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WHERE: Office of the Federal Register
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800 North Capitol Street, NW.
Washington, DC
(3 blocks north of Union Station Metro)

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Presidential Documents

Title 3—

The President

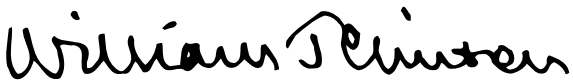
Presidential Determination No. 2001–10 of January 17, 2001

Presidential Determination Pursuant to Section 2 (c) (1) of the Migration and Refugee Assistance Act of 1962, as Amended

Memorandum for the Secretary of State

Pursuant to section 2 (c) (1) of the Migration and Refugee Assistance Act of 1962, as amended, 22 U.S.C. 2601 (c) (1), I hereby determine that it is important to the national interest to make up to $22 million from the U.S. Emergency Refugee and Migration Assistance Fund available to meet unexpected urgent refugee and migration needs, including those of refugees, displaced persons, conflict victims, and other persons at risk, due to crises in the Balkans and Nepal. These funds may be used, as appropriate, to provide contributions to international, governmental, and nongovernmental organizations and, as necessary, for administrative expenses of the Bureau of Population, Refugees, and Migration.

You are authorized and directed to inform the appropriate committees of the Congress of this determination and the obligation of funds under this authority, and to arrange for the publication of this memorandum in the **Federal Register**.



THE WHITE HOUSE,
Washington, January 17, 2001.

[FR Doc. 01–2895
Filed 1–31–01; 8:45 am]
Billing code 4710–10–M

Presidential Documents

Presidential Determination No. 2001–11 of January 19, 2001

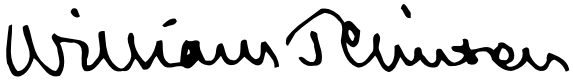
Waiver of Sanctions for the Transfer of Select U.S. Munitions List U.S.-Origin Helicopter Spare Parts From the United Kingdom to India

Memorandum for the Secretary of State

Pursuant to the authority vested in me as President of the United States, and consistent with title IX of the Department of Defense Appropriations Act, 2000 (Public Law 106–79), I hereby waive the application of the restrictions contained in sections 101 and 102 of the Arms Export Control Act, as they have been applied under the International Traffic in Arms Regulations, and determine and certify to the Congress that the application of such restrictions would not be in the national security interests of the United States:

With respect to India, insofar as such restriction would otherwise apply to the issuance of a defense export authorization allowing the transfer of only certain specified U.S.-origin helicopter parts from the United Kingdom to India.

You are hereby authorized and directed to report this determination to the Congress and to arrange for its publication in the **Federal Register**.



THE WHITE HOUSE,
Washington, January 19, 2001.

[FR Doc. 01–2896
Filed 1–31–01; 8:45 am]
Billing code 4710–10–M

Rules and Regulations

Federal Register
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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF THE TREASURY

5 CFR Part 3101

RINs 1550–AB43, 3209–AA15

Supplemental Standards of Ethical Conduct for Employees of the Department of the Treasury

AGENCY: Department of the Treasury.

ACTION: Final rule; amendment.

SUMMARY: The Department of the Treasury (Department), with the concurrence of the Office of Government Ethics (OGE), amends the Supplemental Standards of Ethical Conduct for Employees of the Department of the Treasury (Treasury Ethics Regulations) to revise the circumstances under which certain Office of Thrift Supervision (OTS) employees may obtain credit cards from OTS-regulated savings associations or their subsidiaries, notwithstanding the general prohibition against ''covered employees'' obtaining loans or extensions of credit from these entities. The amendment also eliminates unnecessary provisions concerning retail store credit cards and mortgage assumptions.

EFFECTIVE DATE: February 1, 2001.

FOR FURTHER INFORMATION CONTACT: Henry H. Booth, Senior Ethics Counsel, Office of the Assistant General Counsel (General Law and Ethics), Department of the Treasury, Room 1410, Washington, DC 20220, (202) 622–0450; or Caroline Morris, Ethics Counsel, OTS General Law Division, 1700 G Street, NW, Washington, DC 20552, (202) 906–6431.

SUPPLEMENTARY INFORMATION:

I. Background

The Treasury Ethics Regulations were issued in 1995 to minimize potential conflicts of interest and supplement OGE's Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635) (Standards). *See* 60 FR 22251 (May 5, 1995), as codified at 5 CFR part 3101. The OTS-pertinent part of the Treasury Ethics Regulations, *Additional rules for OTS employees,* at 5 CFR 3101.109 prohibits ''covered OTS employees'' from seeking or obtaining any loan or other extension of credit from a savings association. The requirement prevents employees from taking actions that may violate conflict of interest laws or that may constitute violations of 18 U.S.C. 213 concerning credit extended to examiners. Exceptions to the general prohibition permit covered OTS employees to obtain a credit card from a savings association under certain circumstances. *See* 5 CFR 3101.109(c)(3).

Under the current regulation, most covered OTS employees are permitted to hold and use savings association credit cards if they recuse themselves from any work involving savings associations from which they hold credit cards. This general exception, however, is not available to covered OTS employees assigned to regional offices who wish to obtain a credit card from a savings association headquartered in their region. Under current Treasury Ethics Regulations, no regional covered employees may obtain credit cards from a savings association headquartered in their region. *See* 5 CFR 3101.109(c)(3)(i)(A).

The Department has been prohibiting regional covered OTS employees from holding credit cards issued by a saving association headquartered in their region to strengthen public confidence in the integrity of OTS programs and to facilitate the assignment of work without constraints arising from employees' credit card recusals. When adopted, this restriction did not impose a significant burden on regional covered employees seeking credit cards. Since then, industry consolidation and conversions to the savings association charter have reduced the credit card options available to those employees. Further, the current rules have created problems in terms of staffing certain matters because of widespread holding of particular cards by covered employees. Subsequent to the issuance of the Treasury Ethics Regulation, the OTS examined the extent to which credit cards present conflicts of interest and concluded that in most instances, neither obtaining nor holding a credit card creates a conflict of interest or presents a likelihood for a loss of impartiality by an OTS employee. For these reasons, the existing credit card exception is being revised so that the general prohibition more closely conforms to the scope of 18 U.S.C. 213, the statutory prohibition barring only examiners from accepting credit from savings associations that they examine. This amended rule changes the Treasury Ethics Regulations' prohibition against OTS covered employees obtaining credit and the exceptions to the prohibition in the following ways.

A. Application to OTS Employees Who Are Not Examiners

To assure that the regional and Washington offices have maximum flexibility to assign projects to covered employees who are not examiners, this amendment eliminates the requirement for employees who are not examiners (attorneys, economists, analysts, *etc.*) to be recused from work concerning savings associations that have issued them credit cards. These employees may obtain a credit card from a savings association as long as the credit card is obtained and held on terms and conditions no more favorable than those offered to the general public.[1] Both the existing regulation and the regulation as amended concern the extension of credit by OTS-regulated savings associations and their subsidiaries. The exceptions in the existing regulation allow examiners and other covered employees to obtain credit cards from regulated savings associations under certain circumstances. These exceptions applied to subsidiaries of regulated savings associations only by implication. The amended regulation specifically extends the exceptions for examiners and other covered employees to subsidiaries of OTS-regulated savings associations from which credit cards may be obtained. *See* new § 3101.109(c)(3)(i) and (ii).

B. Application to Examiners

OTS is the primary federal regulator of savings associations. OTS examiners

[1] OTS will continue to require all covered employees to disclose their savings association credit cards on annual financial disclosure reports, and to require employees to continue to attest that their credit cards were obtained and are being held on non-preferential terms, i.e., on terms and conditions (including collection policies) no more favorable than those offered to the general public.

assigned to the agency's five regions conduct examinations, make recommendations and prepare reports for savings associations headquartered in these respective geographical jurisdictions. The current rule prohibits examiners from holding credit cards issued by savings associations headquartered in their region. This rule continues that provision. In addition, OTS assigns examiners with certain skills to examine institutions outside their region. Consistent with the statutory language, the rule has been revised to reflect current practice of prohibiting examiners from obtaining or holding credit from savings associations headquartered outside their region if they are actually assigned to examine the savings associations. The final rule prohibits an examiner from obtaining a credit card from any savings associations or their subsidiaries that are headquartered in his or her region; or if not headquartered in the examiner's region, that he or she is assigned to examine. The rule retains the requirement that an examiner must obtain and hold credit cards on terms and conditions no more favorable than those offered to the general public.

