controlled substance prescriptions purportedly issued by the physician between December 1996 and April 1997. The Order to Show Cause further gave notice that Respondent's Certificate of Registration was immediately suspended, and the suspension would remain in effect until a final determination is reached in these proceedings. The Order authorized and directed DEA agents and diversion investigators to place under seal and remove all controlled substances possessed by Respondent pursuant to his DEA Registration and to take into their possession the suspended Certificate of Registration and all unused official DEA order forms.

Respondent, through counsel, timely requested a hearing on the issues raised in the Order to Show Cause. The requested hearing was held in Pittsburgh, Pennsylvania, on July 12 and 13, 1999. At the hearing the Government called witnesses to testify and introduced documentary evidence. After the hearing, the Government submitted Proposed Findings of Fact, Conclusions of Law, and Argument. In a letter dated September 14, 1999, and received September 17, 1999, counsel for Respondent advised that, ''without conceding any of the facts in the government pleadings or those presented at the administrative hearing on July 13 and 14, 1999, Nicholas A. Sychak, will not be filing proposed findings of fact, conclusions of law and argument.'' On February 23, 2000, Judge Mary Ellen Bittner issued her Opinion and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision, recommending that Respondent's registration be revoked, and any pending applications for renewal be denied. The record was transmitted to the Deputy Administrator for final decision March 27, 2000.

The Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts in its entirety the Opinion and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge (Opinion). His adoption is in no manner diminished by any recitation of facts, issues, and conclusions herein, or of any failure to mention a fact or matter of law. The Respondent did not introduce evidence or call witnesses at the hearing, therefore Judge Bittner's Opinion is based on testimony and other evidence offered by the Government.

As a preliminary matter, counsel for Respondent raised two evidentiary issues that must be addressed before the merits of these proceedings can be fully discussed.

First, on June 9, 1999, counsel for Respondent filed a Motion to Compel Discovery Pursuant to *Brady* v. *Maryland* that requested Judge Bittner to issue ''an order requiring DEA to preserve and to provide defendant, within a time to be specified, any and all actual and potential exculpatory evidence relating to the issues of guilt or punishment currently known to the Government, its agents, and representatives, *or which may become known to them by the exercise, on their part, of due diligence*.'' (Emphasis original). In support of this request, counsel for Respondent cites numerous cases applying *Brady* v. *Maryland*, 373 U.S. 83 (1963) (*Brady*) in various criminal contexts. Counsel for Respondent did not address the issue and cited no authority for the proposition that *Brady* is or should be applicable to civil proceedings, much less an administrative proceeding, as is the case here. On June 24, 1999, the Government filed an Opposition to Respondent's Motion to Compel Discovery Pursuant to *Brady* v. *Maryland*, arguing that the Administrative Procedure Act (APA) confers no independent discovery right; that *Brady* applies only in the criminal context; that DEA regulations govern discovery in these proceedings; and that the DEA regulations provide for adequate discovery. On June 30, 1999, Judge Bittner issued a Ruling and Order, finding *Brady* inapplicable to these proceedings, but further finding that because these proceedings are adversarial, ''on the grounds of fairness, * * * the Government must disclose any exculpatory information in its possession when such information is timely requested by a respondent.'' In response, the Government filed on July 7, 1999, an Emergency Request For Consent to File Appeal to the June 30, 1999, Ruling of the Administrative Law Judge, arguing that neither the APA nor the DEA regulations governing the proceedings provide for the disclosure of exculpatory information, and further that Judge Bittner's Order ''constitutes a significant and unprecedented departure from DEA regulations and practice.'' The Government also argued that Judge Bittner's Order would place a severe burden upon DEA, including the potentialities of placing ongoing investigations and the identities of confidential informants at risk. Subsequently, on July 8, 1999, Judge Bittner issued a Memorandum to Counsel Clarifying Ruling and Order, limiting the scope her previous ruling somewhat by requiring the Government's counsel only ''to review files available to him and on which the Government relied in preparing its prehearing statements for information that would clear or tend to clear Respondent from alleged fault or guilt as to the allegations of Respondent misconduct made in the Government's prehearing statements in this proceeding[.]'' On the same day, Judge Bittner issued a Ruling Denying Request for Consent to File Appeal, denying the Government's request to file an appeal pursuant to the Clarifying Ruling and Order. On July 9, 1999, the Government filed a Response and Objection to Ruling Denying Request For Consent to File Appeal reiterating its objections and requesting that the issue be made part of the official administrative record and forwarded to the Deputy Administrator for consideration.

The Deputy Administrator agrees with the Government, for the following reasons:

First, these proceedings are governed generally by the APA, and specifically by the procedures set forth at 21 CFR 1316.41–1316.68. See 21 CFR 1316.41. What applicable caselaw there is on the issue finds that the APA confers no independent discovery right; *McClelland* v. *Andrus,* 606 F.2d 1278, 1285 (D.C. Cir. 1979); *National Labor Relations Board* v. *Valley Mold Co., Inc.,* 530 F.2d 693 (6th Cir. 1976) (cert. denied, 429 U.S. 824 (1976)); and that the extent of discovery in administrative proceedings is primarily determined by the agency; *Mister Discount Stockbrokers, Inc.* v. *Securities Exchange Commission,* 768 F.2d 875, 878 (7th Cir. 1985) (finding *Brady* inapplicable to agency administrative proceedings). As the Government correctly points out, neither the APA, nor the relevant DEA regulations, nor prior published DEA precedent, authorize the Government's production of exculpatory information.

Second, the applicable DEA Regulations, *supra,* supply more than sufficient due process, whether Respondent's DEA Registration is viewed as a license conferred based on the public interest alone, or whether it is also viewed as a property or a liberty interest. The pertinent DEA Regulations governing these proceedings authorize a pre-hearing conference and written pre-hearing statements for *inter alia* the simplification of the issues, stipulations, identification of witnesses, and the advance submission of all documentary evidence and affidavits for identification; an administrative hearing, reported verbatim; representation by counsel; allow for the introduction of evidence and documents; provide for witnesses and documents to be subpoenaed; allow for the examination and cross-examination of witnesses; allow for the parties to make written proposed corrections to the transcript of the hearing; allow for the parties to submit proposed findings of fact and conclusions of law; and also allow for the parties to file exceptions to the ALJ's recommended decision, findings of fact and conclusions of law. Furthermore, the pre-hearing conference pursuant to 21 CFR 1316.54 and the prehearing disclosure of witness testimony and documentary evidence pursuant to 21 CFR 1316.57 and 1316.58, set forth in each party's pre-hearing statement, provide more than adequate pre-hearing disclosure of the issues and evidence to be submitted in these proceedings. In its June 24, 1999, memorandum of Opposition, the Government notes that ''[i]n this proceeding, the evidentiary items that the Government intends to offer were outlined in its March 1, 1999, Prehearing Statement and the May 24, 1999, supplement thereto. The Government has provided to the Respondent all evidentiary items that it intends to offer during the upcoming administrative hearing.'' Thus, the Deputy Administrator finds the current DEA regulations provide more than adequate discovery in these proceedings, and there was no need for the Government to take the unprecedented and extraneous step of disclosing potentially exculpatory information.

Third, in her June 30, 1999, Ruling and Order, Judge Bittner stated her belief that the burden said Order placed upon the Government was ''minimal, for the Government need only review its files to determine if such information exists.'' Following the filing of the Government's June 24, 1999, Opposition memorandum, Judge Bittner attempted to narrow the scope of her Order in her July 8, 1999, Clarifying memorandum by limiting the Government's burden to review of those files ''available * * * and on which the Government relied in preparing its prehearing statements for [exculpatory] information * * * as to the allegations of Respondent misconduct made in the Government's prehearing statements in the proceeding[.] '' The Deputy Administrator agrees with the Government that, even in its more limited form, Judge Bittner's Order places a significant burden on the Government. The Order creates a risk of disclosure of sensitive information which could reveal the identity of confidential informants, compromise the effectiveness of investigative techniques, or compromise an ongoing criminal investigation concerning the Respondent on third parties. The Order will also require the Government to address Privacy Act issues with respect to information concerning third parties.

For the above-stated reasons, the Deputy Administrator finds that the Government is not required to disclose potentially exculpatory information to Respondent or counsel for Respondent at any phase of these proceedings.

The second evidentiary issue raised by counsel for Respondent is his assertion of a continuing objection to the Government's use of hearsay evidence at the hearing. It is well established, however, that hearsay is admissible in these proceedings. See Arthur Sklar, R.Ph., d/b/a King Pharmacy, 54 FR 34623, 34627 (DEA 1989). ''Hearsay is both admissible, and may, standing by itself, constitute substantial evidence in support of an administrative decision.'' *Klinestiver* v. *DEA,* 606 F.2d 1128 (D.C. Cir. 1979). Judge Bittner addressed this issue at the hearing and in her Opinion, and she has indicated that she considered the hearsay nature of the evidence when determining the evidentiary weight to give it; and she further indicated that, where she has relied on hearsay evidence, she did so because she found it reliable. *See Ramon P. Johnson* v. *United States,* 628 F.2d 187, 190 (D.C. Cir. 1980). The Deputy Administrator concurs with Judge Bittner's analysis and findings of fact with regard to this issue.

Medicap Pharmacy is located in Murrysville, Pennsylvania. According to one of the Government's witnesses, Karen Ruffner, Nicholas A. Sychak opened the pharmacy in 1989 or 1990. The pharmacy was first registered with DEA on July 2, 1991. On June 20, 1996, a confidential informant advised Diversion Investigator John Conlon of the DEA Pittsburgh Resident Office that Mr. Sychak was selling controlled substances to certain individuals without a valid prescription and for no legitimate medical purpose.

As a result of this information, DEA initiated an investigation of the Respondent, and various Pennsylvania State law enforcement agencies subsequently joined the investigation. Surveillance and intelligence gathering identified Lynette Reffner and Steve and Karen Ruffner as frequent visitors to the pharmacy. Investigators also searched the pharmacy's dumpster and found computer printouts of purported controlled substance dispensings. These printouts listed an individual's name, a prescription number, the drug, the date it was dispensed, and the name of the physician who purportedly authorized the dispensing. Agent Edward Cartwright of the Pennsylvania Bureau of Narcotics Investigations and Drug Control (BNIDC) testified that a review of these printouts disclosed discrepancies, such as prescriptions whose dates were inconsistent with the computer's system of numbering prescriptions in chronological order. According to Agent Cartwright, these printouts indicated that some prescriptions were predated. Investigators subsequently learned from pharmacy employees that Mr. Sychak also ''predated'' prescriptions by substituting an old ribbon in the pharmacy's printer to make it appear that a label was older than the date the drug was actually dispensed.

As the Order to Show Cause indicates, there are numerous separate incidents upon which this proceeding is based. Therefore, the different incidents are herein organized by the nine subsequent numbered sections which group the relevant facts, though not necessarily in chronological order, since the timeframes of many of the events described herein overlap.

1. Michael Ray's 1997 Undercover Purchases from Medicap Pharmacy

Agent Cartwright had arrested Michael Ray several years prior to the investigation of Respondent. Mr. Ray was again arrested in the spring of 1997, and the arresting agent asked Agent Cartwright for information about Mr. Ray. Consequently, Agent Cartwright spoke to Mr. Ray, who said that for the previous two years Mr. Sychak had filled forged controlled substance prescriptions for him and that these prescriptions listed ''Ed Olson'' as the patient. At some point, Mr. Ray agreed to act as an undercover informant; Agent Cartwright testified that Mr. Ray was not offered anything in return for his cooperation except that Agent Cartwright appeared at Mr. Ray's sentencing hearing and advised the court of Mr. Ray's cooperation.

On August 8, 1997, Mr. Ray telephoned Mr. Sychak, pretending to be a Dr. Wigle, a name he had picked out of a telephone directory, and asked for sixty hydrocodone 7.5 mg. extra strength, with no refills, for ''Ed Olson.'' That same day, Mr. Ray went to Medicap Pharmacy wearing a recording device, and carrying funds Agent Cartwright had provided him. Mr. Ray paid $37.50 and received the sixty hydrocodone he had requested. The memorialization of the oral prescriptions lists one refill.

On August 15, 1997, Mr. Ray again called the pharmacy, pretending to be a Dr. Beck, to authorize a prescription for hydrocodone for Ed Olson. ''Dr. Beck'' was a fictitious physician invented by DEA for whom Mr. Ray provided fictitious telephone and DEA registration numbers. Mr. Ray called the pharmacy again to ask if the prescription was ready, and spoke with Mr. Sychak's wife. Mr. Ray said that he knew he had refills from Dr. Wigle's prescription, and Ms. Sychak said something to the effect that there should not be any problem and that she would give him a refill of what was on the computer screen. Mr. Ray then visited the pharmacy and paid $37.50 for a ''refill'' of the Dr. Wigle prescription. Mr. Sychak refused to fill the purported prescription from Dr. Beck, telling Mr. Ray that he first wanted to use the refills from Dr. Wigle and that the information about Dr. Beck, including his physician license number and his DEA number, were not yet in the pharmacy's computer system.

On August 22, 1997, Mr. Ray returned to Medicap Pharmacy and paid $37.50 for a second refill of sixty hydrocodone from the Dr. Wigle prescription. Mr. Ray also had with him a blank prescription form listing the information for Dr. Beck so that Mr. Sychak could enter the information into the pharmacy computer. Agent Cartwright testified that Mr. Ray gave the form to Mr. Sychak, who said it would be helpful and put the form in his pocket.

On August 29, 1997, Mr. Ray was sent into the pharmacy with a recording device. Prior to this visit, a prescription for hydrocodone purportedly authorized by Dr. Beck had been called in to the pharmacy. During that visit, Mr. Ray also tried to obtain other controlled substances using the blank Dr. Beck form, but Mr. Sychak refused to provide him any drugs, saying that DEA investigators sometimes inspected the pharmacy and might realize that the handwriting on Dr. Beck's prescription form was the same as that on other pharmacy records. Mr. Sychak returned the blank form to Mr. Ray. Mr. Ray took the blank form with him when he left the pharmacy and, in the presence of Agent Cartwright, filled it out for sixty Percocet. Mr. Ray then took the form back into the pharmacy, paid $39.83 in cash, and received sixty Percocet.

Mr. Ray made another undercover visit to the pharmacy on September 5, 1997. Mr. Ray asked for the hydrocodone purportedly authorized by Dr. Beck for Ed Olson, and presented a written prescription for Percocet in some other patient name. Agent Cartwright testified that investigators had intentionally made this Percocet prescription facially invalid by showing the patient as someone other than the person who presented it. Ray paid $37.50 for sixty hydrocodone 7.5 mg. with APAP, but Mr. Sychak refused to fill the Percocet prescription. Mr. Ray then took from his pocket a blank prescription form purporting to be that of Dr. Beck and filled in the requisite information in Mr. Sychak's presence. Mr. Sychak said something to the effect that most of his customers did not fill out their own prescriptions in front of him, but nonetheless filled the prescription, providing Mr. Ray sixty Roxicet in exchange for $47.95. On September 12, 1997, Mr. Ray again visited Respondent and obtained hydrocodone pursuant to the purported authorization of Dr. Beck, paying $37.50 for the drug.

As noted above, investigators obtained records of purported dispensings from Respondent's trash dumpster. Among these was the pharmacy's receipt for the Roxicet provided to Mr. Ray on September 5.

2. The Delivery of Controlled Substances to Walter, Linda, and James Kaczynski

Pennsylvania state law requires pharmacists to submit to BNIDC monthly a form known as a ''BDC–6'' listing information about all dispensings of Schedule II controlled substances. In early 1998 Investigator Conlon reviewed BDC–6 forms Respondent had submitted for the period April 1995 through October 1997. Respondent listed a large number of Percocet and Roxicet prescriptions purportedly issued by a Dr. Mark Fennema to a Walter Kaczynski, a Linda Kaczynski, and a James Kaczynski. Although the BDC–6 reports indicated that Dr. Fennema was an emergency room physician at a hospital in south Pittsburgh, when investigators subpoenaed the hospital for the Kaczynskis' medical records, the hospital responded that it had not treated any patients with any of those names.

In about March 1998 Investigator Conlon telephoned Dr. Fennema, who was at that time in upstate New York. Dr. Fennema told Investigator Conlon that he generally saw patients only in the emergency room and that he would have no reason to continually prescribe medications to the same patient. After reviewing a faxed copy of the list of prescriptions, Dr. Fennema told Investigator Conlon that he had not issued them.

3. The Deliveries to Lynette Reffner and Michael Riley

Investigator Conlon testified that Medicap Pharmacy records showed that it had dispensed controlled substances to a Lynette Reffner pursuant to prescriptions purportedly issued by a Dr. Richard Kucera between July 17, 1997, and December 23, 1997, and pursuant to prescriptions purportedly issued by a Dr. David Blinn between July 17, and December 30, 1997. The prescriptions that Dr. Blinn purportedly issued totaled 1,620 dosage units of Vicodin, 715 dosage units of hydrocodone, 164 dosage units of Hydroment syrup, and 60 dosage units of phenobarbital. The prescriptions that Dr. Kucera purportedly issued aggregated to 1,390 dosage units of alprazolam, 1,240 dosage units of Ap-Oxazepam, 130 dosage units of diazepam, and 100 dosage units of Darvocet.

On March 25, 1998, Investigator Conlon and Agent Cartwright interviewed Dr. Kucera, who said that he had treated Lynette Reffner but had not authorized any of the prescriptions at issue. Investigator Conlon, DEA Diversion Investigator Kurt Dittmer of DEA's Pittsburgh office, and Agent Cartwright interviewed Dr. Blinn on March 30, 1998, and showed him the list of prescriptions. Dr. Blinn advised the investigators that he had not authorized any of them.

On April 29, 1998, Investigators Conlon and Dittmer, Agent Cartwright, and Sergeant Stan King of the Murrysville Police Department interviewed Ms. Reffner and her paramour, Michael Riley. Subsequently, on June 17, 1999, Ms. Reffner executed a declaration in evidence as a Government exhibit. In the declaration, Ms. Reffner said she originally had valid prescriptions for controlled analgesics filled at Medicap Pharmacy, but in 1992 or shortly thereafter Mr. Sychak began giving her refills for these medications that were not authorized by her physician. Ms. Reffner further stated that by about 1994 she had arranged with Mr. Sychak to purchase drugs from him upon presenting lists of the controlled substances she wanted. Investigators found some of these lists during the searches of Medicap Pharmacy's trash dumpster.

Ms. Reffner stated that every Tuesday she and Mr. Riley purchased sixty Vicodin ES, sixty Xanax, fifty Darvocet, fifty Soma, and eight ounces of Hydromet syrup, and every Friday they bought the same quantities of Xanax, Soma, and Hydromet syrup, along with eighty Vicodin ES and sixty Darvocet. Ms. Reffner stated that Mr. Sychak had told her and Mr. Riley that Soma in combination with the other drugs would ''intensify the high,'' and that they should take a half-tablet of Soma at mealtimes. Ms. Reffner stated that the Soma was listed on Mr. Riley's patient record at the pharmacy, but that Mr. Sychak said he recorded the other drugs as dispensed to her, because she had been severely injured some years earlier and her medical history ''would cover it.'' Ms. Reffner also stated that at some point Mr. Sychak directed Mr. Riley to come to the pharmacy only on Tuesdays and Fridays, when Mr. Sychak and his wife were present, because Mr. Sychak did not want his relief pharmacist to know about this arrangement. Ms. Reffner stated that Mr. Riley and Mr. Sychak also socialized together, and that Mr. Riley worked on Mr. Sychak's cars and Mr. Sychak gave him ''care packages'' of controlled substances, including Lorcet and Vicodin.

Ms. Reffner further stated that in late 1995 she entered a methadone treatment program and that Mr. and Ms. Sychak agreed to provide her a phenobarbital to lessen potential withdrawal symptoms. Ms. Reffner said that both she and Mr. Riley wanted to get help for their addiction and that the Sychaks said they would decrease the quantity of controlled substances they supplied, but in fact the quantity increased. Ms. Reffner also stated that on numerous occasions when she presented a legitimate prescription for a non-controlled substance, Mr. Sychak told her she would not have to pay for the medication, and that he would charge it to some other customer's insurance. Finally, Ms. Reffner stated that Mr. Sychak filled some drugs to her Medical Assistance card and that she paid cash for the rest, that Mr. Sychak always extended her and Mr. Riley credit when they did not have enough money to pay for the drugs they purchased, and that Mr. Sychak maintained a record of how much they owed in a pink notebook.

Investigator Conlon testified that as of the hearing date Ms. Reffner and Mr. Riley were the targets of an ongoing investigation, and he anticipated that they would be charged with state narcotics violations. Investigator Conlon further testified that Mr. Riley and Ms. Reffner agreed to cooperate in the investigation and that investigators told them that their cooperation would be made known to the proper authorities at the time of sentencing.

4. The Deliveries to Karen and Steven Ruffner

The previously mentioned trash dumpster searches disclosed receipts purportedly showing Dr. Ralph Capone as the authorizing physician for numerous controlled substance prescriptions for patients named Daniel Frieben, Amy McKluskey, Phyllis Ruffner, Charles Ruffner, Steve Ruffner, Grace Ruffner, Ruth Snow, and Deborah McCracken. In November 1997, Agent Cartwright interviewed Dr. Capone and asked him about these individuals. Dr. Capone told Agent Cartwright that although Mr. Frieben had been his patient, Dr. Capone had not treated him since about 1993, and that Karen Ruffner was his patient during the period at issue but that he did not authorize any of the prescriptions shown to him.

Karen Ruffner testified as a Government witness. Ms. Ruffner's mother was Sandra Frieben, who died in 1992. For some period of time prior to her death Ms. Frieben worked as a medical assistant to Dr. Capone. Ms. Ruffner testified that Ms. Frieben suffered from a number of painful conditions for which she took, Soma, Talwin, and Vicodin ES and that she abused controlled substances from the end of 1989 until her death. Ms. Frieben obtained drugs by calling prescriptions to pharmacies for herself, saying that the prescriptions were authorized by Dr. Capone, and by writing fake prescriptions for herself on prescription pads she took from Dr. Capone's office. Ms. Ruffner testified that she saw Ms. Frieben write some of these prescriptions, that Ms. Frieben made some of the telephone calls from Ms. Ruffner's home, and that Ms. Frieben asked Ms. Ruffner to take fake prescriptions to the pharmacy for her. Ms. Ruffner testified that she suggested to her mother that she seek treatment for drug abuse, but her mother refused to do so because she did not want her husband to learn about her problem.

Ms. Ruffner testified that although initially her mother used different pharmacies, eventually she obtained drugs only from Medicap Pharmacy. At some point, Ms. Frieben began stealing boxes of drug samples from Dr. Capone's office and taking them to Mr. Sychak, who gave her medication or discounts on medication in exchange. Ms. Ruffner accompanied her mother on these visits to the pharmacy, and testified that after she had done so three or four times, Ms. Frieben asked her to take the samples to Mr. Sychak and bring back her medication. Ms. Ruffner testified that her mother called Medicap Pharmacy both from Dr. Capone's office and from Ms. Ruffner's home to authorize prescriptions for herself for Vicodin, Talwin, or Soma, and sent Ms. Ruffner to the pharmacy to pick up the drugs and to pay for them in cash. Ms. Ruffner further testified that her mother instructed her to deal only with Mr. Sychak.

Ms. Ruffner testified that her mother also asked her to call the pharmacy and would write down exactly what Ms. Ruffner was to say. Ms. Ruffner spoke only to Mr. Sychak, and testified that in these calls she told Mr. Sychak that she was ''Beth'' from Dr. Capone's office (as far as she knew, a made-up name) and that she was ''calling for Sandra Frieben, for Vicodin number 50.'' Ms. Ruffner also testified that the price of the controlled substances increased over time so that her mother paid cash in addition to providing Mr. Sychak the drug samples. Ms. Frieben eventually paid about $89 for 60 Talwin, about $68 for 50 Vicodin, and $34 for generic hydrocodone.

Ms. Ruffner further testified that her own health had been ''fairly poor'' all her life, that she had suffered from chronic pain since she was twelve years old, and that various physicians had prescribed her controlled substances including Vicodin, Vicodin ES, and Soma. Ms. Ruffner started sharing her mother's medications in 1989, when she was nineteen years old, but testified that she never took her mother's drugs without the latter's knowledge.

Ms. Ruffner testified that from 1992 until 1994 she received legitimate prescriptions for Valium and Vicodin, and that she filled all these prescriptions at Medicap Pharmacy. Ms. Ruffner further testified that frequently the vial she received from the pharmacy indicated more authorized refills than the prescription did, but she never asked Mr. Sychak why refills were added. In 1994 Ms. Ruffner's physician stopped prescribing her Vicodin, but Ms. Ruffner continued to receive drugs from Mr. Sychak because he gave her more refills than were authorized by the written prescription. As an example, Ms. Ruffner testified that if a written prescription for 80 Vicodin ES showed one refill, the vial might show four refills. Ms. Ruffner admitted, however, that she did not know whether Mr. Sychak obtained the physician's oral authorization for additional refills.

Ms. Ruffner further testified that at some point ''the refills just stopped,'' and Mr. Sychak told her to call and ask for a prescription for a named person because ''I have to be able to say that I received a phone call from somebody.'' Consequently, according to Ms. Ruffner, she called the pharmacy pretending to be ''Beth'' from Dr. Capone's office, told Mr. Sychak she was authorizing a prescription for Vicodin ES, and gave the patient's name variously as Amy McKluskey, Dan Frieben, Tina Pavolik, Ruth Snow, Debbie McCracken, or Charles, Steve, Phyllis, or Grace Ruffner. All of these names were those of individuals who were either friends or family members of Ms. Ruffner or of her husband, Steven Ruffner. According to Ms. Ruffner, between 1994 and 1998 she made ''hundreds'' of such telephone calls to the pharmacy.

Ms. Ruffner testified that sometimes Mr. Sychak would fill ''prescriptions'' without requiring her to telephone him, but other times he would tell her to call him so that he could say there had been a telephone call. According to Ms. Ruffner, she usually handed Mr. Sychak a piece of paper with a list of names and the controlled substance to be attributed to each name, and sometimes she handed the list to one of the women who worked at the pharmacy. (Agent Cartwright testified that he found such lists during the searches of Medicap's trash dumpster.)

Ms. Ruffner testified that she paid cash for the drugs and that in 1994 she paid about $89 for sixty Vicodin, but that almost every month Mr. Sychak increased the price, telling her that the manufacturer had increased its price. Ms. Ruffner also testified that she initially obtained drugs from Respondent once per month and shared them with her husband, and beginning in about 1996 she and her husband began selling Lorcet and Vicodin in quantities of ten to fifty dosage units. According to Ms. Ruffner, she and her husband used the proceeds of their drug sales to purchase more drugs from Mr. Sychak for their own use and to sell. Eventually, according to Ms. Ruffner, she was paying Mr. Sychak a thousand dollars once or twice per week for drugs; she and her husband would take ''what we needed, and we would sell the rest.'' Ms. Ruffner also testified that when she was in the pharmacy and other people were present in addition to Mr. Sychak, she signaled to him that she wanted Vicodin, Lorcet, or Lortab by referring to Vicodin as ''whites,'' and Lorcet or Lortab as ''blues.''

In early 1998 local police arrested Ms. Ruffner's husband for possession of controlled substances. Ms. Ruffner testified that when she told Mr. Sychak about the arrest he expressed concern about whether any vials from Medicap Pharmacy would be found in Mr. Ruffner's car. Ms. Ruffner further testified that a few days after the arrest she and her husband asked Mr. Sychak for a prescription vial with a legitimate-looking label on it so Mr. Ruffner could say that he had drugs legally. Mr. Sychak complied with Ms. Ruffner's request, and provided him with a legitimate-appearing prescription vial. At some point Mr. Sychak also warned Mr. Ruffner to be sure that he did not leave pill bottles in his car and to destroy the bottles when he had gotten rid of the contents.

On April 24, 1998, Investigator Conlon and three other law enforcement officers visited Ms. Ruffner at her father's home, where she was staying. Investigator Conlon asked Ms. Ruffner to go to the local police station, and she agreed to do so. At the Murrysville police station, Ms. Ruffner agreed to cooperate in the investigation and Agent Cartwright asked her to make a controlled buy from Respondent that same day. Investigators fitted Ms. Ruffner with a recording device and gave her $400 to make the purchase. They also asked her to follow the procedure she normally used to obtain drugs, and consequently she prepared a note with the words, ''Karen's Vicodin (brand),'' ''Daniel's Vicodin (generic),'' ''Tina's Lorcet (generic),'' and ''Amy's Lorcet (generic).'' Next to the reference to ''brand,'' Ms. Ruffner drew an arrow to the comment, ''I only have $400. However you can help me out. Thanks.'' Ms. Ruffner went to Medicap Pharmacy and gave the list to Mr. Sychak, who filled vials with the drugs listed. The total cost of the drugs was $415; Ms. Ruffner asked Mr. Sychak if she could take the drugs and return with the additional $15, but Mr. Sychak refused. Consequently, Mr. Sychak retained the Vicodin, and Ms. Ruffner left the store with the other drugs and gave them to Agent Cartwright. Agent Cartwright testified that although the cash register receipts for Ms. Ruffner's undercover purchase showed a small amount, such as $3 or $6, she actually was spending about $300 to $365. Agent Cartwright further testified that Mr. Ruffner also paid substantially more for the controlled substances he was purchasing from Respondent than the amount reflected on the cash register receipt.

As of the hearing date, Ms. Ruffner had not been charged with any criminal conduct. She testified, however, that Agent Cartwright had told her that she would be charged but had not told her what the charges would be. Investigator Conlon testified that both Mr. and Ms. Ruffner agreed to cooperate in the investigation and that the only statements investigators made to them were that their cooperation would be made known to the proper authorities at the time of sentencing.

Counsel for Respondent contended at the hearing that Ms. Ruffner, the only informant to testify in this proceeding, is not credible. In her Opinion, Judge Bittner recognizes that Ms. Ruffner is not a totally disinterested participant in this proceeding in light of her own status as a target of an investigation. Nonetheless, Judge Bittner found that Ms. Ruffner appeared candid and forthright, and on the basis of her demeanor Judge Bittner found her to be believable. In addition, Judge Bittner found, and the Deputy Administrator agrees, that much of Ms. Ruffner's testimony was consistent with documentary and other evidence and, as noted above, Respondent adduced no evidence and thus Ms. Ruffner's testimony is uncontradicted. See Singers-Andreini Pharmacy, 63 Fed. Reg. 4668, 4672 (DEA 1998).

5. The April 24, 1998, Search

On April 23, 1998, a United States Magistrate Judge issued a search warrant for the premises of Medicap Pharmacy. The warrant was executed on April 24, 1998. As part of the search, investigators received a ''dump'' of Mr. Sychak's computer, and found that ''Walter Kaczynski'' was an alias used by a Larry Stepinski.

The search disclosed substantial amounts of cash, specifically, $11,394 in Mr. Sychak's briefcase, $2,306 in daily deposit envelopes, $706 in a cash register, and $150 from a shelf in a work area. Investigators also retrieved a ledger listing various persons, including targets of investigations, and a running balance of what they owed the pharmacy. In addition, investigators recovered $520 and a small quantity of loose controlled substance tablets from Mr. Sychak's pants pockets. This cash was the State funds that Agent Cartwright had supplied to Karen and Steve Ruffner earlier in the day and that they had used to make an undercover purchase of controlled substances at the pharmacy. Investigator Dittmer testified that the currency was photocopied before it was provided to the Ruffners and that the serial numbers on the photocopies matched those on the bills found in Mr. Sychak's pockets.

Investigator Dittmer also testified that he asked Mr. Sychak if he had any rifles or handguns on the premises and that Mr. Sychak said he did not have any weapons. The search disclosed a loaded 9mm semiautomatic handgun in a plastic grocery bag, however, that also contained cash. The weapon was registered to Mr. Sychak.

During the search, investigators also conducted an inventory of several products containing hydrocodone. Respondent had on hand 18,000 dosage units of Vicodin, 13,000 dosage units of Lorcet, 1,500 dosage units of Didrex, 5,200 dosage units of Darvocet, 3,000 dosage units of Soma, and 10,500 dosage units of alprazolam. Although Soma is not controlled under federal law, Investigator Dittmer testified that he included it in his inventory because it is sometimes used to boost the ''high'' provided by hydrocodone.

Investigator Dittmer and Agent Cartwright interviewed Mr. Sychak during the search and asked him if he ever dispensed a drug without a legitimate prescription. Mr. Sychak responded affirmatively and said that he sold drugs to people who were nagging him, naming Karen and Steven Ruffner. The investigators also asked Mr. Sychak about the ''Dr. Beck prescriptions,'' and Mr. Sychak said that he had spoken personally with Dr. Beck about those prescriptions. When informed that Dr. Beck was fictitious, Mr. Sychak did not respond.

6. The Interviews of Respondent's Employees

During the April 24, 1998, search investigators interviewed Sylvia Macerelli, a pharmacy technician/clerk employed at Medicap Pharmacy. Ms. Macerelli later provided a declaration, in evidence as a Government exhibit. Ms. Macerelli stated that she, pharmacy technician/clerk Amy Meyers, and relief pharmacist Fred Werl believed that Mr. Sychak was committing fraud and distributing drugs illegally. More specifically, Ms. Macerelli said that Mr. Sychak was the only pharmacy employee who waited on the Ruffners and Ms. Reffner. Ms. Macerelli stated that the Ruffners never presented prescriptions, but gave Mr. Sychak lists of controlled substances on scraps of paper, and that they usually received Vicodin and Lorcet. Ms. Macerelli stated that Ms. Reffner similarly presented lists of controlled substances she wished to purchase, that she received drugs in her own name and Mr. Riley's, and that she received Vicodin, Darvocet, Xanax, and hydrocodone products. Ms. Macerelli further stated that Mr. Sychak allowed Ms. Reffner to run a tab, and as of the date of the search she owed approximately $1,000.

Ms. Macerelli also said that Mr. Sychak frequently directed her and Ms. Meyers to add unauthorized refills to prescriptions, telling them that he had checked with the prescribing physician for authorization, but that she never observed Mr. Sychak telephone a physician for such authorization until a few weeks before the search. Ms. Macerelli further stated that she and Ms. Meyers recognized Ms. Ruffner's voice on the telephone when she telephoned the pharmacy and pretended to be calling from a doctor's office. Ms. Macerelli further stated that in the summer of 1997 an assistant in a doctor's office across the street from the pharmacy complained to Mr. Sychak that medicines that she never received were fraudulently billed to her insurance company. According to Ms. Macerelli, she and Ms. Myers would note that although they indicated on the log sheet the last customer of the day to receive drugs billed to insurance plans, the next day there would be additional entries added to the log.

Investigators interviewed Amy Meyers on May 7, 1998. On May 25, 1999, Ms. Meyers executed a declaration, in evidence as a Government exhibit, in which she corroborated many of Ms. Macerelli's statements. Ms. Myers corroborated the information that the Ruffners, Ms. Reffner, and Mr. Riley, obtained controlled substances from Medicap Pharmacy after presenting handwritten notes listing drug names, numbers of dosage units, and the names of persons for whom the drugs were purportedly prescribed, and stated that Walter Kaczynski, Craig Smilack, Linda Nader, Grace Seigworth, Scott Hoyle, Gary Harpis, Tom Farrah, Steve Cuccaro, and Camille Maggio-Palmiere also received controlled substances in a similar fashion. Ms. Meyers stated that all these individuals either paid cash, ran a tab, or used a Medical Assistance card. Ms. Meyers also stated that she checked her own personal prescription profile at the pharmacy in the spring of 1998 and discovered numerous prescriptions listed as billed to her insurance carrier that were allegedly issued to her by various physicians she had never seen for drugs she had never received. Ms. Myers stated that when she confronted Mr. Sychak about these prescriptions he said, ''How do you think I pay for your health insurance?''

On June 8, 1998, investigators interviewed Mr. Fred Werl. Mr. Werl said that he had discovered that the prescriptions issued to the Kaczynskis were forgeries when he called the hospital to verify a prescription and was told that Dr. Fennema was no longer associated with the hospital. Mr. Werl also told the investigators that he told Mr. Sychak about these fraudulent prescriptions and Mr. Sychak said he would take care of the matter, but that Mr. Sychak in fact continued to fill these prescriptions. Mr. Werl said that ''Walter Kaczynski'' came to the pharmacy and gave Mr. Sychak gifts, but that he did not know whether these were in exchange for drugs. Mr. Werl told investigators that at some point he was present when a commercial auditing firm confronted Mr. Sychak and told him that some of the pharmacy documents and records were fraudulent. Mr. Werl also told investigators about the insurance log, and noted that one day he counted 65 entries added after closing hours.

7. The Controlled Buys by Arthur Glaser

On July 27, 1998, Detective Michael Garlecki of the Allegheny County Police Department Narcotics Unit advised Investigator Dittmer that an Arthur Glaser was in custody and that a search of Mr. Glaser's home had revealed some loose pills of controlled substances. Detective Garlecki further advised Investigator Dittmer that Mr. Glaser said that he had obtained these drugs from Medicap Pharmacy. Consequently, Investigator Dittmer interviewed Mr. Glaser, who said that on either July 17 or July 20, 1998, he had purchased four bottles of Lorcet, one bottle of Vicodin, one bottle of Xanax, 200 Valium, and some ''speed'' from Mr. Sychak without a prescription. Mr. Glaser said that he obtained controlled substances in his own name and in the names of his brother and sister, Joseph Glaser and Nanette Glaser, respectively.

Mr. Glaser further stated that he could make undercover purchases from Mr. Sychak under the direction of law enforcement personnel. On September 2, 1998, Mr. Glaser made a recorded telephone call to Mr. Sychak and said he would go to the pharmacy the next day to pick up refills on his inhaler medication and what Investigator Dittmer described as ''other stuff.''

On September 3, 1998, Mr. Glaser, fitted with a recording device and a transmitter and provided with $2,000 in DEA funds, went to the pharmacy. Mr. Glaser obtained from Mr. Sychak 120 Vicodin ES, 500 alprazolam, and 500 Lorcet, in exchange for the $2,000 in cash. While Mr. Glaser was in the pharmacy, Mr. Sychak asked Ms. Sychak, ''What's you intuition?'' and she said, ''I don't know. I think it's okay. Art, you're not being—everything's okay with you, right?'' to which Mr. Glaser replied, ''No, my line is good. My lines are clear. I'm okay.''According to Investigator Dittmer, Mr. Glaser understood Ms. Sychak to ask if his telephone was being tapped.

When Mr. Glaser left the pharmacy, Mr. Sychak followed him out and told Mr. Glaser to telephone the pharmacy when he got home and ask whether it was open on Sundays. Mr. Glaser agreed to do so, and explained to investigators that he routinely called the pharmacy after he arrived home and used a code phrase to let Mr. Sychak know that he had not been stopped by law enforcement personnel who would find the controlled substances.

Mr. Glaser returned to Medicap Pharmacy on September 22, 1998, pursuant to an arrangement he made with Mr. Sychak the day before by telephone. Mr. Glaser was fitted with a recording device and a transmitter and provided with $2,000 in Government funds. Mr. Glaser gave Mr. Sychak the $2,000 and some sports trading cards for Mr. Sychak's son and received in exchange 120 Vicodin ES tablets, 500 alprazolam tablets, and 500 Lorcet tablets. Investigator Dittmer testified that at some point during the visit, Mr. Sychak told Mr. Glaser to ''put the word out on the street that Amy is doing—is selling all these controlled substances.''

On February 16, 1999, Mr. Glaser executed a declaration in evidence as a Government exhibit. In his declaration Mr. Glaser described his arrangement with law enforcement authorities and the undercover visits discussed above. He also stated, among other things, that he and Mr. Sychak had agreed that Mr. Glaser would purchase Lorcet in 500-tablet quantities in the original manufacturer's bottles for $1,500 per bottle. Mr. Glaser further stated that he sold the pills for $4 each to individuals who would then sell them for $8 each on the street, and that he also paid Mr. Sychak $5,000 in cash at unstated intervals in exchange for a shopping bag of Schedule III controlled substances. Mr. Glaser stated that as of sometime in 1993 he routinely paid Mr. Sychak $12,000 to $15,000 per transaction and that sometimes Mr. Sychak kept the pharmacy open late so that Mr. Glaser could make these purchases.

8. The December 16, 1998, Search

As a result of the undercover purchases, investigators obtained a second search warrant for Medicap Pharmacy and executed it on December 16, 1998. Investigators Conlon and Dittmer and ten to fifteen other law enforcement officers conducted the search and seized, among other things, the pharmacy computer's hard drive. That same day, the Deputy Administrator issued the Order to Show Cause and Immediate Suspension of Registration that gave rise to the instant proceeding.

9. The Interview of Larry Stepinski

Also on December 16, 1998, Investigators Conlon and Dittmer and Sergeant Stan King of the Murrysville Police Department interviewed Mr. Stepinski and videotaped the interview. During the interview, Mr. Stepinski said that about four years earlier a Robert Mrvos had written fake prescriptions for Percocet and Didrex, gave them to Mr. Stepinski, and told him to take them to Medicap Pharmacy to be filled. Mr. Stepinski said that he told Mr. Mrvos that the prescriptions were for diametrically opposed drugs, but Mr. Mrvos assured him that Mr. Sychak would fill both. Mr Stepinski further said that Mr. Sychak filled both prescriptions.

Mr. Stepinski stated that Mr. Mrvos sent various drug addicts to Medicap Pharmacy with fake prescriptions; these individuals had the prescriptions filled and then turned the drugs over to Mr. Mrvos in exchange for money. According to Mr. Stepinski, however, at some point Mr. Mrvos was arrested, and Mr. Stepinski obtained the blank prescription forms that Mr. Mrvos had used. Mr. Stepinski stated that he wrote the prescriptions for various fictitious people with the last name Kaczynski, his late uncle's name, because he thought such a name would be believable inasmuch as it was hard to spell. Mr. Stepinski also stated that Mr. Sychak filled prescriptions for him for two people with fictitious last names other than Kaczynski; according to Mr. Stepinski, he told Mr. Sychak ''they were my neighbors and could you fill these for me?'' Mr. Stepinski believed, Mr. Sychak knew that these names were fictitious.

Mr. Stepinski further stated that he forged prescriptions for Didrex and Percocet using blanks from three different physicians, and that from time to time Mr. Sychak told him, ''you're going to have to find a new doctor,'' which Mr. Stepinski interpreted as an instruction to use a different physican's prescription blank. Mr. Stepinski further said that Mr. Sychak told him not to present his ''prescriptions'' to Mr. Werl, because Mr. Werl would call the physician to verify them.

Mr. Stepinski said that he went to the pharmacy every two weeks with two prescriptions, apparently one for Walter Kaczynski and one for Linda Kaczynski, and that he obtained Percocet every two weeks and Didrex once per month. Mr. Stepinski said that about a year after he started taking the Kaczynski prescriptions to the pharmacy he explained to Mr. Sychak that many people, himself among them, were using fictitious names on prescriptions filled at the pharmacy. Mr. Stepinski further said that as a result of this warning, Mr. Sychak stopped providing drugs to the people Mr. Stepinski identified, but not to Mr. Stepinski himself.

Mr. Stepinski said that at one point he used five different fictitious names on the false prescriptions, but that Mr. Sychak told him to cut back to two names. Mr. Stepinski further stated that after the investigation and arrest of a pharmacist at another pharmacy, Mr. Sychak took him outside the pharmacy building and told him that Percocet was ''too hot,'' and suggested he obtain Lorcet instead. Mr. Stepinski said that he told Mr. Sychak he could not switch because he did not know what instructions to write on a Lorcet prescription, and Mr. Sychak went back into the building, returned with Mr. Stepinski's receipt, and wrote the instructions for use for Lorcet on the back. Mr. Stepinski said that after that conversation he wrote ''prescriptions'' for Lorcet instead of Percocet. Apparently, these were standard preprinted forms on which Mr. Mrvos forged the physician's signature. Mr. Stepinski said that he spent about $280 per month for Percocet and about the same amount for Didrex, and that he always paid cash for the drugs.

Counsel for Respondent objected to the introduction into evidence of the videotape of Mr. Stepinski's interview, asserting that Mr. Stepinski was not subject to cross examination, and that Mr. Stepinski may have had reason to cast Mr. Sychak in an unfavorable light. Judge Bittner found, however, and the Deputy Administrator agrees, there is other credible evidence from the hospital where Dr. Fennema had worked and also Investigator Conlon's report of his conversation with Dr. Fennema, that the Kaczynskis were fictitious. In these circumstances, the inference is warranted, which Judge Bittner made, and with which the Deputy Administrator concurs, that none of the deliveries to them were authorized. Judge Bittner also noted that Respondent adduced no evidence that Mr. Sychak made any attempt to verify any of the purported prescriptions to them.

The Deputy Administrator may revoke a DEA Certificate of Registration and deny any pending applications for such a certificate ''if he determines that the issuance of such registration would be inconsistent with the public interest'' as determined pursuant to 21 U.S.C. 824(a)(4) an 823(f). Section 823(f) requires that the following factors be considered:

(1) The recommendation of the appropriate state licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

As a threshold matter, the factors specified in section 823(f) are to be considered in the disjunctive: the Deputy Administrator may properly rely on any one or a combination of those factors, and give each factor the weight he deems appropriate, in determining whether a registration should be revoked or an application for registration denied. Henry J. Schwarz, Jr., M.D., 54 FR 16,422 (DEA) 1989).

The Controlled Substances Act further prohibits dispensing a Schedule II controlled substance without the written prescription of a practitioner, with certain exceptions not pertinent here. 21 U.S.C. 829(a) (1996).

The Act also prohibits dispensing a Schedule III or IV controlled substance ''without a written or oral prescription in conformity with [the Federal Food, Drug and Cosmetic Act,'' 21 U.S.C. 829(b) (1996).

Furthermore, the relevant regulations governing prescriptions and implementing the Controlled Substances Act, 21 CFR 1306.03 through 1306.06 (1999) provide, in relevant part, that: (1) Prescriptions for controlled substances may be issued only by an individual practitioner who is authorized to prescribe these medications by the jurisdiction in which he is licensed to practice his profession and is registered by DEA or exempt from such registrations; (2) a prescription for a controlled substance must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice; (3) although a prescribing practitioner is responsible for the proper prescribing and dispensing of controlled substances, ''a corresponding responsibility rests with the pharmacist who fills the prescription,'' (4) prescriptions for controlled substances must be rated as of and signed on the day issued and must bear the full name and address of the patient, the drug name, strength, dosage form, quantity prescribed, and directions for use, as well as the name, address, and DEA registration number of the practitioner; and (5) prescriptions for controlled substances may be filled only by a pharmacist acting in the usual course of his professional practice.

The Government argues, in substance, that Mr. Sychak filled fictitious and fraudulent prescriptions, delivered controlled substances without a prescription, provided controlled substances in exchange for stolen drug samples, added unauthorized refills to prescriptions, encouraged drug abusers to place fraudulent telephone calls purportedly authorizing dispensings, falsified insurance records, and made misrepresentations to investigators. The Government further argues that even if Mr. Sychak and Medicap Pharmacy could be considered the victims on occasion of stratagems by drug-seeking individuals who presented fraudulent prescriptions or posed as physicians, the pharmacy abrogated its obligation to ensure that it filled only lawful prescriptions.

As noted above, Respondent did not file proposed findings of fact, conclusions of law or argument in this proceeding. In his closing argument at the hearing, counsel for Respondent asserted, in substance, that much of Ms. Ruffner's testimony was hearsay and she had reason to fabricate her testimony; the Government did not offer into evidence the tape recordings of the undercover visits; Respondent was not afforded the opportunity to cross-examine Mr. Stepinski or the other informants; and the Government did not conduct a full audit of the pharmacy. In sum, Respondent argues that the Government has not met its burden of proof in this proceeding.

With regard to factor one of the public interest analysis pursuant to 21 U.S.C. 824(a)(4) and 823(f), the recommendation of the State licensing board, it is undisputed that at the time of the hearing Respondent was authorized by the Commonwealth of Pennsylvania to handle controlled substances. Inasmuch as State licensing is a necessary but not sufficient condition for DEA registration, however, Judge Bittner found, and the Deputy Administrator concurs, that this factor is not determinative.

With regard to factor two, Respondent's experience in handling controlled substances, Judge Bittner made the following factual findings, with which the Deputy Administrator concurs. The stated quantities of illicitly dispensed controlled substances are based upon the evidence of the record as a whole. The Deputy Administrator recognizes that Respondent's computer logs may not have been entirely accurate. Testimony and other evidence, however, such as the fraudulent prescriptions themselves, paint a fairly complete picture of the magnitude of illicit activity encouraged and abetted by Respondent. It is highly doubtful, moreover, that Respondent would have overstated in his computer logs the quantities of controlled substances he was illegally dispensing.

a. The Deliveries to Mr. Ray

On August 8, 1997, Mr. Sychak delivered sixty hydrocodone 7.5 mg to Mr. Ray pursuant to the fictitious oral authorization of Dr. Wigle. Although that ''authorization'' specified no refills, Respondent's memorialization of it lists one refill. Mr. Sychak in fact treated that ''authorization'' as if it provided for two refills, delivering hydrocodone to Mr. Ray on August 15, and August 22, 1997. On August 29, 1997, Mr. Sychak refused to provide drugs based on the blank prescription from the fictitious Dr. Beck, but based that refusal on his concern that DEA investigators might notice that the handwriting on the filled-out prescription was the same as that on other pharmacy records. When Mr. Ray returned to the pharmacy shortly thereafter with the same form filled out for sixty Percocet, however, Mr. Sychak honored it.

On September 5, 1997, Mr. Sychak delivered Percocet to Mr. Ray after he filled out the ''prescription'' in Mr. Sychak's presence, and also provided Mr. Ray with sixty hydrocodone pursuant to another fictitious authorization from Dr. Beck. A week later, Mr. Sychak again provided hydrocodone to Mr. Ray pursuant to a fictitious authorization from Dr. Beck.

b. The Deliveries to Mr. Stepinski

The record establishes that between January 2, 1997, and April 14, 1998, Mr. Sychak delivered 2,870 Percocet, 60 Roxicet, 4,310 Didrex 50 mg., and 360 Lorcet 10/650 to Mr. Stepinski using the names of various Kacyznskis as aliases. The record also establishes that these deliveries were made pursuant to fictitious ''prescriptions'' and that Mr. Sychak was aware that these were not bona fide dispensings.

c. The Deliveries to Lynette Reffner and Michael Riley

Between July 17, 1997, and December 30, 1997, Respondent delivered to Ms. Reffner a total of 1,620 dosage units of Vicodin; 715 dosage units of hydrocodone; 164 dosage units of Hydromet syrup; 60 dosage units of phenobarbital; 1,390 dosage units of alprazolam; 1,240 dosage unit of Ap-Oxazepam; 130 dosage units of diazepam; and 100 dosage units of Darvocet. From 1994 until 1998 Ms. Reffner and Mr. Riley regularly purchased Vicodin ES, Xanax, Darvocet, Soma, and Hydromet syrup from Mr. Sychak without a prescription or any other form of physician authorization.

d. The Deliveries to the Ruffners

The record establishes that Mr. Sychak provided controlled substances to Ms. Ruffner's mother in exchange for physician samples of other drugs, delivered drugs to Ms. Ruffner and to her mother pursuant to purported telephone authorizations he knew to be fictitious, provided Ms. Ruffner more refills than the written legitimate prescriptions authorized, and sold controlled substances to Ms. Ruffner on the basis of lists she gave him containing names of persons and drugs, without any physician authorization. Mr. Sychak also provided Mr. Ruffner a fraudulent prescription vial at the latter's request. Respondent unlawfully delivered controlled substances to the Ruffners for several years. Between July 1996 and April 1998, Respondent delivered to the Ruffners 18,031 Vicodin ES 7.5; 9,165 hydrocodone with APAP 7.5; 8,425 hydrocodone 10 with APAP 650; 2,990 Lorcet 10/650; 2,640 diazepam 10 mg.; 330 Fioricet with codeine No. 3; 90 Lomotil and Lonox; 4,080 milliliters of Hydromet syrup, and 390 Prelu-2 105 mg. There is no indication that any of these deliveries were pursuant to legitimate prescriptions or other physician authorizations. Karen Ruffner additionally received 60 dosage units of Vicodin ES in March and April of 1993 pursuant to a purported prescription issued by Dr. Dzialowski. Finally, during Ms. Ruffner's undercover visit on April 24, 1998, Mr. Sychak sold her generic hydrocodone, without a prescription and upon her giving him a list of people and drug names.

e. The Deliveries to Mr. Glaser

Mr. Glaser stated in his February 1999 declaration that he had purchased Lorcet and other Schedule III controlled substances from Mr. Sychak since 1993, and that he paid $3.00 per pill for Lorcet. The record establishes that between November 1993, and March 1997 Respondent delivered to Mr. Glaser a total of 12,030 dosage units of alprazolam 2 mg.; 360 dosage units of diazepam 10 mg.; 13,980 dosage units of Lorcet; 420 dosage units of Vicodin ES 7.5; 60 hydrocodone 7.5 with APAP; 12,080 milliliters of Tussionex Pennkinetic suspension; 60 phentermine 37.5 mg.; and 240 Xanax 2 mg. It is also noteworthy that Respondent delivered to Mr. Glaser 300 Vicodin in a six-week period in 1994, and 240 Xanax in a three-week period in 1995. Furthermore, as described above, in the course of the two undercover visits in September 1998, less than five months after execution of the April 24 search warrant, Mr. Sychak sold Mr. Glaser 1,000 alprazolam; 140 Vicodin; 1,000 Lorcet; and 60 generic hydrocodone, for a total of $4,000.

Judge Bittner found, and the Deputy Administrator concurs, that the record establishes that over a period of about six years Mr. Sychak sold tens of thousands of dosage units of controlled substances without a physician's authorization. The record further establishes that Mr. Sychak knew or should have known that he was delivering these medications to persons who were drug abusers themselves and/or who were providing the controlled substances to others who were. Judge Bittner found, and the Deputy Administrator concurs, that this factor weighs in favor of a finding that Respondent's continued registration would be inconsistent with the public interest.

With regard to factor three, Respondent's conviction record relating to controlled substances, there is no evidence that either Medicap Pharmacy or Mr. Sychak has been convicted of violating any laws relating to controlled substances at the time of the hearing.

With regard to factor four, Respondent's compliance with applicable laws relating to controlled substances, the record establishes that Mr. Sychak delivered tens of thousands of dosage units of controlled substances without complying with the statutory and regulatory provisions discussed above. Judge Bittner therefore found, and the Deputy Administrator concurs, that this factor weighs in favor of a finding that Respondent's continued registration would be inconsistent with the public interest.

Finally, with regard to the fifth factor, other conduct that may threaten the public health and safety, Judge Bittner found, and the Deputy Administrator concurs, that Mr. Sychak (1) acquiesced to Mr. Ruffner's request to provide a fraudulent prescription vial; (2) provided Percocet to Mr. Ray pursuant to a fictitious prescription that Mr. Ray filled out in front of him; (3) offered to bill Ms. Reffner's phenobarbital to another patient's medical insurance; (4) exchanged controlled substances for stolen physician samples of other drugs; (5) continued to fill false prescriptions after Mr. Werl warned him that they were fraudulent; (6) misrepresented to investigators that he had contacted Dr. Beck to verify a prescription; and (7) billed insurance carriers for drugs the policyholders did not receive. Judge Bittner therefore found, and the Deputy Administrator concurs, that this factor weighs in favors of a finding that Respondent's continued registration would be inconsistent with the public interest.

Judge Bittner found, and the Deputy Administrator concurs, that it is abundantly clear that Mr. Sychak has egregiously abused his privilege to handle controlled substances. It appears from the record that Mr. Sychak was purposefully attempting to engender addiction through his unauthorized dispensing of refills, apparently hoping to profit from the illicit market for controlled substances he thereby created. There is no exculpatory evidence to explain why Mr. Sychak acted as he did, that he regrets his actions, or that he will not repeat them in the future. In these circumstances the conclusion is appropriate that Respondent's continued registration with DEA would be inconsistent with the public interest. See Singers-Andreini Pharmacy, Inc., 53 FR 4668, 4672 (DEA 1998); Gerald M. Bluestone, R.Ph., d/b/a Bluestone Drug Store, 56 FR

16114, 16116 (DEA 1991); Arthur Sklar, R.Ph., d/b/a King Pharmacy, 54 FR 34623 (DEA 1989).

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that the DEA Certificate of Registration BM2751736, issued to Medicap Pharmacy, be, and hereby is, revoked, and any pending applications for renewal of such registration be denied. This order is effective January 4, 2001.

Dated: November 21, 2000.

Julio F. Mercado,

Deputy Administrator.

[FR Doc. 00–30930 Filed 12–4–00; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated August 8, 2000, and published in the **Federal Register** on August 23, 2000, (65 FR 51331), Radian International LLC, 14050 Summit Drive #121, P.O. Box 201088, Austin, Texas 78720–1088, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Gamma hydroxybutyric acid (2010).	I
Thebaine (9333)	II

The firm plans to manufacture small quantities of the listed controlled substances to make deuterated and non-deuterated drug reference standards which will be distributed to analytical and forensic laboratories for drug testing programs.

No comments or objections have been received. DEA has considered the factors in Title 21, United States code, section 823(a) and determined that the registration of Radian International LLC to manufacture the listed controlled substances is consistent with the public interest at this time. DEA has investigated Radian International LLC on a regular basis to ensure that the company's continued registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security systems, audits of the company's records, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823 and 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic classes of controlled substances listed above is granted.

Dated: November 20, 2000.

John H. King,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 00–30934 Filed 12–4–00; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 99–7]

In the Matter of Mary Thomson, M.D.; Continuation of Registration With Restrictions

The Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause dated October 30, 1998, to Mary Thomson, M.D. (Respondent), seeking to revoke the Respondent's DEA Certificate of Registration, BT3320203, pursuant to 21 U.S.C. 824(a)(2) and (4); and deny any pending application for renewal of such registration pursuant to 21 U.S.C. 823(f) because her registration would be inconsistent with the public interest as defined by 21 U.S.C. 823(f). Specifically, the Order to Show Cause alleged that Respondent (1) became opiate dependent on Demerol, a Schedule II Controlled Substance, and received in-patient treatment for chemical dependency; (2) tested positive for opiates and benzodiazepines in October of 1995 and had her hospital privileges suspended; (3) obtained controlled substances by fraud or misrepresentation by issuing prescriptions for controlled substances in names of persons for whom such controlled substances were not intended and administered the controlled substances to herself for no legitimate medical purpose and not in the usual course of her professional practice; (4) pled guilty to one felony count of obtaining controlled substances by fraud and received three years of probation, community service, and a fine; and (5) admitted to using controlled substances without a legitimate medical purpose and diverting controlled substances to her own use. Respondent requested to hearing in a letter filed November 30, 1998. The requested hearing was held in Dallas, Texas, on April 6–8, 1999. At the hearing both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties submitted Proposed Findings of Fact, Conclusions of Law, and Argument. On January 4, 2000, Judge Randall issued her Opinion and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision, recommending that Respondent's registration be continued, subject to three restrictions. The Government thereafter filed Exceptions to Judge Randall's Opinion and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision; and Respondent filed Responses to the Government's Exceptions, The record was transmitted to the Deputy Administrator for final decision February 16, 2000.

The Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts the Opinion and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge, but includes additional restrictions on Respondent's continued registration. His adoption is in no manner diminished by any recitation of facts, issues, and conclusions herein, or of any failure to mention a fact or matter of law. The Deputy Administrator finds the following facts especially relevant to his decision.

Respondent was a practicing pharmacist from 1980 until 1987. Respondent has practiced medicine since 1994, when she completed her medical education. During the course of her medical education, Respondent earned several performance awards, including ''Resident Physician of the Month,'' ''Resident of the Year,'' and ''Outstanding Third Year Resident.'' Respondent was employed by St. Mary's Hospital from 1994 until she resigned by letter received May 6, 1996. Respondent is currently employed as the sole full time physician for Special Health Resources of East Texas (SHRET). SHRET is a non-profit public organization funded at least in part by government grants. Respondent works in three clinics serving a large part of East Texas and also provides treatment for HIV patients at the Well Spring Recovery Center, a center for patients with HIV and substance abuse problems. Most of the patients who avail themselves of SHRET's services are the needy and indigent, and who are also mostly suffering from HIV and related complications. Respondent also administers Phase III clinical trials of experimental AIDS drugs, and follows the treatment of participating patients. Respondent's co-workers at SHRET variously describe her patient care as ''excellent'' and ''exceptional.'' Respondent also provides HIV/AIDS awareness and treatment training to local healthcare professionals, including other physicians.

Before, during, and after the events at issue, Respondent suffered from a number of serious medical disorders, including Lyme Disease and Bipolar Disorder, Type II. The Bipolar Disorder was diagnosed in June of 1996, subsequent to the events forming the basis for the Show Cause Order. Prior to this diagnosis, Respondent's Bipolar Disorder symptoms had been incorrectly diagnosed as depression, and were being treated as such. Judge Randall credited Respondent's treating psychiatrist's testimony that this misdiagnosis of Respondent's Bipolar Disorder contributed to her susceptibility to drug use. Since her diagnosis, Respondent's Bipolar Disorder has been treated with lithium, and her levels are monitored by a psychiatrist on a monthly basis.

On June 28, 1995, Respondent was escorted from St. Mary's Health Care clinic, her place of employment, because nurses there noticed Respondent behaving strangely, that her speech was slurred, and that she was unsteady on her feet. Following Respondent's departure, hospital staff found in Respondent's desk drawer two used syringes and four vials labeled ''Demerol 50 mg'', one partially empty. Each vial listed the same patient's name, hereinafter referred to as J.T. Rather Than resign, or submit to close monitoring by St. Mary's Hospital, Respondent entered an in-patient recovery center for one week, and thereafter attended recovery groups three to five times a week.

On October 13, 1995, nurses working with Respondent again noticed strange behavior by Respondent, who seemed confused while examining patients, and again exhibited slurred speech. Respondent agreed to provide a urine sample to test for controlled substances. The test was positive for opiates and benzodiazepines. At the time, however, Respondent had just had minor surgery, and the evidence shows that the positive results of this test were from validly prescribed drugs related to this surgery.

On November 15, 1995, Respondent entered into an impaired physician agreement with St. Mary's Hospital. The agreement provided that Respondent would submit to weekly drug testing, would attend Alcoholics Anonymous meetings three times a week, and that Respondent would not prescribe any medication for herself.

On March 20, 1996, Respondent tested positive for amphetamines, and subsequently resigned from St. Mary's, rather than face a peer review committee. Respondent's supervisor subsequently testified that this drug test was a false positive, that could be explained by Respondent's use of a decongestant, an antihistamine, or by prescription antidepressant drugs.

On February 11, 1997, Respondent was indicted in the United States District Court for the Northern District of Texas, Lubbock Division (Court), for 12 counts of knowingly and intentionally obtaining and acquiring injectable meperidine, also known as Demerol, a Schedule II narcotic controlled substance, by misrepresentation, fraud, forgery, deception, or subterfuge, in violation of 21 U.S.C. 843(a)(3), and one count of knowingly and intentionally obtaining and acquiring oxycodone, a Schedule II narcotic controlled substance, by misrepresentation, fraud, forgery, deception, or subterfuge, in violation of 21 U.S.C. 843(a)(3). On June 9, 1997, Respondent pled guilty to count eight of the indictment and was sentenced to three years probation. Pursuant to the plea agreement, Respondent was required to participate in a program for the treatment of narcotic dependency, including drug testing; refrain from employment as a physician or pharmacist for the duration of probation except with the written consent of the Court; participate in mental health services as directed by the probation officer; provide 50 hours of community service; and pay a fine.

On August 9, 1997, the Texas Board of Medical Examiners (Board) revoked Respondent's license to practice medicine in Texas; however, the Board probated the revocation, placing Respondent on probation for ten years, subject to the terms and conditions set forth in an Agreed Order with Respondent. The Deputy Administrator finds the following conditions set by the Board especially relevant: (1) Respondent shall obtain written consent from the United States District Court during the probationary period for employment as a physician in the State of Texas; (2) Respondent may only practice in an institutional setting as approved by the Board; (3) Respondent shall not consume alcohol, dangerous drugs, or controlled substances unless prescribed by another physician for a legitimate and therapeutic purpose; (4) Respondent shall submit to random drug and alcohol testing at the request of the authorized representative of the Board and at the request of any of the physicians required and authorized to authorized to evaluate or treat Respondent pursuant to the terms of the Order; (5) Respondent shall submit to a Board approved psychiatrist for monthly counseling and evaluation of her lithium level; (6) Respondent shall participate in an ongoing substance abuse program approved by the Board at least three times a week, and shall provide written reports to the Board documenting the number and locations of the meetings attended; (7) Respondent shall participate in physician health and rehabilitation society meetings and make written reports documenting the Respondent's attendance and participation; (8) Respondent shall complete at least 50 hours per year of continuing AMA approved medical education; (9) Respondent must keep a log book available for inspection at all times of all prescriptions of controlled substances or dangerous drugs with potential for abuse; (10) Respondent's medical practice must be monitored by at least one or more physicians approved by the Board and practicing in Texas; (11) Respondent must not treat or otherwise serve as physician for her immediate family; (12) Respondent shall not unilaterally withdraw from any evaluation, treatment, or medical care required by the Order, upon penalty of the suspension of her medical license; (13) Respondent shall provide written reports regarding any aspect of Respondent's mental or physical condition and compliance with the terms of the Order upon the request of the Board or Board Staff; (14) Respondent may not possess alcohol, controlled substances, or dangerous drugs with potential for abuse, except as authorized by the Order; and (15) Respondent must cooperate with all requests by the Board and Board Staff to monitor her compliance with this Agreed Order.

On October 20, 1997, the Court issued an order consenting to Respondent's ''accepting employment as a physician with SHRET, and practicing medicine with that organization in accordance with the Agreed Order, dated August 9, 1997, issued by the Texas State Board of Medical Examiners.'' Respondent has been employed by SHRET since July or August of 1997 as a consultant, and since November of 1997 as a physician. She has not maintained nor dispensed controlled substances since her employment with SHRET.

Pursuant to 21 U.S.C. 824(a), the Deputy Administrator may revoke a DEA Certificate of Registration as a practitioner if the registrant has been convicted of a felony *inter alia* under any law of the United States, relating to controlled substances; or if the continuance of such a registration would be inconsistent with the public interest. Pursuant to 21 U.S.C. 823(f) and 824(a)(4) and subdelegations of authority thereunder, (28 CFR 0.100(b) and 0.104 (1998)), the Deputy Administrator may deny pending applications for renewal or modification of this registration as a practitioner if the issuance of such application would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered in evaluating the public interest: (1) The recommendation of the appropriate State licensing board or professional disciplinary authority; (2) The applicant's experience in dispensing, or conducting research with respect to controlled substances; (3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances; (4) Compliance with applicable State, Federal, or local laws relating to controlled substances; and (5) Such other conduct which may threaten the public health and safety. These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight he deems appropriate in determining whether a registration should be revoked or an application for registration be denied. See Henry J. Schwarz, Jr., MD., 54 FR 16,422 (1989).

It is undisputed that Respondent in this case has been convicted of a felony within the meaning of 21 U.S.C. 824(a)(2). Her June 9, 1997, plea of guilty to count eight of the indictment for violating 21 U.S.C. 843(a)(3) resulted in a sentence of three years probation with standard and additional conditions. Respondent's DEA Certificate of Registration may be revoked upon this basis alone. See George Forest Landman, D.O., 52 FR 1,258 (1987); Fairbanks T. Chua, M.D., 51 FR 41,676 (1986). The statute is discretionary, however, and the relevant language states ''A registration pursuant to section 823 of this title * * * may be suspended or revoked by the Attorney Generla upon a finding that the registrant—* * * (2) has been convicted of a felony under this subchapter * * * '' (Emphasis added). In this case, the Deputy Administrator finds that the public interest is best served by continuing Respondent's registration, as set forth below.

Regarding factor one of the public interest analysis pursuant to 21 U.S.C. 823(f) and 824(a)(4), the Deputy Administrator finds that it is undisputed that Respondent's license to practice medicine in the State of Texas was revoked, and the revocation probated for ten years subject to the Agreed Order dated August 9, 1997. The Texas Board placed no restrictions on Respondent's authority to prescribe, administer, or dispense controlled substances, except that she keep a log of such prescriptions available for inspection at all times, and that she only possess such substances as permitted by the Agreed Order. Thus, Respondent is authorized to practice medicine and handle controlled substances in the State of Texas, pursuant to the Agreed Order. While 21 U.S.C. 824(a)(3) requires a registrant to have a valid State license or registration, this is not the only requirement for DEA registration, and therefore is not determinative.

Regarding factor two, Respondent has been employed as both a pharmacist and a physician during her career. While Judge Randall found that Respondent demonstrated a knowledge and understanding of applicable State and federal laws and regulations concerning the handling of controlled substances, the Government accurately points out in its Exceptions that Judge Randall failed to take note of her finding that Respondent failed to understand that DEA regulation required Respondent to notify DEA of Respondent's new registered address, even though Respondent neither dispensed nor maintained controlled substances at that place of business. It is undisputed that Respondent failed to formally notify DEA of the change of her registered address after she began employment with SHRET. This oversight, however, while cause for some concern, is also not dispositive.

Regarding factor three, it is undisputed that Respondent pled guilty to one count of knowingly and intentionally obtaining and acquiring injectable Demerol, a Schedule II narcotic substance, by misrepresentation, fraud, forgery, deception, and subterfuge. This conviction resulted from Respondent's actions on June 26, 1995, when she wrote a prescription for Demerol for J.T., and administered the Demerol to herself while at work. Judge Randall credited the testimony of Respondent and her treating psychiatrist in finding that Respondent's drug use was caused by her various medical and emotional diagnoses, and especially her previously undiagnosed Bipolar Disorder. The Deputy Administrator finds the record contains no evidence that Respondent's illegal actions harmed anyone other than herself. In addition, there appears to be no evidence in the record that Respondent's patients failed to receive needed medications. On the other hand, there is significant evidence in the record that Respondent is successfully recovering from her drug abuse, and she has effective professional and personal support networks in place to ensure against further relapse. It is undisputed that Respondent has not improperly used controlled substances since at least May of 1996.

Regarding factor four, Respondent admitted to diverting controlled substances on at least two or three occasions, between February 15, 1995, and June 26, 1995. This is in addition to the specific instance forming the basis of her conviction. Respondent alleges that she cannot remember exactly how many times she diverted controlled substances to her own use, nor from whose prescriptions the controlled substances were diverted. The Deputy Administrator shares Judge Randall's concern with regard to respondent's diversion history. While the record is not clear regarding the number of occasions the Respondent diverted, nor the quantity of controlled substances she diverted, the Deputy Administrator finds that there is sufficient evidence in the record to believe that Respondent's estimates regarding her diversion history substantially minimize the extent of her illegal activity. Judge Randall twice noted in her Recommended Rulings that Respondent's attitude at the hearing showed an attempt to minimize her illegal actions. Not only did Respondent studiously avoid admitting that she diverted the very Demerol upon which her criminal conviction was based, she further alleged that she could not remember any specific instances of diversion whatsoever. In addition, Judge Randall credited the Government's showing that Respondent's claims of an ongoing patient-physician relationship with J.T. were false, and that the Respondent was using J.T.'s name merely to obtain Demerol and to conceal her own illicit use. Judge Randall found, and the Deputy Administrator concurs, that absent the evidence of Respondent's strong efforts to rehabilitate herself, her continual minimizations of her criminal actions and significant breaches of professional judgment would weigh heavily against her retention of a DEA Certificate of

Registration. It is undisputed, however, that Respondent is in compliance with the terms of her Federal probation, and also with the terms of the Agreed Order.

Finally, with regard to the fifth factor, there is no question that Respondent abused controlled substances while performing her duties as a physician. Also troubling is Respondent's false physician-patient relationship with J.T., which Respondent continued to refuse to acknowledge as a subterfuge to supply Respondent's own drug addition. Fortunately for Respondent's patients, and for Respondent herself, there is no evidence that Respondent's illicit drug abuse harmed any others than herself, and further, there is no evidence that Respondent's patients failed to receive needed medications. Without the strong and extensive controls set in place by the Agreed Order, and without the strong evidence of Respondent's sincere efforts to rehabilitate herself, her retention of a DEA Certificate of Registration would not be in accord with the public interest.

The Deputy Administrator agrees with Judge Randall that the Government has met its *prima facie* burden in its case to revoke Respondent's DEA Certificate of Registration and to deny her pending application for renewal. As Judge Randall notes in her Recommended Rulings, however, the governing statute is discretionary. 21 U.S.C. 823(f) states in relevant part that ''[t]he Attorney General *may* deny an application for such registration if he determines that the issuance of such registration would be inconsistent with the public interest.'' (Emphasis added). The Deputy Administrator previously has concluded that, in exercising his discretion in determining the appropriate remedy in any given case, he should consider all the facts and circumstances of the case. See Martha Hernandez, M.D., 62 FR 61,145 (1997). The Deputy Administrator concurs with Judge Randall that the Respondent has presented sufficient evidence to alter the ultimate determination of her case.

Specifically, the Deputy Administrator finds that the Texas Board's Agreed Order with the Respondent provides the public and Respondent herself with effective protection against future criminal diversion of controlled substances. The evidence shows that Respondent is in compliance with all terms of the Agreed Order. In addition, Respondent currently maintains a lifestyle that will help to prevent a relapse of the substance abuse problems she experienced in 1995. Currently, the Respondent attends a substance recovery group, maintains a relationship with a therapist, receives lithium to control the effects of her Bipolar Disorder, submits to regular drug testing, and has developed strong familial and religious associations.

Another significant factor influencing the Deputy Administrator's decision in this case is that Respondent's current professional position at SHRET is devoted to serving the public interest. The Deputy Administrator finds that the public interest is best served in this case by continuing Respondent's registration, with appropriate restrictions, as set forth below. Through SHRET, Respondent provides critical services to a medically under-served community. Respondent also is committed to performing training and continuing education to other health professionals, including physicians, regarding AIDS and HIV issues, over a large geographic area. At least some of this training is performed during her personal time, and not during her regular work hours. Respondent additionally has been approved by the FDA to administer Phase III clinical trials of experimental AIDS drugs, and thereafter to monitor the results. As of the date Respondent's testimony in the present hearing, she had administered six trials in the previous 18 month period. Respondent and her co-workers all credibly testified that her work at SHRET gives Respondent great professional satisfaction. Additionally, Respondent's quality of work at SHRET was credibly characterized by co-workers as ''excellent'' and ''exceptional.'' Respondent is also the medical director at Well Spring, a recovery center designed to assist individuals who are suffering from HIV and who are also substance abusers. The 60 to 90 day program is designed to teach participants alternative methods of pain and stress management, including massage, Acudetox, and neuro-feedback. Well Spring Recovery Center is the only program of its type in Texas, and one of only three in the United States (the other two are located on the East and West Coasts).

The Deputy Administrator agrees with Judge Randall's finding that Respondent effectively has addressed the personal and professional problems that contributed to her drug abuse. While it is troubling that Respondent attempted to tailor her testimony to limit and minimize her illicit activity, the record indicates that Respondent did take affirmative responsibility for her misconduct. The strong and extensive controls set by the Texas Board's Agreed Order, combined with Respondent's actions clearly showing a great personal desire to rehabilitate herself personally and professionally, provide a sufficient level of protection for both Respondent and the public that Respondent should be allowed to maintain her DEA Registration, with restrictions.

Therefore, the Deputy Administrator concludes that Respondent's DEA Certificate of Registration should be continued subject to the following restrictions for three years from the effective date of this final order.

1. Respondent is to forward on a quarterly basis her prescription log to the DEA regional office for the entire three year period of this registration;

2. Respondent is to promptly forward whatever evidence of drug screen results available to her to the DEA regional office for the entire three year period of this registration;

3. Respondent is to promptly forward to the DEA regional office any changes the Texas Board of Medical Examiners may make to the terms of her probation;

4. Respondent shall not prescribe, dispense, administer, or otherwise handle any narcotic controlled substance as defined under the Controlled Substances Act; this restriction shall also extend to the Controlled Substances Buprenorphine, Butorphanol, and Pentazocine; and

5. Consistent with the Court's October 20, 1997 order, Respondent's Registration is contingent upon continuing her employment with SHRET for the entire three year period of the Registration. If for any reason Respondent terminates her employment with SHRET, Respondent shall promptly notify the DEA regional office in writing, setting forth the facts and circumstances leading to said termination of employment.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that the DEA Certificate of Registration BT3320203, submitted by Mary Thomson, M.D. be, and hereby is, continued, and any pending applications for renewal be granted, for Schedules II, III, IV, and V non-narcotics, excepting Butorphanol and Pentazocine, and subject to the above-described restrictions. This order is effective upon the issuance of the DEA Certificate of Registration, but no later than January 4, 2001.

Dated: November 21, 2000.

Julio F. Mercado,

Deputy Administrator.

[FR Doc. 00–30931 Filed 12–4–00; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service.

[INS No. 2103–00]

Immigration and Naturalization Service Airport and Seaport Inspections User Fee Advisory Committee Meeting

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Notice of meeting.

Committee meeting: Immigration and Naturalization Service Airport and Seaport Inspections User Fee Advisory Committee.

Date and time: Wednesday, January 31, 2001, at 1 p.m.

Place: Immigration and Naturalization Service Headquarters, 425 I Street NW, Washington, DC 20536, Shaughnessy Conference Room—Sixth Floor.

Status: Open. Twenty-first meeting of this Advisory Committee.

Purpose: Performance of advisory responsibilities to the Commissioner of the Immigration and Naturalization Service pursuant to section 286(k) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1356(k) and the Federal Advisory Committee Act 5 U.S.C. app. 2. The responsibilities of this standing Advisory Committee are to advise the Commissioner of the Immigration and Naturalization Service on issues related to the performance of airport and seaport immigration inspection services. This advice should include, but need not be limited to, the time period during which such services should be performed, the proper number and deployment of inspection officers, the level of fees, and the appropriateness of any proposed fee. These responsibilities are related to the assessment of an immigration user fee pursuant to section 286(d) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1356(d). The Committee focuses attention on those areas of most concern and benefit to the travel industry, the traveling public, and the Federal Government.

Agenda:

1. Introduction of the Committee members.
2. Discussion of administrative issues.
3. Discussion of activities since last meeting.
4. Discussion of specific concerns and questions of Committee members.
5. Discussion of future traffic trends.
6. Discussion of relevant written statements submitted in advance by members of the public.
7. Scheduling of next meeting.

Public participation: The meeting is open to the public, but advance notice of attendance is requested to ensure adequate seating. Persons planning to attend should notify the contact person at least 5 days prior to the meeting. Members of the public may submit written statements at any time before or after the meeting to the contact person for consideration by this Advisory Committee. Only written statements received by the contact person at least 5 days prior to the meeting will be considered for discussion at the meeting.

Contact person: Charles D. Montgomery, Office of the Assistant Commissioner, Inspections, Immigration and Naturalization Service, Room 4064, 425 I Street NW., Washington, DC 20536, telephone: (202) 616–7498, fax: (202) 514–8345 E-mail: charles.d.montgomery@usdoj.gov.

Dated: November 28, 2000.

Mary Ann Wyrsch,

Acting Commissioner, Immigration and Naturalization Service.

[FR Doc. 00–30842 Filed 12–4–00; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification

The following parties have filed petitions to modify the application of existing safety standards under section 101(c) of the Federal Mine Safety and Health Act of 1977.

1. Rosebud Mining Company

[Docket No. M–2000–135–C]

Rosebud Mining Company, R.D. #9, Box 379A, Kittanning, Pennsylvania 16201 has filed a petition to modify the application of 30 CFR 75.1100–2(e)(2) (quantity and location of firefighting equipment) to its Rosebud No. 2 Mine (I.D. No. 36–08410), Rosebud No. 3 Mine (I.D. No. 36–08773), Roaring Run Mine (I.D. No. 36–08329), Tracy Lynne Mine (I.D. No. 36–08603), Dutch Run Mine (I.D. No. 36–08701) all located in Armstrong County, Pennsylvania; Josephine No. 3 Mine (I.D. No. 36–08719) located in Indiana County, Pennsylvania; and Twin Rocks Mine (I.D. No. 36–08836) located in Cambria County, Pennsylvania. The petitioner proposes to use an alternative method of compliance for firefighting equipment at temporary electrical installations. The petitioner proposes to use two (2) fire extinguishers or one fire extinguisher of twice the required capacity at all temporary electrical installations instead of using 240 pounds of rock dust. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard and will not result in a diminution of safety to the miners.

2. Gibson County Coal, L.L.C.

[Docket No. M–2000–136–C]

Gibson County Coal, L.L.C., P.O. Box 1269, Route 3 Lyle Station Road, Princeton, Indiana 47670 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its Gibson Mine (I.D. No. 12–02215) located in Gibson County, Indiana. The petitioner proposes to use a spring-loaded device with specific fastening characteristics instead of a padlock to secure plugs and electrical type connectors to batteries, and to the permissible mobile powered equipment the batteries serve, to prevent the battery plugs from accidentally separating from their receptacles during normal operation of the battery equipment. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard and will not result in a diminution of safety to the miners.

3. Gibson County Coal, L.L.C.

[Docket No. M–2000–137–C]

Gibson County Coal, L.L.C., P.O. Box 1269, Route 3 Lyle Station Road, Princeton, Indiana 47670 has filed a petition to modify the application of 30 CFR 75.901 (protection of low- and medium-voltage three-phase circuits used underground) to its Gibson Mine (I.D. No. 12–02215) located in Gibson County, Indiana. The petitioner proposes to use a 480-volt, three-phase, 200KW diesel powered generator set with an approved diesel drive engine to supply power to a 250 KVA three-phase transformer and three-phase 480-, 600-, and 995-volt power circuit, to move equipment in and out of the mine and to perform rehab work in areas outby section loading points. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

4. Black Beauty Coal Company

[Docket No. M–2000–138–C]

The Peabody Group, 801 Laidley Tower, P.O. Box 1233, Charleston, West Virginia 25324–1233 has filed a petition for the Black Beauty Coal Company, 8282 Catlin Indianola Road, Catlin, Illinois 61817, to modify the application of 30 CFR 75.1002 (location of trolley wires, trolley feeder wires, high-voltage cables and transformers) to its Riola #1

Mine (I.D. No. 11–02971) located in Vermilion County, Illinios. The petitioner proposes to use high-voltage (2,400) trailing cables inby the last open crosscut at the working continuous miner section(s). The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

5. R & R Coal Company

[Docket No. M–2000–139–C]

R & R Coal Company, 21 East Wood Street, Pine Grove, Pennsylvania 17963 has filed a petition to modify the application of 30 CFR 75.335 (construction of seals) to its R & R Coal Company Mine (I.D. No. 36–08498) located in Schuylkill County, Pennsylvania. The petitioner requests a modification of the existing standard to permit alternative methods of construction of seals using wooden materials of moderate size and weight due to the difficulty in accessing previously driven headings and breasts containing inaccessible abandoned workings; to accept a design criteria in the 10 psi range; and to permit the water trap to be installed in the gangway seal and sampling tube in the monkey seal for seals installed in pairs. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

6. R & R Coal Company

[Docket No. M–2000–140–C]

R & R Coal Company, 21 East Wood Street, Pine Grove, Pennsylvania 17963 has filed a petition to modify the application of 30 CFR 75.1200(d) & (i) (mine map) to its R & R Coal Company Mine (I.D. No. 36–08498) located in Schuylkill County, Pennsylvania. The petitioner proposes to use cross-sections instead of contour lines through the intake slope, at locations of rock tunnel connections between veins, and at 1,000 foot intervals of advance from the intake slope; and to limit the required mapping of the mine workings above and below to those present within 100 feet of the veins being mined except when veins are interconnected to other veins beyond the 100-foot limit through rock tunnels. The petitioner asserts that due to the steep pitch encountered in mining anthracite coal veins, contours provide no useful information and their presence would make portions of the mine illegible. The petitioner further asserts that use of cross-sections in lieu of contour lines has been practiced since the late 1800's thereby providing critical information relative to the spacing between veins and proximity to other mine workings which fluctuate considerably. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

7. R & R Coal Company

[Docket No. M–2000–141–C]

R & R Coal Company, 21 East Wood Street, Pine Grove, Pennsylvania 17963 has filed a petition to modify the application of 30 CFR 75.1202 and 75.1202–1(a) (temporary notations, revisions, and supplements) to its R & R Coal Company Mine (I.D. No. 36–08498) located in Schuylkill County, Pennsylvania. The petitioner proposes to revise and supplement mine maps annually instead of every 6 months as required, and to update maps daily by hand notations. The petitioner also proposes to conduct surveys prior to commencing retreat mining and whenever a drilling program under 30 CFR 75.388 or plan for mining into inaccessible area under 30 CFR 75.389 is required. The petitioner asserts that the low production and slow rate of advance in anthracite mining make surveying on 6-month intervals impractical. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

8. RAG Emerald Resources LP

[Docket No. M–2000–142–C]

RAG Emerald Resources LP, One Oxford Centre, 301 Grant Street, Pittsburgh, Pennsylvania 15219–1410 has filed a petition to modify the application of 30 CFR 75.507 (power connection points) to its Emerald Mine (I.D. No. 36–05466) located in Greene County, Pennsylvania. The petitioner requests that the Proposed Decision and Order of its previously granted petition for modification, docket number M–96–069–C be amended to permit use of the petition at locations other than the No. 3 bleeder shaft at the Emerald Mine. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

9. San Juan Coal Company

[Docket No. M–2000–143–C]

San Juan Coal Company, P.O. Box 561, Waterflow, New Mexico 87421 has filed a petition to modify the application of 30 CFR 75.1909(b)(6) (nonpermissible diesel-powered equipment; design and performance requirements) to its San Juan South Mine (I.D. No. 29–02170) and San Juan Deep Mine (I.D. No. 29–02201) located in San Juan County, New Mexico. The petitioner proposes to operate its diesel road grader without front wheel brakes. The petitioner proposes to operate its diesel grader at a maximum speed of 10 miles per hour, lower the moldboard to increase stopping capability in emergency situations, and to provide training to grader operators on how to recognize the appropriate speeds for different road and slope conditions. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard and that application of the existing standard would result in a diminution of safety to the miners.

10. McCoy Elkhorn Coal Corporation

[Docket No. M–2000–144–C]

McCoy Elkhorn Coal Corporation, 1148 Long Fork Road, Kimper, Kentucky 41539 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its No. 14 Mine (I.D. No. 15–18088), No. 16 Mine (I.D. No. 15–18250), No. 21 Mine (I.D. No. 15–18085), and Smithfork Mine (I.D. No. 15–16693) all located in Pike County, Kentucky. The petitioner proposes to use a permanently installed spring-loaded locking device on mobile battery-powered machines instead of padlocks to prevent the battery plugs from accidentally separating from their receptacles, and to eliminate the hazards associated with difficult removal of padlocks during emergency situations. The petitioner asserts that application of the existing standard would result in a diminution to the miners and that the proposed alternative method would provide at least the same measure of protection as the existing standard.

11. Ohio County Coal Corporation

[Docket No. M–2000–145–C]

Ohio County Coal Corporation, 19050 Highway 1078 South, Henderson, Kentucky 42420 has filed a petition to modify the application of 30 CFR 75.503 (permissible electric face equipment; maintenance) to its Freedom Mine (I.D. No. 15–17587) located in Hopkins County, Kentucky. The petitioner proposes to use a spring-loaded device with specific fastening characteristics instead of a padlock to secure plugs and electrical type connectors to batteries and to the permissible mobile powered equipment the batteries serve, to prevent battery plugs from accidentally separating from their receptacles during normal operation of the battery equipment. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

12. Powder River Coal Company

[Docket No. M–2000–146–C]

Powder River Coal Company, Caller Box 3035, Gillette, Wyoming 62717–3035 has filed a petition to modify the application of 30 CFR 77.1200 (mine map) to its North Antelope/Rochelle Complex (I.D. No. 48–01353) located in Campbell County, Wyoming. The petitioner proposes to use a scale of 1,000 feet to the inch instead of using a scale of not less than 100 or more than 500 feet to the inch. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard and would not result in a diminution of safety to the miners.

13. Gibson County Coal Corporation

[Docket No. M–2000–147–C]

Gibson County Coal Corporation, P.O. Box 1269, Route 3, Lyle Station Road, Princeton, Indiana 47670 has filed a petition to modify the application of 30 CFR 75.701 (grounding metallic frames, casings, and other enclosures of electric equipment) to its Gibson Mine (I.D. No. 12–02215) located in Gibson County, Indiana. The petitioner proposes to use a 200 KW/250 KVA, 480-volt, diesel powered generator set to move equipment in and out of the mine(s) and in emergency situations to move equipment underground. The petitioner proposes to have the neutral of the secondary side of the wye configured 480-, 575-, 995-volt transformer in series between it and the frame of the generator unit, a 995-volt rated resistor that will limit phase-to-frame fault current to 0.5 ampere continuously. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

14. D & F Deep Mine

[Docket No. M–2000–148–C]

D & F Deep Mine, RD 1, Box 33A, Klingerstown, Pennsylvania 17941 has filed a petition to modify the application of 30 CFR 49.2 (mine rescue teams) to its Buck Drift Mine (I.D. No. 36–07456) located in Schuylkill County, Pennsylvania. The petitioner requests a modification of the standard to permit the reduction of two mine rescue teams with five members and one alternate each, to two mine rescue teams of three members with one alternate for either team. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

15. D & F Deep Mine

[Docket No. M–2000–149–C]

D & F Deep Mine, RD 1, Box 33A, Klingerstown, Pennsylvania 17941 has filed a petition to modify the application of 30 CFR 75.335 (construction of seals) to its Buck Drift Mine (I.D. No. 36–07456) located in Schuylkill County, Pennsylvania. The petitioner requests a modification of the existing standard to permit alternative methods of construction of seals using wooden materials of moderate size and weight due to the difficulty in accessing previously driven headings and breasts containing inaccessible abandoned workings; to accept a design criteria in the 10 psi range; and to permit the water trap to be installed in the gangway seal and sampling tube in the monkey seal for seals installed in pairs. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

16. D & F Deep Mine

[Docket No. M–2000–150–C]

D & F Deep Mine, RD 1, Box 33A, Klingerstown, Pennsylvania 17941 has filed a petition to modify the application of 30 CFR 75.1100–2(a) (quantity and location of firefighting equipment) to its Buck Drift Mine (I.D. No. 36–07456) located in Schuylkill County, Pennsylvania. The petitioner proposes to use an alternative method of compliance for firefighting equipment at temporary electrical installations. The petitioner proposes to use two (2) fire extinguishers or one fire extinguisher of twice the required capacity at all temporary electrical installations instead of using 240 pounds of rock dust. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the existing standard.

17. D & F Deep Mine

[Docket No. M–2000–151–C]

D & F Deep Mine, RD 1, Box 33A, Klingerstown, Pennsylvania 17941 has filed a petition to modify the application of 30 CFR 75.1200(d) & (i) (mine map) to its Buck Drift Mine (I.D. No. 36–07456) located in Schuylkill County, Pennsylvania. The petitioner proposes to use cross-sections instead of contour lines through the intake slope, at locations of rock tunnel connections between veins, and at 1,000 foot intervals of advance from the intake slope; and to limit the required mapping of the mine workings above and below to those present within 100 feet of the veins being mined except when veins are interconnected to other veins beyond the 100-foot limit through rock tunnels. The petitioner asserts that due to the steep pitch encountered in mining anthracite coal veins, contours provide no useful information and their presence would make portions of the mine illegible. The petitioner further asserts that use of cross-sections in lieu of contour lines has been practiced since the late 1800's thereby providing critical information relative to the spacing between veins and proximity to other mine workings which fluctuate considerably. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

18. D & F Deep Mine

[Docket No. M–2000–152–C]

D & F Deep Mine, RD 1, Box 33A, Klingerstown, Pennsylvania 17941 has filed a petition to modify the application of 30 CFR 75.1202 and 75.1202–1(a) (temporary notations, revisions, and supplements) to its Buck Drift Mine (I.D. No. 36–07456) located in Schuylkill County, Pennsylvania. The petitioner proposes to revise and supplement mine maps annually instead of every 6 months as required, and to update maps daily by hand notations. The petitioner also proposes to conduct surveys prior to commencing retreat mining and whenever a drilling program under 30 CFR 75.388 or plan for mining into inaccessible area under 30 CFR 75.389 is required. The petitioner asserts that the low production and slow rate of advance in anthracite mining make surveying on 6-month intervals impractical. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

19. Shamrock Coal Company

[Docket No. M–2000–153–C]

Shamrock Coal Company, 1374 Highway 192 East, London, Kentucky 40741 has filed a petition to modify the application of 30 CFR 75.1700 (oil and gas wells) to its Shamrock #18 Series Mine (I.D. No. 15–02502) located in Leslie County, Kentucky. The petitioner has identified one oil or gas well located adjacent to longwall gate entries, and within a proposed longwall mining panel at its Shamrock #18 Series underground mine. The petitioner proposes to plug the well and mine through the plugged well. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

20. Canyon Fuel Company, LLC

[Docket No. M–2000–154–C]

Canyon Fuel Company, LLC, HC 35 Box 380, Helper, Utah 84526–9804 has filed a petition to modify the application of 30 CFR 75.350 (air courses and belt haulage entries) to its Skyline Mine No. 3 (I.D. No. 42–01566) located in Carbon County, Utah. The petitioner proposes to use belt air to ventilate active working places. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

21. Mountain Coal Company, L.L.C.

[Docket No. M–2000–155–C]

Mountain Coal Company, L.L.C., 5174 Highway 133, P. O. Box 591, Somerset, Colorado 81434 has filed a petition to modify the application of 30 CFR 75.352 (return air courses) to its West Elk Mine (I.D. No. 05–03672) located in Gunnison County, Colorado. The petitioner requests a modification of the existing standard to permit the use of a two-entry mining system with the belt entry used as a return air course as stipulated in this petition for modification during longwall panel development mining. The petitioner proposes to install a low-level carbon monoxide system to be used as an early warning detection system during panel development mining, longwall setup, longwall retreat mining, and longwall recovery. The petitioner asserts that application of the existing standard would result in a diminution of safety to the miners and that the proposed alternative method would provide at least the same measure of protection as the existing standard.

22. Oxbow Carbon and Minerals, Inc.

[Docket No. M–2000–156–C]

Oxbow Carbon and Minerals, Inc., P.O. Box 535, Somerset, Colorado 81434 has filed a petition to modify the application of 30 CFR 75.701 (grounding metallic frames, casings, and other enclosures of electric equipment) to its Sanborn Creek Mine (I.D. No. 05–04452) located in Gunnison County, Colorado. The petitioner requests a modification of the existing standard to permit an alternative method for grounding of a diesel generator. The petitioner proposes to use a 480 volt, wye connected, 320 KW portable diesel powered generator for utility power and to move electrically powered mining equipment in and around the mine. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

23. Oxbow Carbon and Minerals, Inc.

[Docket No. M–2000–157–C]

Oxbow Carbon and Minerals, Inc., P.O. Box 535, Somerset, Colorado 81434 has filed a petition to modify the application of 30 CFR 75.901 (protection of low- and medium-voltage three-phase circuits used underground) to its Sanborn Creek Mine (I.D. No. 05–04452) located in Gunnison County, Colorado. The petitioner requests a modification of the existing standard to permit an alternative method for grounding of a diesel generator. The petitioner proposes to use a 480 volt, wye connected, 320 KW portable diesel powered generator for utility power and to move electrically powered mining equipment in and around the mine. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as the existing standard.

Request for Comments

Persons interested in these petitions are encouraged to submit comments via e-mail to ''comments@msha.gov,'' or on a computer disk along with an original hard copy to the Office of Standards, Regulations, and Variances, Mine Safety and Health Administration, 4015 Wilson Boulevard, Room 627, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before January 4, 2001. Copies of these petitions are available for inspection at that address.

Dated: November 22, 2000.

Carol J. Jones,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 00–30841 Filed 12–4–00; 8:45 am]

BILLING CODE 4510–43–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–250/251–LR; ASLBP No. 01–786–03–LR]

Florida Power and Light Company Turkey Point Nuclear Plant, Units 3 and 4; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28710 (1972), and Sections 2.105, 2.700, 2.702, 2.714, 2.714a, 2.717, 2.721, and 2.772(j) of the Commission's Regulations, all as amended, an Atomic Safety and Licensing Board is being established to preside over the following proceeding:

Florida Power and Light Company
Turkey Point Nuclear Plant, Units 3 and 4

This Board is being established pursuant to a notice published in the **Federal Register** (65 FR 60693 (Oct. 12, 2000)) and the Commission's November 28, 2000 order referring intervention petitions for a hearing (CLI–00–23, 52 NRC —— (Nov. 28, 2000)). The proceeding involves an application by the Florida Power and Light Company to renew the operating licenses for its Turkey Point Nuclear Plant, Units 3 and 4, pursuant to the provisions of 10 CFR part 54. The renewed licenses, if granted, would authorize the applicant to operate those units for an additional twenty-year period.

The Board is comprised of the following administrative judges:

Thomas S. Moore, Chairman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555–0001.

Dr. Richard F. Cole, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555–0001.

Dr. Charles N. Kelber, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

All correspondence, documents and other materials shall be filed with the Judges in accordance with 10 CFR § 2.701.

Issued at Rockville, Maryland, this 29th day of November 2000.

G. Paul Bollwerk, III,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 00–30905 Filed 12–4–00; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–333–LT and 50–286–LT ASLBP No. 01–785–02–LT]

Power Authority of the State of New York and Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point 3 LLC, and Entergy Nuclear Operations, Inc. James A. Fitzpatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No. 3; Designation of Presiding Officer

Pursuant to delegation by the Commission, *see* 37 FR 28710 (Dec. 29, 1972), and CLI–00–22, 52 NRC__(Nov. 27, 2000), and the Commission's regulations, *see* 10 CFR 2.1319, notice is hereby given that a single member of the Atomic Safety and Licensing Board Panel is designated as Presiding Officer to conduct further proceedings in accordance with 10 CFR 2.1320 in the following case:

Power Authority of The State of New York, and Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point 3 LLC, and Entergy Nuclear Operations, Inc.

James A. FitzPatrick, Nuclear Power Plant, and Indian Point Nuclear Generating Unit No. 3

The hearing will be conducted pursuant to 10 CFR part 2, subpart M, of the Commission's Regulations, ''Public Notification, Availability of Documents and Records, Hearing Requests and Procedures for Hearings on License Transfer Applications.'' This proceeding concerns applications that together seek the Commission's authorization to transfer the ownership interest in, and operating/maintenance responsibility for (1) the Indian Point Nuclear Generating Unit No. 3 from the Power Authority of the State of New York (PASNY) to Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (ENO), respectively; and (2) the James A. FitzPatrick Nuclear Power Plant from PASNY to Entergy Nuclear Indian Point 3, LLC, and ENO, respectively. The notices of consideration of these transfer requests and opportunity for hearing were published in the **Federal Register** on June 28, 2000. *See* 65 FR 39,953 (2000); 65 FR 39,954 (2000).

The Presiding Officer in this proceeding is Administrative Judge Charles Bechhoefer. All correspondence, documents, and other materials shall be filed with Judge Bechhoefer in accordance with 10 CFR § 2.1313. His mail and e-mail addresses are:

Administrative Judge Charles Bechhoefer, Presiding Officer, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555–0001, E-mail: cxb2@nrc.gov.

Issued at Rockville, Maryland, this 28th day of November 2000.

G. Paul Bollwerk, III,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 00–30904 Filed 12–4–00; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Open Committee Meetings

According to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that meetings of the Federal Prevailing Rate Advisory Committee will be held on—

Thursday, December 14, 2000
Thursday, December 21, 2000

The meeting will start at 10:00 a.m. and will be held in Room 5A06A, Office of Personnel Management Building, 1900 E Street, NW., Washington, DC.

The Federal Prevailing Rate Advisory Committee is composed of a Chair, five representatives from labor unions holding exclusive bargaining rights for Federal blue-collar employees, and five representatives from Federal agencies. Entitlement to membership on the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the Office of Personnel Management.

This scheduled meeting will start in open session with both labor and management representatives attending. During the meeting either the labor members or the management members may caucus separately with the Chair to devise strategy and formulate positions. Premature disclosure of the matters discussed in these caucuses would unacceptably impair the ability of the Committee to reach a consensus on the matters being considered and would disrupt substantially the disposition of its business. Therefore, these caucuses will be closed to the public because of a determination made by the Director of the Office of Personnel Management under the provisions of section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463) and 5 U.S.C. 552b(c)(9)(B). These caucuses may, depending on the issues involved, constitute a substantial portion of a meeting.

Annually, the Chair compiles a report of pay issues discussed and concluded recommendations. These reports are available to the public, upon written request to the Committee's Secretary.

The public is invited to submit material in writing to the Chair on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on this meeting may be obtained by contacting the Committee's Secretary, Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 5538 , 1900 E Street, NW., Washington, DC 20415 (202) 606–1500.

Dated: November 21, 2000.

John F. Leyden,

Chairman, Federal Prevailing Rate Advisory Committee.

[FR Doc. 00–30863 Filed 12–4–00; 8:45 am]

BILLING CODE 6325–01–U

RAILROAD RETIREMENT BOARD

2001 Railroad Experience Rating Proclamations, Monthly Compensation Base and Other Determinations

AGENCY: Railroad Retirement Board.

ACTION: Notice.

SUMMARY: Pursuant to section 8(c)(2) and section 12(r)(3) of the Railroad Unemployment Insurance Act (Act) (45 U.S.C. 358(c)(2) and 45 U.S.C. 362(r)(3), respectively), the Board gives notice of the following:

1. The balance to the credit of the Railroad Unemployment Insurance (RUI) Account, as of June 30, 2000, is $103,012,214.34;

2. The September 30, 2000, balance of any new loans to the RUI Account, including accrued interest, is zero;

3. The system compensation base is $3,091,618,036.00 as of June 30, 2000;

4. The cumulative system unallocated charge balance is ($225,212,154.12) as of June 30, 2000;

5. The pooled credit ratio for calendar year 2001 is zero;

6. The pooled charged ratio for calendar year 2001 is zero;

7. The surcharge rate for calendar year 2001 is 1.5 percent;

8. The monthly compensation base under section 1(i) of the Act is $1,050 for months in calendar year 2001;

9. The amount described in section 1(k) of the Act as ''2.5 times the monthly compensation base'' is $2,625 for base year (calendar year) 2001;

10. The amount described in section 2(c) of the Act as ''an amount that bears the same ratio to $775 as the monthly compensation base for that year as computed under section 1(i) of this Act bears to $600'' is $1,356 for months in calendar year 2001;

11. The amount described in section 3 of the Act as ''2.5 times the monthly compensation base'' is $2,625 for base year (calendar year) 2001;

12. The amount described in section 4(a–2)(i)(A) of the Act as ''2.5 times the monthly compensation base'' is $2,625

with respect to disqualifications ending in calendar year 2001;

13. The maximum daily benefit rate under section 2(a)(3) of the Act is $50 with respect to days of unemployment and days of sickness in registration periods beginning after June 30, 2001.

DATES: The balance in notice (1) and the determinations made in notices (3) through (7) are based on data as of June 30, 2000. The balance in notice (2) is based on data as of September 30, 2000. The determinations made in notices (5) through (7) apply to the calculation, under section 8(a)(1)(C) of the Act, of employer contribution rates for 2001. The determinations made in notices (8) through (12) are effective January 1, 2001. The determination made in notice (13) is effective for registration periods beginning after June 30, 2001.

ADDRESSES: Secretary to the Board, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611–2092.

FOR FURTHER INFORMATION CONTACT: Marla L. Huddleston, Bureau of the Actuary, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611–2092, telephone (312) 751–4779.

SUPPLEMENTARY INFORMATION: The RRB is required by section 8(c)(1) of the Railroad Unemployment Insurance Act (Act) (45 U.S.C. 358(c)(1)) as amended by Public Law 100–647, to proclaim by October 15 of each year certain system-wide factors used in calculating experience-based employer contribution rates for the following year. The RRB is further required by section 8(c)(2) of the Act (45 U.S.C. 358(c)(2)) to publish the amounts so determined and proclaimed. The RRB is required by section 12(r)(3) of the Act (45 U.S.C. 362(r)(3)) to publish by December 11, 2000, the computation of the calendar year 2001 monthly compensation base (section 1(i) of the Act) and amounts described in sections 1(k), 2(c), 3 and 4(a–2)(i)(A) of the Act which are related to changes in the monthly compensation base. Also, the RRB is required to publish, by June 11, 2001, the maximum daily benefit rate under section 2(a)(3) of the Act for days of unemployment and days of sickness in registration periods beginning after June 30, 2001.

Surcharge Rate

A surcharge is added in the calculation of each employer's contribution rate, subject to the applicable maximum rate, for a calendar year whenever the balance to the credit of the RUI Account on the preceding June 30 is less than the greater of $100 million or the amount that bears the same ratio to $100 million as the system compensation base for that June 30 bears to the system compensation base as of June 30, 1991. If the RUI Account balance is less than $100 million (as indexed), but at least $50 million (as indexed), the surcharge will be 1.5 percent. If the RUI Account balance is less than $50 million (as indexed), but greater than zero, the surcharge will be 2.5 percent. The maximum surcharge of 3.5 percent applies if the RUI Account balance is less than zero.

The system compensation base as of June 30, 1991 was $2,763,287,237.04. The system compensation base for June 30, 2000 was $3,091,618,036.00. The ratio of $3,091,618,036.00 to $2,763,287,237.04 is 1.11881892. Multiplying 1.11881892 by $100 million yields $111,881,892. Multiplying $50 million by 1.11881892 produces $55,940,946. The Account balance on June 30, 2000, was $103,012,214.34. Accordingly, the surcharge rate for calendar year 2001 is 1.5 percent.

Monthly Compensation Base

For years after 1988, section 1(i) of the Act contains a formula for determining the monthly compensation base. Under the prescribed formula, the monthly compensation base increases by approximately two-thirds of the cumulative growth in average national wages since 1984. The monthly compensation base for months in calendar year 2001 shall be equal to the greater of (a) $600 or (b) $600 [1 + {(A − 37,800)/56,700}], where A equals the amount of the applicable base with respect to tier 1 taxes for 2001 under section 3231(e)(2) of the Internal Revenue Code of 1986. Section 1(i) further provides that if the amount so determined is not a multiple of $5, it shall be rounded to the nearest multiple of $5.

The calendar year 2001 tier 1 tax base is $80,400. Subtracting $37,800 from $80,400 produces $42,600. Dividing $42,600 by $56,700 yields a ratio of 0.75132275. Adding one gives 1.75132275. Multiplying $600 by the amount 1.75132275 produces the amount of $1,050.79, which must then be rounded to $1,050. Accordingly, the monthly compensation base is determined to be $1,050 for months in calendar year 2001.

Amounts Related to Changes in Monthly Compensation Base

For years after 1988, sections 1(k), 2(c), 3 and 4(a–2)(i)(A) of the Act contain formulas for determining amounts related to the monthly compensation base.