The rule also requires an examiner to submit a written disqualification from examining a savings association issuing a credit card to the examiner, but not from participating in other regulatory and supervisory matters affecting the savings association, such as applications, investigations, or records review. 18 U.S.C. 212 and 213 do not bar such participation, and permitting this participation by examiners broadens OTS staffing options for various activities.

Because this rule more clearly connects the credit card restriction to the examiners' actual or likely work assignments, it will provide OTS examiners greater access to credit cards without restricting the flexibility of supervisors in making work assignments and without increasing the potential for conflicts of interest. Therefore, the rule is consistent with the fundamental purpose of Treasury Ethics Regulations restrictions on savings association credit card use by covered OTS employees.

C. Related Changes

The existing regulations permit covered employees to use exceptions to the prohibition only under limited circumstances, including when the employee (1) obtains a credit card sponsored by a retail firm (§ 3101.109(c)(3)(ii)); or (2) obtains the credit through the assumption of a savings association mortgage on the employee's residence in accordance with the mortgage's original terms (§ 3101.109(c)(3)(iii)). The amended rule eliminates the reference to retail store sponsored credit cards, because a retail store credit card issued by a saving association will be treated no differently than any other savings association issued card. The amended rule's reference to mortgage assumptions also is being deleted as unnecessary.

The current rule's prohibition on obtaining credit from a savings association in § 3101.109(c)(1) applies to ''any loan or extension of credit, including credit obtained through the use of a credit card.'' The amended rule shortens and simplifies that provision by removing the reference to a credit card. It is clear from the content of the rest of paragraph (c) that credit includes the use of a credit card.

II. Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to 5 U.S.C. 553(a)(2), (b), and (d), the Department has found that good cause exists for waiving the regular notice of proposed rulemaking, opportunity for public comment, and 30-day delayed effective date for this final rule amendment. This action is being taken because it is in the public interest that this rule, which concerns matters of agency management, personnel, organization, practice and procedure, and which relieves certain restrictions placed on OTS employees, become effective on the date of publication.

Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Accordingly, no regulatory flexibility analysis is required. The rule would not increase the regulatory burden on savings associations. The economic impact of this rule on savings associations, regardless of size, is expected to be minuscule at most.

Executive Order 12866 Determination

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

Unfunded Mandates Reform Act of 1995 Determinations

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act)[2] 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 rule limits the restrictions on OTS employees borrowing from savings associations. The Department therefore has determined that the rule will not result in expenditures by State, local, or tribal governments or by the private sector of $100 million or more. Accordingly, the Department has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects in 5 CFR Part 3101

Conflict of interests, Ethics, Extensions of credit, Government employees, OTS employees.

Dated: January 16, 2001.

Neal S. Wolin,

General Counsel, Department of the Treasury.

Approved: January 19, 2001.

Amy L. Comstock,

Director, Office of Government Ethics.

For the reasons set forth in the preamble, the Department, with the concurrence of OGE, amends 5 CFR part 3101 as follows:

PART 3101—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE DEPARTMENT OF THE TREASURY

1. The authority citation for part 3101 is revised to read as follows:

Authority: 5 U.S.C. 301, 7301, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 212, 213; 26 U.S.C. 7214(b); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.203(a), 2635.403(a), 2635.803, 2635.807(a)(2)(ii).

2. In § 3101.109, paragraphs (c)(1) and (c)(3) are revised to read as follows:

§ 3101.109 Additional rules for Office of Thrift Supervision employees.

* * * * *

(c) *Prohibited borrowing*—(1) *Prohibition on employee borrowing.* Except as provided in this section, no

[2] Pub. L. 104–4, 109 Stat. 48 (1995) (codified at 2 U.S.C. Chs. 17A, 25).

covered OTS employee shall seek or obtain any loan or extension of credit from any OTS-regulated savings association or from an officer, director, employee, or subsidiary of any such association.

* * * * *

(3) *Exceptions*—(i) *Covered employees other than examiners.* Except for examiners, a covered OTS employee, or the spouse or minor child of a covered OTS employee, may obtain a credit card from an OTS-regulated savings association or its subsidiary if the credit card is issued and held on terms and conditions no more favorable than those offered the general public.

(ii) *Examiners.* An examiner, or the spouse or minor child of an examiner, may obtain or hold a credit card issued by an OTS-regulated savings association or its subsidiary, if:

(A) The savings association is not headquartered in the examiner's region;

(B) The examiner is not assigned to examine the savings association;

(C) The terms and conditions are no more favorable than those offered to the general public; and

(D) The examiner submits a written disqualification from examining that savings association. The examiner nonetheless may participate in other supervisory or regulatory matters involving the savings association.

* * * * *

[FR Doc. 01–2735 Filed 1–31–01; 8:45 am]

BILLING CODE 6720–01–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–SW–61–AD; Amendment 39–12095; AD 2000–23–52]

RIN 2120–AA64

Airworthiness Directives; Sikorsky Aircraft Corporation Model S–76A, S–76B, and S–76C Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This document publishes in the **Federal Register** an amendment adopting superseding Airworthiness Directive (AD) 2000–23–52, which was sent previously to all known U.S. owners and operators of Sikorsky Aircraft Corporation (Sikorsky) Model S–76A, S–76B, and S–76C helicopters by individual letters. This AD requires, before further flight, performing a fluorescent penetrant inspection of the main rotor shaft assembly (shaft). Also required are recurring fluorescent penetrant inspections and visual inspections for any crack. If any crack is found, the shaft must be replaced with an airworthy shaft before further flight. This amendment is prompted by the discovery of two in-service cracked shafts, one with 477 hours time-in-service (TIS) and one with 313 hours TIS. A third shaft, that had been rejected from the manufacturing process for other reasons, was also discovered to have a crack. The actions specified by this AD are intended to prevent failure of the shaft and subsequent loss of control of the helicopter.

DATES: Effective February 16, 2001, to all persons except those persons to whom it was made immediately effective by Emergency AD 2000–23–52, issued on November 9, 2000, which contained the requirements of this amendment.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 16, 2001.

Comments for inclusion in the Rules Docket must be received on or before April 2, 2001.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2000–SW–61–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. You may also send comments electronically to the Rules Docket at the following address: 9-asw-adcomments@faa.gov.

The applicable service information may be obtained from Sikorsky Aircraft Corporation, Attn: Manager, Commercial Tech Support, 6900 Main Street, Stratford, Connecticut 06614, phone (203) 386–7860, fax (203) 386–4703. This information may be examined at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Wayne Gaulzetti, Aviation Safety Engineer, Boston Aircraft Certification Office, 12 New England Executive Park, Burlington, MA 01803, telephone (781) 238–7156, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: On November 3, 2000, the FAA issued AD 2000–23–51, which required a one-time fluorescent penetrant inspection of the shaft. That AD was prompted by the discovery of a cracked shaft having 477 hours TIS. Since the issuance of that AD, additional incidents of cracked shafts occurred, and we determined that additional inspections are required. On November 9, 2000, we issued superseding Emergency AD 2000–23–52, for Sikorsky Model S–76A, S–76B, and S–76C helicopters, which requires an initial and recurring fluorescent penetrant inspections of the shaft. Also required, before the first flight of each day, are visual inspections for any crack. If any crack is found, the shaft must be replaced before further flight with an airworthy shaft.

The FAA has reviewed Sikorsky Aircraft Corporation Alert Service Bulletin No. 76–66–31, Revision B, dated November 7, 2000, which describes procedures for inspecting the shaft, part number 76351–09030 series and 76351–09630 series. In addition to requiring the inspections prescribed in this alert service bulletin, the FAA has determined that certain shafts, part number 76351–09030 series, serial numbers with a prefix of ''B'' and numbers 015–00700 through 00706, must be removed from service because the three cracked shafts discovered thus far came from that manufacturing lot.

Since the unsafe condition described is likely to exist or develop on other Sikorsky Model S–76A, S–76B, and S–76C helicopters of the same type designs, the FAA issued superseding Emergency AD 2000–23–52 to prevent failure of the shaft and subsequent loss of control of the helicopter. The AD requires, before further flight, performing a fluorescent penetrant inspection of the shaft in the area above the upper shaft output seal and below the lower hub attachment flange. Thereafter, recurring fluorescent penetrant inspections are required at specified time intervals and visual inspections using a 10× or higher magnifying glass are required before the first flight of each day. If any crack is found, the shaft must be replaced before further flight with an airworthy shaft that has been inspected in accordance with the requirements of this AD. The actions must be accomplished in accordance with the alert service bulletin described previously. The short compliance time involved is required because the previously described critical unsafe condition can adversely affect the structural integrity and controllability of the helicopter. Therefore, the actions stated previously are required before further flight and at the specified time intervals, and this AD must be issued immediately.

Since it was found that immediate corrective action was required, notice

and opportunity for prior public comment thereon were impracticable and contrary to the public interest, and good cause existed to make the AD effective immediately by individual letters issued on November 9, 2000, to all known U.S. owners and operators of Sikorsky Model S–76A, S–76B, and S–76C helicopters. These conditions still exist, and the AD is hereby published in the **Federal Register** as an amendment to 14 CFR 39.13 to make it effective to all persons. However, there was an error in the preamble section of the emergency AD; the superseded AD number is 2000–23–51, the emergency AD incorrectly referenced AD 2000–53–21. The correction to the superseded AD number is made in this AD; the FAA has determined that this change will neither increase the economic burden on an operator nor increase the scope of the AD.

The FAA estimates that 172 helicopters of U.S. registry will be affected by this AD, that it will take approximately 4 work hours per helicopter to accomplish the fluorescent inspection, ½ work hour per helicopter to perform each visual inspection, and 8 work hours per helicopter to replace the shaft, if necessary, and that the average labor rate is $60 per work hour. Required parts, if a shaft needs to be replaced, will cost approximately $25,000 per helicopter. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $2,913,680 per year (assuming $41,280 for the initial fluorescent inspections; $206,400 for 5 repetitive inspections on each helicopter; $516,000 for 100 visual inspections on each helicopter; and $2,150,000 to replace the shaft on half of the fleet).

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the 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 that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 2000–SW–61–AD.'' The postcard will be date stamped and returned to the commenter.

The regulations adopted herein will 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 final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a ''significant regulatory action'' under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 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 a new airworthiness directive to read as follows:

2000–23–52 Sikorsky Aircraft Corporation: Amendment 39–12095. Docket No. 2000–SW–61–AD. Supersedes Emergency AD 2000–23–51, Docket No. 2000–SW–59–AD.

Applicability: Model S–76A, S–76B, and S–76C helicopters, with main rotor shaft assembly (shaft), part number (P/N) 76351–09030 series or 76351–09630 series, installed, certificated in any category.

Note 1: This AD applies to each helicopter identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For helicopters 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 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 shaft and subsequent loss of control of the helicopter, accomplish the following:

(a) Before further flight, perform a fluorescent penetrant inspection of the shaft in the area above the upper shaft output seal and below the lower hub attachment flange for any cracks in accordance with the Accomplishment Instructions, paragraphs 3.A.(1) through 3.A.(8), contained in Sikorsky Aircraft Corporation Alert Service Bulletin No. 76–66–31, Revision B, dated November 7, 2000 (ASB).

Note 2: The fluorescent penetrant inspection specified in this AD is not the fluorescent penetrant inspection contained in paragraph 4 of Chapter 20–05–00 of the applicable maintenance manual.

(b) Before the first flight of each day, visually inspect the shaft in the area above the upper shaft output seal and below the lower hub attachment flange for any cracks using a 10x or higher magnifying glass. Accomplish this inspection in accordance with the Accomplishment Instructions, paragraphs 3.B.(1) through 3.B.(5), of the ASB, except contacting Sikorsky Aircraft Corporation is not required by this AD.

(c) At intervals not to exceed 20 hours time-in-service or 80 landings, whichever occurs first, perform a fluorescent penetrant inspection of the shaft in the area above the upper shaft output seal and below the lower

hub attachment flange in accordance with the Accomplishment Instructions, paragraphs 3.C.(1) through 3.C.(5), of the ASB, except contacting Sikorsky Aircraft Corporation is not required by this AD.

(d) If a crack is found as a result of any of the inspections, remove the shaft and replace it with an airworthy shaft that has been inspected in accordance with paragraph (a) of this AD before further flight.

(e) Before further flight, shafts, P/N 76351–09030-series, serial numbers with a prefix of ''B'' and numbers 015–00700 through 00706, must be removed from service.

(f) 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, Boston Aircraft Certification Office, FAA. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Boston Aircraft Certification Office.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Boston Aircraft Certification Office.

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

(h) The fluorescent penetrant and visual inspections shall be done in accordance with the Accomplishment Instructions, paragraphs 3.A.(1) through 3.A.(8), 3.B.(1) through 3.B.(5), and 3.C.(1) through 3.C.(5), contained in Sikorsky Aircraft Corporation Alert Service Bulletin No. 76–66–31 (318B), Revision B, dated November 7, 2000. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Sikorsky Aircraft Corporation, Attn: Manager, Commercial Tech Support, 6900 Main Street, Stratford, Connecticut 06614, phone (203) 386–7860, fax (203) 386–4703. Copies may be inspected at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(i) This amendment becomes effective on February 16, 2001, to all persons except those persons to whom it was made immediately effective by Emergency AD 2000–23–52, issued November 9, 2000, which contained the requirements of this amendment.

Issued in Fort Worth, Texas, on January 19, 2001.

Henry A. Armstrong,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 01–2611 Filed 1–31–01; 8:45 am]

BILLING CODE 4910–13–U

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 270

[Release No. IC–24828; File No. S7–11–97]

RIN 3235–AH11

Investment Company Names

AGENCY: Securities and Exchange Commission, (SEC).

ACTION: Final rule; request for comments on Paperwork Reduction Act burden estimate.

SUMMARY: The Securities and Exchange Commission is adopting a new rule under the Investment Company Act of 1940 to address certain broad categories of investment company names that are likely to mislead investors about an investment company's investments and risks. The rule requires a registered investment company with a name suggesting that the company focuses on a particular type of investment (*e.g.*, an investment company that calls itself the ABC Stock Fund, the XYZ Bond Fund, or the QRS U.S. Government Fund) to invest at least 80% of its assets in the type of investment suggested by its name. The rule also would address names suggesting that an investment company focuses its investments in a particular country or geographic region, names indicating that a company's distributions are exempt from income tax, and names suggesting that a company or its shares are guaranteed or approved by the United States government.

DATES: *Effective Date:* March 31, 2001. *Compliance Date:* Registered investment companies must comply with § 270.35d–1 by July 31, 2002.

FOR FURTHER INFORMATION CONTACT: Paul G. Cellupica, Senior Special Counsel, or John L. Sullivan, Senior Counsel, Office of Disclosure Regulation, at (202) 942–0721, or, regarding accounting issues, Kenneth B. Robins, Office of the Chief Accountant, at (202) 942–0590, in the Division of Investment Management, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549–0506.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission (''Commission'') is adopting new rule 35d–1 (17 CFR 270.35d–1) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (''Investment Company Act'').[1]

[1] Unless otherwise noted, all references to ''rule 35d–1'' or any paragraph of the rule will be to 17 CFR 270.35d–1, as adopted by this release.