Under section 1(k), remuneration earned from employment covered under the Act cannot be considered subsidiary remuneration if the employee's base year compensation is less than 2.5 times the monthly compensation base for months in such base year. Multiplying 2.5 by the calendar year 2001 monthly compensation base of $1,050 produces $2,625. Accordingly, the amount determined under section 1(k) is $2,625 for calendar year 2001.

Under section 2(c), the maximum amount of normal benefits paid for days of unemployment within a benefit year and the maximum amount of normal benefits paid for days of sickness within a benefit year shall not exceed an employee's compensation in the base year. In determining an employee's base year compensation, any money remuneration in a month not in excess of an amount that bears the same ratio to $775 as the monthly compensation base for that year bears to $600 shall be taken into account. The calendar year 2001 monthly compensation base is $1,050. The ratio of $1,050 to $600 is 1.75000000. Multiplying 1.75000000 by $775 produces $1,356. Accordingly, the amount determined under section 2(c) is $1,356 for months in calendar year 2001.

Under section 3, an employee shall be a "qualified employee" if his/her base year compensation is not less than 2.5 times the monthly compensation base for months in such base year. Multiplying 2.5 by the calendar year 2001 monthly compensation base of $1,050 produces $2,625. Accordingly, the amount determined under section 3 is $2,625 for calendar year 2001.

Under section 4(a–2)(i)(A), an employee who leaves work voluntarily without good cause is disqualified from receiving unemployment benefits until he has been paid compensation of not less than 2.5 times the monthly compensation base for months in the calendar year in which the disqualification ends. Multiplying 2.5 by the calendar year 2001 monthly compensation base of $1,050 produces $2,625. Accordingly, the amount determined under section 4(a–2)(i)(A) is $2,625 for calendar year 2001.

Maximum Daily Benefit Rate

Section 2(a)(3) contains a formula for determining the maximum daily benefit rate for registration periods beginning after June 30, 1989, and after each June 30 thereafter. Legislation enacted on October 9, 1996, revised the formula for indexing maximum daily benefit rates. Under the prescribed formula, the maximum daily benefit rate increases by approximately two-thirds of the cumulative growth in average national wages since 1984. The maximum daily benefit rate for registration periods beginning after June 30, 2001, shall be equal to 5 percent of the monthly compensation base for the base year immediately preceding the beginning of the benefit year. Section 2(a)(3) further provides that if the amount so computed is not a multiple of $1, it shall be rounded down to the nearest multiple of $1.

The calendar year 2000 monthly compensation base is $1,005. Multiplying $1,005 by 0.05 yields $50.25, which must then be rounded down to $50. Accordingly, the maximum daily benefit rate for days of unemployment and days of sickness beginning in registration periods after June 30, 2001, is determined to be $50.

Dated: November 29, 2000.

By Authority of the Board.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. 00–30861 Filed 12–4–00; 8:45 am]

BILLING CODE 7905–01–U

SECURITIES AND EXCHANGE COMMISSION

Request for Public Comment

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, D.C. 20549.

Extension: Rule 11Aa3–2, SEC File No. 270–439, OMB Control No. 3235–0500; Rule 15c3–4, SEC File No. 270–441, OMB Control No. 3235–0497; Rule 15c3–1(c)(13), SEC File No. 270–443, OMB Control No. 3235–0499.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget for extension and approval.

Rule 11Aa3–2 provides that self-regulatory organizations (SROs) may, acting jointly, file a national market system plan or may propose an amendment to an effective national market system plan by submitting the text of the plan or amendment to the Secretary of the Commission, together with a statement of the purpose of such plan or amendment and, to the extent applicable, the documents and information required by paragraphs (b)(4) and (5) of rule 11Aa3–2.

The collection of information is designed to permit the Commission to achieve its statutory directive to facilitate the development of a national market system. The information is used to determine if a national market system plan, or an amendment hereto, should be approved and implemented.

The respondents to the collection of information are self-regulatory organizations, including national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board.

Ten respondents file an average total of eight responses per year, which corresponds to an estimated annual response burden of 267 hours. At an average cost per burden hour of $50, the resultant total related cost of compliance for these respondents is $13,350 per year (267 burden hours multiplied by $50/hour = $13,350).

Rule 15c3–4 requires certain broker-dealers that are registered with the Commission as OTC Derivatives Dealers to establish, document, and maintain a system of internal risk management controls. The rule sets forth the basic elements for an OTC Derivatives Dealer to consider and include when establishing, documenting, and reviewing its internal risk management control system, which are designed to, among other things, ensure the integrity of an OTC Derivaties Dealer's risk measurement, monitoring, and management process, to clarify accountability at the appropriate organizational level, and to define the permitted scope of the dealer's activities and level of risk. The rule also requires that management of an OTC Derivatives Dealer must periodically review, in accordance with written procedures, the OTC Derivatives Dealer's business activities for consistency with its risk management guidelines.

The staff estimates that the average amount of time an OTC Derivatives Dealer will spend implementing its risk management control system is 2,000 hours and that, on average, an OTC Derivatives Dealer will spend approximately 200 hours each year reviewing and updating its risk management control system. Currently, one firm is registered with the Commission as an OTC Derivatives Dealer. The staff estimates that approximately five additional OTC Derivatives Dealers may become registered within the next three years. Accordingly, the staff estimates the total burden for six OTC Derivatives Dealers to be 1,200 hours annually for reviewing and updating its risk management control system.

The staff believes that the cost of complying with Rule 15c3–4 will be approximately $82.50 per hour.[1] This per hour cost is based upon the annual average hourly salary for a compliance manager, who would generally be responsible for initially establishing, documenting, and maintaining an OTC Derivatives Dealer's internal risk management control system. The total annual cost for all affected OTC Derivatives Dealers is estimated to be $275,000, based on five firms each spending 10,000 hours to implement an internal risk management control system at $82.50 per hour within the next three years.

On December 17, 1997, the Commission proposed for comment amendments to its net capital rule, Rule 15c3–1, which would define the term ''nationally recognized statistical rating organization'' (''NRSRO'')[2] Rule 15c3–1 currently requires broker-dealers, when computing net capital, to deduct from their net worth certain percentages of the market value (''haircuts'') of their proprietary securities positions. Broker-dealers' proprietary position in commercial paper, nonconvertible debt securities, and nonconvertible preferred stock are accorded preferential treatment under the net capital rule, in the form of smaller haircuts, if the instruments are rated investment grade by at least two NRSROs.

The Commission believes that defining the term NRSRO within the net capital rule would provide more transparency in the NRSRO application and review process. In the proposed amendments, the Commission sets forth a list of attributes that it would consider when reviewing a credit rating organization's NRSRO application. Further, the proposed amendments would formalize the appeals process if a credit rating organization is not provided with the NRSRO status it requests.

Currently, the Division utilizes the no-action letter process to determine which credit rating organizations may be considered NRSROs under the net capital rule. Through the no-action letter process, the Division has provided seven credit rating organizations with written assurance that it will not recommend enforcement action against broker-dealers that rely on their credit

[1] Per SIA Management and Professional Earnings, Table 051 (Compliance Manager) + 35% overhead (based on end-of-year 1998 figures).

[2] *See* Securities Exchange Act Release No. 39457 (December 17, 1997), 62 FR 68018 (December 30, 1997). The Commission has not yet adopted a final rule defining the term NRSRO. The Commission's Division of Market Regulation (the ''Division'') has reviewed comments received in connection with the proposal and is preparing a recommendation for the Commission to determine what action, if any, should be taken.

ratings for purposes of the net capital rule.[3] The Division has issued one letter in which the firm requesting NRSRO status was not provided with the assurance it requested.

It is difficult to estimate the number of potential respondents to this collection of information. However, based on the current number of NRSROs and the previous inquires of credit rating organizations, it appears reasonable to estimate that eight credit rating organizations may apply with the Commission pursuant to the proposed amendments. Based on conversations with rating organizations currently treated as NRSROs under the net capital rule and the Commission's experience in this area, it is estimated that the average amount of time necessary to compile the information required to submit an NRSRO application is approximately 100 hours. Therefore, because there may be eight potential respondents to this collection and because it is estimated that it will take approximately 100 hours to collect the information necessary for an adequate submission, the total reporting and recordkeeping burden is estimated to be approximately 800 hours.

Because the proposed amendments only require a one-time application process, which includes any amendments to the initial application, there is no recurring reporting or recordkeeping requirement and thus no annual reporting or recordkeeping requirement. However, NRSROs will be obligated to inform the Commission of any material changes to the information previously collected under the proposed amendments.

The staff believes that the cost of complying with the proposed amendments will be approximately $105 per hour.[4] This per hour cost is based upon the annual average hourly salary for a senior analyst, who would generally be the personnel responsible for preparing an NRSRO application. The total annual startup cost for all affected credit rating organizations is estimated to be $84,000, based on eight firms spending a total of 800 hours to prepare NRSRO applications.

Written comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Direct your written comments to Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549.

Dated: November 20, 2000.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–30849 Filed 12–4–00; 8:45 am]

BILLING CODE 8010–01–M

[3] Four of these firms have since combined or are in the process of combining with other NRSROs.

[4] Per SIA Management and Professional Earnings, Table 145 (Senior Research Analyst) + 35% overhead (based on 1999 annual base salary).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27285]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

November 27, 2000.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by December 22, 2000, to the Secretary, Securities and Exchange Commission, Washington, DC 20549–0609, and serve a copy on the relevant applicant(s) and/ or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if order, and will receive a copy of any notice or order issued in the matter. After December 22, 2000, the applicant(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Alliant Energy Corporation, et al. (70–9735)

Alliant Energy Corporation (''Alliant''), a registered public utility holding company and is wholly owned utility subsidiaries, Wisconsin Power & Light Company (''WPL'') and South Beloit Water, Gas & Electric Company (''South Beloit''), each with principal executive offices N16 W23217 Stone Ridge Drive, Waukesha, Wisconsin 53187, and American Transmission Company LLC (''Transco''), an inactive Wisconsin limited liability subsidiary company of WPL which intends to operate as a utility company, and ATC Management Inc., an inactive Wisconsin subsidiary corporation of WPL which also intends to operate as a utility company (''Corporate Manager'', and together with Alliant, WPL, South Beloit and Transco, ''Applicants''), with principal executive offices at 231 W. Michigan Street, Milwaukee, Wisconsin 53203, have filed an application-declaration (''Application'') under to sections 6(a), 7, 9(a), 10, 11, 12 and 13 of the Act and rules 43, 44, 54, 90 and 91 under the Act.

In summary, Applicants request authority for: (1) WPL to transfer, directly or indirectly, ownership and control over its transmission assets (''WPL Transmission Assets'') to Transco, (2) South Beloit to transfer, directly or indirectly, ownership and control over its transmission assets (''South Beloit Transmission Assets'') to Transco, (3) Transco to issue and WPL, South Beloit, Wisconsin Electric Power Co. (''WEPCO''), Edison Sault Electric Company (''ESE''), Wisconsin Public Power, Inc. (''WPPI''), Wisconsin Public Service Corporation (''WPS'') and Madison Gas and Electric Company (''MGE'' and collectively ''Member Utilities'' [1]) to acquire, directly or indirectly, member units (''Member Units'') of Transco in exchange for either transmission assets or cash, (4) WPL to purchase, and Corporate Manager to issue Class A shares of the Corporate Manager, (5) WPL to purchase, and Corporate Manager to issue, one Class B share of the Corporate Manager, (6) Transco to acquire the WPL Transmission Assets and the South Beloit Transmission Assets, as well as the transmission assets of WEPCO, ESE, WPS and MGE and (7) a series of

[1] ESE, WPPI, WPS, WEPCO and MGE are either exempt or municipal nonassociate utility companies of alliant and are not required to be applicants in this matter.

financings by Transco and Corporate Manager through June 30, 2004 (''Authorization Period'').

WPL is engaged principally in the generation, purchase, distribution and sale of electric power in 35 counties in a 16,000 square-mile area in southern and central Wisconsin. As of December 31, 1999, WPL provides retail electric service to approximately 407,000 customers in 599 cities, villages and towns, and wholesale service to 24 municipal utilities, three rural electric cooperatives, the WPPI system, which provides retail electric service to nine communities in the WPL service area, and one privately owned utility. The WPL Transmission Assets consist of 107 miles of 345 kV transmission facilities, 758 miles of 138 kV transmission facilities, 1,908 miles of 69 kV transmission facilities and associated substations and real property interests. WPL is subject to regulation by the Public Service Commission of Wisconsin.

South Beloit is a wholly owned subsidiary of WPL that supplies retail electric and gas services to customers in the cities of South Beloit and Rockton, Illinois, and the adjacent rural areas. As of December 31, 1999, South Beloit serves approximately 8,000 electric customers. The South Beloit Transmission Assets consist of less than one mile of 345 kV transmission facilities, 10 miles of 69 kV transmission facilities, one substation and associated real property interests. The service territory of South Beloit is located in Illinois and is adjacent to the service territory of WPL in Wisconsin. South Beloit is subject to regulation by the Illinois Commerce Commission.

The electric distribution systems of WPL and South Beloit are interconnected at many points along the Wisconsin-Illinois state line. Applicants state that the electric operations of WPL and South Beloit are integrated and all of WPL's generating units are centrally dispatched by Alliant Energy Corporate Services, Inc., the service company affiliate of WPL and South Beloit. The transmission facilities that Transco will acquire from WPL and South Beloit operate at voltages of 345 kV, 138 kV and 69 kV and include:

1. Transmission lines (including towers, poles and conductors) and transmission substations;

2. Transformers providing transformation within the bulk transmission system and between the bulk and area transmission systems;

3. Lines providing connections to generation sources and step-up (plant) substations;

4. Radial taps from the transmission system up to, but not including, the facilities that establish the final connection to distribution facilities or retail customers;

5. Substations that provide primarily a transmission function;

6. Voltage control devices and power flow control devices directly connected to the transmission system; and

7. WPL's systems operation center located in Stoughton, Wisconsin.

As of December 31, 2000, the original cost of the WPL Transmission Assets and the South Beloit Transmission Assets will be approximately $314,276,000 and $678,000, respectively. The net book value (original cost less accumulated depreciation) of the WPL Transmission Assets and the South Beloit Transmission Assets is expected to be approximately $177,650,000 and $439,000, respectively, at December 31, 2000.

In 1999, Wisconsin enacted legislation (''Transco Legislation'') that facilitates the formation of transmission companies, such as Transco, as not for-profit, single-purpose, limited liability transmission companies. This legislation promotes the transfer of utility company transmission assets to Transco. Transco will issue Member Units to the Member Utilities for cash, in the case of those Member Utilities who don't own transmission assets, or based on the contribution value (''Contribution Value'') of the transmission assets conveyed to Transco. Contribution Value is defined as the original cost less accumulated deprecation, as adjusted on a dollar-for-dollar basis for deferred taxes, excess deferred taxes and deferred investment tax credits. Transco also seeks authority to acquire the incidental transmission facilities of Member Utilities who do not own any transmission assets. The Member Utilities intend to contribute their transmission assets to Transco on or about January 1, 2001. Transco will have the exclusive duty to provide transmission service in geographic areas formerly served by the Transco members.[2]

Because of limitations imposed by the WPL indenture (''Indenture''), WPL will effect the transfer of the WPL Transmission Assets to Transco, and its acquisition of Transco Member Units, through a newly created limited liability company (''NewCo'') to be wholly owned by WPL. Applicants specifically seek authority to carry out the following transactions:

(1) WPL will form NewCo and acquire ownership of NewCo for one or more cash payments,

(2) NewCo will transfer cash [3] is an amount approximately equal to WPL's corresponding cash payment to NewCo for NewCo's ownership interest to the trustee under the Indenture (''Trustee''),

(3) Upon receipt of the payment, the Trustee will release the WPL Transmission Assets from the Indenture lien,

(4) WPL will transfer the WPL Transmission Assets to Transco and

(5) Transco will issue its Member Units to NewCo. WPL and South Boloit also seek authority to transfer to Transco, from time to time, up to $10,000,000 of additional transmission assets, which are currently under construction, in exchange for additional Member Units to be issued to NewCo or South Beloit, as the case may be.

The transmission assets will be valued at their Contribution Value when identifying the Member Utilities' relative shares of interest in the Transco. The resulting shares will be adjusted based on various factors including the relative interest of transmission-dependent Member Utilities which acquire Member Units for cash instead of transmission assets.[4] It is expected that WPL and South Beloit's Contribution Values at December 31, 2000 will be approximately $126,784,000 and $590,000, respectively, and their aggregate initial interest in Transco will approximate 26%. This ownership percentage may fluctuate based on various factors, including the number of Member Utilities.

The Member Utilities will enter into an agreement (''Operating Agreement'') governing the activities of Transco. The Operating Agreement will grant the Corporate Manager full, complete and exclusive discretion to manage and control Transco. The Corporate Manager will have the power to do all things necessary and convenient to carry out Transco's business including the employment of all personnel necessary to operate Transco and the management of any future Transco subsidiaries. In accordance with the Operating

[2] Transco is expected to transfer operational control of its assets to the Midwest Independent Transmission System Operator, Inc. by November 1, 2001.

[3] The cash payment will be equal to the ''fair value'' to WPL of the WPL Transmission Assets, as is defined in, and required by, the Indenture. The fair value will approximate the value of the WPL Transmission Assets. NewCo's payment of cash to the Trustee will permit the WPL Transmission Assets to be released from the Indenture lien.

[4] The transmission dependent Member Utilities' ownership interest in Transco will be measured in relative shares of interest based upon their 1999 Wisconsin load share ratios.

Agreement, all expenses of the Corporate Manager will be treated as Transco expenses. These expenses will be charged back to Transco at cost in accordance with section 13 of the Act and rules 90 and 91 under the Act. The Corporate Manager will employ all personnel necessary to operate Transco. The Corporate Manager will also hold Member Units.

It is expected that the transmission-owning Member Utilities and Transco will enter into one or more agreements (''O&M Agreements'') pursuant to which the Member Utilities will provide Transco with ''reasonable and cost effective operations and maintenance services'' for at least the first three years after the operations date in accordance with the Transco Legislation. Services provided under the O&M Agreements will include line equipment services, station equipment services and emergency response services. The Member Utilities and Transco will also enter into one or more services agreements (''Services Agreements'') under which the Members Utilities will provide Transco with certain services, such as control center services, real estate services and capital project services, not covered by the O&M Agreements. Additionally, the Member Utilities and Transco will enter into a system operating agreement (''System Operating Agreement'') under which Transco will provide, among other things, ancillary services and control area operations at rates approved by the Federal Energy Regulatory Commission. Finally, Transco will provide certain services from the Stoughton Operations Center to support Alliant Energy's operation of its transmission facilities outside of Wisconsin and its 34.5 kV facilities in Wisconsin that are not being transferred to Transco. It is expected that these operations will be governed by an agency agreement (''Agency Agreement''). Any services provided or received by WPL, South Beloit or any other Alliant Energy affiliate under the foregoing agreements will be provided ''at cost'' in accordance with section 13 and rules 90 and 91 under the Act, unless otherwise authorized or directed by appropriate governmental or regulatory authority.

Member Utilities will also purchase shares of the Corporate Member, for cash, in proportion to their percentage interests in Transco. WPL proposes to pay $10 per share for an approximate 26% interest in the Corporate Manager. The Corporate Manager will have two classes of stock: Class A and Class B shares.[5] WPL will receive approximately 26% of the nonvoting Class A shares. Additionally, each Member Utility will receive one Class B voting share.[6] Each holder of a Class B share will be entitled to appoint one of the Corporate Manager's directors. All Class B shares will convert into Class A shares on the earlier of (1) the ownership by the Corporate Manager of more than 50% of Transco interests or (2) the tenth anniversary of the first day of operations of Transco, unless the Corporate Manager's board of directors (''Board'') elects to override the conversion. Class A shares will become voting shares upon the conversion of Class B shares to Class A shares or after the Corporate Manager commences a public offering of its stock. Following a public offering, the Class A shareholders will have the right to elect a majority of the Board and the Class B shareholders will elect a minority of the Board, but each owner of a Class B share will continue to have the right to appoint one of the Board. Each Class A and Class B share will be entitled to the same amount of dividends.

Transco and the Corporate Manager also request authorization for external financing as follows: (1) Short-term debt financing by Transco in the form of, among other things, borrowings under a revolving credit agreement and issuance of commercial paper, (2) long-term debt financing by Transco in the form of debentures or other forms of long-term debt financing and (3) equity financing by Transco and the Corporate Manager in the form of common or preferred stock of the Corporate Manager and other equity securities or additional interests in Transco. The amount of Transco's short-term and long-term debt outstanding at any time will not exceed, in the aggregate, $400 million.

Transco will initially obtain funds externally through short-term debt financing under a Credit Agreement between Transco and Bank One, N.A., as Agent (''Credit Facility''). Transco seeks authority to enter into borrowings up to a principal amount of $125 million under the Credit Facility.[7] Transco proposes to issue short-term debt under the Credit Facility, commercial paper or other forms of short-term financing from time to time during the Authorization Period. Commercial paper would be issued in established domestic or European commercial paper markets to dealers at the prevailing discount rate per annum, or at the prevailing coupon rate per annum, at the date of issuance. The maturity of short-term debt will not exceed one year. Transco seeks authority to amend the Credit Facility without further authorization provided that the maturity date does not extend beyond the Authorization Period and the aggregate principal amount of authorized borrowings does not exceed $125 million.

Transco also proposes to issue long-term debt consisting of debentures, which may be in the form of medium-term notes, convertible debt, subordinated debt, bank borrowings, other debt securities or other forms of long-term financing from time to time, through the Authorization period. Any long-term debt security would have a maturity ranging from one to 50 years. Debentures and medium-term notes would be issued under an indenture. The aggregate amount of short-term and long-term debt outstanding at any time, including debt under the Credit Facility, will not exceed $400 million.

Transco and the Corporate Manager propose to issue equity securities from time to time through the Authorization Period. Corporate Manager intends to issue common or preferred stock and Transco intends to issue other equity securities or additional interests. The aggregate amount of both Transco and Corporate Manager's equity securities will not exceed $500 million. The dividend rate on any series of preferred securities issued by the Corporate Manager will not exceed 500 basis points over the yield to maturity of U.S. Treasury security having a remaining term equal to the term of that series of preferred securities at the time of issuance. Preferred securities may have mandatory redemption dates. Transco also requests authorization to enter into interest rate hedging transactions with respect to existing indebtedness, subject to certain limitations and restrictions, in order to reduce or manage interest rate cost. In addition, the Transco request authorization to enter into interest rate hedging transactions with respect to anticipated debt offerings, subject to certain limitations and restrictions.

Applicants state that proceeds requested under this application will be used to provide financing for general corporate purposes, including working capital requirements, and to fund construction spending to undertake large scale capital improvements to the

[5] The Class A and B structure ensures that the Member Utilities will have economic interests proportionate to the value of their contribution to the Transco while still maintaining the desired per capita voting arrangement.

[6] Neither South Beloit nor ESE will receive shares in the Corporate Manager.

[7] Transco was previously authorized to enter into borrowings of $30 million under the Credit Facility. *See Alliant Energy Corporation, et al.,* Holding Co. Act Release No. 27197 (August 3, 2000).

Wisconsin transmission system necessary to maintain reliability.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–30850 Filed 12–4–00; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27281A]

Amended Notice; A Filing Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

November 28, 2000

A notice issued in this matter on November 22, 2000 (HCAR No. 27281), concerning a proposal by Northeast Utilities (NU), a registered holding company, and its utility subsidiaries to issue short-term debt. NU intended to, and by this amended notice does, include its nonutility subsidiaries in its request for authority to issue short-term debt.

An amended notice is given that the following filing has been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application-declaration for complete statements of the proposed transactions summarized below. The application-declaration and any amendments are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application-declaration should submit their views in writing by December 26, 2000, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549–0609, and serve a copy on the applicant-declarants at the addresses specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After December 26, 2000, the application-declaration, as filed or as amended, may be granted and/or permitted to become effective.

Northeast Utilities, et al. (70–9755)

Northeast Utilities (''NU''), 174 Brush Hill Avenue, West Springfield, Massachusetts 01090–0010, a registered holding company, its service company subsidiary, Northeast Utilities Service Company (''Service''), P.O. Box 270, Hartford, Connecticut 06141–0270, and its public utility and nonutility subsidiary companies (together, ''Subsidiaries''), Western Massachusetts Electric Company (''WMECO'') and The Quinnehtuk Company (''Quinnehtuk'', both located at 174 Brush Hill Avenue, West Springfield, Massachusetts, 01090–0010; The Connecticut Light and Power Company (''CL&P''), NU Enterprises, Inc. (''NUEI''), Northeast Generation Service Company (''NGS''), Northeast Generation Company (''NGC''), Select Energy, Inc. (''Select''), Model 1 Communications, Inc. (''Mode 1''), Northeast Nuclear Energy Company (''NNECO''), The Rocky River Realty Company (''RR'') and Yankee Energy System, Inc. (''YES''), all located at 107 Selden Street, Berlin, Connecticut 06037; Yankee Gas Services Company (''Yankee Gas''), Yankee Energy Financial Services Company (''Yankee Financial'') and NorConn Properties, Inc. (''NorConn''), all located at 599 Research Parkway, Meriden, Connecticut 06450; Holyoke Water Power Company (''HWP''), Canal Street, Holyoke, Massachusetts 01040; Public Service Company of New Hampshire (''PSNH'') and North Atlantic Energy Corporation (''NAEC''), both located at 1000 Elm Street, Manchester, New Hampshire 03015; Yankee Energy Services Company (''YESCO''), 148 Norton Street, Milldale, Connecticut 06467; HEC, Inc. (''HEC''), 24 Prime Parkway, Natick, Massachusetts 01760; and R.M. Services, Inc. (''RMS''), 639 Research Parkway, Meridan, Connecticut 06467 (together with NU and Service, ''Applicants'') have filed an application-declaration under sections 6(a), 7, 9(a), 10, 12(b), 13, 32 and 33 of the Act and rules 43, 45, 52, 54, 90 and 91 under the Act.

By order dated December 28, 1994 (HCAR No. 26207) and Supplemental Orders dated November 20, 1996 (HCAR 26612), February 11, 1997 (HCAR 26665), March 25, 1997 (HCAR 26692), May 29, 1997 (HCAR 26721), January 16, 1998 (HCAR 26816), May 13, 1999 (HCAR 27022), November 17, 1999 (HCAR 27103) and November 13, 2000 (HCAR No. 27275) (collectively, the ''Prior Orders''), the Commission authorized through December 31, 2000 (''Authorization Period''), among other things, (1) NU to issue and sell unsecured short-term notes and commercial paper and to make loans to participants in the NU system money pool (''Money Pool''); (2) Service to administer the Money Pool in accordance with the authority granted in the Prior Orders; (3) WMECO, CL&P, NNECO, YES, Yankee Gas, HWP, PSNH and NAEC (together, the ''Utility Subsidiaries'') to issue and sell unsecured short-term notes; (4) WMECO, CL&P, Yankee Gas and PSNH to issue and sell commercial paper; and (5) the Subsidiaries to borrow from NU and each other, and to lend to each other under the Money Pool, all as provided for in the Prior Orders (''Short-Term Debt Authority'').[1] The Prior Orders limited the Utility Subsidiaries' Short-Term Debt Authority, as appropriate, to any combination of notes, commercial paper or Money Pool borrowings outstanding at any one time in aggregate amounts of $400 million for NU, $250 million for WMECO, $375 million for CL&P, $75 million for NNECO, $50 million for YES, $100 million for Yankee Gas, $5 million for HWP, $225 million for PSNH and $260 million for NAEC (''Debt Limitation'').[2]

The Applicants now request that the Commission modify and supersede the Prior Orders to extend the Authorization Period from December 31, 2000 to June 30, 2003 (''New Authorization Period'').[3] The Applicants request further that the Short-Term Debt Authority, subject to the Debt Limitation, be extended through the New Authorization Period. The Applicants propose that short-term borrowings will take the form of notes to banks and other financial institutions (''Notes''), commercial paper (''Paper''), loans and open-account advances from

[1] Subject to a reservation of jurisdiction over all the nonutility Subsidiaries' Money Pool borrowing authority, Quinnehtuk could borrow up to $16 million outstanding at any one time, NUEI up to $100 million, NGS up to $20 million, Select up to $200 million, RR up to $30 million, Yankee Financial up to $10 million, NorConn up to $10 million, YESCO up to $30 million, HEC up to $20 million and RMS up to $10 million. Subject to the same reservation of jurisdiction, NGC and Mode 1 currently do not have authority to borrow from the Money Pool.

[2] CL&P, WMECO, PSHN and NAEC are currently subject to charter limitations and/or state laws that would prevent them from incurring short-term debt up to their Debt Limitation.

[3] On January 20, 2000 (S.E.C. File 70–9613), NU and Consolidated Edison, Inc. (''CEI'') requested that the Commission approve the terms of an Agreement and Plan of Merger to merge the two companies, resulting in NU becoming a wholly owned subsidiary of CEI. Subsequently, on June 30, 2000 (S.E.C. File 70–9711) (''Financing Order''), NU and CEI requested that the Commission approve certain financing activities for the combined companies, including authority for NU system companies to issue and sell short-term debt and participate in the Money Pool. The Applicants propose that the authority granted in the Prior Orders, as modified and extended in this matter, be superseded by the authority requested in the Financing Order.

NU to the Utility Subsidiaries and Money Pool borrowings.

In particular, the Applicants propose that any Notes issued by NU or the Utility Subsidiaries will bear interest at a rate not exceeding 500 basic points over the base rate in effect from time to time of the lending institution or the base rate of a representative institution. The Notes may be secured or unsecured and will mature no later than 364 days from the date of their issuance. The Applicants further propose that Paper issued by NU, WMECO, CL&P, Yankee Gas and PSNH (''Issuers'') will be issued at rates not exceeding the annual rate prevailing at the time of issuance for commercial paper of comparable qualities and maturities. The Paper will mature no later than 270 days from the date of issuance and will not be repayable prior to maturity. The Applicants state that each of the Issuers will not issue Paper unless the effective cost of the Paper will be equal to or less than that for the issuance of Notes in an amount at least equal to the principal amount of Paper proposed to be issued.

The Applicant finally propose, through the New Authorization Period, that the Subsidiaries be authorized to borrow from NU and each other, and to lend to each other under the Money Pool, as authorized in the Prior Orders and subject to the Debt Limitation.[4] Service will continue to administer the Money Pool under the same terms and conditions approved by the Commission in the Prior Orders. The Applicants state that all other terms, conditions, limitations and reporting obligations contained in the Prior Orders will apply to the proposed transactions.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–30875 Filed 12–4–00; 8:45 am]

BILLING CODE 8010–01–M

[4] Currently, an order of the Massachusetts Department of Telecommunications and Energy limits WMECO's authority to make loans under the Money Pool to CL&P and HWP and three nonutility subsidiaries. WMECO has requested that the Commission reserve jurisdiction over its authority to lend to other Money Pool participants, pending completion of the record. PSNH may not lend to the Money Pool participants under a New Hampshire Public Utilities Commission (''NHPUC'') order authorizing such lending, subject to the elimination of certain write-offs associated with restructuring mandated by the NHPUC. WMECO and PSNH may borrow from the Money Pool.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43628; File No. SR–DTC–00–8]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Tax Certificate as to Beneficial Ownership

November 28, 2000.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act''), notice is hereby given that on June 1, 2000, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by DTC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change eliminates the requirement for DTC's participants to submit a ''Tax Certificate as to Beneficial Ownership'' form.[2]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments that it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.[3]

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

The proposed rule change eliminates the requirement that DTC participants file a ''Tax Certificate as to Beneficial Ownership'' form (''Tax Certificate'').[4]

[1] 15 U.S.C. 78s(b)(1).

[2] A copy of the Tax Certificate is set forth in Exhibit 2 of DTC's proposed rule change, which is available through the Commission's Public Reference Room or through DTC.

[3] The Commission has modified the text of the summaries prepared by DTC.

[4] It has been DTC's practice to require applicants to submit the Tax Certificate prior to becoming DTC participants in order to continue as a participant. Under the proposed rule change, applicants will no longer be required to submit the certificate, and all such certificates previously submitted will be null and void.

The Tax Certificate requires participants to certify that each beneficial owner of a ''foreign security''[5] credited to the participant's DTC account will be entitled to the same reduction in rate or exemption from any applicable withholding tax as would apply if the owner of such foreign security were an individual citizen of the United States who (1) was a resident in the United States and (2) who had no connection with the jurisdiction imposing the tax that would affect the rate at which the tax is to be withheld or an exemption from the tax. By submitting the Tax Certificate, participants also represent that they will withdraw from custody outside of DTC any foreign security which becomes beneficially owned by a person not entitled to such tax treatment.

DTC began requiring the Tax Certificate in 1976, in conjunction with DTC's program to make foreign securities eligible for a full range of DTC services, in order to stop its participants from depositing at DTC physical certificates evidencing foreign issues beneficially owned by customers (primarily foreign persons) not entitled to a treaty rate or to an exemption. Based on the Tax Certificate, issuers could make payment of dividends and other distributions on foreign securities at single rate without regard to the varying withholding tax rates that might otherwise apply.

DTC believes that developments in industry practices and DTC initiatives over the last twenty years make continued reliance upon the Tax Certificate inappropriate and unnecessary. Reliance on the Tax Certificate is no longer necessary because DTC has developed the TaxRelief service over DTC's Elective Dividend Service (''EDS''). Using this service, DTC can solicit certifications from participants regarding the characteristics of beneficial owners of foreign securities held in the participant's account at DTC. The certification can reflect various categories of the tax attributes of the beneficial owners, as relevant under the tax laws of the foreign jurisdictions and any relevant tax treaties, and in accordance with the extent of the participant's knowledge of the

[5] The Tax Certificate defines a ''foreign security'' as ''any security any income from which would be subject to withholding tax imposed by any country other than the United States.''

beneficial owners' characteristics.[6] In contrast, under the Tax Certificate, the participant was required to certify that every underlying beneficial owner was subject to the same withholding tax rate as would be a U.S. individual and to withdraw any foreign securities held by beneficial owners that were subject to different withholding rates (as for example might be the case for charitable organizations, pensions, and residents of certain other countries holding securities directly or indirectly in the participant's DTC account).

In addition, DTC now admits foreign participants, which may be expected to hold securities on behalf of beneficial owners not meeting the criteria set forth in the text of the Tax Certificate.[7] With regard to U.S. participants, most of which executed the Tax Certificates in the 1970s, it is doubtful that they have systems in place to prevent the prohibited deposits or to insure withdrawal after book-entry delivery for a prohibited beneficial owner. Also, book-entry only securities are now eligible for processing at DTC. In such cases, a participant may be unable to comply with the requirement that it withdraw a security in the event it becomes held by a beneficial owner not meeting the criteria.

Under current investment practices, beneficial owners of securities may now hold securities through several layers of custodians that cross country lines and even through foreign central securities depositories that have accounts at DTC. Given these practices, DTC believes that continued reliance on the Tax Certificate, in which every participant certifies that all beneficial owners have the same withholding tax status as U.S. individual residents, is no longer realistic.

DTC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act[8] and the rules and regulations thereunder because it promotes the prompt and accurate clearance and settlement of securities transactions while ensuring the safeguarding of funds and securities in DTC's possession or control.

[6] For a more complete discussion of DTC's EDS service (now called TaxRelief), refer to Securities Exchange Act Release Nos. 29814 (October 11, 1991), 56 FR 52563 (October 21, 1991) and 32171 (April 19, 1993), 58 FR 22003 (April 26, 1993).

[7] See Securities Exchange Act Release Nos. 38600 (May 9, 1997), 62 FR 27086 (May 16, 1997); 40064 (June 3, 1998), 63 FR 31818 (June 10, 1998); and 41466 (May 28, 1999), 64 FR 30077 (June 4, 1999).

[8] 15 U.S.C. 78q–1.

B. Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

DTC proposed eliminating the Tax Certificate at meetings of the DTC Foreign Tax Legal Working Group, most recently at a meeting held on September 29, 1999, and requested comments from the participant representatives that comprise the group. No written comments were received and the members of the Foreign Tax Legal Working Group concurred with the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[9] and Rule 19b–4(f)(4)[10] promulgated thereunder because the proposed rule change effects a change in an existing DTC service that does not adversely affect the safeguarding of securities or funds in DTC's custody or control or for which DTC is responsible and does not significantly affect DTC's respective rights and obligations or persons using the service. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, DC. Copies of such filing also will be available for inspection and copying at DTC's principal office. All submissions should refer to File No. SR–DTC–00–8 and should be submitted by December 26, 2000.

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(4).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–30877 Filed 12–4–00; 8:45 am]

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[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43634; File No. SR–DTC–00–15]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to DTAX Fees in Connection With Providing Internet

November 29, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1], notice is hereby given that on, November 2, 2000, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by DTC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change will allow DTC to modify its current fees for its domestic tax reporting service (''DTAX'') in connection with providing Internet access to the DTAX information database.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning

[1] 15 U.S.C. 78s(b)(1).

the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to revise current fees for DTAX[3] in connection with providing Internet access to the DTAX information database.

DTAX is a data service containing tax information on distributions received with respect to domestic securities. It is available through DTC's PTS and CCF facilities and effective on or about December 1, 2000, will also be accessible over the Internet through DTC's website.

Annual subscription fees for DTAX accessed over the Internet will be as follows:

$4,999 Unlimited interactive inquiries and master file download of all available CUSIPs.

$999 Unlimited interactive inquiries.

Initially, DTAX will be available only to participants although usage may be expanded to include non-participant customers at a later date.[4]

The proposed rule change is consistent with the requirements Section 17A of the Act and the rules and regulations thereunder applicable to DTC because fees will be equitably allocated among users of DTC services.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC perceives no impact on competition by reason of the proposed rule change.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments from DTC participants or others have not been solicited or received on the proposed rule change.

[2] The Commission has modified the text of the summaries prepared by DTC.

[3] For a description of DTAX, refer to Securities Exchange Act Release No. 41105 (February 25, 1999), 64 FR 10523 (March 4, 1999) [File No. DTC–99–02].

[4] Before expanding access to non-participants, DTC will file a proposed rule change under Section 19(b) of the Act.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act and Rule 19b–4(f)(2) thereunder, because the proposed rule change is changing a due, fee or other charge. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of DTC. All submissions should refer to File No. SR–DTC–00–15 and should be submitted by December 26, 2000.

For the Commission by the Division of Market Regulations, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–30878 Filed 12–04–00; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43631; File No. SR–DTC–00–14]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Creating a United States Withholding Tax Service Available Through The Depository Trust Company's Elective Dividend Service

November 28, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on October 31, 2000, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by DTC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would allow DTC to institute a U.S. withholding tax service available to foreign participants beginning January 1, 2001, in which DTC will act as withholding agent to deduct and withhold U.S. tax on U.S.-source income paid to foreign participants.

II. Self-Regulatory Organization's Statement of Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to institute a U.S. withholding tax service available to foreign participants beginning January 1, 2001, in which DTC will act as withholding

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified the text of the summaries prepared by DTC.

agent to deduct and withhold U.S. tax on U.S.-source income paid to foreign participants.

The U.S. Internal Revenue Code (''Code'') generally requires U.S. payors such as DTC to deduct and withhold thirty percent from most payments of U.S.-source income paid to a foreign payee unless lower U.S. withholding tax rates or exemptions apply under provisions of the Code, the regulations, or applicable tax treaties.[3] In the past, DTC has complied with its withholding obligations with respect to securities dividends and other payments made by a U.S. entity to foreign participants by generally requiring each foreign participant to appoint a U.S. bank or broker/dealer to act as its withholding agent or to otherwise obtain an exemption from the IRS thereby relieving DTC of the withholding responsibility. DTC currently has seven foreign participants.[4]

Foreign central securities in obtaining U.S. tax withholding services from U.S. financial institutions and have requested that DTC undertake the U.S. tax withholding responsibility.

In its role as U.S. tax withholding agent under the proposed rule change, DTC will accept relevant instructions from the foreign participant to determine the withholding tax rates; pay dividends, interest, and other securities distributions to the participant net of appropriate taxes, if any, based on the applicable withholding rates; remit the taxes to the IRS; and report the payments on Form 1042–S. Initially, DTC will use its Elective Dividend Service to solicit and receive the instructions from foreign participants, similar to the procedures currently in place with respect to instructions received from U.S. participants that use DTC's TaxRelief service to obtain relief from foreign taxes imposed on U.S. holders of foreign securities.[5]

DTC proposes to charge the following fees for the U.S. tax withholding service:

Monthly Fee	$150	Monthly service charge assessed on each account using the service.
Transaction Fee	$1.50	The fee for each tax adjustment instruction to withhold taxes at a specific rate pool.

Foreign participants that elect not to use DTC's U.S. tax withholding service may continue the current practice of appointing a third party U.S. bank or broker-dealer to receive gross payments on their behalf and act as U.S. tax withholding agent for such payments, or otherwise obtain an exemption from the IRS that relieves DTC of the withholding obligation.

The proposed rule change is consistent with the requirements of section 17A of the Act[6] and the rules and regulations thereunder applicable to DTC because it promotes the prompt and accurate clearance and settlement of securities transactions by facilitating international investment in U.S. securities. The proposed rule change will be implemented consistently with the safeguarding of securities and funds in DTC's custody or control or for which it is responsible.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

DTC has not solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii)[7] of the Act and Rule 19b–4(f)(4) promulgated thereunder because the proposal effects a change in an existing service of a registered clearing agency that does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible, and does not significantly affect the respective rights or obligations of the clearing agency or persons using the service. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of DTC. All submissions should refer to File No. SR–DTC–00–14 and should be submitted by December 26, 2000.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–30883 Filed 12–4–00; 8:45 am]

BILLING CODE 8010–01–M

[3] *See* Sections 1441, 1442 and 1443 of the Internal Revenue Code and the regulations promulgated thereunder.

[4] The seven foreign participants referenced herein are The Canadian Depository for Securities; Cavali ICLC S.A.; Clearstream Banking AG; Crest International Nominees Limited; Donaldson Luftkin & Jenrette International; Hong Kong Securities Clearing Limited; and Transatlantic Securities Company.

[5] Securities Exchange Act Release Nos. 34–42192 (December 1, 1999), 64 FR 69054 [File No. SR–DTC–99–23] (describing DTC's TaxRelief service) and 32171 (April 19, 1993), 58 FR 22003 [File No. SR–DTC–92–17] (approving the extension of DTC's EDS service to include all foreign securities).

[6] 15 U.S.C. 78q–1.

[7] 15 U.S.C. 78s(b)(3)(A)(i).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43629; File No. SR–EMCC–00–06]

Self-Regulatory Organizations; Emerging Markets Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Issuing Reports Concerning Warrants With a Money Distribution

November 28, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] notice is hereby given that on August 22, 2000, the Emerging Markets Clearing Corporation (''EMCC'') filed with the Securities and Exchange Commission ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by EMCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would clarify EMCC's procedures for issuing reports concerning warrants with a money distribution.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

In its filing with the Commission, EMCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. EMCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.[2]

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Currently, Rule 7, Section 16, paragraph (b) of EMCC's Rules provides that where an issuer of a warrant has declared a money distribution on such warrant, EMCC will issue a ''Record Date Report'' (''Report'') to each EMCC member with an outstanding fail deliver or fail receive obligation with respect to that warrant. The Report indicates the member's record date delivery or receive obligations with respect to the distribution. The Rules specify that the Report is to be issued on the record date.

However, EMCC believes that there is no operational reason for the Report to be produced on the record date. The proposed rule change would allow EMCC to provide this information to its members through one or more reports that will be issued after a record date is declared.

EMCC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act and the rules and regulations thereunder because it would provide EMCC with the capability to issue informative reports to members with affected positions and therefore will facilitate the prompt and accurate clearance and settlement of emerging market securities transactions.

B. Self-Regulatory Organization's Statement on Burden on Competition

EMCC does not believe that the proposed rule change will have an impact on or impose a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments relating to the proposed rule change have been solicited or received by EMCC. EMCC will notify the Commission of any written comments received by EMCC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(4) [4] thereunder because the rule change effects a change in an existing service of EMCC that does not adversely affect the safeguarding of securities or funds in the EMCC's custody or control or for which it is responsible and does not significantly affect EMCC's respective rights or obligations or persons using the service. At any time within sixty days of the proposed filing of such rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the rule proposal that are filed with the Commission, and all written communications relating to the rule proposal between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room in Washington, DC. Copies of such filing will also be available for inspection and copying at EMCC's principal office. All submissions should refer to File No. SR–EMCC–00–06 and should be submitted by December 26, 2000.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–30876 Filed 12–4–00; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43636; File No. SR–GSCC–00–14]

Self-Regulatory Organizations; Government Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Changes to GSCC's Fee Structure With Respect to GCF Repo Service

November 29, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] hereby given that on November 14, 2000, the Government Securities Clearing Corporation (''GSCC'') field with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by GSCC. The Commission is publishing this

[1] 15 U.S.C. 78s(b)(1)

[2] The Commission has modified the text of the summaries prepared by EMCC.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(4).

[5] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

After offering the GCF Repo Service free of charge for two years, GSCC is proposing to amend its fee structure to begin charging for the GCF Repo Service.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, GSCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. GSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

GSCC introduced its GCF Repo Service in November 1998.[3] The GCF Repo Service allows GSCC's non-inter-dealer broker netting members (''dealers'') to trade general collateral repurchase transactions involving U.S. Government securities throughout the day without requiring trade for trade settlement on a delivery versus payment basis. Although the Commission has authorized GSCC to charge participants for GCF Repo transactions,[4] GSCC has offered the GCF Repo Service without any charge for two years while it tailored the service to meet the needs of participants. Now that the service has succeeded in becoming an accepted means of processing general collateral repurchase transactions. GSCC has decided to begin charging participants for the service and is proposing to amend its fee structure for GCF Repo transactions. The new charges will be effective as of December 1, 2000.

The current fee schedule for GCF Repo Transactions includes (i) flat fees based on the number of legs of the repo transaction and the number of $50 million increments that make up the trade and (ii) basis point charges applied to the dollar amount of each GCF Repo Transaction.[5] The revised fee schedule drops the flat fees, retains the basis point charges, and adds a recording fee that is also applied to the dollar amount if each GCF Transactions.[6] Basis point charges will be applied to both overnight and term GCF Repo Transactions.

GSCC has determined to assess all fees for the GCF Repo Service based on the total value of a trade instead of including flat fees in the computation. This type of fee arrangement better reflects the risk of GSCC, which risk increases with the dollar amount of transactions that GSCC guarantees. Assessing fees in this manner works particularly well with GCF Repo transactions, which are settled in their full dollar amount by internal entries on the books of the clearing banks and not in $50 million increments as is required over the securities FedWire system.

GSCC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act[7] and the rules and regulations thereunder applicable to GSCC, because it involves changes to GSCC's fee structure that fairly reflect the costs incurred by GSCC in providing services to its members.

(B) Self-Regulatory Organization's Statement on Burden on Competition

GSCC does not believe that the proposed rule change will have any impact, or impose any burden, on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not yet been solicited or received. GSCC will notify the Commission of any written comments received by GSCC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii)[8] of the Act and Rule 19b–4(f)(2)[9] promulgated thereunder because the proposal establishes or changes a due, fee, or other charge imposed by GSCC. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of GSCC. All submissions should refer to File No. SR–GSCC–00–14 and should be submitted by December 26, 2000.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–30880 Filed 12–4–00; 8:45 am]

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[2] The Commission has modified the text of the summaries prepared by GSCC.

[3] Securities Exchange Act Release Nos. 40623 (October 30, 1998), 63 FR 59831 [File No. SR–GSCC–98–02] (order approving GSCC to implement the GCF Repo Service on an intrabank basis) and 41303 (April 16, 1999), 64 FR 20346 [File No. SR–GSCC–99–01] (order approving GSCC to implement the second, interbank phase of the GSF Repo Service that has enabled participating dealers to engage in GCF Repo trading with participating dealers that use a different clearing bank).

[4] Securities Exchange Act Release No. 40623.

[5] As stated above, despite the existence of a fee schedule for GCF Repo transactions, GSCC has never charged for such transactions.

[6] The Revised Fee Structure, attached as Exhibit A to the GSCC filing, is available for inspection and copying in the Commission's Public Reference Section and at the principal office of GSCC.

[7] 15 U.S.C. 78q-1.

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43635; File No. SR–NASD–00–68]

Self-Regulatory Organizations; The National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Transfer Customer Account(s)

November 29, 2000.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1], notice is hereby given that, on November 20, 2000, the National Association of Securities Dealers, Inc. (''NASD'') through its wholly-owned subsidiary, NASD Regulation, Inc. (''NASD Regulation'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by NASD. The Commission is publishing this notice to solicit comments on the propose rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would allow the NASD to amend Rule 11879(e) of the Uniform Practice Code to require that following the validation of a transfer instruction, the carrying member must complete the transfer of customer account(s) to the receiving member within three business days instead of four business days.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements. [2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Rule 11870(e) regulates the transfer of customer accounts from one member organization to another. Such transfers are generally effected through the Automated Customer Account Transfer (''ACAT'') Service, which is a system administered by the National Securities Clearing Corporation (''NSCC''). Since the inception of the ACAT Service in 1985, numerous enhancements to the system have allowed for faster and more efficient transfers of customer accounts. The NSCC enhanced the ACAT Service in 1999 to require carrying members to complete the transfer of accounts to the receiving member within three business days following the validation of a transfer instruction. The NYSE has already amended its Rule 412 to reduce the total post-validation transfer period from four days to three days. [3] The NASD currently expects its members to comply with the three-day requirement notwithstanding that Rule 11870(e) to conform to the NYSE Rule 412(b)(3) requirement that post-validation transfer occur within three business days. This will make Rule 11870(e) consistent with the current NSCC and NYSE three-day requirement, which is the industry standard.

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that the NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The NASD believes that the proposed rule change is designed to accomplish these ends by reducing the time frame allowed for the transfer of customer accounts from one member organization to another and to make NASD requirements conform to NYSE Rule 412(b)(3) and current NSCC requirements.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NASD Regulation does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule change and Timing for Commission Action

The proposed rule change has been filed by NASD as a ''non-controversial'' rule change under Rule 19b–4(f)(6) under the Act.[4] In accordance with Rule 19b–4(f)(6)(iii), prior to the filing date, NASD Regulation submitted written notice of its intent to file the proposed rule change along with a brief description and text of the proposed rule change. In that notice of its intent, NASD Regulation requested that the Commission waive the requirement that the rule change, by its terms, not become operative for 30 days after the date of the filing, as consistent with the protection of investors and the public interest. The Commission has decided to waive that requirement. Accordingly, the proposed rule change will become effective upon filing pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder. At any time within 60 days of this filing, the Commission may summarily abrogate this proposal if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All submissions should refer to File No. SR–NASD–00–68 and should be submitted by December 21, 2000.

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified the text of the summaries prepared by the NASD.

[3] Securities Exchange Act Release No. 40712 (Nov. 25, 1998), 63 FR 67163 (December 4, 1998).

[4] 17 CFR 240.19b–4(f)(6).

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–30879 Filed 12–4–00; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43630; File No. SR–OCC–00–05]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Stockholder Approval of Certain By-Law Amendments

November 28, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that, on June 20, 2000, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would amend Article XI, Section 1 to provide more explicit authorization for a procedure to obtain stockholder approval of certain By-Law amendments.[2]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in section (A), (B), and (C) below, of the most significant aspects of these statements.[3]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to make explicit a long-standing interpretation of OCC's By-Laws, Article XI, Section 1, which provides that certain enumerated provisions of the By-Laws ''may not be amended by action of the Board of Directors without the approval of the holders of all of the outstanding Common Stock of the Corporation.'' Each of OCC's stockholders is a participant exchange of OCC, and each is entitled to elect one ''exchange director'' to OCC's board of directors. It has been the practice of OCC and the exchanges to consider the affirmative vote of each exchange director to be the required approval of the stockholder that elected that exchange director. OCC is proposing to amend Article XI, Section 1 to provide more explicit authorization for this procedure. The proposed rule change was approved by the holders of all outstanding common stock of OCC by unanimous written consent on May 23, 2000, and by OCC's board of directors at a meeting held on May 23, 2000.

In order to eliminate any potential conflict between an exchange director's fiduciary duty as a director of OCC and his or her duty to the stockholder that elected the director, the rule change also allows an exchange director to choose not to have his or her vote in favor of a By-Laws amendment considered to be the approval of such stockholder. In the event that any exchange director exercises this right, the rule change provides that the By-Laws amendment in question will require the written approval of the stockholder represented by that exchange director. Such approval could then be given or withheld by the stockholder without the vote of the exchange director.

The proposed rule change is consistent with Delaware corporate law. Absent the current provision in Article XI, Section 1 of the By-Laws, no stockholder action would be required in order to amend any part of the By-Laws of OCC. Where the requirement of stockholder ''approval'' is imposed by the By-Laws, the By-Laws may specify the mechanism by which that approval is to be obtained.

The proposed rule change is also consistent with the purposes and requirements of Section 17A of the Act[4] and the rules and regulations thereunder applicable to OCC because it assures the fair representation of OCC stockholders in the administration of OCC's affairs and does not impose any burden on competition.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not yet been solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii)[5] of the Act and Rule 19b–4(f)(3)[6] promulgated thereunder because the proposal is solely concerned with the administration of OCC and does not affect the protection of investors or the public interest and does not impose any burden on competition. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C.

[1] 15 U.S.C. 78s(b)(1).

[2] A copy of the text of OCC's proposed rule change and the attached exhibit are available at the Commission's Public Reference Section or through OCC.

[3] The Commission has modified the text of the summaries prepared by OCC.

[4] 15 U.S.C. 78q–1.

[5] 15 U.S.C. 78s(b)(3)(A)(iii).

[6] 17 CFR 240.19b–4(f)(3).

552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of OCC. All submissions should refer to File No. SR–OCC–00–05 and should be submitted by December 26, 2000.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–30882 Filed 12–4–00; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43632; File No. SR–OCC–00–08]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Instructions to Pledge and Release Pledges

November 28, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on, September 8, 2000, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would allow OCC to give effect on an intraday basis to instructions to pledge long options positions and instructions to release pledges.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to accelerate the time when OCC gives effect to instructions to pledge or release long options for purposes of determining margin requirements. Currently, such instructions are acted on during the nightly processing cycle for effect the next business day. As a result, positions that have been released from pledge and could be used to reduce a clearing member's margin requirement are ''idled'' during a business day. OCC proposes to act on pledge and release instructions on an intraday basis thereby affording clearing members more efficient use of their assets and potentially greater flexibility in their financing decisions. No effect would be given to a requested pledge to the extent that the pledge would cause the account not to be adequately margined.

The proposed rule change is consistent with the requirements of Section 17A of the Act and the rules and regulations thereunder applicable to OCC because it increases the ability of clearing members to manage their financing arrangements while maintaining OCC's overall protection against default.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Exchange Act and Rule 19b–4(f)(6) promulgated thereunder because the proposal does not significantly affect the protection of investors or the public interest and does not impose any significant burden on competition. In accordance with Rule 19b–4(f)(6)(iii), prior to the filing date, OCC submitted written notice of its intent to file the proposed rule change along with a brief description and text of the proposed rule change. In that notice of its intent, OCC requested that the Commission waive the requirement that the rule change, by its terms, not become operative for 30 days after the date of the filing, as consistent with the protection of investors and the public interest. The Commission has decided to waive that requirement. Accordingly, the proposed rule change will become effective upon filing pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of OCC. All submissions should refer to File No. SR–OCC–00–08 and should be submitted by December 26, 2000.

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[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified the text of the summaries prepared by OCC.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–30884 Filed 12–4–00; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43625; File No. SR–Phlx–00–72]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to Rules 501, 505, and 506 Regarding Allocation and Specialist Appointment, as well as Rule 748, Supervision, to Reflect Current Circumstances on the Equity, Foreign Currency Option and Option Trading Floors

November 27, 2000.

On July 25, 2000, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Rules 501, 505, and 506 regarding Allocation and Specialist Appointment, as well as Rule 748, Supervision, to reflect current circumstances on the equity, foreign currency option and option trading floors. The proposed rule change was noticed in the **Federal Register**.[3] No comments were submitted on the proposed rule change. This order approves the proposed rule change.

I. Description of the Proposal

The Phlx proposes to amend Rules 501, 505, 506, and 748 to require certain information be provided to the Allocation, Evaluation and Securities Committee (''AES Committee'') for approval and to require certain minimum staffing levels for specialist units. Specifically, the Exchange proposes to amend Rule 501(b)(4) to require that option and foreign currency option specialist units provide detailed information on their application to become a specialist unit regarding their back-up arrangements with regard to financial and staffing support.

The proposal would add Rule 501(c) to require that the AES Committee approve an individual before he may act as a specialist on behalf of a specialist unit. In addition, proposed Rule 501(c) would require that applications for individuals to act as specialist include any other special information that the AES Committee may require for approval. Proposed Rule 501(c) would also require that the AES Committee or its designee approve an individual before that individual may move from one specialist unit to another specialist unit.

The proposal would re-designate Rule 501(c) ad Rule 501(d), which requires that to be approved and retain their specialist privileges, option and foreign currency option specialists must maintain the clearing arrangements and capital structure stated on their application. In addition, Rule 501(d) would require that changes regarding back-up arrangements must be submitted to and approved by the AES Committee. The proposal would also amend Rule 501(d) to require option and foreign currency option specialists to maintain a minimum staffing level for each quarter turret of space on the trading floor.

The proposal would add Rule 501(e), which is similar to Rule 501(d), and would contain the same staffing requirements for equity specialists as are currently contained in Rule 501(c)(2).

The proposal would re-designate Rule 501(d) as Rule 501(f) and amend the language of 501(f) to state that once an applicant is approved by the AES Committee as a specialist unit, any material change in the capital or staff of the unit or any move by the head or assistant specialist must be reported in writing to the AES Committee within two days of the change.

The proposal would add Rule 501, Commentary .02, which states that for purposes of Rule 748 on Supervision, individuals employed or associated with the back-up specialist will be considered engaging in a business activity of the specialist unit that they are assisting. Rule 748(b) would also be amended to refer to this situation.

The proposal would amend Rule 505 to require registrant specialist units to report material changes on the respective equity, option and foreign currency option registration forms to the AES Committee.

The proposal would amend Rule 506 to codify expressly that the AES Committee may require applicant specialist units to provide other information, including system order acceptance and execution levels, and guarantees on the application for a particular equity or option. The proposal also would require that, should a specialist be allocated that equity or option, the specialist would be immediately required to notify the Exchange staff and submit for approval to the AES Committee or its designee in writing any change to the respective system acceptance and execution levels or any other material changes on that application.

The proposal also would replace references to the Department of Securities in Rules 505 and 506 with references to the Exchange staff.

II. Discussion

The Commission finds that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act,[4] which require, among other things, that the rules of the exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with respect to facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.[5] The proposed amendments will provide the AES Committee with additional information to make decisions regarding allocation, reallocation, and transfer of specialist books as well as the approval and retention of specialists on the trading floor.

The Commission believes that proposed amendment to Rule 501(b)(4) regarding back-up arrangements for staffing and capital will help to ensure that specialist books continue to trade on the floor in an efficient manner by requiring the specialist unit to have sufficient staff to handle the high volume in busy markets and requiring the back-up to step in to act as a specialist, when the assigned specialist is unable to do so.

The Commission believes that the proposed amendment to Rule 501(c) regarding the AES Committee's supervision of the individuals applying to be specialists on the floor will help to ensure that applicants have sufficient qualifications and experience to perform the duties of a specialist in active markets.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 43407 (Oct. 3, 2000), 65 FR 60711 (Oct. 12, 2000) (SR–PHLX–00–72).

[4] 15 U.S.C. 78f(b)(5).

[5] In approving the proposal, the Commission has considered the rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Presently, the Phlx's Rules do not sufficiently address the issue of staffing levels; however, the Commission believes that proposed amendment to Rule 501(d) will help to ensure that there is adequate staffing coverage on the trading floors.

The Commission believes that proposed amendment to Rule 506 regarding the AES Committee's authority to require specialist units to state their system order acceptance and execution levels, and notify the AES Committee of any changes to the respective system acceptance and execution levels, will help the Exchange to accurately and effectively assess whether the specialist units have the ability to attract order flow to the Exchange.

The Commission believes that proposed amendments to Rule 501, Commentary .02 and Rule 748, will help ensure adequate supervision of specialist staff by considering back-up staff used by a specialist to be employees of the specialist unit. This will help to hold a specialist unit accountable for the acts of staff under their direction, albeit such staff is not directly employed by that specialist unit.

Lastly, the Commission believes that proposed amendments to Rule 501, 505, and 506 regarding notification will help to supply the Phlx and the AES Committee with the appropriate information to make determinations regarding the ability of a specialist to perform in a particular security in accordance with the AES Committee's review procedures.

III. Conclusion

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[6] that the proposed rule change (SR–PHLX–00–72) is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–30881 Filed 12–4–00; 8:45 am]

BILLING CODE 8010–01–M

SOCIAL SECURITY ADMINISTRATION

The Ticket to Work and Work Incentives Advisory Panel Meeting

AGENCY: Social Security Administration (SSA).

ACTION: Notice of teleconferences and meeting.

DATES: *Teleconferences:*

December 12, 2000, 1:30–3:30 p.m.
December 19, 2000, 1:30–3:30 p.m.

Meeting:

January 9, 2001, 8:30 a.m.–5 p.m.
January 10, 2001, 8:30 a.m.–5 p.m.

ADDRESSES:

Teleconferences: Social Security Administration, International Trade Center, 500 E St. SW., 8th Floor, Theatre Room, Washington, D.C. 20254.

Meeting: Holiday Inn-Capitol, 550 C Street, SW., Washington, DC, 20024, (202) 479–4000, (202) 479–4353 Fax. The hotel is located one block from the L'Enfant Metro Station.

SUPPLEMENTARY INFORMATION:

Type of meetings: These meetings are open to the public. The public is invited to participate by calling into the teleconferences or coming to the addresses listed above for the teleconferences and the meeting. The public is also invited to submit comments in writing at any time on or before January 10, 2001.

Purpose: In accordance with section 10(a)(2) of the Federal Advisory Committee Act, the Social Security Administration (SSA) announces meetings of the Ticket to Work and Work Incentives Improvement Act (TWWIIA) Advisory Panel (the Panel). Section 101(f) of Public Law 106–170 establishes the Panel to advise the Commissioner of SSA, the President, and the Congress on issues related to work incentives programs, planning and assistance for individuals with disabilities as provided under section 101(f)(2)(A) of the TWWIIA. The Panel is also to advise the Commissioner on matters specified in section 101(f)(2)(B) of that Act, including certain issues related to the Ticket to Work and Self-Sufficiency Program established under section 101(a) of that Act.

Interested parties are invited to attend the teleconferences and meeting. The Panel will use the teleconferences to conduct full Panel deliberations on the implementation of the TWWIIA. The Panel will not be taking public testimony at the teleconferences. The Panel will use the meeting time to receive public testimony, hear presentations on the implementation of TWWIIA, conduct full Panel deliberation, receive briefings and conduct business.

Teleconference Agenda: The Panel will meet by teleconference commencing Tuesday, December 12, 2000 at 1:30 p.m. to 3:30 p.m. The Panel will deliberate on the implementation of TWWIIA. The public is invited to participate by coming in to the address listed above or calling in to the scheduled teleconference to listen. No public testimony will be taken.

Teleconference Agenda: The Panel will meet by teleconference commencing Tuesday, December 19, 2000 at 1:30 p.m. to 3:30 p.m. The Panel will deliberate on the implementation of TWWIIA. The public is invited to participate by coming in to the address listed above or calling in to the scheduled teleconference to listen. No public testimony will be taken.

Meeting Agenda: The Panel will meet in person commencing Tuesday, January 9, 2001 at 8:30 a.m. to 5:00 p.m. and Wednesday, January 10, 2001 at 8:30 a.m. to 5:00 p.m. Seating may be limited so persons interested in attending this meeting should contact the Panel staff by e-mail or telephone. Public testimony will be heard in person on Tuesday, January 9, 2001 and Wednesday, January 10, 2001 from 8:30 a.m. to 9:30 a.m. Individuals interested in providing testimony in person should contact the Panel staff as outlined below to schedule time slots. Members of the public must schedule a timeslot in order to comment.

Each presenter will be called on by the Chair in the order in which they are scheduled to testify and is limited to a maximum five-minute verbal presentation. Full written testimony on TWWIIA Implementation, no longer than 5 pages, may be submitted in person or by mail, fax or email on an on-going basis to the Panel for consideration.

In the event that the public comments do not take up the scheduled time period for each day, the Panel will use that time to deliberate and conduct other Panel business.

Since teleconference ports and seating may be limited, persons interested in attending these meetings or in providing testimony at the in-person meeting should contact the Panel staff by E-mailing Kristen M. Breland, at '*kristen.m.breland@ssa.gov*' or calling (410) 966–7225.

The full agendas for the meetings follow this announcement. The agendas are also posted on the Internet at *http://www.ssa.gov/work/Resources/Toolkit/* or can be received in advance electronically or by fax upon request.

Contact Information: Anyone requiring information regarding the Panel should contact the TWWIIA Panel staff. Records are being kept of all Panel proceedings and will be available for public inspection by appointment at the Panel office. Anyone requiring

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[6] 15 U.S.C. 78s(b)(2).

[7] 17 CFR 200.30–3(a)(12).

information regarding the Panel should contact the Panel staff by:

• Mail addressed to Social Security Administration, Ticket to Work and Work Incentives Advisory Panel Staff, 107 Altmeyer Building, 6401 Security Boulevard, Baltimore MD, 21235

• Telephone contact with Kristen Breland at (410) 966–7225

• Fax at (410) 965–9063

• E-mail to *TWWIIAPanel@ssa.gov*

Dated: November 30, 2000.

Deborah M. Morrison,

Designated Federal Officer.

Ticket to Work and Work Incentives Advisory Panel, Teleconference Meeting Agenda

Tuesday, December 12, 2000

Social Security Administration, 8th Floor Theatre Room, 500 E Street, SW, Washington, DC 20254

1:30 p.m.

Meeting Convened by Designated Federal Officer, Deborah M. Morrison, Sarah Wiggins Mitchell, Chair, Presiding

1:30–3:15 p.m.

Deliberations on the Implementation of the Ticket to Work and Work Incentives Improvement Act

3:15–3:30 p.m.

Administrative Issues

3:30 p.m.

Adjournment

Tuesday, December 19, 2000

Social Security Administration, 8th Floor Theatre Room, 500 E Street, SW, Washington, DC 20254

1:30 p.m.

Meeting Convened by Deborah M. Morrison, Designated Federal Officer, Sarah Wiggins Mitchell, Chair, Presiding

1:30–3:15 p.m.

Deliberations on the Implementation of the Ticket to Work and Work Incentives Improvement Act

3:15–3:30 p.m.

Administrative Issues

3:30 p.m.

Adjournment

Ticket to Work and Work Incentives Advisory Panel, Public Meeting Agenda

January 9 and 10, 2001

Holiday Inn-Capitol, 550 C Street, SW, Washington, DC, 20024, (202) 479–4000, (202) 479–4353 Fax. The hotel is located one block from the L'Enfant Metro Station.

Day 1—Tuesday, January 9, 2001

8:30 a.m.

Meeting Called to Order by Deborah M. Morrison, Designated Federal Officer, Welcome and Introductions—Sarah Mitchell, Chair, Presiding

8:30 to 9:30 a.m.

Public Testimony Comment Period on TWWIIA Implementation

9:30 to 10:30 a.m.

Update on TWWIIA Implementation by Office of Employment Support Programs

10:30 to 10:45 a.m.

Break

10:45 to 11:45 a.m.

Panel Deliberations on TWWIIA Implementation

11:45 a.m. to 1:15 p.m.

Lunch (On Your Own)

1:15 p.m.

Meeting Reconvenes, Sarah Mitchell, Chair, Presiding

1:15 to 3:00 p.m.

Panel Deliberations on TWWIIA Implementation

3:00 to 3:30 p.m.

Break

3:00 to 5:00 p.m.

Panel Deliberations on TWWIIA Implementation

5:00 p.m.

Adjournment

Please note: If time allotted for public comment exceeds the time required, the Panel will use the time to deliberate on TWWIIA implementation.

Day 2—Wednesday, January 10, 2001

8:30 to 9:30 a.m.

Public Testimony Comment Period on TWWIIA Implementation

9:30 to 11:45 a.m.

Briefings on TWWIIA Implementation

11:45 a.m. to 1:15 p.m.

Lunch (On Your Own)

1:15 p.m.

Meeting Reconvenes Sarah Mitchell, Chair, Presiding

1:15 to 3:30 p.m.

Panel Deliberations on TWWIIA Implementation

3:30 to 3:45 p.m.

Break

3:45 to 5:00 p.m.

Business Meeting

5:00 p.m.

Adjournment by Deborah M. Morrison, Designated Federal Officer

Please note: If time allotted for public comment exceeds the time required, the Panel will use the time to deliberate on TWWIIA implementation.

[FR Doc. 00–31015 Filed 12–4–00; 8:45 am]

BILLING CODE 4191–02–U

SOCIAL SECURITY ADMINISTRATION

Privacy Act of 1974, as Amended; New System of Records and Routine Use Disclosures

AGENCY: Social Security Administration (SSA).

ACTION: New System of Records and Proposed New Routine Uses.

SUMMARY: In accordance with the Privacy Act (5 U.S.C. 552a(e)(4)) and (e)(11)), we are issuing public notice of our intent to establish a new system of records entitled, the Social Security Administration's Customer PIN/ Password (PPW) Master File System (hereinafter referred to as the Customer PPW Master File System) and routine uses applicable to this system. The proposed Customer PPW Master File System will maintain information collected for use in connection with SSA's implementation of a personal identification number (PIN)/Password system that allows Social Security program applicants, beneficiaries and other customers to conduct business with SSA in an electronic business environment.

The proposed Customer PPW Master File System will provide for routine use disclosures in connection with our administration of the Social Security Act or as mandated by Federal law. We invite public comment on this proposal.

DATES: We filed a report of the proposed new system of records with the Chairman of the Senate Governmental Affairs Committee, the Chairman of the House Reform and Oversight Committee, and the Director, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on November 28, 2000. The proposed system of records, including the proposed routine uses, will become effective on January 13, 2001, unless we receive comments that would warrant the system of records not being implemented.

ADDRESSES: Interested individuals may comment on this publication by writing to the SSA Privacy Officer, Social Security Administration, 3–F–1 Operations Building, 6401 Security Boulevard, Baltimore, Maryland 21235. All comments received will be available for public inspection at the above address.

FOR FURTHER INFORMATION CONTACT: Ms. Joan Peddicord, Social Insurance Policy Specialist, Social Security Administration, Room 3–C–3 Operations Building, 6401 Security Boulevard, Baltimore, Maryland 21235, telephone (410) 966–6491.

SUPPLEMENTARY INFORMATION:

1. Background and Purpose of the Proposed Customer PPW Master File System

SSA has a number of electronic initiatives underway that support the government mandate directing federal agencies to use information technology to offer more efficient and accessible service channels to the public. To support some of SSA's electronic initiatives, and after careful study and development, the Agency created the PPW infrastructure that will allow customers to conduct transactions with SSA on a routine basis through the Internet and toll free automated touch tone response telephone system. The PPW infrastructure will enable SSA to offer customers a specific suite of services that require a PIN/Password system. Using a PPW process, our customers will be able to apply for social security program benefits or view and possibly change personal record information, such as mailing address, through secure online transactions.

Customers must elect (opt-in) to use the PPW process to conduct electronic transactions with SSA. Those who opt-in may include applicants for Social Security benefits, current beneficiaries in pay or non-pay status and other customers who choose these electronic service delivery options to conduct business with SSA. Customers who initially choose to use the PPW process may later elect out (opt-out) of the system by requesting SSA to block access to their records. SSA will disable the PPW capabilities to the records of customers making this request, thus blocking any access to the record.

Further, customers who receive information soliciting their interest in using the PPW process may want to ensure that no electronic access to their records can occur. They may also elect out, and SSA will also disable the PPW capabilities to the records of these customers, thus blocking any access to the record.

Establishment of the PPW Infrastructure

The Agency first identified and developed the underlying principles to support a PPW business process. These principles intentionally focused on the framework to implement a successful PPW process in the various electronic applications SSA develops for customer service initiatives. For example, the PPW infrastructure is designed to:

- Support all direct customer service delivery by SSA,
- Maximize the level of automation involved in assigning, maintaining and using the PPW services,
- Minimize the manual intervention of SSA employees in the PPW process, and
- Limit customer information access to that which is appropriate to the means used in obtaining the password.

SSA also established authentication requirements for its electronic application and transaction processes that the PPW infrastructure is designed to support. These authentication requirements allow SSA to verify the identity of users of the Internet and automated telephone system electronic services. The process for SSA customers to obtain passwords and the corresponding authentication required to use these passwords for a determined set of electronic services share a number of principles:

- Customers must opt-in to the PPW process by indicating to SSA their interest in obtaining a password.
- A customer must have a Password Request Code (PRC) to begin the process of obtaining a password. A PRC has one purpose—to identify a customer who may wish to obtain an SSA password.
- PRCs are electronically generated and assigned to customers by SSA and will only be accessible to a limited number of SSA system employees who maintain the PPW system.
- PRCs are sent to customers through the US Mail.
- The authentication parameters for various electronic services depend on the level of sensitivity assigned to the particular application or transaction to be conducted and the customer's current relationship to the Agency.

2. Collection, Maintenance and Use of Data in the Proposed Customer PPW Master File System

The information maintained in this system of records will be collected from customers who elect to conduct transactions with SSA in an electronic business environment that requires the PPW infrastructure. The information maintained will include identifying information such as the customer's name, Social Security number (SSN) (which functions as the individual's PIN) and mailing address. The system will also maintain the customer's PRC, the password itself and the authorization level and associated data (*e.g.*, effective date of authorization).

We will also maintain transactional data elements necessary to administer and maintain the PPW infrastructure. These include access profile information such as blocked PINs, failed access data, effective date of password and other data linked to the required authentication processes for Internet and automated telephone system applications. The information on this system may also include archived transaction data and historical data.

SSA will use the data in the proposed system for management information purposes in order to effectively administer the PPW infrastructure used to conduct electronic business with SSA customers. Because we will maintain and retrieve data from the proposed system of records by the customer's SSN (which acts as the individual's PIN), the database will constitute a ''system of records'' under the Privacy Act.

3. Proposed Routine Use Disclosures of Data Maintained in the Proposed Customer PPW Master File System

We are proposing to establish routine uses of information that will be maintained in the proposed system as discussed below.

A. Disclosure to the Office of the President for the purpose of responding to an individual pursuant to an inquiry received from that individual or from a third party on his or her behalf.

We will disclose information under this routine use only in situations in which an individual may contact the Office of the President, seeking that office's assistance in an SSA matter on his or her behalf involving this system of records. Information would be disclosed when the Office of the President makes an inquiry and presents evidence that the office is acting on behalf of the individual whose record is requested.

B. Disclosure to a congressional office in response to an inquiry from that office made at the request of the subject of a record.

We will disclose information under this routine use only in situations in which an individual may ask his her congressional representative to intercede in an SSA matter on his or her behalf involving this system of records. Information would be disclosed when the congressional representative makes an inquiry and presents evidence that he or she is acting on behalf of the individual whose record is requested.

C. To the Department of Justice (DOJ), a court or other tribunal (either foreign or domestic), or another party before such tribunal when:

(a) SSA, or any component thereof; or

(b) Any SSA employee in his/her official capacity; or

(c) Any SSA employee in his/her individual capacity where DOJ (or SSA where it is authorized to do so) has agreed to represent the employee; or

(d) The United States or any agency thereof where SSA determines that the litigation is likely to affect the operations of SSA or any of its components,

is a party to the litigation or has an interest in such litigation, and SSA determines that the use of such records by DOJ, the court or other tribunal is relevant and necessary to the litigation, provided however, that in each case, SSA determines that such disclosure is compatible with the purpose for which the records were collected.

We will disclose information under this routine use only as necessary to enable DOJ, a court or other tribunal to effectively defend SSA, its components or employees in litigation involving the proposed system of records.

D. Disclosure to contractors and other Federal agencies, as necessary, for the purpose of assisting SSA in the efficient administration of its programs.

We will disclose information under this routine use only in situations in which SSA may enter into a contractual agreement or similar agreement with a third party to assist in accomplishing an agency function relating to this system of records.

E. Nontax return information which is not restricted from disclosure by federal law may be disclosed to the General Services Administration (GSA) and the National Archives and Records Administration (NARA) under 44 U.S.C. 2904 and 2906, as amended by NARA Act of 1984, for the use of those agencies in conducting records management studies.

The Administrator of GSA and the Archivist of NARA are charged by 44 U.S.C. 2904 with promulgating standards, procedures and guidelines regarding records management and conducting records management studies. Section 2906 of that law, also amended by the NARA Act of 1984, provides that GSA and NARA are to have access to federal agencies' records and that agencies are to cooperate with GSA and NARA. In carrying out these responsibilities, it may be necessary for GSA and NARA to have access to this proposed system of records. In such instances, the routine use will facilitate disclosure.

4. Compatibility of Proposed Routine Uses

The Privacy Act (5 U.S.C. 552a(b)(3)) and our disclosure regulations (20 CFR Part 401) permit us to disclose information under a published routine use for a purpose which is compatible with the purpose for which we collected the information. Section 401.150(c) of the regulations permits us to disclose information under a routine use where necessary to assist in carrying out SSA programs. Section 401.120 of the regulations provides that we will disclose information when a law specifically requires the disclosure. The proposed routine uses lettered A–D above will ensure efficient maintenance of the Customer PPW Master File System; the disclosures that would be made under routine use ''E'' are required by Federal law. Thus, all of the routine uses are appropriate and meet the relevant statutory and regulatory criteria.

5. Records Storage Medium and Safeguards for The Proposed Customer PPW Master File System

We will maintain information in the proposed Customer PPW Master File System in electronic form, computer data systems and paper form. Only authorized SSA personnel who have a need for the information in the performance of their official duties will be permitted access to the information.

Computer firewall technology, data encryption and other systems security measures will ensure that the PPW system is protected from inappropriate access. The existing SSA firewall architecture ensures that customers will be limited only to electronic transactions the Agency determines and will not be able to access SSA's other systems or data.

Security measures also include the use of access codes to enter the computer systems that will maintain the data and storage of the computerized records in secured areas that are accessible only to employees who require the information in performing their official duties. Any manually maintained records will be kept in locked cabinets or in otherwise secure areas. Also, all buildings housing this data are accessible to authorized personnel only, with entrances and exits supervised by security guards. Contractor personnel having access to data in the proposed system of records will be required to adhere to SSA rules concerning safeguards, access and use of the data. SSA personnel having access to the data on these systems will be informed of the criminal penalties of the Privacy Act for unauthorized access to or disclosure of information maintained in this system. See 5 U.S.C. 552a(i)(1).

6. Effect of the Proposed Customer PPW Master File System on the Rights of Individuals

The proposed new system will maintain the necessary data elements to effectively administer the PPW infrastructure used to conduct electronic business with SSA customers. SSA has developed a strategy that makes SSA electronic services more readily available via the Internet and automated telephone systems but with the commensurate privacy and security protections to ensure appropriate use of this new system. We will not collect any unnecessary information and will protect the personal information that does need to be gathered for the Customer PPW Master File System. There are existing security standards that protect access to and disclosure of records in this proposed new system. We will not use the information in any manner that will be adverse to the individuals to whom it pertains. Thus, we do not anticipate that the Customer PPW Master File System will have any unwarranted adverse effect on individuals.

Dated: November 28, 2000.

Kenneth S. Apfel,

Commissioner of Social Security.

60–0290

SYSTEM NAME:

Social Security Administration's Customer PIN/Password (PPW) Master File System.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Social Security Administration, Office of Systems, 6401 Security Boulevard, Baltimore, Maryland 21235.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All SSA customers (applicants, beneficiaries and other customers) who elect to conduct transactions with SSA in an electronic business environment that requires the PPW infrastructure. This may include customers who elect to block PPW access to SSA electronic transactions by requesting SSA to disable their PPW capabilities.

CATEGORIES OF RECORDS IN THE SYSTEM:

The information maintained in this system of records is collected from customers who elect to conduct transactions with SSA in an electronic business environment that requires the PPW infrastructure. The information maintained includes identifying information such as the customer's name, Social Security number (which functions as the individual's personal identification number (PIN) and mailing address. The system also maintains the customer's Password Request Code (PRC), the password itself and the authorization level and associated data (*e.g.,* effective date of authorization).

We also maintain transactional data elements necessary to administer and maintain the PPW infrastructure. These include access profile information such as blocked PINs, failed access data, effective date of password and other data linked to the required authentication processes for Internet and automated telephone system applications. The information on this system may also include archived transaction data and historical data.

SSA will also use the data in the proposed system for management information purposes in order to effectively administer the PPW infrastructure used to conduct electronic business with SSA customers. Because we will maintain and retrieve data from the proposed system of records by the customer's SSN (which acts as the individual's PIN), the database will constitute a ''system of records'' under the Privacy Act.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 205(a) of the Social Security Act; 5 U.S.C. 552a(e)(10) of the Privacy Act; and the Government Paperwork Elimination Act.

PURPOSE(S):

The Customer PPW Master File System maintains information collected for use in connection with SSA's implementation of a PIN/Password system that allows Social Security program applicants, beneficiaries and other customers to conduct business with SSA in an electronic business environment. The system of records is designed to permit entry and retrieval of information associated with maintaining a PPW infrastructure that supports SSA's electronic initiatives requiring a PPW entry process.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Disclosure may be made for routine uses as indicated below:

(1) Disclosure to the Office of the President for the purpose of responding to an individual pursuant to an inquiry received from that individual or from a third party on his or her behalf.

(2) Disclosure to a congressional office in response to an inquiry from that office made at the request of the subject of a record.

(3) To the Department of Justice (DOJ), a court, or other tribunal (either foreign or domestic) or another party before such tribunal when:

(a) SSA, or any component thereof; or

(b) any SSA employee in his/her official capacity; or

(c) any SSA employee in his/her individual capacity where DOJ (or SSA where it is authorized to do so) has agreed to represent the employee; or

(d) the United States or any agency thereof where SSA determines that the litigation is likely to affect the operations of SSA or any of its components, is a party to the litigation or has an interest in such litigation, and SSA determines that the use of such records by DOJ, the court or other tribunal is relevant and necessary to the litigation, provided, however, that in each case, SSA determines that such disclosure is compatible with the purpose for which the records were collected.

(4) Disclosure to contractors and other Federal agencies, as necessary, for the purpose of assisting SSA in the efficient administration of its programs.

(5) Nontax return information which is not restricted from disclosure by federal law may be disclosed to the General Services Administration (GSA) and the National Archives and Records Administration (NARA) under 44 U.S.C. 2904 and 2906, as amended by NARA Act of 1984, for the use of those agencies in conducting records management studies.

Policies and practices for storing, retrieving, accessing, retaining and disposing of records in the system:

STORAGE:

Data are stored in electronic and paper form.

RETRIEVABILITY:

Records in this system are indexed and retrieved by SSN (which acts as the individual's PIN).

SAFEGUARDS:

Security measures include computer firewall technology, data encryption and other systems security measures to ensure that the PPW system is protected from inappropriate access. The existing SSA firewall architecture ensures that customers are limited only to electronic transactions the Agency determines and will not be able to access SSA's other systems or data.

Security measures also include the use of access codes to enter the database and storage of the electronic records in secured areas which are accessible only to employees who require the information in performing their official duties. The paper records that result from the data base site are kept in locked cabinets or in otherwise secure areas. Contractor personnel having access to data in the system of records are required to adhere to SSA rules concerning safeguards, access, and use of the data. SSA personnel having access to the data on this system are informed of the criminal penalties of the Privacy Act for unauthorized access to or disclosure of information maintained in this system of records.

RETENTION AND DISPOSAL:

PPW information maintained in this system is retained until notification of the death of the account holder plus seven years. Means of disposal is appropriate to storage medium (*e.g.,* deletion of individual records from the data base when appropriate or shredding of paper records that are produced from the system).

SYSTEM MANAGER AND ADDRESS:

Social Security Administration, Associate Commissioner, Office of Program Benefits, 6401 Security Boulevard, Baltimore, Maryland, 21235.

NOTIFICATION PROCEDURE:

An individual can determine if this system contains a record about him/her by writing to the system manager at the above address and providing his/her name, SSN or other information that may be in the system of records that will identify him/her. An individual requesting notification of records in person should provide the same information, as well as provide an identity document, preferably with a photograph, such as a driver's license or some other means of identification, such as a voter registration card, credit card, etc. If an individual does not have any identification document sufficient to establish his/her identity, the individual must certify in writing that he/she is the person claimed to be and that he/she understands that the knowing and willful request for, or acquisition of, a record pertaining to another individual under false pretenses is a criminal offense.

If notification is requested by telephone, an individual must verify his/her identity by providing identifying information that parallels the record to which notification is being requested. If it is determined that the identifying information provided by telephone is insufficient, the individual will be required to submit a request in writing or in person. If an individual is requesting information by telephone on behalf of another individual, the subject individual must be connected with SSA and the requesting individual in the same phone call. SSA will establish the subject individual's identity (his/her name, SSN, address, date of birth and place of birth along with one other piece of information such as mother's maiden name) and ask for his/her permission in providing access by telephone to the requesting individual.

If a request for notification is submitted by mail, an individual must include a notarized statement to SSA to verify his/her identity or must certify in the request that he/she is the person claimed to be and that he/she understands that the knowing and willful request for, or acquisition of, a record pertaining to another individual under false pretenses is a criminal offense.

These procedures are in accordance with SSA Regulations 20 CFR 401.45.

RECORD ACCESS PROCEDURES:

Same as notification procedures. Requesters should also reasonably specify the record contents being sought. These procedures are in accordance with SSA Regulations 20 CFR 401.50.

CONTESTING RECORD PROCEDURES:

Same as notification procedures. Requesters should also reasonably identify the record, specify the information they are contesting, and state the corrective action sought and the reasons for the correction with supporting justification showing how the record is untimely, incomplete, inaccurate, or irrelevant. These procedures are in accordance with SSA Regulations 20 CFR 401.65.

RECORD SOURCE CATEGORIES:

Data for the system are obtained primarily from the individuals to whom the record pertains.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE PRIVACY ACT:

None.

[FR Doc. 00–30836 Filed 12–4–00; 8:45 am]

BILLING CODE 4191–02–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. WTO/D–213]

WTO Consultations Regarding Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (USTR) is providing notice that on November 13, 2000, the United States received from the European Communities (EC) a request for consultations under the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). The request relates to the countervailing duties imposed by the United States on imports of certain corrosion-resistant carbon steel flat products from Germany (U.S. Department of Commerce (Commerce) case number C–428–817). In particular, the request relates to the final results of a full sunset review in that case carried out by Commerce and published at 65 FR 47407 (August 2, 2000). The EC alleges that Commerce's finding that revocation of the countervailing duty order would be likely to lead to the continuation or recurrence of a countervailable subsidy is inconsistent with U.S. obligations under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), particularly Articles 10, 11.9 and 21 of that agreement. Under Article 4.3 of the WTO Dispute Settlement Understanding (DSU), consultations are to take place within a period of 30 days from the date of receipt of the request, or within a period otherwise mutually agreed between the United States and the EC. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before January 15, 2001, to be assured of timely consideration by USTR.

ADDRESSES: Submit comments to Sandy McKinzy, Monitoring and Enforcement Unit, Office of the General Counsel, Room 122, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC, 20508, Attn: Corrosion-Resistant Steel Dispute. Telephone: (202) 395–3582.

FOR FURTHER INFORMATION CONTACT: William D. Hunter, Associate General Counsel, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC, 20508. Telephone: (202) 395–3582.

SUPPLEMENTARY INFORMATION: Section 127(b) of the Uruguay Round Agreements Act (URAA) (19 U.S.C. 3537(b)(1)) requires that notice and opportunity for comment be provided after the United States receives a request for the establishment of a WTO dispute settlement panel. Consistent with this obligation, but in an effort to provide additional opportunity for comment, USTR is providing notice that consultations have been requested pursuant to the WTO Dispute Settlement Understanding. If such consultations should fail to resolve the matter and a dispute settlement panel is established pursuant to the DSU, such panel, which would hold its meetings in Geneva, Switzerland, would be expected to issue a report on its findings and recommendations within six to nine months after it is established.

Major Issues Raised by the EC

In its consultation request, the EC alleges that the 1 percent *de minimis* standard in Article 11.9 of the SCM Agreement applies to sunset reviews under Article 21.3. Thus, according to the EC, because Commerce found a likely subsidization rate of only 0.54 percent in its sunset review of the countervailing duty order on corrison-resistant steel from Germany, Commerce was required to revoke the countervailing duty order. The EC also alleges that there is no possibility that the rate of subsidization could increase, because under Commerce's ''declining balance'' methodology for allocating non-recurring subsidies over time, the rate of subsidization likely will continue to decline.

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in the dispute. Comments must be in English and provided in fifteen copies. A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the commenter. Confidential business information must be clearly marked ''BUSINESS CONFIDENTIAL'' in a contrasting color ink at the top of each page of each copy.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitter believes that information or advice may qualify as such, the submitter—

(1) Must so designate the information or advice;

(2) Must clearly mark the material as ''SUBMITTED IN CONFIDENCE'' in a contrasting color ink at the top of each page of each copy; and

(3) Is encouraged to provide a non-confidential summary of the information or advice.

Pursuant to section 127(e) of the URAA (19 U.S.C. 3537(e)), USTR will maintain a file on this dispute settlement proceeding, accessible to the public, in the USTR Reading Room: Room 101, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508. The public file will include a listing of any comments received by USTR from the public with respect to the proceeding; the U.S. submissions to the panel in the proceeding, the submissions, or non-confidential summaries of submissions, to the panel received from other participants in the dispute, as well as the report of the dispute settlement panel, and, if applicable, the report of the Appellate Body. An appointment to review the public file (Docket WTO/D–213, Corrosion-Resistant Steel Dispute) may be made by calling Brenda Webb, (202) 395–6186. The USTR Reading Room is open to the public from 9:30 a.m. to 12 noon and 1 p.m. to 4 p.m., Monday through Friday.

A. Jane Bradley,

Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. 00–30886 Filed 12–4–00; 8:45 am]

BILLING CODE 3190–01–M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Transportation Partnership Council (The Council) Meeting

AGENCY: Department of Transportation, Office of the Secretary.

ACTION: Notice of meeting.

SUMMARY: The U.S. Department of Transportation (DOT) announces a meeting of the Transportation Partnership Council (the Council). Notice of this meeting is required under the Federal Advisory Committee Act.

Time and Place: The Council will meet on Wednesday, December 13, 2000, at 10 a.m., at the U.S. Department of Transportation, Nassif Building, room 10214, 400 Seventh Street, SW, Washington, DC 20590. The room is located on the 10th floor.

Type of Meeting: These meetings will be open to the public. Seating will be available on a first-come, first-served basis. Handicapped individuals wishing to attend should contact DOT to obtain appropriate accommodations.

Point of Contact: Jean B. Lenderking, Human Resource Leadership Division, M–13, U.S. Department of Transportation, Nassif Building, 400 Seventh Street, SW., room 7411, Washington, DC 20590, (202) 366–8085.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is provide final report on Phase II of the DOT labor-management climate study, address next steps for integrating labor-management strategic plan with climate assessment results; and review Council accomplishments.

Public Participation

We invite interested persons and organizations to submit comments. Mail or deliver your comments or recommendations to Ms. Jean Lenderking at the address shown above. Comments should be received by December 1, 2000 in order to be considered at the December 13th meeting.

Issued in Washington, DC, on November 20, 2000.

For the Department of Transportation.

Jean Lenderking,

Labor Relations Officer.

[FR Doc. 00–30259 Filed 12–04–00; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice Before Waiver With Respect to Land at Buffalo Niagara International Airport, Buffalo, New York

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent of waiver with respect to land.

SUMMARY: The FAA is publishing notice of the proposed release of approximately 21 acres of land, also referred to as 455 Cayuga Road, at Buffalo Niagara Internatinal Airport for long term lease for non-aeronautical development. There are no impacts to the Airport and the land is not needed for airport development as shown on the Airport Layout Plan. Fair Market Value lease payments will be paid over a 40-year term to the Airport Sponsor, and used for capital development of the airport.

Any comments the agency receives will be considered as a part of the decision.

DATES: Comments must be received on or before January 4, 2001.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Philip Brito, Manager, FAA New York Airports District Office, 600 Old Country Road, Suite 446, Garden City, New York 11530.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Lawrence Meckler, Executive Director, Niagara Frontier Transportation Authority, at the following address: Mr. Lawrence Meckler, Executive Director, Niagara Frontier Transportation Authority, 181 Ellicott Street, Buffalo, New York 14203.

FOR FURTHER INFORMATION CONTACT: Mr. Philip Brito, Manager, New York Airports District Office, 600 Old Country Road, Suite 446, Garden City, New York 11530; telephone (516) 227–3803; FAX (516) 227–3813; E-Mail *Philip.Brito@faa.gov.*

SUPPLEMENTARY INFORMATION: On April 5, 2000, new authorizing legislation became effective. That bill, the Weldell H. Ford Aviation Investment and Reform Act for the 21st Century, Pubic Law 10–181 (Apr. 5, 2000; 114 Stat. 61) (AIR 21) requires that a 30 day pubic notice must be provided before the Secretary may waive any condition imposed on an interest in surplus property.

Issued in Garden City, New York on October 3, 2000.

Philip Brito,

Manager, New York Airports District Office, Eastern Region.

[FR Doc. 00–30923 Filed 12–4–00; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA has determined that the minimum percentage rate for drug testing for the period January 1, 2001, through December 31, 2001, will remain at 25 percent of covered aviation employees for random drug testing and will remain at 10 percent of covered aviation employees for random alcohol testing.

FOR FURTHER INFORMATION CONTACT: Mr. Arnold N. Schwartz, Office of Aviation Medicine, Drug Abatement Division, Program Analysis Branch (AAM–810), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–5970.

SUPPLEMENTARY INFORMATION:

Administrator's Determination of 2001 Random Drug and Alcohol Testing Rates

In final rules published in the **Federal Register** on February 15, and December 2, 1994 (59 FR 7380 and 62218, respectively), the FAA announced that it will set future minimum annual percentage rates for random alcohol and drug testing for aviation industry employers according to the results which the employers experience conducting random alcohol and drug testing during each calendar year. The rules set forth the formula for calculating an annual aviation industry ''violation rate'' for random alcohol testing and an annual aviation industry ''positive rate'' for random drug testing. The ''violation rate'' for random alcohol tests means the number of covered employees found during random tests given under 14 CFR part 121, appendix J to have an alcohol concentration of 0.04 or greater plus the number of employees who refused a random alcohol test, divided by the total reported number of employees given random alcohol tests plus the total reported number of employees who refused a random test. The ''positive rate'' means the number of positive results for random drug tests conducted under 14 CFR part 121, appendix I plus the number of refusals to take random drug tests, divided by the total number of random drug tests plus the number of refusals to take random drug tests. The violation rate and the positive rate are calculated using information required to be submitted to the FAA by specified aviation industry employers as part of an FAA Management Information System (MIS) and form the basis for maintaining or adjusting the minimum annual percentage rates for random alcohol and drug testing as indicated in the following paragraphs.

When the annual percentage rate for random alcohol testing is 25 percent or more, the FAA Administrator may lower the rate to 10 percent if data received under the MIS reporting requirements for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

When the minimum annual percentage rate for random alcohol testing is 50 percent, the FAA Administrator may lower the rate to 25 percent if data received under the MIS reporting requirements for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the MIS reporting requirements for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent but less than 1.0 percent, the FAA Administrator must increase the minimum annual percentage rate for random alcohol testing to 25 percent.

When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the MIS reporting requirements for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the FAA Administrator must increase the minimum annual percentage rate for random alcohol testing to 50 percent.

When the minimum annual percentage rate for random drug testing is 50 percent, the FAA Administrator may lower the rate to 25 percent if data received under the MIS reporting requirements for two consecutive calendar years indicate that the positive rate is less than 1.0 percent.

When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the MIS reporting requirements for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent.

There is a one year lag in the adjustment in the minimum annual percentage rates for random drug and alcohol testing because MIS data for a given calendar year is not reported to the FAA until the following calendar year. For example, MIS data for 1998 is not reported to the FAA until March 15, 1999, and any rate adjustments resulting from the 1998 data are not effective until January 1, 2000, following publication by the FAA of a notice in the **Federal Register**.

The minimum annual percentage rate for random alcohol testing was 10 percent for calendar year 2000. In this notice, the FAA announces that it has determined that the violation rate for calendar year 1999 is less than one percent positive, at approximately 0.42 percent. Since the data received for that calendar year do not indicate that the violation rate is equal to or greater than 0.5 percent but less than 1.0 percent, the minimum annual percentage rate for random alcohol testing for aviation industry employers for calendar year 2001 will remain at 10 percent.

The minimum annual percentage rate for random drug testing was 25 percent in calendar year 2000. Therefore, the FAA is also announcing that it has determined that the positive rate for calendar year 1999 is less than 1 percent, at approximately 0.65 percent, and that the minimum annual percentage rate for random drug testing for aviation industry employers for calendar year 2001 will remain at 25 percent.

Issued in Washington, DC on November 29, 2000.

Jon L. Jordan,

Federal Air Surgeon.

[FR Doc. 00–30922 Filed 11–30–00; 3:24 pm]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2000–65]

Petitions For Exemption; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption Part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from special requirements of 14 CFR, dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before December 26, 2000.

ADDRESSES: Send comments on any petition to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2000–XXXX at the beginning of your comments. If you wish to receive confirmation that FAA received your comments, include a self-addressed, stamped postcard.

You may also submit comments through the Internet to http://dms.dot.gov. You may review the public docket containing the petition, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office (telephone 1–800–647–5527) is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at http://dms.dot.gov.

FOR FURTHER INFORMATION CONTACT: Forest Rawls (202) 267–8033, or Vanessa Wilkins (202) 267–8029, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91 of Part 11.

Issued in Washington, DC, on November 30, 2000.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Petitions for Exemptions

Docket No.: FAA–2000–8218

Petitioner: Bombardier Aerospace, Inc.

Section of 14 CFR Affected: 14 CFR 25.1435(b)(1)

Description of Relief Sought: To permit Bombardier Aerospace, Inc. an exemption from the 14 CFR 25.1435(b)(1) requirements for static testing of a complete hydraulic system to 1.5 times the design operation pressure for the CL–600–2D24 (Regional Jet CRF–900) airplane.

[FR Doc. 00–30924 Filed 12–4–00; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Jackson County, Michigan

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed I–94 Jackson Urban Area Study between M–60 and Sargent Road in Jackson County, Michigan.

FOR FURTHER INFORMATION CONTACT: Mr. James Kirschensteiner, Programs and Environmental Engineer, Federal Highway Administration, 315 W. Allegan Street, Room 207, Lansing, Michigan 48933, Telephone (517) 377–1880 or Mr. Ron Kinney, Manager, Environmental Section, Bureau of Transportation Planning, Michigan Department of Transportation, PO Box 30050, Lansing, Michigan 48909, Telephone (517) 335–2621.

SUPPLEMENTARY INFORMATION: The FHWA in cooperation with Michigan Department of Transportation (MDOT) will prepare an Environmental Impact Statement (EIS) on a proposal to improve I–94 in the Jackson Urban Area. The proposed study location is approximately 9 miles of the I–94 corridor commencing at the M–60/I–94BL interchange, then proceeding easterly to the Sargent Road interchange. Various rehabilitations and maintenance of this section of I–94 have occurred since its initial construction in 1949 to improve the ride quality and operational characteristics of the route, but it still remains suboptimal by modern day freeway standards. Alternatives under consideration include (1) do-nothing, and (2) widen from two lanes in each direction to three lanes in each direction. The proposed work will include interchange reconstruction.

Scoping documents describing the proposed action and soliciting comments will be sent to appropriate Federal, state, local agencies, private organizations, and citizens who have previously expressed or are known to have interest in this proposal. A series of public meetings will be held as well as a formal public hearing. Public notice will be given of the time and place of the meetings and hearing. The draft EIS will be available for public and agency review and comment prior to the public hearing. No formal scoping meeting is planned at this time.

Comments and suggestions are invited from all interested parties to insure that the full range of issues related to this proposed action are addressed and all significant issues are identified. Questions or comments concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning, and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: November 28, 2000.

James J. Steele,

Division Administrator, Lansing, Michigan.

[FR Doc. 00–30920 Filed 12–4–00; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Rankin County, Mississippi

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for the proposed extension of Airport Parkway from Old Brandon Road south to I–20 along Highway 475 in Rankin County, Mississippi.

FOR FURTHER INFORMATION CONTACT: Cecil Vick, Environmental Coordinator, Federal Highway Administration, 666 North Street, Suite 105, Jackson, MS 39202–3199, Telephone: (601) 965–4217. Contacts at the State and local level, respectively are: Mr. Claiborne Barnwell, Environmental/Location Division Engineer, Mississippi Department of Transportation, P.O. Box 1850, Jackson, MS, 39215–1850, telephone: (601) 359–7920; and Mr. William R. May, District Engineer, Mississippi Department of Transportation, 7759 Highway 80 W., Newton, MS, 39345, telephone (601) 683–3341.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Mississippi Department of Transportation (MDOT), will prepare an Environmental Impact Statement (EIS) for the proposed extension of Airport Parkway from Old Brandon Road south to I–20 along Highway 475 in Rankin County, Mississippi.

The project as proposed would be a facility with full access controls. The study area for the proposed project is bounded by Old Brandon Road to the north, Interstate 20 to the south, and extends a sufficient distance beyond these boundaries to allow for alternative concepts. The boundaries will extend to the vicinity of Fox Hall Drive on the west and approximately 300 meters (1,000 feet) east of the existing roundabout at the airport. Alternatives under consideration include (1) taking no action and (2) build alternative.

A scoping process will be initiated that involves all appropriate federal and state agencies. This will continue throughout the study as an ongoing process. A formal scoping meeting will be held for the project. Coordination will be continued with federal, state, and local agencies, and with private organizations and citizens who express or are known to have interest in this proposal. A formal public involvement process will be initiated, and public meetings will be held as appropriate. The draft EIS will be available for public and agency review and comment prior to the official public hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments, and suggestions are invited from all interested parties.

Comments or questions concerning this proposed action and the EIS should be directed to the FHWA or MDOT at the addresses provided above.

Andrew H. Hughes,

Division Administrator, Jackson, Mississippi.

[FR Doc. 00–30839 Filed 12–4–00; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33960]

The Central Illinois Railroad Company—Lease and Operation Exemption—Lines of The Burlington Northern and Santa Fe Railway Company at Chicago, Cook County, IL

The Central Illinois Railroad Company, a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to lease from The Burlington Northern and Santa Fe Railway Company (BNSF) approximately 5.9 miles of main line track and approximately 12.47 miles of sidetrack, collectively referred to as the Lumber District and Illinois Northern lines or portions thereof, in the vicinity of BNSF's Western Avenue Yard in Chicago, Cook County, IL.[1]

The transaction was scheduled to be consummated no earlier than November 23, 2000, the effective date of the exemption (7 days after the exemption was filed).

If the verified notice contains false or misleading information, the exemption is void *ab initio*. Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33960, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Thomas F. McFarland, Jr., Esq., McFarland & Herman, 20 North Wacker Drive, Suite 1330, Chicago, IL 60606–2902.

[1] On November 20, 2000, a petition to stay the effective date of the exemption was filed by Joseph C. Szabo, on behalf of United Transportation Union-Illinois Legislative Board. The petition for stay was denied in *The Central Illinois Railroad Company—Lease and Operation Exemption—Lines of The Burlington Northern and Santa Fe Railway Company at Chicago, Cook County, IL*, STB Finance Docket No. 33960 (STB served Nov. 22, 2000).

Board decisions and notices are available on our website at *http://www.stb.dot.gov*.

Decided: November 27, 2000.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 00–30655 Filed 12–4–00; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–290 (Sub–No. 212X)]

Norfolk Southern Railway Company—Discontinuance Exemption—in Hudson County, NJ[1]

On November 14, 2000, Norfolk Southern Railway Company (NS) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from 49 U.S.C. 10903 to discontinue service over approximately 3.84 miles of the Weehawken Branch[2] and approximately 6.95 miles of the River Line[3] in Hudson County, NJ. The lines traverse U.S. Postal Zip Codes 07302, 07303, 07306, 07407, and 07087.

NS acquired the right to operate over these lines under the North Jersey Shared Assets Areas Operating Agreement approved by the Board in *CSX Corp.—Control and Operating Leases/Agreements—Conrail Inc.*, STB Finance Docket No. 33388 (Decision No. 89) (STB served July 23, 1998), *clarified and modified* (Decision No. 96) (STB served Oct. 19, 1998), *petitions for review pending sub nom. Erie Niagara Rail Steering Committee* v. *STB*, Nos. 98–4285, *et al.* (2d Cir. filed July 31, 1998).[4] Pursuant to that agreement, NS does not conduct freight operations over the River Line. NS publishes rates and maintains stations for the River Line's shippers,[5] and Conrail conducts the actual train operations in NS's name.

The lines do not contain federally granted rights-of-way. A large part of the real estate and track is owned by the New Jersey Transit Corporation (NJT), and the remainder is owned by Conrail.[6] Any documentation in NS's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

By issuing this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by March 3, 2001.[7]

[1] The petition is related to two abandonment applications simultaneously filed by Conrail under section 308 of the Regional Rail Reorganization Act of 1973 (3–R Act), 45 U.S.C. 748, a provision added to the 3–R Act by the Northeast Rail Service Act of 1981 (Pub. L. No. 97–35). *See Conrail—Abandonment of the Weehawken Branch—in Hudson County, NJ*, STB Docket No. AB–167 (Sub-No. 766N); and *Conrail—Abandonment of the River Line—in Hudson County, NJ*, STB Docket No. AB–167 (Sub-No. 1067N). Conrail has requested that the applications be considered together because the Weehawken Branch and the River Line are operated as a single line due to changes made to track alignment and operations. Where appropriate, the two lines will be referenced as the River Line.

Notices of Insufficient Revenues were timely filed on October 31, 1983, and October 31, 1985, respectively. The Board must grant the applications within 90 days after their filing date (*i.e.*, by February 12, 2001) unless offers of financial assistance (OFA) are filed within the 90-day period. *See* sections 308(c) and (d).

[2] The 3.84-mile segment extends from the point of switch in Jersey City (approximately MP 0.00), to the southerly R.O.W. line of Baldwin Avenue, in Weehawken (approximately MP 2.84), and includes the former DL&W Railroad Lead to the Hoboken Freight Yard in Jersey City.

[3] The 6.95-mile segment is divided into two parts: (1) from the connection to the Passaic and Harismus Branch at CP ''Waldo'' in Jersey City (approximately MP 0.00) to the south side of Clifton Road in Weehawken (approximately MP 4.7), including the River Yard; and (2) from (a) the south side of Clifton Road in Weehawken (approximately MP 0.00) to the northwest side of Tonnelle Avenue (excluding the portion of line, associated track, and underlying right-of-way necessary to retain access and continue service to Durkee Foods) in North Bergen (approximately MP 1.53); (b) the National Docks Secondary in Jersey City from its connection with the River Line at CP ''Nave'' to the east side of Newark Avenue (approximately 1,350 feet); and (c) the Weehawken Branch (Chicken Yard) in Weehawken, from its connection with the River Line on the east side of Willow Avenue to the end of the track (approximately 2,450 feet).