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I. Introduction

Section 35(d) of the Investment Company Act, as amended by the National Securities Markets Improvement Act of 1996, prohibits a registered investment company from using a name that the Commission finds by rule to be materially deceptive or misleading.[2] Before section 35(d) was amended, the Commission was required to declare by order that a particular name was misleading and, if necessary, obtain a federal court order prohibiting further use of the name. In amending section 35(d), Congress reaffirmed its concern that investors may focus on an investment company's name to determine the company's investments and risks, and recognized that investor protection would be improved by giving the Commission rulemaking authority to address potentially misleading investment company names.[3]

Today the Commission is adopting new rule 35d–1 to address certain investment company names that are likely to mislead an investor about a company's investment emphasis. The Commission believes that investors should not rely on an investment company's name as the sole source of information about a company's investments and risks.[4] An investment

[2] 15 U.S.C. 80a–34(d); Pub. L. No. 104–290, § 208, 110 Stat. 3416, 3432 (1996).

[3] *See* S. Rep. No. 293, 104th Cong., 2d Sess. 8–9 (1996).

[4] *See generally* ''Investor Protection: Tips from an SEC Insider,'' Remarks by Arthur Levitt, Chairman, SEC, before the Investors' Town Meeting at the Houstonian Hotel, Washington, D.C. (Apr. 12, 1995) (''An informed investor looks beyond the packaging of a fund, and also sees what's inside.''); ''The SEC and the Mutual Fund Industry: An Enlightened Partnership,'' Remarks by Arthur Levitt, Chairman,

Continued

company's name, like any other single piece of information about an investment, cannot tell the whole story about the investment company.[5] As Congress has recognized, however, the name of an investment company may communicate a great deal to an investor.

The rule applies to all registered investment companies, including mutual funds, closed-end investment companies, and unit investment trusts (''UITs''), and requires an investment company with a name that suggests a particular investment emphasis to invest in a manner consistent with its name. The rule, for example, would require an investment company with a name that suggests that the company focuses on a particular type of security (*e.g.,* an investment company that calls itself the ABC Stock Fund, the XYZ Bond Fund, or the QRS U.S. Government Fund) to invest at least 80% of its assets in the type of security indicated by its name. An investment company seeking maximum flexibility with respect to its investments would be free to select a name that does not connote a particular investment emphasis.

Under current positions of the Division of Investment Management (''Division''), an investment company with a name suggesting that the company focuses on a particular type of investment generally is required to invest only 65% of its assets in the type of investment suggested by its name.[6] In 1997, we proposed rule 35d–1 to replace the staff's positions with a rule codifying the Commission's views and to increase the 65% threshold to 80%.[7]

Today we are adopting rule 35d–1 and the 80% investment requirement to guard against the use of misleading investment company names and to implement Congress's intent in amending section 35(d). Requiring an investment company to invest at least 80% of its assets in the type of investment suggested by its name will provide an investor greater assurance that the company's investments will be consistent with its name. The need for investment companies to invest in a manner consistent with their names is particularly important to retirement plan and other investors who place great emphasis on allocating their investment company holdings in well-defined types of investments, such as stocks, bonds, and money market instruments.[8] As of the end of 1999, an estimated 82.8 million individuals in 48.4 million U.S. households held $ 5.5 trillion in mutual fund assets.[9] These investors face an increasingly diverse universe of investment companies when choosing a company suitable for their investment needs.[10] The 80% investment requirement will help reduce confusion when an investor selects an investment company for specific investment needs and asset allocation goals.

II. Discussion

The Commission received 28 letters commenting on proposed rule 35d–1.[11] Most of the commenters supported the proposal, asserting that an investment company with a name indicating that it will invest in a particular security or industry should follow an overall investment strategy consistent with its name. Many commenters recommended revisions to the proposed rule. In addition, the Commission has received five rulemaking petitions urging adoption of the proposed rule.[12] The Commission is adopting rule 35d–1 with the modifications described below that address commenters' concerns.

A. General

1. Names Indicating an Investment Emphasis in Certain Investments or Industries

We are adopting, substantially as proposed, the requirement that an investment company with a name that suggests that the company focuses its investments in a particular type of investment (*e.g.,* the ABC Stock Fund or XYZ Bond Fund) or in investments in a particular industry (*e.g.,* the ABC Utilities Fund or the XYZ Health Care Fund) invest at least 80% of its assets in the type of investment suggested by the name.[13] The 80% requirement will allow an investment company to maintain up to 20% of its assets in other investments. In the case of mutual funds, these assets, for example, could include cash and cash equivalents that could be used to meet redemption requests. While many commenters supported setting the investment

SEC, before the General Membership Meeting of the Investment Company Institute (''ICI'') at the Washington Hilton Hotel, Washington, D.C. (May 19, 1995) (''some fund names can leave investors with the wrong impression about (the fund's) safety.'').

[5] *See* Herman, *The Confusion is Mutual: Buyers Beware When Funds Drift From Original Intent,* New York Daily News, Oct. 24, 1999, at 5; Millman, *First Pop The Hood: A Fund's Name May Tell You Nothing About How It Acts,* U.S. News & World Rep., Feb. 3, 1997, at 70.

[6] The Division continues to take this position in reviewing investment company disclosure, although the Division's formal guidance in this area was rescinded as part of the general overhaul of Form N–1A in 1998. *See* Former Guide 1 to Form N–1A, Investment Company Act Release No. 13436 (Aug. 12, 1983) (48 FR 37928 (Aug. 22, 1983)) (''N–1A Guidelines Release'') (rescinded by Investment Company Act Release No. 23064 (Mar. 13, 1998) (63 FR 13916 (March 23, 1998) at 13940 n.214) (''N–1A Amendments'')).

[7] Investment Company Act Release No. 22530 (Feb. 27, 1997) (62 FR 10955 (Mar. 10, 1997), correction 62 FR 24161 (May 2, 1997)) (''Proposing Release'').

[8] *See, e.g.,* Vickers, *A Price of Success: An Unbalanced Portfolio,* N.Y. Times, Jan. 12, 1997, at F6; Glassman, *With New Year, Stock Up a 401(k) for the Long Term,* Wash. Post, Jan. 1, 1997, at C13. The amount of retirement assets invested in mutual funds totaled $2.5 trillion at the end of 1999, representing an increase of $553 billion, or 29%, over the 1998 year-end total of $1.9 trillion. ICI, Mutual Fund Fact Book 49–50 (2000). This $2.5 trillion in mutual fund retirement plan assets represented 36% of all mutual fund assets at year-end 1999. *Id.* at 49. The ICI estimates that, in 1998, 77% of fund shareholders invested primarily for retirement purposes. ICI, 1998 Profile of Mutual Fund Shareholders (1999).

[9] *Id.* at 41.

[10] According to Division estimates based on data from the ICI and Lipper Analytical Services, between September 1985 and July 2000, investment company assets increased from $591 billion to $7.4 trillion, and the number of investment companies (including the individual series of registered mutual funds) increased from 9,200 to 32,403.

[11] A summary of the comments prepared by the staff of the Division of Investment Management is available in the public comment file for S7–11–97.

[12] Rulemaking Petition by the Financial Planning Association (June 28, 2000); Rulemaking Petition by Fund Democracy, LLC (June 28, 2000); Rulemaking Petition by Consumer Federation of America, *et al.* (Aug. 8, 2000); Rulemaking Petition by National Association of Investors Corporation (Oct. 9, 2000); Rulemaking Petition by the American Federation of Labor and Congress of Industrial Organizations (''AFL–CIO'') (Dec. 20, 2000). The rulemaking petitions are available for inspection and copying in File No. 4–439 in the Commission's Public Reference Room.

[13] Rule 35d–1(a)(2). A mutual fund that uses a name suggesting that it is a money market fund would continue to be subject to the maturity, quality, and diversification requirements of rule 2a–7 under the Investment Company Act, and its name would be deemed misleading under section 35(d) of the Investment Company Act if it did not comply with these requirements. (17 CFR 270.2a–7(b) & (c)).

The language of the proposal would have required an investment company with a name that suggests that the company focuses its investments in a particular type of *security* to invest at least 80% of its assets in the indicated *securities.* Proposed rule 35d–1(a)(2). We have modified this language to require that an investment company with a name that suggests that the company focuses its investments in a particular type of *investment* invest at least 80% of its assets in the indicated *investments.* Rule 35d–1(a)(2). In appropriate circumstances, this would permit an investment company to include a synthetic instrument in the 80% basket if it has economic characteristics similar to the securities included in that basket.

We note that, for purposes of applying the 80% investment requirement, an investment company may ''look through'' a repurchase agreement to the collateral underlying the agreement (typically, government securities), and apply the repurchase agreement toward the 80% investment requirement based on the type of securities comprising its collateral. *Cf.* Treatment of Repurchase Agreements and Refunded Securities as an Acquisition of the Underlying Securities, Investment Company Act Release No. 24050 (Sept. 23, 1999) ((64 FR 52476 (Sept. 29, 1999)) (proposing rule that would codify prior staff positions permitting investment companies to ''look through'' counterparties to certain repurchase agreements and treat securities comprising the collateral as investments for certain purposes under the Act).

requirement at 80%, some commenters opposed the level of the investment requirement, arguing that it would unduly restrict legitimate portfolio strategies and result in decreased diversification and increased risk and deter investment companies from using descriptive names.

The Commission disagrees with these commenters. Investment companies are not required to adopt names that describe their investment policies. Those investment companies that do not adopt such a name are not subject to the 80% requirement. We believe that if an investment company elects to use a name that suggests its investment policy, it is important that the level of required investment be high enough that the name will accurately reflect the company's investment policy. Moreover, we believe that certain modifications to the proposed rule (*e.g.,* allowing an investment company to have a policy that it will notify its shareholders 60 days prior to a change in its investment policy, rather than requiring that the investment policy be fundamental) will maintain the rule's flexibility and prevent the percentage investment requirement from being too restrictive.[14]

One commenter recommended that the Commission adopt an additional requirement that the remaining 20% of an investment company's assets be invested in securities that are substantially equivalent to its primary investments. We are not adopting the commenter's recommendations because we do not believe that an investment company's name, standing alone, can be expected to fully inform investors about all of the investments of the company.[15] Further, we are concerned that restricting the investment of the remaining 20% of an investment company's assets would unnecessarily reduce the manager's flexibility without providing significant additional benefit to shareholders.

We note, however, that the 80% investment requirement is not intended to create a safe harbor for investment company names. A name may be materially deceptive and misleading even if the investment company meets the 80% requirement. Index funds, for example, generally would be expected to invest more than 80% of their assets in investments connoted by the applicable index. Similarly, a UIT with a name indicating that its distributions are tax-exempt may have a misleading name even if it invests 80% of its assets in tax-exempt investments.[16]

We are modifying the requirement in the proposal that the 80% investment requirement be a fundamental policy of the investment company, *i.e.*, a policy that may not be changed without shareholder approval.[17] Most commenters opposed the fundamental policy requirement, arguing that it would be too burdensome for investment companies, constraining their ability to respond efficiently to market events or to new regulatory requirements, and discouraging them from using descriptive names.

The Commission is persuaded by the commenters' arguments, and the rule, as adopted, generally will provide investment companies with an alternative to the fundamental policy requirement. In lieu of adopting the 80% investment requirement as a fundamental policy, an investment company may adopt a policy that it will provide notice to shareholders at least 60 days prior to any change to its 80% investment policy.[18] This notice alternative will ensure that when shareholders purchase shares in an investment company based on its name, and with the expectation that it will follow the investment policy suggested by that name, they will have sufficient time to decide whether to redeem their shares in the event that the investment company decides to pursue a different investment policy.[19] Any investment company that changes its 80% investment policy would, of course, also be required to change its name, as necessary to comply with the requirements of rule 35d–1 in light of its new investment policy.

We are, however, adopting, as proposed, the provision that the 80% investment requirement be adopted as a fundamental policy for tax-exempt investment companies. This requirement is consistent with the long-standing Division position that a tax-exempt fund may not change its tax-exempt status without shareholder approval.[20] The Commission believes that the 80% investment requirement should continue to be a fundamental policy for a tax-exempt investment company because of the critical importance of the tax-exempt status to its investors.

[14] *See infra* note and accompanying text (discussing notice alternative).

[15] *See, e.g.,* Item 2(b) of Form N–1A (requiring a mutual fund's prospectus to identify its principal investment strategies, including the types of securities in which the fund invests principally). We note that an investment company that is covered by the rule should disclose its policy to invest its assets in accordance with the 80% investment requirement suggested by its name as one of its principal investment strategies in the prospectus. We would not object if mutual funds that change an existing investment policy from 65% to 80% to comply with rule 35d–1 file an amendment to a registration statement disclosing the 80% investment policy pursuant to rule 485(b) under the Securities Act of 1933, provided that the post-effective amendment otherwise meets the conditions for immediate effectiveness under the rule. 17 CFR 230.485(b). This also would apply to closed-end interval funds filing post-effective amendments pursuant to rule 486(b) under the Securities Act. 17 CFR 230.486(b). In other circumstances, mutual funds must determine whether an amendment to a registration statement that discloses changes in investment policy should be filed pursuant to rule 485(a) or may be filed pursuant to rule 485(b) under the Securities Act. 17 CFR 230.485(a) and 230.485(b). Likewise, closed-end interval funds filing post-effective amendments in other circumstances must determine whether they must file pursuant to rule 486(a) or may file pursuant to rule 486(b) of the Securities Act. 17 CFR 230.486(a) and 230.486(b).

[16] The Division currently applies a 95% investment requirement to tax-exempt UITs. *Cf.* Guide 1 of Proposed Form N–7, Investment Company Act Release No. 15612 (Mar. 9, 1987) (52 FR 8268 (Mar. 17, 1987) at 8295) (proposing release for Form N–7, proposed form for registration of UITs) (''The staff takes the position that a (tax-exempt) trust must have at least 95% of its net assets invested in tax-exempt securities in order to have substantially all of its net assets so invested.'').

[17] *See* section 8(b)(3) of the Investment Company Act, 15 U.S.C. 80a–8(b)(3) (regarding policies deemed fundamental by an investment company), and section 13(a)(3) of the Investment Company Act, 15 U.S.C. 80a–13(a)(3) (requiring shareholder approval to change a policy deemed fundamental under section 8(b)(3)).

[18] Rule 35d–1(a)(2)(ii) and (a)(3)(iii). The notice must be in plain English in a separate written document. *See* rule 35d–1(c)(1). Securities Act rule 421(d)(2) (17 CFR 230.421(d)(2)) lists the following plain English principles: (i) Short sentences; (ii) definite, concrete, everyday words; (iii) active voice; (iv) tabular presentation or bullet lists for complex material, whenever possible; (v) no legal jargon or highly technical terms; and (vi) no multiple negatives. The notice, as well as the envelope containing the notice, also must contain a prominent statement such as ''Important Notice Regarding Change in Investment Policy.'' As an alternative to this requirement, if the notice is sent in a separate mailing, the prominent statement may appear either on the envelope or on the notice itself. *See* rule 35d–1(c)(2) and (3).

[19] We believe that an investment company should update its prospectus to reflect an upcoming change in its 80% investment policy by means of an amendment to its registration statement or a prospectus supplement or ''sticker'' no later than the time that it provides notice to its current shareholders of the change in policy. In addition, after an investment company and/or its investment adviser have taken steps that will result in a change in the company's 80% investment policy but before the time when notice to current shareholders is required by rule 35d–1, it may be materially misleading for an investment company to sell its shares to investors without prospectus disclosure of the upcoming change. The time at which prospectus disclosure is required depends on all the facts and circumstances, including the degree of certainty that the change will occur and the steps that have been taken to effect the change.