[4] CSX Transportation, Inc., also acquired the same rights with respect to the River Line and filed a similar petition for exemption on November 20, 2000. *See CSX Transportation, Inc.—Discontinuance Exemption—in Hudson County, NJ*, STB Docket No. AB–55 (Sub-No. 584X).

[5] Two shippers, Cognis Chemical Company and Dykes Lumber Company, are being served.

[6] The River Line's real estate and track was transferred to NJT on or about October 24, 1995, pursuant to the Freight Relocation and River Line Acquisition Agreement that Conrail and NJT entered into on June 8, 1989. Conrail retained a free and exclusive easement for the operation and maintenance of rail freight service.

NJT will reconstruct the River Line and dedicate it to light rail commuter passenger service. The River Line's freight operations will be transferred to Conrail's Northern Branch, which will be reconstructed to accommodate through train service and to remove ''at-grade'' highway and street crossings. Conrail will not terminate freight operations or consummate the abandonment of the River Line, and NS will not exercise the discontinuance authority, until the Northern Branch has been reconstructed.

[7] NS has requested that its petition for exemption be granted with an effective date of February 12, 2001, to coincide with the anticipated effectiveness of the two related Conrail abandonment applications. This request will be considered by the Board when the petition for exemption is addressed.

Any OFA with respect to the lines should be filed in the pertinent Conrail application proceeding under section 308(d) of the 3–R Act and 49 CFR 1152.27. Each OFA must be accompanied by a $1,000 filing fee. *See* 49 CFR 1002.2(f)(25).

All filings in response to this notice must refer to STB Docket No. AB–290 (Sub-No. 212X) and must be sent to: (1) Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423–0001; and (2) James R. Paschall, Norfolk Southern Railway Company, Three Commercial Place, Norfolk, VA 23510. Replies to the NS petition are due on or before December 26, 2000.

Persons seeking further information concerning abandonment and discontinuance procedures may contact the Board's Office of Public Services at (202) 565–1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152.

An environmental assessment (or impact statement) is normally made available in abandonment or discontinuance proceedings, but under 49 CFR 1105.6(d), the Board may modify the environmental requirements in appropriate circumstances. The requirements are being modified here. NS has never conducted operations over the line apart from those Conrail conducted on NS's behalf. Granting a carrier authority to discontinue service it has never provided appears to have no environmental impact. The requirement that the carrier submit a report and that the Board prepare an analysis are therefore superfluous.

Board decisions and notices are available on our website at ''www.stb.dot.gov.''

Decided: November 28, 2000.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 00–30941 Filed 12–4–00; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF TRANSPORTATION

Bureau of Transportation Statistics

Grant Program for Research and Development in the Field of Transportation Statistics

AGENCY: Bureau of Transportation Statistics, DOT.

ACTION: Notice; correction.

SUMMARY: On November 20, 2000, the Bureau of Transportation Statistics (BTS) published a **Federal Register** notice soliciting applications for its Transportation Statistics Research Grants program. The due date for applications listed in that notice was incorrect and this document provides the correct date.

DATES: For BTS to consider your application, we must receive it by January 19, 2001, at 5 p.m. Eastern Standard Time. Applications received after January 19, 2001, will be held for the next cycle, which is anticipated to be every six to twelve months, unless you request in writing that your application be returned.

ADDRESSES: You must send six copies of the application package to the BTS Grants Program, Room 3430, Bureau of Transportation Statistics, US Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Promod Chandhok, Office of Statistical Programs and Services, Bureau of Transportation Statistics, Room 3430, 400 Seventh Street, SW., Washington, DC 20590; phone (202) 366–2158; fax: (202) 366–3640; e-mail: promod.chandhok@bts.gov.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 20, 2000, 65 FR 69803, the Bureau published a notice announcing its Transportation Statistics Research Grants program and describing who is eligible to apply, the application process, and how grants will be awarded. However, the notice was published with an incorrect application due date listed in the DATES section. The correct due date is January 19, 2001.

David Banks,

Assistant Director.

[FR Doc. 00–30869 Filed 12–4–00; 8:45 am]

BILLING CODE 4910–FE–P

DEPARTMENT OF THE TREASURY

Departmental Offices; International Monetary Fund Advisory Committee

AGENCY: Department of the Treasury.

ACTION: Notice of meeting.

SUMMARY: Under section 610 of the Foreign Operations, Export Financing and Related Programs Appropriations Act, 1999, the Secretary of the Treasury is required to establish an International Monetary Fund Advisory Committee (the ''Committee'') to advise the Secretary of the IMF policy.

DATES: The fifth meeting of the Committee will be held on December 18, 2000, beginning at 2 p.m. in the Diplomatic Room located on the third floor of the main Department of the Treasury building, 1500 Pennsylvania Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Designated Federal Official: William McFadden, Senior Policy Advisor, Office of International Monetary and Financial Policy, (Room 4305, NY Ave. Bldg.), Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, D.C., 20220. Telephone number 202–622–0343, fax number (202) 622–7664.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2.

Agenda of Meeting

The IMF Advisory Committee will continue discussions regarding the reforms of the IMF called for by Congress in various pieces of legislation. The reforms may be broadly categorized in the areas of trade and market liberalization, social policy, core labor standards, the environment, good governance, and transparency.

Procedural

This meeting is open to the public. Please note that the meeting may close early if all business is finished. If you wish to attend please FAX your full name, date of birth and social security number to the Designated Federal Official no later than 4 p.m., December 14th, for clearance into the Treasury building. Members of the public who have provided such information, must enter the main Treasury building at the entrance on 15th Street between F and G Streets, and must provide a photo ID at the entrance to be admitted into the building.

Members of the public may submit written comments. If you wish to furnish such comments, please provide 16 copies of your written material to the Designated Federal Official. If you wish to have your comments distributed to members of the Committee in advance of the fourth meeting, 16 copies of any written material should be provided to the Designated Federal Official no later than December 12, 2000.

Dated: November 28, 2000.

William McFadden,

Designated Federal Official.

[FR Doc. 00–30845 Filed 12–4–00; 8:45 am]

BILLING CODE 4810–25–M

Corrections

Federal Register

Vol. 65, No. 234

Tuesday, December 5, 2000

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 33

[Docket No. RM98-4-000; Order No. 642]

Revised Filing Requirements Under Part 33 of the Commission's Regulations

Correction

In rule document 00–29676 beginning on page 70984 in the issue of Tuesday, November 28, 2000, make the following corrections:

§33.3 [Corrected]

1. On page 71016, in the third column, §33.3(c)*(5)* is corrected; ''*(5)*'' should read ''(5)''.

2. On the same page, in the same column, §33.3 (c)*(6)* is corrected; '' *(6)* '' should read ''(6)''.

[FR Doc. C0–29676 Filed 12–4–00; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 179

[Docket No. 99F-1912]

Irradiation in the Production, Processing, and Handling of Food

Correction

In rule document 00–30453 beginning on page 71056 in the issue of Wednesday, November 29, 2000, make the following correction:

On page 71056, in the third column ''**ER29NO00.001**'' should read

$$RE = \frac{Dup}{\mu}$$

[FR Doc. C0–30453 Filed 12–4–00; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF INTERIOR

Bureau of Land Management

[OR-957-00-1420-BJ: G01-0033]

Filing of Plats of Survey: Oregon/ Washington

Correction

In notice document 00–29480 beginning on page 69572 in the issue of Friday, November 17, 2000, make the following corrections:

1. On page 69573, in the first column, under ''*Washington* '', ''T. 27 S., R. 34 E., accepted February 4, 1999 '' should read ''T. 27 N., R. 34 E., accepted February 4, 1999 ''.

2. On the same page, in the same column, in the same location ''T. 22 S., R. 11 W., accepted October 5, 1999 '' should read ''T. 22 N., R. 11 W., accepted October 5, 1999 ''.

3. On the same page, in the same column, in the same location ''T. 33 S., R. 17 E., accepted October 20, 2000 '' should read ''T. 33 N., R. 17 E., accepted October 20, 2000 ''.

[FR Doc. C0–29480 Filed 12–4–00; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Reveiw; comment request

Correction

In notice document 00–29620 appearing on page 69793 in the issue of Monday, November 20, 2000, make the following correction:

In the second column, nine paragraphs from the bottom of the page, ''OMB Number: 1200-0153 '' should read ''OMB Number: 1220-0153 ''.

[FR Doc. C0–29620 Filed 12–4–00; 8:45 am]

BILLING CODE 1505–01–D

SECURITIES and EXCHANGE COMMISSION

[Release No. 34–43583; File No. SR–NASD–00–62]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc., Relating to the Removal of Duplicative Provisions

Correction

In notice document 00–30136 beginning on page 70751 in the issue of Monday, November 27, 2000, make the following correction:

On page 70756, in the second column, in the first complete paragraph, ''December 18, 2001 '', should read ''December 18, 2000 ''.

[FR Doc. C0–30136 Filed 12–4–00; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF THE TREASURY

31 CFR Part 1

Departmental Offices; Privacy Act of 1974; Implementation

Correction

In rule document 00–29673 beginning on page 69865 in the issue of Tuesday, November 21, 2000, make the following correction:

§1.36 [Corrected]

On page 69875, in the first column, in the table under ''(v) Bureau of Engraving and Printing:'', ''BEP .004'' should read ''BEP .044''.

[FR Doc. C0–29673 Filed 12–4–00; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Tuesday,

December 5, 2000

Part II

Securities and Exchange Commission

17 CFR Parts 210 and 240

Revision of the Commission's Auditor Independence Requirements; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210 and 240

[Release Nos. 33–7919; 34–43602; 35–27279; IC–24744; IA–1911; FR–56; File No. S7–13–00]

RIN 3235–AH91

Revision of the Commission's Auditor Independence Requirements

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''SEC'' or ''Commission'') is adopting rule amendments regarding auditor independence. The amendments modernize the Commission's rules for determining whether an auditor is independent in light of investments by auditors or their family members in audit clients, employment relationships between auditors or their family members and audit clients, and the scope of services provided by audit firms to their audit clients. The amendments, among other things, significantly reduce the number of audit firm employees and their family members whose investments in audit clients are attributed to the auditor for purposes of determining the auditor's independence. The amendments shrink the circle of family and former firm personnel whose employment impairs an auditor's independence. They also identify certain non-audit services that, if provided by an auditor to public company audit clients, impair the auditor's independence. The scope of services provisions do not extend to services provided to non-audit clients. The final rules provide accounting firms with a limited exception from being deemed not independent for certain inadvertent independence impairments if they have quality controls and satisfy other conditions. Finally, the amendments require most public companies to disclose in their annual proxy statements certain information related to, among other things, the non-audit services provided by their auditor during the most recent fiscal year.

DATES: *Effective date:* February 5, 2001.

Compliance dates: Transition Dates: Until August 5, 2002, providing to an audit client the non-audit services set forth in § 210.2–01(c)(4)(iii) (appraisal or valuation services or fairness opinions) and § 210.2–01(c)(4)(v) (internal audit services) will not impair an accountant's independence with respect to the audit client if performing those services did not impair the accountant's independence under pre-existing requirements of the SEC, the Independence Standards Board, or the accounting profession in the United States. Until May 7, 2001, having the financial interests set forth in § 210.2–01(c)(1)(ii) or the employment relationships set forth in § 210.2–01(c)(2) will not impair an accountant's independence with respect to the audit client if having those financial interests or employment relationships did not impair the accountant's independence under pre-existing requirements of the SEC, the Independence Standards Board, or the accounting profession in the United States. Until December 31, 2002, § 210.2–01(d)(4) shall not apply to offices of the accounting firm located outside of the United States. Registrants must comply with the new proxy and information statement disclosure requirements for all proxy and information statements filed with the Commission after the effective date.

FOR FURTHER INFORMATION CONTACT: John M. Morrissey, Deputy Chief Accountant, or Sam Burke, Assistant Chief Accountant, Office of the Chief Accountant, at (202) 942–4400, or with respect to questions about investment companies, John S. Capone, Chief Accountant, Division of Investment Management, at (202) 942–0590, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Commission today is adopting amendments to Rule 2–01 of Regulation S–X [1] and Item 9 of Schedule 14A [2] under the Securities Exchange Act of 1934 (the ''Exchange Act'').[3]

I. Executive Summary

We are adopting amendments to our current rules regarding auditor independence.[4] The final rules advance our important policy goal of protecting the millions of people who invest their savings in our securities markets in reliance on financial statements that are prepared by public companies and other issuers and that, as required by Congress, are audited by independent auditors.[5] We believe the final rules strike a reasonable balance among commenters' differing views about the proposals while achieving our important public policy goals.[6]

Independent auditors have an important public trust.[7] Investors must be able to rely on issuers' financial statements.[8] It is the auditor's opinion that furnishes investors with critical assurance that the financial statements have been subjected to a rigorous examination by an objective, impartial, and skilled professional, and that investors, therefore, can rely on them. If investors do not believe that an auditor is independent of a company, they will derive little confidence from the auditor's opinion and will be far less likely to invest in that public company's securities.[9]

One of our missions is to protect the reliability and integrity of the financial statements of public companies. To do so, and to promote investor confidence, we must ensure that our auditor independence requirements remain relevant, effective, and fair in light of significant changes in the profession, structural reorganizations of accounting firms, and demographic changes in

[1] 17 CFR 210.2–01.

[2] 17 CFR 240.14a–101.

[3] 15 U.S.C. § 78a *et seq.*

[4] The amendments were proposed in Securities Act Release No. 7870 (June 30, 2000) (the ''Proposing Release'') [65 FR 43148].

[5] This release uses the terms ''independent auditor,'' ''auditor,'' ''independent public accountant,'' ''accountant,'' and ''independent accountant'' interchangeably to refer to any independent certified or independent public accountant who performs an audit of or reviews a public company's financial statements or whose report or opinion is filed with the Commission in accordance with the federal securities laws or the Commission's regulations.

[6] In addition to soliciting comments in the Proposing Release, we held four days of public hearings (July 26, Sept. 13, Sept. 20, and Sept. 21). The public comments we received can be reviewed in our Public Reference Room at 450 Fifth Street, N.W., Washington, D.C., 20549, in File No. S7–13–00. Public comments submitted by electronic mail are on our website, www.sec.gov. The written testimony and transcripts from each of our public hearings (July 26, Sept. 13, Sept. 20, and Sept. 21) are available on our website. For purposes of this release, date references following the names of participants at our public hearings indicate the hearing date for which the participant submitted written testimony and/or appeared as a witness.

[7] The profession's principles of professional conduct state, ''Members should accept the obligation to act in a way that will serve the public interest, honor the public trust, and demonstrate commitment to professionalism.'' American Institute of Certified Public Accountants (''AICPA'') Professional Standards: Code of Professional Conduct (''AICPA Code of Professional Conduct''), ET § 53.

[8] Public companies and other public issuers and entities registered with us must have their annual financial statements audited by independent public accountants. *See, e.g.,* Items 25 and 26 of Schedule A to the Securities Act of 1933 (the ''1933 Act''), 15 U.S.C. § 77aa(25) and (26), that expressly require that financial statements be audited by independent public or certified accountants. *See also infra* note 34.

[9] *See, e.g.,* Testimony of John Whitehead, retired Chairman, Goldman Sachs & Co. (Sept. 13, 2000) (''Financial statements are at the very heart of our capital markets. They're the basis for analyzing investments. Investors have every right to be able to depend absolutely on the integrity of the financial statements that are available to them, and if that integrity in any way falls under suspicion, then the capital markets will surely suffer if investors feel they cannot rely absolutely on the integrity of those financial statements.'').

society.[10] There have been important developments in each of these areas since we last amended our auditor independence requirements in 1983.[11]

More and more individual investors participate in our markets, either directly or through mutual funds, pension plans, and retirement plans. Nearly half of all American households are invested in the stock market.[12] As technology has advanced, investors increasingly have direct access to financial information, and they act decisively upon relatively small changes in an issuer's financial results. These and other market changes highlight the importance to the market and to investor confidence of financial information that has been audited by an auditor whose only master is the investing public.[13]

As discussed in the Proposing Release and below, the accounting industry has been transformed by significant changes in the structure of the largest firms. Accounting firms have woven an increasingly complex web of business and financial relationships with their audit clients. The nature of the non-audit services that accounting firms provide to their audit clients has changed, and the revenues from these services have dramatically increased. In addition, there is more mobility of employees and an increase in dual-career families.

We proposed changes to our auditor independence requirements in response to these developments. As more fully discussed below, we are adopting rules, modified in response to almost 3,000 comment letters we received on our proposal, written and oral testimony from four days of public hearings (about 35 hours of testimony from almost 100 witnesses), academic studies, surveys and other professional literature.

The Independence Standard. Independence generally is understood to refer to a mental state of objectivity and lack of bias.[14] The amendments retain this understanding of independence and provide a standard for ascertaining whether the auditor has the requisite state of mind. The first prong of the standard is direct evidence of the auditor's mental state: independence ''in fact.'' The second prong recognizes that generally mental states can be assessed only through observation of external facts; it thus provides that an auditor is not independent if a reasonable investor, with knowledge of all relevant facts and circumstances, would conclude that the auditor is not capable of exercising objective and impartial judgment. The proposed amendments to Rule 2–01 included in the rule four principles for determining whether an accountant is independent of its audit client. While some commenters supported our inclusion of the four principles in the rule,[15] others expressed concerns about the generality of these principles and raised questions concerning their application to particular circumstances.[16] In response, we have included the four principles instead in a Preliminary Note to Rule 2–01 as factors that the Commission will consider, in the first instance, when making independence determinations in accordance with the general independence standard in Rule 2–01(b).

The amendments identify certain relationships that render an accountant not independent of an audit client under the standard in Rule 2–01(b). The relationships addressed include, among others, financial, employment, and business relationships between auditors and audit clients, and relationships between auditors and audit clients where the auditors provide certain non-audit services to their audit clients.

Financial and Employment Relationships. Current requirements attribute to an auditor ownership of shares held by every partner in the auditor's firm, certain managerial employees, and their families. We believe that independence will be protected and the rules will be more workable by focusing on those persons who can influence the audit, instead of all partners in an accounting firm. Accordingly, we proposed to narrow significantly the application of these rules. Commenters generally supported our efforts to modernize the current rules because they restrict investment and employment opportunities available to firm personnel and their families in ways that may no longer be relevant or necessary for safeguarding auditor independence and investor confidence.[17] Not all commenters agreed with all aspects of the proposals.[18] We have modified the proposal in some respects, but the final rule, like the proposal, shrinks significantly the circle of firm personnel whose investments are imputed to the auditor. The rule also shrinks the circle of family members of auditors and former firm personnel whose employment with an audit client impairs the auditor's independence.

[10] As stated by Baxter Rice, President of the California Board of Accountancy, ''[I]n this ever-revolving economy and business environment, it's important that we go back and take a look at these regulations and see whether they are really applicable, and whether or not what we do is going to in any way interfere with or is going to enhance auditor independence, including the public perception of auditor independence.'' Testimony of Baxter Rice (Sept. 13, 2000).

[11] Financial Reporting Release (''FRR'') No. 10 (Feb. 25, 1983).

[12] In 1999, an estimated 48.2%, or 49.2 million, U.S. households owned equities either in mutual funds or individually, up from 19% in 1983. Investment Company Institute and Securities Industry Association, ''Bull Market, Other Developments Fuel Growth in Equity Ownership'' (available at www.sia.com/html/pr834.html.).

[13] *See, e.g.,* Testimony of Senator Howard Metzenbaum (Ret.), Chairman, Consumer Federation of America (Sept. 20, 2000) (''Our nation's current prosperity and future financial security are tied up as never before in our financial markets. For that reason, whether they know it or not, Americans are enormously dependent on independent auditors, both to * * * ensure the reliability of the information they use to make individual investment decisions and to ensure the efficiency of the marketplace in assigning value to stocks.''); Testimony of Ralph Whitworth, Managing Member, Relational Investors LLC (Sept. 13, 2000) (''[A]uditor independence goes to the very essence of our capital markets, and it's linked inextricably to the efficiencies of our capitalist system.'').

[14] See discussion in Proposing Release, Section II.B.

[15] *See, e.g.,* Written Testimony of Dennis Paul Spackman, Chairman, National Association of State Boards of Accountancy (Sept. 13, 2000) (The four principles ''set a sensible baseline that is simply stated, easy to understand, useable, and square on the mark. They also serve as an exceptional foundation to the other elements of the proposed revision. * * * [T]hey can serve as a bright beacon giving much needed guidance to members of the profession * * *''); Written Testimony of Robert L. Ryan, Chief Financial Officer, Medtronic, Inc. (Sept. 20, 2000); Written Testimony of John C. Bogle, Member, Independence Standards Board (July 26, 2000).

[16] *See, e.g.,* Letter of Arthur Andersen LLP (Sept. 25, 2000) (''Arthur Andersen Letter''); Written Testimony of the New York Society of Certified Public Accountants (Sept. 13, 2000).

[17] *See, e.g.,* Letter of Ernst & Young LLP (Sept. 25, 2000) (''Ernst & Young Letter''); Written Testimony of James J. Schiro, Chief Executive Officer PricewaterhouseCoopers (Sept. 20, 2000); Written Testimony of the New York State Society of Certified Public Accountants (Sept. 13, 2000); Written Testimony of James E. Copeland, Chief Executive Officer, Deloitte & Touche LLP (Sept. 20, 2000); Arthur Andersen Letter.

[18] Some commenters, for example, believed that the amendments went too far. *See, e.g.,* Written Testimony of J. Michael Cook, former Chairman and Chief Executive Officer, Deloitte & Touche (July 26, 2000) (supporting proposed rule changes in this area but stating that no partner in an accounting firm should have a financial interest in any of the firm's audit clients); Written Testimony of Ray J. Groves, former Chairman and CEO, Ernst & Young (July 26, 2000) (agreeing with proposals but stating preference to retain current proscription of direct investment in an audit client by all partners, principals, and shareholders of an accounting firm); Testimony of Paul B.W. Miller, Professor, University of Colorado at Colorado Springs (July 26, 2000) (''I want to direct my attention * * * to the ownership [provisions], and my language is plain. It simply says don't do it''); Written Testimony of Ronald Nielsen and Kathleen Chapman, Iowa Accountancy Examining Board (Sept. 20, 2000). While supporting the goals of the modernization, others provided suggestions to address their concerns about possible unintended consequences. *See, e.g.,* Ernst & Young Letter; Letter of PricewaterhouseCoopers LLP (Sept. 25, 2000) (''PricewaterhouseCoopers Letter'').

Non-Audit Services. As we discuss below,[19] there has been growing concern on the part of the Commission and users of financial statements about the effects on independence when auditors provide both audit and non-audit services to their audit clients. Dramatic changes in the accounting profession and the types of services that auditors are providing to their audit clients, as well as increases in the absolute and relative size of the fees charged for non-audit services, have exacerbated these concerns. As the Panel on Audit Effectiveness (the ''O'Malley Panel'') recently recognized, ''The potential effect of non-audit services on auditor objectivity has long been an area of concern. That concern has been compounded in recent years by significant increases in the amounts of non-audit services provided by audit firms.'' [20]

We considered a full range of alternatives to address these concerns. Our proposed amendments identified certain non-audit services that, when rendered to an audit client, impair auditor independence. The proposed restrictions on non-audit services generated more comments than any other aspect of the proposals. Some commenters agreed with our proposals.[21] Others believed that the proposals were not restrictive enough and recommended a total ban on all non-audit services provided by auditors to their audit clients.[22] Still other commenters opposed any Commission rule on non-audit services.[23] After careful consideration of the arguments on all sides, and for the reasons discussed below, we have determined not to adopt a total ban on non-audit services, despite the recommendations of some, and instead to identify certain non-audit services that, if provided to an audit client, render the auditor not independent of the audit client.

In response to public comments,[24] in several instances we have conformed the restrictions to the formulations set forth in the professional literature or otherwise modified the final rule to better describe, and in some cases narrow, the types of services restricted. For example, the final rule does not ban all valuation and appraisal services; its restrictions apply only where it is reasonably likely that the results of any valuation or appraisal, individually or in the aggregate, would be material to the financial statements, or where the results will be audited by the accountant. The rule also provides several exceptions from the restrictions, such as when the valuation is performed in the context of certain tax services, or the valuation is for non-financial purposes and the results of the valuation do not affect the financial statements. These changes are consistent with our approach to adopt only those regulations that we believe are necessary to preserve investor confidence in the independence of auditors and the financial statements they audit.

We recognize that not all non-audit services pose the same risk to independence. Accordingly, under the final rule, accountants will continue to be able to provide a wide variety of non-audit services to their audit clients. In addition, they of course will be able to provide any non-audit service to non-audit clients.

Quality Controls. The quality controls of accounting firms play a significant role in helping to detect and prevent auditor independence problems. The final rule recognizes this role by providing accounting firms a limited exception from being deemed not independent for certain independence impairments that are cured promptly after discovery, provided that the firm has certain quality controls in place.

Disclosure of Non-Audit Services. Finally, we continue to believe that disclosures that shed light on the independence of public companies' auditors assist investors in making investment and voting decisions. Accordingly, we proposed and are adopting requirements for disclosures that we believe will be useful to investors.[25] In response to commenters' concerns about the breadth of the proposed disclosure requirements,[26]

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[19] *See infra* Section III.C; *see also* Proposing Release, Section II.C.

[20] *The Panel on Audit Effectiveness: Report and Recommendations* (the ''O'Malley Panel Report''), at ¶ 5.6 (Aug. 31, 2000). The Chairman of the Public Oversight Board (''POB'') similarly warned about the ''uncontrolled expansion'' of management advisory services to audit clients. Letter from John J. McCloy, Chairman, POB (former Chairman of the Board of Chase Manhattan Bank and former President of The World Bank), to Walter E. Hanson, Chairman, Executive Committee, SEC Practice Section (''SECPS'') (Mar. 9, 1979).

[21] *See, e.g.,* Testimony of Robert E. Denham, Member, Independence Standards Board (''ISB'') (July 26, 2000) (''I think [the proposals] represent a very thoughtful, rational, coherent set of proposals.''); Letter of Michael McDaniel (Aug. 14, 2000) (supporting SEC proposal and disagreeing with a Form Letter from the AICPA to its members (''AICPA Form Letter'') urging them to write to the SEC to oppose the scope of services proposal); Letter of Randie Burrell, CPA (Aug. 14, 2000) (same); Letter of Leland D. O'Neal, CPA (Aug. 15, 2000) (same); Letter of David A. Storhaug, CPA (Aug. 21, 2000) (same); Letter of Arthur Gross (Sept. 10, 2000); Letter of Kristian Holvoet (Sept. 8, 2000); Letter of Bettina B. Menzel (Sept. 9, 2000); Letter of Robert Hanseman (Sept. 10, 2000); Written Testimony of Thomas S. Goodkind, CPA (Sept. 13, 2000); Testimony of Senator Howard Metzenbaum (Ret.), Chairman, Consumer Federation of America (Sept. 20, 2000); Written Testimony of Bill Patterson, Director, Office of Investments, AFL–CIO (Sept. 20, 2000); Written Testimony of Frank Torres, Consumers Union (Sept. 20, 2000); Testimony of Nimish Patel, Attorney, Pollet & Richardson (July 26, 2000). *See also* Senator George J. Mitchell (Ret.), ''How to Keep Investor Confidence,'' Editorial, Boston Globe, pg. A15 (Oct. 28, 2000) (''The commission's proposal is well-reasoned and appropriate. * * * [T]he commission should adopt this rule to protect investor confidence and strengthen the most vibrant financial market system in the world.'').

[22] *See, e.g.,* Written Testimony of Kayla J. Gillan, General Counsel, California Public Employees' Retirement System (''CalPERS''), which is the largest public retirement system in the United States with over 1.2 million participants (Sept. 13, 2000) (''The SEC should consider simplifying its Proposal and drawing a bright-line test: no non-audit services to an audit client.''); Written Testimony of John H. Biggs, Chairman and CEO of TIAA–CREF, which has 2.2 million participants (July 26, 2000) (''[I]ndependent public audit firms should not be the auditors of any company for which they simultaneously provide other services. It's that simple,''); Written Testimony of Alan P. Cleveland, the New Hampshire Retirement System, with 52,000 members (Sept. 13, 2000) (''We regard the concurrent performance by the company's external auditor of non-auditor services at the direction and under the control of management to be inherently corrosive and fundamentally incompatible with that duty of independence and fidelity owed by the auditor to the investing public''); Testimony of Jack Ciesielski, accounting analyst (July 26, 2000) (''I think the single best way to improve auditor independence and the appearance of auditor independence is to call for an exclusionary ban on non-audit services to audit clients.''); Letter of Carson L. Eddy, CPA, (Aug. 22, 2000) (''It is my opinion that the general public would be better served if Certified Public Accountants providing the attest function for a client were unable to do any other consulting work for that client, with the exception for the ability to prepare tax returns.''); Letter of William V. Allen, Jr., CPA (Aug. 22, 2000); Letter of Terry Guckes (Sept. 9, 2000); Letter of Art Koolwine (Sept. 8, 2000); Letter of Elliot M. Simon (Sept. 9, 2000); Letter of Melvin Schupack (Sept. 9, 2000); Letter of William Odendahl (Sept. 5, 2000).

[23] *See, e.g.,* Letter of the AICPA (Sept. 25, 2000) (''AICPA Letter''); Letter of KPMG (Sept. 25, 2000) (''KPMG Letter''); Letters of Robert Roy Ward, Chairman and Chief Executive Officer, Horne CPA Group (Sept. 20, 2000), Douglas R. Ream, CPA (undated), Jack W. Palmer (Sept. 9, 2000), Sherry Wilson, CPA (Aug. 28, 2000), and Nathaniel Boyle, CPA (Aug. 16, 2000) (each reiterating concerns expressed in the AICPA's Form Letter).

[24] *See, e.g.,* Ernst & Young Letter; PricewaterhouseCoopers Letter.

[25] Commenters generally agreed that disclosure would be useful to investors. *See, e.g.,* Written Testimony of James W. Barge, Vice President and Controller, Time Warner (Sept. 20, 2000); Letter of The Institute of Internal Auditors (Sept. 5, 2000); Written Testimony of Dennis Paul Spackman, Chairman of the National Association of State Boards of Accountancy (Sept. 13, 2000); Letter of Marsha Payne, President, Association of College & University Auditors (Sept. 25, 2000); Letter of Keith Johnson, Chief Legal Counsel, State of Wisconsin Board (Sept. 20, 2000); Letter of Peter C. Clapman, Senior Vice President and Chief Counsel, Investments, TIAA–CREF (Sept. 21, 2000).

[26] *See, e.g.,* Written Testimony of Clarence E. Lockett, Vice President and Corporate Controller, Johnson & Johnson (Sept. 20, 2000); Written Testimony of Philip A. Laskawy, Chairman, Ernst & Young LLP (Sept. 20, 2000).

however, we have modified them in the final rule.

II. Background

Our Proposing Release generated significant comment and broad debate. We received nearly 3,000 comment letters. In addition to soliciting comments in the Proposing Release, we held four days of public hearings, including one day in New York City, so that we could engage in a public dialogue with interested parties. At the hearings, we heard from almost 100 witnesses, representing investors, investment professionals, large and small public companies, the Big Five accounting firms, smaller accounting firms, the AICPA, banking regulators, consumer advocates, state accounting board officials, members of the Independence Standards Board (''ISB''), academics, and others.[27] In addition, the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs held a hearing about our proposal.[28]

We received thoughtful and constructive input from a broad spectrum of interested parties. That input helped us to understand better the sincere and strongly-held views on all sides and to shape final rule amendments that incorporate these views to the extent consistent with our public policy goals. As discussed specifically below, the final rule amendments, particularly those related to non-audit services, have been modified from the proposals.

Nevertheless, some commenters expressed concern that we have ''rushed to regulate,'' [29] and they asked that we take more time before addressing auditor independence issues generally, and especially the issues regarding the provision of non-audit services to audit clients. As many commenters noted, however, the issues presented by this rulemaking are not new, [30] and recent and accelerating changes in the accounting profession and in society have made resolution of these issues more pressing. For many years the profession has been discussing modernization of the financial and employment relationship rules, and the scope of services issue has been on the horizon even longer.[31] Many previous Commissions have studied these issues.[32] Against this backdrop, in light of the comments that our proposals generated, and informed by our experience and expertise in these matters, we believe that it is appropriate to act now.[33]

III. There Is a Need for Commission Rulemaking

A. The Independence Requirement Serves Important Public Policy Goals

The federal securities laws require, or permit us to require, that financial information filed with us be certified or audited by ''independent'' public accountants.[34] To a significant extent, this makes independent auditors the ''gatekeepers'' to the public securities markets.[35] This statutory framework gives auditors both a valuable economic franchise and an important public trust. Within this statutory framework, the

[27] *See* written testimony and transcripts from each of our hearings.

[28] *A Proposal by the Securities and Exchange Commission to Modernize Its Rules That Govern the Independence of Accountants that Audit Public Companies, Before the Subcomm. On Securities of the Senate Comm. On Banking, Housing, and Urban Affairs,* 95th Cong. 2d Sess. (Sept. 28, 2000).

[29] *See, e.g.,* Letter of KPMG; Written Testimony of Robert K. Elliott, Chairman, AICPA (Sept. 13, 2000) (''There is no reason * * * for a rush to judgment on these critical issues. We have the time to get it right, and the public is entitled to nothing less.''); Written Testimony of Barry Melancon, President and Chief Executive Officer, AICPA (Sept. 13, 2000); Letters of Richard W. Hammel, CPA (Sept. 25, 2000), Roland H. Flyge II, CPA (Sept. 23, 2000), and Daniel P. Naragon, CPA (Sept. 25, 2000) (each reiterating concerns expressed in the AICPA Form Letter).

[30] *See* Written Testimony of Bevis Longstreth, former SEC Commissioner and member of the Panel on Audit Effectiveness (Sept. 13, 2000) (''The SEC acting upon the need for greater independence, a need long recognized by virtually every group assigned the task of considering the issue (and there have been many), has proposed a rule to meet this need.''); Testimony of Senator Howard Metzenbaum (Ret.), Chairman, Consumer Federation of America (Sept. 20, 2000); Written Testimony of Douglas Scrivner, General Counsel, Andersen Consulting (Sept. 20, 2000) (''This issue is not new. The issue has been debated within the profession and by others for over 20 years. The only thing that has changed, in my opinion, is that the risks to the system have increased.''); Written Testimony of Dennis Paul Spackman, Chairman of the National Association of State Boards of Accountancy (Sept. 13, 2000) (''[A]ction is needed. Indeed, I believe it is long over due. While further study may enhance the finer points of the issues, it would do nothing to resolve the larger concerns. They have been deliberated far too long.''); Testimony of Larry Gelfond, CPA, CVA, CFE, former President of the Colorado State Board of Accountancy (Sept. 13, 2000) (''I firmly believe the SEC is taking a correct position in this long debated area of concern to the profession.'').

[31] Congress itself considered the issue of scope of services in the 1970s. *See Report on Improving the Accountability of Publicly Owned Corporations and Their Auditors, Subcomm. on Reports, Accounting and Management of the Senate Comm. on Governmental Affairs,* 95th Cong., 1st Sess. (Comm. Print Nov. 1977).

[32] In the late 1980s, for example, several of the large public accounting firms filed a petition with us seeking to enter into joint ventures, limited partnership agreements, and other similar arrangements with audit clients. *See* Letter from Jonathan G. Katz, Secretary, SEC, to Duane R. Kullberg, Arthur Andersen & Co. (Feb. 14, 1989) (denying the petition).

[33] *See Richard C. Breeden, Roderick M. Hills, David S. Ruder and Harold M. Williams* (former Chairmen of the SEC), Editorial, ''Accounting for Conflicts,'' *Wash. Post,* at A31 (July 21, 2000) (''This initiative is timely and necessary. * * * [T]he time has come to chart a surer path to preserving the all-important principle of auditor independence from commercial client relationships.''); James J. Schiro, Chief Executive Officer, PricewaterhouseCoopers LLP, ''Auditor Independence: It's Time to Change the Rules,'' Wall St. J. (Oct. 10, 2000) (''*New rules are needed now.* Working together, we can devise rules that will protect the public interest today and for decades to come. The need for change is upon us. Further delay will only prolong confusion at a time when greater clarity is needed.'') (emphasis in original); Written Testimony of Senator Howard Metzenbaum (Ret.), Chairman, Consumer Federation of America (Sept. 20, 2000) (''[A] more compelling question is, why wait? * * * Speaking for consumers across the country, we urge the Commission to move forward expeditiously with this important rule proposal.''); Testimony of Professor John C. Coffee, Columbia University (July 26, 2000) (''Right now you have the appropriate moment because the vast majority of firms aren't purchasing dual services. If you wait ten years, that will change, and [it's] much harder to change an existing reality rather than an approaching change. So I think this is the time for action. * * *''); Testimony of J. Michael Cook, former Chairman and Chief Executive Officer, Deloitte & Touche (July 26, 2000) (''[T]he Commission's consideration of this issue at this time is both warranted and necessary. The status quo is not an acceptable answer.''); Written Testimony of Professor Curtis C. Verschoor, DePaul University (July 26, 2000) (stating that the question is ''[n]ot why so fast, but what took so long?''); Letter of John S. Coppel, CPA, CFO, Electric Power Equipment Company (Aug. 16, 2000) (''I view this rule as a long overdue, greatly needed response to the practices now taking place within the profession.'').

[34] For example, Items 25 and 26 of Schedule A to the Securities Act, 15 U.S.C. 77aa(25) and (26), and Section 17(e) of the Exchange Act, 15 U.S.C. 78q, expressly require that financial statements be audited by independent public or certified accountants. Sections 12(b)(1)(J) and (K) and 13(a)(2) of the Exchange Act, 15 U.S.C. 78l and 78m, Sections 5(b)(H) and (I), 10(a)(1)(G), and 14 of the Public Utility Holding Company Act of 1935 (''PUHCA''), 15 U.S.C. 79e(b), 79j, and 79n, Sections 8(b)(5) and 30(e) and (g) of the Investment Company Act of 1940 (''ICA''), 15 U.S.C. 80a–8 and 80a–29, and Section 203(c)(1)(D) of the Investment Advisers Act of 1940 (''Advisers Act''), 15 U.S.C. 80b–3(c)(1), authorize the Commission to require the filing of financial statements that have been audited by independent accountants. Under this authority, the Commission has required that certain financial statements be audited by independent accountants. *See, e.g.,* Article 3 of Regulation S–X, 17 CFR 210.3–01, *et seq.* In addition, public companies must have their quarterly reports reviewed by independent accountants. Article 10 of Regulation S–X, 17 CFR 210.10–01(d) and Item 310(b) of Regulation S–B, 17 CFR 228.310(b). The federal securities laws also grant the Commission the authority to define the term ''independent.'' Section 19(a) of the Securities Act, 15 U.S.C. 77s(a), Section 3(b) of the Exchange Act, 15 U.S.C. 78c(b), Section 20(a) of PUHCA, 15 U.S.C. 79t(a), and Section 38(a) of the ICA, 15 U.S.C. § 80a–37(a), grant the Commission the authority to define accounting, technical, and trade terms used in each Act. Section 17 of the Exchange Act, 15 U.S.C. 78q, and Section 31 of the Investment Company Act, 15 U.S.C. 80a–30, grant the Commission authority to prescribe accounting principles to be used in the preparation of financial statements required.

[35] Steven M. H. Wallman, ''The Future of Accounting and Disclosure in an Evolving World: The Need for Dramatic Change,'' *Accounting Horizons,* at 81 (Sept. 1995).

independence requirement is vital to our securities markets.

The independence requirement serves two related, but distinct, public policy goals. One goal is to foster high quality audits by minimizing the possibility that any external factors will influence an auditor's judgments. The auditor must approach each audit with professional skepticism and must have the capacity and the willingness to decide issues in an unbiased and objective manner, even when the auditor's decisions may be against the interests of management of the audit client or against the interests of the auditor's own accounting firm.

The other related goal is to promote investor confidence in the financial statements of public companies. Investor confidence in the integrity of publicly available financial information is the cornerstone of our securities markets. Capital formation depends on the willingness of investors to invest in the securities of public companies. Investors are more likely to invest, and pricing is more likely to be efficient, the greater the assurance that the financial information disclosed by issuers is reliable.[36] The federal securities laws contemplate that that assurance will flow from knowledge that the financial information has been subjected to rigorous examination by competent and objective auditors.

The two goals—objective audits and investor confidence that the audits are objective—overlap substantially but are not identical. Because objectivity rarely can be observed directly, investor confidence in auditor independence rests in large measure on investor perception.[37] For this reason, the professional literature, such as the AICPA's Statement on Auditing Standards (SAS) No. 1, has long emphasized that auditors ''should not only be independent in fact; they should also avoid situations that may lead outsiders to doubt their independence.'' [38] The Supreme Court has emphasized the importance of the connection between investor confidence and the appearance of independence:

> The SEC requires the filing of audited financial statements in order to obviate the fear of loss from reliance on inaccurate information, thereby encouraging public investment in the Nation's industries. It is therefore not enough that financial statements be accurate; the public must also perceive them as being accurate. Public faith in the reliability of a corporation's financial statements depends upon the public perception of the outside auditor as an independent professional. . . . If investors were to view the auditor as an advocate for the corporate client, the value of the audit function itself might well be lost.[39]

The Commission's independence requirements have always included consideration of investor perceptions.[40] Many foreign countries have similar requirements. A comparative analysis of the independence requirements of eleven countries concluded, ''With the possible exception of Switzerland, most of the countries stress both the appearance and the fact of independence.'' [41] In Canada, Rules of Professional Conduct require that the auditor be free of influence that would impair its judgment ''or which, in the view of a reasonable observer, would impair * * * professional judgment or objectivity.'' [42] David A. Brown, Chair of the Ontario Securities Commission, testified that the importance of the perception of auditor independence ''cannot be overstated.'' [43]

International organizations and standard setters also stress the appearance of independence. In its comment letter, the Federation of European Accountants stated, ''In dealing with independence, one must address both: Independence of mind * * * and Independence in appearance, [i].e. the avoidance of facts and circumstances, which are so significant that an informed third party would question the statutory auditor's objectivity.'' [44] Although the European Union has not defined independence for auditors, a Green Paper from 1996 provides, ''In dealing with independence, it is necessary to address both independence in mind * * * and independence in appearance, i.e. the avoidance of facts and circumstances which are so significant that an informed third party would question the statutory auditor's objectivity.'' [45]

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[36] *See generally* Codification of Financial Reporting Policies (the ''Codification'') § 601.01 (''An investor's willingness to commit his capital to an impersonal market is dependent on the availability of accurate, material and timely information regarding the corporations in which he has invested or proposes to invest.''). Use of the term ''Codification'' means the Codification that existed prior to the Commission's adoption of the rule amendments in this release. For a list of changes to the Codification resulting from the rule amendments, see *infra* Section IX.

[37] *See, e.g.,* Testimony of Laurence H. Meyer, Governor, Board of Governors of the Federal Reserve System (Sept. 13, 2000) (''High quality accounting standards * * * can potentially be nullified if there is a perception that auditors lack independence and objectivity in their enforcement role * * * I think if the perception didn't have any basis in reality, it would not necessarily last very long, so there has to be some interconnection between them, but the perception is an important one.''); Testimony of David A. Brown, QC, Chair, Ontario Securities Commission (Sept. 13, 2000) (''The reality of independence is difficult, if not impossible. Perceptions of independence, therefore, become almost equal to reality in importance.''); Testimony of Kayla Gillan, General Counsel, CalPERS (Sept. 13, 2000) (''It's not only the reality of biased auditing, but also the perception that a biased practice is possible that erodes investor confidence.'').

[38] AICPA SAS No. 1, AU § 220.03. As explained in SAS No. 1, ''Public confidence would be impaired by evidence that independence was actually lacking, and it might also be impaired by the existence of circumstances which reasonable people might believe likely to influence independence.'' *See also* Testimony of Robert K. Elliott, Chairman, AICPA (Sept. 13, 2000) (''[The AICPA] believe[s] that appearances are very important and capital markets require confidence in financial statements and audit reports, and the member firms of the AICPA are basing their business of auditing on their reputations, and that is heavily affected by appearance. There is no question about that. We are not disputing that appearance is important.''); Public Oversight Board (''POB''), *Scope of Services by CPA Firms*, at 27 (Mar. 1979) (''1979 POB Report'') (citing A. Arens and J. Loebbecke, *Auditing: An Integrated Approach* (Prentice-Hall 1976)) (''[The appearance of independence is] a key ingredient to the value of the audit function, since users of audit reports must be able to rely on the independent auditor. If they perceive that there is a lack of independence, whether or not such a deficiency exists, much of that value is lost.''); Earnscliffe Research and Communications (''Earnscliffe''), *Report to the United States Independence Board: Research into Perceptions of Auditor Independence and Objectivity—Phase II*, at 11 (July 2000) (''Earnscliffe II'') (''Perhaps the most overwhelming consensus was the belief that the perception of auditor independence is as critical to the integrity of the financial system, as is the reality.'').

[39] *United States v. Arthur Young and Co.*, 465 U.S. 805, 819 n.15 (1984) (emphasis in original). *See also* Article IV of the AICPA's Standards of Professional Conduct, which provides, ''Objectivity is a state of mind. * * * Independence precludes relationships that *may appear to impair a member's objectivity.* * * *'' AICPA Code of Professional Conduct, ET § 55.01 (emphasis added). Elsewhere, the AICPA's SAS No. 1 states that auditors should ''avoid situations that *may lead outsiders to doubt their independence.*'' SAS No. 1, AU § 220.03 (emphasis added).

[40] *See* Codification § 601.01.

[41] Belverd E. Needles, Jr. (ed.) *Comparative International Accounting Standards* 26 (1985) (comparing France, Netherlands, Switzerland, U.K., Germany, Jordan, Kuwait, Canada, Mexico, U.S., and Japan).

[42] Institute of Chartered Accountants of Ontario, Rules of Professional Conduct Rule 204.1 (Objectivity: audit engagements); *see also* Institute of Chartered Accountants of British Columbia, Rules of Professional Conduct. Rule 204.1, Objectivity—Assurance and Specified Auditing Procedure Engagements.

[43] Testimony of David A. Brown, QC, Chair, Ontario Securities Commission (Sept. 13, 2000). Principles in Hong Kong regarding the conduct of accountants provide that ''a member must at all times perform his work objectively and impartially and free from influence by any consideration which might appear to be in conflict with this requirement.'' Hong Kong Society of Accountants, Fundamental Principles ¶ 10 (revised April 1999). In addition, a Statement of Professional Ethics in that country provides that an auditor ''should be, and be seen to be, free in each professional assignment he undertakes of any interest which might detract from objectivity.'' Hong Kong Society of Accountants, Statement 1.203, Professional Ethics (Integrity, Objectivity and Independence) ¶ 2 (revised June 2000).

[44] Letter of Helene Bon, President, Federation of European Accountants (Sept. 25, 2000).

[45] In 1998, the European Parliament approved a resolution broadly supporting the Green Paper.

The concept of ''appearance'' as used in the final rule is not unbounded. ''Appearance'' as used in our operative legal standards is not a reference to what anyone might think under any circumstances. Rather, as explained below,[46] it is an objective test, keyed to the conclusions of reasonable investors with knowledge of all relevant facts and circumstances.

B. Recent Developments Have Brought the Independence Issues to the Forefront

The accounting industry is in the midst of dramatic transformation. Firms have merged, resulting in increased size, both domestically and internationally. They have expanded into international networks, affiliating and marketing under a common name. Increasingly, accounting firms are becoming multi-disciplinary service organizations and are entering into new types of business relationships with their audit clients. Accounting professionals have become more mobile, and geographic location of firm personnel has become less important due to advances in telecommunications. In addition, there are more dual-career families, and audit clients are increasingly hiring firm partners, professional staff, and their spouses for high level management positions.

In conjunction with these changes, accounting firms have expanded significantly the menu of services offered to their audit clients, and the list continues to grow.[47] Companies are turning to their auditors to perform their internal audit, pension, financial, administrative, sales, data processing, and marketing functions, among many others.[48]

As we noted in the Proposing Release, U.S. revenues for management advisory and similar services[49] for the five largest public accounting firms (the ''Big Five'') amounted to more than $15 billion in 1999.[50] Moreover, revenues for these service lines are now estimated to constitute half of the total revenues for these firms.[51] In contrast, these service lines provided only thirteen percent of total revenues in 1981.[52] From 1993 to 1999, the average annual growth rate for revenues from management advisory and similar services has been twenty-six percent; comparable growth rates have been nine percent for audit and thirteen percent for tax services.[53]

For the largest firms, the growth in management advisory and similar services involves both audit clients and non-audit clients. For the largest public accounting firms, MAS fees from SEC audit clients have increased significantly over the past two decades. In 1984, only one percent of SEC audit clients of the eight largest public accounting firms paid MAS fees that exceeded the audit fee.[54] For the Big Five firms, the percentage of SEC audit clients that paid MAS fees in excess of audit fees did not exceed 1.5% until 1997.[55] In 1999, 4.6% of Big Five SEC audit clients paid MAS fees in excess of audit fees,[56] an increase of over 200% in two years. For the Big Five firms, average MAS fees received from SEC audit clients amounted to ten percent of all revenues in 1999.[57] Almost three-fourths of Big Five SEC audit clients purchased no MAS from their auditors in 1999. This means that purchases of MAS services by one-fourth of firms' SEC audit clients account for ten percent of all firm revenues.[58]

Some smaller firms are consolidating their audit practices and seeking public investors in the resulting company.[59] Other firms are entering into agreements to sell all of their assets, except their audit practices, to established financial services companies. As part of these agreements, the financial services companies hire the employees, and in some cases the partners, of the accounting firm, and then lease back the majority or all of the assets and audit personnel to the ''shell'' audit firm. These lease arrangements allow the financial services firm to pay the professional staff for ''nonprofessional'' services for the corporate organization as well as professional attest services rendered for the audit firm.[60]

Recently, Ernst & Young sold its management-consulting business to Cap Gemini Group SA, a large and publicly traded computer services company headquartered in France.[61] KPMG has sold an equity interest in KPMG Consulting to Cisco Corporation[62] and is in the process of registering additional shares in its consulting business to sell to the public in an initial public offering.[63] In addition, PricewaterhouseCoopers has publicly announced an intention to sell portions of its consulting businesses. Also, Grant Thornton recently sold its e-business consulting practice.[64]

Simultaneous with this metamorphosis of the accounting profession, public companies have come under increasing pressure to meet earnings expectations. Observers suggest that this pressure has intensified in recent years, especially for companies operating in certain sectors of the economy.[65] The extent of the pressure

Green Paper, *The Role, The Position and the Liability of the Statutory Auditor Within the European Union* § 4.8 (July 24, 1996), available at http://europa.eu.int. Communication from the Commission, *The Statutory Audit in the European Union: The Way Forward* (May 7, 1998), C143 8.05.1988–EN, available at http://europa.eu.int.

[46] *See infra* Section IV.C.

[47] Some firms are seeking to provide expanded services through joint ventures with audit clients or their affiliates. As noted above, as early as 1988, large public accounting firms were looking to enter into joint ventures, limited partnership agreements, and other similar arrangements with audit clients. *See* Letter from Jonathan G. Katz to Duane R. Kullberg, Arthur Andersen & Co. (Feb. 14, 1989).

[48] *See* Proposing Release, App. A, for a list of services that auditors provide to their audit and non-audit clients. The list was prepared by the ISB. *See also* Beverly Gordon, ''KPMG spies rapid growth in 'shared services,' '' *Accounting Today*, at 12 (June 3, 1996); ''KPMG Restructures to Reposition Outsourcing,'' *Public Accounting Report*, at 1 (May 15, 1996); websites of Deloitte & Touche (http://www.deloitte.com) and KPMG (http://www.us.kpmg.com).

[49] Management advisory services (''MAS'') are a subset of non-audit services.

[50] *See* Proposing Release, Table 1 in Appendix B. The underlying data are derived from data in ''Special Supplement: Annual Survey of National Accounting Firms—2000,'' *Public Accounting Report* (Mar. 31, 2000), annual reports filed with the AICPA Division for CPA Firms by public accounting firms, and from reports prepared by the AICPA Division for CPA firms.

[51] *See* Proposing Release, Tables 1 and 2 in Appendix B.

[52] *See* Proposing Release, Table 2 in Appendix B.

[53] *See* Proposing Release, Table 1 in Appendix B.

[54] *See* Proposing Release, Table 3 in Appendix B.

[55] *Id.*

[56] *Id.*

[57] *See* Proposing Release, Table 4 in Appendix B.

[58] *See* Proposing Release, Table 3 in Appendix B. Taken together, the data from Tables 1, 3, and 4 indicate that in 1999 more than 12,700 clients of the five largest public accounting firms paid approximately $9.150 billion for accounting and auditing services.

[59] *See, e.g.,* Rick Telberg, ''Anybody can do it! says small-firm consolidator,'' *Accounting Today,* at 5 (Jan. 4–24, 1999).

[60] ''Done Deal: HRB acquires M&P for $240 million cash, pension obligation,'' *Public Accounting Report,* at 1 (July 15, 1999); ''Amex and Checkers Close The Deal,'' *Public Accounting Report,* at 1 (Mar. 31, 1997).

[61] ''Cap Gemini and Ernst & Young Have Agreed to Terms for the Acquisition of Ernst & Young Consulting'' (Feb. 29, 2000) (press release of Ernst & Young).

[62] As clarified by the amended S–1 filed by KPMG Consulting, Inc., in connection with the initial public offering, Cisco may sell up to about half of its stake in that entity. *See* KPMG Consulting, Inc., Form S–1, Amend. No. 3 (Sept. 25, 2000).

[63] *Id.*

[64] Albert B. Crenshaw, ''Audit Firm Sells Consulting Unit,'' Wash. Post, Oct. 26, 2000, at E2; *see also* news release at www.grantthornton.com/esannounce/index.html.

[65] *See* Earnscliffe, *Report to the United States Independence Board: Research into Perceptions of Auditor Independence and Objectivity* (''Earnscliffe I'') at 16 (Nov. 1999) (finding increased pressure and threat of earnings management in the technology sector); *see also* Testimony of Jay W. Eisenhofer, Partner, Grant & Eisenhofer (Sept. 13, 2000) (''[I]n the current environment where

Continued

becomes apparent each time a company loses a significant percentage of its market capitalization after failing to meet analysts' expectations.[66] These intense pressures on companies lead to enhanced pressure on auditors to enable their clients to meet expectations.[67]

As discussed below, the changes in the accounting profession, combined with increasing pressures on companies, raise questions about auditor independence and investor confidence in the financial statements of public companies that those auditors audit. To respond to some of these questions, we proposed, and are now adopting, new rules relating to the financial and employment relationships independent auditors may have with their audit clients, business and financial relationships between accounting firms and audit clients, and the non-audit services that auditors can provide to audit clients without impairing their independence.

C. Independence Concerns Warrant Restrictions on the Scope of Services Provided to Audit Clients

The rules that we adopt today include provisions restricting the scope of services that an auditor may provide to an audit client without impairing the auditor's independence with respect to that client. The proposed restrictions on non-audit services generated most of the public comment on our proposals, both in written comment letters and in testimony provided during our public hearings. Commenters expressed a range of views from full support to staunch opposition.[68]

After careful consideration of the arguments on various sides, we have determined that it is in the public interest for us to adopt certain restrictions on the provision of non-audit services to audit clients. We act on the basis of our evaluation of the potential impact of non-audit relationships on audit objectivity and also on the basis of indications that investor confidence is in fact affected by reasonable concerns about non-audit services compromising audit objectivity.

1. The Expansion of Non-Audit Service Relationships with Audit Clients Has Long Been Viewed as a Potential Threat to Auditor Independence

It has long been recognized that an unchecked expansion of non-audit relationships between auditors and their audit clients could affect both an auditor's objectivity and investor confidence in financial statements.[69] In the 1970s, Congress seriously considered limiting the types of non-audit services that independent auditors could provide. Even though non-audit services did not constitute a large percentage of audit firms' revenues at that time, and Congress ultimately determined not to take legislative action, the deliberations highlighted significant concerns bearing on the independence issue.[70]

These concerns gradually became the subject of increasing debate and study. In 1979, the then-Chairman of the POB expressed concern about the expansion of non-audit services to audit clients:

> The [POB] believes that there is a possibility of damage to the profession and the users of the profession's services in an uncontrolled expansion of MAS [management advisory services] to audit clients. Investors and others need a public accounting profession that performs its primary function of auditing financial statements with both the fact and the appearance of competence and independence. Developments which detract from this will surely damage the professional status of CPA firms and lead to suspicions and doubts that will be detrimental to the continued reliance of the public upon the profession without further and more drastic governmental intrusion.[71]

A 1994 Report of the AICPA Special Committee on Financial Reporting noted that users of financial statements believed that non-audit service relationships could ''erode auditor independence'' and that those users were ''concerned that auditors may accept audit engagements at marginal profits to obtain more profitable consulting engagements.''[72] A separate 1994 report of the Advisory Panel on Auditor Independence noted the increased basis for investor concerns, describing the trend toward non-audit services as ''worrisome'' because ''[g]rowing reliance on nonaudit services has the potential to compromise the objectivity or independence of the auditor.''[73]

In 1994, the SEC staff also studied the issues and issued a Staff Report.[74] While concluding that no action was warranted at the time, the staff recognized the need ''to be alert'' to independence problems that may be

company stock prices are increasingly dependent on showing growth and on meeting or exceeding the expectations of Wall Street investment analysts [, e]ven one missed profit number can have a significant negative effect on stock price. This places great pressure on company executives to insure that each quarter the profits are in the expected range, regardless of whether the quarter has been as good as the analyst expected. In order to meet these expectations, we often find that corporations will sometimes make questionable assumptions.'').

[66] Ann Grimes, ''Former McKesson Officials are Charged,'' *Wall St. J.*, at B6 (Sept. 29, 2000); Sarah Schafer and David S. Hilzenrath, ''Orbital to Settle Shareholder Suit,'' *Wash. Post,* at E1 (July 18, 2000); Paul Sweeney, ''Accounting Fraud: Learning from the Wrongs,'' *Fin. Exec.* (Sept./Oct. 2000); Mike McNamee, ''Accounting Wars,'' *Bus. Wk.,* 157, 160 (Sept. 25, 2000); Bernard Condon, ''Pick a Number, Any Number, Forbes (Mar. 23, 1998).

[67] *See* O'Malley Panel Report, *supra* note 20, ¶ 1.10 (''The growth in equity values over the past decade has introduced extreme pressures on management to achieve earnings, revenue or other targets. These pressures are exacerbated by the unforgiving nature of the equity markets as securities valuations are drastically adjusted downward whenever companies fail to meet 'street' expectations.* * * These pressures on management, in turn, translate into pressures on how auditors conduct audits and in their relationship with audit clients.'').

[68] *See supra* notes 21–23.

[69] *See* Proposing Release, Section II.C.2; O'Malley Panel Report, *supra* note 20, at App. D (chronicling the debate since 1957); The Commission on Auditors' Responsibilities, *Report, Conclusions and Recommendations* 95–96 (1978). *See also infra* notes 92, 98 (citing recent studies).

[70] *Report on Improving the Accountability of Publicly Owned Corporations and Their Auditors, Subcomm. On Reports, Accounting and Management of the Senate Comm. on Governmental Affairs,* 95th Cong., 1st Sess. (Comm. Print Nov. 1977). In the Report, the Subcommittee stated that it ''agrees with the Cohen Commission and many others that the accounting profession must improve its procedures for assuring independence in view of the public's needs and expectations. Several activities of independent auditors have raised questions. Among them are public advocacy on behalf of a client, receiving gifts and discounts from clients, and maintaining relationships that detract from the appearance of arm's-length dealings with clients. Such activities are not appropriate.'' *Id.* at 16. The Subcommittee also stated that ''[t]he best policy . . . is to require that independent auditors of publicly owned corporations perform only services directly related to accounting. Non-accounting management services . . . should be discontinued.'' *Id.* at 16–17. In a letter to Harold Williams, Chairman, SEC, Senator Thomas F. Eagleton, Chairman, Subcomm. on Governmental Efficiency and the District of Columbia, of the Senate Comm. on Governmental Affairs, recommended that ''[t]here must be a requirement that independent auditors of publicly owned corporations perform only services directly related to accounting.'' Letter from Senator Thomas F. Eagleton to Harold Williams (Apr. 6, 1978) (attached list of recommendations) (reprinted in *Securities and Exchange Commission Report to Congress on the Accounting Profession and the Commission's Oversight Role* (July 1978)).

[71] Letter from John J. McCloy, Chairman, POB (former Chairman of the Board of Chase Manhattan Bank and former President of The World Bank), to Walter E. Hanson, Chairman, Executive Committee, SECPS (Mar. 9, 1979).

[72] Special Committee on Financial Reporting, AICPA, *Improving Business Reporting—A Customer Focus: Meeting the Information Needs of Investors and Creditors,* at 104 (1994).

[73] Advisory Panel on Auditor Independence, *Strengthening the Professionalism of the Independent Auditor: Report to the Public Oversight Board of the SEC Practice Section, AICPA,* at 9 (Sept. 13, 1994).

[74] Office of the Chief Accountant, SEC, *Staff Report on Auditor Independence* (Mar. 1994) (*''Staff Report''*). Between 1979 and 1981, public companies were required to disclose in their proxy statements certain information about non-audit services provided by their auditors. *See infra* Section IV.G. (discussing these disclosure requirements).

caused by auditors' provision of non-audit services.[75] A 1996 General Accounting Office (GAO) study predicted that the ''concern over auditor independence may become larger as accounting firms move to provide new services that go beyond traditional services.'' [76]

2. The Growth of Certain Non-Audit Services Jeopardizes Independence

A common theme running through the reports described above is concern that future expansion of non-audit services may make regulatory action necessary. We believe that the circumstances about which the Commission was warned are coming to pass. An auditor's interest in establishing or preserving a non-audit services relationship raises two types of independence concerns. First, the more the auditor has at stake in its dealings with the audit client, the greater the cost to the auditor should he or she displease the client, particularly when the non-audit services relationship has the potential to generate significant revenues on top of the audit relationship. Second, certain types of non-audit services, when provided by the auditor, create inherent conflicts that are incompatible with objectivity.

a. *Non-Audit Services Create Economic Incentives that May Inappropriately Influence the Audit.* As explained above and in the Proposing Release, the rapid rise in the growth of non-audit services has increased the economic incentives for the auditor to preserve a relationship with the audit client, thereby increasing the risk that the auditor will be less inclined to be objective.[77] Some commenters supported this analysis,[78] while others took issue with it.[79] The principal criticisms were: (i) the economic stake in the relationship with the audit client in fact had not materially increased and any such increase is offset by countervailing incentives on the auditor not to compromise his or her independence; and (ii) there is no proof that changing the mix of incentives has affected auditor behavior. We have considered each of these criticisms and address them below.

(i) *The Mix of Economic Incentives Has Changed.* Commenters generally agreed that there has been enormous growth in non-audit services and in their importance to the firms that provide them. Several commenters took issue with whether this growth enhanced any potential conflict of interest. These commenters argued, in essence, that there has always been the potential for a conflict of interest, since the auditor is paid by the client.[80] They argue that because Congress adopted this arrangement in enacting the federal securities laws, by choosing the statutory independence requirement rather than creating a corps of government-paid auditors, Congress implicitly condoned these types of conflicts of interest.

The argument proves too much; it assumes that because Congress permitted one form of potential conflict of interest, it intended to permit all forms. Taken to its logical conclusion, this argument, of course, would read the independence requirement out of the statute. If Congress believed that all conflicts were equal in kind or degree, it would not have required that auditors be independent. Congress apparently chose to tolerate a degree of potential conflict of interest rather than supplant the private auditing profession. Simply because Congress chose to tolerate an unavoidable degree of conflict inherent in the relationship between a private auditor and a paying client, it hardly follows that all conflicts of interest beyond the unavoidable minimum were approved by Congress or that the statutes express indifference to conflicts of interest.

A related argument is that, despite the rapid growth of services, the economic stakes have not really changed for the auditor. The argument is that, despite the growth of non-audit services generally, these services are rarely as significant to the auditor, from an economic standpoint, as maintaining the audit relationship.[81] Put another way, while non-audit services (excluding tax) account for as much as fifty percent of audit firm revenue, only ten percent of revenues come from providing these services to audit clients. But, as noted above, the trend of available data suggests a rapid increase in the provision of non-audit services to audit clients—in 1999, 4.6% of Big Five SEC audit clients paid MAS fees in excess of audit fees, an increase of over 200% in two years.

The increasing importance of non-audit services to accounting firms is further evidenced by suggestions that the audit has become merely a ''commodity'' and that the greater profit opportunities for auditors come from using audits as a platform from which to sell more lucrative non-audit services.[82] An AICPA practice aid entitled ''Make Audits Pay: Leveraging the Audit Into Consulting Services'' provides a step-by-step guide for auditors to become ''business advisers'' to their audit clients. The book quotes an AICPA officer as follows: ''We see the greater viability of the CPA going forward as being a strategic business adviser, an information professional being viewed by the public as the person for solid big-picture business advice—applied to a broader information world instead of a financial information world.'' [83] At the same time, the book acknowledges that ''[t]he business adviser is a client advocate. The entire business adviser audit process is based on understanding the client's business from the owner's perspective and acting in the owner's best interest,'' [84] which, of course, is contrary to the duty of the auditor to the public.

At our public hearings and in comment letters, we also heard a great deal about the ''loss leader'' phenomenon. When an auditor uses the audit as a loss leader, the auditor, in essence, ''low-balls'' the audit fee—even offering to perform it at a loss—in order to gain entry into and build a relationship with a potential client for

[75] *See Staff Report, supra* note 74, at 84; Proposing Release, notes 40–42.

[76] GAO, *THE ACCOUNTING PROFESSION—Major Issues: Progress and Concerns,* at 8 (GAO/AIMD–96–98, Sept. 1996).

[77] *See supra* Section III.B.; Proposing Release, Section II.C.2(b).

[78] *See, e.g.,* Testimony of Kayla Gillan, General Counsel, CalPERS (Sept. 13, 2000) (''The concept that an auditor who has a greater financial incentive to please management than to criticize it will tend to find ways to avoid negative comment is intuitive and obvious.''); Letter of B. Raymond Dunham (''I understand that actual hard evidence may not be apparent on the surface. However, it becomes obvious that auditing judgment may be clouded when large sums of potential revenues are dependent upon an auditing decision from any firm that derives great revenues from consulting services to the same organizations it is responsible for auditing.* * * The separation of consulting and auditing is intuitive if a firm is to maintain independence in its auditing procedures.''); Letter of David T. DeMonte, CPA (''The conflict of interest potential is so patently obvious.'').

[79] *See, e.g.,* Testimony of Thomas C. DeFazio, Executive Vice President and Chief Financial Officer, VirtualCom, Inc. (Sept. 13, 2000) (''[T]he provision of non-audit services does not pressure the audit firms to look the other way.''); Testimony of Thomas M. Rowland, Senior Vice President, Fund Business Management Group, Capital Research & Management Co. (Sept. 20, 2000) (''[A]t no time during my career did I feel pressure from other partners in the firm * * * not to do the right thing.'').

[80] *See, e.g.,* Testimony of Robert K. Elliott, Chairman, AICPA (Sept. 21, 2000).

[81] *See, e.g.,* Letter of Financial Accounting Standards Committee, American Accounting Association (Oct. 12, 2000),

[82] *See* O'Malley Panel Report, *supra* note 20, ¶ 4.4 at 99 (''Focus group participants often indicated that not only clients, but also engagement partners and firm leaders, treat the audit negatively—as a commodity.'').

[83] AICPA Practice Aid Series, *Make Audits Pay: Leveraging the Audit Into Consulting Services,* at 3 (1999).

[84] *Id.* at 24.

the firm's non-audit services.[85] Low-balling creates a variety of independence issues.[86] Use of audits as loss leaders to be made up for with more lucrative consulting contracts further suggests the growth in importance of non-audit services as compared to audits.[87]

Changes in legal standards have also affected incentives. Professor John C. Coffee, Jr. testified that the legal constraints on accountants have loosened considerably in recent years, and as a result, there has been a significant decrease in the threat of liability. It has become much more difficult, and less worthwhile, for private plaintiffs to assert civil claims against auditors even in cases where the plaintiffs believe that an audit failure flowed from a lack of auditor independence.[88] He specifically described the following four significant developments in the law since 1994 that he believes have reduced the likelihood of success in private lawsuits against auditors: (i) the passage of the Private Securities Litigation Reform Act of 1995, which affected pleading standards and substituted proportionate liability for joint and several liability, which makes it less attractive to sue accountants ''because even if you're successful you're only going to get a portion of the total liability assessed against them, and that may not justify the cost''; (ii) passage of the Securities Litigation Uniform Standards Act of 1998, which preempted certain state or common law claims in securities fraud actions against auditors in both state and federal court;[89] (iii) the Supreme Court's decision in Central Bank of Denver in 1994,[90] eliminating liability in private litigation for aiding and abetting a securities fraud violation, ''which was the principal tool used to sue accountants by the plaintiff's bar''; and (iv) the elimination of the threat of treble damage liability as a result of amendment to the Racketeer Influenced and Corrupt Organization Act.[91]

Professor Coffee summarized the effect of these developments by noting that while lawsuits involving accounting irregularities have actually increased since 1995, ''those suits today rarely involve * * * the outside accountant, as a defendant, and when they do they're often very easily and quickly dismissed,'' which would preclude relevant evidence from coming to light. In view of these developments in the law, he noted that an auditor today ''faces greatly increased benefits through the existence of non-audit advisory services that are subject to the discretion of management, and it faces greatly reduced liabilities.''

In part because the risks of liability have changed, as described by Professor Coffee, we do not believe, as urged by at least one commenter,[92] that liability insurance premiums are a barometer of the extent to which non-audit services pose a risk to audit quality. Professional malpractice premiums reflect the risk that the liability insurer will have to fund a judgment or settlement imposing money damages on the auditor. This risk of liability is attributable to a variety of factors, only one of which is the risk of audit failure. The likelihood of audit failure, in turn, is attributable to many factors, only one of which is auditor independence. And auditor independence, in turn, can be threatened in numerous ways, only one of which is the provision of non-audit services. In assessing overall litigation risk, it is entirely possible, for example, that a liability insurer would conclude that an enhanced risk of misconduct is offset by a small probability of discovery, as well as a diminishing likelihood, owing to changes in the law, that even known misconduct would result in a judgment or settlement that the insurer would have to fund. Consequently, even if insurers were to provide auditors substantially the same professional malpractice coverage at approximately the same cost despite increases in their provision of non-audit services, that indicates at most that, from the insurers' perspective, overall litigation risks have not increased. Because there are numerous explanations as to why auditors' professional liability premiums might or might not increase, we are not persuaded that insurance premiums are a useful measure of the effect of non-audit services on auditor independence.

(ii) *Changes in Incentives Are Likely to Affect Behavior.* In the Proposing Release, we discussed our concern that the enhanced incentive to perpetuate a client relationship involving non-audit services increases the so-called ''self-serving bias'' auditors experience in favor of an audit client. We heard during our public hearings from academics who have studied the ''self-serving bias,'' including in connection with the behavior of auditors. Two academics presented research tending to show that subtle but powerful psychological factors skew the perceptions and judgments of persons—including auditors—who have a stake in the outcome of those judgments.[93] Other

[85] *See, e.g.,* Letter of William S. Lerach, Milberg Weiss Bershad Hynes & Lerach LLP (Sept. 22, 2000) (''In some instances, public companies bid out auditing work demanding low bids, while indicating to the bidding firms that low auditing bids will be rewarded with lucrative consulting work''). Texas adopted a statutory provision to prevent the use of audits as loss leaders in order to protect small audit firms that could not compete in a market where audits were underpriced. Tex. Rev. Civ. Stat. art. 41a–1, § 20A (1994). *See also* Testimony of K. Michael Conaway, Presiding Officer, Texas State Board of Accountancy (Sept. 20, 2000) (explaining that the worry was that ''big firms would predatory price their way into markets and * * * in effect, gain a competitive advantage over smaller firms that couldn't discount their work to the same extent''); Written Testimony of Wanda Lorenz, CPA, Lane Gorman Trubitt (Sept. 20, 2000) (''[M]ost of the problems that exist today can be tied to *fee negotiations* on audits * * *. Therefore the profession has accepted being bargained with like a shopkeeper in some bazaar in order to perform other more lucrative work.'') (emphasis in original).

[86] *See* Testimony of Larry Gelfond, CPA, CVA, CFE, former President of the Colorado State Board of Accountancy (Sept. 13, 2000) (''Audit failures occur because auditors become careless and in the oversight or reliance on something, they may be taking a shortcut. Clearly, where an audit is low bid, there is that concern.'').

[87] Low-balling also sends a message to the auditor that the audit relationship is not as valuable as the consulting relationship. *See* Testimony of Roderick Hills, former Chairman, SEC (Sept. 20, 2000). Low-balling sends a message inside the audit firm as well. We are concerned that the shift in a firm's emphasis away from auditing and toward non-audit services causes, over time, a cultural shift within the firm. The factors that drive a high quality audit, including the core values of the auditing profession, may diminish in importance to the firm, as will the influence of those firm members who exemplified those core values in their own professional careers.

[88] Testimony of Professor John C. Coffee, Jr., Columbia University (July 26, 2000) (''[T]he expected costs facing the accountant who might be []tempted to shirk his duties in order to please management have vastly declined in just the last five or six years.''); *see also* Written Testimony of Professor Coffee.

[89] Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105–353, 112 Stat. 3227 (codified in scattered sections of the U.S.C.) (requiring most private class actions alleging fraud in the sale of nationally traded securities to be based on federal law and brought in federal court).

[90] *Central Bank of Denver* v. *First Interstate Bank of Denver,* 511 U.S. 164 (1994).

[91] The Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737, amended 18 U.S.C. § 1964(c) to eliminate ''fraud in the purchase or sale of securities'' as a predicate act for RICO liability unless the defendant has been criminally convicted.

[92] AICPA Letter (citing AICPA, *Serving the Public Interest: A New Conceptual Framework for Auditor Independence* (Oct. 20, 1997) (''AICPA White Paper'')). We note that the data relied on in the AICPA White Paper and referred to in the AICPA Letter was collected in 1997. As we discuss throughout this release, the magnitude of non-audit services has increased dramatically over the past several years.

[93] *See* Testimony of Professor Max H. Bazerman, Northwestern University (July 26, 2000); Testimony of Professor George F. Loewenstein, Carnegie Mellon Institute (July 26, 2000); *see also* Max H. Bazerman, Kimberly P. Morgan, and George F. Loewenstein, ''The Impossibility of Auditor Independence,'' *Sloan Management Review* at 91, 94 (Summer 1997) (reviewing empirical research showing that ''[w]hen people are called on to make impartial judgments, those judgments are likely to be unconsciously and powerfully biased in a manner that is commensurate with the judge's self interest,'' and concluding that, despite their best

academics, by contrast, pointed out that the issue may be more complicated because, even where an auditor has some stake in an outcome, the auditor also has countervailing reputational interests,[94] and concerns about, for example, legal liability,[95] audit committee review,[96] and peer review.[97]

We do not question that there are influences on the auditor and an accounting firm beyond a ''self-serving bias.'' We accept also that firms have incentives to avoid situations that expose them to liability and reputational harm. But, again, the argument proves too much. Even with these disincentives, audit failures and impairments of independence occur.[98] Other studies tend to show that the reputational interests of the audit firm are not the same as the reputational interests of the audit engagement partner or the office of the partner that performs most of the work for an audit client. Specifically, these studies suggest that the audit engagement partner and the office have more to gain by, for example, acquiescing to the client's aggressive accounting treatment than they have to lose if it results in audit failure, particularly if the client engagement contributes substantially to the partner's income and the office's revenues. Reputational damage will be spread across the entire firm, whereas income from the client will be concentrated in the partner and the office out of which he or she works.[99] In addition, in a two-phase study commissioned by the ISB, Earnscliffe reported that ''[m]ost believe that accounting firms today are not indifferent about their reputation for quality audits, but are more focused on raising the profile, reputation, and profitability of non-audit services.'' [100]

While we do not purport to resolve a debate among scholars, it is plain that there is ample basis to conclude that the more a person, including an auditor, has at stake in a judgment, the more likely his or her judgment is to be affected.[101] We stress that the influences that we are concerned with can be ''extremely subtle,'' as stated by the Comptroller of the Currency, John D. Hawke, in testimony supporting our proposal to restrict internal audit outsourcing.[102] Paul A. Volcker, the former Chairman of the Federal Reserve, in his testimony supporting our proposal, noted the real threat posed by the ''insidious, hard-to-pin down, not clearly articulated or even consciously realized, influences on audit practices'' that flow from non-audit relationships with audit clients.[103]

b. *Certain Non-Audit Services Inherently Impair Independence.* Our rule lists services that, regardless of the size of the fees they generate, place the auditor in a position inconsistent with the necessary objectivity. Bookkeeping services, for example, place the auditor in the position of later having to audit his or her own work and identify the auditor too closely with the enterprise under audit. It is asking too much of an auditor who keeps the financial books of an audit client to expect him or her to be able to audit those same records with an objective eye.

In much the same way, performing certain valuation services for the audit client is inconsistent with independence. An auditor who has appraised an important client asset at mid-year is less likely to question his or her own work at year-end. Similarly, an auditor who provides services in a way that is tantamount to accepting an appointment as an officer or employee of the audit client cannot be expected to be independent in auditing the financial consequences of management's decisions. And an auditor who has helped to negotiate the terms of employment for an audit client's chief financial officer is less likely to bring quickly to the audit committee questions about the new CFO's performance.

3. The Expansion of Non-Audit Service Relationships with Audit Clients Is Affecting Investor Confidence in the Independence of Auditors

Recent studies indicate that there is a growing disquiet among investors and other users of financial statements about auditor independence in light of the multi-faceted relationships between auditors and their audit clients. Recently, Earnscliffe found that most interviewees ''felt that the evolution of accounting firms to multi-disciplinary business service consultancies represent[ed] a challenge to the ability of auditors to maintain the reality and the perception of independence.'' [104] In Phase II of its study, Earnscliffe reported that interviewees generally had confidence in and are satisfied with the current standard of financial reporting in the U.S. Nonetheless, the study noted, ''[m]ost [interviewees] felt that the risks of unfavorable perceptions of auditor independence are growing, due largely to the provision of non-audit services to auditees.'' [105]

intentions, ''there is good reason to believe that auditors will unknowingly misrepresent facts and will unknowingly subordinate their judgment due to cognitive limitations''); Jesse D. Beeler and James E Hunton, ''Contingent Economic Rents; Insidious Threats to Auditor Independence,'' manuscript (2000).

[94] Testimony of Don N. Kleinmuntz, Professor, University of Illinois at Urbana-Champaign (Sept. 21, 2000); Testimony of Urton Anderson, Professor, University of Texas at Austin (Sept. 21, 2000) (presenting results of research commissioned by Arthur Andersen, Deloitte & Touche, KPMG, and the AICPA); *see also* Testimony of Professor Rick Antle, Yale University (July 26, 2000) (researcher for the AICPA presenting personal views on data).

[95] *See supra* notes 88–91.

[96] *See infra* Section III.C.5.

[97] At least one witness challenged the effectiveness of the current peer review system. She testified that, as enacted, peer review has no ''teeth.'' Testimony of Wanda Lorenz, CPA, Lane Gorman Trubitt, LLP (Sept. 20, 2000).

[98] *See, e.g., In the Matter of PricewaterhouseCoopers LLP,* AAER No. 1098 (Jan. 14, 1999).

[99] W.R. Kinney, Jr., ''Auditor Independence: Burdensome Constraint or Core Value?'' *Accounting Horizons* (March 1999); G. Trompeter, ''The effect of partner compensation schemes and generally accepting accounting principles on audit partner judgment,'' *Auditing: A Journal of Practice and Theory* (Fall 1994); Paul M. Clikeman, ''Auditor Independence: Continuing Controversy,'' *Ohio CPA Journal* (Apr.–Jun. 1998).

[100] Earnscliffe II, *supra* note 38, at 6. Interviewees included chief executive officers, chief financial officers and controllers, auditors, buy-side and sell-aside analysts, audit committee chairs, and regulators.

[101] The Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees noted with respect to independent directors that, even absent objective verification, ''common sense dictates that a director without any financial, family, or other material personal ties to management is more likely to be able to evaluate objectively the propriety of management's accounting, internal control and reporting practices.'' The Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees (the ''Blue Ribbon Committee''), *Report and Recommendations,* at 22 (1999) (the ''Blue Ribbon Report''). Copies of the Blue Ribbon Report are available at *www.nyse.com* or *www.nasd.com.*

[102] Written Testimony of John D. Hawke, Jr. (July 26, 2000).

[103] Written Testimony of Paul A. Volcker (September 13, 2000). Aggregate economic incentives aside, non-audit services can have the effect of aligning the accountant's interests with those of management. When the accountant acts as a consultant, the accountant must answer to management, and a ''consultant . . . will be judged by the ultimate usefulness of his advice in bringing success to management's efforts. He has had a hand in shaping managerial decisions and will be judged by management on the same basis that the management itself will be judged.'' R.K. Mautz and Hussein A. Sharaf, *The Philosophy of Auditing* at 222 (Am. Acct. Ass'n 1961). As the auditor becomes increasingly involved with the audit client and its managers, the auditor is more likely to perceive himself as a part of the management team and place less emphasis on his or her primary loyalty to investors. In Earnscliffe I, Earnscliffe reported that many individuals interviewed believed that pressures on auditors have been increasing and are becoming problematic, and that ''auditors are developing a stronger interest in their relationship with management, perhaps at the expense of their responsibilities to shareholders.'' Earnscliffe I, *supra* note 65, at 9.

[104] Earnscliffe I, *supra* note 65, at 46 (Nov. 1999). The study also found that many individuals interviewed believed that ''auditors are developing a stronger interest in their relationship with management, perhaps at the expense of their responsibilities to shareholders.'' *Id.* at 9.

[105] Earnscliffe II, *supra* note 38, at 5 (July 2000).

Though the O'Malley Panel did not reach consensus on whether changes to the independence rules are needed, over the past year it surveyed preparers and users of financial statements, auditors, regulators, academics, lawyers, and analysts about the provision of non-audit services, and heard from witnesses at the Panel's public hearings. The Panel found that,

[M]any people continue to be concerned—some very concerned—that the performance of non-audit services could impair independence, or that there is at least an appearance of the potential for impairment. Almost two-thirds of the respondents to the Panel's survey from outside the profession who addressed non-audit services expressed such concerns.[106]

In a June 2000 study, Brand Finance plc surveyed analysts and representatives of companies listed on the London Stock Exchange. Brand Finance reported,

Analysts are concerned that the acceptance of non-audit fees by auditors is likely to result in the independence of the audit being compromised. 94% of analysts stating an opinion believe that significant non-audit fees are likely to compromise audit independence. 76% of companies stating an opinion felt that auditor independence is likely to be compromised where significant non-audit fees are received from audit clients.[107]

Brand Finance also found that ''83% of analysts who expressed an opinion believe objectivity is threatened even when the non-audit fee is less than the audit fee.'' [108]

In another recent survey, the Association for Investment Management and Research (''AIMR'') surveyed its members and certified financial analyst candidates regarding auditor independence issues. AIMR reported that ''[p]otential threats to auditor independence, resulting from audit firms providing non-audit services to their audit clients [were] troublesome to many . . . respondents.'' [109]

A recent poll was conducted by Public Opinion Strategies [110] to determine, among other things, how the investing public views our proposed rules.[111] The results showed that eighty percent of investors surveyed favor (forty-nine percent strongly favor; thirty-two percent somewhat favor) an SEC rule that generally would require restrictions on the types of consulting services accounting firms can provide their audit clients, [112] and fifty-one percent thought the new rule was ''very important'' to protecting individual stock market investors.[113] As summarized by James C. Stadler of Duquesne University, ''The results of our national poll indicate that average American investors, in fact, overwhelmingly support the need for some new rulemaking in this area.'' He further stated, ''The survey results confirm what most practitioners have felt for decades—that large consulting engagements for audit clients can raise serious concerns regarding audit independence.'' [114]

Witnesses at our public hearings and written comments on our proposed rules supplied additional indications that investor confidence in auditor independence is in fact being undermined by non-audit relationships between auditors and audit clients.[115] For example, representatives of TIAA–CREF, CalPERS, the New Hampshire Retirement System, and the AFL–CIO, organizations with responsibilities for the sound investment of hundreds of billions of dollars for the benefit of millions of participants, all came forward to express precisely that concern and to urge us to adopt the restrictions we proposed, or even more stringent restrictions.[116]

Paul Volcker, former Chairman of the Federal Reserve Board, testified as follows about investors' perceptions of a conflict of interest when auditors provide non-audit services to audit clients:

The perception is there because there is a real conflict of interest. You cannot avoid all conflicts of interest, but this is a clear, evident, growing conflict of interest, given the relative revenues and profits from the consulting practice, and a conflict of interest is there.[117]

Richard Blumenthal, the Attorney General of Connecticut stated in his testimony before us, ''The tough-minded questions and vigorous standards that the public has traditionally associated with the term ''independent auditor'' have been compromised by the interdependent business relationship between the auditors and the audited.'' [118] Manuel H. Johnson, a public member of the ISB and the former Vice Chairman of the Federal Reserve Board, testified that,

[T]he growing complexity of financial and economic relationships and the extent of non-audit services provided to audit clients by major accounting firms have significantly increased the perception and the potential for conflicts of interest and threatens the integrity of the independent audit function. [119]

At a Congressional subcommittee hearing regarding our proposals, John H. Biggs, Chairman, President, and Chief Executive Officer of TIAA–CREF, said,

The concern about auditor independence in the presence of substantial management consulting fees has been with us for years, and has caused much questioning and study in the profession. Investor uneasiness and suspicion of the quality of audited financial statements is growing rapidly along with the dramatic rise in the percentage of audit firm revenues that come from cross-sold services.[120]

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[106] The O'Malley Panel Report, *supra* note 20, at ¶ 5.20.

[107] Brand Finance plc, *The future of audit—''Back to the Future,''* ch. 1 (June 2000).

[108] *Id.*

[109] Written Testimony of Mauricio Kohn, CFA, CMA, CFM, AIMR (Sept. 20, 2000) (submitting survey). AIMR is a global, non-profit organization of investment professionals.

[110] The results were published by the A.J. Palumbo School of Business Administration at Duquesne University (''Duquesne Poll''). PricewaterhouseCoopers provided funding for the poll.

[111] The 800 adults had incomes greater than $50,000.

[112] Duquesne Poll, *supra* note 110, Question 12.

[113] Duquesne Poll, *supra* note 110, Question 13. The Poll also found that 37% of respondents thought the new rule was ''somewhat important,'' 6% thought it ''not very important,'' and 3% thought it ''not at all important.''

[114] Mr. Stadler is Dean of the John F. Donahue Graduate School of Business and the A.J. Palumbo School of Business Administration.

[115] For written comments, *see, e.g.,* Letter of Samuel Fleishman (Sept. 9, 2000) (''My confidence in the audits is greatly decreased by knowing that the same company is or could be doing consulting work for the company they are auditing.''); Letter of George R. Jensen (Sept. 8, 2000) (''Investors have a right to expect that sanctity [of the audit] as it is promised without having to wonder about the same firm monkeying with the audit to preserve or enhance their consulting business.''); Letter of Goran LindeOlsson (Sept. 9, 2000) (''The mere possibility that audits may not be 100% objective is reason enough to toughen the rules and keep accounting and consulting services separate.''); Letter of Vivian D. Kilgore Jr. (''No public confidence should be given to any report of any firm that engages in this practice.''); Letter of John Dossing (Sept. 10, 2000) (''Common sense tells me and other indivi[d]ual invest[o]rs this conflict of interests will lead to at the very least the appearance of conflict of interest. How can we trust any audits with the appearance of a conflict of interest. Why invest if we can't trust the figures presented to us in the financial statements?'').

[116] *See* Testimony of John H. Biggs, Chairman and CEO of TIAA–CREF (July 26, 2000); Testimony of Kayla J. Gillan, General Counsel, CalPERS (Sept. 13, 2000); Testimony of Alan P. Cleveland, New Hampshire Retirement System (Sept. 13, 2000); Testimony of Bill Patterson, Director, Office of Investment, AFL–CIO (Sept. 20, 2000).

[117] Testimony of Paul A. Volcker (Sept. 13, 2000).

[118] Written Testimony of Richard Blumenthal (Sept. 20, 2000).

[119] Testimony of Manuel H. Johnson (July 26, 2000). *See also* Testimony of William T. Allen, Chairman, ISB (July 26, 2000) (''[T]he evolution of the auditing profession into multi-service professional firms has given rise to reasonable concerns that the integrity of financial data is being or may be adversely affected or at least that markets may become suspicious of that fact and impose an additional risk premium.'').

[120] Written Testimony of John H. Biggs before the Subcommittee on Securities of the Senate

We recognize there are different views as to whether investor confidence is being undermined.[121] For example, in Phase I of its study, Earnscliffe reports ''The vast majority of respondents believe that auditors are currently performing audits, which meet a high standard of objectivity and independence.'' [122] In Phase II, Earnscliffe reports that with respect to the investing public surveyed, ''Most had a high degree of confidence in the quality and reliability of the information that was available for them to use in making investment decisions.'' [123] In addition, two professors from North Carolina State University submitted a study tending to suggest that ''non-audit services had a positive influence on participants'' perceptions of auditor independence, consistent with the contention that nonaudit services enhance auditor independence.'' [124] Some commenters also cited a survey commissioned by the AICPA and conducted by Penn Schoen & Berland Associates,[125] which found that ninety-one percent of investors surveyed believe audited financial statements are credible.[126]

We take seriously the indications of investor unease, along with indications that investor opinion may be divided. We focus on *degrees* of investor confidence, and we cannot take lightly suggestions that even a minority portion of the population is ''mildly worried'' about a possible appearance problem or that their confidence is being undermined.[127] We also take into account the durability of investor concerns. For decades there have been some who were troubled at the growth of non-audit services.[128] Those who were troubled remain troubled, only more so, and they have been joined by new voices from disparate quarters. We also consider whether the concerns that we hear will likely persist, or are merely transitory and unreasonable fears that inevitably will be allayed. In this instance, we believe that the indications of unease are reasonably based and thus likely to endure and increase, absent preventive action by the Commission.

4. The Rules Are Appropriately Prophylactic

Some commenters and witnesses argue that there is ''no empirical evidence to support the notion that providing non-audit services to audit clients has had any adverse effect on the quality of audits.'' [129] This argument fails to take into account not only the extensive body of research and comments discussed above that document investor concerns, but also the extent to which our approach is, and must be, prophylactic. Moreover, as we explain below, the asserted absence of conclusive empirical evidence on this point is not particularly telling.

a. *The Commission's Independence Rules Must Be Prophylactic.* Our approach to auditor independence traditionally has been, as it must be, prophylactic. Independence rules are similar, though not identical, to conflict of interest rules. To minimize the risks of bias, the independence rules, like conflict of interest rules, proscribe certain relationships or circumstances, whether or not one can show that biased behavior inevitably results from the conflict.[130] The independence rules are preventive both because of the difficulty in proving the link from circumstance to state of mind, as discussed below, and because of the need to act in the public interest and protect investor confidence before it has been significantly undermined.

The Commission's obligation to protect investors requires it to act before there has been a serious erosion of confidence in our nation's securities markets. Our view on this point is quite different from the suggestion from the CEO of an accounting firm that we should wait to adopt restrictions on non-audit services until there has been ''a train wreck or a stockmarket crash.'' [131] Our mission is not to pick up the pieces of such a ''train wreck,'' but to prevent one.

Committee on Banking, Housing and Urban Development (Sept. 28, 2000).

[121] *See, e.g.,* Testimony of John Guinan, Partner, KPMG (Sept. 13, 2000) (''There's no fundamental unease within the marketplace on this subject.''); Testimony of Richard J. Stegemeier, Chairman Emeritus, Unocal Corp. (Sept. 13, 2000) (''I do not believe that [a clear and present danger to investors] exists.'').

[122] Earnscliffe I, *supra* note 65, at 8.

[123] Earnscliffe II, *supra* note 38, at 44. At the request of the AICPA, Gary Orren, a professor at the John F. Kennedy School of Government, reviewed and evaluated Earnscliffe I and II. Memorandum from Gary Orren to AICPA (Sept. 19, 2000). Mr. Orren concluded that the findings do not support our proposals, and that the studies were methodologically flawed. At the same time, he acknowledged that among the respondents in the studies, ''[a] larger number, about half, thought that a perception problem might develop in the future,'' that the majority of groups interviewed perceived a ''slight appearance problem'' today, that the respondents registered ''mild misgivings'' about the effects of non-audit services on independence, and that the respondents were ''mildly worried'' about a possible appearance problem in the future. *Id.* at 3, 4, and 7.

[124] J. Gregory Jenkins and K. Krawczyk, North Carolina State University, *Perceptions of the Relationship Between Nonaudit Services and Auditor Independence,* manuscript (2000) (synopsis). In this study, the researchers interviewed 289 users of financial statements, including business professionals, graduate business students, and accounting professionals at Big Five firms and Non-Big Five firms.

[125] Penn Schoen & Berland Associates, Inc., *National Investors Survey* (Sept. 12, 2000) (''Penn Schoen Survey'').

[126] *Id.* at 4. What the Penn Schoen Survey did not report, but what we believe to be equally important, however, is that among all investors surveyed, only 54% said that they believe audited financial statements are ''very credible,'' 37% believe they are only ''somewhat credible,'' 5% believe they are ''not credible,'' and the remaining 3% do not know if they are credible. *See* Judith Burns, ''Investors Unconcerned About Auditor Independence,'' *Dow Jones New Service* (Sept. 12, 2000). We do not believe that investors or the accounting profession are well-served by a situation in which 37% of investors in a survey think public companies' audited financial statements are only ''somewhat credible.'' In addition, according to the Penn Schoen Survey, 23% of investors surveyed believed that regulators should play a bigger role than they do now in prohibiting accounting firms from offering a range of services (*id.* at 10) and 33% of investors surveyed disagreed that if our rules proposals were implemented audit firms will know less about the companies they audit and the quality of the audit will suffer (*id.* at 13).

[127] Some have suggested that perception is not an appropriate basis for regulation. *See* AICPA White Paper, at App. A (paper by Gary Orren, ''The Appearance Standard for Auditor Independence: What We Know and Should Know'' (Oct. 20. 1997)). Others believe that ''investor perceptions constitute an economically legitimate and theoretically sound basis for regulatory intervention.'' *See, e.g.,* Written Testimony of Rajib Doogar (Sept. 20, 2000).

[128] *See supra* Section III.C.1; *see also* Arthur A. Schulte, Jr., ''Compatibility of Management Consulting and Auditing,'' *Accounting Rev.* 586 (July 1965) (survey of four respondent groups—research and financial analysts of brokerage firms, commercial loan and trust officers of banks, investment officers of insurance companies, and investment officers of domestic mutual funds—indicated a third of all respondents believed that the provision of both audit and non-audit services was a conflict of interest); Abraham J. Briloff, ''Old Myths and New Realities in Accountancy,'' *Accounting Rev.* 490–94 (July 1996) (finding that a significant number of academics, members of financial community, and accountants believed that an auditor's provision of management-advisory services detracted from the quality of the audit); Pierre L. Titard, ''Independence and MAS—Opinions of Financial Statement Users,'' *J. Accountancy* 47 (July 1971) (finding that a significant number of parties who represented major investment concerns believed that an auditor's provision of management advisory services impaired auditor independence).

[129] Letter of Deloitte & Touche (Sept. 25, 2000) (''Deloitte & Touche Letter'').

[130] In this regard, our rule addresses potential conflicts in a way that is similar to rules regarding the conduct of federal judges. For example, § 455 of title 28 of the federal code provides that a federal judge is to disqualify himself (and may be disqualified by the appellate court) in any proceeding where the judge's ''impartiality might reasonably be questioned.'' 28 U.S.C. § 455(a). The courts have explained that ''disqualification is required if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown.'' *Gray* v. *University of Arkansas,* 883 F.2d 1394, 1398 (8th Cir. 1989).

[131] ''The Ties That Bind Auditors,'' *The Economist* at 63 (Aug. 12, 2000) (''Usually there is a train wreck or a stock market crash prompting this sort of radical legislation.'').

We have adopted other rules with a similar attentiveness to the need to sustain investor confidence in the public securities markets. For example, in our Order regarding rule changes by the Municipal Securities Rulemaking Board to address ''pay to play'' practices in the municipal securities market, we stated that the proposed rule changes were intended, among other things, ''to bolster investor confidence in the integrity of the market by eliminating the opportunity for abuses in connection with the awarding of municipal securities business.''[132] Regulation FD provides another example of our acting to protect investor confidence.[133] There, our concern was, among other things, that ''the practice of selective disclosure leads to a loss of investor confidence in the integrity of our capital markets.''[134]

The courts have specifically rejected the need for proof of prior harm as an antecedent to government action designed to safeguard public confidence in the integrity of public actors and processes. For example, the court in *Blount* v. *Securities and Exchange Commission,*[135] articulated this principle in the context of those rules limiting ''pay to play'' practices in the municipal securities markets, stating, ''Although the record contains only allegations, no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic.''[136]

In promulgating rules concerning auditor independence, we are making judgments about incremental probabilities. We must make judgments about the circumstances that render a loss of auditor objectivity more or less likely. ''Objectivity'' is not merely the absence of a conscious intention to skew audit results in a client's favor; it is a willingness to go without reluctance wherever the data lead. For us, the question is not whether an auditor who otherwise would be without bias will inevitably become biased and then intentionally disregard a false statement in a client's financial statements. We do not believe the appropriate benchmark for action is whether new rules are needed to make ''bad'' auditors good, malleable ones stronger, or sales-oriented ones focus solely on the audit. Rather, the actual issue is whether providing these services makes it unacceptably likely that there will be an effect on the auditor's judgment, whether or not the auditor is aware of it.

Similarly, our mandate to enhance investor confidence in our securities markets requires us to make judgments as to effects on degrees of confidence. Investor confidence in the securities markets arises from a multiplicity of sources. Investor confidence is currently high. We must consider not whether otherwise confident investors will lose confidence in our markets, but whether there is a significant enough probability that enough investors will lose enough confidence if we fail to act. In our judgment, the risk is present, and we should address it.

b. *The Commission Should Not Delay Action to Engage in Further Study.* In any event, the assertion that no empirical evidence conclusively links audit failures to non-audit services misses the point.[137] First, ''audit quality,'' which we seek to protect, is about more than just avoiding major audit failures or financial fraud. Auditing, we are often reminded, is not mechanical, but requires numerous subtle judgments.[138] It is important that these judgments be made fairly and objectively, whether or not they relate to matters that are material to the financial statements. As four previous SEC Chairmen stated,

> Some will say that action now is premature or unwarranted. They argue that there's no harm unless you can directly tie a firm's nonaudit services to a failed audit. But this claim belies the environment in which many tough business decisions are made. It is rarely the black-and-white issues that an auditor faces. The danger lies in the gray area—where the pressure to bend to client interest is subtle, but no less deleterious.[139]

The number of ''audit failures'' says nothing about misjudgments in the gray area.

''Audit failures'' in all likelihood also demonstrate relatively little about the incidence of auditor error. An ''audit failure,'' as we use the term, refers to an instance in which the issuer's financial statements are materially misstated and in which the auditor either failed to discover the misstatement or acquiesced in the inclusion of the misstatement in the issuer's financial statements. The Commission is aware of only those audit failures it discovers or that are made public; presumably there are more. And, presumably, every error by an auditor does not lead to an audit failure. Moreover, audit failures arise from a multiplicity of causes, of which an impairment of independence is but one. To demand, as a predicate for Commission action, evidence that each loss of independence produces an audit failure is a bit like demanding proof that every violation of a fire safety code results in a catastrophic fire.[140]

[132] Notice of Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Political Contributions and Prohibitions on Municipal Securities Business, Exchange Act Release No. 33482 (Jan. 14, 1994) [59 FR 3389]; *see also* ''Exceptions to Rules 10b–6, 10b–7, and 10b–8 Under the Securities Exchange Act of 1934 for Distributions of Foreign Securities to Qualified Institutional Buyers, Securities Act Rel. No. 6999 (May 5, 1993) [58 FR 27686)] (''Rules 10b–6, 10b–7, and 10b–8 ('Trading Rules') are prophylactic in nature and designed to protect investors purchasing a security in a distribution from paying a price that has been artifically influenced (*i.e.*, raised or supported) by those persons who have the greatest incentive to engage in manipulative activity. Because the Trading Rules protect investors against artificial price movements, they promote the integrity of the pricing process and public confidence in the U.S. securities markets.'').

[133] ''Selective Disclosure and Insider Trading,'' Release No. 33–7881 (Aug. 15, 2000) [65 FR 51715].

[134] *Id.*

[135] 61 F.3d 938 (D.C. Cir. 1994).

[136] *Id.* at 945. Similarly, even in the First Amendment context of restrictions on campaign contributions, the Supreme Court has upheld the validity of prophylactic rules. *Nixon v. Shrink Missouri Government,* 528 U.S. 377 (2000) (relying on the seminal case of *Buckley v. Valeo,* 424 U.S. 1 (1976)).

[137] The widespread perception among sophisticated members of the financial community that non-audit services are jeopardizing audit reliability at the very least suggests that there is in fact a problem. Moreover, at least one published study has found a statistical link between the provision of non-audit services and the frequency of audit qualifications. Graeme Wines, ''Auditor Independence, Audit Qualifications and the Provision of Non-Audit Services: A Note,'' 34 *Acc. & Fin.* 76 (May 1994). The author analyzed the audit reports put out between 1980 and 1989 by 76 companies publicly listed on the Australian Stock Exchange. He found that ''the auditors of companies not receiving an audit qualification of any type over the period derived a significantly higher proportion of their remuneration from non-audit services fees than the auditors of companies receiving at least one audit qualification.'' *Id.* at 76. While the author acknowledges that his research is by no means conclusive, it does corroborate the common-sense expectation that ''auditors are less likely to qualify a given company's financials statements when higher levels of non-audit fees are derived.'' *Id.* at 83.

[138] *See* Testimony of Robert L. Ryan, CFO, Medtronic, Inc. (Sept. 20, 2000) (''[T]o my mind one of the most sacred things in the whole audit process is judgment.* * * [T]here is so much judgment that goes into a financial statement and I want to feel that if I'm sitting across from a partner * * * that audit is the primary thing.* * *'').

[139] Richard C. Breeden, Roderick M. Hills, David S. Ruder and Harold M. Williams, Editorial, *supra* note. 33.

[140] *See, e.g.*, Written Testimony of J. Michael Cook former Chairman and Chief Executive Officer, Deloitte & Touche (July 26, 2000) (''I do not share the view that proof of such a linkage is the only appropriate basis for regulatory action. To the contrary, I believe the most independence rules today are the result of appearance-based rather than fact-based concerns. Further, I agree with the Commission that the absence of ''proof'' does not justify inaction, particularly when such evidence cannot be expected to be demonstrable.''); Paul B.W. Miller, Ph.D., CPA, Professor, University of Colorado at Colorado Springs, and Paul R. Bahnson, ''The Spirit of Accounting'' (draft column to appear in *Accounting Today,* submitted as Addendum to Written Testimony of Paul Miller (July 31, 2000) (''[A]udit failure is the wrong factor to consider.* * * The issue is not whether the auditor

Second, the subtle influences that we are addressing are, by their nature, difficult to isolate and difficult to link to any particular action or consequence. The asserted lack of evidence isolating those influences and linking them to questionable audit judgments simply does not prove that an auditor's judgment is unlikely to be affected because of an auditor's economic interest in a non-audit relationship. Indeed, it is precisely because of the inherent difficulty in isolating a link between a questionable influence and a compromised audit that any resolution of this issue must rest on our informed judgment rather than mathematical certainty.

Except where an auditor accepts a payment to look the other way,[141] is found to have participated in a fraudulent scheme,[142] or admits to being biased, we cannot know with absolute certainty whether an auditor's mind is, or at the time of the audit was, ''objective.'' It is even harder to measure the impact that a particular financial arrangement with the audit client had on the auditor's state of mind.[143] Similarly, it is difficult to tie a questionable state of mind to a wrong judgment, a failure to notice something important, a failure to seek important evidential matter, a failure to challenge a management assertion, or a failure to consider the quality '' not just the acceptability '' of a company's financial reporting. As the POB noted, ''Specific evidence of loss of independence through MAS [management advisory services], a so-called smoking gun, is not likely to be available even if there is such a loss.''[144]

Testimony during our hearings provided informed, real-world perspectives bearing on the practical difficulty of establishing a conclusive link between non-audit service relationships and compromised audit judgments. Many who provided those perspectives nonetheless urged that we proceed with our rule.[145]

Based on his thirty-three years of law enforcement experience and several cases involving unlawful and questionable conduct by auditors, Robert M. Morgenthau, the District Attorney for the County of New York, testified, ''in most cases, it was impossible to tell whether financial considerations played a role in the auditor's issuing the opinion he did.''[146] In these instances, absent the sort of admission referenced above, we can look only to circumstantial evidence of influences or incentives affecting the auditor.[147] A number of plaintiffs' lawyers agreed that the hard evidence opponents of the proposals seek will be rare because even where the evidence does exist, it is unlikely that it will be made public. Charles Drott, a CPA and a forensic examiner, testified that ''the only time these issues come to light * * * is when there is significant litigation.* * * The accounting firm[s] [are] not sharing this information, and I don't know of any vehicle at the present time that requires them to do so.''[148] Stuart Grant, an attorney who regularly represents institutional investors in securities litigation, stated that, based on his experience, he thought it unlikely that an auditor, like any party to a lawsuit, would ever concede that it made an accounting judgment in part to protect its consulting business.[149] Jay W. Eisenhofer, Mr. Grant's partner, noted that even if a case involving independence allegations were to proceed to trial, any information relevant to the alleged violation that was produced in discovery likely would be protected from general disclosure by a confidentiality order.[150]

While these witnesses and commenters said that, based on their experience, we should not expect to have an abundance of evidence showing a direct link between the provision of non-audit services and audit failures, others pointed to cases where they believed the connection was apparent.[151] Richard Blumenthal, Attorney General of the State of Connecticut, described a matter investigated by his office which he believed did involve a significant audit failure linked to a loss of audit objectivity caused by the auditor's non-audit business relationship with the audit client. Mr. Blumenthal stated, ''Connecticut residents have personally experienced the financial hardship occasioned by the loss of independence and objectivity in the accounting profession. * * * While investors eventually recovered a portion of their losses, many surely never recovered their faith in * * * the accounting profession.''[152]

William S. Lerach, of Milberg Weiss Bershad Hynes & Lerach LLP, which represents investors in securities litigation, provided his perspective on this issue. He stated,

> It has been asserted there is as yet no ''empirical evidence'' demonstrating a loss of auditor independence in providing consultant and other non-audit services. In fact, we know otherwise.
>
> In prosecuting securities fraud cases against public companies and their auditors, we obtain access to internal corporate documents that are sealed from public view by confidentiality orders and are never made available to the Commission. Over the years, we have seen repeated instances where auditors are unable to maintain independence from their clients. Not infrequently, the lack of independence arises most directly from the fact that the auditing firm has substantial consulting relationships with the client '' relationships that are extremely lucrative '' much more lucrative than the auditing work.[153]

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can avoid catastrophic failure but whether the audit can increase the credibility of the statements enough to make investors perceive a lower risk of being misled.''); Testimony of Robert E. Denham, Member, ISB (July 26, 2000) (''[I]t's a mistake to focus too much on the cases of major audit failure and try to draw lessons from whether independence played a role in those.* * * [T]he better question for guiding the Commission * * * is what set of rules is more likely to produce better accounting, better financial reporting in the ordinary circumstances of the good companies.* * *'')

141 *See, e.g., SEC* v. *Jose Gomez,* AAER No. 57 (May 8, 1985).