[20] *See* Certain Matters Concerning Investment Companies Investing in Tax-Exempt Securities, Investment Company Act Release No. 9785 (May 31, 1977) (42 FR 29130 (June 7, 1977)); Letter to Matthew P. Fink, Senior Vice President and General Counsel, ICI, from Mary Joan Hoene, Deputy Director, Division of Investment Management, SEC (pub. avail. Dec. 3, 1987) (''Fink Letter'').

2. Names Indicating an Investment Emphasis in Certain Countries or Geographic Regions

We are modifying our proposal to require investment companies with names that suggest that they focus their investments in a particular country (*e.g.*, The ABC Japan Fund) or in a particular geographic region (*e.g.,* The XYZ Latin America Fund) to meet a two-part 80% investment requirement.[21] Rule 35d–1, as adopted, requires that an investment company with a name that suggests that it focuses its investments in a particular country or geographic region adopt a policy to invest at least 80% of its assets in investments that are tied economically to the particular country or geographic region suggested by its name.[22] The investment company also must disclose in its prospectus the specific criteria that are used to select investments that meet this standard.[23]

As proposed, rule 35d–1 would have required these investment companies to invest in securities that met one of three criteria specified in the rule.[24] Most commenters addressing this aspect of the proposed rule opposed the two-part test, arguing that the specific criteria would be too restrictive because there may be additional securities that would not meet any of the criteria but would expose an investment company to the economic fortunes and risks of the country or geographic region indicated in the company's name. We are persuaded by these comments, which are consistent with the historical position of the Division of Investment Management.[25] The disclosure approach that we are adopting will allow an investment company the flexibility to invest in additional types of investments that are not addressed by the three proposed criteria, but expose the company's assets to the economic fortunes and risks of the country or geographic region indicated by its name.[26]

3. Tax-Exempt Investment Companies

We are adopting substantially as proposed the requirement that an investment company that uses a name suggesting that its distributions are exempt from federal income tax or from both federal and state income taxes adopt a fundamental policy: (i) to invest at least 80% of its assets in investments the income from which is exempt, as applicable, from federal income tax or from both federal and state income tax;[27] or (ii) to invest its assets so that at least 80% of the income that it distributes will be exempt, as applicable, from federal income tax or from both federal and state income tax. Consistent with current Division positions, the requirements would apply to a company's investments or distributions that are exempt from federal income tax under both the regular tax rules and the alternative minimum tax rules.[28]

One commenter recommended that single state tax-exempt money market funds be exempt from the requirements of rule 35d–1, arguing that in several states, the supply of tax-free instruments that are eligible for purchase by money market funds is severely limited and, as a result, some of these funds may not be able to meet the 80% investment requirement. The Commission has determined not to provide this exemption. We note that a single state tax-exempt money market fund, like other tax-exempt investment companies, will be subject to the 80% investment requirement ''under normal circumstances.''[29] Thus, a single state tax-exempt fund could deviate from the 80% requirement in limited circumstances, such as a temporary shortage of securities of appropriate quality that distribute income that is tax-exempt in that particular state.[30] If, however, the supply of such securities is so limited that the fund cannot meet the 80% requirement under normal circumstances, we believe that the investment company should not use a name suggesting that it is a single state tax-exempt fund.[31]

[21] The language of the proposal would have required an investment company with a name that suggests that the company focuses its investments in a particular country or geographic region to invest at least 80% of its assets in *securities of issuers* that are tied economically to that country or region. Proposed rule 35d–1(a)(3). We have modified this language to require that such an investment company invest at least 80% of its assets in *investments* that are tied economically to the particular country or geographic region suggested by its name. Rule 35d–1(a)(3)(i). *See supra* note 13.

[22] Rule 35d–1(a)(3)(i). The term ''geographic region'' includes one or more states of the United States or a geographic region within the United States.

One commenter expressed concern that the rule, by its terms, would apply to an investment company with a long-standing trade name that includes a geographic location, such as the city where the company is headquartered, but which is not intended to refer to the geographic region in which the company invests. We do not intend that rule 35d–1 would require an investment company to change its name in these circumstances, where the connotation of the name is clear through long-standing usage and there is no risk of investor confusion.

[23] Rule 35d–1(a)(3)(ii).

[24] Proposed rule 35d–1(a)(3). Specifically, the investment would have to have been in: (i) securities of issuers that are organized under the laws of the country or of a country within the geographic region suggested by the company's name or that maintain their principal place of business in that country or region; (ii) securities that are traded principally in the country or region suggested by the company's name; or (iii) securities of issuers that, during the issuer's most recent fiscal year, derived at least 50% of their revenues or profits from goods produced or sold, investments made, or services performed in the country or region suggested by the company's name or that have at least 50% of their assets in that country or region.

[25] *Cf.* Letter to Registrants from Carolyn B. Lewis, Assistant Director, Division of Investment Management, SEC (Feb. 22, 1993) at II.A. (rescinded by N–1A Amendments, *supra* note 6, at 13940 n.214) (using substantially the same three proposed criteria, but indicating that the Division would consider other criteria).

[26] For example, an investment company may invest in a foreign stock index futures contract traded on a U.S. commodities exchange, which may not meet any of the three proposed criteria but could expose the investment company to the economic fortunes and risks of the geographic region covered by the index. We note, however, that if an investment company uses a criterion that requires qualifying investments to be in issuers that derive a specified proportion of their revenues or profits from goods produced or sold, investments made, or services performed in the applicable country or region, or that have a specified proportion of their assets in that country or region, the Division, consistent with its current position, would expect the proportion used to be at least 50%, in order for the investments to be deemed to be tied economically to the country or region.

[27] Rule 35d–1(a)(4)(i). The language of the proposal would have required an investment company with a name that suggests that the company's distributions are exempt from federal income tax or from both federal and state income tax to invest at least 80% of its assets in *securities* the income from which is exempt from the applicable taxes. Proposed rule 35d–1(a)(4). We have modified this language to require that such an investment company invest at least 80% of its assets in *investments* the income from which is exempt from the applicable taxes. *See supra* note 13.

[28] *See* Fink Letter, *supra* note 20.

[29] Rule 35d–1(a)(4)(i) and (ii). *See infra* notes 37–38 and accompanying text (discussing ''under normal circumstances'' requirement).

[30] Under rule 35d–1, a single state tax-exempt fund may include a security of an issuer located outside of the named state in the 80% basket if the security pays interest that is exempt from both federal income tax and the tax of the named state, provided that the fund discloses in its prospectus that it may invest in tax-exempt securities of issuers located outside of the named state. Investors are generally more interested in the tax-exempt nature of an issuer's distributions than the issuer's location. *Cf.* Rule 2a–7(a)(23) (defining a single state fund by reference to the amount of its distributed income that is exempt from the income taxes or other taxes on investments of a particular state, rather than the location of the issuers in which it invests).

[31] Rule 2a–7(a)(23), by contrast, defines a single state fund as a tax-exempt fund ''that holds itself out as *seeking to maximize* the amount of its distributed income that is exempt from the income taxes or other taxes on investments of a particular state.'' (emphasis added) Rule 2a–7 provides relief from its diversification requirements to single state funds in recognition of the fact that such a fund may have difficulty in meeting these standards without sacrificing credit quality, and this relief is appropriate when a fund is seeking to maximize its distributions that are tax-exempt in a particular state. We do not, however, believe that it is appropriate for a fund to suggest, through its name, that it is a single state tax-exempt money market fund unless it complies with the 80% investment requirement.

4. Applying the 80% Investment Requirement

Time of Application

The 80% investment requirement generally applies, as proposed, at the time when an investment company invests its assets.[32] We are, however, including a grandfather provision so that a UIT that has made an initial deposit of securities prior to the rule's compliance date will not be required to comply with the 80% investment requirement.[33] Because of the fixed nature of UIT portfolios, such UITs would not be able to adjust their portfolios to comply with the rule.