142 *See, e.g., SEC* v. *Christopher Bagdasarian and Sam White,* AAER No. 825 (Sept. 26, 1996).

143 Article IV of the AICPA's Code of Professional Conduct provides, ''Objectivity is a state of mind, a quality that lends value to a member's services. It is a distinguishing feature of the profession. The principle of objectivity imposes the obligation to be impartial, intellectually honest, and free of conflicts of interest. Independence precludes relationships that may appear to impair a member's objectivity in rendering attestation services.'' AICPA Code of Professional Conduct, ET § 55.01.

144 1979 POB Report, *supra* note 38, at 34 n.103. As the POB noted, ''[T]he Board recognizes that the nonexistence of such evidence does not necessarily mean that there have not been instances where independence may have been impaired. Not all situations where an auditor's objectivity is compromised will result in a lawsuit.'' *Id.* at 35.

145 While we considered testimony from our public hearings in evaluating the need for the rules as a matter of public policy, there was no fact finding with respect to particular cases and we have not reached any conclusions as to the presence or absence of securities law violations in cases discussed by witnesses.

146 Testimony of Robert M. Morgenthau (Sept. 13, 2000).

147 *See* Testimony of Jay W. Eisenhofer, Partner, Grant & Eisenhofer (Sept. 13, 2000) (''It's always difficult to prove [that the auditor was influenced by large consulting fees] as a certainty, but what you're attempting to do is to use that information to demonstrate that the auditor had a motive that in combination with other facts that you're able to elicit demonstrates that the auditor at least recklessly disregarded its obligations, if not intentionally did so.'').

148 Testimony of Charles R. Drott (Sept. 13, 2000).

149 Testimony of Stuart Grant, Partner, Grant & Eisenhofer (Sept. 20, 2000). Mr. Grant testified at the request of his client, the Council of Institutional Investors, although he stated that he was expressing his own views.

150 Testimony of Jay W. Eisenhofer (Sept. 13, 2000).

151 *But see* Testimony of Barry Melancon, President and Chief Executive Officer, AICPA (Sept. 21, 2000) (''Even if there was some isolated case[s] in which non-audit services were found to be linked to audit failures that would not establish a proper basis for the drastic action proposed by this rule.'').

152 Written Testimony of Richard Blumenthal (Sept. 20, 2000).

153 Letter of William S. Lerach (Sept. 22, 2000). *See also* Letter of Britton Davis (Aug. 14, 2000) (''I

Continued

Finally, we are also cognizant that concerns about the impact of non-audit services on independence have been steadily with us, and growing, during relatively prosperous times, and that any economic downturn may heighten concern over some of these issues. As one analyst stated during our public hearings,

If we're asking hard questions about independence and the appearance of independence now, won't our concerns be magnified during times of economic distress? It's not hard to imagine an economic environment where firms may be more prone to pushing the envelope of reliable accounting and reporting, and that's when you would want an auditing profession possessing unquestionable independence. If we have qualms about that independence now, it will be worse in an economic downturn, and that's when investor confidence may be tested on issues other than auditor independence.[154]

5. Our Two-Pronged Approach Responds to Various Aspects of Auditor Independence

As discussed above, some non-audit services, by their very nature, raise independence concerns because, for example, they place the auditor in the position of auditing his or her own work. We are otherwise concerned about non-audit services because of the overall economic incentives they create and because of the interdependence that develops between the auditor and the audit client in the course of the non-audit relationship.

The greatest assurance of auditor independence would come from prohibiting auditors from providing any non-audit services to audit clients. We solicited comment on this approach, and some commenters strongly urged that we adopt such an exclusionary ban.[155] That way, the auditor would never be placed in a conflict-of-interest position, nor would the auditor have any economic incentive, beyond continuation of the audit relationship, that might give rise to a biased attitude. We believe, however, that the better course is for us to eschew a single bright line and instead to draw a series of lines, based on our assessment of particular factual circumstances, understanding that identifying dangerous circumstances in this area is more a matter of informed judgment than measurement. We believe that the two-pronged approach we are taking in the final rules—requiring disclosure of the fees billed by the auditor for the audit, financial information systems design and implementation services, and other non-audit services, and identifying particular services that are incompatible with independence—best protects the audit process. Our approach also permits us to restrict non-audit services only to the extent necessary to protect the integrity and independence of the audit function. Accountants will continue to be able to provide a wide variety of non-audit services to their audit clients. They also will be able to provide any non-audit service to non-audit clients.

Under the proxy disclosure rule being adopted, registrants will have to disclose, among other things, the aggregate fees billed for the audit in the most recent fiscal year, the aggregate fees billed for financial information systems design and implementation, and the aggregate fees billed for non-audit services performed by the auditor in the most recent fiscal year. In addition, companies must provide certain disclosures about their audit committee. Investors will be able to evaluate for themselves whether the proportion of fees for audit and non-audit services causes them to question the auditor's independence. As discussed above, in recent years there has been a dramatic growth in the number of non-audit services provided to audit clients and the magnitude of fees paid for non-audit services.[156] Moreover, there may be less information available to investors about these services since the SECPS has stopped publishing information about audit firms' provision of non-audit services.[157]

Surveys confirm that investors expect that the information that will be disclosed under the final rule will be useful in making investment decisions. In its Phase II study, Earnscliffe found that ''[m]any advocate[] a requirement of full disclosure as a way to both deter an unhealthy relationship between auditor and client, and to inform investors of any risks'' related to the relationship.[158] In addition, the Penn Schoen Survey found that ''[n]ine in ten investors want to know if a company's auditor also provides other services.''[159] Eighty-nine percent of respondents in that study said, ''It would be important for shareholders to know if a company's auditor also provides consulting services to that company.''[160]

We considered a disclosure-only approach and solicited comment on that approach. Some commenters favored a disclosure-only approach to the independence issues created by auditors' provision of non-audit services.[161] We, however, do not believe that such an approach is appropriate for several reasons. First, our federal securities laws require that auditors be independent, and we do not believe that disclosure can ''cure'' an impairment of independence.[162] Second, as discussed above, by their very nature, certain non-audit services provided by auditors can affect an auditor's independence, regardless of whether investors are made aware of the provision of the services. As a representative of one of the largest pension funds commented, ''While we do not believe that disclosure in and of itself is adequate to deal with the independence problems involved here, shareholders have a right

have witnessed several instances of ''rolling over'' on issues that affected our clients, for no other reason than the apparent conflict sticking to our guns would have caused (thus threatening our revenue stream).''); *see also* Testimony of Charles R. Drott, CPA, CFA (Sept. 13, 2000) (''My overall conclusion * * * has been that in most of the cases that I have been involved in, meaning at least 50 cases that I have been involved in regarding audit failures, that the underlying cause of most of these situations was compromised auditor independence. This involved auditors auditing their own work, acting as advocates for their clients, entering into improper business relationships with their clients, and acting as management for their clients.'').

[154] Testimony of Jack T. Ciesielski, accounting analyst (July 26, 2000).

[155] *See supra* note 22.

[156] As discussed above and in the Proposing Release (Section II.C), there have been significant changes in the accounting profession and the provision of non-audit services since 1982, when we rescinded our previous proxy statement disclosure requirement regarding non-audit services. From 1978 to 1982, we required companies to include in their proxy statement disclosures about non-audit services provided by their auditors, including the percentage of the fees for all non-audit services compared to total audit fees and the percentage of the fee for each non-audit service compared to total audit fees (''Disclosure of Relationships with Independent Public Accountants,'' ASR No. 250 (June 29, 1978)). Although our concerns about the provision of consulting and other non-audit services remained unchanged, we later determined to rescind the proxy disclosure requirement (''Rescission of Certain Accounting Series Releases and Adoption of Amendments to Certain Rules of Regulation S–X Relating to Disclosure of Maturities of Long-Term Obligations,'' ASR No. 297 (Aug. 20, 1981)). Among other reasons, our review of proxy disclosures convinced us that accounting firms then, in contrast to now, were not providing extensive non-audit services to their audit clients. In addition, we noted that, even without the proxy statement requirement, investors had access to useful data provided to and made public by the SECPS. As discussed below, that data are no longer readily available.

[157] In particular, summarized information regarding the relationship between non-audit and audit fees is provided to the SECPS by its member firms. Until recently, the SECPS published aggregate information regarding the mix of services provided by an accounting firm to all of its clients. Investors, however, would be primarily interested in the receipt of non-audit services by the companies in which they invest.

[158] Earnscliffe II, *supra* note 38 at 9.

[159] Penn Schoen Survey, *supra* note 125, at 15.

[160] *Id.*

[161] *See, e.g.*, Arthur Andersen Letter.

[162] Testimony of Jack Ciesielski, accounting analyst (July 26, 2000).

to know about relationships that may compromise the independence of audits on which they rely.''[163]

6. The Final Rules Will Assist Audit Committees in Their Oversight Role

Issuers and other registrants have strong incentives to promote auditor independence. It is their financial statements that an auditor examines. They have the legal responsibility to file the financial information with the Commission, as a condition to accessing the public securities markets, and it is their filings that are legally deficient if auditors who are not independent certify their financial statements.

For most public companies, audit committees have become an essential means through which corporate boards of directors oversee the integrity of the company's financial reporting process, system of internal accounting control, and the financial statements themselves. Among other things, an audit committee serves as the board's principal interface with the company's auditors and facilitates communications between the company's board, its management, and its internal and independent auditors on significant accounting issues and policies.

The Commission is an advocate of effective and independent audit committees. Most recently, the Commission and three major exchanges adopted important audit committee rules. The New York Stock Exchange, the National Association of Securities Dealers, Inc., and the American Stock Exchange changed their listing standards. These changes require listed companies to have independent audit committees, and require audit committees to play a significant role in overseeing the company's auditors.[164]

Also, we adopted new disclosure rules regarding audit committees and auditor reviews of interim financial information[165] in response to recommendations of the Blue Ribbon Committee.[166] Those rules require that companies include in their proxy statements reports of their audit committees that state whether, among other things, the audit committees received the written disclosures and the letter from the independent auditors required by ISB Standard No. 1,[167] and discussed with the auditors the auditors' independence. ISB Standard No. 1 requires each auditor to disclose in writing to its client's audit committee all relationships between the auditor and the company that, in the auditor's judgment, reasonably may be thought to bear on independence and to discuss the auditor's independence with the audit committee.[168]

The final rule supplements those required disclosures with an additional disclosure as to whether the issuer's audit committee ''has considered whether the provision of non-audit services] is compatible with maintaining the principal accountant's independence.'' The disclosure focuses particularly on non-audit services and requires disclosure of whether the audit committee itself has focused on the issue. We believe that our final rule, our new audit committee disclosure rules, and the new requirements of the NYSE, AMEX, NASD, and ISB should encourage auditors, audit committees, and management to conduct robust and probing discussion on all issues that might affect the auditor's independence. According to the Blue Ribbon Report, ''If the audit committee is to effectively accomplish its task of overseeing the financial reporting process, it must rely, in part, on the work, guidance and judgment of the outside auditor. Integral to this reliance is the requirement that the outside auditors perform their service without being affected by economic or other interests that would call into question their objectivity and, accordingly, the reliability of their attestation.''[169]

Our final rule does not impose any new legal requirements on audit committees.[170] While the rule may serve to direct the attention of audit committees to the potential for independence issues arising from non-audit services, any action taken by audit committees will be business judgments. Nonetheless, the rule should help audit committees carry out their existing responsibilities by codifying the key legal requirements that may bear on audit committees' exercise of their business judgment.[171] We believe that audit committees, as well as management, should engage in active discussions of independence-related issues with the outside auditors.[172] As with discussions over the quality and acceptability of management's judgments, audit committees can be useful in considering whether assertions of independence rest on conservative or aggressive readings of the independence rules. Similarly, audit committees may wish to consider whether to adopt formal or informal policies concerning when or whether to engage the company's auditing firm to provide non-audit services.[173]

[163] Letter of Peter C. Clapman, Senior Vice President and Chief Counsel, Investment, TIAA–CREF (Sept. 21, 2000).

[164] The New York Stock Exchange (''NYSE''), National Association of Securities Dealers, Inc. (''NASD''), and the American Stock Exchange (''AMEX'') also changed their company listing standards to make it clear that the auditor is ultimately accountable to the board of directors and the audit committee, as opposed to management, and that the audit committee and the board of directors have the ultimate authority and responsibility to select, evaluate and, when appropriate, replace the auditor. *See* Order Approving Proposed Rule Change by the NASD, Exchange Act Rel. No. 42231, File No. SR–NASD–99–48 (Dec. 14, 1999); Order Approving Proposed Rule Change by the NYSE, Exchange Act Rel. No. 42233, File No. SR–NYSE–99–39 (Dec. 14, 1999); and Order Approving Proposed Rule Change by the AMEX, Exchange Act Rel. No. 42232, File No. SR–Amex–99–38 (Dec. 14, 1999).

[165] ''Audit Committee Disclosure,'' Exchange Act Rel. No. 42266 (Dec. 22, 1999).

[166] In its report, the Blue Ribbon Committee noted that with respect to independent directors, even absent objective verification, ''common sense dictates that a director without any financial, family, or other material personal ties to management is more likely to be able to evaluate objectively the propriety of management's accounting, internal control and reporting practices.'' Blue Ribbon Report, supra note 101, at 22.

[167] ISB Standard No. 1, ''Independence Discussions with Audit Committees'' (Jan. 1999). Copies of standards issued by the ISB are available on the ISB's website at www.cpaindependence.org.

[168] In a letter to the SECPS, ISB Chairman William Allen clarified the use of the auditor's judgment under the standard. He stated:

[I]n asking itself whether a fact or relationship is material in this setting the auditor may not rely on its professional judgment that such fact or relationship does not constitute an impairment of independence. Rather the auditor is to ask, in its informed good faith view, whether the members of the audit committee who represent reasonable investors, would regard the fact in question as bearing upon the board's judgment of auditor independence.

Letter from William T. Allen, Chairman, ISB, to Michael A. Conway, Chairman, Executive Committee, SECPS (Feb. 8, 1999). We believe that Chairman Allen's interpretation is appropriate.

[169] Blue Ribbon Report, *supra* note 101, at 40.

[170] *See* Testimony of Barry Melancon, President and Chief Executive Officer, AICPA (Sept. 21, 2000) (''[I]t's the audit firm's responsibility to determine that they are independent.* * * [T]he obligation is clearly on the auditor. The auditor cannot put that obligation off solely to the audit committee in any form or fashion. And even if the audit committee were to determine things were okay, the firm is still responsible to make an independent judgment that they are in fact independent.'')

[171] *See* Testimony of John Whitehead, former Chairman, Goldman Sachs & Co. (Sept. 13, 2000).

[172] *See, e.g.,* Testimony of Robert L. Ryan, Chief Financial Officer, Medtronic, Inc. (Sept. 20, 2000) (''We believe that we should continue to require our audit committees, who are in the best position to evaluate independence, to play an active role in this assessment process as the proposed rule changes outline.'')

[173] Companies have differing approaches to hiring their auditors to provide non-audit services. For example, John H. Biggs testified that TIAA–CREF does not hire its auditors to provide non-audit services (Testimony of John H. Biggs (July 26, 2000)), while Judy Lewent, Senior Vice President and CFO, Merck & Co., Inc., testified that her company employs a set of principles and practices for determining whether to hire their auditors to provide non-audit services, such as rotating its lead auditor every five years and requiring the audit committee to approve each request to use the

Continued

In this latter connection, we note that recently the O'Malley Panel recommended certain guiding factors for audit committees to consider in making business judgments about particular non-audit services. According to the O'Malley Panel, one guiding principle should be whether the ''service facilitates the performance of the audit, improves the client's financial reporting process, or is otherwise in the public interest.''[174] Other matters to be considered are:

• Whether the service is being performed principally for the audit committee.

• The effects of the service, if any, on audit effectiveness or on the quality and timeliness of the entity's financial reporting process.

• Whether the service would be performed by specialists (e.g., technology specialists) who ordinarily also provide recurring audit support.

• Whether the service would be performed by audit personnel and, if so, whether it will enhance their knowledge of the entity's business and operations.

• Whether the role of those performing the service (e.g., a role where neutrality, impartiality and auditor skepticism are likely to be subverted) would be inconsistent with the auditor's role.

• Whether the audit firm's personnel would be assuming a management role or creating a mutuality of interest with management.

• Whether the auditors, in effect, would be auditing their own numbers.

• Whether the project must be started and completed very quickly.

• Whether the audit firm has unique expertise in the service.

• The size of the fee(s) for the non-audit service(s).[175]

These factors expand upon the four factors in the Preliminary Note to Rule 2–01. Additionally, the O'Malley Panel recommends that audit committees pre-approve non-audit services that exceed a threshold determined by the committee. We believe that the O'Malley Panel recommendations represent a thoughtful and appropriate approach to these issues by audit committees, and we encourage audit committees to consider the Panel's recommendations.

Some commenters suggested that the Commission and investors rely primarily on corporate audit committees to monitor and ensure auditor independence.[176] Other commenters, however, including investor representatives, indicated that this approach, without more, was inadequate.[177] While we welcome active oversight by audit committees with respect to auditor independence, we do not believe that this oversight obviates the need for the rule we adopt today. Audit committees bring business judgment to bear on the financial matters within their purview. Their purpose is not to set the independence standards for the profession, and we are not attempting to saddle them with that responsibility. On the other hand, we believe that the final rule facilitates the work of audit committees by establishing clear legal standards that audit committees can use as benchmarks against which to exercise business judgment.

7. The Final Rules Will Not Diminish Audit Quality

Some commenters expressed concern that the proposed restrictions on non-audit services would hurt audit quality.[178] These commenters assert that the auditor gains valuable knowledge about an audit client's business by providing non-audit services. The more the auditor knows about the client, these commenters assert, the higher the quality of the audit. These commenters further assert that accounting firms need broad technical skills to provide high quality audits and that the necessary array of skills can be acquired only if the accounting firm has a multidisciplinary practice. Finally, the commenters assert that the rules will affect accounting firms' ability to recruit and hire talented professionals, which in turn will lead to less capable professionals performing lower quality audits. We note that the rules we adopt today are significantly less restrictive than the proposed rules. We are adopting without substantial alteration restrictions that already appear in the professional literature with respect to the majority of the nine services that are covered by our rules. In any event, we are not persuaded by these arguments.

a. *Auditors Will Continue to Have the Expertise Necessary for Quality Audits.* The suggestion that the more the auditor knows about the audit client, the better its capacity to audit, is flawed. It is an argument without limitation that takes no account of the negative impact on audit quality from an independence impairment. As the former Chief Accountant of the SEC explained several years ago, ''Arguments that more knowledge of the audit client increases the quality of the audit * * * taken to the extreme, would have the auditor keeping the books and preparing the financial statements. Once a firm has worked closely with a client to improve the client's operations or reporting systems, it would appear that the firm would have difficulty in providing a ''critical second look'' at those operations and systems,''[179] as the investing public relies on the auditor to do.

In addition, the argument incorrectly assumes that all additions to an auditor's knowledge about the client's business are relevant to an audit. With respect to the full-scale non-audit practices of some firms, however, the O'Malley Panel said,

> Audit firms' management consulting practices have expanded far beyond the skills required for audit support and the traditional areas related to financial planning and controls. For example, some firms now offer certain investment banking and legal services, outsourcing of a variety of corporate functions, strategic business planning and business process reengineering advice.[180]

Further, the argument that the more an auditor knows about an audit client, the better the audit, assumes that knowledge gained by an accounting firm's consultants is inevitably transferred to the firm's auditors. We are skeptical about this claim. Some testified that there is no sharing of firm personnel between the consulting side and auditing side. The General Counsel of Andersen Consulting said, ''[I]n our experience there is no meaningful crossover of personnel between the audit divisions and these other business consulting functions. The skills necessary to perform high quality audits are vastly different from those needed to perform consulting services of the type covered by the rule.''[181]

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outside audit firm for non-audit services. She noted that the company's process for such determinations has resulted in the use of their audit firm for non-audit services only in limited circumstances (Testimony of Judy Lewent (Sept. 13, 2000)).

[174] O'Malley Panel Report, *supra* note 20, at ¶ 5.29.

[175] *Id.* at 116–17.

[176] *See, e.g.,* Testimony of Philip D. Ameen, Chair, Committee on Corporate Reporting, FEI–CRR (Sept. 20, 2000); Letter of Caroline Rook, Acxiom Corp. (Sept. 7, 2000); Letter of Allen J. Krowe, retired Vice Chairman, Texaco, Inc. (Sept. 5, 2000).

[177] *See, e.g.,* Testimony of Bill Patterson, Director of the Office of Investment, AFL–CIO (Sept. 20, 2000).

[178] *See, e.g.,* AICPA Letter.

[179] Letter from Michael H. Sutton, Chief Accountant, SEC to William T. Allen, Chairman, ISB (Dec. 11, 1997), at 6–7 (attaching SEC Staff Analysis of AICPA White Paper).

[180] O'Malley Panel Report, *supra* note 20, at ¶ 5.11 *But see* Testimony of James E. Copeland, Chief Executive Officer of Deloitte & Touche (Sept. 20, 2000) (asserting that it is the overall competencies gained by providing non-audit services to audit clients and non-audit clients that improve the quality of audits).

[181] Written Testimony of Douglas Scrivner, General Counsel, Andersen Consulting (Sept. 20, 2000). Scrivner also is a former partner of Arthur

Available evidence suggests that even without the opportunity to provide non-audit services to audit clients, auditors will have the expertise to perform quality audits.[182] First, under the final rules, auditors will be able to continue to provide non-audit services to non-audit clients. They can gain the technical and other expertise that they believe they need by providing the non-audit services to all of their other clients who are not also audit clients. Second, the great majority of companies do not purchase any non-audit services from their auditors in any given year. In the most recent year for which data are available, approximately seventy-five percent of the public company clients of the Big Five accounting firms received no non-audit services from their auditor.[183] This would mean that the financial statements of thousands of public companies were audited by firms who provided no non-audit services to them in that year. We do not believe that the lack of non-audit services resulted in inadequate audits of the financial statements of seventy-five percent of all public companies. As J. Michael Cook, former Chairman and Chief Executive Officer of Deloitte & Touche said, ''Some suggest that consulting services are essential to the performance of a quality audit. That assertion, in my opinion, is incorrect. The vast majority of all audits are for companies who purchase little or no consulting services from the audit firm, and those audits are of high quality and always have been.''[184]

We also note that accounting firms that do not provide consulting can focus more readily on the audit function, which could in turn improve audits. As the Chairman of Ernst & Young said regarding his firm's recent sale of its consulting practice,

> [N]ow that we have sold this practice, we have not discovered that we are somehow enfeebled, unable to perform effective audits or to maintain a top-notch audit and tax practice. In fact, we have found the opposite to be true: without a large consulting practice to manage, we are now more targeted and more focused on our core audit and tax business. * * * We have had a greater string of ''wins'' in obtaining new audit clients since we sold our management consulting practice than we have had at any time in recent history—four new Fortune 500 clients, including two Fortune 50 companies, just within the last six months.[185]

Some commenters[186] have cited the O'Malley Panel Report as evidence that the provision of non-audit services positively affects audit quality, reciting the statement from the Report that ''[o]n about a quarter of the engagements in which non-audit services had been provided * * * those services had a positive impact on the effectiveness of the audit.''[187] It may well be that—independence concerns aside—providing certain non-audit services can be said to enhance the ''efficiency'' of the audit. But, as Laurence H. Meyer, a Governor of the Federal Reserve Board, said in support of our proposed restriction on internal audit outsourcing, ''auditor independence is more valuable than these asserted efficiencies.''[188]

Furthermore, we are concerned that as non-audit services become more important, firms may care less about auditing and more about expanding their service lines, which itself may have a negative effect on audit quality.[189] The factors that drive a high-quality audit, including the core values of the auditing profession, may diminish in importance to the firm, as will the influence of those firm members who exemplify those core values.[190] Equally important, the training and compensation that auditors receive may stress the importance of cross-selling at the expense of auditing.[191] The O'Malley Panel, for example, noted a sense that accounting firms ''treat the audit negatively—as a commodity.''[192] The O'Malley Panel also agreed that, ''[i]n their zeal to emphasize the array of services that CPAs offer, audit firms and the AICPA scarcely acknowledge auditing services in the public images that they portray. This serves to exacerbate the independence issue and to downplay

Andersen. *See also* Testimony of Thomas Goodkind, CPA (Sept. 13, 2000) (''I have rarely seen [a transference of knowledge] occur in my experience.'')

[182] *See* Testimony of Stephen G. Butler, Chairman and Chief Executive Officer, KPMG (Sept. 21, 2000) (''[C]learly we don't believe that we will not be able to do a quality audit today in the structure that we have,'' with KPMG having incorporated its consulting business and prepare for an initial public offering of that business). Auditors of course have a professional obligation to have the expertise required to perform quality audits, and during the audit process, to gather all the evidence needed to evaluate, test, and render an opinion on the client's financial statements. *See, e.g.,* General Standard No. 1 of Generally Accepted Auditing Standards (''GAAS'') (''The audit is to be performed by a person or persons having adequate technical training and proficiency as an auditor.''); Standards of Field Work No. 3 of GAAS (''Sufficient competent evidential matter is to be obtained through inspection, observation, inquiries, and confirmations to afford a reasonable basis for an opinion regarding the financial statements under audit.''). Au § 150.02. Where auditors do not have the requisite expertise in house, they can hire others outside the firm to provide the skills needed. As observed by Jack Ciesielski, ''Auditors have always had to call in specialists when matters are outside their understanding.'' Testimony of Jack Ciesielski, accounting analyst (July 26, 2000). *See also* Testimony of John J. Costello, Senior Director of Litigation, Gursey, Schneider & Co., LLP (Sept. 20, 2000) (''[I]n my experience over the years, many times have we had to go and get an independent consultant that was not part of the firm. * * * It is not something that's new. It's been there for a long time and could be done again.'').

[183] *See* Proposing Release, Table 3 in Appendix B.

[184] Written Testimony of J. Michael Cook, former Chairman and Chief Executive Officer, Deloitte & Touche (July 26, 2000). *See also* Written Testimony of Philip A. Laskawy, Chairman, Ernst & Young (Sept. 20, 2000) (''[T]he argument that you have to have 30,000 consultants to do an audit is not real, it never was real, because * * * what percentage of clients are you doing consulting for and it is usually in the 20 to 30 percent range. So, the other 70 percent, I hope, are getting good audits.'').

[185] Written Testimony of Philip A. Laskawy, Chairman, Ernst & Young (Sept. 20, 2000).

[186] *See, e.g.,* KPMG Letter; Deloitte & Touche Letter; Arthur Andersen Letter.

[187] O'Malley Panel Report, *supra* note 20, at ¶ 5.18. Some of the eight members of the Panel, however, issued a separate statement calling for an outright ban (with very limited exceptions) on auditors providing non-audit services to audit clients because of their belief in the ''central importance of independence to the profession of auditing in general, and to the effectiveness of the audit process in particular,'' and ''the severe and growing challenges to independence that the audit profession faces in the current environment.'' *Id.,* ¶ 5.32.

[188] Written Testimony of Laurence H. Meyer (Sept. 13, 2000). Moreover, it has been suggested that these efficiencies can ''be partially appropriated as rents to the CPA firm supplier, and hence can themselves create a threat to independence.'' Dan A. Simunic, ''Auditing, Consulting, and Auditor Independence,'' 22 *J. Accounting Research* 679, 681 (Autumn 1984).

[189] *E.g.,* Letter of Ronald J. Marek, CPA (Aug. 17, 2000) (''Over the past twenty to thirty years, the big accounting firms started placing a higher value on selling skills and less on being 'a good accountant.' This change is appropriate if the goal is generating more fees. This change has resulted in a deterioration of audit quality.''); Letter of Mike McDaniel, CPA (Aug. 14, 2000) (''[T]he focus was sharper and firm operations had many fewer conflicts during the period when consulting services were not a central profit center for the Firms.'').

[190] *See* Testimony of Douglas Scrivner, General Counsel, Andersen Consulting (Sept. 20, 2000) (''What is necessary to maintain audit quality is a sustained focus and investment in the audit profession rather than in non-audit services in order to keep up with the complexity and sophistication of business in a rapidly changing environment.'').

[191] *See, e.g.,* Letter of John L. Marty, CPA (Sept. 9, 2000) (''If the practice of 'cross-selling' of services were constrained, it may cause a renewed emphasis on effective auditing and thereby, enhance the reliability of audited financial statements and protect the investing public.''); Testimony of Larry Gelfond, CPA, CVA, CFE, former President of the Colorado State Board of Accountancy (Sept. 13, 2000) (''Partners are measured by the amount of business that they generate, the referrals that they bring in, and the jobs that they handle. Obviously, their ability to generate more fees has a direct relationship in many of these firms, including my own, to their compensation.''); Testimony of Wanda Lorenz, CPA, Lane Gorman Trubitt, LLP (Sept. 20, 2000) (acknowledging the ''pressure on [audit partners] to sell—pressure on them to retain the client, pressure on them to build fees'').

[192] O'Malley Panel Report, *supra* note 20, ¶ 4.4.

the importance of auditing.''[193] This is a trend that we and the accounting profession alike must guard against because, as one commenter remarked, ''the value of [a CPA] license and the public's perception of that license is going to be diminished when it becomes another one of the alphabet soup titles that people in the various professions now use.''[194]

b. *Many Factors Affect Firms' Recruiting Efforts.* We take concerns about recruiting and retention very seriously. Nonetheless, we are skeptical about the claim that the capacity to offer non-audit services to audit clients is critical to the auditing profession's ability to recruit and retain talented professionals.

Today's prosperity, with record lows in unemployment, has intensified the recruiting pressures on all sectors of the economy, not just the accounting profession.[195] Enabling auditors to provide all types of non-audit services to audit clients is not likely to solve the auditor recruiting issues for the accounting firms. From 1993 to 1999, the average annual growth rate for revenues from management advisory and similar services was twenty-six percent.[196] Over approximately the same time frame, according to data from the U.S. Census Bureau, the number of candidates sitting for the first time for the CPA exam dropped from 53,763 (1991) to 38,573 (1998),[197] and the percentage of students majoring in accounting dropped from four percent of all graduates in 1990 to two percent in 2000.[198] In other words, while accounting firms have been dramatically expanding their consulting practices, there has been a steady decline in certain indicators of interest in the accountancy profession as a career choice, and the firms have been hiring fewer accounting graduates.[199]

According to some commenters, potential recruits have negative perceptions about the accounting profession, including that accounting work is unsatisfying and that accountants have no interaction with clients, and these perceptions must be overcome in order for the profession to attract the best and brightest students.[200] By ''selling'' the non-audit practice to recruits, the commenters suggest that they will be able to dispel negative perceptions of the auditing profession.

If a bar to successful recruiting is the perception that auditing is not especially rewarding, the profession must take some responsibility for creating it.[201] As noted above, some firms increasingly regard the audit as a ''commodity,'' downplay its importance, and present themselves to the public as business advisors first and only incidentally as independent, objective auditors. If large multidisciplinary firms downplay to the general public the importance of auditing, they do little to dispel negative impressions of the auditing profession to the public or to potential recruits.[202]

Moreover, the salaries of accountants, particularly in comparison to the salaries of consultants, may exacerbate recruiting problems. Dennis Spackman, Chairman of the National Association of State Boards of Accountancy, testified, ''[T]here is a disparity in what [the accounting firms] [a]re willing to pay somebody to come on to their consulting staff with what they're willing to pay for somebody to come on the audit staff.''[203] In Mr. Spackman's view, the ''big salary differential'' gives incentives to recruits who are looking for a promising career path to work at a public accounting firm in the nonattest area, rather than the attest area.[204] Publicly available statistical data support the conclusion that firms pay accounting recruits less than consulting recruits and that salaries for accounting recruits have increased at a significantly slower pace than starting salaries for consultants.[205]

Undoubtedly, there are many factors contributing to the decline in interest in careers in the accounting profession.[206] The O'Malley Panel noted a similar concern about the decline in the attractiveness of auditing as a career, identifying increased educational requirements, issues of compensation, heavy workloads and issues of family or lifestyle as contributing factors. In addition, the Panel noted that the decline

> also has been influenced by the perception that alternative career opportunities are more exciting, challenging and rewarding than auditing.* * * The profession will need to restore the historic attractiveness of auditing as a profession and convince the ''best'' people that it offers excellent long-term career opportunities. To do so it will have to

[193] O'Malley Panel Report, supra note 20, ¶ 5.23. *See also* Testimony of Jack Ciesielski, accounting analyst (July 26, 2000) (''[The] accounting profession * * * increasingly seeks to distance itself from the public image as auditor in favor of one that positions accountants in the public's collective mind as business enhancing consultants.'').

[194] Testimony of Robert Fox, Chair, New York State Board of Public Accountancy (Sept. 13, 2000).

[195] *See* Testimony of Paul Volcker, former Chairman, Board of Governors of the Federal Reserve System (Sept. 13, 2000) (''I suspect that many of the traditional professions are feeling under some pressure from the lure of Wall Street incomes, and the dot com world, and I suspect the Federal Reserve feels that, and auditing firms feel it. It is a fact of life. I don't think you cure that problem by creating a conflict of interest in your own firm.'').

[196] *See supra* note 53.

[197] U.S. Census Bureau, *Statistical Abstract of the United States: The National Data Book* (119th ed. 1999).

[198] Taylor Research & Consulting Group Study (2000) (commissioned by the AICPA); *see generally* AICPA Letter (noting trend); *see also* Letter of W. Steve Albrecht, Professor and Associate Dean, Marriott School of Management, Brigham Young University (Aug. 29, 2000) (noting trends and expressing concern that the proposal regarding non-audit services would cause ''further and dramatic declines in the quality and quantity of students wanting to become accountants and auditors'' because the accounting field will be narrower).

[199] In the 1991–1992 academic school year, the firms hired 22,520 graduates with bachelor and master degrees in accounting. In 1995–1996, that number had fallen to 20,470. AICPA: Supply/Demand Study 1997 (''AICPA Supply/Demand Study'') presented to the O'Malley Panel (Aug. 31, 1999).

[200] *See, e.g.,* Arthur Andersen Letter; KPMG Letter; Testimony of Joseph F. Berardino, Managing Partner, Assurance and Business Advisory Services, Arthur Andersen (Sept. 20, 2000).

[201] *See* Testimony of David A. Brown, QC, Chair, Ontario Securities Commission (Sept. 13, 2000) (''[F]irms will continue to have difficulty recruiting new talent for the audit department, particularly if new recruits get a sense that other areas of the firm are more highly valued by firm management. . . . I think [the difficulty of recruiting on the audit side is] a very real issue, but I think the issue is clearly exacerbated by the messages being telegraphed to young recruits, and that is that there's a faster partnership track on the consulting side.'').

[202] We also cannot overlook the extent to which the challenge of recruiting auditors partially may be a result of the firms' own business decisions. As the General Counsel of Andersen Consulting testified at our hearings, ''Some of the firms have diverted investment and resources out of the audit function and into non-audit services, thereby reducing the attractiveness of the audit function as a career path.'' Testimony of Douglas Scrivner, General Counsel, Andersen Consulting (Sept. 20, 2000); Letter of John S. Coppel, CPA, CFO, Electric Power Equipment Company (Aug. 16, 2000) (''Promising young staff are exiting the audit area, the professions['] most important training ground, after a[ss]essing accurately, that career growth opportunities lie elsewhere within the practice.'').

[203] Testimony of Dennis Paul Spackman (Sept. 13, 2000).

[204] *Id.* (''The profession to a great extent is doing it to itself and it's doing it when it gives up audits in very competitive low ball kinds of bidding processes.''); *see also* Testimony of Thomas Goodkind, CPA (Sept. 13, 2000) (stating, in response to a question from Chairman Levitt about why the profession is having a hard time recruiting auditors, ''They're not offering enough money'').

[205] W. Steve Albrecht & Robert J. Sack, *Accounting Education: Charting the Course Through a Perilous Future* 9 (Aug. 2000).

[206] *Id.* (showing that the number of accounting degrees awarded in the 1998–99 academic year declined 20% compared to those awarded in the 1995–96 academic year). There has been a general decline in students seeking bachelor degrees in business-related fields. *See* AICPA Supply Demand/Study 1997, *supra* note 199, which indicates that from 1992 to 1997, the number of students obtaining bachelor degrees in accounting declined by 14%, those obtaining finance degrees declined by 17%, those obtaining general business degrees declined by 8%, and those obtaining marketing degrees declined by 27%.

lift the public perception of the profession to a higher plane and convincingly demonstrate the worth of the profession. This is an effort that will require a partnership among audit firms, professional societies and the academic community.[207]

Finally, our revised rules on investments may assist the accounting profession in addressing their difficulties in recruiting and retaining professionals. In particular, by, among other things, significantly shrinking the circle of accounting firm employees to whom restrictions on investments in audit clients apply, the final rules will allow more accountants to take greater advantage of investment opportunities, and therefore, may make the accounting profession more attractive.[208]

c. *The Rules Need Not Lead to Restructurings.* Some commenters said that our proposals, if adopted, would require accounting firms to restructure their business by, for example, spinning off their consulting practices.[209] It was not, and is not, our intention to cause any firms to restructure. In any event, we remain skeptical of the claim that our rules will be the cause of wholesale restructuring of the accounting profession. Before we proposed these amendments, three of the Big Five firms had either consummated or announced their intention to enter into transactions that would separate their auditing and consulting practices,[210] and other firms undertook restructurings while the proposals were pending. That suggests that reasons, apart from this rulemaking, prompted those business decisions. Indeed, one industry leader commented that his firm was splitting off its consulting business and ''it wasn't done for cultural reasons, it was done for different business reasons than that, and it certainly wasn't done for independence issues.''[211]

Moreover, while a few commenters asserted that accounting firms will sell their consulting practices if we adopt a final rule, they did not provide us with any basis beyond assertion for evaluating their comments. While it would have been preferable to have information describing the economic impact of the proposed rules upon them, these commenters have not elaborated on the claim.[212]

Without information supporting it, the argument that firms will sell off their consulting practices solely because they cannot provide certain consulting services to audit clients seems similarly questionable. As noted in the Proposing Release, while firms will be prevented from providing some consulting services to their audit clients, they will gain potential clients from other firms who are similarly situated.[213] Even assuming some accounting firms will lose the ability to market their consulting services based on asserted synergies with their audit services, no other firm will be better situated. Every consulting firm, including non-accounting firms, will have to compete for consulting business on the same footing.

8. The Final Rules Will Apply to Small Accounting Firms Only if They Have SEC Audit Clients

The final rule applies only to public companies and other entities registered with the Commission or otherwise required to file audited financial statements with the Commission. It does not apply to audits of financial statements not required to be filed with us. Big Five firms audit the vast majority of the financial statements of public companies. Data from the SECPS public files indicate that, in 1999, non-Big Five firms earned less than one percent of their annual revenues from consulting services provided to public company audit clients.[214] Consequently, we believe there will be only an incidental impact on accounting firms that provide audit and non-audit services principally to audit clients that are private companies not registered with the SEC.

We received many letters from small accounting firms expressing strong support for our proposal,[215] and the National Conference of CPA Practitioners, a national organization comprised of 1,200 member firms that represent 5,000 CPAs and service between 400,000 and 500,000 small and medium sized business clients, similarly wrote to express support for the proposal.[216] Indeed, some commenters pointed out that rather than harming the interests of the small practitioners, the rules could provide smaller firms with new business opportunities to provide non-audit services to companies that previously used their auditors to provide those services.[217]

Some commenters expressed concern about a possible derivative effect of our rule amendments on smaller or regional accounting firms that provide audit and non-audit services solely or principally to private companies.[218] The concern is that state boards of accountancy, which regulate and license certified public accountants, may adopt rules analogous to our own for all accountants in their jurisdiction without regard to whether the companies to which they provide non-audit services are public or private companies.[219] This certainly is not our intention. Our concern throughout this rulemaking has been with investors in public companies and the public securities markets.

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[207] O'Malley Panel Report, *supra* note 20, ¶¶ 8.9, 8.10.

[208] *See* Written Testimony of Testimony of Jack Ciesielski, accounting analyst (July 26, 2000); ''Where Have All the Accountants Gone?'' *Bus. Wk.*, at 203 (Mar. 27, 2000) (noting that in addition to competition from corporations and startups and increasing college requirements, ''also to blame, many are beginning to argue, are regulations that govern auditors' ability to invest in stocks,'' and that the firms ''are having a much harder time addressing the biggest retention problem they face today: regulatory restrictions on stock ownership.'').

[209] *See generally* Deloitte & Touche Letter.

[210] *See supra* Section III.B.

[211] Testimony of Stephen G. Butler, Chief Executive Officer, KPMG LLP (Sept. 21, 2000).

[212] Because we believed that it would have been useful to have additional data concerning the revenue mix of accounting firms, as well as the extent to which fees to audit clients for non-audit services exceed fees for audits, we solicited comment on revenue data. In addition, SEC Commissioner Isaac C. Hunt, Jr. informed the Big Five firms that these data would help the Commission in its deliberations. *See* Transcript of July 26 hearing for questions of Commissioner Isaac C. Hunt, Jr. posed to Joseph F. Berardino, Managing Partner, Assurance and Business Advisory Services, Arthur Andersen LLP, Robert R. Garland, National Managing Partner, Assurance & Advisory Services, Deloitte & Touche, and J. Terry Strange, Global Managing Partner, Audit, KPMG LLP (July 26, 2000); *see also* Letters from Commissioner Isaac C. Hunt, Jr. to Joseph F. Berardino, Robert R. Garland, and J. Terry Strange (Aug. 18, 2000) and Letters from Commissioner Isaac C. Hunt, Jr. to Kenton J. Sicchitano, Global Managing Partner—Independence and Regulatory Affairs, PricewaterhouseCoopers LLP, and Mr. Robert Herdman, Vice Chair—AABS Professional Practice, Ernst & Young (Sept. 14, 2000). Counsel to Arthur Andersen LLP, Deloitte & Touche LLP and KPMG LLP indicated that some of these data might be provided by mid-September (Letter from John F. Olson, Gibson, Dunn & Crutcher LLP to Commissioner Isaac C. Hunt, Jr. (Sept. 1, 2000). However, no data were submitted by any of the five firms.

[213] *See* Albert B. Crenshaw, ''Breakup of Andersen Firm Approved,'' *Wash. Post,* at E3 (Aug. 8, 2000) (quoting former Arthur Andersen Chief Executive James Wadia).

[214] *See* Proposing Release, Table 4 in Appendix B.

[215] *See, e.g.,* Letter of Joseph F. Simontacci, CPA (Aug. 14, 2000); Letter of Leland D. O'Neal, CPA (Aug. 15, 2000); Letter of Danny M. Riddle, CPA (Aug. 16, 2000); Letter of Frank Chovanetz, CPA (Aug. 16, 2000).

[216] Letter of National Conference of CPA Practitioners (Sept. 25, 2000).

[217] Testimony of Larry Gelfond, CPA, CVA, CFE, former President of the Colorado State Board of Accountancy (Sept. 13, 2000); *see also* Letter of John Mitchell, CPA (Aug. 14, 2000).

[218] *See* Testimony of Harold L. Monk, Jr., Chairman of the PCPS Executive Committee, AICPA (Sept. 21, 2000); Letter of Peter J. Hackett, Clark, Schaefer, Hackett & Co. (July 25, 2000); Letter of Frank P. Orlando (July 28, 2000); Letter of Michael L. Toms, York, Neel and Co. (Aug. 16, 2000).

[219] *See, e.g.,* Testimony of Thomas J. Sadler, Past Chair, Washington State Board of Accountancy (Sept. 20, 2000); Letter of Mark A. Maurice, Chief Financial Officer, Avenir Group, Inc. (Aug. 15, 2000); Letter of Allan W. Nietzke, CPA (Sept. 23, 2000); Letter of Steven F. Farrel, CPA, ABV Gaither Rutherford & Co. LLP (Sept. 22, 2000); Letter of Honkamp Krueger and Co., P.C. (Sept. 22, 2000).

As we noted in the Proposing Release, the proposals were not intended to ''alter the relationship between federal and state authorities'' or to ''affect the ability of the states to adopt different regulations in those areas they currently regulate.'' Though several state boards suggested that our rules would have a high degree of influence over their state regulations,[220] other commenters pointed out that state boards of accountancy have a strong independent tradition.[221] We fully expect that the state boards will continue their practice of exercising independent judgment in determining the extent to which our rules should be imported into what may be a different context.

9. The Rules Take Into Account the Work of the ISB

During this rulemaking process, members of the ISB provided thoughtful and constructive comments and testimony.[222] We appreciate their commitment and professionalism in pursuing their mandate, and their work laid the foundation for our rulemaking. Several commenters requested that we defer to the ISB[223] with respect to financial and employment rules and scope of services rules,[224] while others stated their belief that the Commission is the appropriate body to act, and that we should act now.[225]

In crafting our rules, we were, and continue to be, mindful of the work of the ISB, and we give due regard to their requests for our guidance. For example, the ISB noted in ISB Standard No. 2 that the standard would not take effect until the SEC revises its rules on independence.[226] Importantly, public members of the ISB have stated that the Commission is the appropriate body to take action with respect to the scope of services issues, and have requested that we do so. As William T. Allen, Chairman of the ISB, stated at our public hearings, the scope of services issue is ''not well-suited for a board of our character. It's really a public policy choice that the government needs to make, I think. And that's, I think the view of us all.''[227] Similarly, Robert Denham, a public member of the ISB, stated, ''the Commission is uniquely well-suited to making the difficult public policy choices that are required to protect independence in an environment that has become increasingly complex.''[228] Mr. Denham also stated,

> As a public member of the ISB I have encouraged the Commission to exercise its authority in this area, because the Commission is the only entity able to balance and evaluate the difficult policy issues that are involved. I am comfortable that the rules proposed regarding scope of services represent a rational, coherent and thoughtful set of policies that will substantially improve protection for auditor independence.[229]

Manuel H. Johnson, another public member of the ISB, stated, ''I do feel it's important the SEC undertake a new rulemaking not only to strengthen the standards and guidance of the ISB but also to directly address in a timely fashion the difficult policy issues surrounding the proper scope of services appropriate for accounting firms charged with the trust of performing independent audits.''[230] We believe that these considerations, and our evaluation of the important public policy goals addressed by our rulemaking, require us to act.

10. The Final Rules Encourage International Efforts in This Area

Foreign companies increasingly seek to raise capital in the U.S. securities markets,[231] and holdings by U.S. investors of foreign company securities have risen. With the increasing globalization of the markets, regulators worldwide have been re-examining current regulatory requirements applicable to cross-border offerings. We, and regulators around the world, have an interest in promoting high quality international accounting, auditing, and independence standards, while at the same time preserving or enhancing existing investor protections.

We have been involved in and support efforts to raise the level and quality of information available to investors in connection with cross-border flows of capital, consistent with our mandate to protect investors. We worked on a project in which the International Accounting Standards Committee (''IASC'') developed the principal components of a core set of international accounting standards. Earlier this year, the International Organization of Securities Commissions (''IOSCO'')[232] announced that it completed its assessment of the IASC core set of standards, and recommended that its members allow multinational issuers to use the IASC standards, as supplemented by reconciliations,

[220] *See, e.g.,* Letter of Baxter Rice, President, California Board of Accountancy (Sept. 25, 2000); Letter of James E. Houle, CPA, Chair, Oregon Board of Accountancy (Sept. 24, 2000).

[221] *See, e.g.,* Testimony of K. Michael Conaway, Presiding Officer, Texas State Board of Public Accountancy (Sept. 20, 2000); Letter of William D. Baker, President, Arizona Board of Accountancy (Sept. 20, 2000).

[222] *See* Letter from Arthur Siegel, Executive Director, ISB (Aug. 31, 2000); Testimony of William T. Allen, John C. Bogle, Manuel H. Johnson, and Robert E. Denham (July 26, 2000).

[223] In this regard, we note that in FRR No. 50, we stated that we were not abdicating our responsibilities in this area and that our existing authority regarding auditor independence was not affected. ISB standards and interpretations do not take precedence over our regulations or interpretations. *See* FRR No. 50 (Feb. 18, 1998). In FRR No. 50, we also stated that ''[i]n view of the significance of auditor independence to investor confidence in the securities markets, the Commission also will review the operations of the ISB as necessary or appropriate and, within five years from the date the ISB was established, will evaluate whether this new independence framework serves the public interest and protects investors.'' *Id.* Some witnesses acknowledged that changes to the ISB structure, such as having a majority of public members, may benefit the process and enhance the public's perception of the Board as a body focused on the public interest and protecting investors. *See, e.g.,* Testimony of William T. Allen, Chairman of the ISB (July 26, 2000) (''[I]informally we have discussed whether or not it would be desirable to increase the public membership of the board to a majority. I don't think it would [change] the outcome of our deliberations, but I recommended that we consider doing that on the notion that it might help the perception of the world, thinking that perhaps we were compromising to get standards done.''); Testimony of Clarence Lockett, Vice President and Corporate Controller, Johnson & Johnson (Sept. 20, 2000) (''I believe that [having a majority of public members] would certainly go a long way in establishing that body in giving the appearance of greater independence from the profession of that body and its role in establishing independence.''); Testimony of Philip A. Laskawy, Chairman, Ernst & Young (Sept. 20, 2000); Written Testimony of James J. Schiro, Chairman and Chief Executive Officer, PricewaterhouseCoopers (Sept. 20, 2000); Testimony of John J. Costello, Senior Director of Litigation, Gursey, Schneider & Co., LLP (Sept. 20, 2000); *see also* the Memorandum by Shaun O'Malley, Chair of the O'Malley Panel, to the O'Malley Panel, dated Aug. 31, 2000, identifying the expansion of the public representation on the ISB as a ''major recommendation'' of the Panel.

[224] *See, e.g.,* KPMG Letter; AICPA Letter; Written Testimony of Philip D. Ameen, Philip B. Livingston, Roger W. Trupin, Financial Executives Institute (Sept. 20, 2000); Written Testimony of the New York State Society of Certified Public Accountants (Sept. 13, 2000).

[225] *See, e.g.,* Letter of Kayla J. Gillan, General Counsel, CalPERS (Sept. 25, 2000) (''While CalPERS supports the work of the [ISB], only this Commission has the legal authority and effective ability to weigh the competing public interests that are represented in this area and reach conclusions about the best way to protect shareowners and the integrity of the financial markets.'').

[226] ISB Standard No. 2, ''Certain Independence Implications of Audits of Mutual Funds and Related Entities,'' ¶ 5 (Dec. 1999).

[227] Testimony of William T. Allen, Chairman, ISB (July 26, 2000).

[228] Testimony of Robert E. Denham, Member, ISB (July 26, 2000).

[229] Written Testimony of Robert E. Denham (July 26, 2000).

[230] Testimony of Manuel H. Johnson, Member ISB (July 26, 2000).

[231] During 1999, approximately 120 foreign companies from 26 countries entered our markets for the first time. At year-end, there were over 1,200 foreign companies from 57 countries filing reports with us, and public offerings by foreign companies totaled over $244 billion. SEC, *Annual Report,* at 76 (1999).

[232] IOSCO is an association of securities regulatory organizations and has over 100 members. *See* IOSCO Annual Report (1999), App. III.

disclosure and interpretation where necessary.[233] In order to determine whether and under what conditions we should accept financial statements of foreign issuers using the IASC standards, earlier this year we issued a Concept Release on International Accounting Standards, seeking comment on the necessary elements of a high quality global financial reporting framework that also upholds the high quality of financial reporting domestically.[234] In addition, last year, we amended our non-financial statement disclosure requirements for offerings by foreign issuers to conform to the international disclosure standards adopted by IOSCO in 1998.[235]

The International Federation of Accountants (''IFAC''), in which the accounting profession participates actively, has several recent initiatives to establish global auditing standards.[236] Most recently, the IFAC Ethics Committee issued for comment an Exposure Draft proposing a framework for independence.[237] In the Exposure Draft, IFAC presents a conceptual or principle-based approach to addressing auditor independence. Some commenters on our proposal, particularly foreign-based firms and organizations such as the Federation Des Experts Comptables Europeens (''FEE''), suggested that we too adopt a conceptual approach, as opposed to a rules-based approach.[238] Several of these commenters argued that while a rules-based approach has certain advantages and is consistent with the historical U.S. approach, a conceptual approach, particularly in the area of non-audit services, is more efficient and flexible.[239]

We understand that many regulators do not agree with the conceptual approach,[240] and several foreign countries prohibit certain non-audit services though standards vary from country to country.[241] Standards vary for a number of reasons, including that in some countries, audits are conducted by statutory auditors who are directly responsible to shareholders, and in some cases audits may be conducted for other than financial reporting purposes.

We believe that our final rules combine important and useful elements of both approaches. As noted, Rule 2–01(c) does not set forth all circumstances that may impair an auditor's independence from its audit client. For other services, and in particular future services, the Preliminary Note makes clear that in applying the general standard in Rule 2–01(b), we will look in the first instance to the four factors. The four factors provide guiding principles for the Commission, similar to what a ''conceptual approach'' would provide.

We recognize that our system of regulation is not universal. We have worked, and will continue to work closely, both directly and through IOSCO, with our foreign counterparts on the important issue of auditor independence.

D. It Is Appropriate To Ease Restrictions on Financial and Employment Relationships

In our approach to financial and employment relationship restrictions, we have attempted to draw lines that promote investor confidence but recognize the problems confronting dual career families and employees of huge accounting firms. Specifically, in the investment and employment area, we have adopted investment and employment rules that allow auditors to maximize the opportunities available to them, while promoting the public interest and protecting investor confidence.

As noted in the Proposing Release and above, there have been significant demographic changes, changes in the accounting profession, and changes in the business environment that have affected accounting firms. Among other things, there has been an increase in dual-career families and an ever-increasing mobility among professionals. Accounting firms have expanded internationally. Most SEC registrants now have their financial statements audited by firms that have offices and professionals stationed in hundreds of cities around the globe, and many of those offices and professionals have no connection to, or influence over, a company's audit.

The current rules on financial and employment relationships of auditors were developed largely when the accounting firms were smaller and less diversified. The trends discussed above, and others, have highlighted the need for us to effect a modernization in these areas. In particular, the current rules describing the financial and employment relationships that an audit partner's spouse could have with a firm's audit client called for modernization. For example, under the current rules, the spouse of a partner at an accounting firm could not hold certain positions at an audit client or stock in an audit client, even through an employee stock compensation or 401(k) plan, even if the partner had no connection to the audit. In light of the trends noted above, including the growth in dual-career families, we sought to address this and similar situations.

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233 IOSCO, Press Release, IASC Standards (May 17, 2000), available at www.iosco.org/iosco.html.

234 ''International Accounting Standards,'' Securities Act Rel. No. 7801 (Feb. 16, 2000) [65 FR 8,896].

235 ''International Disclosure Standards,'' Exchange Act Rel. No. 41936 (Sept. 28, 1999) [64 FR 53,900].

236 The Institute of Management Accountants, the AICPA, and the National Association of State Boards of Accountancy are members of IFAC.

237 IFAC Ethics Committee, *Independence: Proposed Changes to the Code of Ethics for Professional Accountants* (Exposure Draft: Sept. 15, 2000).

238 *See, e.g.,* Letter of Horst Kaminski, German Institut der Wirtschaftsprufer (Institute of Certified Public Accountants) (Sept. 18, 2000); Letter of Ernst & Young (UK practice) (Sept. 7, 2000); Testimony of Jack Maurice, Member of Ethics Working Party, Federation des Experts Comptables Europeens (Sept. 21, 2000).

239 *See, e.g.,* Letter of Mike Rake, Chairman, KPMG Europe (Sept. 22, 2000); Letter of Ernst & Young (UK practice) (Sept. 7, 2000).

240 *See* Letter from Phillipe Danjou, COB, to Lynn Turner, Chief Accountant, SEC (Oct. 10, 2000) (''I can assure you that many regulators in Europe (mainly continental Europe) do not agree with FEE's [conceptual] approach and have made their views known to the European commission when it started its consultation on the proposed Recommendations on statutory auditors' independence. I wrote a letter to Karel Van Hulle, Head of Unit, European Commission, to make clear that COB is not ready to accept a purely conceptual system without clear prohibitions.'').

241 *Id.* (noting that France, Germany, Italy, Spain, Belgium and others presently have a system based primarily on specific prohibitions of non-audit services, with exceptions for special circumstances). *See also* Letter from Michel Prada, President, COB, to Marilyn Pendergast, Chairman, Ethics Committee, IFAC (Sept. 15, 2000) (commenting on IFAC's Exposure Draft and noting that ''we believe that the thrust of the exposure draft should be reversed from an 'allowed if * * *' system to a 'forbidden except when * * *' system. The proposed change from a prescriptive approach to a framework approach is flawed by the absence of a clear definition of an auditor's unique role and position''). In Australia, securities regulators recently settled a case with one of the Big Five firms where the firm agreed to undertakings that restrict its ability to provide certain non-audit services. For example, one of the covenants is that the firm agreed not to ''accept an audit engagement where [the firm] has valued an asset and the valuation is material to the audit engagement. The valuation constitutes a service which is a barrier to the firm's ability to provide an independent audit opinion on the client's financial statements.'' Media Release, Australia Securities and Investments Commission (Nov. 2, 2000), available at www.asic.gov.au. *See also Staff Report, supra* note 74, at Appendix II; Michael Firth, ''The Provision of Nonaudit Services by Accounting Firms to their Audit Clients,'' *Contemporary Accounting Research* Vol. 14, No. 2, pp. 1–21 (Summer 1997). With respect to a recognized need by foreign regulators to take some type of regulatory action in this area, *see* Testimony of David A. Brown, Q.C., Chair, Ontario Securities Commission (Sept. 13, 2000) (noting that for over a year, the Ontario Securities Commission has publicly raised concerns about the issue of auditor independence, and that ''[a]lthough we've not begun to frame a regulatory solution, it has become increasingly evident in Canada that some form of regulatory involvement in a solution will be essential.'').

Accordingly, we are adopting final rules that, among other things, reduce the pool of people within audit firms whose independence is required for an independent audit of a company and shrink the circle of family members whose employment by an audit client impairs an accountant's independence. As noted above, we are adopting these changes not because doing so will itself enhance independence, but because the current rules are broader than necessary to protect investors and our securities markets.

IV. Discussion of Final Rules

A. The Preliminary Note

We have included a Preliminary Note to Rule 2–01 that explains the Commission's approach to independence issues. Rule 2–01 does not purport to, and the Commission could not, consider all circumstances that raise independence concerns. The Preliminary Note makes clear that, in applying the standard in Rule 2–01(b), the Commission looks in the first instance to whether a relationship or the provision of a service:

(a) creates a mutual or conflicting interest between the accountant and the audit client; [242]

(b) places the accountant in the position of auditing his or her own work; [243]

(c) results in the accountant acting as management or an employee of the audit client; or [244]

(d) places the accountant in a position of being an advocate for the audit client.[245]

These factors are general guidance and their application may depend on particular facts and circumstances. Nonetheless, we believe that these four factors provide an appropriate framework for analyzing auditor independence issues. We had proposed to include these four factors in the general standard of Rule 2–01(b). While some commenters agreed with including the four principles in the rule,[246] others did not. Some commenters believed that the principles were too general and difficult to apply to particular situations.[247] Others suggested that the principles should more appropriately be used as ''guide posts'' and included in a preamble instead of in the rule text.[248]

While the principles were derived from current independence requirements, because of these concerns, we are including them in the Preliminary Note. In the context of this Preliminary Note, the four factors play a role comparable to that of the Ethical Considerations in the American Bar Association's Model Code of Professional Responsibility. The Model Code contains three separate but interrelated parts.[249] Ethical Considerations ''represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.''[250] Like those Ethical Considerations, the four principles constitute a body of principles to which accountants and audit committees can look for guidance when an independence issue is raised that is not explicitly addressed by the final rule.

The Preliminary Note states that ''these factors are general guidance only and their application may depend on particular facts and circumstances.'' The Preliminary Note also reflects the notion that the influences on auditors may vary with the circumstances and, as a result, Rule 2–01 provides that the Commission will consider all relevant facts and circumstances in determining whether an accountant is independent.

B. Qualifications of Accountants

Rule 2–01(a) remains unchanged and requires that in order to practice before the Commission an auditor must be in good standing and entitled to practice in the state of the auditor's residence or principal office. This requirement has existed since the Federal Trade Commission first adopted rules under the Securities Act.[251] It acknowledges our deference to the states for the licensing of public and certified public accountants.

C. The General Standard for Auditor Independence

Our rule provides a general standard of auditor independence as well as specifying circumstances in which an auditor's independence is impaired. As to circumstances specifically set forth in our rule, we have set forth a bright-line test: an auditor is not independent if he or she maintains the relationships, acquires the interests, or engages in the transactions specified in the rule. In identifying particular circumstances in which an auditor's independence is impaired, we have taken into account the policy goals of promoting both auditor objectivity and public confidence that auditors are unbiased when addressing all issues encompassed within the audit engagement. We have also taken into account the value of specificity, and we have tried to give registrants and accountants substantial guidance and predictability. The particular circumstances that are set forth in our rule as impairing independence are those in which, in our judgment, it is sufficiently likely that an auditor's capacity for objective judgment will be impaired or that the investing public will believe that there has been an impairment of independence.

Circumstances that are not specifically set forth in our rule are measured by the general standard set forth in final Rule 2–01(b). Under that standard, we will not recognize an accountant as independent with respect to an audit client if the accountant is not, or if a reasonable investor knowing all relevant facts and circumstances would conclude that the accountant is not, capable of exercising objective and impartial judgment on all issues encompassed within the accountant's engagement.[252]

The general standard in paragraph (b) recognizes that an auditor must be independent in fact and appearance. Some commenters suggested that the

[242] *See, e.g.,* Codification §§ 601.01 and 601.04.

[243] *See, e.g.,* Codification § 602.02.c.i.

[244] *See* Rule 2–01(b), 17 CFR 210.2–01(b) (accountant cannot act as ''director, officer or employee'' of audit client and remain independent for purposes of Regulation S–X); Codification §602.02.d.

[245] *See, e.g., Arthur Young,* 465 U.S. at 819 n.15; Codification §§ 602.02.e.i and ii.

[246] *See supra* note 15.

[247] *See supra* note 16; *see also* Written Testimony of Dan L. Goldwasser, Vedder, Price, Kaufman & Kammholz (July 26, 2000) (while acknowledging that ''these concepts are not novel and can be found throughout the audit literature,'' stating that they ''should not be adopted as guiding principles to be invoked each time a novel situation is encountered.'').

[248] *See, e.g.,* Testimony of K. Michael Conaway, Presiding Officer, Texas State Board of Accountancy (Sept. 20, 2000) (''[W]e would ask that [the four principles] be better placed in a preamble or a guidance document.''); Testimony of Clarence E. Lockett, Vice President and Corporate Controller, Johnson & Johnson (Sept. 20, 2000) (''[W]e do not believe the four governing principles should be stated as firm rules [but rather] be part of the framework and serve [as] guiding principles.'').

[249] Thomas D. Morgan and Ronald D. Rotunda, eds., The Model Code of Professional Responsibility (1995).

[250] *Id.* at Preliminary Statement (citing ''Professional Reponsibility: Report of the Joint Conference,'' 44 A.B.A.J., at 1159 (1958)).

[251] Federal Trade Commission, *Rules and Regulations Under the Securities Act of 1933,* art. 14 (July 6, 1933).

[252] *Cf. Staff Report, supra* note 74, at 12–16. *See also* SEC, *Tenth Annual Report of the Securities and Exchange Commission,* at 205–207 (1944), which states:

[T]he Commission has found an accountant to be lacking in independence with respect to a particular registrant if the relationships which exist between the accountant and the client are such as to create a reasonable doubt as to whether the accountant will or can have an impartial and objective judgment on the questions confronting him.

use of an appearance-related standard departs from current rules.[253] As discussed above and in the Proposing Release, the Commission, courts, and the profession have long recognized the importance of the appearance of independence.[254]

Moreover, the general standard we are adopting merely reflects the different means of demonstrating a lack of objectivity. Objectivity is a state of mind,[255] and except in unusual circumstances, a state of mind is not subject to direct proof.[256] Usually, it is demonstrated by reference to circumstantial evidence. Accordingly, the final rule is formulated to indicate that an auditor's independence is impaired either when there is direct evidence of subjective bias, such as through a confession or some way of recording the auditor's thoughts, or when, as in the ordinary case, the facts and circumstances as externally observed demonstrate, under an objective standard, that an auditor would not be capable of acting without bias.

The appearance standard incorporated in the general standard is an objective one. Appearance is measured by reference to a reasonable investor. The ''reasonable person'' standard is embedded in the law generally. In particular, the ''reasonable investor'' standard is reflected in the concept of materiality under the federal securities laws.[257]

Commenters expressed concern that a general standard based on the conclusion of a ''reasonable investor'' may have some imprecision. They urged that the general standard require only independence ''in fact.'' We believe, however, that we have reduced imprecision substantially by describing in some detail particular circumstances that give rise to an impairment of independence. Moreover, reliance solely on independence ''in fact'' would increase the imprecision beyond a ''reasonable investor'' test, because independence ''in fact'' is essentially an inquiry into the subjective workings of the accountant's mind, whereas a ''reasonable investor'' test relies on observable circumstances and is thus better suited to uniform and consistent application.

We recognize that there is an irreducible degree of imprecision in the notion of independence. We will be mindful of this imprecision, and the range of reasonable views that it engenders, in applying the auditor independence rules. We do not, for example, seek to discourage the development of non-audit services that do not raise independence issues. In considering our response to services not explicitly covered by these rules, we will take into account the nature of the service, prior contacts with the staff, relevant public statements by the Commission or staff, and any related professional literature.

Paragraphs (c)(1) through (5) require the accountant to be independent during the ''audit and professional engagement period.''[258] This term is defined in Rule 2–01(f)(5) to mean the period covered by any financial statements being audited or reviewed, and the period during which the auditor is engaged either to review or audit financial statements or to prepare a report filed with us, including at the date of the audit report.[259] The use of the word ''during'' in paragraphs (c)(1) through (5) is intended to make clear that an accountant will lack independence if, for example, he or she is independent at the outset of the engagement but acquires a financial interest in the audit client during the engagement.

We have further confined the legal standard by including the explicit reference to ''all relevant facts and circumstances.'' To make this explicit, we have included the language in the rule text. We have also modified the language to refer to whether a reasonable investor would ''conclude'' as opposed to ''perceive'' that the accountant was not capable of exercising objective and impartial judgment. While this is not a substantive change, it makes clear that independence is an objective standard measured from the perspective of the reasonable investor.

Current Rule 2–01(c) provides that we will look to all relevant circumstances, including all relationships between the accountant and the audit client and not just those relating to reports filed with the Commission. We proposed to include this language in Rule 2–01(e). Under the adopted rule, however, the language appears in Rule 2–01(b) in order to highlight that in applying the general standard in Rule 2–01(b), we will consider ''all relevant circumstances.''

We remind registrants and accountants that auditor independence is not just a legal requirement. It is also a professional and ethical duty. That duty requires auditors to remain independent of audit clients,[260] and includes an obligation to ''avoid situations that may lead outsiders to doubt [the auditor's] independence.''[261]

In certain situations, whether or not legally required, the best course may be for the accountant to recuse himself or herself from an audit engagement. On occasion, there may be a relationship, apart from those contemplated by any standard or rule, that has an important meaning to an individual accountant and could create, or be viewed by a reasonable investor with knowledge of all relevant facts and circumstances as creating, a conflict with the accountant's duty to investors.[262] In this and any similar situation, we encourage accountants to seek to recuse themselves from any review, audit, or attest engagement, whether or not specifically required by the Commission's, the ISB's, or the profession's rules.

D. Specific Applications of the Independence Standard

Rule 2–01(c) ties the general standard of paragraph (b) to specific applications. Paragraphs (c)(1) through (c)(5) address separately situations in which an accountant is not independent of an

[253] *See, e.g.,* KPMG Letter.

[254] *See, supra* note 38–40; Proposing Release, Section II.B.

[255] *See, supra* note 39.

[256] *See, United States* v. *Gamache,* 156 F.3d 1, 8 (1st Cir. 1998) (''Now, undoubtedly, establishing intent, short of a situation in which it is admitted, is difficult and usually depends on the use of circumstantial evidence.'').

[257] *See TSC Industries, Inc.* v. *Northway, Inc.,* 426 U.S. 438, 449 (1976) (information is material if it would be ''viewed by the reasonable investor as having significantly altered the 'total mix' of information made available''); *Basic, Inc.* v. *Levinson,* 485 U.S. 234–236 (1988).

[258] *See also* AICPA Code of Professional Conduct, ET § 101.02 (revised Feb. 28, 1998).

[259] Rule 2–01(f)(5) states that the engagement period ends when the registrant or accountant notifies the Commission that the registrant is no longer the accountant's audit client. This notice typically would occur when the registrant files with the Commission a Form 8–K with disclosures under Item 4 ''Changes in Registrant's Certifying Accountant.'' In some cases, however, a Form 8–K is not required, such as when the registrant is a foreign private issuer or when the audited financial statements of a non-reporting company are filed upon its acquisition by a public company. Notification to the Commission in these cases would occur by the filing of the next audited financial statements of the foreign private issuer or the successor corporation. Registrants or auditors in these situations, however, may provide earlier notice to the Commission on Form 6–K or by other appropriate means.

[260] *See* AICPA SAS No. 1, Au § 220.03; AICPA Code of Professional Conduct, ET § 101. Of course, accountants also have to comply with applicable state law on independence. *Id.*

[261] AICPA SAS No. 1, AU § 220.03.

[262] *Cf. AUSA Life Ins. Co.* v. *Ernst & Young,* 206 F.3d 202, 205 (2d Cir. 2000) (noting ''E&Y's failure lay in the seeming spinelessness'' of the audit engagement partner and that ''[p]art of the problem was undoubtedly the close personal relationship between'' that partner and the company's chief executive officer, a former co-partner in the firm) (quoting 991 F. Supp. 234, 248 (S.D.N.Y. 1997) (district court opinion)).

audit client because of certain: (1) financial relationships, (2) employment relationships, (3) business relationships, (4) transactions or situations involving the provision of non-audit services, or (5) transactions or situations involving the receipt of contingent fees.[263]

The proposed rule included a provision under which an accountant's independence would have been impaired if the accountant had any of the relationships or provided any of the services described by proposed Rule 2–01(c), or ''otherwise [did] not comply with the standard'' of paragraph (b). We have eliminated from the text of the rule the language regarding the accountant's failure ''otherwise'' to comply with the standard. Instead, we have modified the structure of paragraph (c) to make clear that the paragraph sets forth a ''non-exclusive specification of circumstances'' that are inconsistent with the standard of paragraph (b).

1. Financial Relationships

Rule 2–01(c)(1) sets forth the general rule regarding financial relationships that impair independence. It addresses, among other things, direct or material indirect investments, trustee positions involving investment decision-making authority, investments in common with audit clients, debtor-creditor relationships, deposit accounts, brokerage accounts, commodity accounts, and insurance policies.

Rule 2–01(c)(1) contains the general standard that ''[a]n accountant is not independent if, at any point during the audit and professional engagement period, the accountant has a direct financial interest or a material indirect financial interest in the accountant's audit client.'' The rule then specifies certain financial interests that constitute a direct or material indirect financial interest in an audit client. As the rule indicates, the list of specified interests is not intended to be exclusive. The specified interests represent common types of financial interests that impair independence, but the effect of other types of financial interests on auditor independence will be determined under the general standards of paragraphs (b) and (c)(1).

In applying the financial relationship provisions of the rule, it is important to bear in mind the definition of ''audit client.'' ''Audit client,'' when used in the rule, includes some ''affiliate[s] of the audit client,'' as that term is defined in the rule.[264] Accordingly, financial relationships with certain affiliates of audit clients are subject to the provisions of Rule 2–01(c)(1). In this discussion, as well as in the rule, references to ''audit client'' should be understood to include the appropriate affiliates of the audit client.

For the most part, the specified financial interests described in this section of the rule impair independence only if they are financial interests of the accounting firm, covered persons in the firm, or immediate family members of covered persons. (The exception concerns situations involving beneficial ownership of more than five percent of an entity, or control of an entity.) This represents a liberalization from prior restrictions that generally reached all partners in the firm regardless of whether they had any relationship to the audit of the particular client.

While the comments we received reflected widespread (although not universal) agreement with our goal of modernizing the financial relationships restrictions, some commenters urged us not to liberalize these restrictions to the extent we proposed. Generally, these commenters argued in favor of the prophylactic value of a rule precluding a broader scope of persons from having a financial interest in an audit client of the firm.[265] Several of these commenters also spoke of the importance of a firm culture that treats all clients as clients of the firm, and in which the firm can call on any partner to assist with the audit of any client on short notice without having to consider whether the partner's personal financial interests preclude it.[266]

On the other hand, some commenters, while agreeing generally with our proposal to scale back the scope of persons whose financial interests are restricted, advocated that we further narrow the group of persons who are included in the restrictions. These commenters generally expressed a preference for a ''tiered'' approach that would restrict even fewer people with respect to some types of financial interests.[267]

The balance we struck between these two sets of concerns was viewed favorably by many commenters.[268] We believe that fair, meaningful, and relevant independence rules concerning financial relationships should reflect a calibrated approach to determining what specific relationships realistically give rise to independence concerns. After considering the comments we received, we have drawn the lines essentially where we proposed—''covered persons in the firm'' and their immediate family members—though we have modified slightly the definition of ''covered persons'' in the firm.[269] The final rule, like the proposed rule, would attribute all investments by a covered person's ''immediate family members,'' that is, the covered person's spouse, spousal equivalent, and dependents, to the covered person.

a. *Investments in Audit Clients.* Rule 2–01(c)(1)(i) describes investments that impair an accountant's independence as to a particular audit client. Paragraph (A) provides that an accountant is not independent of an audit client if the accounting firm, any covered person in the firm, or any immediate family member of any covered person has a ''direct investment''—such as stocks, bonds, notes, options, or other securities—in the audit client. As the language of the rule makes clear, this is not an exclusive list of all ownership interests subject to the rule. Other than with respect to the scope of persons encompassed by the rule, paragraph (A) does not represent any substantive change to our rules on direct investments.

We noted in the Proposing Release that ''as under current law, the rule cannot be avoided through indirect means.''[270] We stated, as an example, that an accountant precluded from having a direct investment in an audit client could not evade that restriction by

[263] A number of the specified situations are based on examples in the Codification and the AICPA and SECPS membership rules.

[264] *See infra* Sections IV.H.3 and IV.H.5, for detailed discussions of the definitions of ''audit client'' and ''affiliate of the audit client.'' As explained below, the affiliates of the audit client that are deemed to included in the term ''audit client'' for purposes of the financial relationship provisions in paragraph (c)(1)(i) are more limited than the group included in other parts of the rule.

[265] *See, e.g.,* Written Testimony of Thomas M. Rowland, Senior Vice President, Fund Business Management Group, Capital Research and Management Company (Sept. 20, 2000) (restrictions should extend to persons in the firm beyond the scope of ''covered persons''); Letter of John Spadafora (June 28, 2000) (Narrowing the scope of persons whose investments are restricted ''is another step backwards creating temptations to pass inside information to those whose investments are not restricted.'').

[266] *See, generally*, Written Testimony of J. Michael Cook, former Chairman and Chief Executive Officer, Deloitte & Touche (July 26, 2000); Testimony of Ray J. Groves, former Chairman and Chief Executive Officer of Ernst & Young (July 26, 2000).

[267] *See, e.g.,* Ernst & Young Letter.

[268] *See, e.g.,* Written Testimony of William R. Kinney, Jr., Professor, University of Texas at Austin (Sept. 20, 2000) (proposed changes will ''reduce aggregate regulatory compliance without affecting audit quality or increasing independence impairment risk for investors''); Testimony of Robert L. Ryan, Chief Financial Officer, Medtronic, Inc. (Sept. 20, 2000) (proposed financial relationship rules are ''logical, less bureaucratic, and we're completely in agreement'').

[269] *See infra* Section IV.H.9 for a detailed discussion of the definition of ''covered persons in the firm.''

[270] Proposing Release, Section III.C.1(a) citing Codification § 602.02.b.ii (Example 1).

investing in the client through a corporation or as a member of an investment club.[271] Some commenters proposed that we address that issue with specific rule text, and they proposed language.[272] While not adopting the language proposed by commenters, we have, in the interest of increased clarity, included in the final rule language addressing that issue.

Specifically, we have added the proviso that an investment through an intermediary shall constitute a ''direct investment'' in the audit client if either of two conditions is satisfied: ''(1) The accounting firm, covered person, or immediate family member, alone or together with other persons, supervises or participates in the intermediary's investment decisions or has control over the intermediary; or (2) The intermediary is not a diversified management investment company . . . and has an investment in the audit client that amounts to 20% or more of the value of the intermediary's total investments.'' If either of these criteria is satisfied, the investment is treated as a direct investment in the audit client and, therefore, impairs independence. If an investment through an intermediary does not satisfy either of these two criteria, however, the investment is considered ''indirect,'' and it impairs independence only if it crosses one of the thresholds set out in Rule 2–01(c)(1)(i)(D) or (E).

Rule 2–01(c)(1)(i)(B) provides that an accountant is not independent when ''[a]ny partner, principal, shareholder, or professional employee of the accounting firm, any of his or her immediate family members, any close family member of a covered person in the firm, or any group of the above persons has filed a Schedule 13D or 13G [273] [] with the Commission indicating beneficial ownership of more than five percent of an audit client's equity securities, or controls an audit client, or a close family member of a partner, principal, or shareholder of the accounting firm controls an audit client.'' Paragraph (B) is the only one of the financial relationship provisions that specifically encompasses a range of persons beyond covered persons and their immediate family members. The broader scope of coverage under paragraph (B) is based on the view that when a financial interest in an audit client of the firm becomes particularly large, the fact that the person holding that interest is distanced from the audit engagement no longer sufficiently mitigates the potential for a conflict.

We have made one substantive addition to the proposed paragraph (B). We have added at the end of the paragraph the clause ''or a close family member of a partner, principal, or shareholder of the accounting firm controls an audit client.'' This provision identifies additional circumstances that impair independence, beyond the circumstances in our proposed rule.[274] For instance, this provision would provide that independence is impaired when the sister or parent of a partner in the firm who is not a covered person controls an audit client. We agree that the circumstances described by this provision would result in an impairment of independence. In addition, we note that this provision is consistent with existing rules.[275]

Rule 2–01(c)(1)(i)(C) provides that an accountant is not independent when ''[t]he accounting firm, any covered person in the firm, or any of his or her immediate family members, serves as voting trustee of a trust or executor of an estate containing the securities of an audit client, unless the accounting firm, covered person in the firm or immediate family member has no authority to make investment decisions for the trust or estate.'' Because a trustee or executor typically has a fiduciary duty to preserve or maximize the value of the trust's or estate's assets, we believe it is appropriate to treat the trustee's or executor's interest as a direct financial interest in the audit client and to deem the auditor's independence impaired. We understand, however, that a person might serve as a trustee or executor without having any authority to make investment decisions for the trust or estate. Because we see no reason to consider an auditor's independence impaired in those circumstances, we have added the proviso at the end of paragraph (C) to include an exception for those circumstances.

Rule 2–01(c)(1)(i)(D) covers material indirect investments in an audit client. The basic rule provides that an accountant is not independent when ''[t]he accounting firm, any covered person in the firm, any of his or her immediate family members, or any group of the above persons has any material indirect investment in an audit client.'' This provision carries over the existing proscription on material indirect investments in audit clients.[276]

At the proposing stage, paragraph (D) included two examples of what would constitute a material indirect investment: (1) Ownership of more than five percent of an entity that has an ownership interest in the audit client, and (2) ownership of more than five percent of an entity in which the audit client has an ownership interest. A number of commenters, however, proposed eliminating those examples as unnecessarily restrictive and burdensome. We agree that the examples would have consequences beyond what we intended. Accounting firms may, through their pension plans or otherwise, acquire more than five percent stakes in other entities. In these situations, it may well be impracticable for an accounting firm regularly to monitor whether that entity has *any* financial interest in an audit client or whether an audit client has *any* financial interest in the entity.[277] Accordingly, we have omitted those examples in the final rule.

Because the material indirect investment rule is a general standard, we have also decided to include one additional provision to clarify the meaning of ''material indirect investment'' in the context of mutual fund investments. Specifically, the rule makes explicit that the term ''material indirect investment'' does not include ownership by any covered person in the firm, any of his or her immediate family members, or any group of the above persons, of five percent or less of the outstanding shares of a diversified management investment company that invests in an audit client.[278] Consequently, the material indirect investment rules, as adopted, allow auditors to invest in management investment companies, provided that the company is diversified as defined under the Investment Company Act of 1940.[279] If an investment company is

[271] Proposing Release, Section III.C.1(a).

[272] *See* Ernst & Young Letter; PricewaterhouseCoopers Letter.

[273] 17 CFR 240.13d–101, 13d–102.

[274] *Cf.* Ernst & Young Letter; PricewaterhouseCoopers Letter (suggesting a similar provision for immediate family members of all partners in the firm).

[275] *See* Codification § 602.02.h (Examples 1 and 5).

[276] *See* former Rule 2–01(b).

[277] The analysis is different with respect to situations where the entity has a material investment in the audit client, or the audit client has a material investment in the entity. We address those situations in Rule 2–01(c)(1)(i)(E), discussed below.

[278] The term ''diversified management investment company'' refers to those entities meeting the definitions of ''management company'' and ''diversified company'' in Sections 4(3) and 5(b)(1) of the Investment Company Act, 15 U.S.C. §§ 80a–4(3) and 80a–5(b)(1).

[279] Under the Investment Company Act, a ''diversified'' management company must meet the following requirements: at least 75% of the value of its total assets is in cash, cash items, Government securities, securities of other investment companies, and other securities limited in respect

Continued

non-diversified under the Investment Company Act of 1940,[280] the company must disclose that fact in its prospectus. As a result, an accountant can easily determine by reviewing the prospectus whether the company is diversified for purposes of the rule. In addition, this provision does not constitute any substantive change from the proposed rule, because the general categories of examples in the proposed rule would have covered this situation. This provision is intended to ensure that all firm personnel and their family members can freely invest (up to the five percent cap) in diversified mutual funds that are not audit clients and are not part of an investment company complex that includes an audit client, without bearing the burden of constantly monitoring whether, and to what degree, those funds invest in an audit client's securities.[281]

We have not included accounting firms within this provision for two reasons. First, in contrast to most individual investors, accounting firms through their pension funds may invest large sums and, therefore, better access diversified investment vehicles, such as managed accounts that do not invest in their audit clients. At the same time, the large amounts that may be invested by an accounting firm, through its pension plan or otherwise, increase the chances that the indirect investment may be material to the audit client. This should not be understood, however, to prevent accounting firms from investing in diversified mutual funds. Rather, when they invest in such funds, they must comply with the general ''material indirect investment'' standard.

Second, at the suggestion of commenters,[282] we have included a new paragraph (E) that governs (1) investments in entities that invest in audit clients (''intermediary investors'') and (2) investment in entities in which audit clients invest (''common investees''). We have decided to codify in our rule the substance of the existing AICPA restrictions applicable to those situations.[283] We have codified those restrictions in paragraph (c)(1)(i)(E).

Paragraph (E), like the AICPA rule, is framed in terms of material investments and the ability to exercise significant influence over an entity.[284] In the case of an intermediary investor, paragraph (E) provides that an accountant is not independent if the firm, a covered person, or an immediate family member of a covered person has either (1) a direct or material indirect investment in an entity that has both an investment in an audit client that is material to that entity and the ability to exercise significant influence over the audit client,[285] or (2) the ability to exercise significant influence over an entity that has the ability to exercise significant influence over an audit client.[286]

In the case of a common investee, paragraph (E) provides that an accountant is not independent if the firm, a covered person, or an immediate family member of a covered person has either (1) a direct or material indirect investment in an entity in which an audit client has a material (to the audit client) investment and over which the audit client has the ability to exercise significant influence,[287] or (2) any material investment in an entity over which an audit client has the ability to exercise significant influence.[288]

With respect to paragraph (c)(1)(i)(E)(*2*), which turns in part on whether a covered person's or immediate family member's investment in an entity is material to that person, we do not anticipate that compliance requires a firm constantly to monitor the net worth of all covered persons and their immediate family members in order to know at all times whether any particular investment is material to them. We anticipate that monitoring for compliance with this paragraph will involve routine monitoring of the investments of all covered persons and their immediate family members, combined with monitoring of the identity of entities over which the firm's audit clients have the ability to exercise significant influence. When overlap between those categories appears, the firm can take additional steps to determine whether the relevant investment is material to the covered persons or immediate family members holding the investment.

If an ''intermediary investor'' or a ''common investee'' becomes an affiliate of the audit client under paragraph (f)(4)(i) or (iv), then paragraph (E) no longer governs the question of independence. Rather, paragraph (A)'s provision concerning direct investments in audit clients will apply to that intermediary investor or common investee, and *any* investment in that entity by the firm, a covered person, or an immediate family member of a covered person would impair independence.

b. *Other Financial Interests.* Rule 2–01(c)(1)(ii) describes other financial interests of an auditor that would impair an auditor's independence with respect to an audit client because they create a debtor-creditor relationship or other commingling of the financial interests of the auditor and the audit client. In some situations, the continued viability of the audit client may be necessary for protection of the auditor's own assets (*e.g.*, bank deposits or insurance) or for the auditor to receive a benefit (*e.g.*, insurance claim). These situations reasonably may be viewed as creating a self-interest that competes with the

of any one issuer to an amount not greater in value than five percent of the value of the total assets of such management company and not more than ten percent of the outstanding voting securities of such issuer. 15 U.S.C. § 80a–5(b)(1).

[280] One commenter recommended that diversification be measured under Subchapter M of the Internal Revenue Code rather than the Investment Company Act of 1940. *See* Letter of Investment Company Institute (Sept. 25, 2000) (''ICI Letter''). Under Subchapter M, at the end of each calendar quarter of the taxable year, at least 50% of the value of the fund's total assets must be represented by cash, cash items, U.S. Government securities, securities of other investment companies, and investments in other securities, which, with respect to any one issuer, do not represent more than five percent of the value of total assets of the fund or more than ten percent of the voting securities of the issuer. In addition, no more than 25% of the value of the fund's total assets may be invested in securities of any one issuer. The Commission determined not to adopt the tax code diversification test because an investment company could concentrate its investments in a smaller number of issues and requires diversification only at the close of each quarter.

[281] *See* Written Testimony of Thomas C. Rowland, Senior Vice President, Fund Business Management Group, Capital Research and Management Company (Sept. 20, 2000) (suggesting a similar rule).

[282] *See* Ernst & Young Letter; PricewaterhouseCoopers Letter.

[283] *See* AICPA Code of Professional Conduct, ET section 101–8.

[284] Here, as elsewhere in the rule, we use the term ''significant influence'' as it is used in Accounting Principles Board Opinion No. 18, ''The Equity Method of Accounting for Investments in Common Stock'' (Mar. 1971) (''APB No. 18''). *See infra* Section IV.H.3. Because we have included a specific rule on investments in non-clients, as well as the material indirect investment rule of paragraph (D), we have decided that a more limited definition of ''affiliate of an audit client'' is warranted for purposes of the investment rules in paragraph (c)(1)(i). The definition of ''audit client'' provides that, for purposes of paragraph (c)(1)(i), audit client does not include ''entities that are affiliates of the audit client only by virtue of paragraph (f)(4)(ii) or (f)(4)(iii) of the section.'' In other words, the only ''affiliates of the audit client'' that are included in the term ''audit client'' in section (c)(1)(i) are those that are in a control relationship with the audit client or that are part of the same investment company complex as the audit client. The rules on investments specifically state that an investment in certain entities that significantly influence, or are significantly influenced by, the audit client, impair the auditor's independence. Accordingly, there is no need to include those entities within the more general definition of an ''affiliate of the audit client.''

[285] *See* Rule 2–01(c)(1)(i)(E)(*1*)(*ii*).

[286] Rule 2–01(c)(1)(i)(E)(*3*). The operation of paragraphs (E)(*1*)(*ii*) and (E)(*3*) is illustrated in the chart attached as Appendix A.

[287] Rule 2–01(c)(1)(i)(E)(*1*)(*i*).

[288] Rule 2–01(c)(1)(i)(E)(*2*). The operation of paragraphs (E)(*1*)(*i*) and (E)(*2*) is illustrated in the chart attached as Appendix B.

auditor's obligation to serve only investors' interests. We have adopted Rule 2–01(c)(1)(ii) largely as proposed, though we have made some modifications, described below.

(i) *Loans/Debtor-Creditor Relationships.* Rule 2–01(c)(1)(ii)(A) provides that an accountant will not be independent when the accounting firm, any covered person in the accounting firm, or any of the covered person's immediate family members has any loan (including any margin loan) to or from an audit client, or an audit client's officers, directors, or record or beneficial owners of more than ten percent of the audit client's equity securities. As proposed, we have also adopted exceptions for four types of loans: [289] (1) automobile loans and leases collateralized by the automobile; (2) loans fully collateralized by the cash surrender value of an insurance policy; (3) loans fully collateralized by cash deposits at the same financial institution; and (4) a mortgage loan collateralized by the borrower's primary residence provided the loan was not obtained while the covered person in the firm was a covered person.

As adopted, paragraph (A) varies from the proposed rule in two respects, one representing a substantive change and one a clarifying change. The substantive change involves increasing to ten percent (up from the proposed five percent) the percentage of an audit client's securities that a lender may own without posing an independence impairment for an accountant who borrows from that lender. We have made this change because we believe that doing so will not make the rule significantly less effective, and may significantly increase the ease with which one can obtain the information necessary to assure compliance with this rule. The ten percent threshold corresponds to the definitions in the Commission's Regulation S–X of a ''principal holder of equity securities,''[290] as well as a ''promoter.''[291] In addition, other aspects of the securities laws attach significance to an equity interest in excess of ten percent.[292] These definitions and substantive legal provisions clearly classify ten percent shareholders as having a special and influential role with the issuer.

Accordingly, a lender owning more than ten percent of an audit client's securities would be considered to be in a position to influence the policies and management of that client.

The clarifying change involves the wording of paragraph (A)(*4*), which describes the mortgage loan exception. The proposed rule referred to a mortgage loan ''collateralized by the accountant's primary residence.'' In the final rule, we have changed ''accountant'' to ''borrower,'' because we intend for the exception to apply also to mortgage loans obtained by an immediate family member of a covered person. The proposed rule also specified that this exception was limited to loans ''not obtained while the borrower was a covered person in the firm or an immediate family member of a covered person in the firm.'' In the final rule, we have changed this language to ''not obtained while the covered person in the firm was a covered person.'' This change is intended only as a way of clarifying that the test focuses on the status of the relevant covered person at the time of the mortgage loan.

(ii) *Savings and Checking Accounts.* Rule 201(c)(1)(ii)(B) concerns savings and checking accounts. It provides that an accountant is not independent when the firm, a covered person, or an immediate family member of a covered person ''has any savings, checking, or similar account at a bank, savings and loan, or similar institution that is an audit client, if the account has a balance that exceeds the amount insured by the Federal Deposit Insurance Corporation or any similar insurer, except that an accounting firm account may have an uninsured account balance provided that the likelihood of the bank, savings and loan, or similar institution experiencing financial difficulties is remote.''

At the suggestion of commenters, we have modified this provision from the proposed rule by adding the exception for accounting firm accounts with institutions that have no more than a remote likelihood of experiencing financial difficulties.[293] Large firms often maintain account balances well in excess of FDIC limits, and the heavy daily volume of large transactions imposes such demands on a financial institution that there is, as a practical matter, a very limited universe of banks capable of servicing those accounts. Under the circumstances, we are persuaded that it is necessary to provide an exception that would allow accounting firms (but not individuals who are covered persons) to maintain balances above insured limits even if the financial institution is an audit client. We emphasize that this is a narrow exception mandated by practical necessity, and that, even so, the exception only applies as long as there is no more than a remote likelihood of the institution experiencing financial difficulties. If there is more than a remote likelihood of the institution experiencing financial difficulties, then an uninsured balance will impair independence because the auditor would be placed in the situation of having to decide whether to express an opinion about the institution as a going concern when the auditor's own assets may be at risk.

(iii) *Broker-Dealer Accounts.* Rule 2–01(c)(1)(ii)(C) provides that an accountant will not be independent when the accounting firm, any covered person in the firm, or any of the covered person's immediate family members, has any brokerage or similar accounts maintained with a broker-dealer that is an audit client if any such accounts include any asset other than cash or securities (within the meaning of ''security'' provided in the Securities Investor Protection Act (''SIPA'')), or where the value of the assets in the accounts exceeds the amount that is subject to a Securities Investor Protection Corporation (''SIPC'') advance for those accounts, under Section 9 of SIPA. Those final provisions are as we proposed.

In addition, we have added to paragraph (C) a provision intended to ensure that brokerage accounts maintained outside of the U.S. not covered by SIPA will nonetheless not impair independence so long as the value of the assets in those accounts is insured or protected pursuant to a program similar to SIPA. Some commenters noted that SIPC insurance is not available in jurisdictions outside the U.S. and suggested that we add this provision.[294] We believe that this addition represents a logical extension of our purpose in originally proposing the SIPA exception. Again, however, the insurance must be similar to SIPA for the exception to apply.

(iv) *Futures Commission Merchant Accounts.* Rule 201(c)(1)(ii)(D) provides that the accountant will not be independent when the accounting firm, any covered person in the firm, or any covered person's immediate family member has any futures, commodity, or similar account maintained with a futures commission merchant that is an audit client. Few commenters

[289] Consistent with the Proposing Release, we have treated credit card debt as a separate category. *See* discussion of paragraph (c)(1)(ii)(E) below.

[290] Regulation S–X, Rule 1–02(r), 17 CFR 210.1–02(r).

[291] Regulation S–X, Rule 1–02(s)(2), 17 CFR 210.1–02(s)(2).

[292] *See, e.g.*, Section 16 of the Securities Exchange Act of 1934, 15 U.S.C. § 78p.

[293] *See* Ernst & Young Letter; PricewaterhouseCoopers Letter.

[294] *See generally,* Deloitte & Touche Letter.

commented on this provision,[295] and we have adopted it exactly as proposed.

(v) *Credit Cards*. Rule 201(c)(1)(ii)(E) provides that an accountant is not independent when the accounting firm, any covered person in the firm, or any covered person's immediate family member has ''[a]ny aggregate outstanding credit card balance owed to a lender that is an audit client that is not reduced to $10,000 or less on a current basis taking into consideration the payment due date and any available grace period.'' This represents a slight modification from the rule as proposed. Under the proposed rule, independence would have been impaired the moment that a relevant credit card balance exceeded $10,000. Commenters, noting the occasional use of credit cards for large consumer purchases, college tuition, and tax payments, asked that we modify the rule so that the $10,000 limit applies only as of the due date.[296] We agree that the issue we seek to address in this paragraph (E) is equally well addressed with a more flexible approach, taking account of the realities of day-to-day life, that allows a credit card balance to exceed $10,000 so long as the balance is brought back down below $10,000 within the immediate credit card payment cycle.

(vi) *Insurance Products*. Rule 201(c)(1)(ii)(F) provides that an auditor's independence is impaired whenever any covered person in the firm or any immediate family member of a covered person holds any individual insurance policy issued by an insurer that is an audit client unless: (1) The policy was obtained at a time when the person in the firm was not a covered person; or (2) the likelihood of the insurer becoming insolvent is remote. The final rule reflects two modifications from the proposed rule.

First, the rule that we proposed would have provided that an accounting firm's independence was impaired by having a professional liability policy originally issued by an audit client. We have reconsidered this issue in light of comments pointing out that professional liability insurance for accountants is provided by relatively few insurers and, moreover, complex syndication relationships among those insurers make it unreasonable to expect that any given professional liability insurer will ever be completely absent from the coverage scheme that insures its auditor.[297] The final rule, therefore, does not provide that a professional liability policy gives rise to an independence impairment. In addition, by leaving the word ''individual'' in our final rule, we intend to make clear that the rule does not apply to professional liability or any other type of insurance policy held by an accounting firm.

Second, the rule that we proposed would have provided that independence was impaired by a covered person or immediate family member having any individual policy originally issued by an insurer that is an audit client. Commenters pointed out how this provision could work a hardship where, for example, an accountant obtains a life insurance policy from an audit client of the firm, but obtains the policy when he or she is not a covered person with respect to the client. If that accountant later becomes a covered person with respect to that insurer, our proposed rule effectively would have required that accountant to obtain that insurance from another carrier. Changing life insurers, however, could prove to be very difficult and expensive depending on many other factors that could have changed since the accountant first obtained the insurance.

We believe that the goal of this paragraph (F) can be served equally well by a provision that largely averts that potential hardship. The final rule, therefore, provides that, so long as the likelihood of the insurer becoming insolvent is remote, independence is not impaired if a covered person or immediate family member obtains a policy from an audit client when the covered person is not a covered person with respect to that audit client.[298] If, however, the likelihood of the insurer becoming insolvent is not remote, then independence is impaired regardless of the lack of ''covered person'' status at the time the policy was obtained. In any event, when the likelihood of insolvency is remote, and the policy was obtained when the covered person was not a covered person, it is our intention that the covered person be able to renew the policy and increase the coverage if done pursuant to the pre-existing contractual terms of the policy.

Finally, as discussed in more detail below, recusal remains an option in some circumstances. If a person or a member of that person's immediate family wished to obtain insurance from an audit client, the person may be able to recuse himself or herself from being a covered person for that audit client. For instance, depending on a firm's organization, persons that are covered persons only because they are within the definition of the ''chain of command'' may be able to re-structure their supervisory role with respect to a particular audit client so as to fall outside that definition with respect to the audit client.

(vii) *Investment Companies*. Rule 2–01(c)(1)(ii)(G) addresses investments in an entity that is part of an investment company complex. The rule provides that, when an audit client is part of an investment company complex, an accountant is not independent if the accounting firm, a covered person, or an immediate family member of a covered person has any financial interest in an entity in the investment company complex. Technically, this provision represents an explicit statement of a concept that otherwise necessarily follows from other aspects of the rule. Specifically, because the definition of ''affiliate of the audit client'' includes any entity that is part of an investment company complex (as defined in Rule 2–01(f)(14)) that includes an audit client,[299] the restrictions included in paragraphs (c)(1)(i) and (c)(1)(ii) necessarily apply to any such entity. We have singled out these entities in paragraph (G) to minimize the possibility that a reader focused on the financial relationship provisions might overlook those entities' inclusion as ''an affiliate of the audit client.'' We solicited comment on whether we should follow ISB Standard No. 2,[300] and our intent, as stated in the Proposing Release, was to codify the substance of ISB Standard No. 2. Commenters generally did not object to this concept, although several expressed concerns about the definition of ''investment company complex'' as discussed below.[301] We have reworded paragraph (G) from the Proposing Release solely for the purpose of clarity. No substantive change is intended.

c. *Exceptions*. We are adopting Rule 2–01(c)(1)(iii) regarding limited exceptions to the financial relationship rules substantially as proposed, with slight modifications, and we are adding one additional exception. These exceptions recognize that there are situations in which an accountant, by virtue of being given a gift or receiving an inheritance, or because the accounting firm has taken on a new audit client, may lack independence

[295] *See* Deloitte & Touche Letter (agreeing that such accounts ''might, in certain circumstances, create a perception that an accounting firm's independence has been impaired'').

[296] *See, e.g.*, AICPA Letter.

[297] Letter of XL Capital Limited (Sept. 25, 2000); AICPA Letter; Letter of Swiss Re (Sept. 22, 2000).

[298] *See* AICPA Letter (suggesting this approach).

[299] *See* Rule 2–01(f)(4)(iv).

[300] ISB Standard No. 2, ''Certain Independence Implications of Audits of Mutual Funds and Related Entities,'' at ¶3 (Dec. 1999).

[301] *See infra* Section IV.H.11.

solely because of events beyond the accountant's control. In these circumstances, independence is not deemed to be impaired if the financial interest is promptly disposed of or the financial relationship is promptly terminated. These exceptions operate to avert an independence impairment only with respect to the financial interests referenced in the exceptions. These exceptions do not have the effect of averting an independence impairment caused by any other factors, such as employment relationships or non-audit services.

(i) *Inheritance and Gift.* Rule 2–01(c)(1)(iii)(A) provides that an accountant's independence will not be impaired by virtue of an unsolicited financial interest, such as a gift or inheritance, so long as the recipient disposes of the interest as soon as practicable, but in no event later than thirty days after the recipient has knowledge of, and the right to dispose of, that interest. Our proposed version of this provision required that the interest be disposed of no later than thirty days after the recipient has a right to dispose of it. We have added the phrase ''has knowledge of'' to avoid the unfairness that could result in a case where the recipient of a financial interest does not learn of that interest immediately upon acquiring it. In addition, several commenters from foreign jurisdictions noted that there are situations abroad in which an accounting firm may be appointed executor of an estate without its advance knowledge.[302] We have modified the rule to address these situations. Specifically, we have expanded it to cover ''unsolicited financial interests'' even if not acquired through inheritance or gift.

(ii) *New Audit Engagement.* We are adopting Rule 2–01(c)(1)(iii)(B) substantially as proposed. It is designed to allow accounting firms to bid for and accept new audit engagements, even if a person has a financial interest that would cause the accountant to be not independent under the financial relationship rules. This exception is available to an accountant so long as the accountant did not audit the client's financial statements for the immediately preceding fiscal year, and the accountant was independent before the earlier of (1) signing an initial engagement letter or other agreement to provide audit, review, or attest services to the audit client, or (2) commencing any audit, review, or attest procedures (including planning the audit of the client's financial statements).

The new audit engagement exception of Rule 2–01(c)(1)(iii)(B) is necessary because an auditor must be independent, not only during the period of the auditor's engagement, but also during the period covered by any financial statements being audited or reviewed. Because of an existing financial relationship between an accounting firm or one of its employees and a company (that is not an audit client), an accounting firm may not be able to bid for or accept an audit engagement from the company without this exception. This exception allows firms to bid for and accept engagements in these circumstances, provided they are otherwise independent of the audit client and they become independent of the audit client under the financial relationship rules before the earlier of the two events specified in paragraphs (B)(2)(i) and (ii).

We have modified the audit engagement exception slightly from the proposed rule. As proposed, the exception would have applied only if the firm was independent under the financial relationship rules before the earlier of beginning work on the audit or accepting the engagement to provide audit, review, or attest services. Commenters have pointed out that it would be reasonable to allow for some grace period to divest of financial interests after the audit client and the accountant first agree to an audit relationship. Otherwise, an accountant would have little choice but to come into compliance with the financial interest rules before even bidding to become the auditor for a particular client.

Accordingly, we have revised paragraph (B)(2)(i) to focus on the ''signing of an initial engagement letter or other agreement,'' rather than ''accepting the engagement.'' By this change, we mean to afford accountants a divestiture window between the time they first understand that a new client has selected them to perform audit, review, or attest services—or there has been an oral agreement to that effect—and the time that an initial engagement letter or other written agreement is actually signed, or audit procedures commence. If an accountant is in compliance with the financial relationship rules before the earlier of that signing or the commencement of audit, review, or attest services, the accountant's independence is not impaired by the operation of the financial relationship rules of paragraphs (c)(1)(i) and (c)(1)(ii).

(iii) *Employee Compensation and Benefit Plans.* We are adopting an additional exception to the financial interest rules in response to concerns expressed by several commenters. These commenters encouraged us as part of this modernization to allow for broader participation by immediate family members of auditors in employee compensation and benefit plans.[303] This additional exception is consistent with our goal of updating the independence rules in ways that recognize the realities of the modern economy (and dual income households) and continue to protect the public interest.

The exception is necessary because our employment rules will allow an immediate family member of a covered person (most typically a spouse) to be employed by an audit client in a position other than an ''accounting role or financial reporting oversight role'' without impairing the auditor's independence. In these situations, the immediate family member would remain subject to our financial interest rules and therefore could not have a direct financial interest in the audit client. Accordingly, an employee in this situation could be prevented from participating in a stock-based compensation program.

We are adopting an additional exception to the financial interest rules to provide some relief in these situations. The exception will apply to investments in audit clients by immediate family members of covered persons who are covered persons only by virtue of being a partner in the same office as the lead audit engagement partner of, or a partner or manager performing ten or more hours of non-audit services for, an audit client. This exception will allow the immediate family members of these covered persons to acquire an interest in an audit client, if the immediate family member works for the audit client and acquires the interest as an ''unavoidable consequence'' of participating in an employee compensation program in which employees are granted, for example, stock options in the employer as part of their total compensation package, without impairing the audit firm's independence. The phrase ''unavoidable consequence'' in this paragraph means that, to the extent the employee has the ability to participate in the program but has the option to select investments in entities that would not make him or her an investor in an audit client, the employee must choose

[302] *See* Letter of KPMG Europe (Sept. 22, 2000); Written Testimony of Institute of the Chartered Accountants in England & Wales (''ICAEW'') (Sept. 13, 2000).

[303] *See, e.g.*, ICI Letter; Deloitte & Touche Letter; *see also* Letter of the Association of Private Pension and Welfare Plans (Aug. 7, 2000).

other investments to avoid an impairment of independence.

Immediate family members of this subset of covered persons must dispose of the financial interest as soon as practicable once they have the right to do so, however, and they may not otherwise invest in the audit client without impairing the firm's independence. Where there are legal or other similar restrictions on a person's right to dispose of a financial interest at a particular time, the person need not dispose of the interest until the restrictions have lapsed. For example, a person will not have to dispose of an investment in an audit client if doing so would violate an employer's policies on insider trading. On the other hand, waiting for more advantageous market conditions to dispose of the interest would not fall within the exception.

This exception is similarly available to immediate family members of the same subset of covered persons who must invest in one or more audit clients in order to participate in their employer's 401(k) or similar retirement plan. Accordingly, under the exception, the spouse or another immediate family member of this subset of covered persons can participate in a 401(k) plan, even if his or her only investment option within the plan is, for example, a mutual fund that is in the same investment company complex as a mutual fund that is an audit client. If, however, the immediate family member has an alternative in the 401(k) plan that does not involve investing in a fund complex for which the person's relative is a covered person, then the family member may not invest in the audit client without impairing the auditor's independence. We highlight that the exception in paragraph (c)(1)(iii)(C) is available only to immediate family members of covered persons who are covered persons by virtue of being in the same office as the lead audit engagement partner of an audit client (paragraph (f)(11)(iv)) or because they perform ten or more hours of non-audit services for an audit client (paragraph (f)(11)(iii)).

The Investment Company Institute proposed that the exception apply to the immediate family members of all covered persons in the firm.[304] We believe, however, that the exception we are adopting is sufficiently broad. As discussed elsewhere in this release, even absent this exception, the rules we are adopting significantly shrink the circle of firm personnel to whom the financial interest rules apply.

d. *Audit Clients' Financial Relationships.* Rule 2–01(c)(1)(iv) specifies two sets of circumstances in which an audit client's financial interests in the accounting firm cause an accountant to be not independent of that audit client. We have modified the proposed rule as discussed below.

(i) *Investments by the Audit Client in the Auditor.* As discussed in the Proposing Release, when an audit client invests in its auditor, the auditor may be placed in the position of auditing the value of any of its securities that are reflected as an asset in the financial statements of the audit client. In addition, the accountant may reasonably be presumed to have a mutuality of financial interest with the owners of the firm, including an audit client-shareholder.[304]

Under Rule 2–01(c)(1)(iv)(A), an accountant is not independent with respect to an audit client when the audit client has, or has agreed to acquire, any direct investment in the accounting firm, such as stocks, bonds, notes, options, or other securities, or the audit client's officers or directors are record or beneficial owners of more than five percent of the equity securities of the accounting firm. In applying this provision, it is important to remember that the definition of accounting firm includes ''associated entities'' of the accounting firm, including any that are public companies. Paragraph (A) seeks to prevent a situation in which an accountant, in order to audit asset valuations of a client that holds securities of the accounting firm, must value the accounting firm's own securities. Paragraph (A) also seeks to prevent a situation in which the audit client, or in some circumstances its officers and directors, can exercise any degree of influence over the accounting firm, whether by virtue of the accounting firm's fiduciary obligation to its investors or by nominating and voting for directors.

The AICPA noted in its comment letter that its current rules also do not permit an audit client to hold any investment in its auditor.[306] The AICPA was critical of the application of our proposed provision, at least without a materiality threshold, to subsidiaries and other entities related to the accounting firm. Consistent with our general approach, we have decided to apply this rule to not only the corporate entity performing the audit, but also its subsidiaries and associated entities. We note that we have eliminated the definition of ''affiliate of the accounting firm,'' which many commenters argued captured more entities with some relation to the accounting firm than necessary.[307]

The proposed rule did not include any provision restricting audit client officers and directors from owning the accounting firm's securities. In that respect, our proposed approach was more liberal than existing law, which deems independence impaired if an audit client's officers or directors own any equity securities of the accounting firm. We sought comment, however, on whether the rule's prohibitions should also apply to other situations in which the audit client has a financial interest, such as when the audit client's CEO invests in the accounting firm. Although some commenters opposed the addition of this notion,[308] we have determined that the final rule should liberalize existing law, simply not to the extent we proposed. Accordingly, the final rule provides that independence is impaired if an officer or director of the audit client owns more than five percent of the equity securities of the accounting firm. We believe that investments in the accounting firm by audit client officers and directors do not routinely give rise to independence concerns, but that concerns arise when an officer or director of the audit client accumulates a significant stake in the accounting firm. Because record or beneficial ownership interests exceeding five percent will be reflected in Schedule 13D filings relating to the accounting firm, the firm will be able to monitor for compliance with this provision, without having to rely solely on an intrusive investigation or audit client monitoring of its officers' and directors' investments.

(ii) *Underwriting.* Rule 2–01(c)(1)(iv)(B) provides that an accountant is not independent of an audit client when the accounting firm ''engages an audit client to act as an underwriter, broker-dealer, market maker, promoter, or analyst with respect to securities issued by the accounting firm.'' Few transactions are as significant to the financial health of a company, including an accounting firm, as the sale of its securities, whether in private or public offerings. In an

[304] ICI Letter.

[305] *See* Letter from POB to ISB (Jan. 12, 2000) (''Public ownership in an auidt firm or in its parent or in an entity that effectively has control of the audit firm would add another form of allegiance and accountability to those identified by the Supreme Court—a form of allegiance that in our opinion will be viewed as detracting from, if not conflicting with, the auditor's 'public responsibility' '').

[306] *See* AICPA Letter.

[307] *See infra* Section IV.H.2.

[308] *See* Written Testimony of William Travis, McGladrey & Pullen LLP (Sept. 20, 2000).

offering, an underwriter either buys and then resells a company's securities or receives a commission for selling the securities. In either circumstance, were an audit client to act as underwriter of an accounting firm's or its associated entity's securities, the audit client would assume the role of advocate or seller of the accounting firm's securities. Moreover, depending on the terms of the underwriting, the underwriter could for a time become a significant shareholder of the accounting firm. There also may be indemnification agreements that place the underwriter and auditor in adversarial positions.

In addition, the accounting firm would have a direct interest in ensuring the underwriter's viability and credibility, either of which could be damaged as the result of an audit. Moreover, the auditor would have a clear incentive not to displease an audit client to which it had entrusted a critical financial transaction. Similar conflicts of interest may arise if an audit client or an affiliate of an audit client is engaged to perform other financial services for an accounting firm, such as making a market in the accounting firm's securities or issuing an analyst report concerning the securities of the accounting firm.

We have reworded paragraph (B) from the proposed wording to avert an unintended consequence. The proposed rule provided that independence would be impaired if an audit client ''performs any service for the accounting firm related to underwriting, offering, making a market in, marketing, promoting, or selling securities issued by the accounting firm, or issues an analyst report concerning the securities of the accounting firm.'' Worded that way, the provision could be read to impair independence any time, for example, a broker-dealer issues an analyst's report making a favorable recommendation concerning the securities of any associated entity of an accounting firm, because, in a broad sense, that report could benefit the accounting firm and could be seen as a ''service for'' the accounting firm. To avoid any possibility of that construction, we have reworded paragraph (B) to make clear that independence is impaired only if the accounting firm actually ''engages'' the audit client for the purpose of obtaining those services.

2. Employment Relationships

We are adopting, substantially as proposed, Rule 2–01(c)(2), which sets forth the employment relationships that impair an auditor's independence. As discussed in the Proposing Release, independence requirements related to employment relationships between accountants or their family members and audit clients are based on the premise that when an accountant is employed by an audit client, or has a close relative or former colleague employed in certain positions at an audit client, there is a significant risk that the accountant would not be capable of exercising the objective and impartial judgment that is the hallmark of independence.

We are modernizing the employment relationship rules in a manner consistent with the public interest and investor protection. We are keenly aware of the changes in traditional family structures, the increased mobility of professional employees, the recent globalization of accounting firms, and similar changes in society at large. We have determined that, in this environment, existing restrictions on employment relationships between accountants or their family members and audit clients are more restrictive than necessary to protect investors. Accordingly, we are narrowing those restrictions.

We received a number of comments on our proposals to modernize the employment relationship rules. The vast majority of commenters who spoke to this issue supported modernization in general, even if they did not support all aspects of our proposals.[309] For example, some commenters who agreed with the objectives of our proposals questioned if the ISB rather than the Commission should prescribe requirements in this area.[310] Some commenters expressed a preference for the language used in ISB proposals and ISB Standard No. 3.[311] ISB Standard No. 3, ''Employment with Audit Clients,'' states, ''An audit firm's independence is impaired with respect to an audit client that employs a former firm professional who could, by reason of his or her knowledge of and relationships with the audit firm, adversely influence the quality or effectiveness of the audit, unless the firm has taken steps that effectively eliminate such risk.'' The standard also describes the types of safeguards that the ISB believes would effectively eliminate the risk of an impairment of independence.

We appreciate the concepts underlying ISB Standard No. 3 and strongly support firms' use of quality controls and ''safeguards'' to encourage their partners and employees to be aware of and adhere to auditor independence standards. We are concerned, however, that a ''safeguards'' approach, which is dependent on a firm's self-analysis and self-reviews, will not provide a definitive standard. In our view, independence is better assured by consistent and uniform rules, rather than by rules that rely on the auditor's assessment of the extent of its own self-interest. Furthermore, it has been our experience that the existence of safeguards or quality controls alone does not ensure compliance with even the most basic independence regulations.[312] Accordingly, we have chosen a more objective standard for employment relationships, which is described in paragraph (c)(2).[313]

Like the financial interest rules we are adopting, the employment relationship rules greatly reduce the pool of people within audit firms whose families are affected by the independence requirements. Paragraph (c)(2) sets forth the general rule that an auditor is not independent of an audit client if the accountant or a family member has an employment relationship with an audit client. The provision includes a non-exclusive list of employment relationships that are inconsistent with the general standard of paragraphs (b) and (c)(2). Employment relationships not specifically described in paragraphs (c)(2)(i) through (c)(2)(iv) are subject to the general test of paragraphs (b) and (c)(2).

The following are examples of employment relationships that impair an auditor's independence under the final rule.[314]

- A current partner of an accounting firm serves as a member of the board of directors of the audit client;

[309] *See* PricewaterhouseCoopers Letter (''We endorse and applaud the SEC's initiatives to modernize the archaic financial interest and employment rules in order to reflect today's social and business realities. We support, for the most part, the treatment of these topics in the Release.'').

[310] *See, e.g.,* Deloitte & Touche Letter; Letter of Steven Ryan, Chair, Financial Accounting Standards Committee, American Accounting Association (Oct. 12, 2000); Written Testimony of John C. Bogle, Public Member, ISB (July 26, 2000).

[311] *See, e.g.,* AICPA Letter; Written Testimony of William T. Allen, Chair, ISB (July 26, 2000).

[312] *See, e.g.,* Letter from Lynn E. Turner, Chief Accountant, SEC, to Charles A. Bowsher, Chairman, Public Oversight Board (Dec. 9, 1999); Letters from Lynn E. Turner, Chief Accountant, SEC, to Michael A. Conway, Chair, SECPS (Nov. 30, 1998; Dec. 9, 1999). These letters are available on our website.

[313] Nevertheless, we encourage, and we expect, firms to follow the steps described in ISB Standard No. 3, including the steps to be taken in the period after the firm's professional reports an intention to join an audit client and the steps to be taken after the professional actually joins the audit client. We also anticipate that peer reviews conducted by the POB will cover firms' compliance with these steps.

[314] These examples are illustrative only and should not be relied upon as a complete list of employment relationships that impair an accountant's independence under paragraphs (b) and (c)(2).

- A sibling of a covered person is employed by an audit client as the director of internal audit;
- A former professional employee of an accounting firm who resigned from the accounting firm two years ago is employed by an audit client in an accounting role and the former employee receives a pension from the firm tied to the firm's revenues or profits;
- A former partner of an accounting firm accepts the position of chief accounting officer at an audit client, and the former partner continues to maintain a capital balance with the accounting firm; or,
- A former director of an audit client becomes a partner of the accounting firm, and that individual participates in the audit of the financial statements of the audit client for a period during which he or she was a director of the audit client.

We discuss each of the rules giving rise to these examples in turn.

a. *Employment at Audit Client of Accountant.* Rule 2–01(c)(2)(i) continues the principle set forth in current Rule 2–01(b) that to be independent, neither the accountant nor any member of his or her firm can be a director, officer, or employee of an audit client. Paragraph (2)(i) provides that an accountant is not independent if any current partner, principal, shareholder, or professional employee of the accounting firm is employed by the audit client, or serves as a member of the board of directors or similar management or governing body of the audit client. In the most basic sense, the accountant cannot be employed by his or her audit client and be independent.

b. *Employment at Audit Client of Certain Relatives of Accountant.* Rule 2–01(c)(2)(ii) provides that certain employment relationships between covered persons' close family members and an audit client will impair the auditor's independence. As discussed below, close family members include the covered person's spouse, spousal equivalent, dependents, parents, nondependent children, and siblings. The application of the rule to close family members stands in contrast to the financial interest rules, where only the interests of the covered person's immediate family members (*i.e.,* spouse, spousal equivalent, and dependents) are attributed to the covered person. As we explained in the Proposing Release, we believe this distinction is appropriate because, while some close family members' investments may not be known to a covered person, the place and nature of such family members' employment should be obvious.

Like the proposed rule, final Rule 2–01(c)(2)(ii) limits the employment relationships that impair auditor independence when held by a close family member of a covered person to those involving an "accounting role or financial reporting oversight role." As a result, an audit client's employment of even an immediate family member will not necessarily impair an auditor's independence, unless that family member is in an "accounting role or financial reporting oversight role."

Not all commenters agreed with the scope of the rule, some arguing that our proposal was too generous and others arguing that the proposal was too restrictive.[315] In this regard, we note that the ISB has taken a more restrictive approach in suggesting that independence is impaired if an immediate family member of a person on the audit engagement team is employed by the audit client in any position.[316] We continue to believe, however, that we need only apply our restriction to family members in an "accounting role or financial reporting oversight role" at an audit client. Some commenters, on the other hand, argued for a rule that did not impose restrictions on close family members of all covered persons. While we acknowledge that individuals who are covered persons because they provide ten or more hours of non-audit services to the audit client or work in the same office as the lead audit engagement partner are less likely to be able to influence an audit than covered persons who are on the audit engagement team or in the "chain of command," we do not agree that the likelihood is so remote as to warrant carving their close family members out of the rule.

We define "accounting role or financial reporting oversight role" in Rule 2–01(f)(3). The definition includes two categories of persons. One category includes those with more than minimal influence over the contents of the accounting records or anyone who prepares them. This typically would include certain persons working in the accounting department or who perform accounting functions. We have not chosen to reach as many persons in the audit client's accounting department as are covered by the "audit sensitive" category in the AICPA's employment rules.[317] The definition also may include certain individuals, such as an accounts receivable supervisor or manager, who are relied upon by management to calculate amounts that are placed directly into the company's financial statements.

The second category includes those who influence the preparers or the contents of the financial statements of the audit client. The definition lists positions in which we believe a person generally wields the type of influence over the financial statements that causes independence concerns, such as a member of the audit client's board of directors (or similar management or governing body), chief executive officer, president, chief financial officer, chief operating officer, general counsel, chief accounting officer, controller, director of internal audit, director of financial reporting, treasurer, vice president of marketing, or any equivalent position.

Several commenters expressed support for the concept of "accounting role or financial reporting oversight role," but recommended that we modify the definition in various ways, for example, by eliminating vice president of marketing from the scope of the rule or making the list an exhaustive list of covered positions.[318] We believe that the vice president of marketing makes important determinations that affect the company's financial results.[319] These include, for example, supervising sales that result in the revenues reported in financial statements, shaping sales policies and procedures, and participating at a high level in the formulation of the company's budget. For these reasons, we consider a vice president of marketing to be involved in a financial reporting oversight role. We have declined to make the list of positions exhaustive because titles alone do not always accurately describe a person's duties and functions.

Other modifications to the definition make explicit our concerns about positions in which the employee would

[315] *Compare* Letter of Paula Morris, MPA, CPA, Assistant Professor, Kennesaw State University (Sept. 25, 2000) (expressing her concerns about loosening the rules regarding spouses' and dependents' employment relationships) with Deloitte & Touche Letter (suggesting that an audit client's employment of a close family member of a covered person who is not on the audit engagement team or in the chain of command, should not be deemed to impair the auditor's independence, even if the person holds an accounting or financial reporting oversight role because there is only a "remote likelihood" that such a person could influence the audit).

[316] ISB, "Invitation to Comment 99–1: Family Relationships Between the Auditor and the Audit Client" (July 1999).

[317] AICPA Code of Professional Conduct, ET § 101.11.

[318] AICPA Letter ("For the most part, the specific positions listed in the definition . . . are appropriate and provide helpful advice to practitioners. . . . however . . . we do not believe the vice president of marketing should be included in this list."); Ernst & Young Letter.

[319] *See, e.g., In the Matter of Jimmy L. Duckworth,* CPA, AAER No. 1205 (Nov. 10, 1999); *In the Matter of Pinnacle Micro, Inc., Scott A. Blum, and Lilia Craig,* AAER No. 975 (Oct. 3, 1997).

exercise more than minimal influence over the contents of the accounting records or anyone who prepares them, or would exercise influence over the contents of the financial statements or anyone who prepares them. As noted above, the final rule also incorporates the proposed list of examples of positions in which we consider a person to exercise influence over the contents of the financial statements or people who prepare the financial statements. We have singled out these two categories of positions because persons in these positions can influence the financial reporting of the company.

As noted in the Proposing Release, the so-called ''five hundred mile rule'' has been eliminated under Rule 2–01(c)(2)(ii). Whether a covered person lives near a close family member who is employed by the audit client no longer seems relevant in today's world of instantaneous international communications and global securities markets. Accordingly, we have dispensed with this test of auditor independence.

c. *Employment at Audit Client of Former Employee of Accounting Firm.* We are adopting Rule 2–01(c)(2)(iii) substantially as proposed, with the minor modifications discussed below. Rule 2–01(c)(2)(iii) describes the circumstances under which an auditor's independence will be impaired by an audit client's employment of a former partner, principal, shareholder, or professional employee of the accounting firm in an accounting role or financial reporting oversight role. As we noted in the Proposing Release, when these persons retire or resign from accounting firms, it is not unusual for them to join the management of former audit clients or to become members of their boards of directors. Registrants and their shareholders may benefit from the former partner's accounting and financial reporting expertise. Investors and the public in general also may benefit when individuals on the board or in management can work effectively with the auditors, members of the audit committee, and management to provide informative financial statements and reports.

When these persons, however, assume positions with the firm's audit client and also remain linked in some fashion to the accounting firm, they may well be in a position to influence the content of the audit client's accounting records and financial statements on the one hand, and the conduct of the audit, on the other. This is particularly true when the individual, while at the accounting firm, was in some way associated with the audit of the client. A close association between a member of the board of directors or of senior management with his or her former firm creates an impression of a mutuality of interest and may well affect the auditor's judgment.[320]

In addition, even under the usual circumstances, there is some possibility that accounting firm partners may compromise their independence in order to secure management positions with the audit clients.[321] That risk is heightened where there is a ''revolving door'' between the auditor and the client.[322] Finally, there is the risk that the former partner's familiarity with the firm's audit process and the audit partners and employees of the firm will enable him or her to affect the audit as it progresses.[323] Accordingly, under the final rule, as under current requirements, an auditor's independence with respect to an audit client is deemed to be impaired when former partners, shareholders, principals, or professional employees of the firm are employed in an accounting or financial reporting oversight role at an audit client, unless certain conditions are met.

Consistent with our proposal, the final rule provides that independence will not be impaired if certain steps are taken to ensure the individual's separation from the accounting firm. Under the final rule, the former partner, principal, shareholder, or professional employee must not: (i) Influence the firm's operations or financial policies, (ii) have a capital balance in the firm, or (iii) have a financial arrangement, other than one providing for regular payment of a fixed dollar amount, as described in paragraphs 2–01(c)(2)(iii)(C)(*1*) and (*2*). Any payment of a fixed dollar amount must be made pursuant to a fully funded retirement plan, rabbi trust or similar vehicle. Or, in the case of a former professional employee who was not a partner, principal, or shareholder of the firm and has been disassociated from the accounting firm for more than five years, the fixed payments made to the former employee must be immaterial to him or her.

As proposed, the rule contemplated only fixed payments made pursuant to a fully funded retirement plan or rabbi trust.[324] Several commenters expressed concern about the rule's application in foreign jurisdictions in which rabbi trusts are not recognized.[325] In response to these comments, we have modified the rule to indicate that using a similar payment vehicle will satisfy the rule. If

[320] *See* AICPA, Auditing Standards Division, ''Audit Risk Alert—1994, General Update on Economic, Accounting, and Auditing Matters,'' at 35 (1994).

A few litigation cases suggest auditors need to be more cautious in dealing with former coworkers employed by a client. None of these cases involved collusion or an intentional lack of objectivity. Nevertheless, if a close relationship previously existed between the auditor and a former colleague now employed by a client, the auditor must guard against being too trusting in his or her acceptance of representations about the entity's financial statements. Otherwise the auditor may rely too heavily on the word of a former associate, overlooking that a common interest no longer exists.

[321] *See* Paul M. Clikeman, ''Close revolving door between auditors, clients,'' *Accounting Today,* at 20 (July 8–28, 1996); *Cf. In the Matter of Richard A. Knight,* AAER No. 764 (Feb. 27, 1996) (individual allegedly learned of accounting misstatements while he was engagement partner for firm conducting audit and resigned to become registrant's executive vice president and chief financial officer).

[322] *See, e.g., AUSA Life Ins. Co. v. Ernst & Young,* 206 F.3d 202 (2d Cir. 2000); AICPA Board of Directors, *Meeting the Financial Reporting Needs of the Future: A Public Commitment From the Public Accounting Profession,* at 4 (June 1993) (''AICPA Board Report''); *see also Staff Report, supra* note 74, at 51–52; In addressing an example of this problem, the court in *Lincoln S&L v. Wall,* 743 F. Supp. 901, 917 n.23 (D.D.C. 1990) wrote:

Atchison, who was in charge of the Arthur Young audit of Lincoln, left Arthur Young to assume a high paying position with Lincoln. This certainly raises questions about Arthur Young's independence. Here a person in charge of the Lincoln audit resigned from the accounting firm and immediately became an employee of Lincoln. This practice of ''changing sides'' should certainly be examined by the accounting profession's standard setting authorities as to the impact such a practice has on an accountant's independence. It would seem that some ''cooling off period'' perhaps, one to two years, would not be unreasonable before a senior official on an audit can be employed by the client.

[323] In response to these and other concerns, the AICPA Board of Directors suggested in 1993 that we prohibit a public company from hiring the partner responsible for the audits of that company's financial statements for a minimum of one year after the partner ceases to serve that company. *See* AICPA Board Report, *supra* note 322, at 4. Our staff has indicated, however, that, if implemented, this suggestion would take the form of the firm's independence being impaired for a period of time from the date the individual left the audit engagement, rather than as a prohibition on hiring the former partner. *Staff Report, supra* note 74, at 52 n.146. *See also* Committee of Sponsoring Organizations of the Treadway Commission (''COSO''), ''Fraudulent Financial Reporting: 1987–1997: An Analysis of U.S. Public Companies,'' at 21 (1999) (finding, with respect to companies where there was fraudulent financial reporting, that among 44 companies for which there was information available on their CFO's background, 11% of the companies' CFOs had previous experience with the companies' audit firms just before joining the company).

[324] As noted in the Proposing Release, to avoid adverse tax consequences to the individual, accounting firms often settle their retirement obligations to former partners by fully funding a ''rabbi trust'' from which payments will be made to the individual. Under Rule 2–01(f)(16), a ''rabbi trust'' is an irrevocable trust whose assets are not accessible to the firm until all benefit obligations have been met but are subject to claims of the firm's creditors in bankruptcy or insolvency. We are adopting the definition of ''rabbi trust'' as proposed.

[325] *See, e.g.,* Written Testimony of ICAEW (Sept. 13, 2000).

a rabbi trust is available in the jurisdiction, however, the accounting firm and the former professional must use a rabbi trust, rather than some other vehicle.

As noted, to satisfy the conditions of paragraph (C)(1), the retirement plan or rabbi trust must be fully funded.[326] We believe that full funding is critical to breaking the link between the firm and the individual. Any situation that requires the individual to be dependent on the firm to fund his or her retirement payments weds the financial interests of the former employee and the firm, and creates the potential for the firm to exert influence over the individual, or vice versa.

The proposed rule did not contain a ''cooling off'' period. We solicited comment on whether we should require a mandatory cooling off period for former partners and professional staff of an audit firm who join an audit client.[327] Several commenters supported the notion of a cooling off period,[328] but others disagreed.[329] We have determined that a cooling off period unnecessarily restricts the employment opportunities of former professionals, and we have decided not to adopt a cooling off provision.[330]

We also solicited comment on whether application of the rule should depend on whether the professional leaving the accounting firm was a partner at the firm or non-managerial audit staff. We considered whether to provide a sunset provision so that accounting firms need not track all former professional employees indefinitely to determine, for purposes of this provision, whether they become employed in an accounting role or financial reporting oversight role at an audit client. While we believe that it is usual for accounting firms to know whether their former partners, principals, or shareholders are employed in these roles at an audit client, we understand the practical difficulties firms might have tracking all former professionals who left the firm while at a managerial or staff level. Accordingly, we are adopting a rule under which the accountant's independence will not be impaired when a former professional, who was not a partner, joins an audit client in an accounting role or financial reporting oversight role position after five years, provided the retirement benefits of the former employee are immaterial to him or her.

The materiality provision is necessary because, to satisfy the conditions in paragraph (C)(2), the retirement plan does not have to be fully funded. In the absence of such funding, we believe that the receipt by the former employee of more than an immaterial amount would create the unification of financial interests discussed above.

d. *Employment at Accounting Firm of Former Employee of Audit Client.* We are adopting Rule 2–01(c)(2)(iv) substantially as proposed. The rule specifies that individuals who were formerly officers, directors, or employees of an audit client and who later become partners, principals, or shareholders of the accounting firm will impair the independence of the firm with respect to that audit client, unless they do not participate in, and are not in a position to influence, the audit of the financial statements of the audit client covering a period during which the individuals were employed by or associated with the audit client. When a former employee of an audit client joins the accounting firm, the independence rules ensure that the employee is not in a position to influence the audit of his or her former employer.[331] Because participating in the audit of the former employer could easily require former employees to audit their own work, the rule provides that independence is impaired unless the former employees do not participate in and are not in a position to influence the audit of the financial statements of the audit client for any period during which they were employed by or associated with that audit client.

The final rule applies to all former employees of the audit client, not only those who were in accounting or financial reporting oversight roles. It also applies to former audit client employees whether they become partners, principals, or shareholders of the accounting firm or professional employees of the firm.[332]

3. Business Relationships

We proposed Rule 2–01(c)(3) to describe the business relationships that impair an auditor's independence from an audit client. We are adopting the rule substantially as proposed with two minor modifications. The rule continues the Codification's current standard that an auditor's independence with respect to an audit client is impaired when the accounting firm, or a covered person in the firm, has a direct or material indirect business relationship with an audit client, or any person associated with the audit client in a decision-making capacity, such as an audit client's officers, directors, or substantial stockholders.

Commenters were generally supportive of the approach we took in the proposal, with the exception of one provision.[333] We proposed that independence was also impaired if the accounting firm or any covered person had a direct or material indirect business relationship with ''record or beneficial owners of more than five percent of the [audit client's] equity securities.'' This formulation was intended to provide a more precise definition of the subset of associated persons who constitute ''substantial stockholders'' in the existing restrictions on business relationships in the Codification.[334] Commenters, however, expressed concerns with this threshold.[335] Similarly, one large accounting firm expressed concern with

[326] We would not consider an individual's 401(k) account to constitute a financial arrangement with the accounting firm to be fully funded for these purposes because, although the investment remains subject to market risk, the account balance is not dependent on the accounting firm's financial performance even if the firm continues to administer the account for the former firm personnel.

[327] With regard to cooling off periods, *see* AICPA Board Report, *supra* note 322, at 4 (June 1993) (suggesting that the Commission prohibit a public company from hiring the partner responsible for the audits of that company's financial statements for a minimum of one year after the partner ceases to serve that company) and *Lincoln S&L* v. *Wall,* 743 F. Supp. at 917 n.23 (''It would seem that some 'cooling off period,' perhaps one to two years, would not be unreasonable before a senior official on an audit can be employed by the client.'').

[328] *See, e.g.,* Letter of Pamela Roush, Ph.D., CMA (undated).

[329] *See, e.g.,* Written Testimony of Mauricio Kohn, CFA, CMA, CFM, AIMR (Sept. 20, 2000) (''We do not believe it is necessary to impose a mandatory 'cooling-off period,' prohibit clients from hiring audit firm professionals, or stipulate that an audit firm's independence is impaired when its professionals accept key positions with current clients.'').

[330] Nonetheless, we encourage firms to maintain adequate controls to ensure that former employees are not unduly influencing the audit engagement team.

[331] Of course, once an employee of an accounting firm, the person would also be subject to all other independence requirements applicable to other firm members. For example, if the former audit client employee becomes a covered person, he or she could have no financial interest in the audit client. *See* Rule 2–01(c)(1).

[332] The AICPA recommended that the rule apply to all professional employees of the accounting firm, not just to partners, shareholders, and principals. *See* AICPA Letter. We agree and, therefore, have modified the final rule to encompass this situation.

[333] *See, e.g.,* Deloitte & Touche Letter; Written Testimony of Dennis Paul Spackman, Chairman, National Association of State Boards of Accountancy (Sept. 13, 2000) (''I am in full agreement with the provisions of the Commission's proposal [regarding] Business Relationships.'').

[334] *See* Codification § 602.02.g.

[335] *See* Deloitte & Touche Letter (''Although we agree with the direction of [Rule 2–01(c)(3)], it provides no basis for prohibiting business relationships with beneficial owners of more than five percent of the equity securities of the audit client or any of its affiliates.'').

the proposed language, asserting that our proposal would ''greatly expand[] the universe of venture capital firms with which we could not have any business relationships.''[336]

In response to these comments, we are adopting instead the language used in the Codification, which refers to an associated person ''in a decision-making capacity, such as an audit client's officers, directors or substantial stockholders.'' Because our rule, as adopted, conforms more closely to the Codification, we anticipate that it will provide greater clarity to the profession in interpreting Rule 2–01(c)(3) and address the concerns about the proposal that were articulated by several commenters.

We are also clarifying the rule by adding the words ''to the audit client'' after ''provides professional services'' in the last sentence of the rule. As discussed in the Proposing Release, the exception for providing professional services is meant only to make clear that Rule 2–01(c)(3) does not address the provision of professional services by the auditor to the audit client. The addition of these four words is intended to make clear that joint business ventures or prime/subcontractor arrangements in which audit clients and auditors jointly provide ''professional services'' would continue to impair the auditor's independence.[337]

We also proposed defining the phrase ''consumer in the ordinary course of business'' as part of the definitions explicitly set forth in Rule 2–01(f). Commenters, however, expressed concern that, as defined, this phrase could have unintended consequences.[338] Accordingly, we omit the definition of ''consumer in the ordinary course of business'' in the rules we are adopting and will continue to apply the term consistent with its use in the Codification.

As we noted in the Proposing Release, we are retaining a number of the examples currently found in the Codification to provide guidance on permissible and impermissible business relationships.[339] We expect that the interpretations and examples that have evolved under the Codification with respect to this rule will continue to provide useful guidance to the profession.

We also solicited comment as to whether we should retain the ''direct or material indirect business relationship'' formulation or if there was another formulation that could provide additional or more precise guidance. The AICPA asserted that ''not all business relationships with audit clients should be proscribed if they are immaterial. . . . The inclusion of a materiality standard in the context both of [sic] all business relationships (direct and indirect) sufficiently mitigates whatever independence risk would be posed.''[340] For the same reasons we have explained before, we do not believe that auditors should be allowed to have any direct business relationships with their audit clients other than as a consumer in the ordinary course of business.[341] We have carefully considered the comments we have received and believe that the rule we are adopting constitutes a fair and balanced approach that protects independence without unduly restricting business opportunities for auditors or their clients.

4. Non-Audit Services

a. *General Rule.* We are adopting a rule that provides that an accountant is not independent if the accountant provides the non-audit services identified in paragraph (c)(4). The rule is derived from current Rule 2–01, our releases that have been incorporated into the Codification, and existing AICPA rules.

The proposed rule identified certain services that could not be provided by the auditor without impairing the auditor's independence with respect to the audit client ''[e]ven if the audit client accept[ed] ultimate responsibility for the work that is performed or decisions that are made . . . .'' In the final non-audit services rule, Rule 2–01(c)(4), we have eliminated that language. As described below, we have added certain exceptions to the non-audit services that impair an auditor's independence. These exceptions are appropriate only where management takes certain actions and accepts certain responsibilities. For example, we have set forth certain circumstances where an auditor does not lose his or her independence by providing certain actuarial services to insurance company audit clients. The exception, however, is available only where management accepts responsibility for significant actuarial methods and assumptions.

The final amendments identify nine non-audit services that, when provided by the auditor to an audit client, impair the auditor's independence. In the proposed rule, we identified ten such services. For many of the non-audit services that we proposed to include in the rule, we aimed to codify existing restrictions.[342] Commenters expressed concerns, however, that certain of our proposed rules were written more broadly than existing independence rules.[343] In addition, commenters indicated that, to the extent our proposals differed from current standards, they believed current standards more appropriately circumscribed auditors' non-audit activities.[344] In response to these comments, we made several modifications to the rules, including eliminating altogether the provision on expert services.[345]

b. *Particular Non-Audit Services that Impair Independence.* (i) *Bookkeeping or Other Services Related to the Audit Client's Accounting Records or Financial Statements.* We proposed and are adopting paragraph (c)(4)(i), which, with limited exceptions, would deem an auditor's independence to be impaired when the auditor performs bookkeeping services for an audit client. Even prior to our proposals, auditors were restricted by AICPA Ethics Rules and the Codification from providing certain bookkeeping services.[346] As explained in the Codification and reiterated in the Proposing Release,[347] providing bookkeeping services for an audit client impairs the auditor's independence because the auditor will be placed in the position of auditing the firm's work

[336] Ernst & Young Letter; *see also* AICPA Letter (''Such sweeping new restrictions would dramatically constrict the parties with which accounting firms could engage, even though many such parties at most have only very attenuated ties to audit clients. . . . We view independence risks as extremely remote in such circumstances and, therefore, consider the reach of such provisions unnecessarily broad.'').

[337] *See* Codification § 602.02.g; Letter from Jonathan G. Katz, Secretary, SEC, to Duane R. Kulberg, Arthur Andersen & Co. (Feb. 14, 1989).

[338] *See, e.g.,* Deloitte & Touche Letter.

[339] *See* infra Section IX; Codification 602.02(g).

[340] *See* AICPA Letter.

[341] *See* Letter from Jonathan G. Katz, Secretary, SEC, to Duane R. Kulberg, Arthur Anderson & Co., (Feb. 14, 1989).

[342] *See, e.g.*, Proposing Release, Section III.D.1.(b)(i)(iv) (regarding bookkeeping and actuarial services, respectively). *But see* Proposing Release, Section III.D.1.(b)(ii) (regarding financial information systems).

[343] *See, e.g.*, Testimony of Barry Melancon, President and Chief Executive Officer, AICPA (Sept. 21, 2000).

[344] *See* Testimony of Joseph F. Bernardino, Managing Partner, Assurance and Business Advisory Services, Arthur Anderson LLP (Sept. 20, 2000) and Testimony of James E. Copeland, Chief Executive Officer, Deloitte & Touche LLP (Sept. 20, 2000) (responsing to questions from Chairman Artrhur Levitt, SEC, about whether they would be comfortable if our final rules on non-audit services paralleled the profession's own rules); *see also* testimony of K. Michael Conaway, President Officer, Texas State Board of Accountancy (Sept. 20, 2000).

[345] *See infra* Section IV.D.4.b(x).

[346] AICPA Code of Professional Conduct, ET § 101.05; Codification § 602.02.c.i.

[347] Proposing Release, Section III.D.1(b)(i); Codification § 602.02.c.

when auditing the client's financial statements. It is hard to maintain the requisite objectivity about one's or one's firm's own work. This is especially true where finding an error would raise questions about the adequacy of the bookkeeping services provided by the firm. In addition, keeping the books is a management function, the performance of which leads to an inappropriate mutuality of interests between the auditor and the audit client.

We have modified our final rule in response to several comments.[348] First, commenters believed that the proposed definition should not cover all financial statements, including those not filed with the Commission. For example, auditors sometimes prepare statutory financial statements for foreign companies, and these are not filed with us. At least one commenter requested that we therefore exclude those financial statements from the rule's coverage.[349] Focusing solely on whether the financial statements are filed with us would not be appropriate in all circumstances, since in some instances statutory financial statements form the basis of the U.S. GAAP financial statements that are filed with us. Under these circumstances, an auditor who has prepared the statutory financial statements of an audit client is put in the position of auditing its own work when auditing the resultant U.S. GAAP-converted financial statements. Accordingly, the final rule amendments cover not only financial statements that are filed with us, but also financial statements that form the basis of financial statements that are filed with us. As proposed, the final amendments also cover any service involving maintaining or preparing the audit client's accounting records.

Second, although we proposed to cover services that resulted in the accountant generating financial information that would be disclosed to investors, commenters believed that this language was too broad. As part of the audit process, auditors may generate data in connection with evaluating financial information that eventually may be disclosed to investors.[350] We believe that they should continue to be able to do so. Accordingly, we narrowed the definition to eliminate this language and instead are incorporating wording from the AICPA Ethics Rules to the effect that an accountant cannot prepare source documents or originate data underlying the client's financial statements without impairing independence.[351]

Third, several commenters requested that we provide an exception to the rule so that auditors could perform bookkeeping services in emergency or other unusual situations.[352] The Codification provides such an exception. Example 6 of Section 602.02.c.ii of the Codification states that when, due to the unexpected resignation of a company's comptroller at the end of the year, the accountant was called upon to provide assistance in closing the books and the accountant did not make decisions on a managerial level, the accountant's independence was not impaired.[353] We recognize that there may be emergency or other unusual situations, such as the one described above, in which the auditor will need to provide bookkeeping services that are otherwise prohibited. Accordingly, we are adopting an exception from the bookkeeping restriction for emergency or other unusual situations, provided that the accountant does not act as a manager or make any managerial decisions. We expect that such situations will be rare. We encourage registrants and auditors to contact the staff with any questions about the application of this provision to particular circumstances.

Finally, the final rule contains a limited exception related to bookkeeping for foreign subsidiaries or divisions of audit clients. The Codification provides this type of exception.[354] The Proposing Release noted that the Commission recognized the need for relief in this area, and that therefore we had proposed to retain this section of the Codification.[355] In response to commenters' concerns,[356] however, we are incorporating the exception into the rule. Accountants therefore may provide these services for foreign divisions or subsidiaries of a domestic audit client under certain conditions. First, the services must be limited, routine, or ministerial. Second, it must be impractical for the entity receiving the services to obtain them from another provider.[357] Third, under the adopted rule as under the Codification, the foreign entity for which the accountant is performing these services cannot be material to the consolidated financial statements. Fourth, as under the Codification, the entity must not have employees capable or competent to perform the services. Fifth, the services performed must be consistent with local professional ethics rules.[358] Last, as explained in the Codification, ''the Commission believes that a comparison of the fees for the bookkeeping services and the audit should provide a fair test for determining the significance of the work to the registrant and the accountant, and indirectly, the possible effect on the firm's independence,'' and that therefore a limit on the services can be ''based on the relationship of the fee charged for the service to the total audit fee charged to the registrant.''[359] Accordingly, the final rule provides that the total fees for the bookkeeping services provided by the auditor to a company's foreign entities collectively (for the entire group of companies) cannot exceed the greater of one percent of the consolidated audit fee or $10,000.[360]

(ii) *Financial Information Systems Design and Implementation.* Paragraph (c)(4)(ii) identifies certain information technology services that, if provided to an audit client, impair the accountant's independence. Paragraph (c)(4)(ii) also identifies other information technology services that may be provided to an audit client without impairing independence so long as certain conditions are satisfied.

The rule we adopt today on information technology services represents a change from the rule we proposed. Some commenters objected to our proposed rule. This provision lay at the heart of some of the largest accounting firms' arguments that our proposed rules would hinder their access to technology, limit their understanding of their clients' operations, and hurt their recruiting efforts.[361] These arguments compete

[348] *See, e.g.*, Deloitte & Touche Letter; AICPA Letter.

[349] *See,* Ernst & Young Letter.

[350] For example, as part of the audit process, the auditor might process adjustments that eventually are incorporated into the audit client's financial statements. *See* Deloitte & Touche Letter.

[351] AICPA Code of Professional Conduct, ET § 101.05.

[352] *See, e.g.*, Deloitte & Touche Lettter.

[353] Codification § 601.02.c.ii, Example 6.

[354] Codification § 601.02.c.iii.

[355] Proposing Release, note 160.

[356] Deloitte & Touche Lettter; Ernst & Young Letter; PricewaterhouseCoopers Letter.

[357] There may be entities that are not large enough to maintain the capability in-house, yet there may not be reputable providers of these services where domestic companies' foreign affiliates are located or a reputable firm may not want to provide the Services because they will generate only minimal fees. *See* Codification § 601.02.e.iii.

[358] Codification § 601.02.c.iii (requiring compliance with this condition, ''so that an informed observer in the foreign location would have no cause to question the fact or appearance of independence'').

[359] Codification § 601.02.c.iii.

[360] The Commission has determined to raise to $10,000 from $1,000 the dollar threshold in the Codification in light of the inflation since the provisions in the Codification were adopted.

[361] *See generally*, Arthur Andersen Letter; Deloitte & Touche Lettter.

with the widespread and persistent perceptions that large, lucrative information technology consulting relationships with an audit client may give rise to conflicts of interest, may result in auditors functioning as management, or may result in an auditor auditing his or her own work.

The final rule reflects a pragmatic approach to a difficult issue. The rule singles out certain information technology services as independence impairments under any circumstances, and identifies other categories of information technology services that will not impair independence if certain conditions are fulfilled. Those conditions are designed to minimize the potential for an auditor to end up making management decisions or auditing his or her own work.

The rule also takes a pragmatic approach to the potential independence problem posed by the economic incentives that accompany large consulting contracts. Rather than effectively ban those relationships, we are amending the proxy disclosure rules to require public companies to make specific disclosure of fees paid to their auditor for information technology services. In addition, public companies must disclose that their audit committee (or, if there is no audit committee, the board of directors) considered whether the provision of the information technology services, as well as all other non-audit services, is compatible with maintaining the auditor's independence.

As discussed in greater detail below, we anticipate that audit committees will consider the independence implications of the engagements that are subject to the disclosure requirements. Moreover, the disclosure will provide information to enable investors themselves to evaluate auditor independence, and will enable future study of whether large information technology consulting relationships have an effect on audit quality and auditors' independence.

Paragraph (c)(4)(ii)(A) provides that an accountant is not independent of an audit client if the accountant is ''[d]irectly or indirectly operating, or supervising the operation of, the audit client's information system or managing the audit client's local area network.'' These services impair an accountant's independence under existing AICPA rules, [362] and, under the rules we adopt today, will impair independence under any circumstances.

Under paragraph (c)(4)(ii)(B), ''[d]esigning or implementing a hardware or software system that aggregates source data underlying the financial statements or generates information that is significant to the audit client's financial statements, taken as a whole,'' will impair an accountant's independence unless certain conditions are met.[363] This section of the final rule differs from the proposed rule in that we have modified the description of the hardware and software systems that the rule reaches by adding the phrase ''that aggregates source data underlying the financial statements.'' This change was suggested by commenters. [364]We have adopted this change because, to the extent that the design and implementation activities concern hardware and software systems that aggregate source data, they are likely to be the types of systems that raise independence concerns.

The conditions that the rule imposes are intended to reduce the likelihood that the auditor will be placed in a position of making, and then auditing, managerial decisions. They are also intended to ensure that management will make all significant decisions during the process and, at its conclusion, will be fully responsible for the results of the project including the proper functioning of the company's internal accounting controls.

The first condition, set out in paragraph (c)(4)(ii)(B)(1), is that ''the audit client's management has acknowledged in writing to the accounting firm and the audit client's audit committee, or if there is no such committee then the board of directors, the audit client's responsibility to establish and maintain a system of internal accounting controls in compliance with Section 13(b)(2) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(b)(2).'' This condition makes clear that this statutory responsibility cannot be shifted to the accounting firm.

Paragraphs (c)(4)(ii)(B)(2) and (c)(4)(ii)(B)(3), setting out the second and third conditions, complement each other. Paragraph (B)(2) articulates the condition that ''the audit client's management designates a competent employee or employees, preferably within senior management, with the responsibility to make all management decisions with respect to the design and implementation of the hardware or software system.'' Paragraph (B)(3) articulates the condition that ''the audit client's management makes all management decisions with respect to the design and implementation of the hardware or software system including, but not limited to, decisions concerning the systems to be evaluated and selected, the controls and system procedures to be implemented, the scope and timetable of system implementation, and the testing, training and conversion plans.'' These conditions are intended to ensure that an audit client that receives information technology services from its auditor does not delegate to its auditor responsibility for ''management decisions'' relating to the design and implementation of the system.

The fourth condition, set out in paragraph (c)(4)(ii)(B)(4), is that ''the audit client's management evaluates the adequacy and results of the design and implementation of the hardware or software system.'' Paragraph (c)(4)(ii)(B)(5) sets out the fifth condition, that ''the audit client's management does not rely on the accountant's work as the primary basis for determining the adequacy of its internal controls and financial reporting systems.'' These conditions reiterate the principles that management is to make all substantive decisions, that the auditor should not have a mutual interest in the successful operation of the systems, and that the auditor should not be placed in the position of auditing his or her firm's decisions about the system.

The rule expressly does not limit services in connection with the assessment, design, and implementation of internal accounting and risk management controls, provided the auditor does not act as an employee or perform management functions. During the audit, accountants generally obtain

[362] *See* AICPA Code of Professional Conduct, ET § 101.05.

[363] Although we anticipate that accountants and their audit clients will usually seek to meet these conditions, we note certain points about paragraph (c)(4)(ii)(B) relevant to situations where these conditions are not met. First, by ''significant,'' we refer to information that is reasonably likely to be material to the financial statements of the audit client. Since materiality determinations may not be final before financial statements are generated, an accounting firm may need to evaluate the general nature of the information rather than wait to evaluate system output during the period of the audit engagement. For example, without satisfying the conditions of paragraphs (c)(4)(ii)(B)(1)–(5), an accountant would not be independent of an audit client for which it designed an integrated Enterprise Resource Planning (''ERP'') system. (An ERP system is designed to integrate all functions and departments in a company into one computer system that can serve the needs of each department.) In addition, without satisfying the conditions, a firm's independence would be impaired if it designed and implemented an accounts receivable/order management system that recorded and summarized sales that were material to the financial statements of the audit client. A firm's independence would not be impaired, however, if the accounting firm designed and implemented a system for a foreign subsidiary whose financial condition and results of operations were not material to the financial statement of the audit client.

[364] Ernst & Young Letter; PricewaterhouseCoopers Letter.

an understanding of their audit clients' systems of internal accounting controls and may recommend ways in which those controls can be improved or strengthened. This service can be valuable to companies and their audit committees, and may also enhance audit quality, without raising independence concerns. In addition, we do not see any significant reason for concern about an audit firm's work on hardware or software systems that are unrelated to the audit client's financial statements or accounting records.

(iii) *Appraisal or Valuation Services and Fairness Opinions.* We are adopting a rule that, with some exceptions, provides that an accountant is not independent if the accountant provides appraisal or valuation services or any service involving a fairness opinion.[365] Appraisal and valuation services include any process of valuing assets, both tangible and intangible, or liabilities. Fairness opinions are opinions that an accounting firm provides on the adequacy of consideration in a transaction. As explained more thoroughly in the Proposing Release, if an audit firm provides these services to an audit client, when it is time to audit the financial statements the accountant could well end up reviewing his or her own work, including key assumptions or variables suggested by his or her firm that underlie an entry in the financial statements.[366] Where the service involves the preparation of projections of future results or future cash flows, the accountant may develop a mutuality of interest with the audit client in attaining the forecasted results.

We solicited comment on whether we should provide an exception from the rule when the amounts involved are likely to be immaterial to the financial statements that later would be reviewed by the auditor. Several commenters stated that such an exception is warranted.[367] In response, we are limiting application of the rule to the provision of appraisals, valuations, or services involving a fairness opinion where it is reasonably likely that the results, individually or in the aggregate, would be material to the audit client's financial statements [368] or where the results would be audited by the auditor. As a general matter, auditors would be auditing the results when they perform a GAAS audit.

The rule also contains an exception for appraisal or valuation services where the accounting firm reviews and reports on work done by the audit client itself or an independent, third-party specialist employed by the audit client, and the audit client or specialist provides the primary support for the balance recorded in the client's financial statements. In those instances, because a third party or the audit client is the source of the financial information subject to the review or audit, the accountant will not be reviewing or auditing his or her own work.

Another exception allows accountants to continue to value an audit client's pension, other post-employment benefit, or similar liabilities, so long as the audit client has determined and taken responsibility for all significant assumptions and data underlying the valuation.[369] Accountants historically have provided pension assistance to their audit clients, and if appropriate persons at the audit client determine the underlying assumptions and data, we believe that independence is not impaired.

Commenters also stated that an accountant's independence should not be deemed impaired when the accountant performs appraisal or valuation services as a necessary part of permitted tax services. As the rule text and this Release make clear, accountants will continue to be able to provide tax services to audit clients. A few commenters pointed out, however, that unless accountants can perform appraisal and valuation services that are part of a tax planning strategy or for tax compliance purposes, the client would not hire the accountant to provide tax services.[370] The final rule makes clear that accountants can perform appraisal and valuation services for those purposes without impairing independence.

Commenters requested an exception for appraisal and valuation services where the services are for non-financial purposes. Because our principal concern about appraisal and valuation services is that they lead auditors to audit their own work, so long as the results do not affect the financial statements, appraisal or valuation services performed for non-financial purposes do not impair an auditor's independence.

At least one commenter suggested that we include an exception for purchase price allocations.[371] An exception is not appropriate here because these allocation decisions, particularly those regarding the valuation of intangible assets, can have a direct, significant, and immediate impact on companies' financial statements. For example, where a company acquires another company with large, on-going in-process research and development projects, the acquiring company will need to decide how much of the purchase price to allocate to those projects. This may affect in turn the amount charged against earnings in the current year as in-process research and development expense, and the amount to be classified as goodwill and amortized against future years' earnings. Any such allocations later will be reviewed in the course of the audit, leading the firm to audit its own work.[372]

Finally, commenters raised concerns about the restriction on the provision of contribution-in-kind reports.[373] We have removed the language in the rule referring to contribution-in-kind reports because we view such reports to be akin to fairness opinions, which are restricted under the final rules. We understand from commenters that certain foreign jurisdictions require auditors to issue contribution-in-kind reports for their audit clients [374] and that, in some European jurisdictions, auditors may be appointed or approved by an administrative or judicial authority to act as an independent expert and issue a contribution-in-kind report for the audit client.[375] The Commission is sensitive to those issues and in the past has worked with foreign regulators and companies to reach an acceptable resolution.[376] We will

[365] The ISB has identified threats to the independence of firms that perform appraisal and valuation services for audit clients. *See* ISB, Discussion Memorandum 99–3 ''Appraisal and Valuation Services,'' at 7–9.

[366] *See generally* Codification § 602.02.c.

[367] *See e.g.,* Arthur Anderson Letter; Deloitte & Touche Letter; PricewaterhouseCoopers Letter.

[368] Of course, reference to financial statements includes results of operations, financial conditions and cash flows.

[369] AICPA Code of Professional Conduct, ET §101.05 states that an auditor's independence would not be impaired in connection with appraisal and valuation services ''when all significant matters of judgment are determined or approved by the client and the client is in a position to have an informed judgment on the results of the valuation.''

[370] *See, e.g.,* Arthur Andersen Letter.

[371] Deloitte & Touche Letter.

[372] We note in this regard, that if an acquisition individually, and when aggregated with other acquisitions reflected in the financial statements, is immaterial to the audit client's financial statements, then assisting in the allocation of the purchase price would not fall within the conditions of the rule and therefore would not be deemed to impair the auditor's independence.

[373] *See, e.g.,* Deloitte & Touche Letter; Ernst & Young Letter; Letter of KPMG Europe (Sept. 22, 2000).

[374] Ernst & Young Letter.

[375] *See e.g.,* Deloitte & Touche Letter; Letter of KPMG Europe (Sept. 22, 2000).

[376] *See* Letter from Lynn Turner, Chief Accountant, SEC, to Antonio Rosati, CONSOB (Aug. 24, 2000). In that letter, our Chief Accountant did not deem the auditor's independence to be impaired where there were certain agreed-upon procedures for the contribution-in-kind report and

continue our practice of determining whether to accept a contribution-in-kind report on a case-by-case basis. In this regard, we encourage registrants and their auditors to contact the staff to discuss particular situations where a foreign jurisdiction requires a contribution-in-kind report to enable the staff to work with the registrant and the foreign jurisdiction in reaching an appropriate resolution.

(iv) *Actuarial Services.* SECPS rules currently prohibit member accounting firms from providing certain actuarially oriented advisory services to insurance companies.[377] Accountants providing these services assume a key management task. In addition, because actuarially oriented advisory services may affect amounts reflected in an insurance company's financial statements, providing these services may cause an accountant later to audit his or her own work. Rule 2–01(c)(4)(iv) addresses these issues.

Commenters expressed concern that the proposal was broader than a similar SECPS rule, in that the restrictions in the proposal applied to services provided to all public companies, not just insurance companies, and the proposal did not include the four examples of appropriate services that are included in the SECPS rule.[378] We have modified our final rule with respect to actuarial services to parallel closely the SECPS rule, including the four exceptions. The final rule limits only actuarially oriented advisory services involving the determination of insurance company policy reserves and related accounts. We are narrowing the prohibition to services for insurance companies because, as explained in the SECPS rule, it is primarily in these companies that the actuarial function is ''basic to the operation and management'' of the company.[379]

The final rule states that an auditor's independence is impaired if the audit firm provides certain actuarially oriented advisory services involving the determination of insurance company policy reserves and related accounts, unless three conditions are met. First, the audit client must use its own actuaries or third-party actuaries to provide management with the primary actuarial capabilities. Second, management must accept responsibility for any significant actuarial methods and assumptions employed by the accountant in performing or providing the actuarial services. Third, the accountant cannot render the actuarial services to the audit client on a continuous basis. All of these conditions are designed to ensure that the accountant does not assume a management function for the audit client.

Assuming these conditions are met, the accountant can perform four types of actuarial services for an insurance company audit client without impairing the accountant's independence. The four types of actuarial services are: (i) Assisting management to develop appropriate methods, assumptions, and amounts for policy and loss reserves and other actuarial items presented in financial reports, based on the company's historical experience, current practice, and future plans; [380] (ii) assisting management in the conversion of financial statements from a statutory basis to one conforming with GAAP; (iii) analyzing actuarial considerations and alternatives in federal income tax planning; and (iv) assisting management in the financial analyses of various matters, such as proposed new policies, new markets, business acquisitions, and reinsurance needs. Allowing accountants to provide these four types of actuarially oriented advisory services under the three conditions is consistent with the SECPS rule.[381] We believe that if the conditions are met, in the context of state-regulated insurance companies, the four services would not constitute an assumption of the insurance company management's role or responsibilities, and would not impair the auditor's independence.

(v) Internal Audit Services. Although companies are not required to do so, they may, as part of their internal controls, form internal audit departments that are used to make sure that control systems are adequate and working. According to the Committee of Sponsoring Organizations (''COSO''), internal auditors play an important role in evaluating and monitoring a company's internal control system.[382] As explained by Robert Denham, a member of the ISB, at our public hearings, ''Good internal auditing . . . requires the internal auditor to be very closely integrated with management. The internal auditor is part of the management team. He or she is identifying problems and providing reports that help management correct those problems.''[383] In sum, ''the internal audit function is, basically, an arm of management,''[384] and internal auditors are, in effect, part of a company's internal accounting control system.

Although a company may prefer to outsource its internal audit function, management must continue to be responsible for the function.[385] When a company outsources the function to a third-party provider, there may be a concern that management has ceded this responsibility. While this is a concern in any internal audit outsourcing arrangement, there are additional concerns when a company outsources the work to its external auditor. As Comptroller of the Currency John D. Hawke, Jr., testified, ''When a bank out-sources its internal audit function to the same firm that performs the bank's external financial audit . . . the possibility for inherent conflicts and impairments of auditor independence and auditor integrity is greatest.''[386] Although Mr. Hawke discussed the conflicts in the bank context, his comments are equally applicable to any registrant.

Research commissioned by the Institute of Internal Auditors indicates that the internal auditors surveyed perceive an independence problem where internal audit work is outsourced to the external auditor.[387] In particular,

the accountant represented in the report that the report did not express an opinion on the fairness of the transaction, the value of the security, or the adequacy of consideration to shareholders. This letter is available on our website.

[377] SECPS Reference Manual (''SECPS Manual'') §1000.35.

[378] PricewaterhouseCooopers Letter; Ernst & Young Letter; see also Deloitte & Touche Letter.

[379] SECPS Manual §1000.35, at ¶ 5.

[380] Although it addresses a different topic, accountants and registrants may refer to ISB, ''Interpretation No. 99:1: Impact on Auditor Independence of Assisting Clients in the Implementation of FAS 133 (Derivatives)'' for general guidance on what constitutes ''assistance'' as opposed to ''performing'' certain functions or services.

[381] See SECPS Manual §1000.35.

[382] See Committee of Sponsoring Organizations of the Treadway Commission, Internal Control—Integrated Framework, at 7 (1992) (the ''COSO Report'').

[383] Testimony of Robert E. Denham (July 26, 2000); see also Testimony of John Whitehead, retired Chairman, Goldman Sachs & Co. (Sept. 13, 2000) (''internal auditing is the function of management'').

[384] Testimony of Manuel H. Johnson, Public Member, ISB (July 26, 2000).

[385] See AICPA Code of Professional Conduct, ET §101.15 (Interpretation 101–13).

[386] Testimony of John D. Hawke, Jr. (July 26, 2000). He also reported a trend among banks in favor of outsourcing internal audit work to the external auditor. He testified that ''[o]f [the] 50 largest banks'' within the jurisdiction of the OCC, ''8 out-source their internal audit, and 7 of those 8 out-source to the same firm that does their external audit. That's a pretty good chunk of the largest banks.'' Id. In addition, Mr. Hawke reported that in a survey of the OCC banks in the Northeast region, one-third outsource their internal audit work and half of those banks outsource to their external auditor. Id.

[387] In this study, companies with small, ''mean-sized,'' and large internal audit departments were asked to indicate their level of agreement (on a scale of zero to five, with five being the strongest) with the following statement: ''There is an independence

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in auditing the company's financial statements, the accountant will consider the extent to which he or she may rely on the internal control system in designing its audit procedures.[388] When the auditor has performed the internal audit work, the auditor will need to consider or examine its own work.

Final Rule 2–01(c)(4)(v) seeks to curb these conflicting interests without precluding companies, particularly small companies, from obtaining internal audit services from their auditors where the auditor's independence would not be compromised. Under the final rule, an auditor's independence is impaired by performing more than forty percent of the audit client's internal audit work related to the internal accounting controls, financial systems, or financial statements, unless the audit client has $200 million or less in assets.

The final rule provides an exception for businesses with $200 million or less in assets. Specifically, the rule provides that audit clients who have less than $200 million in total assets may receive more than forty percent of their internal audit functions from their auditor without giving rise to an impairment of independence. We provide this exception after carefully considering the potential impact of our rules on small businesses. At the proposing stage, we requested comment on whether we should provide an exception for smaller businesses. We adopt this exception in response to comments that we received,[389] and in recognition of the fact that smaller businesses, many of which may be located away from major business centers, could suffer particular hardships if we do not provide some exception.[390]

We chose a $200 million threshold for various reasons. From the available data, the $200 million threshold appears to provide a line below which not only are the companies themselves smaller, but the accounting firms that audit them also tend to be smaller.[391]

Commenters distinguished the situation in which the auditor supplements an audit client's internal audit function from the situation in which the auditor supplants the client's internal audit function. They suggested that an auditor should not be permitted to provide all of the internal audit services required by an audit client but should be allowed to provide a limited amount of internal audit services without impairing the auditor's independence.[392] For example, Ray J. Groves, former Chairman and Chief Executive Officer of Ernst & Young, said that ''limited amounts in specific areas of internal out-sourcing make a lot of sense, as opposed to complete out-sourcing, as long as the audit client maintains their own independent internal audit function with capable management and people within it.''[393] These comments in large part reflect the current AICPA rule on internal audit outsourcing,[394] which, as explained by a senior official of the AICPA, ''prohibit[s] the complete outsourcing.''[395] In response to these comments and in recognition of the AICPA rule, our final rule, with respect to registrants with $200 million or more in assets, allows auditors to perform up to forty percent of an audit client's internal audit work.[396]

Several commenters expressed concern about the effect of the proposed rule on small businesses that have no internal audit department or staff. They noted that smaller firms may not have sufficient need for full-time internal auditors but nonetheless, may need some services that internal auditors typically provide, which they obtain from their external auditors. According to these commenters, we should encourage this practice. Unless these companies can turn to their external auditors, they state, the work will not be done at all. Because we agree that small businesses should be encouraged to use internal audit services, the final rule allows auditors to provide an unlimited amount of internal audit services to clients with less than $200 million in assets, provided certain conditions are met.

In addition, the final rule does not restrict internal audit services regarding operational internal audits unrelated to the internal accounting controls, financial systems, or financial statements. This is because our focus is on services that affect the integrity of financial statements and reported financial information.[397]

Under all circumstances in which an auditor performs any internal audit services for an audit client, including with respect to companies with assets under $200 million, the auditor must comply with the six conditions listed in paragraph (B) to avoid an impairment of independence. Four of the six conditions are drawn from a ruling published in 1996 by the Ethics Committee of the AICPA.[398] It states that AICPA members may provide certain internal audit outsourcing services to audit clients without

problem if the external audit firm performs extended audit services (internal audit services) for the same firm for which it performs the annual financial statement audit.'' The level of agreement among respondents was between 3.7 and 4.0, ''indicating a perception of an independence problem.'' Larry E. Rittenberg and Mark A. Covaleski, The Outsourcing Dilemma: What's Best for Internal Auditing, at 68 and Exh. 4–4 (Institute of Internal Auditors Research Foundation 1997).

[388] AICPA SAS No. 55, AU § 319 (effective for audits on or after Jan. 1, 1990).

[389] See, e.g., Testimony of John D. Hawke, Jr., Comptroller of the Currency (July 26, 2000) (noting concerns about the effect of the proposed rule on small banks); Testimony of Wayne A. Kolins, National Director of Assurance, BDO Seidman, LLP (Sept. 20, 2000).

[390] These hardships could include, for example, difficulty in obtaining suitable professional services at a cost appropriate to the size of the business, or, for a small accounting firm, the loss of a substantial portion of its client base for either its audit or internal audit services.

[391] Using the $200 million threshold reasonably isolates companies that are relatively small themselves—approximately 54% of the 9,414 public reporting companies in the Standard & Poors Research Insight Compustat Database (''Compustat Database'') '' and has the effect of almost completely excepting smaller accounting firms. Approximately 85% of the public company audit clients (other than bank holding companies) of non-Big Five accounting firms have less than $200 million in assets. Of public company audit clients with more than $200 million in assets—the companies that would not trigger the exception—no more than 6.1% (again, excluding bank holding companies) are audited by non-Big Five firms. The source for these data is the Compustat Database, October 31, 2000. For further analysis, see infra Section V.B. (cost-benefit analysis).

[392] *See, e.g.,* Testimony of Jacqueline Wagner (Sept. 13, 2000) (testifying for the Institute of Internal Auditors) (''The IIA believes that the total outsourcing of the internal auditing function to the organization's external auditing firm impairs that firm's independence.''); Testimony of Dominick Esposito, Chief Executive Officer, Grant Thornton LLP (Sept. 13, 2000) (''I think if there is the entire internal audit department outsourced, it can present a conflict.'').

[393] Testimony of Ray J. Groves (July 26, 2000).

[394] See AICPA Code of Professional Conduct, ET §101.15 (Interpretation 101–13).

[395] Testimony of Barry Melancon, President and Chief Executive Officer (Sept. 13, 2000). Mr. Melancon also noted that ''[t]here still has to be management responsibility for the overall internal audit function . . . we certainly agree that the ultimate responsibility for internal auditing, the management decision making, must [lie] with management, not with the auditor.''

[396] When providing internal audit services to an audit client with $200 million or more in assets, the auditor must measure the internal audit services provided to the audit client in full-time employee hours. In order to remain independent, the auditor must ensure that it provides 40% or less of the total hours expended by the audit client, the auditor and anyone else on internal audit matters related to internal accounting controls, financial systems, and financial statements, and matters that impact the financial statements.

[397] In addition, performing procedures that generally are considered to be within the scope of the engagement for the audit of the audit client's financial statements, such as confirming accounts receivable and analyzing fluctuations in account balances, would not impair the accountant's independence, even if the extent of testing exceeds that required by GAAS. For example, if an accountant in normal circumstances would plan to observe ten percent of an audit client's inventory, but at the audit client's request the accountant observes 50% of inventory on hand, the accountant's independence would not be impaired.

[398] AICPA Code of Professional Conduct, ET §101.15 (Interpretation 101–13).

impairing their independence, so long as, among other things, (i) the client designates a competent member of management to be responsible for the internal audit function, (ii) management determines the scope, risk, and frequency of internal audit activities, including those to be performed by the auditor, (iii) management evaluates the findings and results arising from the internal audit activities, including those performed by the auditor, and (iv) management evaluates the adequacy of the audit procedures performed and the findings resulting from performance of those procedures. In addition, consistent with a later ruling by the AICPA, the final rule requires that (v) the audit client acknowledges its responsibility to establish and maintain a system of internal accounting controls in compliance with Section 13(b)(2) of the Securities Exchange Act, and (vi) that management not rely on the auditor's work as the primary basis for determining the adequacy of its internal controls.[399]

In the Proposing Release we noted that we were inclined not to follow the AICPA rule on internal audit outsourcing because we believed that, in providing such services, the auditor assumed a management function and, in the course of the audit, would have to review his or her own work. As discussed above, however, we have been persuaded that the auditor can perform a limited amount of an audit client's internal audit function without supplanting management's role or auditing its own work. In addition, we have been persuaded that encouraging internal audit outsourcing at small businesses is wise public policy. We have, accordingly, determined to allow the limited relationships described above under the conditions recommended and used at this time by the AICPA.

(vi) *Management Functions.* Current Rule 2–01 of Regulation S–X and the AICPA's rules preclude accountants from acting as management.[400] We are adopting Rule 2–01(c)(4)(vi) as proposed, which provides that an accountant's independence is impaired with respect to an audit client for which the accountant acts, temporarily or permanently, as a director, officer, or employee or performs any decision-making, supervisory, or ongoing monitoring functions.

(vii) *Human Resources.* Under current SECPS rules, accountants cannot perform certain executive recruiting and human resource services for audit clients.[401] Specifically, under those rules, an accountant's independence would be impaired if the accountant: (a) Searches for or seeks out prospective candidates for managerial, executive or director positions with audit clients;[402] (b) engages in psychological testing, or other formal testing or evaluation programs;[403] (c) undertakes reference checks of prospective candidates for executive or director positions with audit clients;[404] (d) acts as a negotiator on the audit client's behalf, such as in determining position, status or title, compensation, fringe benefits, or other conditions of employment;[405] or (e) recommends, or advises an audit client to hire, a specific candidate for a specific job.[406] Those rules do not, however, preclude an accountant from, upon request of the audit client, interviewing candidates and advising an audit client on the candidate's competence for financial, accounting, administrative or control positions.[407]

Excessive involvement in human resource selection or development places the auditor in the position of having an interest in the success of the employees that the auditor has selected, tested, or evaluated. Accordingly, an auditor may be reluctant to suggest that those employees failed to perform their jobs appropriately because doing so would require the auditor to acknowledge shortcomings in its human resource service.

Commenters were concerned that our proposed language expanded upon the limitations in the AICPA and SECPS rules.[408] For example, commenters expressed concern that the proposed rule would prohibit an accountant from advising an audit committee on the competence of a prospective controller or CFO.[409] Commenters also were concerned that the proposed rule limited accountants from providing tax-related services related to structuring compensation packages.[410] We agree that an objective evaluation by the accountant of a candidate's competency for an accounting or financial position may be useful to some, particularly smaller, companies and that the impact of this evaluation is reduced by the proscription that the accountant may not recommend that the audit client hire a particular candidate. We also believe that an accountant should not negotiate regarding the contents of a compensation package the accountant has designed. Accordingly, in light of the comments received, we have modified the final rule, and final Rule 2–01(c)(4)(vii) more closely parallels the SECPS rules.

(viii) *Broker-Dealer Services.* Current Rule 2–01 states that an accountant's independence is impaired if the accountant is connected with the audit client as an underwriter or promoter.[411] The Codification further states that concurrent engagement as a broker-dealer is incompatible with the practice of public accounting.[412] Rule 2–01(c)(4)(viii) combines these provisions with certain provisions from the AICPA rules.[413] As adopted, the amendments state that an accountant's independence will be impaired if the accountant acts as a broker-dealer, promoter, or underwriter on behalf of an audit client, makes investment decisions on behalf of the audit client or otherwise has discretionary authority over an audit client's investments, executes a transaction to buy or sell an audit client's investment, or has custody of assets of the audit client, such as taking temporary possession of securities purchased by the audit client. As noted in our existing standards, activities such as recommending securities, soliciting customers, and executing orders create a mutuality of interest and the potential for self-review.

Although our intention was to codify current restrictions, commenters believed that our proposal went further.[414] In particular, commenters were concerned that by including the term ''investment adviser'' we were precluding accountants from providing certain investment advisory or personal financial planning services that they currently provide.[415] In response to

[399] AICPA Code of Professional Conduct, ET §191.206–207 (Interpretation 101–103).

[400] Former Rule 2–01(b), 17 C.F.R. 210.2–01(b); AICPA Code of Professional Conduct, ET §101.02.

[401] *See* SECPS Manual §1000.35 App. A; see also AICPA Code of Professional Conduct, ET §101.05 (Interpretation 101–3) (deeming an auditor's independence impaired when the auditor negotiates employee compensation or benefits, or hires or terminates client employees).

[402] SECPS Manual §1000.35 App. A.

[403] *Id.*

[404] *Id.*

[405] *Id.;* AICPA Code of Professional Conduct, ET §101.05.

[406] *Id.*

[407] SECPS Manual §1000.35 App. A

[408] *See, e.g.,* Deloitte & Touche Letter; KPMG Letter; PricewaterhouseCoopers Letter; Ernst & Young Letter.

[409] *See, e.g.,* KPMG Letter; Ernst & Young Letter.

[410] *See, e.g.,* Deloitte & Touche Letter; Ernst & Young Letter.

[411] Former Rule 2–01(b), 17 CFR 210.2–01(b).

[412] Codification §602.02.e.iii.

[413] *See* AICPA Code of Professional Conduct ET §101.05.

[414] *See, e.g.,* Ernst & Young Letter; PricewaterhouseCoopers Letter.

[415] *See* Arthur Andersen & Co., 1994 SEC No Act. LEXIS 617 (July 8, 1994) (''Andersen No-Action Letter'') in which the staff stated it would not recommend enforcement action under the Investment Advisers Act where an accounting firm did not register as an investment adviser but an

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these concerns, we have removed the term ''investment adviser'' from the rule text.

Current AICPA rules specify investment advisory services that accountants may provide to audit clients without impairing their independence. Under these rules, accountants can recommend the allocation of funds that an audit client should invest in various asset classes, based on the client's risk tolerance and other factors; provide a comparative analysis of the client's investments to third-party benchmarks; review the manner in which the audit client's portfolio is being managed by investment account managers; and transmit a client's investment selection to a broker-dealer, provided that the client has made the investment decision and has authorized the broker-dealer to execute the transaction.[416] Accountants may continue to provide those services without impairing their independence.

Current AICPA rules also specify investment advisory services accountants may not provide to audit clients without impairing their independence. The final rule incorporates these restrictions. Accordingly, as under the AICPA's rules,[417] auditors cannot make investment decisions for audit clients or exercise discretionary trading authority over an audit client's account, cannot execute transactions for audit clients, and cannot take custody of an audit client's assets. Providing such services creates a mutuality of interest and may result in the auditor having to audit the value of investments that the auditor made for the client.

The Codification states that ''[t]he functions customarily performed [by a broker-dealer] include the recommendation of securities, the solicitation of customers and the execution of orders, any one of which could involve securities transactions of clients either as issuer or investor and provide third parties with sufficient reason to question the accountant's ability to be impartial and objective.''[418] Because these activities continue to be encompassed within the meaning of ''broker-dealer'' under the rule we are adopting, and therefore, when performed on behalf of an audit client, impair an auditor's independence, we have eliminated the language ''in any capacity recommending the purchase or sale of an audit client's securities' from the rule text.

By restricting broker-dealer services to those provided ''on behalf of the audit client,'' we do not mean to suggest that an auditor can recommend an audit client's securities to either another audit client or a non-audit client.[419] The language ''on behalf of'' the audit client encompasses all situations in which the auditor is directly or indirectly compensated for the recommendation.

The final rule, however, will not alter current guidance as to the corporate finance consulting services auditors provide to audit and non-audit clients.[420] For example, accountants, without impairing their independence, may advise audit clients in need of capital that one alternative is to do a public offering of their securities. Also, the staff has indicated that limited activities on the part of the auditor by way of general explanatory work and limited fact finding (such as identifying and introducing an audit client to potential merger partners that meet specified criteria) would not impair an auditor's independence. An auditor's independence would be impaired, however, by entering into preliminary or other negotiations on behalf of an audit client, by promoting the client to potential buyers, or ''with respect to subsequent audits of a client if the accountant renders advice as to whether, or at what price a transaction should be entered into.''[421] These interpretations of former Rule 2–01(b) apply equally to the amended rule we adopt today. To the extent an auditor is otherwise permitted to provide services to a non-audit client concerning corporate financing transactions to which an audit client is a party, the permissibility of those services does not turn on whether the advice involves transactions in which the consideration provided by an audit client to the non-audit client is in the form of an audit client's securities, as opposed to cash or other assets.

Commenters expressed concern that, because the terms ''securities professional'' and ''analyst'' are not defined in the securities laws, they would cause confusion.[422] To avoid any such confusion and to limit concerns about overbroad application of those terms, we have eliminated those terms from the rule text. We note, however, that broker-dealers provide an array of services that may include analyst activities.

Finally, we have not included in the final rule the prohibition relating to designing broker-dealer or investment adviser compliance systems. We have eliminated this provision to conform the rule to current law.

(ix) *Legal Services.* For the reasons set forth in the Proposing Release, we believe that there is a fundamental conflict between the role of an independent auditor and that of an attorney. The auditor's charge is to examine objectively and report, regardless of the impact on the client, while the attorney's fundamental duty is to advance the client's interests.[423] As discussed in the Proposing Release at greater length,[424] existing regulations,[425] the U.S. Supreme Court,[426] and professional legal organizations[427] have deemed it inconsistent with the concept of auditor independence for an accountant to provide legal services to an audit client. Accordingly, we are adopting the proposed rule as to legal services with a few modifications. Final Rule 2–01(c)(4)(ix) provides that an accountant is not independent of an audit client if the accountant provides any service to

affiliated registered investment adviser provided investment advisory services. The staff permitted the affiliate to publish a newsletter with financial planning information, provided the newsletter does not recommend any specific industry sectors or securities, to identify categories of mutual funds that satisfy an advisory client's investment objectives, and to recommend two or more mutual funds in each category. When an advisory client wants more specific advice, the investment advisory affiliate accountant will provide a client with a list of two or more investment advisers or broker-dealers that meet certain predetermined criteria, provided that the accountant does not receive any fee or other economic benefit from the mutual funds, investment advisers or broker-dealers recommended. The advisory affiliate will disclose to advisory clients that the recommended mutual funds, investment advisers, or broker dealers may include audit clients. *See also* Ernst & Young Letter (citing Andersen No-Action Letter).

[416] AICPA Code of Professional Conduct, ET §101.05 (Interpretation 101–3).

[417] *Id.*

[418] Codification §602.02.e.iii.

[419] *See* Arthur Andersen Letter (acknowledging that it is appropriate to prohibit accountants from recommending any specific securities to audit clients and from recommending audit clients' securities to non-audit clients).

[420] *See* AICPA Code of Professional Conduct, ET §101.05, Interpretation 101–3, which states that an accountant's independence would not be impaired if that accountant assists in developing corporate strategies, assists in identifying or introducing the client to possible sources of capital that meet the client's specifications or criteria, assists in analyzing the effects of proposed transactions, assists in drafting an offering document or memorandum, or participates in transaction negotiations in an advisory capacity.

[421] Letter from Edmund Coulson, Chief Accountant, SEC, to Edward McGowen, Pannell Kerr Forster, at 2 (July 11, 1988) (discussing mergers and acquisition services, among others).

[422] *See* Ernst & Young Letter; PricewaterhouseCoopers Letter.

[423] *See also* ISB, ''Discussion Memorandum 99–4: Legal Services'' (Dec. 1999).

[424] *See* Proposing Release, Section III.D.1(b)(ix).

[425] Codification §602.02.e.ii.

[426] *Arthur Young,* 465 U.S. at 819–20 n.15.

[427] American Bar Association Commission on Multidisciplinary Practice, Report to the House of Delegates, at 5 (July 2000) (''ABA Report'') (available at www.ABAnet.org/cpr/mdpfinalrep2000.html).

an audit client under circumstances in which the person providing the service must be admitted to practice before the courts of a U. S. jurisdiction.

We understand that some firms, largely through their foreign affiliates, are providing legal services outside of the United States. Moreover, we understand [428] that lawyers affiliated with foreign affiliates of U. S. accounting firms on occasion provide legal services in the United States where they are not required to be admitted to a bar in the United States. The final rule does not address these practices, where local law does not preclude such services and the services relate to matters that are not material to the consolidated financial statements of an SEC registrant or are routine and ministerial. We note, however, that it is clear to us that legal services provided outside the United States raise serious independence concerns under circumstances other than those meeting at least those minimum criteria.

We solicited comment on whether our proposed rule on legal services created uncertainty or complexity since the prohibition focused on the jurisdiction in which the legal services were provided. Commenters stated that indeed the rule should be revised because U.S. attorneys can, under various circumstances, render legal services in jurisdictions where they are not licensed to practice law. For example, when an attorney is not licensed to practice law in a particular jurisdiction, he or she can apply to a court *pro hac vice* to be able to appear before the court for purposes of the case.[429] Accordingly, we modified the rule so that an accountant's ability to render legal services no longer depends on his or her being licensed in the jurisdiction where the services are rendered, but rather on whether, under the circumstances, the provider of the services must be admitted to practice before the courts of a U.S. jurisdiction.

Some commenters suggested that safeguards, such as firewalls, could prevent or cure any independence problem that might arise by virtue of an accountant providing legal services to an audit client.[430] Recently, the Commission on Multidisciplinary Practice of the ABA considered whether firewalls would address sufficiently issues that might arise if a law firm were to provide both legal and other services.[431] That Commission rejected the firewall approach, stating ''[We] explicitly recognize[] the[] incompatibility [of legal and audit services]. [We] do not believe that a single entity should be allowed to provide legal and audit services to the same client.''[432] In light of current regulations and the ABA Report, we have determined not to adopt a firewall approach.

(x) *Expert Services.* We are not adopting the proposal to restrict the provision of expert services. The proposed rule would have provided that an accountant's independence is impaired as to an audit client if the accountant renders or supports expert opinions for the audit client or an affiliate of the audit client in legal, administrative, or regulatory filings or proceedings (''expert services''). Commenters said that our proposals went beyond current rules.[433] For example, AICPA Ethics Standards permit accountants to serve as expert witnesses.[434]

Commenters argued that accountants may need to act as experts in defending work they have done for audit clients before such bodies as the Internal Revenue Service, and indeed, this Commission.[435] As stated in the Proposing Release, we did not intend for our proposals to prohibit an auditor from testifying as a fact witness to its audit work for a particular client. In those instances, the auditor is merely providing a factual account of what he or she observed and the judgments he or she made. Nevertheless, to avoid confusion and any uncertainty that might be created by permitting the accountant to testify in one capacity but not another, we have determined not to adopt a restriction on expert services. When an accountant performs such services, however, he or she should be particularly mindful of his or her duty to maintain objectivity and integrity, as discussed in the AICPA Ethics Regulations.[436]

c. *Alternative Approaches to Scope of Services Restrictions.* As discussed in the Proposing Release, we considered a number of alternatives concerning scope of services. We solicited public comment on each alternative. After considering the comments received, we have determined not to adopt any of the alternatives proposed.

For the reasons discussed above, we have not adopted a disclosure-only approach or a complete ban on auditors' provision to audit clients of non-audit services. In addition, as discussed above, we welcome and encourage active oversight by audit committees with respect to auditor independence, but do not believe that such oversight obviates the need for the rule we adopt today. In this regard, it is our statutory responsibility to protect the public interest.

We are persuaded that relying on a firewalls approach is also unworkable. Under a firewalls approach, there would be a strict separation between those professionals in the accounting firm who perform audit work for an audit client and those who provide non-audit services for the client. GAAS, however, under certain circumstances requires that auditors seek out a registrant's consultants in the course of an audit to discuss work performed by the consultant.[437] Accordingly, a strict firewalls approach would conflict with GAAS requirements.

5. Contingent Fees

We proposed to restrict the receipt of contingent fees from audit clients, and we continue to believe that contingent fee arrangements result in the auditor having a mutual interest with the client. For example, if an accounting firm arranged to receive an audit fee of $200,000, but half of that fee was contingent on the audit client successfully completing an initial public offering within the following year, the auditor would have a mutual interest with the audit client in the success of the planned IPO and in the continuing viability of the audit client. Consequently, we are adopting a restriction on contingent fees. In response to comments,[438] however, we

[428] *See* Ernst & Young Letter; PricewaterhouseCoopers Letter; Arthur Andersen Letter.

[429] *See, e.g.,* Va. Sup. Ct. R. 1A:4 (2000).

[430] *See, e.g.,* Arthur Andersen Letter.

[431] *See* ABA Report, *supra* note 427.

[432] *Id.* at 5 (footnote omitted).

[433] *See, e.g.,* PricewaterhouseCoopers Letter; Deloitte & Touche Letter.

[434] AICPA Code of Professional Conduct, ET §101.202–101.203.

[435] *See, e.g.,* Arthur Andersen Letter.

[436] AICPA Code of Professional Conduct, ET §102.07 (''[I]n the performance of any professional service, a member shall comply with rule 102 [ET §102.01], which requires maintaining objectivity and integrity and prohibits subordination of judgment to others.* * * Moreover, there is a possibility that some requested professional services involving client advocacy may appear to stretch the bounds of performance standards, may go beyond sound and reasonable professional practice, or may compromise credibility, and thereby pose an unacceptable risk of impairing the reputation of the member and his or her firm with respect to independence, integrity, and objectivity. In such circumstances, the member and the member's firm should consider whether it is appropriate to perform the services.'').

[437] AICPA SAS No. 22, AU § 311.04b; AU § 9311.03.

[438] *See, e.g.,* PricewaterhouseCoopers Letter; Deloitte & Touche Letter.

modified the rules to parallel more closely the existing restrictions.[439]

Final Rule 2–01(c)(5) defines a contingent fee as any fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service. Contingent fees include commissions and similar payments. Consistent with the AICPA rules, our definition of ''contingent fees'' contains an exception for fees fixed by courts or other public authorities, or, in tax matters, fees determined based on the results of judicial proceedings or the findings of governmental agencies. We have added the AICPA's exception for fees, in tax matters, determined based on the results of judicial proceedings or the findings of governmental agencies. This exception is based, in part, on the position that when the fee is determined not by the parties but by courts or government agencies acting in the public interest, it is less likely that such fees will be used to create a mutual financial interest between the auditor and audit client. This exception also acknowledges that, as explained above, tax services generally do not create the same independence risks as other non-audit services.

In response to comments, we have eliminated from the rule text the language regarding ''value added'' fees. Some commenters represented that accounting firms sometimes receive fees where the client determines at the end of the engagement whether the services rendered warrant an additional fee, but there is no agreement (written or otherwise) for the audit client to pay the additional fee. In these situations, the client, at its complete discretion, determines at the end of the performance period that the accountant provided services that had greater value than the amount due under the contract. That type of ''value added'' fee is not within the scope of the prohibition.[440]

On the other hand, the staff will look closely to determine whether a fee labeled a ''value added'' fee is in fact a contingent fee, such as where there are side letters or other evidence that ties the fee to the success of the services rendered. For example, as discussed in the Proposing Release, an auditor might undertake a study of certain types of a client's expenditures in order to identify greater amounts of qualifying expenses that would result in greater income tax credits. Fees for such services might be based on a percentage of the tax credits generated, a base fee plus a percentage of tax credits generated over a pre-determined base amount, or a base fee plus a ''value added'' amount to be added to the base fee. In that case, the accounting firm's economic benefit will be greater if the tax credits are maximized. Because this interest (in the economic benefit) is inconsistent with acting independently in assessing the accuracy of the impact on the income tax accounts and financial statements of the tax credits, those kinds of fee arrangements are prohibited under the final rule.

E. Quality Control Provisions

We recognize that situations may arise where an accountant's independence becomes impaired inadvertently, such as where a family member makes an investment of which the covered person is not aware. Paragraph (d) addresses those situations. We are adopting a limited exception pursuant to which inadvertent violations of these rules by covered persons will not make the accounting firm not independent if the accounting firm maintains certain quality controls and satisfies other conditions. The effect of this provision is that an accounting firm that has appropriate quality controls will not be deemed to lack independence when an accountant did not know of the circumstances giving rise to the impairment and, upon discovery, the impairment is quickly resolved.

As we explained in the Proposing Release, strong quality controls deter, detect, and provide a means to address impairments of an auditor's independence. Our staff has stated repeatedly that it is concerned that firms, particularly larger firms, may lack appropriate worldwide quality controls.[441] The staff has urged certain firms to review and modernize existing procedures.[442]

Many firms have designed and implemented quality controls or are doing so now. In that regard, several commenters wrote that because firms already have quality control procedures in place, there is no need for this provision.[443] Other commenters supported the provision and asked us to adopt it.[444] We are adopting this limited exception to the general principle that attributes to an entire firm independence impairments of individual accountants. We proposed such a limited exception in the belief that adequate quality controls would limit the occasions in which the exception would come into play. Without such a requirement, we fear that the incidence of individual violations would be much greater.

Paragraph (d) provides that an accounting firm's independence will not be impaired solely because a covered person in the firm is not independent, as long as three conditions are met. First, the covered person must not have known of the circumstances giving rise to the lack of independence. The proposed rule provided that to take advantage of the exception, the firm must show that the covered person did not know, and was ''reasonable in not knowing,'' of the circumstances giving rise to the impairment. One commenter suggested eliminating this language because, once a firm implements a quality control system envisioned in the rule (with automated tracking of investments, ongoing training, and inspections and monitoring programs), a person may never be deemed to be ''reasonable'' in not knowing the circumstances giving rise to an impairment, and the exception would never be available.[445] Accordingly, we have revised the first condition to apply when the covered person did not know of the circumstances giving rise to the impairment.

The second condition is that the covered person's lack of independence was corrected as promptly as possible under the relevant circumstances after the covered person, or the firm, became aware of it. Several commenters suggested adding the phrase ''under the relevant circumstances.''[446] We agree that this change is appropriate because whether an action is ''prompt'' depends, at least in part, on the surrounding circumstances. In light of this change, however, we also have revised this provision so that the lack of independence must be corrected as

[439] AICPA Code of Professional Conduct, ET § 302.01.

[440] As Ray J. Groves, former Chairman and CEO, Ernst & Young testified, ''It does not impair independence to reward a professional who excels in his or her performance, or who exceeds reasonable expectations.'' Written Testimony of Ray J. Groves (July 26, 2000).

[441] *See* Letter from Lynn Turner, Chief Accountant, SEC, to Charles Bowsher, Chairman, POB (Dec. 9, 1999); *see, e.g., In the Matter of PricewaterhouseCoopers, LLP,* AAER No. 1098 (Jan. 14, 1999).

[442] *See* Letters from Lynn Turner, Chief Accountant, SEC, to Michael Conway, Chairman, SECPS Executive Committee (Nov. 30, 1998; Dec. 8, 1999; May 1, 2000).

[443] AICPA Letter; Deloitte & Touche Letter; KPMG Letter; Letter of Jodi L. McFall, CPA (Sept. 1, 2000); Letter of Electronic Data Systems (Sept. 11, 2000); Letter of William Tourville, CPA (Sept. 14, 2000); Letter of Gary Whitsell (Sept. 19, 2000).

[444] Letter of Thomas Graves (July 18, 2000); Letter of the FEE (Sept. 25, 2000).

[445] *See* Ernst & Young Letter.

[446] *See, e.g.,* Ernst & Young Letter.

promptly as possible under the relevant circumstances.

The third condition is that the accounting firm must have a quality control system in place that provides ''reasonable assurance'' that the firm and its employees do not lack independence. As we stated in the Proposing Release, we believe that a quality control system is the first line of defense to guard against independence impairments. We understand that accounting firms vary greatly. The rule we are adopting, as proposed, explicitly states that the quality control provisions may take into account the size and nature of the firm's practice.

In the Proposing Release, we stated that a firm's quality controls should apply to the firm and its affiliates worldwide,[447] and we solicited comment about whether a firm's quality controls should be this comprehensive. We received useful comments about the applicability of this provision to foreign affiliates.[448] Because we have eliminated the definition of affiliate of the accounting firm, however, we have modified the third provision to state that the quality controls must cover at least all employees and associated entities of the accounting firm participating in the engagement, including employees and associated entities located abroad. While we do not necessarily expect a firm making use of the limited exception to demonstrate that it has implemented appropriate quality control systems in each of its offices worldwide, the rule requires that, to avail itself of the limited exception, the firm must have quality control systems that cover each employee and associated entity participating in the engagement for which independence was impaired.

Several commenters stated that while it is appropriate for the Commission to examine whether a firm or a covered person is independent, we should not prescribe quality controls.[449] The rule does not require any firm to adopt quality controls.[450] Rather, for the reasons stated above, it makes adequate quality controls a prerequisite for a limited exception where the firm otherwise would be deemed not independent.

Rule 2–01(d)(4) describes the elements of a quality control system that large accounting firms—those with more than 500 SEC registrants as audit, review, or attest clients—must have in place to qualify for the limited exception.[451] Many of the elements are set forth in a 1999 letter from the staff to the SECPS.[452] While the rule as adopted requires only the larger firms to implement these elements to qualify for the limited exception, we note that some of these elements may be suitable for other firms as well. We discuss the elements below.

1. Written Independence Policies and Procedures

The largest firms' independence policies and procedures must be reduced to writing. As we stated in the Proposing Release, we expect the policies and procedures to be comprehensive, to cover all professionals in the accounting firm, and to address all aspects of independence, including financial, employment, and business relationships, as well as fee arrangements.

2. Automated Systems

Large firms must have automated systems to identify investments that may impair independence. In our proposal, this provision applied to all employees in the firm. Commenters stated, however, that it may not be necessary for the automated quality control system to include the financial investments of persons below the managerial level. Commenters also stated that it may be difficult to establish a system to identify all financial relationships that might impair independence.[453] These commenters suggested revising the provision for an automated tracking system to apply only to partners and managerial employees, while adding a provision providing for timely dissemination of information about its current list of audit clients to all professionals.[454] We agree with these commenters that non-managerial employees have less control over the audit process and, therefore, need not be included in the automated system. However, to meet this limited exception, a firm's quality control system must provide reasonable assurance that nonpartners and managerial employees are complying with the applicable independence rules. We also have clarified the scope of the required automated system, by changing the words ''financial relationships'' to ''investments in securities.'' Accordingly, an automated system would not need to track covered persons' ''other financial interests,'' such as brokerage and credit card accounts, to qualify for this limited exception. We also note that, for purposes of monitoring compliance with our rule on ''material'' indirect investments, an automated system need not track covered persons' net worth to determine if an indirect investment is material to that person. Nonetheless, such a system must provide some means of identifying indirect investments that might impair independence under the material indirect investment rule.

3. Timely Information

In light of the changes made to the requirement for automated systems, we added a provision that applies to all professionals. The quality controls of a large firm taking advantage of the limited exception must include a system that provides timely information about the entities from which the accountant must be independent. We expect that this system, for example, would contain current and accurate information about audit, review, and attest clients of the accounting firm and the affiliates of those audit clients. All professionals should be able quickly to determine whether an investment they are about to make may cause the independence of the firm to be impaired.

4. Training

Large firm quality controls also must include annual or ongoing firm-wide training about auditor independence, and we are adopting this provision as proposed. Each professional in a large accounting firm should be able to demonstrate competence with respect to professional standards, legal requirements, and firm policies and procedures.

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[447] Proposing Release, n. 192.

[448] *See* Ernst & Young Letter (acknowledging that the requirement applies worldwide).

[449] *See* KPMG Letter; Letter of KPMG Europe (Sept. 22, 20000).

[450] GAAS already requires firms to have quality controlls for their audit practices and refers auditors to the ''Statements on Quality Control Standards'' (''SQCS'') for guidance regarding the elements of those systems. AICPA SAS No. 25; AU section 161.

[451] We considered whether to use the number of firm professionals, instead of the number of SEC registrants, to determine which firms are required to implement the quality controls in Rule 2–01(d) to qualify for the limited exception. *See* SECPS Manual § 1000.46. We use number of SEC registrants because we are particularly concerned with those firms that audit a large number of SEC registants, regardless of the number of professionals, and because we can more easily verify the number of SEC registrants audited by a firm.

[452] Letter from Lynn Turner, Chief Account, SEC, to Michael Conway, Chairman, SECPS Executive Committee (DEC. 9, 1999).

[453] *See, e.g.,* Letter of KPMG Europe (Sept. 22, 2000).

[454] *See* Ernst & Young Letter; PricewaterhouseCoopers Letter.

5. Internal Inspection and Testing

For a large firm to qualify for the limited exception, its quality controls must include an internal inspection and testing program to monitor adherence to the independence requirements of the profession, standard setters, and other regulatory bodies. This would entail procedures to audit, on a test basis, information submitted by employees and partners and information in a client investment database. Firms also should monitor the investments of the firms themselves and their pension and retirement plans, and any business arrangements with their audit clients.

6. Notice of Names of Senior Management Responsible for Independence

We also proposed to require, with respect to large firms, that all firm members, officers, directors, and employees be notified of the name and title of the member of senior management responsible for compliance with the independence requirements. We are adopting this provision as proposed.

7. Prompt Reporting of Employment Negotiations

The quality control system of a large firm must contain written policies and procedures to require firm professionals to report promptly to the firm as soon as they begin employment negotiations with an audit client. The firm also should have appropriate procedures to remove immediately such a professional from an audit client's engagement and review the professional's work related to that audit client. In addition, we believe such engagements should be selected for peer review. As proposed, this provision would have applied to all firm professionals. Commenters, however, suggested that the provision should apply only to partners and covered persons.[455] Because of the number of professionals employed by the larger firms, and because we are most concerned with individuals who may affect the audit, we have revised this provision to apply only to partners and covered persons.

8. Disciplinary Mechanism

As we proposed, the quality control system of a large firm also must have a disciplinary mechanism to ensure compliance. One commenter stated that a disciplinary mechanism may only promote compliance, but cannot ensure it.[456] Although no system can guarantee 100% compliance in all circumstances, a firm's quality controls should be designed and implemented to ensure compliance, not merely to promote it. We are, therefore, adopting this language as proposed.

Several commenters noted that firms operating overseas may be prohibited from requesting certain information based on local restrictions on information gathering, or they may be required to amend an employee's employment contract before doing so.[457] We are sensitive to these concerns and we have responded, in part, by providing for a long transition period for accountants operating abroad, as discussed below. In any event, the SECPS has required member firms to implement quality controls, including many of these provisions.[458] If a firm is unable to apply its quality controls to offices outside the U.S., it may be unable to take advantage of the limited exception we are adopting.

F. Transition and Grandfathering

1. Transition

a. *Appraisal or Valuation Services or Fairness Opinions, and Internal Audit Services.* We proposed that, for the two years following the effective date of Rule 2–01, providing to an audit client certain non-audit services identified in the rule would not impair the accountant's independence if the services were provided under an existing contract and performing the services would not impair the accountant's independence under existing requirements. As discussed above, we modified eight of the non-audit service provisions proposed to parallel or draw from current independence requirements regarding these services. Because the restrictions embodied in these provisions now more closely parallel current restrictions, we assume that accountants currently comply with them.

With respect to appraisal or valuation services or fairness opinions and internal audit services, however, we are providing for a longer transition because the new rule extends beyond current restrictions. Final Rule 2–01(e)(1)(i) provides that an accountant's independence will not be impaired if the accountant continues for up to eighteen months to provide to an audit client these services, so long as the services did not impair the accountant's independence under pre-existing independence requirements.

We recognize that adoption of these and other provisions might require a registrant to decide between continuing to engage its auditing firm to audit its financial statements and continuing to engage that firm to provide certain non-audit services. It may not be feasible for the registrant and the auditor to cease all ongoing or scheduled non-audit engagements immediately. The company may need time to find a new provider of those services, to complete works in progress, and to provide for a smooth transition from one provider of services to another. Consequently, with respect to the two identified non-audit services, the final rule provides for an eighteen-month transition.

Under the transition provision proposed, accounting firms could not have entered into any new non-audit service contracts with their audit clients without impairing their independence. In response to commenters' concerns that the viability of these lines of business could be called into question if they were prohibited from entering into new contracts, we modified the provision to allow firms the flexibility to make business decisions over the next eighteen months that, in light of the new rule, are appropriate for their firms.

Final Rule 2–01(e)(1)(i), however, requires performance on any contracts inconsistent with the non-audit service provisions to be completed within eighteen months of the effective date of the final rule. To the extent that work on current contracts and contracts entered into within eighteen months of the effective date cannot be completed before the non-audit service provisions of the final rule take effect, accountants must take whatever steps are necessary to ensure that, at the end of the eighteen-month transition period, they are not providing any non-audit services inconsistent with final Rule 2–01.

b. *Other Financial Interests and Employment Relationships.* Rule 2–01(e)(1)(ii) provides for a three-month transition for certain of the financial interest rules (paragraph (c)(1)(ii)) and all of the employment provisions (paragraph (c)(2)) in the final rule. We are providing a transition period for these provisions because Rule 2–01 modestly expands current restrictions on certain accounting firm personnel in these areas. Because accounting firms may, therefore, need time to educate their employees and provide guidance on the new rule, we are providing a transition period of three months after the effective date of the rule.

[455] *See* Ernst & Young Letter; PricewaterhouseCoopers Letter.

[456] Letter of KPMG Europe (Sept. 22, 2000).

[457] *See* Ernst & Young Letter; Letter of Ernst & Young, U.K. (Sept. 7, 2000); Letter of KPMG Europe (Sept. 22, 2000); Deloitte & Touche Letter.

[458] *See* Letter from Michael A. Conway, Chairman, SECPS Executive Committee, to the Managing Partners of the SECPS Member Firms (April 2000).

c. *Quality Control Systems.* As discussed at length above, accounting firms can take advantage of the limited exception to the independence requirements provided by paragraph (d) of the rule, if they have in place a quality control system that, based on several factors, ''provides reasonable assurance'' that the firm and its employees do not lack independence. Under Rule 2–01(d)(4), the quality control systems of accounting firms that provide audit, review or attest services to more than 500 SEC registrants will not be considered to provide reasonable assurance of independence, unless the systems have certain characteristics. We are providing a transition provision that applies to the implementation date for the specific elements of a quality control system as described in paragraph (d)(4) of the rule.

Recently adopted SECPS provisions require quality controls substantially similar to those described in paragraph (d)(4).[459] Because these SECPS requirements are effective December 31, 2000, which precedes the effective date for the Commission's final rule, no transition date for paragraph (d)(4) is necessary for domestic accounting firms. By the date that this rule becomes effective, SECPS member firms should have appropriate quality control systems in place.

In the Proposing Release, however, we noted that foreign offices, or foreign ''associated'' or ''sister'' firms, of domestic firms may require additional time to develop and implement quality control systems that satisfy the requirements of paragraph (d)(4). We solicited comment on whether foreign offices, accordingly, should be afforded a transition period to phase in the quality control systems necessary to take advantage of the limited exception provided by the rule. Some commenters suggested that because establishing and implementing quality controls to apply worldwide would be difficult, we should provide for a long transition period.[460] In response to these comments, we determined to give accounting firms' foreign offices until December 31, 2002 to implement the quality controls described by the final rule.

We believe that investors in our capital markets should have the right to expect that the same quality controls over a firm's adherence to the independence requirements apply irrespective of where the audit, or where parts of the audit, take place. The two-year transition period strikes a reasonable balance between the need for improved quality control systems by all offices participating in an audit and the practical problems inherent in implementing these controls abroad.

As a result of this transition provision, before January 1, 2003, if a domestic firm with more than 500 SEC registrants as audit clients seeks to avail itself of the limited exception in paragraph (d), it must have a quality control system that complies with paragraph (d)(4) and any foreign office of the firm (or foreign associated or sister firm) participating in the audit of that company must have a system that provides reasonable assurance of independence, as required by paragraph (d)(3). After December 31, 2002, the foreign office (or foreign associated or sister firm) also must comply with the requirements in paragraph (d)(4).

2. Grandfathering

The rule provisions related to loans, insurance products, and employment relationships take effect three months after the effective date of the rule. Under the new rule, absent a grandfathering provision, a limited number of accountants or their family members might have been required, for example, to refinance a mortgage loan with an audit client or to leave their current employment with an audit client, in order for the auditor to remain independent. Because we would expect it to be more problematic in some cases for auditors and their family members to refinance a loan or to obtain a replacement insurance policy than, for example, for them to obtain a new credit card (from a non-audit client), we have grandfathered these relationships in Rule 2–01(e)(2), provided that these relationships do not impair independence under existing requirements. The AICPA similarly grandfathered certain loans that auditors and their family members had with audit clients when it revised its independence requirements related to loans in November 1991.[461] Accordingly, under the final rule, auditors and their relatives should not have to alter their loan agreements, change insurance policy providers, or require family members to find different employment for the accountant to maintain his or her independence.

Likewise, we have grandfathered contracts for the provision of financial information systems design and implementation in existence on the effective date of the rule. The information technology rule we adopt today imposes five conditions on these services, but we believe it would be unfair to require auditors providing these services to their audit clients under existing contracts to satisfy these conditions. We do not, however, believe that the conditions are so onerous as to warrant a transition period for new contracts. Accordingly, we are grandfathering contracts that are in place on the effective date of the rule, but requiring all contracts entered after the effective date of the rule to meet the conditions imposed by Rule 2–01(c)(4)(ii)(B).

3. Settling Financial Arrangements with Former Professionals

As discussed above, under Rule 2–01(c)(2)(iii), an accounting firm will not be considered independent of an audit client if a former employee of the firm has an ''accounting role or financial reporting oversight role'' at the audit client and the firm and the former employee have a financial arrangement that does not satisfy the requirements set forth by Rule 2–01(c)(2)(iii). Rule 2–01(e)(3) provides that, notwithstanding Rule 2–01(c)(2)(iii), an accounting firm will not lose its independence with respect to an audit client if the former employee with whom it maintains a financial arrangement inconsistent with Rule 2–01(c)(2)(iii) assumed an accounting or financial reporting oversight role at the audit client prior to the effective date of this rule. With respect to former firm employees who join an audit client in such a role after the effective date of this rule, however, the firm must ensure that the requirements of paragraph (c)(2)(iii) are met in order to maintain its independence with respect to the audit client. We are including this provision, which essentially grandfathers existing employment relationships between former audit firm employees and audit clients, because our intention was not to require former firm employees who are currently in accounting or financial reporting oversight roles at audit clients to leave their positions to preserve the accounting firm's independence.

G. Proxy Disclosure Requirement

We proposed to require disclosure of certain information regarding, among other things, non-audit services provided by the registrant's auditor to the registrant. We solicited comment on whether the proposed disclosures would be useful to investors. As noted above, most commenters addressing the issue supported a disclosure

[459] SECPS Manual § 1000.46 (April 2000).

[460] Ernst & Young Letter (suggesting a three-year transition period); Letter of Ernst & Young U.K. (Sept. 7, 2000).

[461] AICPA Ethical Standard ET § 101.07 (grandfathering certain loans that existed as of January 1, 1992).

requirement, though several raised concerns with elements of the proposal.[462] We believe that with the disclosures we are adopting, investors will be better able to evaluate the independence of the auditors of the companies in which they invest.[463] Accordingly, we are requiring companies to provide certain disclosures, but we have modified the proposed disclosure requirement as discussed below.[464] Our disclosure requirement has three components: (1) Disclosure regarding fees billed for services rendered by the principal accountant; (2) disclosure regarding whether the audit committee considered the compatibility of the non-audit services the company received from its auditor and the independence of the auditor; and (3) disclosure regarding the employment of leased personnel in connection with the audit.

1. Disclosure of Fees

The final proxy disclosure rule, like the proposal, requires registrants to aggregate and disclose the fee paid for the annual audit and for the review of the company's financial statements included in the company's Forms 10-Q or 10-QSB for the most recent fiscal year.[465] In light of the other modifications described below, we are requiring this fee disclosure under a caption entitled ''Audit Fees.''

We proposed to require registrants to describe each professional service, other than audit services, provided by their principal accountants during the most recent fiscal year, and to disclose the fee for each of these professional services; however, under the proposed disclosures, a registrant would not have had to describe the service or disclose the fee if the fee for the service was less than the lesser of $50,000 or ten percent of its audit fee. We solicited comment on the scope of this proposed disclosure. Several commenters believed that this proposed disclosure was too detailed. At least one commenter worried that the detailed disclosure requirement could place registrants at a competitive disadvantage when, for example, they disclose that the audit firm was retained to conduct due diligence in connection with a possible acquisition.[466] Other commenters suggested that a simpler disclosure, focused on the aggregate amount of non-audit and audit services provided to a company by its auditor, would be more useful to investors.[467] We were persuaded by these arguments and, accordingly, we are adopting a more limited disclosure requirement.

Under the final rule, we are not requiring registrants to describe each professional service or to disclose the fee for each service. Instead, we are requiring that registrants disclose under the caption, ''Financial Information Systems Design and Implementation Fees,'' the aggregate fees billed for services of the type described in final Rule 2–01(c)(4)(ii)(B)(information technology services)[468] rendered by the registrant's principal accountant during the most recent year, and, under the caption ''All Other Fees,'' the fees billed for all other non-audit services, including fees for tax-related services, rendered by the principal accountant during the most recent year.

Although some commenters suggested that we require disclosure only of the aggregate fees billed by the principal accountant for audit and for non-audit services, we are, in essence, requiring registrants to break non-audit services into two categories—one category focused on information technology services and one category encompassing all other non-audit services. As discussed above, our concern with information technology services relates both to the relative size of non-audit fees to audit fees and the value of the services themselves.[469] Our two-pronged approach responds to both of these concerns.