Assets to Which Requirement Applies

As adopted, the 80% investment requirement will be based on an investment company's net assets plus any borrowings for investment purposes.[34] This is a modification from the proposed requirement that would have based the 80% investment requirement on a company's net assets plus any borrowings that are senior securities under section 18 of the Investment Company Act.[35]

The use of net assets rather than total assets was intended to reflect more closely an investment company's portfolio investments. Commenters were generally supportive of the proposed use of net assets. Several commenters, however, recommended that the 80% investment requirement be applied to net assets plus borrowings used for investment purposes, arguing that this modification would more closely track the Commission's stated objective of preventing an investment company from circumventing the 80% investment requirement by investing borrowed funds in investments that are not consistent with its name. The Commission agrees with these commenters, and has modified the proposal accordingly.[36]

Temporary Departure From 80% Requirement

Consistent with current Division positions, the rule, as adopted, will require investment companies to comply with the 80% investment requirement ''under normal circumstances.'' [37] This is a modification of the proposed rule, which contemplated that an investment company may depart from the 80% requirement in order to take a ''temporary defensive position'' to avoid losses in response to adverse market, economic, political, or other conditions.[38] We are persuaded by the commenters who argued that the ''temporary defensive position'' exception was too narrow and did not give investment companies sufficient flexibility to manage their portfolios, particularly in the case of large cash inflows or anticipated large redemptions.

The ''under normal circumstances'' standard will provide funds with flexibility to manage their portfolios, while requiring that they would normally have to comply with the 80% investment requirement. This standard will permit investment companies to take ''temporary defensive positions'' to avoid losses in response to adverse market, economic, political, or other conditions. In addition, it will permit investment companies to depart from the 80% investment requirement in other limited, appropriate circumstances, particularly in the case of unusually large cash inflows or redemptions. For example, a new investment company will be permitted to comply with the 80% investment requirement within a reasonable time after commencing operations. We remind investment companies, however, that in the Division's view, an investment company generally must not take in excess of six months to invest net proceeds in order to operate in accordance with its investment objectives and policies.[39] In addition, we would generally expect new mutual funds, which typically invest in relatively liquid assets and which receive cash from share purchases on an ongoing basis, to be fully invested within a much shorter time.[40] We emphasize that an investment company should not use a name subject to the rule unless it intends to, and does, comply with the 80% investment requirement absent unusual circumstances.

B. Names Suggesting Guarantee or Approval by the U.S. Government

Consistent with the requirements of section 35(a) of the Investment Company Act, rule 35d–1, as adopted, prohibits an investment company from using a name that suggests that the company or its shares are guaranteed or approved by the United States government or any United States government agency or instrumentality.[41] The prohibited types of names include names that use the words ''guaranteed'' or ''insured'' or similar terms in conjunction with the words ''United States'' or ''U.S. government.''

C. Other Investment Company Names

1. General

Rule 35d–1, as adopted, does not codify positions of the Division of Investment Management with respect to investment company names including the terms ''balanced,'' ''index,'' ''small, mid, or large capitalization,'' ''international,'' and ''global.'' [42] In

[32] The rule would require an investment company that no longer meets the 80% investment requirement (*e.g.,* as a result of changes in the value of its portfolio holdings or other circumstances beyond its control) to make future investments in a manner that would bring the company into compliance with the 80% requirement. However, an investment company subject to the requirement would not have to sell portfolio holdings that have increased in value. *See* Proposing Release, *supra* note 7, at 10958 n.28 and accompanying text.

[33] Rule 35d–1(b).

[34] Rule 35d–1(d)(2).

[35] 15 U.S.C. 80a–18. *See* proposed rule 35d–1(b)(2)(ii).

[36] Whether a particular transaction is considered borrowing for investment purposes would depend on all of the facts and circumstances. For purposes of this provision, however, a typical securities lending transaction (in which an investment company lends its portfolio securities and enters an agreement with a lending agent to reinvest cash collateral in highly liquid fixed-income securities, such as U.S. government securities) would not be considered borrowing for investment purposes.

[37] *See* former Guide 1 in the N–1A Guidelines Release, *supra* note (applying 65% investment requirement ''under normal circumstances'').

[38] Proposed rule 35d–1(b)(3).

[39] *See* Guide 1 to Form N–2, Registration Statement of Closed-End Management Investment Companies.

[40] In very limited circumstances, it may be appropriate for a closed-end fund that invests in securities whose supply is limited to take longer than six months to invest offering proceeds. *See* Guide 1 to Form N–2, Registration Statement of Closed-End Management Investment Companies (may be appropriate for a closed-end fund investing in a single foreign country or small businesses to take up to two years to invest offering proceeds).

[41] Rule 35(d)–1(a)(1).

[42] *See* Letter to Registrants from Carolyn B. Lewis, Assistant Director, Division of Investment Management, SEC (Feb. 25, 1994) at II.D. (rescinded by N–1A Amendments, *supra* note 6, at 13940 n.214) (''small, medium, and large capitalization''); Letter to Registrants from Carolyn B. Lewis, Assistant Director, Division of Investment Management, SEC (Jan. 17, 1992) at II.A. (rescinded by N–1A Amendments, *supra* note 6, at 13940 n.214) (''index''); Letter to Registrants from Carolyn B. Lewis, Assistant Director, Division of Investment Management, SEC (Jan. 3, 1991) at II.A. (rescinded by N–1A Amendments, *supra* note 6, at 13940 n.214) (''international'' and ''global'').

The terms ''small, mid, or large capitalization'' and ''index'' suggest a focus on a particular type of investment, and investment companies that use these terms will be subject to the 80% investment requirement of the rule. The term ''balanced,'' however, does not suggest a particular investment focus, but rather a particular type of diversification among different investments, and ''balanced'' funds will not be subject to the rule. The Division takes the position that an investment company that holds itself out as ''balanced'' should invest at least 25% of its assets in fixed income senior securities and should invest at least 25% of its assets in equities. *Cf.* Former Guide 4 in the N–1A Guidelines Release, *supra* note 6 (rescinded by N–1A Amendments, *supra* note 6, at 13940 n.214) (requiring an

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addition, the rule does not apply to fund names that incorporate terms such as ''growth'' and ''value'' that connote types of investment strategies as opposed to types of investments. The Division will continue to scrutinize investment company names not covered by the proposed rule.[43] In determining whether a particular name is misleading, the Division will consider whether the name would lead a reasonable investor to conclude that the company invests in a manner that is inconsistent with the company's intended investments or the risks of those investments.[44]

2. Names and Average Weighted Portfolio Maturity and Duration

Investment companies investing in debt obligations often seek to distinguish themselves by limiting the maturity of the instruments they hold. These investment companies may call themselves, for example, ''short-term,'' ''intermediate-term,'' or ''long-term'' bond or debt funds. Historically, the Division of Investment Management has required investment companies with these types of names to have average weighted portfolio maturities of specified lengths. In particular, the Division has required an investment company that included the words ''short-term,'' ''intermediate-term,'' or ''long-term'' in its name to have a dollar-weighted average maturity of, respectively, no more than 3 years, more than 3 years but less than 10 years, or more than 10 years.[45] Although the Proposing Release stated that the Division did not intend to continue to use these criteria, the Division has re-evaluated this position in light of its subsequent experience and the comments received on the Proposing Release. The Division has concluded that it will continue to apply these maturity criteria to investment companies that call themselves ''short-term,'' ''intermediate-term,'' or ''long-term'' because they provide reasonable constraints on the use of those terms.

We note, however, that there may be instances where the average weighted maturity of an investment company's portfolio securities may not accurately reflect the sensitivity of the company's share prices to changes in interest rates.[46] The Commission and the Division, therefore, do not intend compliance with the Division's maturity guidelines to act as a safe harbor in determining whether a name is misleading. In a case, for example, where an investment company's name was consistent with the Division's maturity guidelines, but the ''duration'' of the company's portfolio was inconsistent with the sensitivity to interest rates suggested by the company's name, the name may be misleading.[47]

D. Compliance Date

Rule 35d–1 will become effective March 31, 2001. The Commission proposed to allow an investment company up to one year from the effective date of the proposed rule to comply with the rule's requirements. The Commission is persuaded by commenters that additional time may be required to make portfolio adjustments; internal compliance system changes; and, for those companies that do not wish to be subject to the rule, to adopt name changes. Therefore, the Commission will permit an investment company until July 31, 2002, to comply with the rule's requirements.