We are also requiring disclosure of fees billed for non-audit services, other than information technology services, rendered by the principal accountant in the last fiscal year. While we proposed to require disclosure of fees for each service as discussed above, we have determined to require only disclosure of aggregate fees billed for non-audit services, excluding information technology services. As noted above, commenters generally favored more simple disclosure, believing it is more useful to investors. In requiring disclosure of aggregate fees, we are adopting a disclosure requirement that is similar to the disclosure that the United Kingdom has required since 1989. As discussed in the Proposing Release, since 1989, the British government has required companies to disclose their annual audit fee and fees paid to their auditor for non-audit services.[470] ''The [British] government believes that the publication of the existence of, and extent of, non-audit consultancy services provided to audit clients will enable shareholders, investors, and other parties to judge for themselves whether auditor independence is likely to be jeopardized.''[471]

Some have argued that disclosure should be our sole response to auditor independence issues and that we should adopt no additional rules, noting that this is the regulatory scheme in the

[462] *See supra* note 25.

[463] See Earnscliffe II, *supra* note 38, at 45, which states, ''Most people sensed that the relationship between the auditor and auditee was appropriate, typically neither too close nor tension-ridden. The one area of greater concern had to do with the provision of non-audit services to audit clients, where participants felt unsettled and discomfited. Avoidance of this practice seemed preferred, but disclosure was seen as a helpful alternative step as well.''

[464] The disclosure requirement pertains to the accounting firm that is the registrant's principal accountant. The principal accountant generally is the accounting firm that takes responsibility for the report on the financial statements of the registrant for each year presented. *See* SEC Division of Corporation Finance, ''Accounting Disclosure Rules and Practices: An Overview,'' Topic Four, I.D. (Mar. 31, 2000).

[465] *See* proposed Rule 14a–101 Item 9(e)(4); Rule 10–01(d) of Regulation S–X and Item 310 of Regulation S–B, 17 CFR 210.10–01, 228.310(b).

[466] Ernst & Young Letter.

[467] PricewaterhouseCoopers Letter; Ernst & Young Letter; Testimony of J. Michael Cook, former Chairman and Chief Executive Officer, Deloitte & Touche (July 26, 2000); Testimony of Philip D. Ameen, Chair, Committee on Corporate Reporting, FEI–CRR (Sept. 20, 2000).

[468] *See supra* Section IV.D.4.b(ii). The services described in Rule 2–01(c)(4)(ii)(B) relate to systems that aggregate source data underlying, or generate information significant to, the financial statements, which may be a particular concern to investors. *See* Earnscliffe I, *supra* note 65, at 24, which states, ''Some felt that installing computer systems was not a problem * * * others argued that if the computer system had anything to do with the financial reporting systems * * * then the auditor would be in serious conflict.'' The required disclosure will permit investors to decide whether such services create independence concerns.

[469] *See* Earnscliffe I, *supra* note 65, at 26, which describes responses to a scenario when the annual audit fee was $1 million and the auditor performed computer system work for $10 million, which was 1% of the auditor's annual revenues, and states, ''First off, the sheer size of the contract was seen as a potential perception challenge. Even though $10 million might be good value for the client, and only a tiny fraction of the audit firm's business, there was a sense of doubt that the firm would be willing to walk away from such a relationship, if that were necessary to protect the independence of the audit.''

[470] Companies Act 1985, Part XI, Chapter V, Auditors, §390B, ''Remuneration of Auditors and Their Associates for Non-audit Work,'' and Regulations 1991, §5, ''Disclosure of Remuneration for Non-Audit Work.'' *See generally* Written Testimony of Graham Ward, Institute of Chartered Accountants of England and Wales (''ICAEW'') (Sept. 13, 2000).

[471] Michael Firth, ''The Provision of Nonaudit Services by Accounting Firms to their Audit Clients,'' *Contemporary Accounting Research,* at 6 (Summer 1997). Firth hypothesized that companies with potentially high agency costs (i.e., companies in which directors do not control management or which have a large amount of debt) would limit the non-audit services provided by their auditors because the appearance of a lack of auditor independence would increase their cost of capital. Firth's sample data came from the 500 largest British industrial, listed companies. Firth's findings were consistent with his hypothesis.

U.K.[472] As we discussed above, we have determined to adopt a two-pronged approach—disclosure plus restrictions on the provision of certain non-audit services. The U.K. disclosure rules are just one piece of a larger regime in the U.K. to address auditor independence issues. The self-regulatory authority in the U.K. has a majority of public members and generally exercises broad examination authority.[473] An ''independent practice inspection unit'' sends inspectors to the 20 largest accounting firms (who audit ninety percent of the companies listed on the London FTSE) every year to examine the accounting firms for independence issues.[474] The differences in the U.K. and U.S. regulatory schemes and self-regulatory approaches highlight the need for our two-pronged approach—disclosure plus restrictions on the provision of certain non-audit services.

We requested comment on whether, in the case of investment companies, the rule should extend beyond the registrant to require the disclosures as to all entities in the investment company complex. One commenter suggested that applying the proxy disclosure requirements to the investment company complex would be of limited utility to investors, particularly where the adviser's parent company is an entity, such as a bank, broker-dealer or insurance company whose operations are completely separate from the investment adviser and the registrant. The commenter suggested requiring disclosure only of the aggregate fees billed for information technology services and other non-audit services provided to certain other service providers in the investment company complex.[475]

We recognize that it could be confusing to provide investors with disclosure concerning audit and non-audit services for all entities (including all the funds) within the investment company complex. We believe, however, that the ability to compare the registrant's audit fee with the aggregate fees billed for non-audit services provided to all the entities that operate an investment company would be useful for investors in evaluating the independence of the investment company's auditor. Because the adviser plays an integral role in managing and overseeing the investment company, we believe the fees billed for non-audit services provided to a fund's adviser are relevant and should be disclosed. In addition, various service providers to the investment company are in a control relationship with the adviser. We believe that investors should be informed of the aggregate amount of the registrant's audit fee and the fees billed for information technology services and other non-audit services provided by the independent principal accountant to these service providers.

As a result, the proxy rules require investment companies to disclose a fund's audit fee and the aggregate fees billed for information technology and other non-audit services provided by the registrant's auditors to the registrant, its adviser, and entities in a control relationship with the adviser that provide services to the registrant. This approach will provide investors with pertinent information about the relationship between the fund's auditor and other entities in the investment company complex.

2. Audit Committee Disclosure

As discussed above, audit committees play an important role in overseeing the financial reporting process and the auditor's independence. We proposed to require that companies disclose in their proxy statements whether, before each disclosed non-audit service was rendered, the company's audit committee approved, and considered the effect on independence of, such service provided by the company's principal accountant. Several commenters encouraged us to wait until the full effects of recently enacted audit committee reforms are known, in particular the effects of ISB Standard No. 1, the new exchange listing rules, and our recent audit committee disclosure rules. However, we think that the disclosure requirements that we are adopting will complement those initiatives by encouraging audit committees to focus particular attention on scope of services issues.

We have modified the proposed disclosure to require disclosure only of whether the audit committee considered whether the principal accountant's provision of the information technology services and other non-audit services to the registrant is compatible with maintaining the principal accountant's independence.[476] In light of the recommendations adopted by the O'Malley Panel and the other audit committee reforms,[477] we believe that companies will be providing useful information to investors under the modified requirement. Investors will be aided by knowing whether the company's audit committee considered whether the provision of non-audit services by the company's principal accountant is compatible with maintaining the accountant's independence. We are requiring issuers to disclose only whether the audit committee considered whether the principal accountant's provision of non-audit services is compatible with maintaining the principal accountant's independence. We are not requiring issuers to disclose the conclusions of the audit committee deliberations. Accordingly, we see little possibility of private liability arising from these disclosures.

3. Leased Employees

Under the final amendments, a company will have to disclose, if greater than fifty percent of the hours expended on the audit engagement, the percentage of hours expended by personnel the principal auditor leased or otherwise acquired from another entity. This disclosure requirement responds to a recent trend by some accounting firms to sell their non-audit practices to financial services companies. Often in these transactions, the partners and employees become employees of the financial services firm. The accounting firm then leases assets, namely professional auditors, back from those companies to complete audit engagements. In such an arrangement, audit professionals become full- or part-time employees of the financial services company, but work on audit engagements for their former accounting firm. They receive compensation from the financial services firm and, in some situations, from the accounting firm, as well.[478] We believe that investors

[472] *See* Arthur Andersen Letter.

[473] *See* Department of Trade and Industry, ''A Framework of Independent Regulation for the Accounting Profession,'' ¶¶ 29, 35, 39, 44, and 46 (Nov. 1998).

[474] Testimony of Graham Ward, ICAEW (Sept. 13, 2000).

[475] ICI Letter.

[476] We note that audit committees currently receive information about the auditor's provision of non-audit services under ISB Standard No. 1 and SECPS Manual § 1000.08. *See* ISB Standard No. 1, *supra* note 167; SECPS Manual § 1000.08 (requiring the auditor to report annually to the audit committee or board of directors (or its equivalent in a partnership) of SEC registered audit clients on the ''total fees received from the client for management advisory services during the year under audit and a description of the types of such services rendered'').

[477] The O'Malley Panel has recommended that audit committees pre-approve non-audit services that exceed a threshold determined by the committee. This recommendation is consistent with the recommendations of the Blue Ribbon Committee regarding auditors' services. The Panel set forth factors for audit committees to consider in determining the appropriateness of a service. *See* O'Malley Panel Report, *supra* note 20, at ¶ 5.30.

[478] The ISB cites threats to independence arising from these structures and identifies quality controls to ensure the independence of the auditors in these situations. *See* ISB, ''Discussion Memorandum 99–

Continued

should be informed of arrangements whereby most of the auditors who work on an audit are employed elsewhere.[479]

4. Proxy Statement

Finally, under the final rules, companies must provide the disclosures we are requiring in their proxy and information statements. We solicited comment on whether the disclosure should instead be required in the Form 10–K. Some commenters said that the disclosure should be made in the Form 10–K,[480] with some commenters expressing concern that the proxy statement will become overloaded with information. Other commenters expressed a preference for the disclosure to be in proxy statements.[481] We have determined that the proxy statement is the appropriate place for the disclosure since shareholders often vote on whether to select or ratify the selection of the auditors.[482] Companies must provide the disclosure only in the proxy statement relating to an annual meeting of shareholders at which directors are to be elected (or special meeting or written consents in lieu of such meeting). This disclosure is not required for companies reporting solely under Section 15(d) of the Exchange Act[483] since they are not subject to our proxy rules. Similarly, this disclosure will not be required to be provided by foreign private issuers[484] since they have different corporate governance regimes and are not subject to our proxy rules.

Companies must comply with the new proxy and information statement disclosure requirements for all proxy and information statements filed with us after the effective date.

H. Definitions

As we proposed, we are including definitions of some of the key terms used in Rule 2–01 in paragraph (f) of the Rule. In this section of the release, we provide a more detailed explanation of those defined terms not discussed in the preceding sections. We have made clear in the rule we adopt that paragraph (f) provides definitions only for the purposes of Rule 2–01 and not for other sections of Regulation S–X.

1. ''Accountant''

We are adopting, as proposed, Rule 2–01(f)(1) that defines the term ''accountant.'' The rules are written in terms of an accountant's independence from the audit client. The definition of ''accountant'' includes the accounting firm in which the auditor practices. The definition makes clear that an individual accountant's lack of independence may be attributed to the firm.

2. ''Accounting Firm''

We are adopting the definition of ''accounting firm'' in Rule 2–01(f)(2) with two modifications from the version proposed. As adopted, ''accounting firm'' means ''an organization (whether it is a sole proprietorship, incorporated association, partnership, corporation, limited liability company, limited liability partnership, or other legal entity) that is engaged in the practice of public accounting and furnishes reports or other documents filed with the Commission or otherwise prepared under the securities laws, and all of the organization's departments, divisions, parents, subsidiaries, and associated entities, including those located outside of the United States.'' The definition also expressly includes ''the organization's pension, retirement, investment or similar plans.''

The first modification is solely to clarify the definition. We have simplified the description of what public accounting firms are covered under our rule by referring only to those that ''furnish reports or other documents filed with the Commission or otherwise prepared under the securities laws.'' We believe that this description captures the accounting firms subject to our independence requirements. No substantive change from the rule as proposed is intended.

The second change is more significant. As proposed, the definition of ''accounting firm'' included ''affiliate of the accounting firm.'' The term ''affiliate of the accounting firm'' was separately defined to include a broad group of entities that are either financially tied to or otherwise associated with the accounting firm enough to warrant being treated like the accounting firm for purposes of our independence requirements. Specifically, we defined as an ''affiliate of the accounting firm'' any person controlling, controlled by, or under common control with the firm, shareholders of more than five percent of the firm's voting securities, and entities five percent or more of whose securities are owned by the firm. The proposed rule also included any officer, director, partner, or co-partner of any of the foregoing.

We also proposed defining as affiliates of the accounting firm certain entities that are business partners of the accounting firm. In general, these included certain (i) joint ventures in which the accounting firm participates, (ii) entities that provide non-audit services to the accounting firm's audit clients and with which the accounting firm has certain financial interests or relationships, and (iii) entities involved in ''leasing'' professional services to the accounting firm for their audits. The proposed definition also included all other entities with which the accounting firm is publicly associated in certain ways.

The definition we proposed also attributed to the auditor actions and interests of certain entities involved in joint ventures or partnerships with the accounting firm in which the parties agree to share revenues, ownership interests, appreciation, or certain other economic benefits. It also expressly included any entity that provides non-audit services to an audit client, if the accounting firm has an equity interest in, shares revenues with, loans money to, or if any covered person has certain direct business relationships with, the consulting entity, as well as persons ''co-branding'' or using the same (or substantially the same) name or logo as the accounting firm, cross-selling services with the accounting firm, or co-managing with the accounting firm.

Finally, the proposed definition of ''affiliate of the accounting firm'' addressed the situation where full- or part-time employees of an entity other than the firm signing the audit report perform a majority of the audit engagement. The proposal provided that if an auditor ''leases'' personnel from an entity to perform audit procedures or prepare reports to be filed with the Commission, and the ''leased'' personnel perform a majority of the hours worked on the engagement, then the actions and interests of the ''lessor,'' and certain persons at the lessor are attributed to the audit firm.

Our proposed definition of ''affiliate of the accounting firm'' proved to be one of the most controversial aspects of our proposed rule. Many commenters believed that the definition was overbroad and expressed concern over the application of the proposed definition to their business arrangements. The largest accounting firms were concerned that the

2: Evolving Forms of Firm Structure and Organization,'' at 20 (Oct. 1999).

[479] AICPA SAS No. 1, AU § 543 also sets forth guidance on when a principal auditor discloses and makes reference to another auditor who performs an audit of a component of the entity.

[480] *See, e.g.,* Testimony of Robert E. Denham, Member, ISB (July 26, 2000) (recommending that disclosure be put in footnotes to the financial statements or in the Form 10–K).

[481] *See, e.g.,* Letter of Peter C. Clapman, Senior Vice President and Chief Counsel, Investments, TIAA-CREF (Sept. 21, 2000).

[482] *See* Item 9 of Schedule 14A. 17 CFR 240.14a–101.

[483] 15 U.S.C. 78(d).

[484] ''Foreign private issuer'' is defined in Securities Act Rule 405 (17 CFR 230.405) and Exchange Act Rule 3b–4 (17 CFR 240.3b–4).

definition, as a practical matter, would inappropriately restrict their ability to enter into certain types of business relationships, including joint ventures and co-branding arrangements.[485] One of the so-called ''middle tier'' accounting firms expressed concern that the proposed definition would reach the ''alliance'' it has arranged with other accounting firms and service providers across the country.[486] Many commenters repeated the AICPA's comment that the definition was ''overbroad.''[487] Some commenters suggested an alternative, much narrower definition that defined affiliates of the accounting firm as entities that control, are controlled by, or are under common control with the accounting firm.[488] Some firms acknowledged that, at least with respect to the provision of non-audit services, a test based on significant influence may be appropriate.

In light of these comments and after careful consideration, we have decided not to adopt the definition of ''affiliate of the accounting firm'' we proposed. The issue of what entities other than the legal entity issuing reports or other documents filed with the Commission should be treated as the accounting firm is of relatively recent origin. In recent years, accounting firms have explored new ''alternative practice structures'' and increasingly entered into new business arrangements with entities not engaged in public accounting. To date, our staff has dealt with these questions by interpreting the existing rules. Our staff's approach has been to analyze these situations in light of all relevant facts and circumstances.[489] We proposed a comprehensive definition that described all the relevant facts and circumstances that might lead us to conclude that a separate legal entity was sufficiently associated with the accounting firm to warrant applying the Commission's independence requirements to that entity. In light of the comments received, we are persuaded that the rule as proposed could have unintended consequences, and that varying criteria of affiliation could be appropriate depending on the regulatory context in which the issue of attribution arises.

Accordingly, we have eliminated the proposed definition of ''affiliate of the accounting firm'' from the rule we adopt and replaced the phrase ''and affiliates of the accounting firm'' in the proposed definition of ''accounting firm'' with ''and associated entities, including those located outside of the United States.''[490] We intend this phrase to reflect our staff's current practice of addressing these questions in light of all relevant facts and circumstances, looking to the factors identified in our staff's previous guidance on this subject.[491] While the rules we adopt do not provide accounting firms with the certainty of our proposed rule, we are convinced that a more flexible approach is warranted as the types and nature of accounting firms' business arrangements continue to develop.

3. ''Affiliate of the Audit Client''

We are adopting a modified definition of ''affiliate of the audit client.'' As proposed, Rule 2–01(f)(4) defined ''affiliate of the audit client'' as any entity that has ''significant influence'' over the audit client, or any entity over which the audit client has significant influence. The definition was intended to cover both ''upstream'' and ''downstream'' affiliates of the audit client, including the audit client's corporate parent and subsidiary.

We received a number of comments expressing concern about our proposed definition of ''affiliate of the audit client.'' Some members of the accounting profession felt that our proposed definition was overbroad and would require the auditor to maintain independence from entities far removed from the audit client.[492] Some commenters suggested that we should use the ''control'' test currently found in Rule 1–02 of Regulation S–X to define an affiliate of an audit client. At least one commenter suggested that our proposed definition should be limited to only those affiliates that are ''material'' to the audit client.[493]

After considering these comments, we have decided to modify substantially our proposed rule. Under the rule we adopt today, entities, if not part of an investment company complex, will be considered affiliates of the audit client if they satisfy the criteria of one of three paragraphs of Rule 2–01(f)(4). First, under paragraph (4)(i), which is based on the control definition currently in Rule 1–02 of Regulation S–X, an entity is an affiliate of the audit client when the entity controls, is controlled by, or is under common control with the audit client. Second, paragraph (4)(ii) defines as an affiliate of the audit client any entity over which the audit client has significant influence, unless that entity is not material to the audit client. Third, paragraph (4)(iii) includes those entities that have significant influence over the

485 *See, e.g.,* KPMG Letter; Arthur Andersen Letter.

486 *See* Written Testimony of Wayne Kolins, National Director of Assurance, BDO Seidman, LLP (Sept. 20, 2000).

487 *See, e.g.,* Letter of Fred M. Rock, CPA (Sept. 20, 2000); Letter of Centerprise Advisors, Inc. (Sept. 25, 2000).

488 *See, e.g.,* Deloitte & Touche Letter; Testimony of Wayne A. Kolins, BDO Seidman, LLP (Sept. 20, 2000).

489 *See* Letter of Edmund Coulson, Chief Accountant, SEC, to Robert Mednick, Arthur Andersen (June 20, 1990).

490 Questions of attribution in this context have not been analyzed on the basis of ''affiliation'' in the past. Indeed, the term ''affiliate of the accounting firm'' is not used in our current Rule 2–01 or in the Codification. The term was used in our proposed rule, along with the proposed definition of the term, to attempt to bring certainty to this issue. Since ''affiliate'' is defined in Rule 1–02 of Regulation S–X and we are eliminating the definition of ''affiliate of the accounting firm,'' we have used the term ''associated'' instead of ''affiliated'' in our final rules to make clear that, consistent with the status quo, the entities treated as if they were the accounting firm will not be determined by reference to the definition of ''affiliate'' in Rule 1–02 of Regulation S–X. While the ''control'' relationships of Rule 1–02 may be adequate to warrant treating an entity as the accounting firm for independence purposes, Rule 1–02 does not set forth the exclusive circumstances in which an entity's interests will be imputed to the accounting firm in this context. In addition, we do not intend for the definition of ''associated'' used in any other context in the federal securities laws to apply to this term.

491 *See, e.g.,* Letter of Edmund Coulson, Chief Accountant, SEC, to Robert Mednick, Arthur Andersen (June 20, 1990); Letter of W. Scott Bayless, Assistant Chief Accountant, SEC, to Larry Edgerton, Elms, Faris & Co. (June 7, 1996); Letter of Lynn E. Turner, Chief Accountant, SEC, to Jeff Yabuki, American Express Financial Advisors (Nov. 2, 1998); Letter of Lynn E. Turner, Chief Accountant, SEC to Michael Gleespen, Century Business Services (Nov. 2, 1998); Letter of Lynn E. Turner, Chief Accountant, SEC, to Terry Putney, H&R Block Business Services (Nov. 2, 1998); Letter of Lynn E. Turner, Chief Accountant, SEC, to Michael Conway, KPMG Peat Marwick LLP (Jan. 7, 1999); Letter of Lynn E. Turner, Chief Accountant, SEC, to Nigel Buchanan, PricewaterhouseCoopers (July 26, 1999); Letter of Lynn E. Turner, Chief Accountant, SEC, to Kathryn A. Oberly, Esq., Ernst & Young (May 25, 2000); Letter of Lynn E. Turner, Chief Accountant, SEC, to Antonio Rosati, Director of Issuers Division, Commissione Nazionale per le Societa e la Borsa (August 24, 2000); Letter of Lynn E. Turner, Chief Accountant, SEC, to J. Terry Strange, KPMG (October 16, 2000); *see also* Codification § 602.02.b.ii, Ex. 8; 602.02.b.iv; 602.02.c.iii; 602.02.g, Ex. 5. *Cf.* SECPS Manual § 1000.45 (discussing application of SECPS rules to ''foreign associated firm[s]''); AICPA Code of Professional Conduct, ET § 101.16 (Interpretation 101–14) (application of independence rules to alternative practice structures); AICPA Code of Professional Conduct, ET § 505.03 (application of independence rules to entities controlled by an accounting firm or its members). In addition, accounting firms entering into business transactions in which they acquire equity stakes in other companies will need to continue to consider whether they will have a direct or material indirect business relationship with, or a direct financial interest or material indirect financial interest in, any of their audit clients that are also clients of or enter into business relationships with or invest in or are invested in by that other company. *See* Letter of Lynn E. Turner, Chief Accountant, SEC, to Kathryn A. Oberly, Esq., Ernst & Young (May 25, 2000); Letter of Lynn E. Turner, Chief Accountant, SEC, to J. Terry Strange, KPMG (October 16, 2000).

492 *See* AICPA Letter; Arthur Andersen Letter.

493 *See* Deloitte & Touche Letter.

audit client, unless the audit client is not material to that entity.

Paragraph (4)(i) now makes clear that entities in a control relationship with the audit client, regardless of materiality considerations, are affiliates of the audit client for independence purposes. This includes the audit client's parent and subsidiaries and is consistent with current Rule 2–01(b). We are not convinced, however, that a control test alone captures all situations in which an entity is sufficiently related to the audit client to require it to be treated as the audit client's affiliate for independence purposes. Our Codification currently considers entities affiliates of the audit client in a number of situations in which control is not present.[494] As under our proposal, we continue to believe that a significant influence test sets a proper baseline threshold for audit client affiliation because, under the equity method of accounting,[495] it results in the marriage of financial information between the audit client and the entity influenced by, or influencing, the financial or operating policies of the audit client. As urged by commenters, however, the addition of the materiality threshold to the significant influence test should avoid undue hardships to accounting firms in situations where their audit clients have numerous affiliates that are immaterial to them.

As in our proposed rule, we continue to use the term ''significant influence'' in the definition to refer to the principles in APB No. 18. Some commenters suggested that, since the term ''significant influence'' is not defined in the rules, it would be difficult to apply.[496] Many other commenters, however, did not object to the term or express any uncertainty as to the term's meaning. Given the concept's familiarity to the accounting profession and its use in the profession's independence requirements, we have decided to retain its use without providing an explicit definition in the rules we adopt.

We use the term ''significant influence'' as it is used in APB No. 18. It recognizes that ''significant influence'' can be exercised in several ways: representation on the board of directors; participation in key policy decisions; material inter-company transactions; interchange of personnel; or other means. APB No. 18 also recognizes that an important consideration is the extent of the equity investment, particularly in relation to the concentration of other investments. In order to provide a reasonable degree of uniformity in application of this standard, the Board concluded that,

> [A]n investment (direct or indirect) of 20% or more of the voting stock of an investee should lead to a presumption that in the absence of evidence to the contrary an investor has the ability to exercise significant influence over an investee. Conversely, an investment of less than 20% of the voting stock of an investee should lead to a presumption that an investor does not have the ability to exercise significant influence unless such ability can be demonstrated.[497]

In addition, we have added a new section to the definition of ''affiliate of an audit client'' to deal specifically with affiliation questions in mutual fund complexes. Paragraph (4)(iv) provides that when the audit client is part of an investment company complex, each entity in the investment company complex is an ''affiliate of the audit client.'' In this respect, we are following the ISB's Standard No. 2, ''Certain Independence Implications of Audits of Mutual Funds and Related Entities.''[498]

While this provision was not in our proposed definition of ''affiliate of the audit client,'' it was clearly embodied in our proposed Rule 2–01(c)(1)(ii)(G), which provided, ''When the audit client is an entity that is part of an investment company complex, the accountant must be independent of each entity in the investment company complex.'' As we explained in the Proposing Release, this provision was meant to reflect the standard of ISB Standard No. 2. We pointed out in the Proposing Release that this provision applied to auditor-audit client relationships other than financial interests, and sought comment on whether it should be limited in any context other than financial interests. At least one commenter analyzed our proposed Rule 2–01(c)(1)(ii)(G) as an extension of the definition of ''affiliate of the audit client.''[499]

While some commenters suggested that we limit this principle through a restriction on the scope of the ''investment company complex'' definition, few commenters disagreed with the ISB's basic conclusion that the unique structure of mutual fund complexes warrants special rules of affiliation. After considering the comments on this issue, we have decided to adopt this provision substantively as proposed, but to move it to the definition of ''affiliate of the audit client'' to make its purpose and effect clearer.

4. ''Audit and Professional Engagement Period''

We have adopted the definition of ''audit and professional engagement period'' in Rule 2–01(f)(5), as proposed, with one modification. As defined, the 'audit and professional engagement period' is ''[t]he period covered by any financial statements being audited or reviewed (the ''audit period''); and the period of the engagement to audit or review the audit client's financial statements or to prepare a report filed with the Commission (the 'professional engagement period'').'

The definition specifies that the professional engagement period begins when the accountant either signs an initial engagement letter (or other agreement to review or audit a client's financial statements) or begins review, audit, or attest procedures, whichever is earlier,[500] and that the professional engagement period ends when the client or accountant notifies the Commission that the client is no longer that accountant's audit client.[501] Some commenters asserted that the professional engagement period should begin when the accountant begins its procedures.[502] Commenters expressed concern that ''time will be needed for covered persons and their family members to unwind financial interests or employment relationships.''[503] We believe that our rule, as adopted, provides an appropriate amount of flexibility and certainty to the auditor because both signing the initial engagement letter and beginning the audit procedures are entirely within the control of the accountant. An accountant may orally agree to an engagement and then simply delay signing an engagement letter or beginning procedures so as to toll the start of its professional engagement period.

With regard to the termination of the professional engagement period, we note that the current rules of the SECPS require an auditor to notify the Commission in writing that an SEC registrant who was a former client is no

[494] *See* Codification § 602.02.b.iii (Ex. 1); 602.02.b.iv; 602.02.c.iii; 602.02.h (Ex. 9).

[495] *See* APB No. 18.

[496] *See* Letter of Stanley Keller, Esq., and Richard Rowe, Esq., ABA Committees on Federal Regulation of Securities Law and Accounting (Sept. 27, 2000).

[497] *See* APB No. 18, at ¶ 17. Paragraph 17 of APB No. 18 also discusses a number of considerations that may affect the ability of an entity to have significant influence over an investee.

[498] We have, however, narrowed the definition of ''investment company complex'' from the definition used in ISB Standard No. 2. *See infra* Section IV.H.11.

[499] *See* Arthur Andersen Letter.

[500] Rule 2–01(f)(5)(ii)(A).

[501] Rule 2–01(f)(5)(ii)(B).

[502] *See, e.g.,* Deloitte & Touche Letter.

[503] *See, e.g.,* Deloitte & Touche Letter.

longer a client.[504] Similarly, a domestic registrant has an obligation to report changes in its independent auditor on Form 8–K. While no corollary requirement applies to foreign private issuers, there is certainly no prohibition against either such an issuer or its auditor providing us with a private notification that would suffice to end the professional engagement period for purposes of our independence assessment, should this be an issue for the accountant or the registrant.

In response to concerns of commenters,[505] we are providing a limited exception in the definition that applies to foreign private issuers who are offering or listing securities in the United States for the first time. For auditors of those foreign private issuers who previously were not required to, and did not, file any registration statement or report with the Commission, the ''audit and professional engagement period'' does not include periods ended prior to the beginning of the last fiscal year ended before the issuer first filed or was required to file a registration statement or report with us, provided that the company has fully complied with home country independence standards in those prior periods.

5. ''Audit Client''

Rule 2–01(f)(6) defines ''audit client.'' We have defined this term as the entity whose financial statements or other information is being audited, reviewed, or attested. We believe this is how ''audit client'' commonly is used, and we are adopting this as part of the definition. Use of this definition, of course, in no way changes our position that the auditor ''owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public.''[506]

We have made one change to the definition. Commenters suggested adding affiliate of the audit client, defined above, to the definition of audit client for the sake of simplicity, and we have done so.[507] The definition of audit client, for purposes of paragraph (c)(1)(i) (investments in audit clients), however, does not include entities that are affiliates of the audit client by virtue of paragraph (f)(4)(ii) or paragraph (f)(4)(iii), which define an affiliate in terms of significant influence. As discussed more fully above, if an entity is an affiliate of the audit client because of a ''significant influence'' relationship, it is covered by the rules relating to material indirect investments and investments in non-client entities under (c)(1)(i)(D) and (c)(1)(i)(E), and it is not necessary, therefore, to include it in the definition of audit client.

6. ''Audit Engagement Team''

Rule 2–01(f)(7) defines the term ''audit engagement team.'' The ''audit engagement team'' includes the people in the accounting firm who are most directly in a position to influence the audit. Members of the ''audit engagement team'' are included within the category of ''covered persons in the firm,'' which is the term used to indicate the persons in the firm subject to a number of the specific provisions of paragraph (c) of Rule 2–01.

The ''audit engagement team'' includes ''all partners, principals, shareholders, and professional employees participating in an audit, review, or attestation engagement of an audit client, including those conducting concurring or second partner reviews, and all persons who consult with others on the audit engagement team during the audit, review, or attestation engagement regarding technical or industry-specific issues, transactions, or events.''

Commenters who addressed this definition generally agreed that persons in a position to influence the audit, such as the audit engagement team, should be covered persons for purposes of the rule's restrictions on certain relationships with audit clients.[508] We have adopted the definition with only one variation from the proposed definition. The proposed definition included the phrase ''all persons who consult, *formally or informally,* with others . . . .'' In the final rule, we have deleted the phrase ''formally or informally,'' to avoid unintended overbreadth. Rather, we use the term ''consult'' to refer to meaningful discussions related to the audit.

7. ''Chain of Command''

Rule 2–01(f)(8) defines the term ''chain of command.'' This term is defined to refer to the group of people in the accounting firm who, while not directly on the audit engagement team, are capable of influencing the audit process either through their oversight of the audit itself or through their influence over the members of the audit engagement team. Like the ''audit engagement team,'' persons in the ''chain of command'' are included as ''covered persons in the firm,'' and therefore are subject to a number of the provisions in paragraph (c) of Rule 2–01.

Based on the input of commenters, we have modified this definition somewhat from the proposed definition. Commenters stated that our definition included too broad a range of persons, capturing people, such as managers who could ''influence the . . . compensation of any member of the audit engagement team,'' whose connection to the audit is too tenuous to reasonably conclude that they have the ability to influence the audit.[509]

We are persuaded that the proposed definition was broader than necessary, and we have accordingly sharpened its focus and tried to eliminate any ambiguity. As defined in the final rule, ''chain of command'' includes all persons who (i) supervise or have direct management responsibility for the audit, including at all successively senior levels through the accounting firm's chief executive; (ii) evaluate the performance or recommend the compensation of the audit engagement partner; or (iii) provide quality control or other oversight of the audit.''

8. ''Close Family Members''

We are adopting, as proposed, Rule 2–01(f)(9) that defines ''close family members.'' Close family members is defined to mean a person's spouse, spousal equivalent, parent, dependent, nondependent child, and sibling. These terms should be understood in terms of contemporary family relationships. Accordingly, ''spouse'' means a husband or wife, whether by marriage or under common law; ''spousal equivalent'' means a cohabitant occupying a relationship generally equivalent to that of a spouse; ''parent'' means any biological, adoptive, or step-parent; ''dependent'' means any person who received more than half of his or her support for the most recent calendar year from the relevant covered person; ''child'' means any person recognized by law as a child or step-child; and ''sibling'' means any person who has the same mother or father.

''Close family members'' includes the persons separately defined as ''immediate family members'' (spouse, spousal equivalent, and dependent), and adds certain family members who may, as a general matter, be thought to have less regular, but not necessarily less close, contact with the covered person

[504] SECPS Manual § 1000.08; *cf.* AICPA Code of Professional Conduct, ET § 101.02.

[505] *See, e.g.,* Ernst & Young Letter (''We also would revise the definition of 'audit and professional engagement period' in the Release . . . to codify the Commission staff's practice of only requiring the latest audited period in initial filings by foreign private issuers to be fully compliant with SEC independence rules.'').

[506] *Arthur Young,* 465 U.S. at 818.

[507] *See, e.g.,* PricewaterhouseCoopers Letter.

[508] *See, e.g.,* Deloitte & Touche Letter.

[509] *See* Deloitte & Touche Letter.

in question (parent, nondependent child, and sibling). We distinguish the two groups, in part, because the less immediate the family relationship to the covered person, the more substantial that family member's relationship to the audit client should be before we deem it to impair the auditor's independence. Commenters, in general, raised few issues with the proposed definition of ''close family members'' and, therefore, we are adopting this definition as proposed.

9. ''Covered Persons in the Firm''

Rule 2–01(f)(11) defines the term ''covered persons in the firm.'' The term includes four basic groups. The first two groups, the ''audit engagement team'' and the ''chain of command,'' are described above. Their inclusion in the category of ''covered persons in the firm'' is unchanged from the proposed rule.

We have modified the description of the third category of covered persons from our proposal. The proposed rule referred to ''any other partner, principal, shareholder, or professional employee of the accounting firm who is, or during the audit client's most recent fiscal year was, involved in providing any professional service to the audit client or an affiliate of the audit client.'' We included this category because the auditing literature, quite appropriately, directs the audit engagement team to discuss certain matters with the firm personnel responsible for providing such services to that client.[510]

In response to concerns raised by commenters,[511] we have modified the definition of this category of covered persons in two respects. First, we have changed the term ''professional employee'' to ''managerial employee,'' to encompass a somewhat narrower scope of persons. Second, we have set a minimum hour threshold that must be crossed before an individual becomes a covered person by virtue of providing a non-audit service to an audit client. This subpart of the definition now includes only those individuals who have ''provided ten or more hours of non-audit services to the audit client for the period beginning on the date such services are provided and ending on the date the accounting firm signs the report on the financial statements for the fiscal year during which those services are provided, or who expects to provide ten or more hours of non-audit services to the audit client on a recurring basis.''

In this definition, the phrase ''beginning on the date such services are provided'' refers to the date on which the individual provides his or her tenth hour of non-audit service to a particular audit client within the space of a single fiscal year of that client. For example, if the client's fiscal year runs from January 1 to December 31, and an individual provides eight hours of non-audit services on February 1 and two hours of non-audit services on June 1, then the period described above would commence following the provision of the services on June 1. From that date through the date that the accounting firm signs the report on the financial statements for that fiscal year, that individual is a ''covered person in the firm.'' We reiterate: the individual's status as a covered person does *not* end at the conclusion of the fiscal year in question, but continues until the firm has signed the report for the financial statements for that fiscal year.

The proposed rule described the fourth category of covered persons as ''any other partner, principal, or shareholder from an 'office' of the accounting firm that participates in a significant portion of the audit.'' We included these people on the theory that they are the ones most likely to interact with the audit engagement team on substantive matters and may exert influence over the audit engagement team by virtue of their physical proximity to, or relatively frequent contact with, the audit engagement team.

In response to concerns raised by commenters about the breadth of the category, particularly the inclusion of every ''office'' that participates in a ''significant portion'' of the audit,[512] we have modified this definition. The final rule narrows the scope of the definition to ''any other partner, principal, or shareholder from an 'office' of the accounting firm in which the lead audit engagement partner primarily practices in connection with the audit.'' We are persuaded that it is reasonable to draw the line at partners, principals, and shareholders, rather than at all ''professional employees,'' and that it is also more reasonable and more practicable to draw a clear line at the ''office''[513] of the firm in which the lead engagement partner primarily practices.

A person who is not a covered person at the time an audit engagement begins might nonetheless become a covered person at any time during the audit engagement. As soon as events or circumstances bring a person within any category of covered person defined above, that person is a ''covered person in the firm.'' An individual must be independent of the audit client, pursuant to the provisions of the rule, before becoming a covered person in the firm. That means, for example, that an individual must dispose of any financial interest in the audit client completely and irrevocably before being consulted by another covered person concerning the audit engagement. For example, the rule does not allow the person consulted to participate in a discussion about the audit engagement and then ''cure'' an independence impairment by later disposing of an investment. Likewise, a person who becomes a covered person by rotating onto an engagement or being promoted into the chain of command must be independent pursuant to the provisions of the rule prior to becoming a covered person.

One commenter suggested that the definition of ''covered persons in the firm'' should include leased accounting personnel.[514] We note that to the extent leased personnel otherwise fall within any category of ''covered persons in the firm,'' such as by being on the audit engagement team, they will be covered persons in the firm.[515]

Because the rule narrows the scope of firm personnel to whom investment and employment restrictions apply, an accounting firm employee in a distant part of the world, or even down the street, might own an audit client's securities, have a family member in a financial position at the client, or enter into a business relationship with a client without necessarily impairing the firm's independence from the audit client. We expect that many partners and employees who previously could not own securities issued by an audit client will be able to do so under the rule.

It should be noted that insider trading restrictions prohibit any partner, principal, shareholder, or employee of the firm, whether or not he or she performs any service for the client, from trading on the basis of any material nonpublic information about that client.

10. ''Immediate Family Members''

We are adopting, as proposed, final Rule 2–01(f)(13), which defines ''immediate family members'' to mean a

[510] AICPA SAS No. 22, AU § 311.046 and AUI 9311.03.

[511] *See, e.g.,* Deloitte & Touche Letter; Ernst & Young Letter.

[512] *See, e.g.,* Deloitte & Touche Letter; Ernst & Young Letter.

[513] For a discussion of the definition of ''office,'' *see infra* Section IV.H.12.

[514] *See* Deloitte & Touche Letter.

[515] For example, leased accounting personnel might consult with a professional employee participating in an audit and thereby become a member of the audit engagement team.

person's spouse, spousal equivalent, and dependents. These terms have the same meaning as they do in the definition of ''close family members.''

''Immediate family members'' is a narrower group than ''close family members.'' Again, we believe that the less immediate the family relationship to the covered person, the more substantial that family member's relationship to the audit client should be before we deem it to impair independence. By identifying ''immediate family members,'' we are identifying those persons who have such regular and close contact with a ''covered person'' that it is fair, for independence purposes, to attribute to the covered person any financial and employment relationships that family member has with the audit client.

We received a few comments on the definition of ''immediate family members.'' Some commenters agreed that the definition should not include emancipated adult children, while others expressed concern that non-dependent children were not included in this group.[516] On balance, we believe that, for purposes of these rules, emancipated children are sufficiently independent of their parents to warrant not imputing their financial interests to their parents. We are, therefore, adopting the definition as proposed.

11. ''Investment Company Complex''

As proposed, the definition of ''investment company complex'' focused on investment advisers and entities in a control relationship with the adviser, including entities under common control with the adviser. The proposed definition was loosely based on ISB Standard No. 2, which defines ''mutual fund complex'' to mean ''[t]he mutual fund operation in its entirety, including all the funds, plus the sponsor, its ultimate parent company, and their subsidiaries.''[517]

We solicited comment on the definition proposed, and, in particular, on whether an alternative definition, focusing on the fund's principal underwriter and administrator would be more appropriate. Some commenters expressed concern about the scope of the investment company complex definition, particularly that it included entities that have no direct relationship to investment company operations.[518] These commenters' concern was that all subsidiaries of an adviser's parent company would also be included in the investment company complex. Therefore, an accounting firm could not provide certain non-audit services to, or invest in, subsidiaries of the parent of the adviser, even if those subsidiaries operated businesses unrelated to the investment company business. Under the proposed definition, for example, if a parent company owned an adviser and a manufacturing company, the accountant that audited the adviser (or a fund advised by the adviser) could not invest in the manufacturing company, even though its operations would not be affected by the audit of the adviser (or the fund).

In response to these comments, we have adopted in Rule 2–01(f)(14) a definition of investment company complex that is more limited than the one proposed. As adopted, the rule only includes an entity under common control with the adviser if the entity provides services to an investment company in the investment company complex. More specifically, if a sister entity of the investment adviser, other than another investment adviser, does not provide administrative, custodian, underwriting, or transfer agent services to the adviser or a fund, it is not part of the investment company complex.

As proposed, an entity that would be an investment company but for the exclusions provided by section 3(c) of the Investment Company Act and that is advised by the investment adviser or sponsored by the sponsor is part of the investment company complex. Also, as proposed, the definition does not include sub-advisers whose role is primarily portfolio management and who provide services pursuant to a subcontract with, or are overseen by, an adviser in the complex. There was some support for excluding sub-advisers from the definition of investment company complex.[519] We have determined to exclude sub-advisers from the definition because a fund, or even its adviser, may not be able to know whether the sub-adviser obtained any non-audit services from the fund's or the adviser's auditor. Moreover, considering a sub-adviser or the funds it advises to be part of the investment company complex presents practical difficulties where the sub-adviser is itself an adviser in a separate investment company complex.

12. ''Office''

Rule 2–01(f)(15) defines ''office'' to mean a distinct sub-group within an accounting firm, whether distinguished along geographic or practice lines. The term ''office'' is an integral part of the description of one category of ''covered persons'' and, thereby, helps identify firm personnel who cannot have financial or employment relationships with a particular audit client without impairing the firm's independence. The definition has not changed from the proposed definition.

We give ''office'' a meaning that does more than merely refer to a distinct physical location where the firm's personnel work. By ''office'' we mean to encompass any reasonably distinct sub-group within an accounting firm, whether constituted by formal organization or informal practice, where the personnel who make up the sub-group generally serve the same clients, work on the same matters, or work on the same categories of matters. In this sense, ''office'' may transcend physical boundaries, and it is possible that a firm may have a sub-group that constitutes an ''office'' even though the personnel making up that sub-group are stationed at various places around the country or the world.

At the same time, we intend for ''office'' also to include reference to a physical location. For this reason, ''office'' will generally include a distinct physical location where the firm's personnel work. We recognize, however, that in some cases thousands of firm personnel may work at a single, large physical location, but physical divisions may nonetheless effectively isolate different sub-groups of personnel from each other in ways that will warrant treating each sub-group as a separate ''office'' under the proposed definition.

Some commenters raised concerns about the definition of office.[520] One commenter asserted that the proposed definition is unworkable and does not provide helpful guidance.[521] This commenter expressed a preference for the ISB's approach to the concept of ''office or practice unit,'' in the ISB's Exposure Draft on Financial Interests and Family Relationships.[522]

[516] *See* Written Testimony of Ronald Nielsen and Kathleen Chapman, Iowa Accountancy Examining Board (Sept. 20, 2000).

[517] ISB Standard No. 2, *supra* note 226.

[518] *See, e.g.,* Deloitte & Touche Letter; AICPA Letter.

[519] *See, e.g.,* Arthur Andersen Letter.

[520] *See, e.g.,* Deloitte & Touche Letter; AICPA Letter.

[521] *See* AICPA Letter.

[522] The ISB Exposure Draft, cited in the AICPA Letter, states the following: the identification of the relevant ''office'' or practice unit is based on the facts and circumstances, including the firm's operating structure, and requires judgment. In a traditional geographic practice office (one city location with one managing partner in charge of all operations—audit, tax, and consulting), that location should be considered to be the office. In addition, if there are smaller, nearby ''satellite'' offices managed under the primary city office, broadly sharing staff, etc., those locations should also be considered part of the primary office. On the other hand, many firms are now structured more on an industry specialization or line-of-service basis, and manage offices on that basis. For example, if

Continued

In some respects, the definition that we adopt overlaps with the ISB approach. Like the ISB approach, our definition will necessarily involve the application of judgment, governed by substance. And under our definition, as under the ISB approach, expected regular personnel interactions and assigned reporting channels may well be more important than an individual's physical location. We have determined to adopt the definition that we proposed, because it is unclear to us that the ISB approach would necessarily encompass each distinct sub-group that, in particular circumstances, should be encompassed.

I. Codification

As previously discussed, the Commission's current auditor independence requirements are found in various rules and interpretations. Section 600 of the Codification provides interpretations and guidance not otherwise available in Rule 2–01. The final rule articulates a number of situations and circumstances, such as financial relationships, employment relationships, and non-audit services that impair auditor independence. Accordingly, we are deleting some interpretations included in the Codification, either because they are reflected in the revised Rule 2–01 or they have been superseded, in whole or in part, by the rule. Because examples have been deleted both because they are no longer necessary and because they are inconsistent with the final rule, inferences should not be drawn from the deletion of a particular example. The revised Codification contains the discussion of the final rule from this release, as well as the background information and interpretations that may continue to be useful in situations not specifically or definitively addressed in paragraph (c). Examples of these items include business relationships, unpaid prior professional fees, indemnification by clients, and litigation.

a financial services group were a separate practice unit, and were operated that way with limited contact with personnel of other local units, that may represent a separate office for purposes of this standard. Substance should govern the office classification, and the expected regular personnel interactions and assigned reporting channels of an individual may well be more important than his or her physical location.

V. Cost-Benefit Analysis

The amendments to Rule 2–01 modernize the rules for determining whether an auditor is independent in light of (i) investments by auditors or their family members in audit clients; (ii) employment relationships between auditors or their family members and audit clients; and (iii) the non-audit services provided by audit firms to their audit clients. In the Proposing Release, we identified three constituencies affected by the rule: (1) investors; (2) issuers; and (3) accounting firms that provide services affected by this release.[523] Below we discuss the costs and benefits to each of these groups. In all cases, we discuss the costs and benefits relative to the current regulatory environment.[524]

A. Costs and Benefits of the Rule Regarding Investments in and Employment Relationships With Audit Clients

The final rule clarifies, and in some cases eliminates, certain existing requirements under which an accountant's independence is impaired by investment and employment relationships between an accountant, covered persons, or their families, and an audit client. As explained above,[525] changes in business practices and demographics, including an increase in dual-career families, warrant a change in our auditor independence requirements to prevent an unnecessary restriction on the employment and investment opportunities available to auditors and members of their families. To this end, the rule amendments take a more targeted approach, focusing on those persons who are involved in or can influence an audit. In addition, the rule provides a limited exception for accounting firms under which an inadvertent violation of these rules by certain persons will not cause a firm's independence to be impaired, so long as the firm has quality controls that meet certain conditions and the impairment is resolved promptly.

1. Benefits

The elimination of certain investment and employment restrictions should benefit auditors and their families by permitting a wider range of investment and employment opportunities. According to the 1999 annual reports filed by accounting firms with the SECPS, the five largest accounting firms employ approximately 115,000 professionals. Other public accounting firms that audit SEC registrants employ an estimated 5,000 to 25,000 professional staff. The amendments we are adopting will benefit these 120,000 to 140,000 accounting firm professional employees and their families by enabling them to invest in some public companies in which, under the current rules, they cannot invest without impairing the independence of the companies' auditors. In addition, under these amendments, audit clients and their affiliates may, in certain circumstances, employ family members of some audit firm employees without impairing the auditor's independence.

[523] While we discuss the costs and benefits to issuers separately from those accruing to investors, impacts on the issuers are also likely to flow to investors as owners of the issuers' securities.

[524] It has been suggested that the Proposing Release did not clearly specify the baseline from which the costs and benefits were being estimated. The following presentation clearly establishes the baseline: costs and benefits are compared to current regulations.

[525] *See supra* Section III.B.

Expanding the set of investment opportunities available to auditors and their family members may increase the return they can earn on their investments and improve their ability to reduce risk through diversification. Opening employment opportunities to auditors and their family members increases their freedom of choice with respect to their employment opportunities and may lead to an increase in their compensation. Consequently, the amendments have the potential to improve the pecuniary and non-pecuniary benefits of employment. These benefits may make accounting firms more appealing as a career choice, and as a result may aid the firms in their recruiting efforts.[526]

In addition, independence requirements are found in various Commission rules, Commission interpretations, staff letters and reports, and, in some cases, AICPA literature. The final rule puts this guidance in an easily accessible format that will save interested parties costs in ascertaining and complying with the rule.

Finally, the rule provides that an accounting firm's independence will not be impaired solely because a covered person inadvertently fails to comply with the independence rules if the firm has adequate independence quality controls in place. This limited exception should provide a benefit to accounting firms and their employees.

2. Costs

Modification of the investment and employment restrictions may require accounting firms, their employees, or others to incur transaction costs, such as one-time costs to modify existing systems that monitor investments and employment relationships, and training

[526] See Written Testimony of Jack Ciesielski, accounting analyst (Sept. 13, 2000) (''I think the real problem in attracting talent in the auditing profession is the share ownership restrictions placed on auditors. * * * The relaxation of share ownership constraints that are proposed in this document should allay most fears of future auditors.'').

costs to prepare professional staff to understand and conform to the revised rules. With respect to the provisions regarding employment relationships and investments, the rule provides a transition period and does not cover loan contracts, insurance products, and employment relationships undertaken prior to the end of this transition period. The rule does not impose any additional costs with respect to the separations of former partners that have occurred prior to the effective date of this rule. Existing rules will apply to these partners. During the transition period, the only cost to separating partners and their firms relates to the timing of the payments made as part of the separation.[527] The new rule applies only to those that leave the firm after the new rule becomes effective. These modifications of the rule from our original proposal will reduce the costs of implementation.[528]

As discussed above, the rule does not require accounting firms to establish quality controls that conform to the rule requirements. In the case of the largest firms, the rule specifies minimum characteristics of these systems.[529] Because the limited exception is elective, any related costs will be assumed voluntarily, if at all, by accounting firms that decide that the benefits of this limited exception justify the costs of any incremental changes that are necessary to make their quality control systems meet the rule's standards.

An accounting firm that chooses to upgrade its existing quality control system to comply with the limited exception should incur only the incrementally small costs of implementing any improvements beyond what is required by GAAS and SECPS membership requirements.[530] GAAS already requires firms to have quality controls for their audit practices and refers auditors to the ''Statements on Quality Control Standards'' (''SQCS'') for guidance regarding the elements of those systems.[531] SQCS No. 2 states that firms' controls should provide ''reasonable assurance that personnel maintain independence (in fact and in appearance) in all required circumstances, perform all professional responsibilities with integrity, and maintain objectivity in discharging professional responsibilities.''[532] Because foreign accounting firms providing assurance on financial statements filed with the SEC are required to adhere to GAAS, they are also subject to these same quality control standards.[533]

In addition to requirements imposed by GAAS, public accounting firms that are SECPS members must comply with independence quality control membership requirements. Further, SECPS guidelines indicate that its members are required to assist their foreign associated firms to conform to ''U.S. independence requirements of the SEC and ISB, and SEC rules and regulations in areas where such rules and regulations are pertinent.''[534] Among other things, member firms with at least 7,500 professionals must implement an electronic tracking system by no later than December 31, 2000.[535] The final rule supplements the GAAS requirement for firms with more than 500 SEC registrants as audit clients by identifying procedures that should be part of their quality control systems. Because an accounting firm with 500 SEC registrants will likely also meet the SECPS' 7,500 professionals requirement, the rule is unlikely to impose a requirement for quality controls that does not already exist under GAAS and SECPS membership requirements.

In the Proposing Release, we asked for comments and data on the assessment of potential costs associated with the proposed quality control provision, but no commenter provided specific or empirical data on this issue. We expect the costs associated with the implementation of an amended quality control system to be small. Firms may choose to maintain the current restrictions if they determine that the costs of establishing the new system exceed the benefits. We nevertheless recognize that public accounting firms and their employees will require some time to familiarize themselves with, and understand, the amended rule. A one-hour review by each of the 120,000 to 140,000 public accounting professionals would result in a $3.6 million to $4.2 million one-time transition cost.[536] We include the $4.2 million in our aggregate cost estimation. Given that accounting firms currently engage in on-going training relating to auditor independence, we believe that these transition costs likely represent an over-estimation of the true cost imposed by this rule. Further, given that the firms must continue the educational process regardless of the rule, we treat this as a one-time cost.

Commenters were generally supportive of the proposals regarding employment relationships between and investments by auditors or their family members and audit clients. As discussed above, after considering the comments received, we are adopting the investment and employment rules, as modified.[537]

B. Costs and Benefits of Restricting Certain Non-Audit Services

There is increasing concern that the growth of non-audit services provided by auditors to audit clients affects auditor independence.[538] There is also concern that auditors' provision of certain non-audit services to audit clients creates a conflict of interest that also affects auditor independence. These effects on auditor independence may be costly to investors if they lead to, among other things, a decrease in the quality of financial reporting, lower investor confidence, or both. Importantly, as a result of the conflicts created by auditors' provision of non-audit services, investors may lose confidence in the quality and integrity of financial reports even if there are relatively few dramatic audit failures or restatements. Given the size of U.S. securities markets, even a small loss in

527 *See* Rule 2–01(e)(1)(ii).

528 The rules we adopt today are slightly more restrictive than current rules with respect to certain financial interests—such as credit cards and bank accounts—and employment relationships as they relate to covered persons on the audit engagement team. We do not anticipate that these changes will impose significant costs.

529 Other public accounting firms would have the flexibility to adopt a system to comply with the requirement in light of the nature and size of their practice. *See* SAS No. 25, AU §161.03. This is in general conformity with GAAS, which states, ''The nature and extent of a firm's quality control policies and procedures depend on factors such as its size, the degree of operating autonomy allowed its personnel and its practice offices, the nature of its practice, its organization, and appropriate cost-benefit considerations.'' *See* SAS No. 25, AU §161.02.

530 Because the threshold for the limited exception is based on the number of audit clients rather than professionals, certain middle-tier firms, if they grow, may meet the threshold earlier than they would under current SECPS requirements. See SECPS Manual §1000.46. We note that our rule does not require implementation of these systems, but rather leaves it to the discretion of the firm.

531 SAS No. 25, AU §161 n.1.

532 AICPA Professional Standards: SQCS, QC §20.09.

533 *See* ''International Accounting Standards,'' Securities Act Rel. No. 7801 (Feb. 16, 2000) [65 FR 8,896]; Form 20–F, Item 8, ''Financial Information,'' 17 CFR 249.220f.

534 *See* SECPS Manual §1000.45.

535 *See* Letter from Michael A. Conway, Chairman, Executive Committee, SECPS, to the Managing Partners of SECPS Member Firms, April 2000 (available at www.aicpa.org).

536 *See* Romac International, *1999 Salary Survey and Career Navigator: Finance & Accounting* (1999), which reports the median national public accounting salary to be $47,300 annually. Assuming a 2080-hour work year, we obtain $22.75 per hour. We increase our hourly estimate to $30 to allow for benefits and other overhead expenses.

537 *See supra* Sections IV.D.1, IV.D.2.

538 *See supra* Section III.B.

investor confidence has large wealth consequences for investors.

After careful consideration of the testimony from four days of public hearings and a review of the almost 3,000 comment letters received by the Commission, we have narrowed the scope of our proposals regarding non-audit services. In the Proposing Release, we enumerated ten services that if provided by the auditor to an audit client would be considered to be, in whole or in part, incompatible with the concept of auditor independence. As discussed above, in many cases we intended our proposal to track substantially the existing independence requirements of the profession. In response to commenters' concerns that our proposals were broader than existing requirements, we have made certain modifications.[539] As a result of our modifications, the language in the adopted rule substantially mirrors or draws from existing Commission requirements or the professional guidance of the AICPA and SECPS with respect to eight non-audit services (not including internal audit services). There should, therefore, be minimal costs associated with our codification of the provisions regarding these eight services. With respect to most information systems consulting, auditors may continue to provide these services to an audit client without impairing independence, as long as certain conditions are met.

The final rule does impose new limitations on auditors' ability to provide to audit clients internal audit services without impairing independence. If the accounting firm provides both the internal and external audit, it may, in effect, be auditing its own work. In this situation, the firm cannot, in our view, provide a truly independent ''second opinion.'' Without a truly independent second opinion, material defects in the accounting system may not be detected as quickly, if at all. Final Rule 2–01(c)(4)(iv) seeks to curb these conflicting interests without precluding companies, particularly small companies, from obtaining internal audit services from their auditors where the auditor's independence would not be compromised.

Under the final rule, accounting firms may provide all internal audit services to audit clients with assets of $200 million or less, provided certain conditions are met. In addition, accounting firms may provide up to forty percent of the internal audit services of issuers with assets in excess of $200 million, provided the same conditions are met.[540] These conditions are intended to create circumstances in which the auditor can continue to exercise objective and impartial judgment, and the audit retains its value as a ''second opinion.''

Relative to the Proposing Release, the $200 million threshold in the internal audit provision minimizes the aggregate costs associated with the rule without substantially reducing the benefits of greater investor confidence in audited financial statements. In addition, the $200 million threshold in the internal audit provision minimizes the impact of the provision on smaller companies and smaller accounting firms.

The available data indicate that most SEC registrants are audited by one of the largest accounting firms, sing 1999 SECPS data, we identified 16,653 registrants who filed audited company financial statements with the Commission.[541] Of those 16,653 registrants, the Big Five accounting firms audit 12,769 (76.7%) of these companies; the next three largest firms (referred to as the ''second tier firms'') audit 942 (5.7%); the next 20 largest accounting firms audit 730 (4.4%); and the remaining 2,212 (13.3%) companies are audited by smaller accounting firms.

In order to estimate the impact of the rule on small companies and small accounting firms, we used the Compustat Database.[542] Our analysis indicates that of the 9,414 Compustat covered companies, 4,326 (46%) have assets of $200 million or more and will be covered by the limitation, whereas 5,088 (54.1%) have assets of less than $200 million[543] and will not be covered by the rule. By excluding companies with less than $200 million in assets from application of the new limitation on these non-audit services for audit clients, the final rule permits, subject to certain conditions, large and small accounting firms to accept consulting engagements with these small companies that would otherwise be prohibited.

The Compustat Database includes 8,732 non-bank companies: 3,735 (42.8%) have assets of $200 million or more, and 4,997 (57.2%) have assets of $200 million or less. The Compustat data indicate that approximately 93.9% of non-bank companies with assets in excess of the $200 million threshold are audited by one of the Big Five accounting firms. Clients of second tier accounting firms account only for 1.3% of this group. The database specifically identifies 107 companies or 2.9% as audited by other smaller accounting firms. The remaining 71 (1.9%) large companies were not identified with an auditor in the database. If we include these 71 companies with the 107 identified as audited by smaller accounting firms, at most 4.8% of the companies with assets in excess of $200 million are audited by the smaller firms and, therefore, potentially impacted by the provision on internal audit services. Conversely, 85.7% of non-Big Five audit clients have assets below $200 million.

Current and past bank regulators expressed concern about the effect of our internal audit proposal on smaller banks serving smaller communities.[544]

[539] In the Proposing Release, the proscribed services included expert witness services. Expert witness services have been removed from the list of services that are per se incompatible with an auditor's independence.

[540] Under the final rule, the term ''internal audit services'' does not include operational internal audit services unrelated to the internal accounting controls, financial systems, or financial statements. Additional discussion of the impact of this threshold appears in Section IV.D.4.b(v).

[541] Throughout this section we round percentages to one decimal place. As a result some percentage combinations, when relevant, will not add to exactly 100.

[542] Our purpose in using these data is to estimate the association between company size and the auditors classified as Big Five, second tier and smaller accounting firms. The Compustat Database has two limitations for purposes of this estimate. First, the Compustat Database does not include all companies filing with the SEC. Second, we note that Compustat includes American Depository Receipts (ADRs). Some of the companies issuing ADRs and included on Compustat may not be required to file audited financial statements with the SEC. The data include 499 non-bank filers who issue ADRs; 405 are for companies with $200 million or more of assets; and 94 are companies with less than $200 million in assets. Only 57 of these ADR issuers are not audited by Big Five accounting firms.

The data also include 22 bank holding companies with $200 million or more of assets that have issued ADRs. The database contains information on approximately 9,414 registered companies including bank holding companies. Compustat applies set criteria for adding companies to the database. The criteria vary depending upon whether a company is domiciled in the U.S., Canada or abroad. The net effect of these criteria is that Compustat is heavily weighted toward larger companies, particularly, larger North American companies. If these criteria have the effect of excluding smaller companies that may have assets of less than $200 million, this analysis will overstate the proportion of companies that will be affected by the rule and the impact of the rule on smaller companies. *See* Compustat Database, October 31, 2000.

[543] The average revenue of companies with assets of $195—$205 million is $209 million.

[544] *See* Testimony of Paul Volcker, former Chairman, Board of Governors of the Federal Reserve System (Sept. 13, 2000) (''I know that when . . . I was Chairman, there was still a question of whether banks had to be audited, and they are, of course, examined and many of the banks complain that it would be very costly and they didn't have the resources for decent internal auditing efforts. . . .''); *see also* Testimony of Laurence H. Meyer, Governor, Board of Governors of the Federal Reserve System (Sept. 13, 2000); Testimony of John D. Hawke, Jr., Comptroller of the Currency (July 26, 2000). Both indicated that their respective organizations have been concerned about internal

The $200 million threshold is designed to limit the impact of the rule to larger, national banks. The Compustat Database included 682 bank holding companies. Of these, 591 (86.7%) have assets of $200 million or more and 91 (13.3%) have assets of less than $200 million. Big Five accounting firms audit 382 (64.6%) of the large bank holding companies. The next three largest (second tier) firms audit 31 (5.2%) of the large bank holding companies. Compustat specifically identified 116 (19.6%) as audited by other accounting firms. The data source did not identify an auditor for the remaining 62 (10.5%) companies.[545] The $200 million exemption permits the 91 smaller bank holding companies, likely to serve smaller communities,[546] to obtain from their auditors internal audit services. Accordingly, as adopted, the rule should not impose a substantial burden on these institutions and the communities they serve. Further, the Compustat criteria for inclusion in the database may understate the population of smaller bank holding companies.

Evidence suggests that internal audit outsourcing is provided primarily by the largest of the public accounting firms.[547] Under the adopted rule, auditors will still be able to provide internal audit services.[548] We estimate that the auditor could still provide on average as much as sixty-one percent of a company's internal audit activity, including internal audit activities not covered by the rule.[549]

The effect of the rule changes pertaining to internal audit outsourcing is to reduce the costs associated with the final rule without substantially reducing the benefits. To the extent that the final rule, taken as a whole, maintains or increases investors' confidence in the reliability of publicly available financial information, it increases the integrity of the U.S. securities markets. In the Proposing Release, we asked for comments and data on the assessment of costs associated with internal audit outsourcing and information systems consulting. While the staff garnered and analyzed data where it could, we received little data from public commenters that could be used in our analysis.[550]

1. Benefits

Benefits are expected to accrue to investors, issuers, providers of management consulting services, and public accounting firms. Benefits include:

- Greater confidence in auditor independence and increased reliability of financial statements to investors, issuers and other users;
- Centralizing and codifying of the independence rules; and
- Better operational and investment decisions.

a. *Investors.* For the reasons explained in this release, the Commission believes that the rule will enhance auditor independence. This should result in improved reliability, credibility, and quality of financial statements of public companies. Quality financial statements depend on subtle choices and judgments in reflecting economic events using accounting numbers. Quality financial statements also depend upon highly competent and independent auditors. Investors rely on quality financial statements in order to invest their funds effectively and efficiently. Therefore, the more confidence investors have in the independence of the auditor, the more reliance they will place on the financial statements when making investment decisions.

Several representatives of the largest institutional investors in the country testified that this rule would enhance auditor independence, bolster institutional and individual investor confidence, and benefit their plan participants.[551] One institutional investor associated poor performance with poor quality financial reporting and "a seemingly meek auditor."[552] In a similar vein, another commenter asserted that the rule will increase auditor independence and this, in turn, may reduce the incidence of fraud or lead to its more timely discovery.[553]

Some commenters suggested that there is no empirical evidence that

audit outsourcing for some time. Neither organization has placed an absolute ban on internal audit outsourcing. However, both have provided guidance on the manner in which internal audit outsourcing is to be handled.

[545] Professional staff of the Office of the Chief Accountant obtained the names of bank holding company auditors by searching Commission 10–K filings contained in EDGAR. 10KWizard was utilized to search the EDGAR database.

[546] Only ten of the 91 bank companies with less than $200 million in assets were located in one of the top 35 U.S. cities by population. *See* Compustat Database, October 31, 2000.

[547] The Institute of Internal Auditors ("IIA") Global Auditing Information Network ("GAIN") cited by Larry E. Rittenberg and Mark A. Covaleski in their monograph, *The Outsourcing Dilemma: What's Best for Internal Auditing* for IIA (1997) ("Rittenberg") and Manufacturers Alliance, *Survey of General Audit* (2000) generally include large companies. According to Rittenberg, companies included in the IIA GAIN study are large, increasing the probability that the GAIN companies are Big Five clients. Only two of the companies responding to the Manufacturers Alliance survey used accounting firms other than a Big Five firm as the primary external auditor. The Alliance survey reported a ten percentage point increase in the outsourcing of general audit tasks to the primary external auditor between 1995 and 2000. Of the companies using Big Five firms as their primary auditor, 42.5% indicated that they outsourced general audit work to their primary auditor. The survey also indicates that the portion of general audit needs that is outsourced remains fairly small, at less than 5% for 72.9% of the respondents.

[548] As noted above, our definition of internal audit is narrower than that used by Rittenberg and Covaleski.

[549] Rittenberg and Covaleski provide data that allows us to estimate the potential impact of the 40% limitation included in the rule. The Table below uses the information above to estimate the internal audit outsourcing and extended audit services that the external auditor can perform for the SEC registrant audit clients after the new rule is in effect. According to the IIA GAIN information in 1995 studied by Rittenberg and Covaleski, 35% of internal audit activities were classified as "operational." These activities can be fully outsourced under the rule. The remaining services were classified as follows: 17% compliance audit; 14% information systems; 26% financial audits; 8% other (unspecified). The rule will allow 40% of these services to be outsourced. Accordingly, under the rule, 61% of internal audit services could be outsourced.

In addition, the Manufacturers Alliance conducted its Survey of General Audit, 2000 and received responses from 106 companies of which 104 were audited by Big Five firms. It asked respondents how general audit time was allocated and received the following response: 40.2% control/compliance, 32.3% operational audit, 5.9% assisting external audit, 11.0% service requests, 3.4% M&A work and 7.1% other activities. While the categories are generally not the same as those used in the IIA GAIN reports, the operational audit component in both surveys is similar. On the other hand, control/compliance work is much higher for the Alliance survey respondents than the apparently similar category used in GAIN. This might be attributed to classification problems and/or the time period considered. However, in 1995 the Alliance survey reported an even higher control/compliance allocation at 46.9%. Further, the Alliance survey does not break out IT work specifically, making it difficult to compare the two survey results on this dimension. Alliance survey respondents did indicate that computer systems oriented work was growing rapidly (33%) or somewhat rapidly (59.4%). The Alliance survey reported a rise from 20.0% in 1995 to 32.3% in 2000 in the operational audit category, a category of internal auditing services not prohibited by the rule.

[550] *See* Letters from Commissioner Isaac C. Hunt, Jr., *supra,* note 212. Some commenters suggested that by requesting data on the costs and benefits of the rule, we asked the public to shoulder a burden rightfully belonging to the regulator. *See, e.g.,* Arthur Andersen Letter. We do not suggest that any party was obligated to provide data in response to our requests for comments. On the other hand, where data are exclusively under the control of commenters, our rules cannot be criticized for any failure to take into account data to which we do not have access. Wherever possible, we relied on information supplied by interested parties and other public sources of information.

[551] *See* Letter of Kim Johnson, General Counsel, The Public Employees Retirement Association of Colorado (September 1, 2000); Testimony of Allen Cleveland, New Hampshire Retirement System (Sept. 13, 2000); Testimony of John Biggs, Chairman, President and CEO of TIAA-CREF (July 26, 2000).

[552] *See* Testimony of Kayla Gillan, General Counsel, CalPERS (Sept. 13, 2000).

[553] *See* Testimony of Jay Eisenhofer, Partner, Grant & Eisenhofer (Sept. 13, 2000) ("Your rule, I believe, will cut down on fraud, cut down on auditor self-interest, and increase the reliability of financial statements.").

shows that the provision of non-audit services damages investors' confidence in the independence of auditors or the accuracy of financial statements.[554] Commenters suggested that there is, therefore, no basis for our assertion that the rule will benefit investors.[555] One such commenter suggested that the rule might, in fact, decrease investor confidence. This commenter argued that investors believe that the rule may decrease the quality of audits because auditors will know less about the companies they audit.[556] However, other commenters suggested that providing consulting services does not improve the quality of audits.[557] There is also academic and survey evidence that users of financial statements believe that the provision of non-audit services may impair the auditor's independence.[558] A public opinion poll conducted by Public Opinion Strategies found that approximately eighty percent of investors favor a rule that imposes such restrictions.[559] Another survey, conducted by AIMR, reported that over sixty-two percent of responding analysts believe that providing outsourcing services would likely compromise or impair auditor judgment.[560] Brand Finance, in a survey of U.K. analysts, found that ninety-four percent of respondents believed that the current level of non-audit service fees was likely to compromise auditor independence.[561]

b. *Issuers.* Issuers will benefit from the proposed scope of services regulations in several respects. First, the rule will eliminate some of the uncertainties as to when a registrant's auditor will not be recognized as independent. Second, since increased investor confidence in financial reporting may encourage investment, the rule would facilitate capital formation. Issuers should be able to attract capital at lower rates of return or in some circumstances attract investment where they currently cannot raise capital.[562] Third, the rule will increase the utility of annual audits to the management of issuers.

Management of the issuer also receives benefits from the external audit. No less than other investors, managers need reliable financial information about potential investment opportunities in order to manage their firm's assets. Internally, managers need assurance of the effective functioning of the control and reporting systems that produce the information on which they base their operating decisions. While company managers may obtain the needed assurances through internal processes, including internal audit groups, the external auditor also contributes to the company managers' assurance that the company's internal control processes are functioning effectively and that financial and other data are reliable.

One commenter asserted that to the extent an issuer perceived that buying non-audit services from its auditor increased its cost of capital to such an extent that it outweighed the benefits of purchasing non-audit services, it could protect itself by limiting the amount and types of non-audit services it purchased from its auditor.[563] This argument may not fully capture the incentives of management or the issuer, however. Academic literature describes how managers' incentives can deviate from those of investors.[564] For example, a company manager may have a family or financial relationship with the auditor and may benefit from a lack of complete independence from the company's auditor. It is difficult for the company to credibly pre-commit to restricting the purchase of non-audit services from the auditor. Further, managers rely on auditors that may be unaware that they are subject to subtle biases that may

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[554] *See, e.g.,* KPMG Letter.

[555] *See, e.g.,* Arthur Andersen Letter.

[556] *See, e.g.,* Deloitte & Touche Letter.

[557] *See, e.g.,* Testimony of Douglas Scrivner, General Counsel, Andersen Consulting (Sept. 20, 2000) (''It is important to note that audit firms do not provide consulting services to improve the quality of the audits, but rather for commercial considerations. A then CEO of one of the Big Five audit firms was quoted recently in *Business Week* saying 'If I had to trade an auditing account for other business, I would do it.' '').

[558] Despite the mixed academic results and the difficulties in preparing unbiased survey results, it is clear that the perception of auditor independence is important to financial statement users and can be affected negatively by the extent and type of non-audit services provided by the auditor to audit clients.

Perception is difficult to establish definitively. A number of academics have provided evidence that perceptions are affected by the mix of audit and non-audit services provided to audit clients. The academic evidence is mixed and subject to alternative interpretation. Selected papers by academics include: M. Firth, ''Perceptions of Auditor Independence and Official Ethical Guidelines,'' 55 *Acct. Rev.,* at 451–466 (July 1980) (''Firth''); R.A. Shockley, ''Perceptions of Auditors' Independence: An Empirical Analysis,'' 56 *Acct. Rev.,* at 785–800 (October 1981) (''Shockley''); D.J. Lowe and K. Pany, ''CPA Performance of Consulting Engagements with Audit Clients: Effects on Financial Statement Users' Perception and Decisions,'' 14 *Auditing: J. of Prac. & Theory,* at 35–53 (Fall 1995) (''Lowe 1995''); D.J. Lowe and K. Pany, ''An Examination of the Effects of Type of Engagement Materiality, and Structure on CPA Consulting Engagements with Audit Clients,'' 10 *Acct. Horizons,* at 32–52 (December 1996) (''Lowe 1996''); J.G. Jenkins and K. Krawczyk, ''Perception of the Relationship Between Nonaudit Services and Auditor Independence,'' North Carolina State University, manuscript (2000) (''Jenkins & Krawczyk'').

Generally, Firth and Shockley found that financial statement users are more concerned than auditors about the independence problems associated with matters such as incentives to retain clients in a competitive environment and/or when non-audit services are sold to audit clients. More recently, Lowe (1995, 1996) found that loan officers and financial analysts appear to perceive little or no independence problem at low levels (1% of office revenue) of non-audit services, but did exhibit concern as the level of office revenues from non-audit services rose. Jenkins & Krawczyk studied three group's perceptions about auditor independence and the provision of non-audit services to audit clients. The Jenkins and Krawczyk study groups are Big Five CPA professionals, non-Big Five CPA professionals and a group labeled ''general public,'' composed of business professionals and graduate business students. The CPA professionals, particularly those associated with the Big Five, generally felt that independence was not threatened and in some cases might be strengthened by the provision of non-audit services to audit clients. The ''general public'' was generally supportive of the provision of non-audit services, but less so than the other two groups.

Recent surveys of a variety of financial statement users demonstrate the existence of varying degrees of concern for auditor independence when offering non-audit services to audit clients. The story told by the surveys is admittedly complex. Virtually all of the surveys that have been submitted to the public record (Public Opinion Strategies, Brand Finance PLC, Earnscliffe, AIMR, Penn Schoen Survey, and Pace University) indicate some concern for auditor independence. The degree of concern may be, in part, a function of the timing of the surveys, the manner in which the subjects were queried, and the subject sample selection.

[559] Duquesne Poll, *supra* note 110. The surveyors asked several related questions of the subjects. First they asked, ''And from what you've seen, read or heard, do you generally favor or oppose this SEC proposal?'' This was immediately followed by, ''And do you strongly favor/oppose or just somewhat favor/oppose the SEC proposal.'' In response to this question, 30% stated that they ''Strongly Favor'' and 34% that they ''Somewhat Favor'' the SEC proposal. The surveyors then provided a one paragraph narrative describing the auditor's responsibilities with respect to fair presentation of financial statements and a one paragraph narrative describing the SEC concerns about the potential conflict of interest auditors face when selling both audit and consulting services to the same client. The subjects were then asked to state whether they strongly/somewhat favor/oppose a position based on this information. At this point 49% stated that they ''Strongly Favor'' and 32% stated that they ''Somewhat Favor'' the SEC proposal.

[560] *See* Testimony of Mauricio Kohn, CFA, CMA, CFM, AIMR (Sept. 20, 2000).

[561] *See* Letter of Brand Finance PLC (June 13, 2000).

[562] *See* Testimony of Rajib Doogar (Sept. 13, 2000) (''Low audit credibility, in turn, will drive up costs of capital, affecting the well functioning of capital markets and indeed of the US economy as a whole.'').

[563] *See* Letter of Charles C. Cox, Kenneth R. Cone, and Gustavo E. Bamberger, Lexecon Inc. (Sept. 25, 2000) (''Lexecon Letter'').

[564] *See, e.g.,* M.C. Jensen and W.H. Meckling, ''Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,'' 3 *J. of Fin Econ,* at 305–360 (1976); A.A. Alchian and H. Demsetz, ''Production, Information Costs, and Economic Organization,'' 62 *Am. Econ. Rev.,* at 777–795 (1972). This agency conflict grows out of the inability of investors to perfectly control by contract managers' behavior. The problem is exacerbated if investors cannot monitor management's choices.

affect their judgments.[565] Finally, management may be frequently marketed to by its auditor to purchase non-audit services.[566]

Although the decision of an individual company to purchase services from the auditor may be in the best interest of the company's investors, it may not be in the interest of investors in all companies as a whole. If decisions by individual company management reduce the reliability of audited financial statements as a whole, aggregate investment may be misallocated even if any individual company is acting in the best interest of its shareholders. It is unlikely that such concerns would enter into the company manager's choice of service provider even if it were a logical consequence of that choice.

Audit committees will also have more concise and clearer guidance to support their enhanced role in overseeing the management/auditor relationship. The amendments to the proxy rules require disclosure of whether the audit committee, or the board of directors if there is no such committee, considered whether the provision of non-audit services by the company's principal accountant is compatible with maintaining the principal accountant's independence. Several commenters stated that the rule enhances the ability of the audit committee to identify situations in which auditor independence may be impaired. For example, the Co-Chairman of the Blue Ribbon Committee stated that he thought that ''[this rule] would help audit committees do their job better.''[567] Another commenter argued that without this guidance audit committees must rely primarily on auditors to determine their own independence.[568]

c. *Public Accounting Firms.* The rule provides a general test for, and a list of, non-audit services that, when provided to an audit client, will impair an auditor's independence. Currently, auditor independence requirements are found in several sources, including AICPA guidance, the Codification on Financial Reporting, SECPS rules, and a variety of Commission interpretive releases and staff no-action letters. Consolidating many of these requirements into one rule is an important purpose and benefit to this rule.

Some commenters disagreed that this rule would clarify independence requirements for public accounting firms.[569] These commenters argued that the rule creates confusion and therefore increases the amount of time that accounting firms, and others, will need to spend on compliance.[570] We disagree. As discussed above, in response to comments, we have made significant modifications that clarify the rule's requirements. We realize that any rule inevitably requires some interpretation. We believe that, as modified, this rule will centralize and clarify independence requirements and thus result in increased certainty, resulting in a benefit to public accounting firms.

Some commenters have argued that no benefits at all will be created by the rule. The basic argument is that no tangible evidence exists that independence has been impaired by provision of these non-audit services to audit clients.[571] In testimony, however, several individuals recounted litigation experiences and discussed cases in which they believed that a lack of independence contributed to an audit failure and financial reporting fraud.[572]

Others have argued that economic forces provide sufficient incentives to audit firms to ensure independence.[573] According to one such commenter, auditors lose market share when their reputations are damaged, either as a result of government action or private litigation.[574]

Commenters also suggested that auditors already have strong incentives to maintain their reputations.[575] The auditor's reputation is based on the public's belief in the auditor's objectivity and competence. The actual or perceived loss of either objectivity or competence can be expected to affect negatively the auditor's ability to obtain and retain clients.[576] We also note that the SECPS mandates certain quality controls designed to support auditors' self-monitoring.[577] However, evidence suggests that these mechanisms may not be sufficient.[578] One commenter concluded, based on a model of the auditor's incentives to maintain independence, that under certain circumstances when an auditor can command sufficiently high benefits from the mix of services, audit credibility may be diminished.[579]

Some commenters have suggested that litigation acts as an incentive for the auditor to maintain independence.[580] Conversely, another commenter noted that the expected cost of an auditor's

[565] *See* M.H. Bazerman, K.P. Morgan, and G.F. Loewenstein, ''The Impossibility of Auditor Independence,'' 38 *Sloan Mgt. Rev.* 89–94 (Summer 1997); Testimony of Professor Max H. Bazerman, Northwestern University (July 26, 2000); Testimony of Professor George F. Loewenstein, Carnegie Mellon Institute (July 26, 2000); J.D. Beeler and J.E. Hunton, ''Contingent Economic Rents: Insidious Threats to Auditor Independence,'' manuscript (2000); G. Trompeter, ''The Effect of Partner Compensation Schemes and Generally Accepted Accounting Principles on Audit Partner Judgment,'' 13 *Auditing: J. Prac. & Theory,* at 56–68 (Fall 1994). Trompeter provides experimental evidence that compensation schemes can influence subject judgments. Trompeter finds that auditors whose rewards are based on local office revenues have a tendency to support management views more often than if their rewards are computed on the broader firm revenue base. In the latter case, loss of a local client does not necessarily lead to substantial individual reward losses. Trompeter addresses the incentives issue, one of the complex issues possibly leading to subtle biases in judgment. His results suggest a self-serving bias effects judgment. *But see* Testimony of Professor Urton Anderson, University of Texas (Sept. 21, 2000) and Professor Don N. Kleinmuntz, University of Illinois at Urbana-Champaign (Sept. 21, 2000) for arguments that the self-serving bias is overcome in practice by a variety of behavioral and institutional factors. *See* R.R. King, ''An Experimental Investigation of Self-Serving Biases in an Auditing Trust Game,'' manuscript (2000).

[566] *See* AICPA Practice Aid Series, *Make Audits Pay: Leveraging the Audit into Consulting Services* (1999). Furthermore, as a result of the rule, issuers may avoid marketing pressure from their auditors to purchase certain non-audit services.

[567] *See* Testimony of John C. Whitehead, retired Chairman, Goldman Sachs & Co. (Sept. 13, 2000).

[568] *See* Testimony of D. Bevis Longstreth, former SEC Commissioner and Member of the O'Malley Panel (Sept. 13, 2000).

[569] *See, e.g.,* Lexecon Letter.

[570] *See, e.g.,* Deloitte & Touche Letter.

[571] *See, e.g.,* KPMG Letter. *See supra* Section III.C.4, for a discussion of this comment. *But see* Testimony of J. Michael Cook, former Chairman and Chief Executive Officer, Deloitte & Touche (July 26, 2000) (''I agree with the Commission that the absence of 'proof' does not justify inaction, particularly when such evidence cannot be expected to be demonstrable.'').

[572] *See, e.g.,* Testimony of Richard Blumenthal, Attorney General, State of Connecticut (Sept. 20, 2000); Testimony of Robert Morgenthau, District Attorney for the County of New York (Sept. 13, 2000); Testimony of Charles R. Drott (Sept. 13, 2000).

[573] *See, e.g.,* Lexecon Letter.

[574] *See, e.g.,* Lexecon Letter. The authors cite two studies that find accounting firms face significant costs when government regulators criticize auditors: M. Firth, ''Auditor Reputation: The Impact of Critical Reports Issued by Government Inspectors,'' 21 *Rand J. of Econ.,* at 374–387 (Autumn 1990) and L. R. Davis and D. T. Simon, ''The Impact of SEC Disciplinary Actions on Audit Fees,'' 11 *Auditing: J. of Prac. & Theory,* at 58–68 (Spring 1992). In the former study, the loss of reputation in the U.K. manifested itself in lower market share for the largest accounting firms, while in the latter loss of reputation was related to a reduction in audit fees. We note that in both studies governmental oversight was responsible for making public the improper auditor behavior. It is not clear from this research that other economic forces were (or are) sufficiently strong to impose the costs to loss of reputation.

[575] *See, e.g.,* Lexecon Letter.

[576] *See* Lexecon Letter for a discussion and bibliography on this point.

[577] *See* SECPS Manual §1000.45 (April 2000).

[578] *See, e.g.,* Testimony of Dennis Paul Spackman, Chairman, National Association of State Boards of Accountancy (Sept. 13, 2000); Testimony of Paul Volcker, former Chairman, Board of Governors of the Federal Reserve System (Sept. 13, 2000).

[579] *See* Testimony of Rajib Doogar (Sept. 13, 2000).

[580] *See, e.g.,* Lexecon Letter.

loss of independence due to litigation declined in recent years with the passage of the Private Securities Litigation Reform Act of 1995.[581]

d. *Estimation of Benefits of Restricting Certain Non-Audit Services.* The primary benefit of this rule is increased investor confidence in reported financial statements. This benefit is spread across all market participants and may manifest itself in changes in the investment patterns of individuals and the borrowing costs of businesses. Given the sheer magnitude of the U.S. financial system, even a small change in investor confidence manifests itself as a large aggregate benefit.

If we measure the increase in investor confidence by a decrease in the required rate of return on an investment, it would lead to increased profitability for investment opportunities. As a result, the change in investor confidence may manifest itself in a revaluation of current securities prices. Everyone in the market benefits from this change in confidence because all participants can potentially take advantage of the increased investment opportunities. All individual investors benefit from the general increase in market values while businesses benefit in reconsidering their investment opportunities within their existing budget constraints and when seeking additional capital from the market. The market revaluation will be the result of many forces, but should be greater than the change in the required rate of return on a percentage basis simply because of the mathematical relationship between cash flows, interest rates and securities values.[582]

Not all market participants may benefit equally. The extent of individual and business benefit depends upon their current resources and assets, investments and investment opportunities. It is not clear whether these conditions would reduce the aggregate economic benefit. Because we cannot observe the distribution of benefits to individuals and businesses, we assume for the purposes of this estimate that benefits accrue primarily to those affected directly by all parts of the rule. This group includes businesses (and investors in those businesses) that will benefit from the increased confidence.

To obtain an estimate of the number of individuals and businesses that may benefit, we note that, in any given year, approximately 74.3% of companies purchase only auditing services from their Big Five auditor.[583] SECPS data further indicate that consulting revenues from SEC clients amount to 22.8% of the Big Five firms' total consulting revenues. It may be reasonable, therefore, to estimate that only twenty-five percent of audit clients will be directly affected by the rule.

However, the Big Five accounting firms provide audit and consulting services to the largest companies listed on the stock exchanges. According to a 1996 GAO report, the then largest six accounting firms audited seventy-eight percent of the nation's publicly traded companies.[584] Approximately ninety percent of all companies with more than $200 million in assets are audited by one of these five firms.[585] Therefore it is likely that the proportional value of the benefits will be significantly greater than twenty-five percent.

If an increase in investor confidence generated by these rules leads to a decrease in the required rate of return, we can estimate the benefits based on the current market capitalization. For example, a decrease in the cost of capital as small as a single basis point (or one one-hundredth of one percent) would lead to an aggregate annual impact of approximately $2 billion.[586] Although increased confidence should benefit the entire market, we provide an estimate that limits the benefit to those directly affected by the rule. Even if we measure the impact on the basis of the proportion of companies that annually purchase services covered by the rule (25%), a one basis point reduction in the required rate of return would result in an annual benefit of approximately $500 million.

Benefits may also accrue to the economy in the form of more efficient contracting, improvements in operating and investing decisions by management, and greater market stability. Each of these benefits is extremely difficult to measure. We know that many parties to contracts rely on financial statement data, management relies on such data when negotiating contracts, and reliable financial data contributes to both the efficiency of contracting and the effectiveness of contract enforcement. Management needs reliable financial information when making operational and investment decisions, and external auditors contribute to management's assurance about financial information. Unexpected financial statement restatements result in large market capitalization drops. Recent examples of large unexpected financial reports restatements and resulting market capitalization losses have been reported.[587] The logical consequence of such market surprises, in addition to the redistribution of gains and losses across investors, is greater uncertainty in the market place.[588] The resulting uncertainty may dissuade investors from participating[589] or may increase the required rate of return as a means of ensuring against the uncertainty. We make no separate estimate of benefits for the above noted items.

We recognize the difficulty in obtaining direct measures of all the benefits associated with each aspect of the rule to each individual or group. Therefore, in this section, we limited our estimate to the broad economic impact on the capital markets that affects all participants.

2. Costs

Some commenters suggested that the only way to ensure that the provision of certain services does not impair auditor independence is to completely prohibit the purchasing of those services from the auditor.[590] We do not believe that

[581] *See* Testimony of Professor John C. Coffee, Jr., Columbia University (July 26, 2000).

[582] This effect can be observed in a simple present value calculation. Assuming future cash flows of $100 per period and a discount rate or required rate of return of 10%, the present value of the cash flows in perpetuity is $1,000. If the discount rate is reduced to 9%, a 10% change in the discount rate, the present value of the future cash flows is $1,111, an 11% change in the present value. This analysis ignores the possibility that a decrease in the discount rate can change the investment opportunity set and increase the per-period cash flows.

[583] While we recognize that the set of firms that may purchase such services may change from year to year, we have received no evidence to suggest that the fraction of companies that may actually purchase such services in any given year is different from our estimate.

[584] *See* GAO Report. Appendix B of the Proposing Release, Table 4 provides a 1999 comparable figure of 76.68%.

[585] *See* Compustat Database (October 31, 2000).

[586] This calculation is based on the aggregate value of U.S. equities markets of $16.1 trillion as of September 29, 2000 as reported by Wilshire Associates and an additional $4.3 trillion in corporate debt outstanding issued by U.S. firms as of June 30, 2000 as reported by the Board of Governors of the Federal Reserve. Therefore the aggregate value of outstanding debt and equity securities is $20.4 trillion.

[587] *See* ''Accounting Wars,'' *Bus. Wk.,* at 156–168 (Sept. 25, 2000).

[588] *See* Testimony of Bill Patterson, Director, Office of Investments, AFL-CIO (Sept. 20, 2000) (''Now, the individual investor, I think their interest in the process is really catalyzed again around these high profile irregularities like Cendant, Sunbeam, Lucent, and Waste Management. I think these are warning shots to investors that this is a problem that has to be addressed.'').

[589] *See* Testimony of Frank Torres, Consumers Union (Sept. 20, 2000) (''I think American consumers, from my experience, don't like the idea that they might get had.'').

[590] *See, e.g.,* Letter of Jack Ciesielski, accounting analyst (July 14, 2000); Letter of William V. Allen, Jr. (Aug. 22, 2000); Testimony of John Biggs, Chairman and CEO of TIAA–CREF (July 26, 2000); Testimony of Kayla J. Gillan, General Counsel, CalPERS (Sept. 13, 2000) (''A clear, simple and

such a prohibition would serve the investor and issuer communities.

a. *Issuers.* The final rule has the effect of restricting issuers from purchasing certain non-audit services from their auditors. Most of the rule's limitations, however, are drawn from existing limitations, including the proscription on operating or supervising an audit client's information technology function. Moreover, issuers would still be allowed to obtain most other information technology services and internal audit services from their auditor provided they comply with certain conditions. The rule would have the effect, however, of preventing issuers with more than $200 million in total assets from outsourcing more than forty percent of certain of their internal audit activities to their auditor.

As some commenters noted, the rule may impose costs on some issuers.[591] Issuers that do not competitively bid non-audit services or that would have purchased these newly proscribed non-audit services solely from their auditors and that are limited by the rule will have to look to other professional services firms, including other public accounting firms, to provide these services in the future. These issuers may incur costs from the use of a separate vendor, including the possible loss of any synergistic benefits of having a single provider of both audit and non-audit services. The issuer may also incur one-time transaction costs associated with identifying and choosing another vendor to provide those services.[592] Estimation of these costs is discussed below.

Some commenters have argued that the rule will sometimes force an audit firm to choose between providing an audit or non-audit service to a public company client, and that audit firms may forego providing audit services, thereby reducing competition for both audit and non-audit services.[593] As to internal audit services, in particular, however, available evidence suggests it is unlikely that auditors will cross the threshold that would require them to choose between external audit revenues and internal audit revenues.[594] Further, it is unlikely that any individual firm has particular exclusive expertise in the internal audit function and therefore a suitable number of competitors likely exists to ensure that the issuer can obtain these services elsewhere at a reasonable cost.

b. *Public Accounting Firms.* Public accounting firms may individually lose a source of revenue because they will no longer be able to sell internal audit services to their audit clients. Any loss may be mitigated by the opportunity to market this service to the audit clients of other public accounting firms. As discussed above, the $200 million asset exemption reduces the impact of the rule on the Big Five and particularly on the second tier and smaller accounting firms.

Of the top three second-tier firms with fewer than 1,000 clients, one firm has stated that it does not perform internal audit outsourcing work for its public company audit clients.[595] Another firm's testimony indicates that it provides minimal proscribed non-audit services to its public audit clients.[596] Thus, it does not appear that at least two of the next three largest firms will be significantly affected by the rule.

c. *Shared Costs.* The rule might also affect what some contend are synergies (or "knowledge spillovers") that arise from providing non-audit services to an audit client. If they exist, spillovers may provide issuers with a more efficient audit or provide the auditor with additional knowledge that will enhance not only the concurrent audit, but other audits as well. Since synergies may benefit either or both parties to some extent, we consider them a potentially shared benefit or cost. As well, to the extent that the proposed definition of affiliate of the accounting firm or affiliate of the audit client would have reduced the market for the provision of internal audit outsourcing, we consider that here.

Some commenters have suggested that the proposed rule's definition with respect to affiliate of the accounting firm would be restrictive and impose significant costs. We have not adopted the proposed definition of an "affiliate of the accounting firm," and left in place the existing standards for determining those entities associated with a firm that should be deemed to be part of the firm for auditor independence purposes. As such, it imposes no additional cost.

Generally, research on enhanced efficiency or effectiveness of providing non-audit services to audit clients is suggestive, but indirect and inconclusive.[597] The recent sale or

bright line [prohibition] standard will avoid this tendency [toward creative ways to avoid the rule], and moreover, I have not heard anyone suggest that there is an absence of qualified and cost effective alternatives to the auditor performing nonaudit consulting services to the same client.").

[591] *See, e.g.,* Lexecon Letter.

[592] Some commenters suggested that the rule would impose additional costs on small businesses and accounting firms. The impact of the rule on small entities is discussed below in Section VI.

[593] *See, e.g.,* Arthur Andersen Letter; Deloitte & Touche Letter.

[594] *See* Manufacturers Alliance, *Survey of General Audits* (2000). In a survey of its members, the Alliance found that just less than 96% of respondents outsourced less than 35% of the internal audit. This amount is within the 40% threshold allowed by the rule.

[595] Memorandum to File No. S7–13–00 (September 23, 2000).

[596] *See* Testimony of William D. Travis, Managing Partner, McGladrey and Pullen, LLP (Sept. 20, 2000). According to Mr. Travis' testimony, 85% of McGladrey and Pullen LLP's total revenues are attributable to accounting, auditing and tax. Therefore, only 15% is attributable to all consulting engagements. In addition the testimony indicates that approximately 50% of the firm's accounting and tax clients purchase audit services and that only 15% of its client base is made up of public companies. Mr. Travis also notes elsewhere in his testimony that "[t]he IT practice [] was part of what was sold to an affiliate of Block, so the consulting practice is owned entirely by Block." *See also* Compustat Database, October 31, 2000. Compustat lists only five companies with assets of $200 million or more as audited by McGladrey and Pullen, LLP.

[597] Two studies in the 1980s documented that audit fees were generally greater, after controlling for other factors, for clients that also purchased non-audit services from the same public accounting firm. *See* Z. V. Palmrose, "The effect of non-audit services on the pricing of audit services," 24 *J. of Acct. Res.,* at 405–11 (Autumn 1986); D. A. Simunic, "Auditing, consulting, and auditor independence," 22 *J. of Acct. Res.,* at 679–702 (Autumn 1984). Palmrose found that the positive relationship held for both incumbent and non-incumbent auditors, suggesting that synergies may not exist. Nevertheless, the authors of these studies concluded that this evidence was not inconsistent with the hypothesis that the joint provision of audit and non-audit services may give rise to "knowledge spillovers." More recent research documents that these higher fees are associated with increased audit effort (in labor hours). *See* L. R. Davis, David N. Ricchiute, and G. Trompeter, "Audit Effort, Audit Fees, and the Provision of Non-Audit Services to Audit Clients," 68 *Acct. Rev.,* at 135–50 (Jan. 1993). The results of the Davis study therefore cast further doubt on the knowledge spillover hypothesis.

Three recent studies also address the issue of synergies at least indirectly. *See* B. Arrunada, "The Provision of Non-Audit Services by Auditors: Let the Market Evolve and Decide," 19 *Intl. Rev. of Law and Econ.,* at 513–31 (1999) ("Arrunada"); M. Ezzamel, D.R. Gwilliam and K.M. Holland, "Some Empirical Evidence from Publicly Quoted UK Companies on the Relationship Between the Pricing of Audit and Non-audit Services," 27 *Acct. and Bus. Res.,* at 3–16 (1996) ("Ezzamel"); K. Pany and P. M. J. Reckers, "Auditor Performance of MAS: A Study of its Effects on Decisions and Perceptions," *Acct. Horizons,* at 31–38 (June 1988) ("Pany & Reckers"). Ezzamel in the U.K. observed a positive relationship between audit fees and non-audit fees. But the authors do not distinguish between competing explanations of the observed phenomenon. Pany & Reckers conducted an experimental study on U.S. loan officers. They did not find deterioration in the loan approval rate as consulting fees increased. But they did find limited evidence that providing MAS at a level of 90% of audit fees for a period of three years may present an independence perception problem among some financial analysts. They note that in 1988, levels of MAS fees as high as 90% of audit fees were uncommon. Arrunada states that after examining the effects of the provision of non-audit services on service cost, audit competition, service quality, and auditor independence, "[he] concludes that the provision of non-audit services reduces total costs,

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proposed sale of the consulting divisions of several large public accounting firms argues against significant knowledge spillovers. If efficient and effective audits require expertise most efficiently maintained through the provision of consulting services to audit clients, there is an incentive to retain consulting practices. Thus, the sale of these consulting practices would appear inconsistent with the existence of significant synergies that would be negatively affected by the rule.[598]

In the Proposing Release, we asked for comment and data on our estimates of the number of accounting firms affected by the rule and the costs imposed by the rule. We also sought comment and data specifically as to the existence and value of such synergies. We received many comments but no data. Instead, we estimate the potential costs associated with the possible loss of synergy as a percent of revenues lost from internal audit outsourcing.

We base our cost estimates on the total audit, accounting and tax revenues for fiscal 1999 for the Big Five public accounting firms.[599] This estimate is $14.9 billion. From this $14.9 billion, we estimate the total costs of the internal audit for Big Five audit clients based on the relationship between internal audit budgets and external audit fees for firms responding to the Manufacturers Alliance survey. On average, firms in this sample spent 1.7 times as much on the internal audit as they did on the external audit.[600] Therefore, we estimate the aggregate cost of internal audits for Big Five audit clients in 1999 to be $25.6 billion.

This estimate of aggregate internal audit costs is likely to overstate the true costs for two reasons. First, the aggregate revenues reported by PAR include tax and accounting services in addition to external audit fees. Second, data in the Manufacturers Alliance survey suggest that the ratio of internal to external audit fees is smaller for smaller companies.[601] In fact, for the smallest firms in their sample, external audit fees exceed the internal audit budget.

Additional information in the Manufacturers Alliance survey indicates that approximately two percent of respondents outsource more than fifty percent of their internal audit.[602] Further, analysis described earlier indicated that on average, companies with assets greater than $200 million could still purchase as much as sixty-one percent of their entire internal audit budget from their external auditor. Together, these estimates imply that at most, the restrictions will reduce internal audit outsourcing fees to the auditor by 0.8%, or $207.7 million. Finally, we apply a growth rate of twenty-one percent to these revenues to arrive at a year 2000 estimate of $251.3 million.[603]

Professor Rick Antle testified to the effect that there is little reliable evidence as to the size of potential synergies from purchasing consulting services from the audit firm, but he has provided an estimate.[604] We agree with Professor Antle's assessment of the difficulties inherent in measuring these effects. In his testimony, Professor Antle estimated that lost synergies could be on the order of ten percent of twice the gross profits before partner compensation and taxes of the consulting practice. Further, he estimates the gross profit margin to be 0.20.[605] We acknowledge that there is little empirical evidence to support this estimate, but it represents the larger of the two estimates presented by the two representatives of the accounting firms.[606] Applying those percentages to our estimate of revenues restricted by the rule results in an annual estimate of lost synergies of $10.1 million for audit clients who will be forced to reduce internal audit outsourcing services from their auditors.

In addition, the rule may impose certain transition costs to be borne by companies that currently have long-term consulting engagements with their auditors for proscribed services. A significant number of consulting engagements are short-term projects.[607]

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increases technical competence, and motivates more intense competition. Furthermore, it does not necessarily damage either auditor independence or the quality of non-audit services.''

[598] *See* Testimony of Philip A. Laskawy, Chairman, Ernst & Young LLP (Sept. 20, 2000). Mr. Laskawy commented on this matter as it relates to information systems consulting: We recently sold our practice in this area. We did so for a variety of reasons, but one reason certainly was that although we did not believe independence was actually impaired by this service, we could understand that particularly with large fees that sometimes are involved an appearance problem could be present. I might note that now that we have sold this practice we have not discovered that we are somehow enfeebled, unable to perform effective audits or to maintain top-notch audit and tax practices. In fact, we have found more the opposite to be true. Without a large consulting practice to manage we are now more targeted and more focused on our core audit and tax business, and our audit and tax partners feel as though they, and not the management consultants, are in the drivers seat at the firm. Moreover, from our clients' perspective, there actually may be an advantage in not having such a practice. We have had a greater string of wins in obtaining new audit clients since we sold our management consulting practice than we had at any time in recent history, four new Fortune 500 clients, including two Fortune 50 companies, just within the last six months.

See also Testimony of James J. Schiro, Chief Executive Officer, PricewaterhouseCoopers, before the Panel on Audit Effectiveness (July 10, 2000) (''[Our] restructuring will allow us to rededicate ourselves to our core principles.''); Testimony of J. Terry Strange, Global Managing Partner, Audit, KPMG LLP, (July 26, 2000) (''In our view, the restructurings that are underway are driven by market forces, not regulatory considerations.''); Testimony of Thomas Goodkind, CPA (Sept. 13, 2000) (responding to a question about his experiences relating to synergies and knowledge transfers between audit and non-audit staff, Goodkind replied, ''In my experience, a transference of knowledge, I've rarely seen that in my experience.''); Testimony of Douglas R. Carmichael (July 26, 2000) (''The counter argument that consulting improves audit quality is also unproven and does not provide a basis for eliminating the proposed restrictions.''); Testimony of Douglas Scrivner, General Counsel, Andersen Consulting (Sept. 20, 2000) (''It is important to note that audit firms do not provide consulting services to improve the quality of the audits, but rather for commercial considerations.'').

[599] *See Public Accounting Report: Annual Survey of National Accounting Firms* (2000) (''PAR'').

[600] See Manufacturers Alliance, *Survey of General Audit* (2000). We use data from table 13 and table 66 to derive this ratio.

[601] *Id.* at table 16.

[602] *Id.* at table 73.

[603] Data are derived from PAR. The average growth rate in non-audit service revenues in 1999 was 21% and 9% for auditing and accounting services. Because there is uncertainty about whether individual firms classify internal audit outsourcing as consulting or assurance services, we choose the larger growth rate. In the current economy this may represent an optimistic growth rate.

[604] *See* Testimony of Professor Rick Antle, Yale University (July 26, 2000) (''I'll tell you now that as far as I know there's no systematic evidence as to the magnitude of these economies, just none that I know of.''). *See also* Letter of Professor Rick Antle, Yale University (Sept. 25, 2000). Professor Antle provides analysis to estimate the aggregate cost of lost synergies. He estimates the value of the non-audit services as ''the additional value of having the consulting done by the audit firm.'' He further estimates this value at $700 million, the gross margin attributable to all non-audit services provided to SEC audit clients in 1999. This number likely over-estimates the gross profits for these services in the future for two reasons: First, it includes revenues for non-audit services for the Big Five firms, two or three of which have sold or are committed to selling most of these practices. Second, the rule does not prohibit the purchase of all non-audit services by audit clients. In addition, Professor Antle estimates the aggregate social benefit of non-audit services purchased from any provider. Because the rule does not prohibit the purchase of any of these services, this estimate is not relevant to the cost-benefit analysis.

[605] Professor Antle's assumption about the value of synergies to the gross profit before partner compensation implies that the value of these synergies is on the order of 4% of non-audit revenues from SEC clients.

[606] *See also* Testimony of Charles Cox, Kenneth R. Cone and Gustavo E. Bamberger, Lexecon, Inc. (Sept. 25, 2000). These commenters also estimate the aggregate cost of lost synergies on the order of 1%–2% of non-audit revenues from SEC clients.

[607] *See* Testimony of Stephen G. Butler, Chairman and Chief Executive Officer, KPMG (Sept. 21, 2000). In response to a Commissioner's question about the source of non-audit service revenues, Mr. Butler commented that any statement attributing a percent of non-audit services to SEC audit clients for his firm would be difficult to interpret. Butler stated that ''it is difficult to look at that sort of statistic because that's not a constant 20% that buys that

The rule allows for a transition period of eighteen months for certain non-audit services. Over this period, audit firms may continue to contract with their audit clients for the newly covered non-audit services. The firms entering into new contracts, however, will either plan to complete those services by the end of the transition period or to assign or sell those contracts to someone else before the end of the period because at the end of this period, audit firms may no longer provide the newly proscribed services to their audit clients.

In this analysis, we recognize that some companies may face transition costs associated with changing the provider of non-audit services. But, for the reasons discussed above, we believe those costs will be small in the aggregate. Thus, any company whose current contract expires during the transition period faces the same costs as any new purchaser of the services. Those contracting costs are captured above in our analysis of synergies.

By extension, only companies with contracts for the proscribed services extending beyond the transition period will be faced with any re-contracting costs imposed by the rule. We note that those re-contracting costs may be borne by the company itself or by the auditor in its attempt to sell the contract to another provider. We received no information concerning these costs from commenters. Nevertheless, we have included $1.3 million in the cost estimate.[608]

Commenters also suggested that the rule would generate a cost associated with lost effectiveness on the audit and a cost associated with recruiting and retention of staff professionals.[609] We have seen no evidence that the rule will lead to less effective audits. Our cost estimates associated with lost synergies and scope include efficiency costs, if any, associated with an increase in cost to accomplish an effective audit. The sale by certain of the Big Five firms of their consulting practices further undermines the argument that the loss of non-audit business will impair audit effectiveness.

We also are skeptical about comments that suggest that the prohibition of certain services will make the profession less attractive to potential employees,[610] and increase staff recruiting and retention costs. Some argue that less qualified individuals will have to be hired to meet personnel needs and that this will ultimately lead to less effective audits, with a resulting impact on auditing firms, issuers and investors.[611] We do not believe that the issues of retention and recruitment are caused by this rule.[612] These problems are not new and are more systemic. Several commenters have noted that starting salaries for recent accounting graduates have failed to keep pace with other fields such as information systems, financial and treasury analysis and consulting.[613] Other commenters have stated that accounting firms have de-emphasized the audit function, treating it more like a commodity.[614] In addition, despite increases in university enrollments, interest in technical fields such as accounting, engineering, computer sciences and mathematics have been declining.[615]

C. Costs and Benefits of the Disclosure Requirements

The final rules require public companies to disclose in their proxy statements audit fees, fees for permitted information systems consulting and other fees paid to the auditor. The rule also requires public companies to disclose, when applicable, that personnel who are full- or part-time employees of an entity other than the audit firm performed more than fifty percent of the audit. In addition, the audit committee or the board of directors must state whether it has considered whether the provision of non-audit services by the auditor is compatible with maintaining auditor independence.

Many commenters argued that the provision of information systems consulting in and of itself does not impair auditors' independence.[616] This may be true where the conditions described in the rule are met. Even when these conditions are met, when the information systems consulting fees become large relative to audit fees, auditor independence may be at risk. At the same time, we understand that the level where impairment may occur may be related to other factors such as the closeness of the auditor-client relationship or the nature of the client's business and industry. Therefore, we believe that investors and audit committees are well-suited to determine when provision of these services may cause impairment.

The disclosure of fees from the provision of information systems and

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service from us. It might be 20% of the number of our clients this year, it might be the same percentage next year, but it might be a totally different 20 percent.''; Testimony of Robert K. Elliott, Chairman, AICPA (Sept. 21, 2000) (''[auditing is] . . . not an annuity, [but] it is more like an annuity than a consulting engagement which, when it's over, it's over.'').

[608] We assume that these costs may represent as much as 5% of the revenues from proscribed services purchased by each affected company. If as many as 10% of the purchasers of proscribed internal audit services from their auditor have contracts in excess of eighteen months and the entire $251.3 million represents revenues from proscribed services, the aggregate transition costs would be $1.3 million. Some may argue that transition costs are substantially higher, but we note that if transition costs are sufficiently high, economic theory suggests the service providers would be, on average, charging higher fees for the same level of service to the detriment of their clients. *See, e.g.,* T. Nilssen, ''Two Kinds of Consumer Switching Costs,'' 23 *Rand J. of Econ.,* at 579–589 (Winter 1992).

[609] *See, e.g.,* Arthur Andersen Letter; Deloitte & Touche Letter.

[610] *See, e.g.,* Letter of W. Steve Albrecht, Professor and Associate Dean, Marriott School of Management, Brigham Young University (Aug. 25, 2000); Letter of Professor James Jiambalvo, University of Washington (Sept. 14, 2000); Written Testimony of Professor Peter Cappelli, Wharton School (Sept. 20, 2000).

[611] *See, e.g.,* Testimony of Joseph F. Berardino, Managing Partner, Assurance and Business Advisory Services, Arthur Andersen (July 26, 2000); Written Testimony of Stephen G. Butler, Chairman and Chief Executive Officer, KPMG (Sept. 13, 2000).

[612] *See* Testimony of J. Michael Cook, former Chairman and Chief Executive Officer, Deloitte & Touche (July 26, 2000) (''A final assertion that quality will ultimately decline because the 'new audit profession' will be unattractive to the best and brightest people. I cannot evaluate that possibility but would observe that the audit-dominated firms of the future that today's leaders express concerns about are in many respects comparable to the firms that attracted them (and me) to the profession twenty or more years ago. Certainly much has changed in that time period, but I would expect the right leaders to be able to make such firms attractive once again.'').

[613] *See* Salary Survey Fall 2000, National Association of Colleges and Employers, 2000. Recent starting salaries for accounting graduates are 23% lower than those for information systems, 24% for consulting and 9% for financial and treasury analysis; *See also* Testimony of Robert K. Elliot, Chairman, AICPA (Sept. 21, 2000); Testimony of Barry Melancon, President and Chief Executive Officer, AICPA (Sept. 21, 2000).

[614] *See, e.g.,* Testimony of Douglas Scrivner, General Counsel, Andersen Consulting (Sept. 20, 2000) (''It is more likely that recruitment has been jeopardized by the actions of the accounting firms themselves. Some of the firms have diverted investment and resources out of the audit function and into non-audit services, thereby reducing the attractiveness of the audit function as a career path. They have created the very environment in which accounting majors look elsewhere and audit staff move over to the consulting side as quickly as they can.''); *See also* O'Malley Panel Report, *supra* note 20, at ¶ 4.4 (''Focus group participants often indicated that not only clients, but also engagement partners and firm leaders, treat the audit negatively as a commodity.''). *See generally* the Taylor Research and Consulting Group, Inc., *Final Quantitative Report* (2000); Albrecht and R. Sack, *Accounting Education: Charting the Course through a Perilous Future,* at 23 (August 2000). AICPA statistics presented to the O'Malley Panel indicate that from 1992 to 1997 the number of students obtaining bachelor degrees declined by 14%, those obtaining finance degrees declined by 17%, those obtaining general business degrees declined by 8%, and those obtaining marketing degrees declined by 27%.

[615] *See* Digest of Educational Statistics, 1999.

[616] *See, e.g.,* Written Testimony of Mauricio Kohn, CFA, CMA, CFM, AIMR (Sept. 20, 2000) (submitting survey); Letter of Mary Ellen Olivierio and Bernard Newman, Lubin School of Business, Pace University (Sept. 23, 2000).

other non-audit services provided by a company's auditor is intended to assist investors in deciding whether these services affect the independence of the auditor. Similar disclosures have been provided in the United Kingdom for several years.[617] The disclosure regarding the use of leased personnel to perform an audit is intended to allow investors to know when personnel of an entity other than the audit firm performed a majority of the audit so that investors can consider the independence of the other entity. Under such circumstances, the independence of the other entity and its personnel may be as relevant "if not more relevant" to auditor independence than the independence of the auditor itself. As discussed above, some commenters believe disclosure alone would not be sufficient to alleviate an impairment of auditor independence.

1. Benefits

While the SECPS collects information on non-audit and audit fees from its member firms, it no longer publishes this information. Accordingly, such information is not readily available or easily accessible to the investing public. Further, this information provides a description of types of services provided by the public accounting firm for all of its clients, rather than for each audit client. The rule would provide aggregate fee information for each registrant to the market.[618]

The disclosure related to non-audit services fees received by auditors would give investors insight into the relationship between a company and its auditor. In so doing, the disclosure will reduce uncertainty about the scope of such relationships by providing facts about the magnitude of non-audit service fees. This information may help shareholders decide, among other things, how to vote their proxies in selecting or ratifying management's selection of an auditor.

The disclosure regarding the auditor's use of another entity's employees to perform a majority of the audit work also provides important information to investors. Investors need to know when a majority of the audit work is performed by persons who have financial, business, and personal interests in addition to, or different from, persons employed by the auditor. This disclosure is significant because it reveals when the "principal auditor" (the auditor performing a majority of the audit work) is an entity other than the firm signing the audit opinion.

We believe that investors benefit jointly from the prohibition of certain services and the disclosure discussed above. Investors benefit under the rule from the knowledge that the accounting firms are not providing certain services that impair their independence. They will also be able to assess the relevance of aggregate compensation to the auditor for non-audit services. To the extent that confidence arises from both the prohibition and the disclosure aspects of the rule, our estimate of annual benefits on the order of one half to two billion dollars includes both elements of the rule.

2. Costs

We believe that the disclosure rule will impose relatively minor reporting costs on issuers. Generally, information about auditor fees is readily available to registrants. ISB Standard No. 1 requires auditors to report on certain independence issues to the audit committees of their SEC audit.[619] In addition, the SECPS requires members to report annually to the audit committee, or similar body, the total fees received from the company for management advisory services during the year under audit and a description of the types of such services rendered.[620] Companies also must report the billings from their auditors as expenses and import this billing information into their systems. As a result, companies should have ready access to the information on fees paid to their auditor for non-audit services.

Disclosure of audit and non-audit fees will impose a reporting burden on all issuers subject to the proxy disclosure rules. For the purpose of the Paperwork Reduction Act, we estimated the aggregate reporting cost of $272,620 to complete the appropriate paperwork.[621] Commenters suggested that this estimate is unreasonably low.[622] Some commenters suggested that registrants would spend more time making the required disclosures. We do not agree; the disclosures can be made using information that registrants will have on hand. We also note that the scope of the required disclosure has been significantly reduced from the proposal, limiting it to only aggregate audit, IT, and other non-audit fees. For the purpose of providing an aggregate cost estimate, we consider a range of $272,620 and $1.09 million, but use only the top of this range for the total. The rule will not impose significant burdens related to storing, analyzing and compiling data, or to training employees. Moreover, even if registrants spend more time in making the required disclosure, the marginal increase in cost

[617] *See* Lexecon Letter; Letter of Brand Finance PLC (June 13, 2000).

[618] The Commission imposed a similar disclosure requirement when it issued ASR 250. As noted above, ASR 250 was withdrawn three years later. The rule prompted some academic research at the time. Three studies from the period and a current study are of particular interest: J. H. Scheiner and J.E. Kiger, "An Empirical Investigation of Auditor Involvement in Non-Audit Services," 20 *J. of Acct. Res.,* at 482–496 (Autumn 1982) ("Scheiner & Kiger); J. H. Scheiner," "An Empirical Assessment of the Impact of SEC Nonaudit Service Disclosure Requirements on Independent Auditors and Their Clients," 22 *J. of Acct. Res.,* at 789–797 (Autumn, 1984) ("Scheiner"); G.W. Glezen and J.A. Millar, "An Empirical Investigation of Stockholder Reaction to Disclosures Required by ASR No. 250," 23 *J. of Acct. Res.,* at 859–870 (Autumn 1985); M. Ezzamel, D.R. Gwilliam and K. M. Holland, "Some Empirical Evidence from Publicly Quoted UK Companies on the Relationship Between the Pricing of Audit and Non-audit Services," 27 *Acct. and Bus. Res.,* at 3–16 (1996) ("Ezzamel").

Scheiner and Glezen studied the impact of ASR 250 disclosure requirements on the provision of audit and non-audit services and concluded that the major accounting firms did not significantly reduce the amounts of services offered. Glezen compared stockholder approval of auditors before and after the issuance of ASR 250 and found no significant decline in the approval ratios across the three periods. These authors generally conclude that either independence is not important to stockholders, a conclusion they consider unlikely, or the level of non-audit services did not reach the level at which independence was perceived to be threatened. Scheiner allows that the firms in his study were not providing clients many of the services that fell within the disclosure rule. Scheiner and Kiger find evidence that the non-audit services provided to audit clients at that time generally "consisted of traditional accounting services—primarily tax services. Less traditional services which are often questioned by critics of the accounting profession comprise only a small part of total non-audit services." They further state that at that time, "[t]he prohibition of non-accounting, non-audit services would not appear to have a substantial impact on firms because these services do not represent a large percentage of total revenues."

As we discussed in Section III.B., the level of non-audit services in general and non-audit services for audit clients in particular have increased substantially in recent years. Ezzamel found in the U.K. that substantial income was produced by non-audit services and that "the extent of voluntary disclosure of the breakdown on non-audit services was limited and the existing disclosure requirement allowed considerably variety in the manner in which non-audit services incurred or paid abroad were disclosed."

[619] ISB Standard No. 1, *supra* note 167. In addition, SAS No. 61 provides additional guidance on topics that an auditor should discuss with the audit committee (or board of directors if there is no such committee) of each registrant. AICPA SAS No. 61, AU § 380.

[620] SECPS Manual § 1000.08(i).

[621] In our Paperwork Reduction Act analysis in the Proposing Release, we estimate that approximately 9,892 respondents file proxy statements under Schedule 14A and approximately 253 respondents file information statements under Schedule 14C. We based the number of entities that would complete and file each of the forms on the actual number of filers during the 1998 fiscal year.

[622] See Deloitte & Touche Letter. Deloitte & Touche provided an estimate of 3–6 hours per filing for a small firm and 50–100 hours for a large firm, but provided no data to support this estimate.

will not be significant relative to the overall costs discussed in this section. Even assuming the burden is four times as great to make the disclosure, the annual cost of complying with the disclosure portion of the rule would be $1.09 million.

D. Estimated Aggregate Costs and Benefits

The elements of the total quantified cost of the rule are lost synergies for those currently purchasing proscribed services; transition costs for those currently purchasing both audit and proscribed consulting services; professional training to learn the new rules regarding employment, investment, and independence; and disclosure costs. Using assumptions and methods that tend to overstate costs, we estimate the aggregate cost to the U.S. economy to be approximately $16.6 million for the first year and $12.4 million for subsequent years.[623]

Finally, we have quantified one primary benefit of the rule as increased investor confidence that may lead to a reduction in the required rate of return. In summary the rule benefits (i) auditors and members of their families as a result of changes in restrictions on investment and employment relationships; (ii) family members of auditors as a result of changes in the restrictions on employment relationships; (iii) issuers by eliminating certain uncertainties about their auditor's independence, by increasing investor confidence and thus facilitating issuers in raising capital, and by increasing the utility of annual audits and quarterly reviews; (iv) public accounting firms by clarifying the independence rules; (v) investors who will benefit from increased confidence in the reported financial statements; and (vi) all of the market participants through more efficient contracting, improved operating and investing decisions, and greater market stability.

Even if the rule leads to only a very small change in that rate of return, the annual benefit could be in the range of one half to two billion dollars. Benefits may also accrue to the economy in the form of more efficient contracting, improvements in operating and investing decisions by management and greater market stability. Finally, relaxation of the investment and employment constraints on auditing professionals and their families may also lead to more efficient investments by these persons.

VI. Final Regulatory Flexibility Analysis

We have prepared this Final Regulatory Flexibility Act Analysis in accordance with the Regulatory Flexibility Act (''RFA'').[624] This analysis relates to amendments to Rule 2–01 of Regulation S–X and to Item 9 of Schedule 14A [625] under the Exchange Act. The amendments modernize our auditor independence requirements.

The rules as adopted will not have a significant impact on a substantial number of small entities. The vast majority of public companies required under the federal securities laws to submit reports prepared by an independent accountant to the Commission are not ''small'' for purposes of the RFA. Moreover, as to the impact on small accounting firms, the Big Five accounting firms, which are not small entities, provide auditing services for the vast majority of public companies. The major effects of these rules, therefore, will not be on small entities. Nevertheless, we are mindful of the possible effect of our rules on small entities, and we have made certain modifications, noted below, that should reduce significantly the impact of the new rules on small entities.

A. Reasons for and Objectives of the Rule Amendments

As discussed above, the federal securities laws require registrants to file financial statements that have been audited, and reports that have been prepared, by ''independent'' accountants.[626] Our auditor independence requirements are found in Rule 2–01 and interpretations, which have been supplemented by staff letters, staff reports, and ethics rulings by the accounting profession. Many of the interpretations are reprinted in Section 600 of the Codification. We have not amended the fact-specific examples in the Codification since 1983. As discussed more fully above, since that time, there has been a dramatic transformation of the accounting industry. Increasingly, accounting firms are becoming multi-disciplinary service organizations and are entering into novel and complex business relationships with their audit clients. At the same time, individual accounting professionals have become more mobile, while the geographic location of personnel has become less important due to advances in telecommunications and the Internet. In addition, an increasing number of American families have two wage earners.

To protect the reliability and integrity of the financial statements of public companies and to promote investor confidence, we must ensure that our auditor independence requirements remain relevant, effective, and fair in light of the new business environment. Consequently, the rule amendments provide a general standard for determining auditor independence and identify relationships that render an accountant not independent of an audit client under the standard in Rule 2–01(b). The relationships addressed include, among others, financial and employment relationships, business relationships, and relationships where auditors provide certain non-audit services to their audit clients. We also are requiring certain public companies to disclose in their annual proxy statements information about, among other things, non-audit services provided by their auditors.

Financial and Employment Relationships. Under former requirements, an auditor's independence was impaired if any partner in the firm, any manager in an office participating in a significant portion of the audit, or certain of their relatives, had a financial interest in, or certain employment relationships with, an audit client. As explained above, these requirements may have unnecessarily restricted employment and investment opportunities for auditors and members of their families.

The amended rule targets application of these particular auditor independence rules to those who can actually influence the audit of a client. The amended rule allows audit firm partners, other professionals, and their families, more freedom in their investments and employment decisions and will allow them to take greater advantage of future opportunities in these areas. The amended rule shrinks significantly the circle of family members and former accounting firm personnel whose employment impairs an auditor's independence; the amended rule similarly reduces significantly the pool of firm personnel whose investments are imputed to the auditor. We believe that the amended rule will maximize the opportunities available to auditors while promoting the public interest and protecting investor confidence.

Non-Audit Services. We, along with certain users of financial statements,

[623] The ongoing figure is not adjusted for inflation or growth in consulting revenues beyond 2000. However, we note that there is a slowdown in the growth of these services. See, e.g., PAR, End of a Run: National Firms' Growth Rate Slowed In FY 99 (Mar. 31, 2000).

We note that the transition costs of $1.3 million may be incurred at any time over the eighteen-month transition period. We include this estimate in the first year only for ease of presentation.

[624] 5 U.S.C. 603.

[625] 17 CFR 240.14a–101.

[626] *See supra* note 8.

have become increasingly concerned about the effects on independence when auditors provide both audit and non-audit services to their audit clients. These concerns have been exacerbated in recent years by changes in the types of non-audit services that accounting firms provide as well as by dramatic increases in the fees, in both absolute and relative terms, for those non-audit services. As we discuss more fully above, the rapid growth of non-audit services has increased the economic incentives for the auditor to preserve a relationship with the audit client, thereby increasing the risk that the auditor will be less vigilant in its objectivity. Additionally, aggregate economic incentives aside, certain types of non-audit services by their very nature can create conflicts incompatible with objectivity. At the same time that more and more individual investors are participating in our capital markets, either directly or through mutual funds, pension plans, and retirement plans, we have seen growing public concern about the increasing importance of non-audit services to accounting firms. The amended rule identifies certain non-audit services that, if performed by an auditor for an SEC audit client, would render the accountant not independent.

Disclosure. As discussed, the types of non-audit services provided by auditors to audit clients have changed, and the fees paid for those services have increased. We are adopting a proxy statement disclosure requirement focused on the fee relationship between registrants and their auditors. Independent studies and the comments we received have shown that concerns are likely to be raised about auditor independence when the consulting fees paid by a registrant are significant when compared to the audit fees. Accordingly, the disclosure we are mandating addresses this area and will be useful to investors in evaluating auditors' independence. The amendments require registrants to disclose in their proxy statements their audit fees, fees for financial information systems design and implementation, and the fees for other non-audit services rendered by the principal accountant to the company. In addition, we are requiring companies to disclose whether their audit committees have considered whether the provision of financial information systems design and implementation services and other non-audit services provided by the company's principal accountant is compatible with maintaining the principal accountant's independence. Investors accordingly will have access to this information when making investment and voting decisions.

B. Significant Issues Raised by Public Comment

The proposals generated significant comment and broad debate. As we discussed in detail above, the final rule amendments, particularly those related to non-audit services, have been modified from the proposals in response to comment letters, written and oral testimony from four days of public hearings, academic studies, surveys, and other professional literature.

At the time we published the Proposing Release, we also prepared an Initial Regulatory Flexibility Analysis (IRFA), a summary of which was published in the Proposing Release. We requested comment on the IRFA, and we received several comments in response. Separately, many commenters representing small accounting firms expressed strong support for the proposal,[627] and other commenters representing small businesses expressed concerns about the proposal.

With respect to procedural issues related to the IRFA, one commenter questioned our procedure, arguing that we should have requested information on the number of small entities affected some time earlier and that neither the Proposing Release nor the IRFA indicates that the Small Business Administration (''SBA'') reviewed or commented on the IRFA.[628] At the time that we prepared the Proposing Release, we prepared the IRFA in accordance with the RFA and made it available to the public as required by Section 603 of the RFA. We submitted the IRFA to the SBA, and the SBA had no comments on the IRFA. The same commenter questioned whether the agency assured that small entities had an opportunity to participate in the rulemaking. In addition to soliciting extensive comments in the Proposing Release and holding four days of hearings at which representatives of small accounting firms testified, we published a summary of the IRFA in the **Federal Register**, and many small firms commented on the proposed amendments.

C. Small Entities Subject to the Rule

For purposes of analyzing the impact on small public companies, the Commission has defined ''small business'' in Rule 157 under the Securities Act.[629] Rule 157 provides that ''small business'' means any entity whose total assets on the last day of its most recent fiscal year were five million dollars or less and is engaged, or proposes to engage, in small business financing. A registrant is considered to be engaged, or to propose to engage, in small business financing under this rule if it is conducting, or proposes to conduct, an offering of securities which does not exceed the dollar limitation prescribed by Section 3(b) of the Securities Act.[630] We estimated in the IRFA that there are approximately 2,500 Exchange Act reporting companies that are small businesses.

The Commission also has defined small business for purposes of an investment company in Rule 0–10 of the Investment Company Act.[631] This definition provides that an investment company is a ''small business'' if it has net assets of $50 million or less as of the end of its most recent fiscal year. In the IRFA, we estimated that approximately 227 investment companies are small businesses.

Our rules do not define ''small business'' or ''small organization'' with regard to accounting firms. The SBA, however, has defined a small business, for purposes of accounting firms, as those with under $6 million in annual revenues.[632] In the IRFA, we explained that we have limited data indicating revenues for accounting firms, and that we cannot estimate the number of firms with less than $6 million in revenues. We requested comment on the number of accounting firms with revenues under $6 million in order to determine the number of small accounting firms potentially affected by the rule amendments but received no response. We also requested comment generally on the number of small entities that may be affected by the rule amendments and received no estimates. One commenter believed that we had not identified the full range of types of and number of small entities affected or the types of impacts, but the commenter provided no further information.[633]

Several small accounting firms and small companies expressed concern about a possible derivative effect of our rule on companies that are not registered with us and on the auditors of such companies.[634] These commenters were concerned that state governments, state boards of accountancy, and others may adopt rules similar to ours without regard to whether the companies are public or

[627] *See supra* notes 215, 216.

[628] Letter of Jim J. Tozzi, Member, Board of Advisors, Center for Regulatory Effectiveness (Aug. 30, 2000) (''Tozzi Letter'').

[629] 17 CFR 230.157.

[630] 15 U.S.C. § 77c(b).

[631] 17 CFR 270.0–10.

[632] 13 CFR 121.201.

[633] Tozzi Letter.

[634] *See supra* notes 218, 219.

private. As we explained above, the rules apply to public companies and other entities registered with the Commission or otherwise required to file audited financial statements with the Commission. In addition, the rules are not intended to alter the relationship between federal and state agencies, and they do not affect the ability of the states to adopt their own rules. Moreover, commenters pointed out that state boards have a strong independent tradition.[635] We expect that the state boards of accountancy will continue their practice of exercising independent judgment in determining the extent to which our rules should be imported into their regulatory regimes.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The new rules could potentially affect two primary groups—registrants and auditors. The rules could affect these two groups differently, but in neither case do we expect that the rules would result in significant reporting, recordkeeping or other compliance requirements. The possible effects of the rules on these two groups are as follows:

Investments and Family Relationships. The rule amendments regarding investments and employment relationships liberalize restrictions on investments by, and employment available to, accountants and their families without impairing the accountant's independence. We stated in the IRFA that in this sense, therefore, we are relaxing compliance requirements. One commenter noted that although we correctly state that we are relaxing certain requirements, the proposed threshold regarding a material indirect investment and the proposed definition of affiliate of the accounting firm would restrict the ability of small businesses to invest in, or enter business relationships with, other firms.[636]

We recognize these concerns, and we have revised the rules, in part, to take them into account. As described above, the rule governing a material indirect investment in an audit client is intended to carry over the existing proscription on material indirect investments in audit clients. In addition, in part because of concerns that the definition of ''affiliate of the accounting firm'' would have unintended consequences on alliances of small accounting firms, we have modified our approach to avoid this result.

Non-Audit Services. The IRFA discussed whether the proposed rule on non-audit services would have a significant effect on small entities. Some commenters expressed concern about the effects of the rules on small registrants that rely on the special expertise of their auditors or that lack resources to engage a second accounting firm to provide non-audit services.[637] Other commenters stated that small businesses have long-term relationships with auditors that provide non-audit services, or are located in an area with few firms able to provide such services.[638] Some small businesses in rural areas may lack the ability to perform the internal audit function on their own.[639]

We are sensitive to these concerns and we have modified the rule so that eight of the non-audit service provisions parallel or draw from current independence requirements regarding those services. We also determined not to adopt a restriction on ''expert services. Accordingly, with respect to the eight non-audit services, therefore, we do not believe that the rules would have a significant effect on small businesses.

We have amended our rule regarding financial information systems design and implementation. The rule proposal would have prevented audit firms from providing some information technology consulting to their audit clients without impairing the firm's independence. The final rule singles out certain services as impairing independence and identifies other categories of such services that will not impair independence if certain conditions are met that are designed to ensure that the audit client's management retains responsibility for decision-making authority over the client's financial information systems. Accordingly, if the conditions are met, a small entity could obtain financial information systems design and implementation services.

With regard to internal audit services, we have revised the rule from what we proposed so that the internal audit restrictions do not apply to registrants with less than $200 million in assets, as long as the registrant follows certain conditions. This, of course, largely eliminates the effect of the rule amendments on small entities with respect to the auditor's provision of internal audit services to small entities. This change from the proposed rule would lower the burden on smaller businesses that are not defined as small under our rules. It also has the effect of almost completely excepting smaller accounting firms from the coverage of this provision of the rule, since the firms that audit those companies tend to be smaller. Our analysis indicates that approximately fifty-four percent of registrants have assets of less than $200 million, which, of course, would exclude all companies defined as ''small businesses'' for purposes of the RFA.

The IRFA also stated that we did not believe that the non-audit services provision would have a significant impact on a substantial number of small accounting firms and requested comment on the impact. Some commenters stated that the rules could harm firms that must offer both audit and non-audit services to stay in business,[640] and one commenter recommended that firms with $1 million or less in revenue be exempt.[641]

Other commenters supported the rule amendments relating to non-audit services. Some noted that rather than harming small accountants, the rules could provide smaller firms with new business opportunities to provide non-audit services to companies that previously used their auditors for these services.[642]

Although we lacked definitive data, the IRFA provided information on accounting firms that were likely to be small accounting firms, and the number of SEC clients of those firms. The majority of SEC registrants are audited by one of the Big Five firms, which are not small entities. We have data regarding the approximately 776 accounting firms with fewer than 20 SEC audit clients.[643] Accounting firms with fewer than 20 SEC audit clients tend to be smaller accounting firms, and we estimate that fewer than twenty percent of these firms provide any consulting or non-audit services to their SEC audit clients. Only ten to twelve percent of the accounting firms with two or fewer SEC audit clients provide

[635] *See supra* note 221.

[636] *See, e.g.,* AICPA Letter.

[637] *Id.; see also* Letter of David E. Pertl, Senior Vice President and CFO, First Choice, Inc. (Sept. 18, 2000); Letter of Kelly Schwarzbeck, CPA, Alexander X. Kuhn & Co. (Aug. 22, 2000); Letter of Robert L. Bunting (Aug. 22, 2000).

[638] *See, e.g.,* Letter of the California Chamber of Commerce (Sept. 15, 2000); Letter of Joseph C. King, CPA, Faulkner & King, PSC (Sept. 13, 2000).

[639] *See, e.g.,* Letter of Landon J. Brazier, Knight Vale & Gregory (Aug. 31, 2000); Letter of Stephen Lange Ranzini, Chairman, CEO and President, University Bank (Sept. 9, 2000).

[640] *See, e.g.,* Letter of Dean R. Heintz, CPA, Casey Peterson & Assoc., Ltd. (Aug. 8, 2000); Letter of Patrick J. Day, CPA (Aug. 10, 2000).

[641] Letter of Patrick J. Day, CPA (Aug. 10, 2000).

[642] *See* Testimony of Larry Gelfond, CPA, CVA, CFE, former President of the Colorado State Board of Accountancy (Sept. 13, 2000); Letter of John Mitchell, CPA (Aug. 14, 2000).

[643] *See* Public Accounting Report, Special Supplement: Annual Survey of National Accounting Firms—2000 (March 31, 2000); Annual Reports to SECPS, Annual reports filed with AICPA Division for CPA firms; SECPS Reports, Reports prepared by the AICPA Division for CPA firms.

any consulting or non-audit services to their SEC audit clients. We also estimated that the fees of the firms with 20 or fewer SEC audit clients that come from consulting and non-audit services provided to SEC audit clients average less than 7.5% of the firms' total fees for non-audit services, and less than one percent of their total fees. We estimated that small accounting firms obtain non-audit or consulting fees, on average, from less than one SEC audit client.

In addition, the change from the proposed rule discussed above—eliminating restrictions on internal audit services for registrants with less than $200 million in assets—would lower the burden on smaller accounting firms. We estimate that approximately eighty-five percent of the clients of non-Big Five firms have assets of less than $200 million.[644] Thus, as long as certain conditions are met, the rule amendments regarding internal audit services would not apply to eighty-five percent of audit clients of all but the Big Five firms.

While we understand that some small businesses may incur some costs as a result of the rule amendments, we believe that few small businesses will be affected, and that any effects will be minimal. The changes we have made in the rules as adopted should ameliorate any burden on small firms significantly. Moreover, while some small businesses may be required to engage a new firm to perform certain functions, there is no comparatively greater effect on small firms with respect to costs incurred to choose a new accounting firm. Such costs apply equally to larger registrants as to smaller registrants.

Quality Controls. The new rules establish a limited exception pursuant to which inadvertent violations of the rules by covered persons in the accounting firm will not render the firm not independent if the accounting firm maintains certain quality controls and satisfies other conditions. SECPS membership requirements and GAAS already require firms to have quality controls over their audit practices, so there should be little additional burden on accounting firms that want to take advantage of the exception.

Disclosure. The new proxy disclosure rules require all companies subject to our proxy rules to disclose information to shareholders regarding fees for audit services, fees for services related to financial information systems design and implementation, and fees for all other non-audit services. Companies also must disclose if the audit committee considered whether the provision of non-audit services by the company's principal accountant is compatible with maintaining the principal accountant's independence. These requirements would apply to small businesses that are subject to the proxy rules, which we estimate to be no more than most of the 2,500 small registrants that file periodic reports, and 227 investment companies.

The rules as proposed required, among other things, a description of each professional service provided by the principal accountant, disclosure of the fee for each, and disclosure of whether the audit committee approved the service. We have modified the disclosure requirement to eliminate the requirements that companies describe each non-audit service provided by their auditors and the fee for each such service. We believe that by making these changes, we have accommodated commenters' concerns while ensuring that investors have the information they need to make judgments about whether the registrant has an independent auditor. In addition, the information required should be readily available to the registrant because of the requirements under ISB Standard No. 1 and the rules of SECPS.[645]

E. Agency Action to Minimize Effect on Small Entities

The RFA directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. We considered several alternatives, including the following referenced in the RFA: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources of small entities; (ii) the clarification, consolidation or simplification of compliance and reporting requirements for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the new rules, or parts of the new rules, for small entities.

We considered each of the four alternatives, and a variety of alternatives to our provisions on non-audit services. With respect to the first alternative—establishment of differing compliance or reporting requirements—we stated in the IRFA that, with respect to investments and employment relationships, we believe that the impact of the rules in this area on small entities was already minimal. We did not believe, therefore, that establishing differing requirements would materially decrease the impact of the rules on small businesses, and we did not make special provisions. The IRFA discussed establishing differing standards in the area of non-audit services, and further discussed the three other alternatives contained in the RFA, mentioned above.

Regarding the provision of non-audit and consulting services by small accounting firms, we considered several approaches. As discussed above, however, we have determined that our two-pronged approach of requiring disclosure and identifying particular non-audit services that are incompatible with independence best protects the audit process.[646] In addition, because of the limited amount of non-audit services that small accounting firms provide to their SEC audit clients, we believe that the adoption of any of these approaches would not have a significant impact on a substantial number of small businesses or small accounting firms.

The second alternative—the clarification, consolidation or simplification of compliance and reporting requirements for small entities—is addressed below in connection with our discussion of our consideration of the fourth alternative. We have exempted small entities from certain provisions of the rules, which simplifies compliance requirements for those entities.

The third alternative mentioned above—use of performance rather than design standards—would be difficult, in part, to implement in this context. As to the quality controls exception we did implement such a performance standard. As to the other components of the rule changes, performance standards would not carry out the Commission's statutory mandate to ensure that registrants file financial statements and reports with us that have been certified by independent public accountants. Rather, we must identify and address influences that impair independence.

Some commenters suggested that we adopt the last alternative—an exemption from coverage of the new rules, or parts of the new rules, for small entities.[647] Other commenters suggested that our rules not apply to audits of smaller public companies, regardless of the size of the auditor. These commenters stated that small public companies may be in greater need of consulting assistance and may not be able to obtain the assistance from anyone other than their

[644] *See* Compustat Database, Oct. 31, 2000. The 85% figure excludes clients that are bank holding companies. For further analysis, see the cost-benefit analysis in Section V.B above.

[645] *See supra* note 476.

[646] *See supra* Section IV.G.

[647] *See, e.g.,* Letter of Donald G. Mantyla, CPA (Sept. 25, 2000).

auditors.[648] We appreciate this concern and we have made certain changes to the rule.

The changes we have made recognize that, for some small companies, the company's auditor may be the only reasonably available service provider for certain services. The final rules, therefore, take into account that small firms may need internal audit services from their auditors and provide an exception for companies under $200 million in assets, subject to certain conditions. For the reasons discussed above, aside from these limited areas, we do not believe that a further exemption for small entities is appropriate.

VII. Paperwork Reduction Act

Certain of the provisions in the amendment to Item 9 of Schedule 14A contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995.[649] We published notice soliciting comments on the collection of information requirements in the Proposing Release and submitted these requirements to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. § 3507(d) and 5 CFR 1320.11. The collections of information are titled ''Regulation 14A (Commission Rules 14a–1 through 14b–2 and Schedule 14A)'' and ''Regulation 14C (Commission Rules 14c–1 through 14c–7 and Schedule 14C).''

OMB approved the rule's collection of information requirements.[650] Regulation 14A (OMB Control No. 3235–0059) was adopted pursuant to Section 14(a) of the Exchange Act and prescribes information that a company must include in its proxy statement to ensure that shareholders are provided information that is material to their voting decisions. Regulation 14C (OMB Control No. 3235–0057) was adopted pursuant to Section 14(c) of the Exchange Act and prescribes information that a company must include in an information statement when a shareholder vote is to be held but proxies are not being solicited. Schedule 14A requires certain disclosure related to a company's independent accountants and Schedule 14C refers to Schedule 14A for the disclosure requirements related to the company's independent accountants. The final rule requires issuers to disclose in Schedules 14A and 14C, among other things, the aggregate fees billed for audit services, for financial information systems design and implementation services, and for other non-audit services provided by the issuer's principal accountant, and certain disclosures regarding the company's audit committee.

The Commission received comments concerning the proposed collection of information requirements. Some commenters suggested that the collections of information lacks practical utility and noted that we rescinded an earlier requirement that issuers disclose information concerning non-audit services provided by their auditors.[651] These commenters generally argued that the proposed disclosure was unnecessary and would be confusing to registrants and investors.[652] Commenters also argued that we had not adequately demonstrated the need for the disclosure requirement.[653] One commenter suggested that the proposed collection of information is duplicative of information available to the Commission from the SECPS.[654]

We believe that the disclosure requirement is necessary, practical, and useful. As discussed more fully above, in recent years there has been a dramatic growth in the absolute and relative size of fees charged for non-audit services provided to audit clients.[655] At the same time, information about audit firms' provision of non-audit services is not as readily available as it was when we rescinded an earlier disclosure requirement.[656] The disclosure we seek is not, contrary to one commenter's assertion, readily available through industry sources.[657] Under circumstances where investors have less information about a matter that has become more important, we believe that the disclosure requirement will prove useful to investors. Further, we have modified the rule from that proposed to make the disclosed information more understandable to investors.[658] For example, under the rule as adopted, registrants will not disclose a line-by-line description of each non-audit service, but rather will disclose relevant amounts in the aggregate. Investors will be able to determine quickly the amounts spent on non-audit services relative to the amount spent on audit services. As discussed below, these modifications lower the already minor burden on registrants of making this disclosure.

Commenters also questioned our estimate of the burden imposed by the new disclosure requirement.[659] Specifically, commenters suggested that issuers will spend more than one hour on completing the new disclosure requirements.[660] Some commenters suggested that in calculating the burden, we did not consider all of the relevant factors.[661] Among other things, some commenters suggested that we failed to

[648] Letter of Stanley Keller, Chair, Committee on Federal Regulation of Securities, American Bar Association (Sept. 27, 2000); Letter of Robert Bunting (Sept. 6, 2000); Letter of P. Gerard Sokoloski, CPA, President, NY State Society of Certified Public Accountants (Sept. 25, 2000).

[649] 44 U.S.C. 3501 *et seq.*

[650] One commenter raised a number of issues related to OMB's processing and review of our submission. Because OMB has reviewed and approved our submission, we do not address these comments here.

[651] *See, e.g.,* Letter of Center for Regulatory Effectiveness: CRE Report Card on the SEC's Proposed Rule on Auditor Independence (''CRE Report Card'').

[652] *See, e.g.,* Letter of Douglas R. Cox, Gibson, Dunn and Crutcher (Aug. 22, 2000) (''Cox Letter''). This commenter suggested, among other things, that the rule mandates disclosure of information that would appear irrelevant to the selection of auditors because a vote to ratify auditors is not required by the federal securities laws or many state laws. The commenter noted that the rule requires disclosure on Schedule 14C which does not ask investors to vote on any matter. Deloitte & Touche, in its comment letter, suggested that the Commission could minimize the burden imposed by the rule by requiring disclosure only when the stockholders vote on the approval or ratification of the company's accounting firm. Deloitte & Touche Letter. The disclosure rule serves a broader purpose than assisting shareholders in votes to ratify the selection of an auditor. The disclosure rule is one component of our auditor independence rules, the purpose of which is to promote the integrity of financial statements and promote investor confidence. Thus, the disclosure is aimed not only at a registrant's existing shareholders but at prospective shareholders as well.

[653] Tozzi Letter.

[654] CRE Report Card.

[655] *See* Section IV.G for further discussion of the disclosure requirement, including discussion of comments received concerning that requirement.

[656] As discussed in the Proposing Release (*see* Section II.C.4 and note 156 of this release), from 1978 to 1982, we required companies to disclose in their proxy statements all non-audit services provided by their auditors but later rescinded the requirement. Among other reasons, our review of proxy disclosures convinced us that accounting firms then, in contrast to now, were not providing extensive non-audit services to their audit clients. In addition, we noted that, even without the proxy statement requirement, investors had access to useful data provided to and made public by the SECPS.

[657] As noted above, the SECPS has stopped publishing information about audit firms' provision of non-audit services.

[658] *See supra* Section IV.G.

[659] *See, e.g.,* Deloitte & Touche Letter; Cox Letter.

[660] *See, e.g.,* Deloitte & Touche Letter. Deloitte & Touche stated in its comment letter that it ''is difficult to estimate the average hours without an empirical study,'' but suggested that disclosure would require approximately three to six hours for companies with basic reporting systems and approximately 50–100 hours for companies with more complex reporting systems. As discussed below, we have modified the disclosure requirement, and we do not agree that the required disclosure will create more than a minimal additional burden to companies already preparing Schedules 14A or 14C.

[661] Cox Letter.

consider burdens relating to storing and analyzing the information, training personnel, hiring outside assistance, and putting the information into a reporting format.[662] Further, commenters disagreed with our assertion in the Proposing Release that the information required to make the disclosure should be readily available to respondents.[663]

Commenters also disagreed with our estimate of the number of registrants that would be affected by the disclosure requirement. In the Proposing Release, we stated the burden would fall primarily on one-quarter of registrants because only one-quarter of registrants receive non-audit services from their accountants in any given year. Some commenters disagreed. While it may be true, these commenters suggested, that only twenty-five percent of registrants receive non-audit services in any given year, a larger percentage receives non-audit services in some years and not others.[664] Commenters suggested that the percentage of registrants that would have to maintain records related to the disclosure requirements would therefore be greater than twenty-five percent.[665] At least one commenter stated that all registrants would have to check their records to determine whether they must disclose more than just audit fees.[666]

We believe that our estimate of the burden imposed by the disclosure requirement is reasonable. While all registrants will have to disclose audit fees under the new rule, and, where applicable, registrants must make disclosures concerning the use of leased personnel on the audit, we believe that the time and expense required to make such disclosures will be minimal. In calculating our estimate of the burden imposed by the new disclosure requirement, we carefully considered the relevant factors.[667] Further, as discussed above, we have reduced the amount and narrowed the scope of disclosure that registrants will be required to make. These modifications reduce the amount of time spent in making disclosure. For example, as proposed, the rule would have required a registrant to describe each professional service rendered by its accounting firm, and to disclose the fee paid for each service.[668] Instead, the rule as adopted requires a registrant to disclose the aggregate fees paid for audit, information technology, and other non-audit services.[669] This information is readily accessible to issuers;[670] it is an incremental addition to previously required disclosure about the identity of a company's auditor. In addition, we believe that a registrant will know how much it spent during the previous fiscal year on its audit. A registrant should be able to determine quickly the amounts paid to its auditor for information technology and other non-auditservices by consulting its internal records. The rule should not require registrants to seek significant outside assistance, or substantially modify their systems to maintain and collect data. We therefore believe that 2,536 hours is a reasonable estimate of the paperwork burden imposed by the rule.[671]

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Compliance with the disclosure requirements is mandatory. There is no mandatory retention period for the information disclosed, and responses to the disclosure requirements will not be kept confidential.

VIII.Consideration of Impact on the Economy, Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Sections 2(b) of the Securities Act, 3(f) of the Exchange Act, and 2(c) of the Investment Company Act require the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, also to consider whether the action will promote efficiency, competition, and capital formation.[672] The rule amendments update our independence requirements in light of developments in the accounting profession and in society generally. The rule amendments affect the scope of services an auditor may provide to an audit client without impairing the auditor's independence and also affect the financial, employment and business relationships that an auditor (and certain other persons) may have with an audit client without impairing independence. The purpose of the amendments is to promote investor confidence in the integrity of the audit process and in the audited financial statements that investors use to make investment decisions. As discussed above, investor confidence promotes market efficiency and capital formation. Competition is discussed below.

With respect to the scope of services provisions, some commenters suggested that there is no evidence that auditors' provision to audit clients of non-audit services affects auditor independence or investors' perceptions of auditor independence, and they therefore argued that the rule will not increase investor confidence.[673] Academic studies and other surveys, however, suggest that certain users of financial statements have long believed that an auditor's provision to an audit client of non-audit services could affect both the auditor's objectivity and investor confidence in the financial statements.[674] Furthermore, even a relatively modest increase in investor confidence could have a significant, positive effect on the economy,[675] while a relatively modest decrease in investor confidence could have significant consequences for the capital formation process.

[662] CRE Report Card; AICPA Letter.

[663] *See, e.g.,* Cox Letter.

[664] *Id.*

[665] *See, e.g.,* CRE Report Card.

[666] *See* Deloitte & Touche Letter.

[667] We do not believe that the new disclosure requirement will cause registrants significant burdens associated with administrative tasks such as collecting, storing, and formatting the information, nor do we believe that compliance with the disclosure rule will require significant employee training.

[668] The proposed rule required disclosure of each professional service during the most recent fiscal year. Under the proposed rule, a service did not have to be disclosed if the fee for that service was less than $50,000 or ten percent of that registrant's audit fee. Commenters suggested that these thresholds were too low, and would result in disclosures of insignificant services. As adopted, the rule does not require disclosure of each professional service.

[669] As proposed, the rule would have required registrants to disclose whether the audit committee approved each disclosed non-audit service and considered the possible effect on the principal accountant's independence. As adopted, the rule requires disclosure of whether the audit committee considered whether the provision of the non-audit services by the principal accountant is compatible with maintaining the principal accountant's independence. We do not believe that this requirement imposes a significant burden.

[670] As noted above, audit committees currently receive information about the auditor's provision of non-audit services under ISB Standard No. 1 and SECPS Manual §1000.08. *See supra* note 476.

[671] In its comment letter, the AICPA suggested that the proposed rule's definition of ''affiliate of the accounting firm'' created ambiguities that made the disclosure requirement potentially overbroad and burdensome. In response to commenters' concerns, we have removed the definition of ''affiliate of the accounting firm'' from the rule as adopted. Instead, the rule relies on existing guidance concerning when an entity is associated with the accounting firm. We believe that, with this modification, the disclosure requirement in the final rule is targeted to its purpose and is not unduly burdensome.

[672] 15 U.S.C. 77b(b); 15 U.S.C. 78c(f); 15 U.S.C. 80a–2(c).

[673] *See, e.g.,* KPMG Letter.

[674] *See supra* Sections III.C.1, III.C.3.

[675] *See supra* Section IV.B.1.

Commenters suggested that the proposals would impede efficiency because the rule may prevent audit clients from selecting the most efficient service provider.[676] As adopted, however, the rule in large part codifies existing limitations on auditors' provision to audit clients of non-audit services. To the extent these existing limitations or new limitations from our rule prevent the choice of the least costly service provider in some situations, we believe such limitations are warranted to achieve our goal of enhancing auditor independence.[677]

With respect to the claim that synergies are created by the auditor's provision of both audit and non-audit services, research on the evidence of such synergies is inconclusive.[678] Moreover, the recent sales or proposed sales by large accounting firms of their consulting divisions[679] suggest that audit firms' provision of at least certain non-audit services creates, at most, limited synergies.

Section 23(a) of the Exchange Act requires the Commission, when adopting rules under the Exchange Act, to consider the impact on competition of any rule it adopts.[680] Some commenters suggested that the rule would inhibit competition. Some of these commenters argued that, in response to the proposed rule, accounting firms would choose not to provide audit services in favor of providing non-audit services, and that firms already providing the audit might not bid on that client's non-audit work.[681] They suggested that this would lead to reduced competition for both audit and non-audit services, reducing issuers' choices and increasing their costs. One commenter further suggested that reduced competition in the bidding process would place firms that chose to split off their consulting competencies at a competitive advantage over those that chose to stay together, and ultimately cause firms to consider splitting off their consulting groups.[682]

The rule as adopted, however, allows issuers to purchase more non-audit services from their auditors than would have been allowed under the rule as proposed. This modification should reduce the effect on competition about which commenters were most concerned.

Some commenters suggested that the proposed rule would hinder the ability of small accounting firms to compete. They argued that the definition of ''affiliate of the accounting firm'' in the proposal would restrict small firms from participating in alliances and other business relationships, thereby providing larger firms with a competitive advantage by limiting the scope of services available to clients of small firms.[683] Still other commenters suggested that if the rule results in a reshuffling of clients, medium-sized and small firms may suffer a net loss of non-audit service clients. According to these commenters, displaced clients of these firms may be more likely to engage a better-known firm for non-audit services than another small or medium-sized firm.[684] On the other hand, some commenters stated that the proposal would not be harmful to small accounting firms, but rather would allow small accounting firms to compete for audit or non-audit services that could no longer be provided by a company's auditor.[685]

Commenters also suggested that the rule would make it difficult for small businesses to compete. Some expressed concern about the effects of the rules on small businesses that rely on the special expertise of their auditors or that lack the resources to engage a second accounting firm to provide non-audit services; they commented that small registrants would be required to either choose a new accounting firm to perform audits or to provide non-audit services.[686] Other commenters stated that small businesses have long-term relationships with auditors that provide non-audit services, or are located in a geographic area with few firms able to provide such services.[687] Commenters also suggested that accounting firms other than the Big Five may stop serving SEC registrants, or they may stop providing audit services, in both cases leading to less choice and competition.[688]

As discussed elsewhere in this release, we have modified the rule so that the provisions regarding most affected non-audit services do no more than codify existing restrictions. For example, under the rule as adopted, all registrants may purchase most information technology consulting services from their auditors, so long as the stated conditions are met. With respect to internal audit services, the adopted provision does not restrict registrants with $200 or less in assets, as long as certain conditions are met. As a result, small businesses should be able to obtain the services they need.

In addition, approximately eighty-five percent of the public company audit clients of non-Big Five accounting firms have assets of $200 million or less.[689] Accordingly, as long as certain conditions are met, the rule will not preclude smaller firms from providing internal audit services to the vast majority of their public company clients. This modification should alleviate many of the commenters' concerns about the rule's impact on small accounting firms' ability to compete. In any event, to the extent the rule has any anti-competitive effect, we believe it is necessary and appropriate in furtherance of the goals of the Exchange Act.

IX. Codification Update

The ''Codification of Financial Reporting Policies'' announced in Financial Reporting Release No. 1 (April 15, 1982) is amended as follows:

1. By removing section 602.01.
2. By amending section 602.02 by removing the preamble paragraph immediately preceding the introduction.

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[676] *See, e.g.,* Arthur Andersen Letter.

[677] *Cf.* Testimony of Alfred M. King, Valuation Research Corporation (July 26, 2000).

[678] *See supra* Section V.B.2(c).

[679] *Id.*

[680] 15 U.S.C. 78w(a)(2).

[681] *See, e.g.,* Arthur Andersen Letter; Deloitte & Touche Letter.

[682] *See* Deloitte & Touche Letter. As discussed above, some firms had already split off, or announced the split-off of, their consulting practices prior to our Proposing Release. The rule does not dictate any particular business model for accounting firms. Rather, firms remain free to determine their own structure, consistent with the law.

[683] *See, e.g.,* Testimony of Wayne A. Kolins, National Director of Assurance, BDO Seidman, LLP (Sept. 20, 2000). As discussed in more detail in this release, we have removed the definition of ''affiliate of the accounting firm'' from the rule as adopted. Instead, the rule relies on existing guidance concerning when an entity is associated with the accounting firm. We believe that this modification addresses commenters' concerns in this area.

[684] *See id.*

[685] *See, e.g.,* Testimony of Larry Gelfond, CPA, CVA, CFE, Colorado Accountancy Board, September 13, 2000 (''I do not believe that [the rule] will in any way hinder our [small] firm. In many respects, it may even benefit our firm. . . . I look at this, frankly, as an opportunity, particularly in the internal audit functions to step in, and given our experience, to work with management and with their respective independent auditor, let's say a Big Five firm, that this is an area that we can frankly look at as a new revenue generator.'').

[686] *See, e.g.,* AICPA Letter; Letter of David E. Pertl, Senior Vice President and CFO, First Choice, Inc. (Sept. 18, 2000); Letter of Kelly Schwarzbeck, CPA, Alexander X. Kuhn & Co. (Aug. 22, 2000); Letter of Robert L. Bunting (Sept. 6, 2000); Letter of Bruce C. Holbrook, Vice Chairman, Goodman & Company, LLP (July 25, 2000); Letter of William W. Traynham, CPA, President, Community Bankshares Inc. (Aug. 14, 2000).

[687] *See, e.g.,* Letter of the California Chamber of Commerce (Sept. 15, 2000); Letter of Joseph C. King, CPA, Faulkner & King, PSC (Sept. 13, 2000).

[688] *See, e.g.,* Letter of Jeffry T. Herbst (Sept. 11, 2000); Letter of Richard P. Thornton (Sept. 13, 2000); Letter of Marc J. Garofalo, Mayor, Derby, Conn. (Sept. 18, 2000).

[689] *See* Compustat Database, October 31, 2000. The 85% figure excludes clients that are bank holding companies. For further analysis, *see supra* Section V.B (cost-benefit analysis).

3. By amending section 602.02.b.i to remove paragraphs 2 and 3.

4. By amending section 602.02.b.ii to remove examples 1, 2, 3, 4, 6, 7, 8, and 10, and redesignate examples 5 and 9 as examples 1 and 2.

5. By amending section 602.02.b.iii to remove examples 1, 2, and 4, and redesignate example 3 as example 1.

6. By removing section 602.02.b.iv.

7. By amending section 602.02.b.v to remove example 4.

8. By amending section 602.02.c.i to remove the last two paragraphs.

9. By removing section 602.02.c.ii.

10. By removing section 602.02.c.iii.

11. By removing section 602.02.d.

12. By removing section 602.02.e.ii.

13. By removing section 602.02.e.iii.

14. By removing section 602.02.f.

15. By amending examples 2, 3, 4, 5, 6, 7, 8, 10, 13, 15, 16, 20, and 23 in section 602.02.g by replacing the references to ''partner,'' ''partners,'' ''certifying accountant,'' or ''accountant'' to ''covered person,'' ''covered persons,'' ''covered person'' and ''covered person,'' respectively, except no change should be made where references to ''partner'' are preceded by the word ''limited'' or ''general.''

16. By amending section 602.02.g to replace the reference to Rule 2–01(b) in the last sentence of the first introductory paragraph with ''Rule 2–01'' and to remove examples 17, 18, 19, and 22 and redesignate examples 20, 21, 23, and 24 as examples 17, 18, 19, and 20, respectively.

17. By removing section 602.02.h.

18. By adding a new section 602.01, captioned ''Discussion of Rule 2–01,'' to include the text in Section IV of this release.

19. By amending Section 601.03 to include, at the end, the text in Section III.C.6 of this release.

20. By amending section 602.02 to redesignate sections 602.02.b.v, 602.02.e.i, 602.02.e.iv, 602.02.g, 602.02.i.i, and 602.02.i.ii as sections 602.02.b.iv, 602.02.d.i, 602.02.d.ii, 602.02.e, 602.02.f.i, and 602.02.f.ii, respectively.

The Codification is a separate publication of the Commission. It will not be published in the Code of Federal Regulations.

X. Statutory Bases and Text of Amendments

We are adopting amendments to Rule 2–01 of Regulation S-X and Item 9 of Schedule 14A under the authority set forth in Schedule A and Sections 7, 8, 10, 19, and 28 of the Securities Act, Sections 3, 10A, 12, 13, 14, 17, 23, and 36 of the Exchange Act, Sections 5, 10, 14, and 20 of the Public Utility Holding Company Act of 1935, Sections 8, 30, 31, and 38 of the Investment Company Act of 1940, and Sections 203 and 211 of the Investment Advisers Act of 1940.

List of Subjects

17 CFR Part 210

Accountants, Accounting.

17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Text of Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The heading for Part 210 is revised as set forth above.

2. The authority citation for Part 210 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 78c, 78j–1, 78*l*, 78m, 78n, 78o(d), 78q, 78u–5, 78w(a), 78*ll*, 78mm, 79e(b), 79j(a), 79n, 79t(a), 80a–8, 80a–20, 80a–29, 80a–30, 80a–37(a), 80b–3, 80b–11 unless otherwise noted.

3. By amending § 210.2–01 by adding a preliminary note and paragraphs (d), (e) and (f) and revising paragraphs (b) and (c) to read as follows:

§ 210.2–01 Qualifications of accountants.

Preliminary Note to § 210.2–01

1. Section 210.2–01 is designed to ensure that auditors are qualified and independent of their audit clients both in fact and in appearance. Accordingly, the rule sets forth restrictions on financial, employment, and business relationships between an accountant and an audit client and restrictions on an accountant providing certain non-audit services to an audit client.

2. Section 210.2–01(b) sets forth the general standard of auditor independence. Paragraphs (c)(1) to (c)(5) reflect the application of the general standard to particular circumstances. The rule does not purport to, and the Commission could not, consider all circumstances that raise independence concerns, and these are subject to the general standard in § 210.2–01(b). In considering this standard, the Commission looks in the first instance to whether a relationship or the provision of a service: creates a mutual or conflicting interest between the accountant and the audit client; places the accountant in the position of auditing his or her own work; results in the accountant acting as management or an employee of the audit client; or places the accountant in a position of being an advocate for the audit client.

3. These factors are general guidance only and their application may depend on particular facts and circumstances. For that reason, § 210.2–01 provides that, in determining whether an accountant is independent, the Commission will consider all relevant facts and circumstances. For the same reason, registrants and accountants are encouraged to consult with the Commission's Office of the Chief Accountant before entering into relationships, including relationships involving the provision of services, that are not explicitly described in the rule.

(a) * * *

(b) The Commission will not recognize an accountant as independent, with respect to an audit client, if the accountant is not, or a reasonable investor with knowledge of all relevant facts and circumstances would conclude that the accountant is not, capable of exercising objective and impartial judgment on all issues encompassed within the accountant's engagement. In determining whether an accountant is independent, the Commission will consider all relevant circumstances, including all relationships between the accountant and the audit client, and not just those relating to reports filed with the Commission.

(c) This paragraph sets forth a non-exclusive specification of circumstances inconsistent with paragraph (b) of this section.

(1) *Financial relationships.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant has a direct financial interest or a material indirect financial interest in the accountant's audit client, such as:

(i) *Investments in audit clients.* An accountant is not independent when:

(A) The accounting firm, any covered person in the firm, or any of his or her immediate family members, has any direct investment in an audit client, such as stocks, bonds, notes, options, or other securities. The term *direct investment* includes an investment in an audit client through an intermediary if:

(*1*) The accounting firm, covered person, or immediate family member, alone or together with other persons, supervises or participates in the intermediary's investment decisions or has control over the intermediary; or

(*2*) The intermediary is not a diversified management investment company, as defined by section 5(b)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a–5(b)(1), and has an investment in the audit client that amounts to 20% or more of the value of the intermediary's total investments.

(B) Any partner, principal, shareholder, or professional employee of the accounting firm, any of his or her immediate family members, any close family member of a covered person in the firm, or any group of the above persons has filed a Schedule 13D or 13G (17 CFR 240.13d–101 or 240.13d–102) with the Commission indicating beneficial ownership of more than five percent of an audit client's equity securities or controls an audit client, or a close family member of a partner, principal, or shareholder of the accounting firm controls an audit client.

(C) The accounting firm, any covered person in the firm, or any of his or her immediate family members, serves as voting trustee of a trust, or executor of an estate, containing the securities of an audit client, unless the accounting firm, covered person in the firm, or immediate family member has no authority to make investment decisions for the trust or estate.

(D) The accounting firm, any covered person in the firm, any of his or her immediate family members, or any group of the above persons has any material indirect investment in an audit client. For purposes of this paragraph, the term *material indirect investment* does not include ownership by any covered person in the firm, any of his or her immediate family members, or any group of the above persons of 5% or less of the outstanding shares of a diversified management investment company, as defined by section 5(b)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a–5(b)(1), that invests in an audit client.

(E) The accounting firm, any covered person in the firm, or any of his or her immediate family members:

(*1*) Has any direct or material indirect investment in an entity where:

(i) An audit client has an investment in that entity that is material to the audit client and has the ability to exercise significant influence over that entity; or

(*ii*) The entity has an investment in an audit client that is material to that entity and has the ability to exercise significant influence over that audit client;

(*2*) Has any material investment in an entity over which an audit client has the ability to exercise significant influence; or

(*3*) Has the ability to exercise significant influence over an entity that has the ability to exercise significant influence over an audit client.

(ii) *Other financial interests in audit client.* An accountant is not independent when the accounting firm, any covered person in the firm, or any of his or her immediate family members has:

(A) *Loans/debtor-creditor relationship.* Any loan (including any margin loan) to or from an audit client, or an audit client's officers, directors, or record or beneficial owners of more than ten percent of the audit client's equity securities, except for the following loans obtained from a financial institution under its normal lending procedures, terms, and requirements:

(*1*) Automobile loans and leases collateralized by the automobile;

(*2*) Loans fully collateralized by the cash surrender value of an insurance policy;

(*3*) Loans fully collateralized by cash deposits at the same financial institution; and

(*4*) A mortgage loan collateralized by the borrower's primary residence provided the loan was not obtained while the covered person in the firm was a covered person.

(B) *Savings and checking accounts.* Any savings, checking, or similar account at a bank, savings and loan, or similar institution that is an audit client, if the account has a balance that exceeds the amount insured by the Federal Deposit Insurance Corporation or any similar insurer, except that an accounting firm account may have an uninsured balance provided that the likelihood of the bank, savings and loan, or similar institution experiencing financial difficulties is remote.

(C) *Broker-dealer accounts.* Brokerage or similar accounts maintained with a broker-dealer that is an audit client, if:

(*1*) Any such account includes any asset other than cash or securities (within the meaning of "security" provided in the Securities Investor Protection Act of 1970 ("SIPA") (15 U.S.C. 78aaa *et seq.*));

(*2*) The value of assets in the accounts exceeds the amount that is subject to a Securities Investor Protection Corporation advance, for those accounts, under Section 9 of SIPA (15 U.S.C. 78fff-3); or

(*3*) With respect to non-U.S. accounts not subject to SIPA protection, the value of assets in the accounts exceeds the amount insured or protected by a program similar to SIPA.

(D) *Futures commission merchant accounts.* Any futures, commodity, or similar account maintained with a futures commission merchant that is an audit client.

(E) *Credit cards.* Any aggregate outstanding credit card balance owed to a lender that is an audit client that is not reduced to $10,000 or less on a current basis taking into consideration the payment due date and any available grace period.

(F) *Insurance products.* Any individual policy issued by an insurer that is an audit client unless:

(*1*) The policy was obtained at a time when the covered person in the firm was not a covered person in the firm; and

(*2*) The likelihood of the insurer becoming insolvent is remote.

(G) *Investment companies.* Any financial interest in an entity that is part of an investment company complex that includes an audit client.

(iii) *Exceptions.* Notwithstanding paragraphs (c)(1)(i) and (c)(1)(ii) of this section, an accountant will not be deemed not independent if:

(A) *Inheritance and gift.* Any person acquires an unsolicited financial interest, such as through an unsolicited gift or inheritance, that would cause an accountant to be not independent under paragraph (c)(1)(i) or (c)(1)(ii) of this section, and the financial interest is disposed of as soon as practicable, but no later than 30 days after the person has knowledge of and the right to dispose of the financial interest.

(B) *New audit engagement.* Any person has a financial interest that would cause an accountant to be not independent under paragraph (c)(1)(i) or (c)(1)(ii) of this section, and:

(*1*) The accountant did not audit the client's financial statements for the immediately preceding fiscal year; and

(*2*) The accountant is independent under paragraph (c)(1)(i) and (c)(1)(ii) of this section before the earlier of:

(*i*) Signing an initial engagement letter or other agreement to provide audit, review, or attest services to the audit client; or

(*ii*) Commencing any audit, review, or attest procedures (including planning the audit of the client's financial statements).

(C) *Employee compensation and benefit plans.* An immediate family member of a person who is a covered person in the firm only by virtue of paragraphs (f)(11)(iii) or (f)(11)(iv) of this section has a financial interest that would cause an accountant to be not independent under paragraph (c)(1)(i) or (c)(1)(ii) of this section, and the acquisition of the financial interest was an unavoidable consequence of participation in his or her employer's employee compensation or benefits program, provided that the financial interest, other than unexercised employee stock options, is disposed of as soon as practicable, but no later than

30 days after the person has the right to dispose of the financial interest.

(iv) *Audit clients' financial relationships.* An accountant is not independent when:

(A) *Investments by the audit client in the accounting firm.* An audit client has, or has agreed to acquire, any direct investment in the accounting firm, such as stocks, bonds, notes, options, or other securities, or the audit client's officers or directors are record or beneficial owners of more than 5% of the equity securities of the accounting firm.

(B) *Underwriting.* An accounting firm engages an audit client to act as an underwriter, broker-dealer, market-maker, promoter, or analyst with respect to securities issued by the accounting firm.

(2) *Employment relationships.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant has an employment relationship with an audit client, such as:

(i) *Employment at audit client of accountant.* A current partner, principal, shareholder, or professional employee of the accounting firm is employed by the audit client or serves as a member of the board of directors or similar management or governing body of the audit client.

(ii) *Employment at audit client of certain relatives of accountant.* A close family member of a covered person in the firm is in an accounting role or financial reporting oversight role at an audit client, or was in such a role during any period covered by an audit for which the covered person in the firm is a covered person.

(iii) *Employment at audit client of former employee of accounting firm.* A former partner, principal, shareholder, or professional employee of an accounting firm is in an accounting role or financial reporting oversight role at an audit client, unless the individual:

(A) Does not influence the accounting firm's operations or financial policies;

(B) Has no capital balances in the accounting firm; and

(C) Has no financial arrangement with the accounting firm other than one providing for regular payment of a fixed dollar amount (which is not dependent on the revenues, profits, or earnings of the accounting firm):

(*1*) Pursuant to a fully funded retirement plan, rabbi trust, or, in jurisdictions in which a rabbi trust does not exist, a similar vehicle; or

(*2*) In the case of a former professional employee who was not a partner, principal, or shareholder of the accounting firm and who has been disassociated from the accounting firm for more than five years, that is immaterial to the former professional employee.

(iv) *Employment at accounting firm of former employee of audit client.* A former officer, director, or employee of an audit client becomes a partner, principal, shareholder, or professional employee of the accounting firm, unless the individual does not participate in, and is not in a position to influence, the audit of the financial statements of the audit client covering any period during which he or she was employed by or associated with that audit client.

(3) *Business relationships.* An accountant is not independent if, at any point during the audit and professional engagement period, the accounting firm or any covered person in the firm has any direct or material indirect business relationship with an audit client, or with persons associated with the audit client in a decision-making capacity, such as an audit client's officers, directors, or substantial stockholders. The relationships described in this paragraph do not include a relationship in which the accounting firm or covered person in the firm provides professional services to an audit client or is a consumer in the ordinary course of business.

(4) *Non-audit services.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant provides the following non-audit services to an audit client:

(i) *Bookkeeping or other services related to the audit client's accounting records or financial statements.*

(A) Any service involving:

(*1*) Maintaining or preparing the audit client's accounting records;

(*2*) Preparing the audit client's financial statements that are filed with the Commission or form the basis of financial statements filed with the Commission; or

(*3*) Preparing or originating source data underlying the audit client's financial statements.

(B) Notwithstanding paragraph (c)(4)(i)(A) of this section, the accountant's independence will not be impaired when the accountant provides these services:

(*1*) In emergency or other unusual situations, provided the accountant does not undertake any managerial actions or make any managerial decisions; or

(*2*) For foreign divisions or subsidiaries of an audit client, provided that:

(*i*) The services are limited, routine, or ministerial;

(*ii*) It is impractical for the foreign division or subsidiary to make other arrangements;

(*iii*) The foreign division or subsidiary is not material to the consolidated financial statements;

(*iv*) The foreign division or subsidiary does not have employees capable or competent to perform the services;

(*v*) The services performed are consistent with local professional ethics rules; and

(*vi*) The fees for all such services collectively (for the entire group of companies) do not exceed the greater of 1% of the consolidated audit fee or $10,000.

(ii) *Financial information systems design and implementation.*

(A) Directly or indirectly operating, or supervising the operation of, the audit client's information system or managing the audit client's local area network.

(B) Designing or implementing a hardware or software system that aggregates source data underlying the financial statements or generates information that is significant to the audit client's financial statements taken as a whole, unless:

(*1*) The audit client's management has acknowledged in writing to the accounting firm and the audit client's audit committee, or if there is no such committee then the board of directors, the audit client's responsibility to establish and maintain a system of internal accounting controls in compliance with section 13(b)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(b)(2));

(*2*) The audit client's management designates a competent employee or employees, preferably within senior management, with the responsibility to make all management decisions with respect to the design and implementation of the hardware or software system;

(*3*) The audit client's management makes all management decisions with respect to the design and implementation of the hardware or software system including, but not limited to, decisions concerning the systems to be evaluated and selected, the controls and system procedures to be implemented, the scope and timetable of system implementation, and the testing, training, and conversion plans;

(*4*) The audit client's management evaluates the adequacy and results of the design and implementation of the hardware or software system; and

(*5*) The audit client's management does not rely on the accountant's work as the primary basis for determining the adequacy of its internal controls and financial reporting systems.

(C) Nothing in this paragraph (c)(4)(ii) shall limit services an accountant performs in connection with the assessment, design, and implementation of internal accounting controls and risk management controls, provided the auditor does not act as an employee or perform management functions.

(iii) *Appraisal or valuation services or fairness opinions.*

(A) Any appraisal service, valuation service, or any service involving a fairness opinion for an audit client, where it is reasonably likely that the results of these services, individually or in the aggregate, would be material to the financial statements, or where the results of these services will be audited by the accountant during an audit of the audit client's financial statements.

(B) Notwithstanding paragraph (c)(4)(iii)(A) of this section, the accountant's independence will not be impaired when:

(*1*) The accounting firm's valuation expert reviews the work of the audit client or a specialist employed by the audit client, and the audit client or the specialist provides the primary support for the balances recorded in the client's financial statements;

(*2*) The accounting firm's actuaries value an audit client's pension, other post-employment benefit, or similar liabilities, provided that the audit client has determined and taken responsibility for all significant assumptions and data;

(*3*) The valuation is performed in the context of the planning and implementation of a tax-planning strategy or for tax compliance services; or

(*4*) The valuation is for non-financial purposes where the results of the valuation do not affect the financial statements.

(iv) *Actuarial services.*

(A) Any actuarially-oriented advisory service involving the determination of insurance company policy reserves and related accounts for the audit client, unless:

(*1*) The audit client uses its own actuaries or third-party actuaries to provide management with the primary actuarial capabilities;

(*2*) Management accepts responsibility for any significant actuarial methods and assumptions; and

(*3*) The accountant's involvement is not continuous.

(B) Subject to complying with paragraph (c)(4)(iv)(A)(*1*)–(*3*) of this section, the accountant's independence will not be impaired if the accountant:

(*1*) Assists management to develop appropriate methods, assumptions, and amounts for policy and loss reserves and other actuarial items presented in financial reports based on the audit client's historical experience, current practice, and future plans;

(*2*) Assists management in the conversion of financial statements from a statutory basis to one conforming with generally accepted accounting principles;

(*3*) Analyzes actuarial considerations and alternatives in federal income tax planning; or

(*4*) Assists management in the financial analysis of various matters, such as proposed new policies, new markets, business acquisitions, and reinsurance needs.

(v) *Internal audit services.* Either of:

(A) Internal audit services in an amount greater than 40% of the total hours expended on the audit client's internal audit activities in any one fiscal year, unless the audit client has less than $200 million in total assets. (For purposes of this paragraph, the term *internal audit services* does not include operational internal audit services unrelated to the internal accounting controls, financial systems, or financial statements.); or

(B) Any internal audit services, or any operational internal audit services unrelated to the internal accounting controls, financial systems, or financial statements, for an audit client, unless:

(*1*) The audit client's management has acknowledged in writing to the accounting firm and the audit client's audit committee, or if there is no such committee then the board of directors, the audit client's responsibility to establish and maintain a system of internal accounting controls in compliance with section 13(b)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(b)(2));

(*2*) The audit client's management designates a competent employee or employees, preferably within senior management, to be responsible for the internal audit function;

(*3*) The audit client's management determines the scope, risk, and frequency of internal audit activities, including those to be performed by the accountant;

(*4*) The audit client's management evaluates the findings and results arising from the internal audit activities, including those performed by the accountant;

(*5*) The audit client's management evaluates the adequacy of the audit procedures performed and the findings resulting from the performance of those procedures by, among other things, obtaining reports from the accountant; and

(*6*) The audit client's management does not rely on the accountant's work as the primary basis for determining the adequacy of its internal controls.

(vi) *Management functions.* Acting, temporarily or permanently, as a director, officer, or employee of an audit client, or performing any decision-making, supervisory, or ongoing monitoring function for the audit client.

(vii) *Human resources.*

(A) Searching for or seeking out prospective candidates for managerial, executive, or director positions;

(B) Engaging in psychological testing, or other formal testing or evaluation programs;

(C) Undertaking reference checks of prospective candidates for an executive or director position;

(D) Acting as a negotiator on the audit client's behalf, such as determining position, status or title, compensation, fringe benefits, or other conditions of employment; or

(E) Recommending, or advising the audit client to hire, a specific candidate for a specific job (except that an accounting firm may, upon request by the audit client, interview candidates and advise the audit client on the candidate's competence for financial accounting, administrative, or control positions).

(viii) *Broker-dealer services.* Acting as a broker-dealer, promoter, or underwriter, on behalf of an audit client, making investment decisions on behalf of the audit client or otherwise having discretionary authority over an audit client's investments, executing a transaction to buy or sell an audit client's investment, or having custody of assets of the audit client, such as taking temporary possession of securities purchased by the audit client.

(ix) *Legal services.* Providing any service to an audit client under circumstances in which the person providing the service must be admitted to practice before the courts of a United States jurisdiction.

(5) *Contingent fees.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant provides any service or product to an audit client for a contingent fee or a commission, or receives a contingent fee or commission from an audit client.

(d) *Quality controls.* An accounting firm's independence will not be impaired solely because a covered person in the firm is not independent of an audit client provided:

(1) The covered person did not know of the circumstances giving rise to the lack of independence;

(2) The covered person's lack of independence was corrected as promptly as possible under the relevant circumstances after the covered person or accounting firm became aware of it; and

(3) The accounting firm has a quality control system in place that provides reasonable assurance, taking into account the size and nature of the accounting firm's practice, that the accounting firm and its employees do not lack independence, and that covers at least all employees and associated entities of the accounting firm participating in the engagement, including employees and associated entities located outside of the United States.

(4) For an accounting firm that annually provides audit, review, or attest services to more than 500 companies with a class of securities registered with the Commission under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), a quality control system will not provide such reasonable assurance unless it has at least the following features:

(i) Written independence policies and procedures;

(ii) With respect to partners and managerial employees, an automated system to identify their investments in securities that might impair the accountant's independence;

(iii) With respect to all professionals, a system that provides timely information about entities from which the accountant is required to maintain independence;

(iv) An annual or on-going firm-wide training program about auditor independence;

(v) An annual internal inspection and testing program to monitor adherence to independence requirements;

(vi) Notification to all accounting firm members, officers, directors, and employees of the name and title of the member of senior management responsible for compliance with auditor independence requirements;

(vii) Written policies and procedures requiring all partners and covered persons to report promptly to the accounting firm when they are engaged in employment negotiations with an audit client, and requiring the firm to remove immediately any such professional from that audit client's engagement and to review promptly all work the professional performed related to that audit client's engagement; and

(viii) A disciplinary mechanism to ensure compliance with this section.

(e) *Transition and grandfathering.*

(1) *Transition.*

(i) *Appraisal or valuation services or fairness opinions and internal audit services.* Until August 5, 2002, providing to an audit client the non-audit services set forth in paragraphs (c)(4)(iii) and (c)(4)(v) of this section will not impair an accountant's independence with respect to the audit client if performing those services did not impair the accountant's independence under pre-existing requirements of the Commission, the Independence Standards Boards, or the accounting profession in the United States.

(ii) *Other financial interests and employment relationships.* Until May 7, 2001, having the financial interests set forth in paragraph (c)(1)(ii) of this section or the employment relationships set forth in paragraph (c)(2) of this section will not impair an accountant's independence with respect to the audit client if having those financial interests or employment relationships did not impair the accountant's independence under pre-existing requirements of the Commission, the Independence Standards Board, or the accounting profession in the United States.

(iii) *Quality controls.* Until December 31, 2002, paragraph (d)(4) of this section shall not apply to offices of the accounting firm located outside of the United States.

(2) *Grandfathering.* Financial interests included in paragraphs (c)(1)(ii)(A) and (c)(1)(ii)(F) of this section and employment relationships included in paragraph (c)(2) of this section in existence on May 7, 2001, and contracts for the provision of services described in paragraph (c)(4)(ii) of this section in existence on February 5, 2001 will not be deemed to impair an accountant's independence if they did not impair the accountant's independence under pre-existing requirements of the Commission, the Independence Standards Board, or the accounting profession in the United States.

(3) *Settling financial arrangements with former professionals.* To the extent not required by pre-existing requirements of the Commission, the Independence Standards Board, or the accounting profession in the United States, the requirement in paragraph (c)(2)(iii) of this section to settle financial arrangements with former professionals applies to situations that arise after the effective date of this section.

(f) *Definitions of terms.* For purposes of this section:

(1) *Accountant*, as used in paragraphs (b) through (e) of this section, means a certified public accountant or public accountant performing services in connection with an engagement for which independence is required. References to the accountant include any accounting firm with which the certified public accountant or public accountant is affiliated.

(2) *Accounting firm* means an organization (whether it is a sole proprietorship, incorporated association, partnership, corporation, limited liability company, limited liability partnership, or other legal entity) that is engaged in the practice of public accounting and furnishes reports or other documents filed with the Commission or otherwise prepared under the securities laws, and all of the organization's departments, divisions, parents, subsidiaries, and associated entities, including those located outside of the United States. Accounting firm also includes the organization's pension, retirement, investment, or similar plans.

(3) *Accounting role or financial reporting oversight role* means a role in which a person is in a position to or does:

(i) Exercise more than minimal influence over the contents of the accounting records or anyone who prepares them; or

(ii) Exercise influence over the contents of the financial statements or anyone who prepares them, such as when the person is a member of the board of directors or similar management or governing body, chief executive officer, president, chief financial officer, chief operating officer, general counsel, chief accounting officer, controller, director of internal audit, director of financial reporting, treasurer, vice president of marketing, or any equivalent position.

(4) *Affiliate of the audit client* means:

(i) An entity that has control over the audit client, or over which the audit client has control, or which is under common control with the audit client, including the audit client's parents and subsidiaries;

(ii) An entity over which the audit client has significant influence, unless the entity is not material to the audit client;

(iii) An entity that has significant influence over the audit client, unless the audit client is not material to the entity; and

(iv) Each entity in the investment company complex when the audit client is an entity that is part of an investment company complex.

(5) *Audit and professional engagement period* includes both:

(i) The period covered by any financial statements being audited or reviewed (the ''audit period''); and

(ii) The period of the engagement to audit or review the audit client's financial statements or to prepare a report filed with the Commission (the ''professional engagement period''):

(A) The professional engagement period begins when the accountant either signs an initial engagement letter (or other agreement to review or audit a client's financial statements) or begins audit, review, or attest procedures, whichever is earlier; and

(B) The professional engagement period ends when the audit client or the accountant notifies the Commission that the client is no longer that accountant's audit client.

(iii) For audits of the financial statements of foreign private issuers, the ''audit and professional engagement period'' does not include periods ended prior to the first day of the last fiscal year before the foreign private issuer first filed, or was required to file, a registration statement or report with the Commission, provided there has been full compliance with home country independence standards in all prior periods covered by any registration statement or report filed with the Commission.

(6) *Audit client* means the entity whose financial statements or other information is being audited, reviewed, or attested and any affiliates of the audit client, other than, for purposes of paragraph (c)(1)(i) of this section, entities that are affiliates of the audit client only by virtue of paragraph (f)(4)(ii) or (f)(4)(iii) of this section.

(7) *Audit engagement team* means all partners, principals, shareholders, and professional employees participating in an audit, review, or attestation engagement of an audit client, including those conducting concurring or second partner reviews and all persons who consult with others on the audit engagement team during the audit, review, or attestation engagement regarding technical or industry-specific issues, transactions, or events.

(8) *Chain of command* means all persons who:

(i) Supervise or have direct management responsibility for the audit, including at all successively senior levels through the accounting firm's chief executive;

(ii) Evaluate the performance or recommend the compensation of the audit engagement partner; or

(iii) Provide quality control or other oversight of the audit.

(9) *Close family members* means a person's spouse, spousal equivalent, parent, dependent, nondependent child, and sibling.

(10) *Contingent fee* means, except as stated in the next sentence, any fee established for the sale of a product or the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such product or service. Solely for the purposes of this section, a fee is not a ''contingent fee'' if it is fixed by courts or other public authorities, or, in tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies. Fees may vary depending, for example, on the complexity of services rendered.

(11) *Covered persons in the firm* means the following partners, principals, shareholders, and employees of an accounting firm:

(i) The ''audit engagement team'';

(ii) The ''chain of command'';

(iii) Any other partner, principal, shareholder, or managerial employee of the accounting firm who has provided ten or more hours of non-audit services to the audit client for the period beginning on the date such services are provided and ending on the date the accounting firm signs the report on the financial statements for the fiscal year during which those services are provided, or who expects to provide ten or more hours of non-audit services to the audit client on a recurring basis; and

(iv) Any other partner, principal, or shareholder from an ''office'' of the accounting firm in which the lead audit engagement partner primarily practices in connection with the audit.

(12) *Group* means two or more persons who act together for the purposes of acquiring, holding, voting, or disposing of securities of a registrant.

(13) *Immediate family members* means a person's spouse, spousal equivalent, and dependents.

(14) *Investment company complex.*

(i) ''Investment company complex'' includes:

(A) An investment company and its investment adviser or sponsor;

(B) Any entity controlled by or controlling an investment adviser or sponsor in paragraph (f)(14)(i)(A) of this section, or any entity under common control with an investment adviser or sponsor in paragraph (f)(14)(i)(A) of this section if the entity:

(*1*) Is an investment adviser or sponsor; or

(*2*) Is engaged in the business of providing administrative, custodian, underwriting, or transfer agent services to any investment company, investment adviser, or sponsor; and

(C) Any investment company or entity that would be an investment company but for the exclusions provided by section 3(c) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(c)) that has an investment adviser or sponsor included in this definition by either paragraph (f)(14)(i)(A) or (f)(14)(i)(B) of this section.

(ii) An investment adviser, for purposes of this definition, does not include a sub-adviser whose role is primarily portfolio management and is subcontracted with or overseen by another investment adviser.

(iii) Sponsor, for purposes of this definition, is an entity that establishes a unit investment trust.

(15) *Office* means a distinct sub-group within an accounting firm, whether distinguished along geographic or practice lines.

(16) *Rabbi trust* means an irrevocable trust whose assets are not accessible to the accounting firm until all benefit obligations have been met, but are subject to the claims of creditors in bankruptcy or insolvency.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

4. The general authority citation for Part 240 is revised to read, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

5. By amending § 240.14a–101 to add paragraph (e) to Item 9 to read as follows:

§ 240.14a–101 Schedule 14A Information required in proxy statement.

* * * * *

Item 9. *Independent public accountants.* * * *

* * * * *

(e)(1) Disclose, under the caption *Audit Fees*, the aggregate fees billed for professional services rendered for the audit of the registrant's annual financial statements for the most recent fiscal year and the reviews of the financial statements included in the registrant's Forms 10–Q (17 CFR 249.308a) or 10–QSB (17 CFR 249.308b) for that fiscal year.

(2) Disclose, under the caption *Financial Information Systems Design and Implementation Fees*, the aggregate fees billed for the professional services described in Paragraph (c)(4)(ii) of Rule 2–01 of Regulation S–X (17 CFR 210.2–01(c)(4)(ii)) rendered by the principal accountant for the most recent fiscal year. For purposes of this disclosure item, registrants that are

investment companies must disclose fees billed for services rendered to the registrant, the registrant's investment adviser (not including any sub-adviser whose role is primarily portfolio management and is subcontracted with or overseen by another investment adviser), and any entity controlling, controlled by, or under common control with the adviser that provides services to the registrant.

(3) Disclose, under the caption *All Other Fees*, the aggregate fees billed for services rendered by the principal accountant, other than the services covered in paragraphs (e)(1) and (e)(2) of this section, for the most recent fiscal year. For purposes of this disclosure item, registrants that are investment companies must disclose fees billed for services rendered to the registrant, the registrant's investment adviser (not including any sub-adviser whose role is primarily portfolio management and is subcontracted with or overseen by another investment adviser), and any entity controlling, controlled by, or under common control with the adviser that provides services to the registrant.

(4) Disclose whether the audit committee of the board of directors, or if there is no such committee then the board of directors, has considered whether the provision of the services covered in paragraphs (e)(2) and (e)(3) of this section is compatible with maintaining the principal accountant's independence.

(5) If greater than 50 percent, disclose the percentage of the hours expended on the principal accountant's engagement to audit the registrant's financial statements for the most recent fiscal year that were attributed to work performed by persons other than the principal accountant's full-time, permanent employees.

Dated: November 21, 2000.

By the Commission.

Jonathan G. Katz,

Secretary.

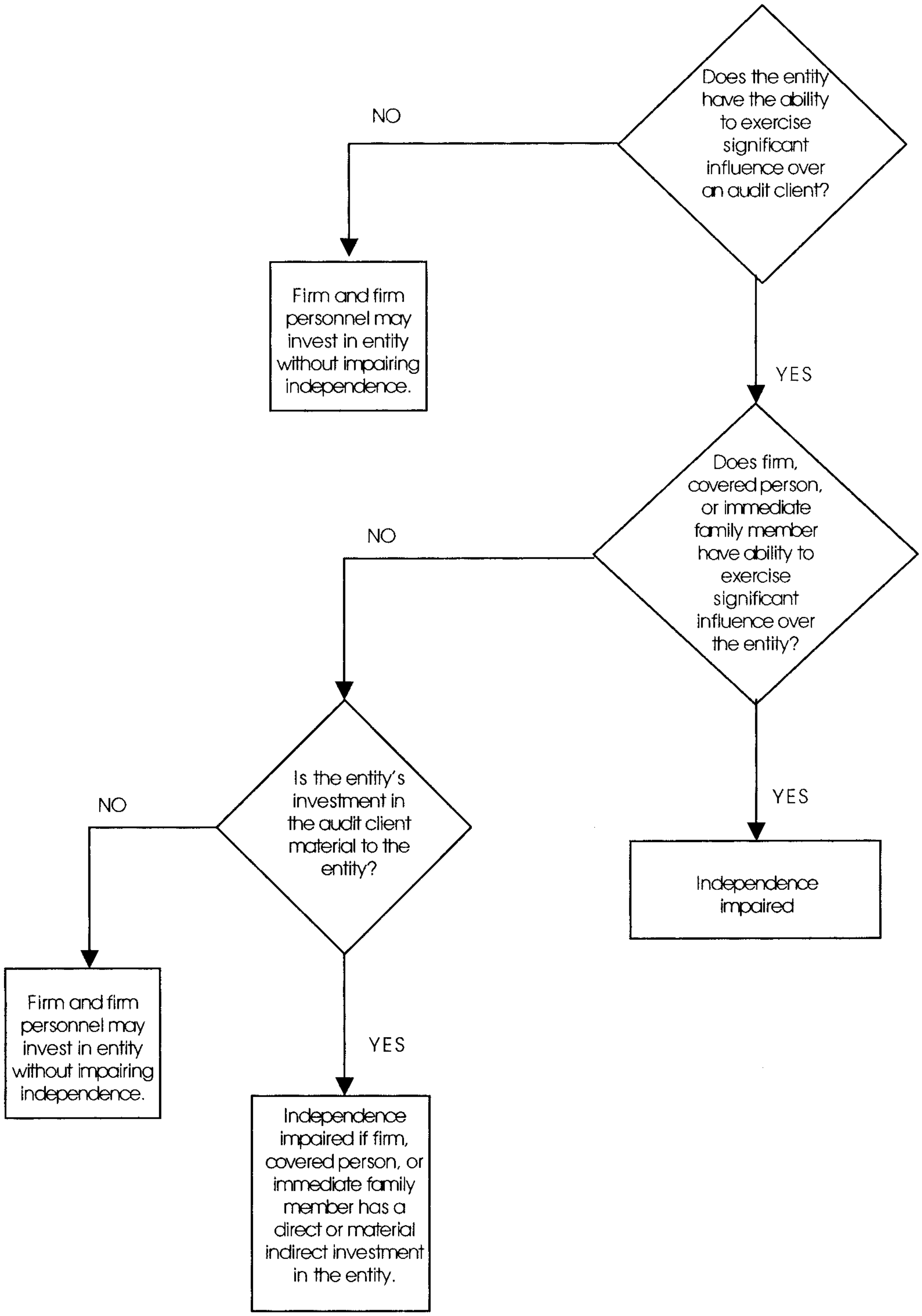
BILLING CODE 8010–01–P

Note: The Appendices to the Preamble will not appear in the Code of Federal Regulations.

APPENDIX A

Investing in Entities that Invest in Audit Clients

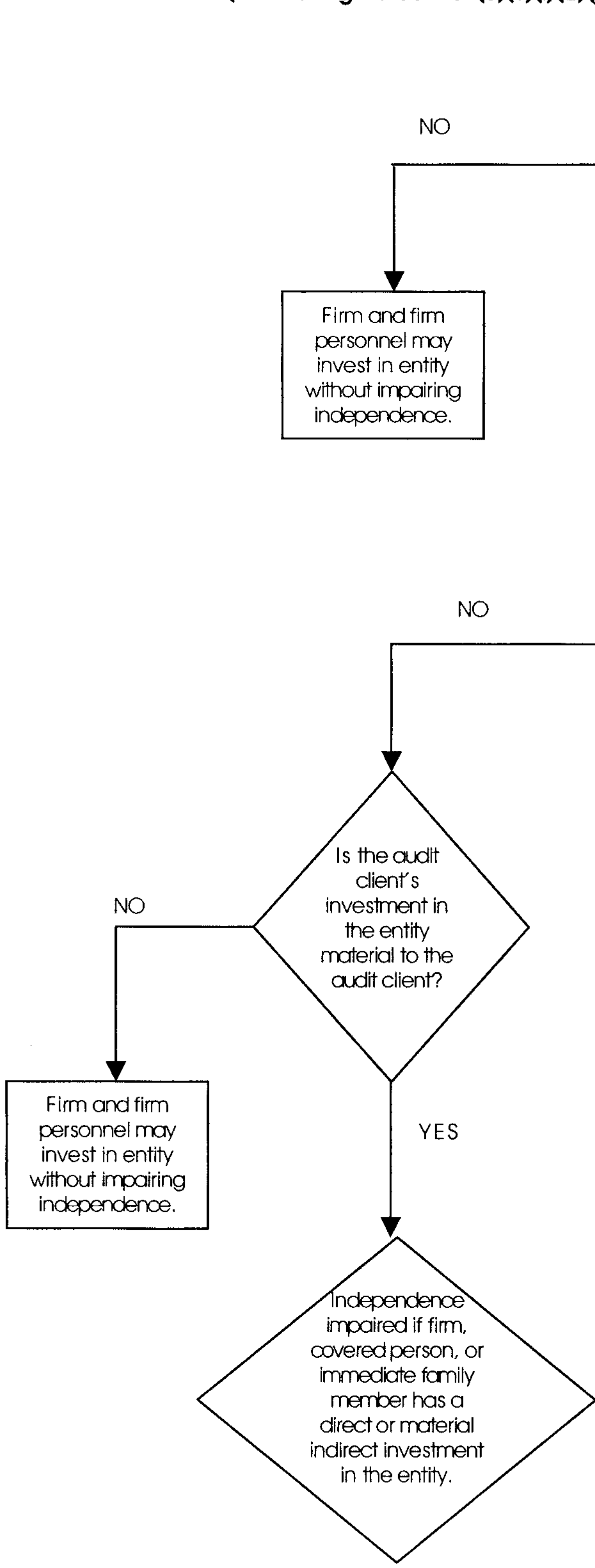
(Illustrating Rules 2-01(c)(1)(i)(E)(1)(ii) and 2-01(c)(1)(i)(E)(3))



APPENDIX B

Investing in Entities in which Audit Clients Invest

(Illustrating Rules 2-01(c)(1)(i)(E)(1)(i) and 2-01(c)(1)(i)(E)(2))



[FR Doc. 00–30244 Filed 12–4–00; 8:45 am]

BILLING CODE 8010–01–C

Federal Register

Tuesday,

December 5, 2000

Part III

Department of Health and Human Services

Food and Drug Administration

21 CFR Parts 16, 101 and 115

Food Labeling, Safe Handling Statements, Labeling of Shell Eggs; Refrigeration of Shell Eggs Held for Retail Distribution; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 16, 101, and 115

[Docket Nos. 98N–1230, 96P–0418, and 97P–0197]

RIN 0910–AB30

Food Labeling, Safe Handling Statements, Labeling of Shell Eggs; Refrigeration of Shell Eggs Held for Retail Distribution

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is revising its food labeling regulations to require a safe handling statement on cartons of shell eggs that have not been treated to destroy *Salmonella* microorganisms. The agency also is requiring that, when held at retail establishments, shell eggs be stored and displayed under refrigeration at a temperature of 7.2 °C (45 °F) or less. FDA is taking these actions because of the number of outbreaks of foodborne illnesses and deaths caused by *Salmonella* Enteritidis (SE) that are associated with the consumption of shell eggs. These actions also respond, in part, to petitions from Rose Acres Farm, Inc., and the Center for Science in the Public Interest (CSPI). Safe handling statements will help consumers take measures to protect themselves from illness or deaths associated with consumption of shell eggs that have not been treated to destroy *Salmonella* (all serotypes). Refrigeration of shell eggs that have not been treated to destroy *Salmonella* will help prevent the growth of SE in shell eggs.

DATES: This rule is effective September 4, 2001, except § 115.50, which is effective June 4, 2001.

FOR FURTHER INFORMATION CONTACT: For the labeling provisions: Geraldine A. June, Center for Food Safety and Applied Nutrition (HFS–822), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–205–4561. For refrigeration provisions: Nancy S. Bufano, Center for Food Safety and Applied Nutrition (HFS–306), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–401–2022.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

FDA and the Food Safety and Inspection Service (FSIS) of the U.S. Department of Agriculture (USDA) share Federal authority to regulate eggs. The two agencies published in the **Federal Register** of May 19, 1998 (63 FR 27502), an advanced notice of proposed rulemaking seeking information on how to identify farm-to-table actions that would decrease food safety risks associated with shell eggs. On July 1, 1999, FDA and FSIS, in testimony before the Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia of the Senate Committee on Governmental Affairs, committed to developing by November 1, 1999, an action plan to address the presence of SE in shell eggs using a farm-to-table approach. On August 26, 1999, FDA and FSIS jointly held a public meeting to gather stakeholders' input and to discuss the development of the action plan. On December 10, 1999, FDA and FSIS presented the Egg Safety Action Plan (Ref. 1) to the President. The plan identifies the systems and practices from production to consumption that must be implemented to reduce and, ultimately, eliminate eggs as a source of human SE illnesses. This plan includes requirements for refrigeration at retail and requirements for the safe handling statement being issued in this rulemaking. FDA, along with FSIS, intends to use information gathered by both agencies to develop and implement a comprehensive program to address the safety of shell eggs from farm to table.

In the **Federal Register** of July 6, 1999 (64 FR 36492), FDA published a proposed rule (hereinafter referred to as ‘‘the proposal’’) to require safe handling label statements on shell eggs that have not been treated to destroy *Salmonella* microorganisms and refrigeration of these shell eggs while held by retail establishments. In a separate document in the same issue of the **Federal Register** (64 FR 36516), FDA published a Preliminary Regulatory Impact Analysis (PRIA) and Initial Regulatory Flexibility Analysis of the proposal. FDA proposed these regulations because of the number of outbreaks and deaths associated with the consumption of shell eggs that have not been treated to destroy *Salmonella*. Interested parties were given until September 20, 1999, to comment on the proposal.

FDA received approximately 790 responses, each containing one or more comments, to the proposal. These responses were received from the egg industry, egg packaging companies, trade associations, consumers, consumer interest groups, animal interest groups, academia, State Government agencies, members of Congress, and a foreign Government agency. More than 700 of these comments addressed forced molting, which is directed at the production of shell eggs, and, therefore, outside of the scope of this rulemaking, and will not be addressed in this document. Other comments also addressed issues that are outside the scope of this rule and will not be addressed in this document (e.g., implementation of national standards for quality assurance (QA) programs, implementation of Hazard Analysis and Critical Control Points (HACCP) programs, use of sanitary standard operating procedures, Good Agricultural Practices/Good Manufacturing Practices, and other intervention procedures such as manipulation of feeds and competitive exclusion to control SE, sell-by dates, uniform coding, repacking of shell eggs, refrigeration of nest run shell eggs, and creation of a single food safety agency responsible for eggs). These comments were considered by the agency in its action plan to address the presence of SE in shell eggs and will be considered in the development of subsequent proposed measures aimed at improving egg safety.

Some of the remaining comments supported the proposal. Others opposed the proposal or suggested modifications to the proposal. The relevant comments and the agency's responses to the comments are discussed below.

II. Shell Egg Labeling

A. Rationale for the Safe Handling Statement

In the proposal, FDA discussed the risk of foodborne illness associated with the consumption of shell eggs. In 1997, there were 7,924 SE isolates reported to the Centers for Disease Control and Prevention (CDC). In 1998, 58 percent of the SE outbreaks reported to CDC where a food vehicle was identified implicated foods containing eggs. Although recent CDC data show a 44 percent decrease in the isolation rate of SE, FDA believes that the incidence of SE is still too high. As discussed in the proposal (64 FR 36492 at 36501), FDA believes that it could take considerable time to design and implement a complete program that would eliminate eggs as a source of human SE illnesses, and indeed the Egg Safety Action Plan has a 10-year timeframe to achieve that goal (Ref. 1). However, as part of this program, FDA determined that there are measures that can be put in place quickly that can reduce the risks to consumers: refrigeration, which lengthens the effectiveness of the eggs' natural defenses against SE and slows the growth rate of SE, and thorough cooking, which kills viable SE that may be present. The agency maintained in the proposal that, unless informed about the risks presented by eggs contaminated with SE and ways that they may reduce these risks, consumers could suffer serious illness or death from consumption of raw or undercooked eggs. Accordingly, FDA proposed to require safe handling statements on shell eggs to inform consumers that there may be a risk associated with consumption of eggs and ways that they can properly handle and prepare eggs in order to reduce such risks.

(Comment 1) Several comments maintained that FDA overstated the magnitude of the risk associated with SE. One comment contended that the incidence of illness cited in the proposal was misleading. For example, the comment stated that information on all cases of salmonellosis was cited with the implication that it has a direct application to salmonellosis from SE. The comment stated that information on foodborne disease data from the years where salmonellosis associated with SE was increasing were included in the proposal, whereas, data from 1995 to 1998 showing a decrease in salmonellosis associated with SE were omitted. Some comments pointed out that recent data from CDC showing a 44 percent decrease in the isolation rate of SE from 1996 to 1998 do not support FDA's conclusion of a continued predominance of SE. Furthermore, one comment pointed out that there was only a 14 percent decrease in the isolation rate of all *Salmonella* serotypes in the same time period as the 44 percent decrease in the isolation rate of SE.

FDA disagrees that it overstated the magnitude of the risk associated with SE. The comment misunderstood how the data were presented in the proposal. FDA did not present the data regarding the incidence of all cases of salmonellosis to imply that these cases were reflective of SE-associated cases of salmonellosis. Rather, FDA used this information to place SE-associated salmonellosis in context of the epidemiology of *Salmonella* overall. First, in the proposal, FDA discussed the severity of salmonellosis and the magnitude of the disease, i.e., numbers of reported illnesses. Next, the agency discussed the numbers of SE-associated cases of salmonellosis and the fact that shell eggs are the major source of SE-related cases of salmonellosis where a food vehicle is identified.

The agency also disagrees with the comment stating that FDA did not include information on the decrease in the rate of infections caused by SE from 1996 to 1998. On the contrary, in the proposal (64 FR 36492 at 36493), FDA stated that recent CDC data showed a 44 percent decrease in the isolation rate of SE. However, the agency concluded that, even with the decrease in the isolation rate of SE reported by CDC, the incidence of SE associated with eggs was still too high and additional measures could and should be put in place to reduce the incidence even further.

B. Safe Handling Statement

In the proposal, FDA tentatively concluded that certain elements were essential to an effective safe handling statement, i.e., an informational statement that describes the hazard and the at-risk consumers, an instructional statement that describes measures that consumers can take to reduce or eliminate the risk, and a linking statement that relates the informational statement to the instructional statement. Applying the essential elements, FDA crafted several examples of label statements. FDA conducted focus group research to evaluate consumer understanding of the safe handling statements to test their effectiveness in informing consumers of the risks associated with shell eggs and of the safe handling practices that may be used to mitigate the risks.[1] Based on information from the focus groups, FDA proposed to require the following safe handling statement on shell eggs that have not been treated to destroy *Salmonella:*

SAFE HANDLING INSTRUCTIONS:

Eggs may contain harmful bacteria known to cause serious illness, especially in children, the elderly, and persons with weakened immune systems. For your protection: keep eggs refrigerated; cook eggs until yolks are firm; and cook foods containing eggs thoroughly.

1. Comments on the Focus Group Research

(Comment 2) Several comments questioned FDA's focus group research. One comment maintained that, although focus groups are helpful tools to obtain feedback on food safety messages, FDA tested four very similar versions of the same label statement and, therefore, could not judge whether its proposed statement provided consumers with information they thought was necessary. The comment concluded that the label statements tested by FDA did not adequately reflect how consumers perceived FDA's proposed safe handling statement versus any other statement.

FDA disagrees with this comment. The comment misunderstood the intent of the focus group research. The intent of the research was for FDA to gauge how best to word the safe handling statement so that it is understood by consumers, not to determine what information is necessary in the statement. FDA developed several statements containing information

[1] The moderator of the focus groups asked participants about their knowledge of the possible health effects associated with eggs as well as their personal experiences with handling eggs. After assessing the participants' knowledge and attitudes, the moderator gave the participants a series of safe handling statements for shell eggs on individual sheets of 8.5 x 11-inch white paper. The moderator engaged the participants in discussions on the impact of the statements and asked them to compare each statement with the other statements. The moderator also asked participants to comment on the format of the statements. The focus of the discussions was whether they understood the message.

judged by FDA subject matter experts to be most necessary to consumers. These subject matter experts arrived at their determination of necessary information content after considering suggestions for messages that were submitted by outside organizations (Ref. 2). FDA provided five different safe handling statements for discussion in the focus groups. During the focus groups, participants discussed specific phrasing or message elements within each statement to gauge the effect of both the specific elements of the message and the overall message. Participants also provided input on how formatting could make the statement more readable. Thus, while adhering to the content judged necessary by FDA subject matter experts, the agency assessed numerous variations in how to best word and format the statement to communicate effectively with consumers.

(Comment 3) One comment stated that, although FDA did conduct some focus group testing, it should conduct direct testing such as mall-intercept studies to further refine the statement. This comment maintained that considering the susceptibility of older persons to foodborne illness, FDA should direct its message testing to this group.

FDA disagrees that it needs to conduct mall-intercept studies to fine tune the statement. If focus group results are not clear cut, then an experimental quantitative method such as mall-intercept studies could be used to fine tune the message. In this case, however, the focus group results were so consistent that FDA did not deem it necessary to conduct experimental testing. In addition, the focus group testing of the safe handling statements included consumers 60 years of age and older. These older consumers did not differ greatly from younger consumers in their responses to the safe handling statements that were tested. Consequently, FDA sees no need to conduct additional testing on older persons.

2. Description of the Hazard

Most of the comments that responded to the proposed labeling supported the concept of safe handling instructions for shell eggs. However, some of these comments opposed the specific language in the proposed statement for the reasons discussed below.

(Comment 4) Many of these comments asserted that including a description of the hazard, i.e., ‘‘eggs may contain harmful bacteria known to cause serious illness, especially in children, the elderly, and persons with weakened immune systems,’’ is unwarranted.

Several comments contended that the hazard description will distract consumers from the safe handling instructions. To support this assertion, one comment presented consumer research from the American Egg Board (AEB) and concluded from it that most respondents saw FDA's proposed label statement as a warning that eggs are harmful rather than a message to promote safe handling. Some comments asserted that consumers have become weary of labels and warnings and no longer pay attention to them. Other comments expressed their concern that, because of the length of the hazard description, consumers may not read the entire statement and, thus, would not read the safe handling instructions.

Several comments that opposed the inclusion of the hazard statement maintained that consumers are aware of risks associated with SE in eggs and, therefore, the description is unnecessary. One of these comments presented data from a survey conducted by the California Department of Public Health Services that showed that 84 percent of the respondents were aware that eggs contained bacteria that could cause illness. The comment also pointed out that a consumer survey in Iowa reported that 93 percent of those surveyed were aware of *Salmonella* in eggs. Another survey in California showed that 86 percent of the English-language respondents were aware of *Salmonella* in eggs. The comment noted that a FDA survey in 1998 showed that 2⁄3 of respondents had heard of *Salmonella* and knew that cooking would kill it. This represented a 60 percent increase from a survey done in 1993. According to another comment, before FDA implements such a strongly worded safe handling instruction, it should determine whether consumers are really uninformed about the possibility of the presence of illness-causing bacteria in eggs.

Several comments maintained that the proposed safe handling statement for eggs is more harsh than the safe handling statement on meat and poultry and, therefore, unfairly targets the egg industry. One comment pointed out that USDA's risk assessment estimated that the contamination rate for eggs is 1 egg in 20,000, which, according to the comment, is several orders of magnitude lower than most animal products. Thus, the comment maintained that because the risk of becoming ill can be eliminated completely with proper handling and cooking, such a harsh hazard description for a product with a small risk is not justified.

In the proposal, FDA discussed its concern that unless consumers are advised of the risks presented by eggs contaminated with SE and ways that they could reduce these risks, consumers, especially those that are at greatest risk, could suffer serious illness or death from the consumption of raw or undercooked eggs. The agency's primary intent in proposing the label statement for eggs was to give consumers ways to reduce their risk, without having to avoid the product. In addition, consumer research available to the agency indicated that label messages generally are more credible when consumers know the reason for the message (Ref. 3). Therefore, the agency tentatively concluded that to adequately inform consumers there was a need to include information on why there was a risk associated with consumption of raw or improperly cooked shell eggs. However, in light of the comments that asserted that the hazard description: (1) Is not new information, (2) is not consistent with safe handling statements on other raw animal products, and (3) may distract consumers from the safe handling instructions, the agency is persuaded that it should reconsider the necessity of the hazard description as proposed.

The agency is persuaded by information provided by FDA's consumer research and comments to the proposal that the risks associated with consumption of SE-contaminated eggs is not new information to consumers. FDA survey data indicate that the percentage of consumers eating raw eggs has declined in recent years, as appropriate food safety practices have received more publicity (Ref. 4). FDA's own focus group research indicated that many consumers were aware that *Salmonella* is the major cause of foodborne illness associated with egg consumption. Because many of the consumers stated that they knew of the risk associated with eggs, they considered the safe handling statement to be more of a reminder than to provide new information.

FDA recognizes that the proposed label statement is different than that for meat and poultry. In crafting the label statement, the agency relied on previous focus group research that indicates consumers prefer messages that are more specific to the nature of the hazard and the appropriate action to take because of the hazard (Ref. 3). The agency points out, however, that there are differences in the labeling issues involved, which result in some differences in wording. For example, in the meat/poultry safe handling statement there is no specific mention of the food, rather the statement uses ‘‘some products’’ whereas, the proposed statement for eggs refers to ''eggs.'' The agency points out that the meat/poultry statement was designed to appear on a very wide range of products, therefore, it needed to be more general in the way that it identifies foods. The egg label statement will appear only on eggs and, therefore, can be more specific. However, FDA acknowledges that the proposed hazard description on the labels of eggs may appear more harsh than the hazard description on the packages of meat/poultry. The agency does not want consumers to be confused about the level of risk associated with the consumption of raw or undercooked eggs versus consumption of any other raw or undercooked animal product.

FDA has decided to revise the safe handling statement by removing the proposed hazard description, i.e., ''eggs may contain harmful bacteria known to cause serious illness especially in children, the elderly, and persons with weakened immune systems'' and replace it with a shorter hazard description. FDA continues to believe that the safe handling statement would be more effective if consumers knew that the reason for following the safe handling instructions was to prevent illness from bacteria. Consequently, FDA has decided to minimize the potential for misunderstanding by shortening the introductory hazard description to ''to prevent illness from bacteria.'' As was the case with the proposed hazard statement, this statement alerts consumers to the reason why it is important to adhere to the safe handling instructions and does not have the same potential as the proposed statement to distract consumers from the safe handling message.

Accordingly, based on the findings of the agency's consumer focus group research and comments to the proposal, FDA is revising the safe handling statement in proposed § 101.17(h)(1) to read as follows:

SAFE HANDLING INSTRUCTIONS:

To prevent illness from bacteria: keep eggs refrigerated, cook eggs until yolks are firm, and cook foods containing eggs thoroughly.

3. Description of At-Risk Consumers

(Comment 5) A few comments opposed the description of at-risk groups in the hazard statement. According to one comment, consumers would perceive that the safe handling instructions are targeted only at the groups listed in the statement. Another comment pointed out that the safe handling labels on meat and poultry do not list at-risk groups. This comment contended that because of the low probability of contamination of eggs, vulnerable populations are no more at risk from eggs, and probably at less risk, than they are from any other raw animal product. One comment requested removal of the at-risk groups from the proposed safe handling statement because the reference to at-risk groups may heighten the misperception that eggs are a dangerous food.

FDA points out that the new hazard description does not include the listing of at-risk consumers. While FDA survey data indicated that most consumers do not know that some people are at a higher risk of foodborne illness than others and that focus group participants thought that the information on at-risk groups was an important aspect of communicating the nature of the hazard, the agency has reconsidered whether, in this case, it is necessary to provide that information on the labels of eggs. The agency acknowledges that the labels of meat/poultry do not include the listing of at-risk consumers. Because vulnerable populations are at greater risk of most foodborne illnesses, FDA believes that it would be better to provide this information to these consumers through educational channels rather than to tie the information to specific products. FDA does not want at-risk populations to be misled to believe that eggs present a greater risk to them than other raw animal products. Thus, the agency decided to remove the at-risk consumers from the proposed safe handling statement on eggs to be consistent with label statements on other raw animal products.

FDA believes that the information that eggs may be harmful to certain vulnerable populations is important information that must be conveyed to these consumers. Therefore, FDA will continue to provide information about food safety to consumers, including those at greater risk. In addition, FDA plans to develop an educational and outreach campaign after the publication of this final rule to bring attention to the new requirements for shell eggs and to disseminate information to consumers, particularly at-risk populations and those that prepare their meals.

4. Cooking Instructions

(Comment 6) Most comments agreed that there should be an instruction on proper cooking. Although some of the comments supported the language in the cooking instruction, i.e., ''cook eggs until yolks are firm, and cook foods containing eggs thoroughly,'' a few comments objected to the cooking instruction. One comment stated that the phrase ''cook thoroughly'' may be too vague, but offered no alternative language. Another comment contended that FDA should eliminate the phrase ''cook foods containing eggs thoroughly'' because it is impossible to cook some egg-containing foods thoroughly, e.g., meringue and Caesar salad. The comment asserted that these foods can be made safe by using pasteurized eggs or avoiding the food. Therefore, the comment concluded that because the proposed phrase cannot be followed in all cases, it should be removed.

FDA disagrees with the elimination of the phrase ''cook foods containing eggs thoroughly.'' FDA believes that it is necessary to inform consumers that, when cooking or preparing a food that contains raw eggs, the food must be cooked thoroughly to reduce the risk of illness. The agency rejects the notion that the cooking instruction should be removed because it is not possible to cook all egg-containing foods thoroughly. The intent of the cooking instruction is to give consumers information generally on how to properly cook eggs and egg-containing foods to reduce risks. The intent of the message is not to cover every possible scenario as it relates to eggs. The agency concludes that if consumers recognize that they are at risk of illness if they consume a food that is made with a raw or undercooked egg, they would avoid the food or use a substitute, e.g., pasteurized egg product, to reduce the risk. Thus, FDA is retaining the cooking instructions, as proposed, in the safe handling statement.

In the proposal, FDA requested comment on whether it should require a statement that the product should not be used for certain purposes, e.g., ''use pasteurized eggs for recipes requiring raw or partially cooked eggs.'' The agency also requested comment on whether it should include on the label an explicit instruction to avoid the product for at-risk consumers or for individuals preparing food for at-risk consumers.

(Comment 7) One comment stated that FDA should not use the phrase ''use pasteurized eggs for recipes requiring raw or partially cooked eggs'' because consumers cannot readily purchase certain pasteurized egg products in retail stores, e.g., egg whites. However, the comment did not provide data on the availability of the product. There were no comments that supported use of the statement ''use pasteurized eggs for recipes requiring raw or partially cooked eggs.''

Because there was no support for the subject statement, the agency is not requiring it in the safe handling statement. In addition, FDA did not receive any comments on whether it should include an explicit instruction for at-risk consumers to avoid the product, and therefore, is not requiring such a statement. However, as announced in the Egg Safety Action Plan, FDA plans to take additional steps to protect at-risk consumers by establishing safe egg handling and preparation practices consistent with provisions in the Food Code. (Refs. 1 and 5).

5. Other Comments on the Text of the Safe Handling Statement

(Comment 8) Some comments maintained that the description of the hazard will frighten consumers and will discourage consumers from eating eggs. According to one comment, eggs have a history of consumer avoidance because of the fear of heart disease from dietary cholesterol provided by eggs. This comment asserted that, given the history and perception that eggs are a dangerous food, the proposed statement may likely lead to further avoidance of eggs. The comment suggested that additional language be placed on the carton to combat the negative connotation of the safe handling statement.

It is not the agency's intent to frighten consumers or discourage consumption of eggs. Rather, the main purpose of the proposed label statement is to provide consumers with information on how to prepare eggs safely. FDA focus group research did not indicate that the proposed hazard description frightened consumers. Rather, the research indicated that consumers perceived the hazard statement as a helpful reminder about why they should handle eggs safely. Thus, FDA is not persuaded that additional language to combat a negative connotation of the safe handling statement is warranted. Nevertheless, the agency believes that it is less likely that the revised safe handling statement would frighten consumers.

(Comment 9) A few comments asserted that the hazard description is unwarranted for eggs produced under a proven risk-reduction program. According to one of these comments, consumer perception of the frightening or negative nature of the message would negate the effort put forth by producers who use these food-safety programs. Another comment contended that the proposed label statement with the hazard description has the potential to increase foodborne illness because producers would be less likely to participate in risk reduction programs if their products would still be required to bear the hazard component of the safe handling statement. The comments suggested a two-tiered label system, i.e., one label statement for eggs produced under QA systems and another for eggs that are not produced under QA systems. Another comment that supported the two-tiered concept contended that although the safe handling statement on eggs produced under on-farm QA programs could have a less stringent hazard description, it should not omit the reference to the potential hazard. The comment offered the following two tiered labeling scheme:

For eggs not in QA programs:

Caution: Eggs may contain illness-causing bacteria. Keep refrigerated. Do not eat raw. Cook until yolk is firm.

For those in QA programs:

SAFE HANDLING INSTRUCTIONS:

To prevent illness, keep refrigerated. Do not eat raw. Cook until yolk is firm.

As an alternative to the proposed label statement, one comment suggested that FDA develop and adopt a "positive" label system that would recognize eggs produced under proven risk reduction programs.

FDA recognizes and applauds the work being done by States and industry to address egg safety. However, FDA believes that two different label statements in the marketplace may be confusing to consumers. A different safe handling statement for eggs produced under QA programs could mislead consumers to believe that those eggs do not require safe handling when, in fact, both categories of eggs should be handled safely. However, in light of the agency's decision to revise the hazard description to "to prevent illness from bacteria," the question of a two tiered labeling scheme with a less stringent hazard description for eggs produced under QA plans becomes moot. Finally, the agency is not persuaded to develop a "positive" labeling scheme for eggs produced under QA plans, since like the two-tiered approach, it could create confusion. However, FDA would not object to "positive" statements, or any other voluntary information on the labels of eggs, as long as the information is truthful and not misleading. This information may not appear inside of the box with the required safe handling statement. FDA points out that information may be considered misleading, for example, if it implies that a food is safer than other similar products that may not be labeled.

(Comment 10) One comment from a foreign government stated that it uses QA programs and HACCP principles to ensure egg safety and that its eggs for export into the United States must be SE-free. Thus, the comment asserted that the proposed label statement is unnecessary for its products.

The agency does not agree with the comment that a foreign government requirement that eggs for export into the United States be SE-free negates the necessity for safe handling instructions. Unless eggs have been specifically treated to destroy *Salmonella*, FDA believes that there still is a chance that the eggs contain transovarian-transmitted SE. Further, FDA notes that it regulates both domestic and imported foods on an equal basis. As discussed above in this section, FDA is not permitting a different safe handling statement for eggs produced under QA plans. Thus, FDA is not establishing different labeling criteria for imported eggs based on the requirements of the country of origin.

(Comment 11) A few comments stated that the safe handling statement should begin with the terms "caution" or "notice." One of these comments stated that the word "caution" or "notice" would attract the consumer's attention. Another comment asserted that the serious public health threat posed by SE warrants a cautionary statement on labels that informs consumers that the way they are accustomed to eating eggs may no longer be safe. This comment contended that the term "safe handling instructions" does not achieve the objective of communicating to consumers quickly and unambiguously that eggs may be unsafe. Further, according to the comment, the word "caution" unlike "warning" or "danger" would not cause the consumer to avoid the product altogether.

Consumer research indicates that the word "caution" has the same connotation to consumers as "warning" and is, therefore, inappropriate for a safe handling statement (Ref. 6). Because FDA's focus group research indicates that consumers believe that there are practical, simple things they can do to control the risk from eggs, a safe handling statement is more appropriate and, consequently, the most appropriate signal words are "safe handling instructions." In addition, as discussed in the proposal (64 FR 36492 at 36505), FDA considered the term "notice" to introduce the safe handling statement and concluded that the term would not draw attention to the important fact that there are ways to reduce the risks of foodborne illness other than avoidance of the product. Therefore, FDA is not changing the phrase "safe handling instructions" to "caution" or "notice."

(Comment 12) One comment expressed the concern that the safe handling statement would be difficult to understand because it is above a fifth grade reading level.

FDA points out that considerable effort was made to ensure that the language in the statement would be understandable to consumers. Specific phrases or message elements were tested for comprehensibility either in the egg focus groups or in previous consumer research on food safety issues. For example, results of the focus group research indicated that some participants were confused by the term ''shell eggs'' and found ''eggs'' more understandable. They also found the phrase ''cook eggs until yolks are firm'' more understandable than ''cook thoroughly.'' These findings were used to craft the proposed statement. Although focus group participants had varying educational levels, those with high level of education, e.g., graduate degrees, were excluded from participation. None of the participants appeared to find the message difficult to understand. Thus, the agency is not persuaded by the comment that the safe handling statement would be difficult to understand.

Other comments addressing the length of the safe handling statement and the specific wording of the hazard description in the safe handling statement have become moot because FDA has revised the statement. Therefore, those comments will not be addressed.

6. Alternatives to the Proposed Label Statement

(Comment 13) A few comments stated that the label statement on eggs for household consumers should be different from that on eggs for food service. One of the comments offered the following suggested labeling in a two tiered labeling scheme:

For household eggs:

Keep refrigerated and cook thoroughly

For eggs in food service:

Handle Safely: refrigerate promptly; don't cross contaminate; clean hands and surfaces often; cook to proper temperature.

FDA believes that the statement suggested by the comment for household consumers does not provide adequate information. For example, the statement required by § 101.17(h)(1) uses the phrase ''cook eggs until yolks are firm'' which is more descriptive than ''cook thoroughly.'' Furthermore, FDA was not persuaded by these comments that food service establishments need additional information on cartons of eggs. Although the agency recognizes that many of the SE-associated outbreaks occur in food service establishments, it does not agree that additional labeling is the best way to address this issue. Thus, the agency is not persuaded to change the safe handling statement to those suggested by the comment.

(Comment 14) One comment stated that a lengthy safe handling statement is unnecessary and, alternatively, supported the use of the following on shell eggs:

IMPORTANT: Must Be Kept Refrigerated to Maintain Safety

or

IMPORTANT: Must Be Kept Refrigerated

According to this comment, if FDA determines that the labels of shell eggs need safe handling instructions, then those instructions should be in addition to the statement above.

The agency is not persuaded that this suggested label statement is all that is needed on eggs to inform consumers of ways that they may protect themselves. As discussed in the proposal, two measures that would mitigate the risk of SE in shell eggs are refrigeration and proper cooking. The suggested message does not instruct consumers that proper cooking is a measure that they can take to protect themselves. The agency also rejects the comment's suggestion that the suggested statement appear on the label in addition to FDA's proposed safe handling instructions. Two statements on the label informing consumers to keep eggs refrigerated would be redundant. FDA believes that the phrase ''to prevent illness from bacteria'' informs consumers that refrigeration is one measure they can take to reduce or eliminate the risk of foodborne illness. Thus, FDA concludes that it is implicit in the safe handling statement that refrigeration helps maintain safety.

(Comment 15) A few comments preferred statements that were very short, clear, and aimed at all consumers such as ''do not eat raw or undercooked eggs'' and ''keep refrigerated, cook thoroughly, and do not eat raw'' with each of the instructions preceded by bullets. Other comments supported the following label statement that incorporates the basics of the Fight Bac campaign:

Safe Handling Instructions
CLEAN: Wash hands and surfaces often.
SEPARATE: Don't cross contaminate
COOK: Cook to proper temperatures.
CHILL: Refrigerate Promptly

This statement, according to one comment is a simple and positive message and was designed based on consumer focus research. Furthermore, the comment maintained that it does not single out a specific food item.

FDA is not persuaded to adopt the safe handling statements suggested by these comments. The agency believes that the suggested statements do not inform consumers why the safe handling instructions should be followed. Also, the agency notes that the statement incorporating the basics of the Fight Bac campaign educates consumers about food safety in general. However, FDA's proposal to require a safe handling instruction is being issued under 201(n) and 403(a) of the Federal Food, Drug, and Cosmetic (FD&C Act) (21 U.S.C. 321(n) and 343(a)). Under section 201(n) of the FD&C Act, in determining whether labeling is misleading, it must be taken into account, among other things, the extent to which labeling fails to reveal material information with respect to consequences that may result from the usual use of the product. FDA believes that, although instructions to wash hands and not to cross contaminate products are useful pieces of information, such information is not specific to eggs. Therefore, FDA is not persuaded to adopt this suggested alternative phrasing.

7. Placement and Prominence

a. *Placement and type size of the safe handling statement.* As discussed in the proposal, section 403(f) of the FD&C Act requires that mandatory label information be placed on the label with such conspicuousness as to render it likely to be read and understood by ordinary individuals under customary conditions of use. In the past, FDA has generally required label statements required by § 101.17 (21 CFR 101.17) to be placed on the information panel. The agency noted that the principal display panel (PDP) would provide even more prominence. Accordingly, the agency tentatively concluded to require the proposed safe handling statement either on the information panel or the PDP. The agency also noted in the proposal that § 101.2(c) (21 CFR 101.2(c)) requires that mandatory information appearing on the PDP and information panel, including information required by § 101.17, appear prominently and conspicuously in type size no less than 1⁄16 inch. Consequently, the agency concluded that it was not necessary to repeat the requirements in this rulemaking.

(Comment 16) Some of the comments stated that there is not enough room on the egg carton to print such a lengthy safe handling statement with the other Federal and State mandated labeling requirements such as nutrition labeling, USDA grade and quality logos, product code, registration numbers to identify packers, date of pack, sell-by date, and count and weight. Some comments maintained that the lack of space is greater for small (six or eight count) cartons and pulp/open view cartons. Further, one comment pointed out that some of the manufacturers of smaller egg cartons are incapable of printing on the side of the lid. For those who have space to print on the side of the lid, the comment pointed out that the cost to purchase equipment needed to print on the side of the lid would cost several million dollars. Some comments asserted that the space on the label is used by some firms for promotional material, which is a critical selling feature for the firm. Therefore, according to these comments, further regulation would limit a firm's ability to market its own products. While one comment stated that the safe handling statement should be on the outside of the lid, other comments requested some flexibility for placement of the label statement. Two comments maintained that FDA should conduct more research to see if the statement should appear on the information panel and whether consumers would notice the statement there. One comment requested that for small cartons the safe handling information be communicated with an 800 telephone number printed on the carton, e.g., ''FOR SAFE HANDLING INSTRUCTIONS, PLEASE CALL 1–(800)____–____.''

FDA recognizes that manufacturers may have to redesign their labels, but believes that, in many instances and, particularly in light of the fact that the safe handling statement that will be required is about one-half the length of the one proposed, simply reducing the type size of non-mandatory information will provide sufficient space to accommodate the safe handling statement in § 101.17(h)(1). Further, FDA believes that there is enough space on the foam type cartons of shell eggs (both the small, i.e., 6 to 8 egg carton, and larger cartons) to bear all other Federal and State mandated information as well as FDA's safe handling statement. In fact, some of those cartons now contain safe handling information that is comparable in length or more lengthy than FDA's revised safe handling statement. Therefore, for these cartons, FDA concludes that, as revised, there is ample space for its safe handling statement.

FDA also recognizes the limitation of label space on pulp style egg cartons. However, FDA believes that the pulp/open view cartons also have ample space for the shorter revised safe handling statement as evidenced by existing nonmandatory labeling. Thus, FDA is not revising the requirement in § 101.17(h)(2) that the safe handling statement must appear either on the PDP or the information panel of the label. The agency concludes that because there is ample space for the safe handling statement on both large and small cartons of shell eggs, FDA is not providing a telephone referral for the safe handling instructions for these cartons. In addition, FDA rejects the comments suggesting that it should conduct more research to determine whether consumers would notice safe handling instructions on the information panel. The comments did not provide any information that consumers would not notice the safe handling statement on the information panel and, therefore, FDA is not changing the provision of allowing the safe handling statement on the information panel.

(Comment 17) A few comments requested that FDA require a minimum type size. For example, one comment stated that 12-point type is best for older persons to read. The comment acknowledged that some egg cartons may not be able to accommodate 12-point type and stated that type size of less than 8-point would be difficult to read. One comment maintained that other formatting requirements would enhance the readability of the statement. For example, the comment suggested that FDA consider requirements for the use of simple type and use of ink and paper with sufficient contrast. Another comment suggested that FDA require that the statement appear in a hairline box with adequate space around the statement and appear in dark words on light background to enhance the visibility.

FDA does not agree that it should require a minimum type size. The agency reiterates that § 101.2(c) requires that mandatory information appearing on the PDP and the information panel, including information in § 101.17, appear prominently and conspicuously in a type size of no less than 1/16 inch. Although comments recommended 12 point font for the safe handling statement to make it easier for older persons to read, one of these comments acknowledged that there may be insufficient space to accommodate the statement in that type size on the egg carton. Furthermore, the comments did not provide data to support the contention that older consumers are unable to read information on the information panel and PDP that appear in 1/16 type size. Accordingly, FDA is not requiring a minimum type size for the safe handling statement that is different from the minimum type size requirements in § 101.2(c). The agency also notes that 21 CFR 101.15 describes conditions that would make a label statement lack the prominence and conspicuousness required by § 101.2(c). Some of these include insufficient background contrast, and crowding with other written, printed, or graphic matter. Because these provisions are already in place for prominence and conspicuousness for information required by § 101.17, the agency finds that it is not necessary to repeat these requirements in this rulemaking.

b. *Use of graphics*. In the proposal, FDA recognized that safe handling instructions on meat and poultry utilized graphic illustrations. The agency tentatively concluded that its focus group research did not indicate that graphic illustrations were necessary to convey the safe handling instructions to consumers. However, the focus groups did respond favorably to bullets and the agency requested comment on whether graphics would enhance the visibility of the statement and whether it should require them.

(Comment 18) Some comments maintained that icons depicting actions to be taken (e.g., a refrigerator to indicate that product should be refrigerated) make the safe handling statement easier to understand. Other comments supported the use of bullets to enhance the safe handling statement. One comment supported use of a graphic symbol to attract the consumer's attention to the label such as an exclamation point in a triangle. This symbol, the comment maintained, could become a universal symbol for foods that present a hazard.

The agency is not requiring these suggested labeling options. None of the comments provided data that showed that consumers would be better informed with graphics and, thus, did not call into question FDA's testing that showed that consumers would be adequately informed of safe handling information without the use of graphics. However, the agency would not object to the use of bullets or graphic illustrations in addition to what is required. Accordingly, graphic illustrations and bullets may appear with the safe handling statement to draw greater attention to the statement. However, other wording may not appear in the box with the prescribed label statement. As stated in the proposal (64 FR 36492 at 36504), FDA believes that prescribing the specific language of the safe handling statement gives manufacturers a level playing field by requiring the same language for all products covered by the regulation, while giving consumers a message that is not confusing, misleading, or ineffective.

c. *Labeling for shell eggs not for direct sale to consumers.* In the proposal, FDA stated that the safe handling statement on cartons of shell eggs that are not for direct sale to consumers, e.g., shell eggs that are to be repacked at a site other than originally processed or are to be shipped for use in food service establishments, would serve as a means to inform repackers and food preparers of the safe handling instructions. The agency tentatively concluded that the same goal of conveying the message could also be accomplished by customary practices of the trade. Thus, FDA proposed that the safe handling statement on shell eggs that are not for direct sale to consumers may be provided on cartons or in labeling, e.g., invoices or bills of lading in accordance with the practice of the trade.

(Comment 19) Some comments opposed labeling in invoices and bills of lading because, they asserted, the labeling may be separated from the product and not read by food handlers. The comments maintained that the safe handling instructions must be read and understood by the food handler because they are the ones who must use the safe handling instructions when storing and preparing egg dishes. Moreover, according to one comment, the majority of eggs shipped to food service establishments are in 15 or 30 dozen cases that have ample room for labeling and, therefore, there is no need for the flexibility. One comment asserted that the proposed safe handling instructions should be on shipping containers and other food service packages because most incidents of SE-contamination in eggs occur in food service establishments.

The agency agrees that the safe handling instructions must be conveyed and understood by the food handler. However, the agency is not persuaded by comments that the safe handling statement would not reach the food preparers if it is not on the label. FDA believes that it is the responsibility of the owner/operator of the establishment to make sure that food preparers receive the safe handling instructions as well as training on how to implement the instructions. Moreover, the agency points out that it intends to ensure that food preparers receive safe handling information for shell eggs by establishing safe egg handling and preparation practices at retail consistent with the Food Code (Refs. 1 and 5). Thus, FDA is not persuaded to prohibit the use of labeling such as invoices and bills of lading as a means for meeting the requirements of this rule when the eggs are to be repacked, relabeled, or further processed.

8. Other Labeling Issues

(Comment 20) Some comments contended that the label statement will not significantly reduce the numbers of SE-associated illnesses.

The agency disagrees that the label statement will not significantly reduce the numbers of SE-associated illnesses. In the PRIA, FDA used a Food Marketing Institute study (Ref. 7) of the effects of USDA's meat and poultry safe handling instructions to estimate the effect of the safe handling label statement for shell eggs. The agency estimated that the likelihood that shell eggs would be undercooked or consumed raw would decline by approximately 5 percent. FDA also estimated that the likelihood that consumers would fail to refrigerate shell eggs would decline by 2 percent. These percentages continue to be the agency's best estimate of the approximate effects of the safe handling label for shell eggs. In a separate simulation, FDA used its modification of USDA's SE risk assessment model [1] and CDC's surveillance model to estimate the effect of the safe handling label. With the FDA-modified SE risk assessment baseline, FDA estimated the number of illnesses that would be prevented by labeling to be 4,948 to 162,846 with a mean of 46,339. Using the CDC baseline, the estimate of the number of illnesses prevented by labeling was 2,813 to 42,892, with a mean of 14,775. As discussed below in section IV.A of this document, FDA used more recent data to adjust the CDC surveillance model used in the proposal. Thus, FDA's estimate of the number of illnesses prevented by labeling using the revised CDC baseline is 1,570 to 25,196 with a mean of 8,784. Comments did not provide FDA with other estimates of the prevention of salmonellosis. FDA maintains that its estimates represent a significant reduction in illness.

(Comment 21) Some comments contended that most outbreaks occur in food service establishments and, therefore, FDA's focus should be on educating and providing safe handling instructions for food service workers, not household consumers. On the other hand, one comment maintained that label statements are not going to change the behavior of food service workers who take shortcuts.

FDA disagrees with these comments. The agency believes that information about food safety should be given to both household consumers and food service workers. Previously in section II.A of this document, FDA discussed its rationale for providing safe handling instructions for consumers. The agency recognizes that food service is an additional component of the farm-to-table continuum and points out that, as part of FDA's and FSIS' Egg Safety Action Plan, FDA intends to initiate rulemaking to establish safe handling and preparation practices for food service establishments based on sections of the Food Code related to egg safety (Refs. 1 and 5). FDA also points out that the requirement for refrigeration of eggs at retail, including food service establishments (see discussion below in section III of this document) will be mandatory upon the effective date of this regulation.

FDA agrees that education is an important factor in providing instructions on food safety. Thus, the agency intends to develop an educational and outreach campaign related to this final rule to inform the public, including both consumers and food service employees.

(Comment 22) Several comments pointed out that many existing egg cartons already bear safe handling instructions. To eliminate costly relabeling, these comments requested that FDA permit existing safe handling label statements if they meet or exceed the statement required by the final rule. One comment requested that if a carton already has a ''keep refrigerated'' label on the carton that it be allowed to delete the phrase from the safe handling statement.

The agency is not persuaded to exempt eggs that have existing safe handling instructions from requirements in § 101.17(h)(1). FDA has concluded that prescribing the language for a safe handling statement for shell eggs would give consumers a clear and consistent message and provide a ''level playing field'' for industry by requiring that all products covered by the regulation bear the same information. Further, FDA concludes that a prescribed safe handling statement would ensure a message that is not misleading or confusing.

In addition, the agency is not persuaded to delete the phrase ''keep

[1] The baseline for the cases of samonellosis was estimated in three different ways. The USDA risk assessment estimated the number of illnesses with a full farm-to-table model. The model included an estimate of the number of eggs infected, the number of infected eggs likely to be consumed, and an estimate of the number and severity of illnesses caused by SE. In the second model, FDA modified the USDA risk assessment model by using a 5 percent probability that shell eggs are refrigerated at 7.2 °C (45 °F) in retail establishments and institutions. FDA modified the original model based on more recent information on the numbers of establishments not refrigerating eggs at 7.2 °C (45 °F). The CDC model estimates the number of illnesses based on the number of confirmed cases as indicated by the number of SE isolates reported to CDC plus estimated unreported cases.

eggs refrigerated'' from the safe handling statement on cartons that already have a keep refrigerated statement. The agency recognizes that many cartons already have refrigeration instructions and notes that USDA requires in 9 CFR 590.50 that eggs packed for the ultimate consumer be labeled to indicate that refrigeration is required. However, FDA believes that the refrigeration instruction is an essential component of the safe handling statement and, as such, should not be taken out of the context of the rest of the statement. Further, FDA's safe handling statement permits manufacturers to uniformly comply with both FDA's safe handling statement and FSIS' refrigeration labeling requirement because FSIS' requirement is that cartons be labeled to indicate that refrigeration is required. Consequently, this safe handling statement can replace that required by FSIS. The agency recognizes the redundancy in having two refrigeration statements and points out that, while firms are revising labels to add the safe handling statement, they can delete the additional ''keep refrigerated'' statement that is not a part of the safe handling statement required in § 101.17.

Although FDA is not exempting eggs that have existing safe handling instructions from requirements in § 101.17(h)(1), the agency does see merit in using enforcement discretion with firms that want to exhaust existing labels provided that the labeling meets or exceeds the requirement for the instructional element, which includes: (1) A refrigeration instruction and (2) a cooking instruction. FDA believes that this would reduce the costs for some firms while still providing consumers information on how to properly handle eggs. Firms with existing inventories as of the effective date of this final rule may exhaust those inventories as long as they contain the essential elements listed above. Upon their next printing, however, these firms must comply with the requirements in § 101.17(h)(1).

Lastly, the agency is revising proposed § 101.17(h)(1) and deleting proposed § 101.17(h)(6) to be consistent with the changes made in § 115.50 (as discussed in section III.C of this document). The remainder of § 101.17(h) is renumbered to reflect this change.

C. Comments on Effective Date

(Comment 23) A few comments asserted that the implementation time for the proposed labeling requirement is insufficient. These comments maintained that given the logistics of redesigning cartons, replacing inventory, making necessary adjustments to distribution channels, and accommodating seasonal product demand fluctuations, the egg industry needs a 360-day implementation period. According to one comment, once the rule is finalized, new designs will need to be developed, then sent to customers for label approval. The comment stated that production of the label could not take place until the design is approved, which according to the comment, could take 60 to 90 days. The comment maintained that once production begins, it will involve label changes for thousands of stockkeeping units (SKU's) of hundreds of different customers, which would be a burden given only the approximately 90 days left to comply. The comment estimated that personnel would take 11,386 to 19,880 hours to redesign the label; retool all carton labels, including artwork; communicate with customers; order plates; and complete other required activities.

Further, the comment contended that it is not likely that egg producers will have begun to use the proposed statement before the compliance date in order to take advantage of FDA's willingness, as stated in the proposal (64 FR 36492 at 36510), to allow producers to use the safe handling statement as proposed and if printed before the publication of the final rule. The comment asserted that producers would not want to take the chance of changing labels twice. The comment explained that egg carton stock is prepared well in advance and customers' needs may be less than expected. Therefore, if cartons are not used prior to the effective date, they will need to be discarded. The comment stated that, on the other hand, a large inventory may be needed to accommodate peak periods, such as Christmas and Easter and if large stocks are not maintained, the inventory may run out. Additionally, the comment expressed concern that, depending on when the rule is published, the labeling requirement could be implemented during the time of peak production, and, therefore would make compliance with the requirement extremely difficult. Another comment disagreed with FDA's assessment that a longer compliance period would delay benefits of the rule because many cartons currently contain safe handling instructions and, therefore, benefits are being realized now.

The agency notes that the purpose of the safe handling labeling requirement is to protect the public health by providing consumers with material information, i.e., instructions on how to safely handle and prepare eggs in order to reduce the risk of illness. Therefore, FDA believes that the safe handling statement should be placed on egg cartons as soon as possible. However, FDA is persuaded by the comments that it may be extremely burdensome for some producers to comply with the labeling requirements in 180 days. The agency acknowledges the difficulty in designing new labels, receiving label approval from customers, and building up inventories. The agency also recognizes the costliness of destroying inventories that do not comply with FDA's requirements. The agency is persuaded by the economic concerns raised in the comments that it should provide some flexibility to manufacturers. As discussed below in more detail in section IV.A of this document, the longer compliance period will generate savings in costs that would exceed the reduction in benefits thus still meeting the agency's need to address the public health concern. Therefore, FDA is providing an additional 90 days for firms to come into compliance with the requirements in § 101.17(h).

III. Refrigeration of Shell Eggs in Retail Establishments

As discussed in section II of this document, SE in eggs is a significant public health concern. As discussed in the proposal, FDA concluded that one practicable measure to limit the number of viable SE in shell eggs is refrigeration because it extends the effectiveness of the egg's natural defenses against SE and slows the growth rate of SE. USDA published a final rule (63 FR 45663, August 27, 1998) to require that shell eggs packed for consumer use be stored and transported at an ambient temperature not to exceed 7.2 °C (45 °F). This regulation, however, does not apply to eggs while held at all retail establishments. FDA is concerned that without continued refrigeration up until the time that the eggs are cooked, there would be an opportunity for the egg's defenses to degrade and growth of SE to occur. The agency reviewed research indicating that SE multiplies at temperatures of 10 °C (50 °F) and above but can be inhibited at lower temperatures, e.g., 8 °C (46 °F), 7.2 °C (45 °F) and 4 °C (39 °F). Based on this research and USDA's temperature requirement during transport, FDA proposed a maximum ambient temperature of 7.2 °C (45 °F) for eggs stored and displayed at retail establishments.

A. Refrigeration Temperature Requirements

(Comment 24) Most comments regarding the proposal to require refrigeration of shell eggs supported a requirement for refrigeration. Some of these comments supported the proposed maximum temperature requirement, i.e., 7.2 °C (45 °F), whereas other comments disagreed with this temperature requirement. Several comments suggested that the agency set the maximum ambient temperature for shell eggs held at retail at 5 °C (41 °F), instead of 7.2 °C (45 °F). Some of these comments suggested that this would provide a margin of safety, especially for eggs packed tightly together in large trays or in large retail coolers. Other comments noted that a requirement of 5 °C (41 °F) would ensure consistency with the requirement in FDA's Food Code that potentially hazardous foods be refrigerated at 5 °C (41 °F) (Ref. 5).

The agency is not persuaded that the temperature requirement should be 5 °C (41 °F), rather than 7.2 °C (45 °F). As discussed in section I.F of the proposal, research indicates that SE multiplies at temperatures of 10 °C (50 °F) and above but that multiplication is inhibited at lower temperatures. Therefore, by requiring a refrigeration temperature lower than 10 °C (50 °F), the agency is already providing a margin of safety for shell eggs. FDA concludes that refrigeration at 7.2 °C (45 °F), i.e., the same temperature required by USDA under the Egg Products Inspection Act (EPIA) for the storage and transportation of shell eggs, is sufficient to protect the public health. Because eggs cool down only slightly faster when held at 5 °C (41 °F) as opposed to 7.2 °C (45 °F), as discussed in the PRIA (64 FR 36516 at 36518), requiring eggs to be stored at the lower temperature would have a negligible effect on the SE risk. Requiring a temperature of 5 °C (41 °F) as the maximum ambient temperature would increase costs to the producer without producing significant additional food safety benefits.

Furthermore, the agency notes that the storage temperature of shell eggs addresses growth of SE in shell eggs, whereas the refrigeration temperature required by the Food Code, i.e., 5 °C (41 °F), addresses growth of all pathogens that may be present in potentially hazardous foods. Thus, in addressing holding temperatures for potentially hazardous foods in general, the Food Code requires a temperature for retail storage that will prevent or slow the growth of most pathogens, including cold-tolerant pathogens such as *Listeria monocytogenes* that have been shown to grow at 5 °C (41 °F). The agency does not have data suggesting that *L. monocytogenes* or other pathogens are a potential concern in shell eggs. The agency concluded that a maximum storage temperature of 7.2 °C (45 °F) will be effective in inhibiting the growth of SE that may be present in shell eggs. Of course, this requirement does not preclude States or retailers from maintaining shell eggs at lower refrigeration temperatures.

(Comment 25) One comment contended that FDA based the 7.2 °C (45 °F) ambient temperature requirement on studies that do not provide a sound scientific foundation for the requirement. The comment stated that none of the articles FDA cites in support of the proposed refrigeration requirement examined SE growth in eggs stored under conditions that simulate actual commercial storage conditions. The comment maintained that, because commercially stored egg cartons are often placed on pallets in large numbers and stacked to high levels in high-volume coolers, the eggs' internal temperature may be substantially higher than the coolers' ambient temperature, especially for centrally located eggs that are insulated by surrounding eggs and, therefore, exposed to warmer temperatures.

FDA disagrees with the comment. The studies noted by the comment were not cited as evidence that eggs in commercial storage conditions would achieve a certain temperature when refrigerated. Rather, these studies provide evidence that SE growth is inhibited when eggs are at the temperature studied. While the agency agrees that eggs packed near the center of a large pallet may not cool as quickly as those near the perimeter, the temperature of eggs, when refrigerated, will progress towards the ambient temperature of the refrigeration unit. As discussed above in this section, FDA has provided its rationale for why an ambient temperature of 7.2 °C (45 °F) for storage of eggs is the best available option for protecting the public health.

(Comment 26) One comment recommended that States be allowed to require ambient temperatures lower than 7.2 °C (45 °F) for shell eggs if they believe their citizens will be better protected by a lower temperature, such as 5 °C (41 °F), particularly if gaps exist in the scientific data on this issue.

The agency recognizes that some States and localities may have temperature requirements lower than 7.2 °C (45 °F). As stated in the proposal (64 FR 36492 at 36499), the agency does not intend that this regulation would preempt recommendations of the Food Code or other State or local requirements that require a lower temperature. The regulation would, however, preempt any State or local requirements that allow a temperature greater than 7.2 °C (45 °F).

(Comment 27) One comment supported the 7.2 °C (45 °F) ambient temperature requirement, but urged the agency and others to communicate effectively with retail establishments to minimize any confusion that may result from the temperature difference between this proposed requirement and the requirement in the Food Code.

While the new temperature requirement may create some confusion initially, the Food Code will be revised to reflect this new temperature for storage of shell eggs in its next reprinting (currently anticipated to be 2001). The revision will include not only the new temperature requirement, but also the scientific references and public health reasons for the change in annexes 2 and 3, respectively, of the Code. In the meantime, FDA will rely, as it has in the past, on State and local authorities to assist retail establishments in complying with the agency's regulations. The agency holds annual training courses for State personnel and food service directors that focus on changes in the Food Code. FDA will work closely with the States to ensure that they communicate effectively with retail establishments to minimize any confusion that may result from the temperature difference between this requirement and the requirement in the 1999 Food Code and to ensure that compliance assistance is consistent nationwide.

(Comment 28) One comment supported the refrigeration of shell eggs at 7.2 °C (45 °F) provided that minor variations in ambient temperature do not result in condemnation of eggs. The comment suggested that FDA make refrigeration mandatory, but make the temperature of 7.2 °C (45 °F) a voluntary standard, or establish a level of temperature variation (e.g., 5 °F) that would be tolerated before the eggs would be subject to regulatory action. Another comment objected to the fact that FDA made no provision in its proposal for eggs that are out of compliance for a limited amount of time, and suggested that the allowance of a reasonable amount of time to place eggs in a cooler after delivery would not compromise their safety.

FDA disagrees with the comment that the temperature for refrigeration of eggs be a voluntary standard, rather than a mandatory requirement. The agency has proposed 7.2 °C (45 °F) as the maximum ambient temperature for storage and display of shell eggs at retail establishments. Realizing that minor variations in ambient temperature are unavoidable, retailers may choose to maintain shell eggs at temperatures below the maximum established temperature to provide for a margin for variation. As with any regulation, the enforcement of this temperature requirement will depend on the particular circumstances regarding the situation (including the temperature of the eggs themselves) as well as the discretion of the agency. In § 115.50(b)(1), FDA provided that ''shell eggs held for retail distribution shall promptly be placed under refrigeration * * * upon receipt at a retail establishment.'' The agency believes that retailers should make every effort to promptly place shell eggs under refrigeration upon receipt. In most cases, this can be done. However, FDA recognizes that there may be some circumstances in which short delays are unavoidable. For example, when eggs are delivered to a grocery store, the stock clerk responsible for moving the eggs into the cooler could be briefly delayed in the task because he is cleaning up after an accident in one of the aisles involving a glass breakage. To allow for a practical application of the refrigeration requirement in such situations, FDA is adding a provision to § 115.50(b)(1) that provides that where short delays are unavoidable, the eggs should be placed under refrigeration as soon as reasonably possible.

B. Enforcement of the Refrigeration Requirement

(Comment 29) One comment expressed concern that consequences for violation of FDA's refrigeration requirement are inconsistent with violation of FSIS' refrigeration requirement for shell eggs during transportation. The comment noted that FSIS issues a facility violation but does not retain the product if eggs are found to be held above 7.2 °C (45 °F), whereas FDA would require diversion or destruction of the eggs.

As set out in the final rule, FDA has the authority, under sections 301 and 402(a)(4) of the FD&C act, to seize eggs that are held at retail at an ambient temperature above 7.2 °C (45 °F), on the grounds that those eggs have been held under insanitary conditions whereby they may be rendered injurious to health and are, therefore, adulterated. FDA may also use administrative procedures set out in this rule to order that the eggs that have been held in violation of the 7.2 °C (45 °F) requirement established in this rule, be destroyed or diverted. FSIS has the authority, under the EPIA, to detain eggs that are transported at an ambient temperature above 7.2 °C (45 °F), pending judicial seizure. FSIS also has the option of seeking civil money penalties against violators of the transport temperature requirement. The two agencies will coordinate enforcement efforts as closely as the different statutes allow. Both agencies agree that enforcement of the temperature requirement will depend on the particular circumstances regarding the situation (including the temperature of the eggs themselves) as well as the discretion of each agency.

(Comment 30) Two comments stated that they oppose complete preemption of State and local egg safety provisions. One of these comments from an association of State food and drug officials agreed that temperature requirements should be uniform, but also argued that the States should be free to enforce equivalent State requirements under State laws and regulations. This comment also stated that States should be permitted to require refrigeration temperatures lower than 7.2 °C (45 °F).

In the proposal, FDA tentatively concluded that the regulation should preempt less stringent State and local requirements because allowing them would interfere with the important public health objective of refrigerating eggs at 7.2 °C (45 °F). FDA does not intend that this regulation preempt State requirements that are the same as or more stringent, i.e., 7.2 °C (45 °F) or lower. The regulation does, however, preempt any State or local temperature requirements greater than 7.2 °C (45 °F). FDA would like to clarify that States will be permitted to enforce their own temperature requirements that are equivalent to or lower than FDA's proposed requirement. For example, if a State has a temperature requirement of 5 °C (41 °F) and eggs were found at a storage temperature of 6.7 °C (44 °F), then the eggs would be in compliance with the Federal regulations, but not the State regulations and the State could take enforcement action to enforce its own regulations.

(Comment 31) One comment also opposed preemption of State administrative procedures. The comment asserted that, the administrative procedures provided in the proposal would impose a lengthy process on States and localities. The comment maintained that it is doubtful that State or local jurisdictions would follow FDA's proposed procedures, e.g., they would not call FDA district or regional directors to remove adulterated eggs from establishments traditionally under their jurisdiction. Nevertheless, the comment asks for clarification on whether the proposed regulations preempt State administrative procedures.

The agency is clarifying that the administrative procedures in proposed § 115.50 do not preempt State or local administrative procedures. On the contrary, FDA explicitly provides in § 115.50(d) that State and localities may follow the hearing procedures set out in § 115.50(e) substituting, where necessary, appropriate State or local officials for FDA officials, or they may follow comparable State and local procedures as long as such procedures satisfy basic due process. Thus, FDA intends that States could use their own administrative procedures to enforce the regulation. FDA is removing the word ''comparable'' to make it clearer that State and local administrative procedures do not need to track FDA's procedures.

(Comment 32) One comment raised concerns about the breadth of the preemptive effect of the proposed regulation. It questioned whether the proposed rule might preempt all State laws relating to egg safety and substitute FDA's regulation. This comment contended that States already have systems in place that expeditiously remove unsafe foods from commercial channels and that those should not be preempted.

FDA agrees with the comment. States do have systems already in place that expeditiously remove adulterated food from the marketplace. In the proposal, FDA acknowledged that States and localities, more than FDA, currently enforce regulations in retail establishments. When examining options for the enforcement of refrigeration requirements, FDA tentatively concluded that a Federal-State cooperative approach would be the best approach to enforce the refrigeration requirements. Thus, FDA proposed to allow States and localities to enforce the Federal regulation, along with FDA, if the States and localities so desired.

FDA wants to make it very clear that the intended preemptive effect of this regulation is very narrow. FDA does not intend to preempt general food safety laws that apply to eggs, such as State food and drug acts, or State or local laws, regulations, or ordinances applying to retail establishments, e.g., the Food Code. A State or local food safety agency can continue to enforce its own refrigeration requirements or other egg safety requirements under its own administrative or judicial enforcement procedures as long as the retail refrigeration requirements for eggs are (equal to or less than 7.2 °C (45 °F). FDA is including State and local agencies in the enforcement of this regulation to broaden their enforcement tools, not to narrow them. To ensure that the limited preemptive effect of these regulations is clear, FDA has added a statement on the preemptive effect of the regulations to the codified text.

(Comment 33) A comment contended that the provisions in the proposal that allow States and localities to enforce the provisions ''until FDA notifies the State or locality in writing that such assistance is no longer needed'' appear to place State regulatory actions subordinate to those of FDA. The comment maintained that it knew of no other situation where regulatory actions of State or localities constituted ''assistance'' to a Federal agency, especially when intrastate commerce is involved. The comment asked for clarification of this issue.

The provision that allows State and local agencies to enforce FDA's regulations draws its terms from section 311 of the Public Health Service Act (PHS Act). FDA does not consider State and local food safety activities to be subordinate to Federal activities. In fact, FDA created this cooperative model to ensure that State and local officials continue to be the primary enforcement officials in retail establishments while being provided the ability to enforce this Federal requirement for egg refrigeration.

(Comment 34) One comment also expressed concern regarding the precedent of using the PHS Act for enforcement of communicable disease regulations when there are other collaborative and integrated mechanisms available, e.g., the Food Code. The comment maintained that many States adopt the provisions of title 21 of the *Code of Federal Regulations* (CFR) and, therefore, the comment noted that it previously requested that FDA adopt relevant sections of the Food Code as regulations. The comment asserted that adopting relevant sections of the Food Code as a Federal regulation would lower the risk of illness, while promoting uniformity without preempting State and local authority.

The agency notes that this regulation is not the first regulation issued by FDA that utilized the PHS Act to address prevention of communicable diseases. FDA used the PHS Act as its legal authority to issue: (1) Regulations to control the interstate shipment of molluscan shellfish (21 CFR 1240.60); (2) regulations to control the interstate and intrastate commerce of turtles (§ 1240.62 (21 CFR 1240.62)); (3) requirements for mandatory pasteurization of milk and milk products (21 CFR 1240.61); and regulations to control blood and tissue products (21 CFR 640 and 1270). However, the agency acknowledges that this regulation represents a new approach to food safety as it relates to matters traditionally addressed by the States. The agency believes that the Federal-State cooperative approach that it is adopting in this final rule for the regulation of eggs is the most effective and efficient use of Federal, State, and local food safety authorities.

Further, FDA recognizes that many States adopt parts of 21 CFR by reference. However, the agency is not persuaded by the comment that it should adopt relevant sections of the Food Code in lieu of issuing this regulation. FDA notes that its policy on the refrigeration of eggs, i.e., that refrigeration at 7.2 °C (45 °F) is adequate to maintain the safety of shell eggs would be the same whether or not the agency issued rulemaking to codify in 21 CFR sections of the Food Code relevant to shell eggs. Nevertheless, as announced in the Egg Safety Action Plan, the agency plans to take additional steps to protect at-risk consumers by establishing safe egg handling and preparation practices at retail, consistent with provisions in the Food Code.

(Comment 35) One comment contended that FDA should evaluate each State and local program to ensure that they have the expertise and resources to enforce the regulations. This comment contended that if the States and local programs do not have the capability to enforce the rule, FDA should provide training or resources, or enforce the rule itself. Furthermore, the comment stated that FDA should perform comprehensive annual reviews and permit only those agencies that satisfy strict performance standards to continue to enforce the rule.

FDA disagrees with this comment. As discussed in the proposal, the agency recognizes that the inspection of retail establishments traditionally has been the province of State and local food safety agencies. FDA expects that these agencies would continue to inspect these establishments and will be able to enforce the refrigeration requirement. FDA considered a requirement that the States report to FDA on their enforcement activities. However, the agency concluded that, because of the vast number of food safety agencies at the State and local level, reporting to FDA would be too resource intensive. Further, the agency concluded that requiring States and localities to report to FDA would remove valuable resources from egg safety enforcement and place them into administrative activities. Consequently, FDA decided to not require enforcement reports from State and local agencies. Moreover, FDA, in keeping with the principles of Executive Order 13132 on federalism, thought it prudent to allow States the maximum administrative discretion possible in enforcing this rule. However, the agency intends to stay informed of the enforcement of State and local agencies. Where State or local coverage needs to be augmented, FDA intends to act.

(Comment 36) One comment opposed the allowance of 10-working days after the order is given for the destruction of eggs that are not in compliance with the temperature requirement as proposed in § 115.50(e)(1)(i). This comment maintained that FDA provided no rationale for the time period. Moreover, the comment contended that 10 days was an unnecessarily long period of time and could allow for inadvertent repacking. The comment suggested that only 3 to 5 days be allowed.

The agency disagrees with the comment. The time period of 10-working days is consistent with other regulations that address the prevention of communicable disease, e.g., regulations in § 1240.62 that control the interstate and intrastate commerce of turtles. Moreover, the agency believes that 10-working days allows sufficient time for interested parties to appeal the detention order as provided in § 115.50(e)(2)(i). In addition, the agency points out that the administrative procedures provide for sufficient safeguards against inadvertent repacking of shell eggs that were not held in compliance with the temperature requirement. Section 115.50(e)(1)(iv) provides that eggs that are detained be labeled with official tags stating that they not be sold, distributed, or otherwise disposed of except that they be diverted or destroyed, or moved pending appeal. The comment did not persuade FDA that there is sufficient cause to be concerned that eggs will be inadvertently repacked if they are held for 10-working days before they are destroyed or diverted. Thus, the agency is retaining the provision in § 115.50(e)(1)(i) for 10-working days before eggs are diverted or destroyed.

(Comment 37) One comment suggested that inspectors check the temperature of the shell eggs' environments at least twice a year. The comment also suggested that, to ensure that retail establishments are maintaining accurate temperatures, continuous temperature recording devices be required and records made available to inspectors.

The agency agrees that the inspection of retail establishments twice a year is reasonable. In fact, the Food Code recommends that retail establishments be inspected once every 6 months. These inspections include checking the temperature at which potentially hazardous foods, including eggs, are being held. However, the agency does not find that it is necessary to make the inspection a requirement as part of this rulemaking. The agency expects that when State and local agencies routinely inspect retail establishments, they will check the temperature at which shell eggs are held. In addition, for any establishment that FDA inspects, it will also check the temperature at which shell eggs are held. Thus, FDA is not persuaded by the comment to require a specific interval for checking the temperature at which shell eggs are held.

FDA disagrees that it should require that retail establishments maintain continuous recording devices. The agency notes that neither the Food Code nor FSIS, in its directive regarding the enforcement of refrigeration requirements for shell eggs (Ref. 8), recommends that such devices be used. Furthermore, FDA notes that requirement of such devices may be very costly, especially for small businesses. Consequently, the agency is not persuaded by the comment to require establishments to maintain continuous recording devices.

C. Other Changes to the Proposal

FDA is revising proposed § 115.50 by deleting paragraph (d) and revising paragraph (b) for clarification. The agency concludes that § 115.50(d) stating that the requirements of this section apply to all eggs may be confusing in light of the fact that paragraph (b) states that all requirements of the section, except paragraph (c) apply to shell eggs. FDA is revising paragraph § 115.50(b) to state ''except as provided in paragraph (c) of this section; shell eggs held for retail distribution, whether in intrastate or interstate commerce, shall bear the following statement: '' With this revision, § 115.50(d) becomes redundant. The rest of the section is renumbered to reflect this change.

IV. Final Regulatory Impact Analysis

A. Benefit-Cost Analysis

FDA has examined the economic implications of this final rule as required by Executive Order 12866. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, safety, distributive, and equity effects). Executive Order 12866 classifies a rule as significant if it meets any one of a number of specified conditions, including having an annual effect on the economy of $100 million; adversely affecting some sector of the economy in a material way; or adversely affecting jobs or competition. A regulation is also considered a significant regulatory action under Executive Order 12866 if it raises novel legal or policy issues. Under the Unfunded Mandates Reform Act of 1995 (Public Law 104–4) requiring cost-benefit and other analyses, a significant rule is defined in section 1531(a) as ''a Federal mandate that may result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100,000,000 (adjusted annually for inflation) in any 1 year * * *.'' Finally, the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121) defines a major rule for the purpose of congressional review as having caused or being likely to cause one or more of the following: An annual effect on the economy of $100 million; a major increase in costs or prices; significant effects on competition, employment, productivity, or innovation; or significant effects on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

FDA finds that this final rule is economically significant under Executive Order 12866. FDA determined that this final rule, based on the median estimate of cost contained in the economic analysis, does not constitute a significant rule under the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Furthermore, in accordance with the Small Business Regulatory Enforcement Fairness Act of 1995 (Public Law 104–121) FDA determined that this final rule will be a major rule for the purpose of congressional review.

This section contains the regulatory impact analysis of the final rule. A more complete analysis and a list of references is available in a separate document entitled ''Preliminary Regulatory Impact Analysis and Initial Regulatory Flexibility Analysis of the Proposed Rule to Require Refrigeration of Shell Eggs at Retail and Safe Handling Labels'' (64 FR 36516, July 6, 1999).

FDA received no comments that directly addressed the cost-benefit analysis of the proposed rule. Several comments, however, discussed aspects of the rule that would affect the cost-benefit analysis. In this final regulatory impact analysis, FDA responds to those comments.

1. Regulatory Options

FDA considered several regulatory options for dealing with SE in shell eggs. The options considered include: (1) No new regulatory action, (2) labeling only, (3) refrigeration at 7.2 °C (45 °F) only, (4) refrigeration at 5 °C (41 °F), (5) labeling and refrigeration as proposed, (6) HACCP for shell eggs, (7) in-shell pasteurization, (8) longer compliance periods, and (9) limited retail sell-by periods. FDA received comments on the proposal that directly or indirectly dealt with the economic analyses of some of these options.

(Comment 38) Several comments discussed the costs of in-shell pasteurization (option 7). In the analysis of the proposal, FDA assumed that the annual cost of pasteurization was $0.30 per dozen eggs. If 47 billion shell eggs were consumed per year, the annual cost of pasteurizing all of them would be about $1.2 billion. One comment estimated the cost to be $0.26 to $0.38 per dozen eggs, which implies that the annual cost of pasteurizing 47 billion shell eggs would be $1 to $1.5 billion. Another comment estimated that pasteurization would increase the price of a dozen eggs by 35 to 40 percent. The comment listed no prices, but at an average price of $0.80, the additional cost of pasteurizing 47 billion eggs would be $0.28 to $0.32 per dozen, or $1.1 to $1.3 billion per year. FDA did not estimate the transition, or set-up costs, (e.g., costs of equipment, redesign of processing facilities, training) for processors switching to pasteurization, so these estimates understate the full cost of in-shell pasteurizing all shell eggs.

Although in-shell pasteurization would greatly reduce SE, the agency concludes that other interventions between farm and table will reduce SE at lower cost. The egg safety action plan includes these other interventions, such as on-farm controls, controls at packer/processor, and retail controls, in addition to in-shell pasteurization.

(Comment 39) Several comments requested a longer compliance period for the new egg label.

The main disadvantage of longer compliance periods for the labeling provision (option 8) is that the option would delay the realization of the benefits of the rule. In this final rule, the agency will allow 9 months (instead of the proposed 6 months) for producers to comply with the labeling provision. The longer compliance period will probably generate savings in costs that exceed the reduction in benefits (as measured with the revised CDC surveillance baseline). FDA discusses the effects of the longer compliance period in more detail in the sections on benefits and costs.

2. Benefits

Benefits from the final rule to require a safe handling label and the refrigeration of shell eggs at 7.2 °C (45 °F) come from reducing egg-related illness. The formula FDA used for estimating benefits is:

Marginal health benefits = baseline risk (number of SE illnesses related to shell eggs) x expected reduction in the number of illnesses brought about by the final rule x health cost per illness.

(Comment 40) Although there were no comments directly on the estimated benefits, several comments argued that FDA used too high a baseline number of SE illnesses. In addition, some comments cited new data from CDC on SE. In the economic analysis in the proposal, FDA used the results of the USDA SE risk assessment for one estimate of the baseline risk and the CDC *Salmonella* surveillance data for another estimate of the baseline (64 FR 36516 at 36520). The CDC active surveillance data showed a 44 percent fall in SE between 1996 and 1998 (Ref. 9). CDC also released a new estimate of the total number of illness associated with *Salmonella* (Ref. 10). The new estimate of the total number of illnesses from *Salmonella* is lower than previous estimates, which implies that the baseline number of SE-related illnesses is also lower. In response to the comments on FDA's baseline number of illnesses, FDA adjusted the CDC surveillance baseline to incorporate the recent CDC surveillance data and estimated number of SE-related illnesses.[2] The SE risk assessment model baseline did not use CDC cases, so it does not change. Table 1 of this document shows the USDA SE risk assessment baseline, the FDA-modified USDA SE risk assessment baseline (for explanation of this modification, see footnote 1 in section II.A.8 of this document), the CDC surveillance baseline, and the adjusted CDC surveillance baseline.

TABLE 1.—FOUR ANNUAL ILLNESSES FROM ESTIMATES OF SALMONELLA ENTERITIDIS (SE) IN SHELL EGGS

	5th Percentile	Median	Mean	95th Percentile
a. USDA SE Risk Assessment				
Illnesses	126,374	504,082	661,633	1,742,592
Arthritis	3,631	14,864	19,994	55,915
Deaths	68	301	391	1,050
b. USDA SE Risk Assessment as Modified by FDA				
Illnesses	115,645	416,156	569,231	1,508,814
Arthritis	3,372	12,548	17,175	48,594
Deaths	66	250	354	985
c. CDC Surveillance Model				
Illnesses	63,884	189,599	191,511	319,275
Arthritis	1,330	5,533	5,727	12,202
Deaths	37	122	115	197
d. Revised CDC Surveillance Model				
Illnesses	36,523	112,138	114,271	194,796
Arthritis	762	3,011	3,410	7,251
Deaths	21	66	68	117

FDA used the USDA SE risk assessment model to estimate the expected reduction in illnesses attributed to the rule. The design of the USDA SE risk assessment model allowed the agency to estimate the number of illnesses prevented by comparing the baseline number of illnesses with the number of illnesses under the rule.

FDA calculated the health cost per illness prevented by classifying SE illnesses by the severity of outcome: Mild, moderate, and severe acute gastrointestinal illnesses; resolved and chronic reactive arthritis; and death. The agency then multiplied the estimated monetary health cost per type of illnesses by the number of illnesses prevented of each type. FDA calculated total health benefits from the final rule with the following formula:

Total health benefits = (number of mild cases prevented x $ per case) + (number of moderate cases prevented x $ per case) + (number of severe-acute cases prevented x $ per case) + (number of resolved cases of arthritis prevented x $ per case) + (number of chronic cases of arthritis prevented x $ per case) + (number of deaths x $ per death).

The baseline risk, the expected reduction in risk, and the health costs per illness are all uncertain. FDA, therefore, estimated a distribution of possible health benefits for the final rule, with the distribution based on the probability distributions associated with the main uncertainties. FDA estimated that this final rule would reduce the number of egg-related illnesses by 6 to

[2] In the analysis of the proposed rule, FDA estimated the number of SE illnesses from shell eggs with a Monte Carlo simulation. In one simulation, FDA used CDC surveillance data from 1988 through 1997 to calculate that the annual average number of SE isolates was 8,400. FDA then applied the probability that an isolate would be reported that was used in the USDA SE risk assessment, i.e., 0.014, to estimate the total number of SE cases. FDA assumed, based on outbreak and other information, that 10 to 60 percent of all SE cases were associated with shell eggs. In the revised CDC surveillance model, FDA used CDC surveillance data from 1989 through 1998 to calculate an average annual number of SE isolates of 8,300. The agency applied the probability of reporting used in the new CDC foodborne illness estimates, 0.026, to estimate the total number of SE cases (Ref. 10). As in the proposed rule, FDA assumed that 10 to 60 percent of all SE cases were associated with shell eggs. Part d of table 1 shows the results of the simulation based on the revised CDC data.

49 percent (5th to 95th percentile), with the median equal to 14.5 percent and the mean equal to 19 percent. The ranges (5th to 95th percentile) of estimated annual benefits for the three baselines are shown in table 2 of this document.

TABLE 2.—TOTAL ANNUAL HEALTH BENEFITS FROM THE REDUCTION IN SALMONELLOSIS ATTRIBUTABLE TO THE PROPOSED SHELL EGG RULES: USDA[1] SE[2] RISK ASSESSMENT BASELINE, CDC[3] SURVEILLANCE BASELINE, AND ADJUSTED CDC SURVEILLANCE BASELINE

Variable	5th Percentile	Median	Mean	95th Percentile
a. Modified USDA SE Risk Assessment Baseline				
Illnesses prevented	12,369	65,801	115,848	407,064
Health benefits	$86.7 million	$703 million	$1,700 million	$6,610 million
b. CDC Surveillance Baseline				
Illnesses prevented	7,032	25,132	36,937	107,230
Health benefits	$49.2 million	$303 million	$501 million	$1,679 million
c. Revised CDC Surveillance Baseline				
Illnesses prevented	3,925	14,958	21,961	62,991
Health benefits	$32.9 million	$259.5 million	$466.3 million	$1,619 million

[1] USDA means U.S. Department of Agriculture.
[2] SE means *Salmonella* Enteritidis.
[3] CDC means the Centers for Disease Control and Prevention.

FDA estimated the benefits derived from extending the compliance period for the labeling regulation. With the longer compliance period for the labeling provision, some of the labeling benefits will be postponed for 3 months. In the analysis of the proposal, the agency estimated the median benefits attributable to labeling alone to be $261 million using the USDA SE risk assessment baseline and $103 million using the CDC surveillance baseline. With the revised CDC surveillance baseline, median labeling benefits are $91 million. FDA used a 7 percent rate of discount to estimate the reduction in benefits from increasing the compliance period for labeling by 3 months. The later effective date will reduce median health benefits by, at most, $5 million under the USDA SE risk assessment baseline and $2 million under either version of the CDC surveillance baseline because some labels would be in place before the effective date. Because it is based on more recent information, the agency believes that $2 million is the best estimate of the reduction in benefits associated with the later effective date for the safe handling label.

The benefit estimates above depend on a number of assumptions including assumptions about individual response to the egg labels. Modification of these assumptions would lead to changes (increases or decreases) in the estimate of the benefits of this rule.

3. Costs

FDA received no comments on the estimated costs of this rule and, therefore, will use the same estimate reported in the analysis of the proposal. The costs of the final rule are the sum of the costs of changes in manufacturing practices—labeling and refrigeration—and changes in consumer practices—egg preparation and consumption.

a. *Labeling*. The costs of labeling are the sum of inventory disposal, label redesign and administrative costs. FDA calculated labeling costs with the following model:

Labeling cost = ($ administrative costs per firm x number of affected firms) + ($ value of cartons manufactured x disposal percentage of carton inventory) + (number of affected labels x $ redesign cost per label).

In the analysis of the proposed rule, FDA estimated the total cost of labeling for a 6-month compliance period to be a one-time cost of approximately $18 million. The cost included administrative costs, inventory disposal costs, and label redesign costs. Several comments stated that inventory and redesign costs would be high, but did not state whether the cost estimates FDA presented were high. One comment from a carton manufacturer stated that redesign costs for its foam labels would be $2 million. Based on the market share cited in the comment, the cost per SKU would be about $500, which is the cost used in the proposal for a 6-month compliance period.

Another comment stated that in order to print on the sides of cartons manufacturers of smaller egg cartons would have to purchase new equipment costing several million dollars. The agency disagrees that such purchases will be necessary. With redesign and reduced type size for non-mandatory material, sufficient free space will be available for the safe handling statement without the need to print on the sides of the cartons. The shorter safe handling statement in this final rule (compared to the statement in the proposal) increases the agency's confidence that smaller egg cartons will have sufficient space.

In light of FDA's decision to extend the compliance period to 9 months, labeling costs will decrease. In the analysis of the proposal, FDA compared a 6-month compliance period with a 12-month compliance period. FDA now assumes that the labeling costs for a 9-month compliance will be about halfway between the costs for 6- and 12-month periods. As table 3 of this document shows, this assumption leads to estimated costs of $15 million.

TABLE 3.—ESTIMATED TOTAL COSTS TO INCORPORATE SAFE HANDLING STATEMENTS (TOTAL COSTS ROUNDED TO NEAREST MILLION)

Compliance Period	6 Months	9 Months	12 Months
Total administrative costs	$280,000	$240,000	$200,000
Total inventory disposal costs	$3,000,000	$2,250,000	$1,500,000
Total label redesign costs	$15,000,000	$12,500,000	$10,000,000
Total labeling costs	$18,000,000	$15,000,000	$12,000,000

FDA believes that the 9-month compliance period combined with the shortening of the safe handling statement may reduce labeling costs by more than the $3 million difference shown in table 3. The shorter statement should eliminate many of the problems associated with fitting the statement on cartons with limited flat space. With 3 more months for compliance, many more establishments will be able to use up all of their carton inventories before the effective date.

b. *Refrigeration*. FDA estimated the refrigeration costs to be the cost of the additional equipment required for all establishments to maintain an ambient temperature of 7.2 °C (45 °F). The agency calculated the cost by multiplying the estimate of the number of establishments that would require new (or upgraded) equipment by the cost of equipment. FDA estimated the number of establishments that would require new equipment by assuming that no establishments in States that have adopted the Food Code and some fraction—with one-third the most likely—of establishments in States that have not adopted the Food Code would require new equipment. FDA used industry sources to obtain estimates of the range of costs of new or additional equipment necessary to meet the refrigeration provision of the final rule. The estimated costs per establishment ranged from close to zero for small equipment upgrades to $6,000 for a large new refrigerator.

FDA estimated a distribution of the total possible refrigeration costs for the final rule. The range (5th to 95th percentile) of estimated one-time refrigeration costs was $7 million to $228 million, with a median of $31 million.

c. *Changes in consumer practices*. FDA estimated the annual costs to consumers of changing the way eggs are prepared and consumed as:

Cost of changes in consumer practices = annual number of eggs consumed x baseline fraction of eggs consumed undercooked x fractional reduction in undercooked eggs in response to safe handling label x $ value of undercooking one egg.

This cost to consumers is uncertain. The range (5th to 95th percentile) of annual costs was $2 million to $20 million, with a median of $10 million. The cost of changes in consumer practices is an annual recurring cost of the final rule.

4. Summary of Costs and Benefits

Table 4 of this document shows the median estimated benefits and costs of the final rule.

TABLE 4.—MEDIAN ANNUAL ESTIMATED BENEFITS AND COSTS OF THE FINAL RULE (IN MILLIONS OF DOLLARS)

Benefits/Costs	First Year	All Other Years
Median estimated benefits (USDA[1] SE[2] risk assessment baseline)	$700	$700
Median estimated benefits (original CDC[3] surveillance baseline)	$300	$300
Median estimated benefits (revised CDC surveillance baseline, final rule)	$260	$260
Median estimated costs (proposed rule)	$60	$10
Median estimated cost (final rule)	$56	$10

[1] U.S. Department of Agriculture
[2] *Salmonella* Enteritidis
[3] Centers for Disease Control and Prevention

B. Small Entity Analysis

1. Introduction

FDA has examined the economic implications of this final rule as required by the Regulatory Flexibility Act (5 U.S.C. 601–612). If a rule has a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires agencies to analyze regulatory options that would lessen the economic effect of the rule on small entities. FDA finds that, under the Regulatory Flexibility Act, this final rule will have a significant economic impact on a substantial number of small entities.

2. Economic Effects on Small Entities

a. *Number of small entities affected*. The final rule will affect many small entities, including egg processors, grocery stores and other stores including roadside stands, restaurants, and other food service establishments. FDA has not been able to determine how many of the 669 egg processors registered with the USDA are small businesses (Ref. 11). Egg processors generally fall into two industrial classifications: Poultry slaughtering and processing (standard industrial classification (SIC) code 2015) and whole poultry and poultry products (SIC code 5144). The two classifications roughly correspond to in-line and off-line processors. In-line processors package the eggs at the egg laying facility. Off-line processors ship the eggs to packers.

The Small Business Administration (SBA) defines in-line egg processors (SIC code 2015–03) to be small businesses if they employ 500 or fewer people. According to a search in Dun's Market Identifiers (Ref. 12) 25 in-line egg-processing firms would be defined as small. SBA defines off-line processors (SIC code 5144) to be small if they employ 100 or fewer people. Dun's Market Identifiers did not have a subcategory for egg processors. For the entire category of poultry and poultry products (SIC code 5144), 80 percent of establishments employ fewer than 100 workers. If the same proportion holds for the subcategory composed of egg processors, then 470 firms would be classified as small.[3] FDA, therefore,

[3] The estimated total number of in-line establishments is 134, but 52 are branches of firms. If the total number of in-line firms is 82(=134 − 52),

Continued

estimated the total number of small egg processors to be 495 (= 25 + 470).

The refrigeration provision will affect small establishments that are not currently refrigerating at 7.2 °C (45 °F). SBA defines grocery stores (SIC code 5411) to be small if annual gross revenue is less than $20 million. Other food stores (SIC codes 5431, 5451, and 5499), which include fruit and vegetable markets, dairy product stores, and miscellaneous food stores, are small if annual sales are less than $5 million. Restaurants are small if annual sales are less than $5 million and institutions are small if sales are less than $15 million.

As shown in table 5 of this document, FDA estimated that the number of small establishments affected by the final refrigeration provision will be 25,400. One comment questioned how FDA derived this estimate. The agency derived this estimate of small businesses affected from the estimate for all establishments affected. FDA estimated the number of establishments (small and large) currently not keeping eggs at an ambient temperature of 7.2 °C (45 °F) by assuming that some fraction of establishments in States without temperature requirements were holding eggs at temperatures greater than 7.2 °C (45 °F). FDA does not know the fraction of establishments holding shell eggs at temperatures greater than 7.2 °C (45 °F), so the agency used a Monte Carlo simulation to estimate a distribution for the number of establishments affected. In the simulation, FDA assumed that in each State without a 7.2 °C (45 °F) requirement, between 0 and 100 percent (with 33 percent the most likely proportion) of the establishments held shell eggs at a higher temperature. The mean result of the 1,000 iterations of the simulation was a total of approximately 44,400 large and small establishments, which included 10,700 grocery and other food stores, 24,000 restaurants, and 9,700 institutions (including schools, hospitals, nursing homes, prisons, military establishments, and universities) (64 FR 36516 at 36536, July, 9 1999). FDA reported only the mean of the distribution of simulation results. The results for the simulated number of establishments ranged from a 5th percentile of 12,320 to a 95th percentile of 81,700.

To estimate the number of small establishments holding eggs at temperatures above 7.2 °C (45 °F), FDA assumed that the proportion of small establishments affected by the refrigeration provision would be the same as the fraction of institutions for the entire category. According to SBA size standards for small entities, 71 percent of grocery and other food stores and 54 percent of restaurants are small. Institutions are more complicated, because they cut across SIC codes. FDA assumed that 50 percent of institutions serving eggs are small. FDA then estimated the number of small establishments affected by the refrigeration provision by multiplying the fraction assumed to be small by the total number of establishments affected. Table 5 of this document shows the mean number of small establishments likely to be affected by the refrigeration provision of the final rule. The agency also has included the 5th and 95th percentiles to show the uncertainty associated with the mean estimates. FDA emphasizes that these are estimates, not a count of the actual firms affected. The agency uses them to demonstrate that this final rule will affect a substantial number of small establishments.

TABLE 5.—NUMBER OF SMALL ENTITIES LIKELY TO BE AFFECTED BY THE REFRIGERATION PROVISION OF THE FINAL RULE (SIMULATION RESULTS; ROUNDED TO NEAREST 100)

Category	5th Percentile	Mean	95th Percentile
Grocery and Other Stores	2,100	7,600	14,000
Restaurants	3,600	13,000	23,900
Institutions	1,300	4,800	8,900
Total	7,000	25,400	46,800

b. *Costs for small entities*. For the 9-month compliance period in the final rule, redesign costs per SKU will be about $875 for pulp cartons and $375 for foam cartons.[4] The cost of the labeling provision borne by small processors will vary with the number of SKU's and the fraction of the costs passed to the processors from carton manufacturers. The average number of SKU's per processor for the industry is 30; FDA assumed small processors will market somewhere between 2 and 20 SKU's. Additional redesign costs could, therefore, be as high as $17,500 for a small processor (= 20 x $875), although it is unlikely that the processor would bear all redesign costs.

Refrigeration costs vary across establishments, depending on the age of current refrigerators, the planned replacement cycle, and whether the small establishments are currently keeping eggs at or below 7.2 °C (45 °F). FDA assumed that additional refrigeration costs for small retailers will average $633, with $700 the most likely value. The agency also assumed that the proportion of additional refrigeration costs borne by small entities will be the same as the proportion of small entities in each category of establishment. The cost of the refrigeration provision to small entities is shown in table 6.

TABLE 6.—COSTS TO SMALL ENTITIES OF THE REFRIGERATION PROVISION OF THE FINAL RULE

Category	Total Costs for Small Entities	Percent of Total
Grocery and Other Stores	$4.8 million	30
Restaurants	$8.2 million	51
Institutions	$3.1 million	19
Total	$16.1 million	100

and the number of processors is 669, then 587 firms are off-line processors. If 80 percent are small, then 470 off-line(=0.8 × 587) processors are small.

[4] In the analysis of the proposal, FDA estimated that the average redesign cost for foam cartons would be $500 for a 6-month compliance period and $250 for a 12-month compliance period. In the analysis of the final rule, FDA assumed that the redesign cost for a 9-month compliance period will by $375, midway between the two. Similarly, the agency assumed that the redesign costs for a pulp carton will be $875 for a 9-month compliance period, midway between the $1,000 and $750 estimated for 6-month and 12-month compliance periods.

3. Regulatory Options

a. *Exemption for small establishments*. The burden on small establishments would be lifted if they were exempt from the provisions of the final rule. Most of the establishments affected by this final rule, however, are small. Exempting small establishments from its provisions would largely negate the rule. No comments requested exemptions from the proposed rule for small establishments.

b. *Longer compliance periods*. Lengthening the labeling compliance periods for the labeling and refrigeration provisions would provide regulatory relief (cost reduction) for small entities. Lengthening the refrigeration compliance period from the final rule's effective date to 12 months after the effective date would reduce costs by allowing establishments to postpone upgrading their equipment. To estimate the regulatory relief from lengthening the refrigeration compliance period, FDA assumed that the reduction in cost would equal the interest (discounted at 7 percent per year) on the cost of refrigeration equipment over the extension of the compliance period. If the compliance period were extended by 12 months, the interest on the cost of equipment would be over $1 million (= $16.1 x 0.07). For the most likely equipment cost of $700 per small establishment, the interest saving would be about $50 (= 0.07 x $700). FDA received no comments requesting longer compliance periods for the refrigeration provision.

(Comment 41) Some comments requested a 12-month compliance period for the labeling provision. The agency has responded by increasing the compliance period to 9 months. In the cost analysis of this final rule, FDA estimated that total industry costs would fall by at least $3 million if the compliance period for the labeling provisions were extended from 6 months to 9 months. Most of the relief will come from the reduced costs of redesigning the carton label and reduced inventory disposal costs. For pulp cartons, extending the compliance period to 9 months will reduce redesign costs from $1,000 (for a 6-month compliance period) to $875 per SKU. For foam cartons, extending the compliance period to 9 months will reduce redesign costs from $500 (for a 6-month compliance period) to $375 per SKU. The comments stressed the difficulty of redesign caused by the length of the statement in the proposal. Because the safe handling statement in the final rule has been shortened, FDA expects that redesign costs will not be as large a burden as many comments on the proposed rule implied. Furthermore, redesign costs are not necessarily passed on to small processors.

Small processors will, however, bear inventory disposal costs. In the cost analysis of the proposal, FDA estimated disposal costs for label inventories to be $3 million for a 6-month compliance period. The agency believes that the principal relief for small egg packers and processors will come from the reduction in inventory costs. For a 9-month compliance period, the disposal costs for label inventories will be $2,250,000. FDA does not know what fraction of those costs will be borne by small processors. If the agency assumes that small processors bear half of the disposal costs, then the average inventory cost per small processor would be $3,000 (= ($3,000,000 x 0.5) / 495) for a 6-month compliance period and $2,250 (= ($2,250,000 x 0.5) / 495) for a 9-month compliance period. Changing the effective date to 9 months after publication will, therefore, save $750 per small processor. For processors holding large inventories, the saving will be larger. The longer compliance period will also increase the likelihood that small processors will use up their carton inventories and bear no disposal costs.

4. Recordkeeping and Recording Requirements

The Regulatory Flexibility Act requires a description of the recordkeeping and recording required for compliance with this rule. This rule does not require the preparation of a report or a record.

5. Worst Case for a Small Establishment

The greatest impact to a small retail establishment as a consequence of the refrigeration provision would be the purchase of a new refrigerator. In the analysis of the proposal, FDA estimated the cost of a new refrigerator to be between $2,500 and $6,000. In order to estimate the worst possible outcome for a small entity, FDA assumed that some small retail establishment would purchase a new refrigerator at the maximum estimated cost of $6,000. If this cost were amortized over a 10-year period (using a discount rate of 7 percent) then the approximate annual expense would be $850 per year for 10 years. According to Dun and Bradstreet, 85 percent of all grocery stores have annual sales of less than $20 million, and 71 percent of all restaurants have annual sales of less than $5 million (Ref. 12). Among the smallest 10 percent of these establishments, the average sales volume is $100,000 per year for a grocery store and $50,000 per year for a restaurant. Therefore, an additional expense of $850 per year amounts to approximately 1 to 2 percent of average sales per year for the smallest stores. Grocery stores and restaurants typically have profit margins on sales of 1 to 5 percent, so a reduction of the profit margin by 40 to 100 percent would be the worst-case outcome for the smallest retailers.

Because the comments on the proposed rule emphasized the importance of inventories, FDA concludes that the worst outcome from the labeling provision would occur if a small packer held large inventories of cartons that could not be used. If average inventory costs per small processor (for a 9-month compliance period) are $2,250, some establishments could bear much higher inventory costs.

6. Summary of Small Entity Analysis

FDA estimated that the labeling provisions could impose average inventory costs of $2,250 on 495 small processing establishments. The refrigeration provision would impose estimated average costs of $633 on approximately 25,400 small establishments. The agency concludes that this final rule will have a significant economic impact on a substantial number of small entities.

V. Federalism

These rules establish national safe handling labeling and retail refrigeration requirements for shell eggs under the FD&C Act and the PHS Act. FDA has determined that these egg safety final rules have federalism implications under Executive Order 13132 because they will preempt State and local labeling and retail refrigeration requirements that are not as stringent as Federal requirements. Although FDA proposed this rule before Executive Order 13132 was issued or became effective, FDA believes that these final rules satisfy the requirements of Executive Order 13132.

The constitutional basis for FDA's authority to regulate the safety and labeling of foods is the statutes created by Congress to regulate food safety. As set out in the preamble to the proposed and final rules, foodborne illness resulting from SE contaminated eggs is a public health problem nationwide. However, only 37 States and the District of Columbia require refrigeration at 7.2 °C (45 °F) or lower in retail establishments, the temperature that FDA has determined is necessary to prevent growth of SE. No State has a requirement for complete safe handling instructions. Accordingly, there is a clear need for Federal action to establish national standards that will ensure the safety of eggs for all consumers in this country.

To ensure the safety of eggs for all consumers in this country, not only must there be national standards, but enforcement of these standards must be uniform across the country. However, because State and local public health officials are the primary enforcement officials in retail establishments, FDA has recognized that it must rely on these officials to provide the bulk of the enforcement of these regulations. FDA thus believes that it is critical for these regulations to establish uniform minimum standards. If less stringent State or local refrigeration and labeling requirements are not preempted, enforcement of those less stringent requirements—which are not sufficient to protect the public health—will interfere with the cooperative enforcement of the Federal egg refrigeration and labeling requirements. FDA believes that the cooperative enforcement approach utilized in these rules is critical to effective implementation of these important food safety requirements.

Thus, although Congress did not expressly preempt State law in this area, FDA finds preemption is needed because State and local laws that are less stringent than the Federal requirements will significantly interfere with the important public health goals of these regulations.

FDA does not believe that preemption of State and local refrigeration and labeling requirements that are the same as or more stringent than the requirements of these regulations is necessary, as enforcement of such State and local requirements will not interfere with the food safety goals of these regulations. Accordingly, the preemptive effect of this rule is limited to State or local requirements that are not as stringent as the requirements of these regulations; requirements that are the same as or more stringent than FDA's requirements remain in effect.

Although the proposed rule was published before Executive Order 13132, FDA gave States and localities notice of the intended preemptive effect of these rules in the notice of proposed rulemaking. In addition, FDA consulted with representatives of State and local governments before issuing the proposal. FDA received one comment from a State Department of Agriculture, which did not discuss preemption and one comment from an organization representing State and local food safety officials, which raised questions about the scope of preemption. These questions are answered in the body of the preamble. As set out in the preamble and this discussion on federalism, the preemptive effect of these regulations is very narrow.

VI. Environmental Impact

The agency has previously considered the environmental effects of this rule as announced in the proposal (64 FR 36492, July 6, 1999). No new information or comments have been received that would affect the agency's previous determination that there is no significant impact on the human environment and that environmental impact statement is not required.

VII. Paperwork Reduction Act of 1995

FDA concludes that the labeling requirements in this document are not subject to review by the Office of Management and Budget because they do not constitute a ''collection of information'' under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Rather, the safe handling statement is ''public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public'' (5 CFR 1320.3(c)(2)).

VIII. References

The following references have been placed on display at the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. President's Council on Food Safety, ''Egg Safety from Production to Consumption: an Action Plan to Eliminate *Salmonella* Enteritidis Illnesses due to Eggs,'' December 10, 1999.
2. Summary Report on Focus Group Testing of Safe Handling Statements on Shell Eggs. Levy, A. S. and A. W. Heaton, Consumer Studies Team, Office of Scientific Analysis and Support, Center for Food Safety and Applied Nutrition, Food and Drug Administration, March 13, 1998.
3. FDA memorandum, Alan S. Levy to Kenneth Falci, June 26, 1999.
4. ''FDA: Consumers are Changing,'' *Food Safety Educator*, vol. 3(4), p. 2, 1998.
5. U.S. Public Health Service, ''Food Code: 1999, Recommendations of the United States Public Health Service, Food and Drug Administration,'' Ch. 3.
6. Review of Research Communicating Warning Information. Consumer Studies Team, Office of Scientific Analysis and Support, Center for Food Safety and Applied Nutrition, Food and Drug Administration, p. 54, July 1998.
7. Food Marketing Institute (conducted by Abt Associates, Inc.), ''Trends in the United States: Consumer Attitudes & the Supermarket,'' Washington, DC, Food Marketing Institute, 1996.
8. United States Department of Agriculture, Food Safety and Inspection Service, FSIS Directive 8840.1, ''Enforcement of Refrigeration and Labeling Requirements for Shell Eggs Packed for Consumer Use,'' June 18, 1999.
9. Centers for Disease Control and Prevention, ''Incidence of Foodborne Illnesses: Preliminary Data from the Foodborne Diseases Active Surveillance Network (FoodNet)—United States, 1998,'' *Morbidity and Mortality Weekly Report*, vol. 48, pp. 189–194, March 12, 1999.
10. Mead, P. S., L. Slutsker, V. Dietz, L. F. McCaig, J. S. Bresee, C. Shapiro, P. M. Griffin, and R. V. Tauxe, ''Food-Related Illness and Death in the United States,'' *Emerging Infectious Diseases*, vol. 5, pp. 607–625, September to October 1999.
11. FDA memorandum, Peter Vardon to the record, October 7, 1998.
12. The Dialog Corp., Dun's Market Identifiers, Mountain View, CA, March 19, 1998.

List of Subjects

21 CFR Part 16

Administrative practice and procedure.

21 CFR Part 101

Food labeling, Nutrition, Reporting and recordkeeping requirements.

21 CFR Part 115

Eggs, Refrigeration.

Therefore, under the Federal Food, Drug, and Cosmetic Act and the Public Health Services Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR chapter I is amended as follows:

PART 16—REGULATORY HEARING BEFORE THE FOOD AND DRUG ADMINISTRATION

1. The authority citation for 21 CFR part 16 continues to read as follows:

Authority: 15 U.S.C. 1451–1461; 21 U.S.C. 141–149, 321–394, 467f, 679, 821, 1034; 28 U.S.C. 2112; 42 U.S.C. 201–262, 263b, 364.

2. Section 16.5 is amended by adding paragraph (a)(4) to read as follows:

§ 16.5 Inapplicability and limited applicability.

(a) * * *

(4) A hearing on an order for relabeling, diversion, or destruction of shell eggs under section 361 of the Public Health Service Act (42 U.S.C. 264) and §§ 101.17(h) and 115.50 of this chapter.

* * * * *

PART 101—FOOD LABELING

3. The authority citation for 21 CFR part 101 is revised to read as follows:

Authority: 15 U.S.C. 1453, 1454, 1455; 21 U.S.C. 321, 331, 342, 343, 348, 371; 42 U.S.C. 243, 264, 271.

4. Section 101.17 is amended by revising the section heading and by adding paragraph (h) to read as follows:

§ 101.17 Food labeling warning, notice, and safe handling statements.

* * * * *

(h) *Shell eggs.* (1) The label of all shell eggs, whether in intrastate or interstate commerce, shall bear the following statement:

SAFE HANDLING INSTRUCTIONS: To prevent illness from bacteria: keep eggs refrigerated, cook eggs until yolks are firm, and cook foods containing eggs thoroughly.

(2) The label statement required by paragraph (h)(1) of this section shall appear prominently and conspicuously, with the words ''SAFE HANDLING INSTRUCTIONS'' in bold type, on the information panel or principal display panel of the container.

(3) The label statement required by paragraph (h)(1) of this section shall be set off in a box by use of hairlines.

(4) Shell eggs that have been, before distribution to consumers, specifically processed to destroy all viable *Salmonella* shall be exempt from the requirements of paragraph (h) of this section.

(5) The safe handling statement for shell eggs that are not for direct sale to consumers, e.g., those that are to be repacked or labeled at a site other than where originally processed, or are sold for use in food service establishments, may be provided on cartons or in labeling, e.g., invoices or bills of lading in accordance with the practice of the trade.

(6) Under sections 311 and 361 of the Public Health Service Act (PHS Act), any State or locality that is willing and able to assist the agency in the enforcement of paragraphs (h)(1) through (h)(5) of this section, and is authorized to inspect or regulate establishments handling packed shell eggs, may in its own jurisdiction, enforce paragraphs (h)(1) through (h)(5) of this section through inspections under paragraph (h)(8) of this section and through administrative enforcement remedies identified in paragraph (h)(7) of this section until FDA notifies the State or locality in writing that such assistance is no longer needed. When providing such assistance, a State or locality may follow the hearing procedures set out in paragraphs (h)(7)(ii)(C) through (h)(7)(ii)(D) of this section, substituting, where necessary, appropriate State or local officials for designated FDA officials or may utilize State or local hearing procedures if such procedures satisfy due process.

(7) This paragraph (h) is established under authority of both the Federal Food, Drug, and Cosmetic Act (the act) and the PHS Act. Under the act, the agency can enforce the food misbranding provisions under 21 U.S.C. 331, 332, 333, and 334. However, 42 U.S.C. 264 provides for the issuance of implementing enforcement regulations; therefore, FDA has established the following administrative enforcement procedures for the relabeling, diversion, or destruction of shell eggs and informal hearings under the PHS Act:

(i) Upon finding that any shell eggs are in violation of this section an authorized FDA representative or State or local representative in accordance with paragraph (h)(6) of this section may order such eggs to be relabeled under the supervision of said representative, diverted, under the supervision of said representative for processing in accordance with the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031 *et seq.*), or destroyed by or under the supervision of an officer or employee of the FDA, or, if applicable, of the State or locality, in accordance with the following procedures:

(A) *Order for relabeling, diversion, or destruction under the PHS Act.* Any district office of the FDA or any State or locality acting under paragraph (h)(6) of this section, upon finding shell eggs held in violation of this regulation, may serve upon the person in whose possession such eggs are found a written order that such eggs be relabeled with the required statement in paragraph (h)(1) of this section before further distribution. If the person chooses not to relabel, the district office of the FDA or, if applicable, the appropriate State or local agency may serve upon the person a written order that such eggs be diverted (from direct consumer sale, e.g., to food service) under the supervision of an officer or employee of the issuing entity, for processing in accordance with the EPIA (21 U.S.C. 1031 *et seq.*) or destroyed by or under the supervision of the issuing entity, within 10-working days from the date of receipt of the order.

(B) *Issuance of order.* The order shall include the following information:

(*1*) A statement that the shell eggs identified in the order are subject to relabeling, diversion for processing in accordance with the EPIA, or destruction;

(*2*) A detailed description of the facts that justify the issuance of the order;

(*3*) The location of the eggs;

(*4*) A statement that these eggs shall not be sold, distributed, or otherwise disposed of or moved except as provided in paragraph (h)(7)(i)(E) of this section;

(*5*) Identification or description of the eggs;

(*6*) The order number;

(*7*) The date of the order;

(*8*) The text of this entire section;

(*9*) A statement that the order may be appealed by written appeal or by requesting an informal hearing;

(*10*) The name and phone number of the person issuing the order; and

(*11*) The location and telephone number of the responsible office or agency and the name of its director.

(C) *Approval of director.* An order, before issuance, shall be approved by the director of the office or agency issuing the order. If prior written approval is not feasible, prior oral approval shall be obtained and confirmed by written memorandum as soon as possible.

(D) *Labeling or marking of shell eggs under order.* An FDA, State, or local representative issuing an order under paragraph (h)(7)(i)(A) of this section shall label or mark the shell eggs with official tags that include the following information:

(*1*) A statement that the shell eggs are detained in accordance with regulations issued under section 361(a) of the PHS Act (42 U.S.C. 264(a)).

(*2*) A statement that the shell eggs shall not be sold, distributed or otherwise disposed of or moved except, after notifying the issuing entity in writing, to:

(*i*) Relabel, divert them for processing in accordance with the EPIA, or destroy them, or

(*ii*) Move them to another location for holding pending appeal.

(*3*) A statement that the violation of the order or the removal or alteration of the tag is punishable by fine or imprisonment or both (section 368 of the PHS Act, 42 U.S.C. 271).

(*4*) The order number and the date of the order, and the name of the government representative who issued the order.

(E) *Sale or other disposition of shell eggs under order.* After service of the order, the person in possession of the shell eggs that are the subject of the order shall not sell, distribute, or otherwise dispose of or move any eggs subject to the order unless and until the notice is withdrawn after an appeal except, after notifying FDA's district office or, if applicable, the State or local agency in writing, to:

(*1*) Relabel, divert, or destroy them as specified in paragraph (h)(7)(i) of this section, or

(*2*) Move them to another location for holding pending appeal.

(ii) The person on whom the order for relabeling, diversion, or destruction is served may either comply with the order or appeal the order to the FDA Regional Food and Drug Director.

(A) *Appeal of a detention order*. Any appeal shall be submitted in writing to the FDA District Director in whose district the shell eggs are located within 5-working days of the issuance of the order. If the appeal includes a request for an informal hearing, the hearing shall be held within 5-working days after the appeal is filed or, if requested by the appellant, at a later date, which shall not be later than 20-calendar days after the issuance of the order. The order may also be appealed within the same period of 5-working days by any other person having an ownership or proprietary interest in such shell eggs. The appellant of an order shall state the ownership or proprietary interest the appellant has in the shell eggs.

(B) *Summary decision*. A request for a hearing may be denied, in whole or in part and at any time after a request for a hearing has been submitted, if the FDA Regional Food and Drug Director or his or her designee determines that no genuine and substantial issue of fact has been raised by the material submitted in connection with the hearing or from matters officially noticed. If the FDA Regional Food and Drug Director determines that a hearing is not justified, written notice of the determination will be given to the parties explaining the reason for denial.

(C) *Informal hearing*. Appearance by any appellant at the hearing may be by mail or in person, with or without counsel. The informal hearing shall be conducted by the FDA Regional Food and Drug Director or his designee, and a written summary of the proceedings shall be prepared by the FDA Regional Food and Drug Director.

(*1*) The FDA Regional Food and Drug Director may direct that the hearing be conducted in any suitable manner permitted by law and this section. The FDA Regional Food and Drug Director has the power to take such actions and make such rulings as are necessary or appropriate to maintain order and to conduct an informal fair, expeditious, and impartial hearing, and to enforce the requirements concerning the conduct of hearings.

(*2*) Employees of FDA will first give a full and complete statement of the action which is the subject of the hearing, together with the information and reasons supporting it, and may present oral or written information relevant to the hearing. The party requesting the hearing may then present oral or written information relevant to the hearing. All parties may conduct reasonable examination of any person (except for the presiding officer and counsel for the parties) who makes any statement on the matter at the hearing.

(*3*) The hearing shall be informal in nature, and the rules of evidence do not apply. No motions or objections relating to the admissibility of information and views will be made or considered, but any party may comment upon or rebut any information and views presented by another party.

(*4*) The party requesting the hearing may have the hearing transcribed, at the party's expense, in which case a copy of the transcript is to be furnished to FDA. Any transcript of the hearing will be included with the FDA Regional Food and Drug Director's report of the hearing.

(*5*) The FDA Regional Food and Drug Director shall prepare a written report of the hearing. All written material presented at the hearing will be attached to the report. Whenever time permits, the FDA Regional Food and Drug Director may give the parties the opportunity to review and comment on the report of the hearing.

(*6*) The FDA Regional Food and Drug Director shall include as part of the report of the hearing a finding on the credibility of witnesses (other than expert witnesses) whenever credibility is a material issue, and shall include a recommended decision, with a statement of reasons.

(D) *Written appeal*. If the appellant appeals the detention order but does not request a hearing, the FDA Regional Food and Drug Director shall render a decision on the appeal affirming or revoking the detention within 5-working days after the receipt of the appeal.

(E) *Regional Food and Drug Director decision*. If, based on the evidence presented at the hearing or by the appellant in a written appeal, the FDA Regional Food and Drug Director finds that the shell eggs were held in violation of this section, he shall affirm the order that they be relabeled, diverted under the supervision of an officer or employee of the FDA for processing under the EPIA, or destroyed by or under the supervision of an officer or employee of the FDA; otherwise, the FDA Regional Food and Drug Director shall issue a written notice that the prior order is withdrawn. If the FDA Regional Food and Drug Director affirms the order he shall order that the relabeling, diversion, or destruction be accomplished within 10-working days from the date of the issuance of his decision. The FDA Regional Food and Drug Director's decision shall be accompanied by a statement of the reasons for the decision. The decision of the FDA Regional Food and Drug Director shall constitute final agency action, reviewable in the courts.

(F) *No appeal*. If there is no appeal of the order and the person in possession of the shell eggs that are subject to the order fails to relabel, divert, or destroy them within 10-working days, or if the demand is affirmed by the FDA Regional Food and Drug Director after an appeal and the person in possession of such eggs fails to relabel, divert, or destroy them within 10-working days, the FDA district office, or, if applicable, the State or local agency may designate an officer or employee to divert or destroy such eggs. It shall be unlawful to prevent or to attempt to prevent such diversion or destruction of the shell eggs by the designated officer or employee.

(8) Persons engaged in handling or storing packed shell eggs for retail distribution shall permit authorized representatives of FDA to make at any reasonable time such inspection of the establishment in which shell eggs are being held, including inspection and sampling of the labeling of such eggs as may be necessary in the judgment of such representatives to determine compliance with the provisions of this section. Inspections may be made with or without notice and will ordinarily be made during regular business hours.

(9) No State or local governing entity shall establish or continue in effect any law, rule, regulation, or other requirement requiring safe handling instructions on unpasteurized shell eggs that are less stringent than those required in paragraphs (h)(1) through (h)(5) of this section.

5. New part 115 is added to read as follows:

PART 115—SHELL EGGS

Authority: 21 U.S.C. 342, 371; 42 U.S.C. 243, 264, 271.

§ 115.50 Refrigeration of shell eggs held for retail distribution.

(a) For purposes of this section a "retail establishment" is an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption directly to consumers.

(b) Except as provided in paragraph (c) of this section, all shell eggs, whether in intrastate or interstate commerce, held for retail distribution:

(1) Shall promptly be placed under refrigeration as specified in paragraph (b)(2) of this section upon receipt at a retail establishment, except that, when short delays are unavoidable, the eggs

shall be placed under refrigeration, as soon as reasonably possible; and

(2) Shall be stored and displayed under refrigeration at an ambient temperature not greater than 7.2 °C (45 °F) while held at a retail establishment.

(c) Shell eggs that have been specifically processed to destroy all viable *Salmonella* shall be exempt from the requirements of paragraph (b) of this section.

(d) Under sections 311 and 361 of the Public Health Service Act (PHS Act), any State or locality that is willing and able to assist the agency in the enforcement of paragraph (b) of this section, and is authorized to inspect or regulate retail establishments, may, in its own jurisdiction, enforce paragraph (b) of this section through inspections under paragraph (f) of this section and through administrative enforcement remedies identified in paragraph (e) of this section until FDA notifies the State or locality in writing that such assistance is no longer needed. When providing assistance under paragraph (e) of this section, a State or locality may follow the hearing procedures set out in paragraphs (e)(2)(iii) through (e)(2)(iv) of this section, substituting, where necessary, appropriate State or local officials for designated FDA officials or may utilize State or local hearing procedures if such procedures satisfy due process.

(e) This section is established under authority of both the Federal Food, Drug, and Cosmetic Act (the act) and the PHS Act. Under the act, the agency can enforce the food adulteration provisions under 21 U.S.C. 331, 332, 333, and 334. However, 42 U.S.C. 264 provides for the issuance of implementing enforcement regulations; therefore, FDA has established the following administrative enforcement procedures for the diversion or destruction of shell eggs and for informal hearings under the PHS Act:

(1) Upon finding that any shell eggs have been held in violation of this section, an authorized FDA representative or a State or local representative in accordance with paragraph (d) of this section may order such eggs to be diverted, under the supervision of said representative, for processing in accordance with the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031 *et seq.*) or destroyed by or under the supervision of an officer or employee of the FDA, or, if applicable, of the State or locality in accordance with the following procedures:

(i) *Order for diversion or destruction.* Any district office of FDA or any State or local agency acting under paragraph (d) of this section, upon finding shell eggs held in violation of this section, may serve upon the person in whose possession such eggs are found a written order that such eggs be diverted, under the supervision of an officer or employee of the issuing entity, for processing in accordance with the EPIA (21 U.S.C. 1031 *et seq.*) or destroyed by or under the supervision of said district office, within 10-working days from the date of receipt of the order.

(ii) *Issuance of order.* The order shall include the following information:

(A) A statement that the shell eggs identified in the order are subject to diversion for processing in accordance with the EPIA or destruction;

(B) A detailed description of the facts that justify the issuance of the order;

(C) The location of the eggs;

(D) A statement that these eggs shall not be sold, distributed, or otherwise disposed of or moved except as provided in paragraph (e)(1)(v) of this section;

(E) Identification or description of the eggs;

(F) The order number;

(G) The date of the order;

(H) The text of this entire section;

(I) A statement that the order may be appealed by written appeal or by requesting an informal hearing;

(J) The name and phone number of the person issuing the order; and

(K) The location and telephone number of the office or agency and the name of its director.

(iii) *Approval of District Director.* An order, before issuance, shall be approved by the Food and Drug Administration (FDA) District Director in whose district the shell eggs are located. If prior written approval is not feasible, prior oral approval shall be obtained and confirmed by written memorandum as soon as possible.

(iv) *Labeling or marking of shell eggs under order.* An FDA, State, or local agency representative issuing an order under paragraph (e)(1) of this section shall label or mark the shell eggs with official tags that include the following information:

(A) A statement that the shell eggs are detained in accordance with regulations issued under section 361(a) of the PHS Act (42 U.S.C. 264(a)).

(B) A statement that the shell eggs shall not be sold, distributed or otherwise disposed of or moved except, after notifying the issuing entity in writing, to:

(*1*) Divert them for processing in accordance with the EPIA or destroy them; or

(*2*) Move them to an another location for holding pending appeal.

(C) A statement that the violation of the order or the removal or alteration of the tag is punishable by fine or imprisonment or both (section 368 of the PHS Act, 42 U.S.C. 271).

(D) The order number and the date of the order, and the name of the government representative who issued the order.

(v) *Sale or other disposition of shell eggs under order.* After service of the order, the person in possession of the shell eggs that are the subject of the order shall not sell, distribute, or otherwise dispose of or move any eggs subject to the order unless and until the notice is withdrawn after an appeal except, after notifying FDA's district office or, if applicable, the State or local agency in writing, to:

(A) Divert or destroy them as specified in paragraph (e)(1)(i) of this section; or

(B) Move them to another location for holding pending appeal.

(2) The person on whom the order for diversion or destruction is served may either comply with the order or appeal the order to the FDA Regional Food and Drug Director in accordance with the following procedures:

(i) *Appeal of a detention order.* Any appeal shall be submitted in writing to FDA's District Director in whose district the shell eggs are located within 5-working days of the issuance of the order. If the appeal includes a request for an informal hearing, the hearing shall be held within 5-working days after the appeal is filed or, if requested by the appellant, at a later date, which shall not be later than 20-calendar days after the issuance of the order. The order may also be appealed within the same period of 5-working days by any other person having an ownership or proprietary interest in such shell eggs. The appellant of an order shall state the ownership or proprietary interest the appellant has in the shell eggs.

(ii) *Summary decision.* A request for a hearing may be denied, in whole or in part and at any time after a request for a hearing has been submitted, if the FDA Regional Food and Drug Director or his or her designee determines that no genuine and substantial issue of fact has been raised by the material submitted in connection with the hearing or from matters officially noticed. If the FDA Regional Food and Drug Director determines that a hearing is not justified, written notice of the determination will be given to the parties explaining the reason for denial.

(iii) *Informal hearing.* Appearance by any appellant at the hearing may be by mail or in person, with or without counsel. The informal hearing shall be conducted by the FDA Regional Food and Drug Director or his designee, and a written summary of the proceedings shall be prepared by the FDA Regional Food and Drug Director.

(A) The FDA Regional Food and Drug Director may direct that the hearing be conducted in any suitable manner permitted by law and this section. The FDA Regional Food and Drug Director has the power to take such actions and make such rulings as are necessary or appropriate to maintain order and to conduct an informal fair, expeditious, and impartial hearing, and to enforce the requirements concerning the conduct of hearings.

(B) Employees of FDA will first give a full and complete statement of the action which is the subject of the hearing, together with the information and reasons supporting it, and may present oral or written information relevant to the hearing. The party requesting the hearing may then present oral or written information relevant to the hearing. All parties may conduct reasonable examination of any person (except for the presiding officer and counsel for the parties) who makes any statement on the matter at the hearing.

(C) The hearing shall be informal in nature, and the rules of evidence do not apply. No motions or objections relating to the admissibility of information and views will be made or considered, but any party may comment upon or rebut any information and views presented by another party.

(D) The party requesting the hearing may have the hearing transcribed, at the party's expense, in which case a copy of the transcript is to be furnished to FDA. Any transcript of the hearing will be included with the FDA Regional Food and Drug Director's report of the hearing.

(E) The FDA Regional Food and Drug Director shall prepare a written report of the hearing. All written material presented at the hearing will be attached to the report. Whenever time permits, the FDA Regional Food and Drug Director may give the parties the opportunity to review and comment on the report of the hearing.

(F) The FDA Regional Food and Drug Director shall include as part of the report of the hearing a finding on the credibility of witnesses (other than expert witnesses) whenever credibility is a material issue, and shall include a recommended decision, with a statement of reasons.

(iv) *Written appeal*. If the appellant appeals the detention order but does not request a hearing, the FDA Regional Food and Drug Director shall render a decision on the appeal affirming or revoking the detention within 5-working days after the receipt of the appeal.

(v) *Regional Food and Drug Director decision*. If, based on the evidence presented at the hearing or by the appellant in a written appeal, the Regional Food and Drug Director finds that the shell eggs were held in violation of this section, he shall affirm the order that they be diverted, under the supervision of an officer or employee of the FDA for processing under the EPIA or destroyed by or under the supervision of an officer or employee of the FDA; otherwise, the Regional Food and Drug Director shall issue a written notice that the prior order is withdrawn. If the Regional Food and Drug Director affirms the order he shall order that the diversion or destruction be accomplished within 10-working days from the date of the issuance of his decision. The Regional Food and Drug Director's decision shall be accompanied by a statement of the reasons for the decision. The decision of the Regional Food and Drug Director shall constitute final agency action, reviewable in the courts.

(vi) *No appeal*. If there is no appeal of the order and the person in possession of the shell eggs that are subject to the order fails to divert or destroy them within 10-working days, or if the demand is affirmed by the Regional Food and Drug Director after an appeal and the person in possession of such eggs fails to divert or destroy them within 10-working days, FDA's district office or appropriate State or local agency may designate an officer or employee to divert or destroy such eggs. It shall be unlawful to prevent or to attempt to prevent such diversion or destruction of the shell eggs by the designated officer or employee.

(f) *Inspection*. Persons engaged in retail distribution of shell eggs shall permit authorized representatives of FDA to make at any reasonable time such inspection of the retail establishment in which shell eggs are being held, including inspection and sampling of such eggs and the equipment in which shell eggs are held and any records relating to such equipment or eggs, as may be necessary in the judgement of such representatives to determine compliance with the provisions of this section. Inspections may be made with or without notice and will ordinarily be made during regular business hours.

(g) *Preemption*. No State or local governing entity shall establish or continue in effect any law, rule, regulation, or other requirement allowing refrigeration of unpasteurized shell eggs at retail establishments at any temperature greater than 7.2 °C (45 °F).

Dated: June 2, 2000.

Jane E. Henney,

Commissioner of Food and Drugs.

Donna E. Shalala,

Secretary of Health and Human Services.

[FR Doc. 00–30761 Filed 11–30–00; 10:20 am]

BILLING CODE 4160–01–F

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REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at http://www.access.gpo.gov/nara/index.html. Some laws may not yet be available.

H.R. 2346/P.L. 106–521

To authorize the enforcement by State and local governments of certain Federal Communications Commission regulations regarding use of citizens band radio equipment. (Nov. 22, 2000; 114 Stat. 2438)

H.R. 5633/P.L. 106–522

District of Columbia Appropriations Act, 2001 (Nov. 22, 2000; 114 Stat. 2440)

S. 768/P.L. 106–523

Military Extraterritorial Jurisdiction Act of 2000 (Nov. 22, 2000; 114 Stat. 2488)

S. 1670/P.L. 106–524

To revise the boundary of Fort Matanzas National Monument, and for other purposes. (Nov. 22, 2000; 114 Stat. 2493)

S. 1880/P.L. 106–525

Minority Health and Health Disparities Research and Education Act of 2000 (Nov. 22, 2000; 114 Stat. 2495)

S. 1936/P.L. 106–526

Bend Pine Nursery Land Conveyance Act (Nov. 22, 2000; 114 Stat. 2512)

S. 2020/P.L. 106–527

To adjust the boundary of the Natchez Trace Parkway, Mississippi, and for other purposes. (Nov. 22, 2000; 114 Stat. 2515)

S. 2440/P.L. 106–528

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S. 2773/P.L. 106–532

Dairy Market Enhancement Act of 2000 (Nov. 22, 2000; 114 Stat. 2541)

S. 2789/P.L. 106–533

To amend the Congressional Award Act to establish a Congressional Recognition for Excellence in Arts Education Board. (Nov. 22, 2000; 114 Stat. 2545)

S. 3164/P.L. 106–534

Protecting Seniors From Fraud Act (Nov. 22, 2000; 114 Stat. 2555)

S. 3194/P.L. 106–535

To designate the facility of the United States Postal Service located at 431 North George Street in Millersville, Pennsylvania, as the ''Robert S. Walker Post Office''. (Nov. 22, 2000; 114 Stat. 2559)

S. 3239/P.L. 106–536

To amend the Immigration and Nationality Act to provide special immigrant status for certain United States international broadcasting employees. (Nov. 22, 2000; 114 Stat. 2560)

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