III. Cost/Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. The Commission did not solicit any comments on the costs and benefits associated with the rule and did not receive any comments addressing the costs and benefits. While it is difficult to quantify the costs and benefits related to the rule, the Commission notes that the commenters generally supported the proposed rule.

Rule 35d–1 will provide significant benefits to investors, by helping to ensure that an investment company that has a name suggesting that it focuses on a particular type of investment, or in investments in a particular industry, invests at least 80% of its assets in the type of investment suggested by its name. The 80% investment threshold represents an increase from the staff's current position that an investment company with a name suggesting that the company focuses on a particular type of investment only needs to invest 65% of its assets in the type of investment suggested by its name. By increasing the investment requirement from 65% to 80%, the rule will enable investors to more efficiently compare one fund with another before making investment decisions, which will tend to promote competition among investment companies, and will reduce the time that investors must spend searching for an investment company that meets their particular needs. In addition, the rule will benefit investors by reducing the amount of time and resources that they must devote to monitoring whether the investment companies that they have invested in are continuing to follow their stated investment objectives. Further, by decreasing the likelihood that an investment company will deviate from the investment objective and policy suggested by its name, and invest in ways that do not correspond with investors' individual investment needs and asset allocation goals, the rule will also lower the costs imposed on investors by inefficient allocation of their assets.

Moreover, the rule will enable an investment company affected by the rule to adopt a policy that it will notify its investors before changing its investment policy; such a policy would allow investors more time to reallocate their assets if the company's investment

investment company that purports to be ''balanced'' to maintain at least 25 percent of the value of its assets in fixed income senior securities).

The term ''foreign'' indicates investments that are tied economically to countries outside the United States, and an investment company that uses this term would be subject to the 80% requirement. The terms ''international'' and ''global,'' however, connote diversification among investments in a number of different countries *throughout* the world, and ''international'' and ''global'' funds will not be subject to the rule. We would expect, however, that investment companies using these terms in their names will invest their assets in investments that are tied economically to a number of countries throughout the world. *See* Proposing Release, *supra* note 7, at 10960 n.38 and accompanying text (''The Division no longer distinguishes the terms 'global' and 'international.' '').

[43] As a general matter, an investment company may use any reasonable definition of the terms used in its name and should define the terms used in its name in discussing its investment objectives and strategies in the prospectus. *See* Letter to Registrants from Carolyn B. Lewis, Assistant Director, Division of Investment Management, SEC (Feb. 25, 1994) at II.D (rescinded by N–1A Amendments, *supra* note 6, at 13940 n.214) (using this approach for investment companies that include the words ''small, mid, or large capitalization'' in their names).

[44] *See* In re Alliance North Am. Gov't Income Trust, Inc. Securities Litigation, No. 95 Civ. 0330 (LMM), 1996 U.S. Dist. LEXIS 14209, at *8 (S.D.N.Y. Sept. 27, 1996); The Private Investment Fund for Governmental Personnel, Inc., 37 S.E.C. 484, 487–88 (1957).

[45] *See* Investment Company Act Release No. 15612 (Mar. 9, 1987) (52 FR 8268 (Mar. 17, 1987) at 8301) (proposing to codify these positions in a guideline).

[46] In 1994, some investors did not anticipate how certain investment companies would perform when interest rates declined over a relatively short period of time. *See, e.g.,* Antilla, *A New Concept in Fund Ads: Truth,* N.Y. Times, July 10, 1994, at C13 (regarding the performance of certain short-term bond funds).

[47] In view of the shortcomings associated with analyzing interest rate volatility based on average weighted maturity, investment companies and investment professionals increasingly evaluate bond portfolios based on ''duration,'' which reflects the sensitivity of an investment company's return to changes in interest rates. See, e.g., Wright, Duration: The Second Step, Morningstar Mutual Funds 1–2 (Sept. 12, 1997); Rekenthaler, Duration Arrives, Morningstar Mutual Funds 1–2 (Jan. 21, 1994). Whether a name was misleading in the circumstances outlined above would depend on all the facts and circumstances, including other disclosures to investors.

focus changes. The rule will thereby help to ensure that investors' assets in mutual funds and other investment companies are invested in accordance with their expectations, and will enhance the efficiency and accuracy with which investors can design their fund portfolios to meet their individual investment needs.

We believe the benefits to investors resulting from the rule are significant, although they are difficult to quantify. The Commission estimates that total investment company assets are $7.4 trillion.[48] We estimate that approximately $ 429.9 billion of these assets are invested in investment companies that would be affected by the rule and that do not currently meet an 80% investment threshold.[49] We estimate that investors in these investment companies would receive benefits from the imposition of an 80% investment requirement under the rule equivalent to one basis point (0.01%) of assets invested in these investment companies, or $43.0 million.[50]

Rule 35d–1 will also impose certain costs on investment companies and therefore indirectly on investors. First, an investment company affected by the rule that currently has less than 80% of its investments in the type of investments indicated by its name will have to take one of two actions in order to comply with the 80% investment requirement of the rule. It may increase its investments in the type of investments described by its name to 80% or more. Alternatively, it may choose to change its name.

The Commission estimates that there are currently 8,675 open-end management investment companies, series of such companies, or closed-end management investment companies that are registered with the Commission and would fall within the definition of ''Fund'' contained in rule 35d–1.[51] Of this total, the Commission estimates that 7,200, or 83%, have descriptive names that would be covered by the rule.

The Commission estimates that 6,696, or approximately 93%, of these 7,200 investment companies and series would currently meet or exceed an 80% investment threshold.[52] Of the 504 investment companies and series that the Commission estimates do not currently meet this 80% threshold, the Commission estimates that approximately 30%, or 151, fail to meet the threshold principally because of large cash positions; presumably, these cash positions are temporary, and these investment companies would intend to reduce these cash positions and would in all probability satisfy the 80% investment threshold in the near future.

The remaining estimated 353 investment companies and series would need to take steps to meet the 80% investment requirement in the rule, by either changing their name or changing their investments. Although the costs to these investment companies of either changing their investments or their names cannot be quantified, we believe they will be relatively small. We note that investment companies do not have to be in compliance with the rule until July 31, 2002. Those investment companies that choose to change their investment policy in order to have 80% of their investments consistent with their names will incur brokerage costs in connection with adjusting their investments. However, many of these investment companies normally experience substantial portfolio turnover each year, so it is unclear whether they would incur brokerage costs in order to comply with the rule that they would not be incurring otherwise. Investment companies that choose to change their names in order to comply with the rule may incur certain limited legal and administrative expenses, which we estimate would be $1,000 for each affected investment company or series, exclusive of printing and mailing costs. The Commission estimates that the average number of shareholder accounts in investment companies or series of investment companies that are likely to be affected by the rule is 28,000. The Commission estimates that printing and mailing costs in connection with a name change are $.25 per shareholder, or $7,000 (28,000×$.25) for an average-sized investment company series.[53]

Second, after the compliance date, investment companies subject to rule 35d–1(a)(2), (a)(3) and (a)(4) may want to monitor their investment activity on an ongoing basis to confirm that they are in compliance with the rule. We believe these monitoring costs will be quite limited. The 80% investment requirement of these sections of the rule will apply to net assets, plus borrowings for investment purposes.[54] Investment companies already have to calculate net assets daily. In addition, investment companies may already monitor their investment activity in order to comply with the Division's current 65% investment requirement.

Third, there may also be costs associated with the rule in the event that an investment company affected by the rule seeks to change its 80% investment policy subsequent to the compliance date.[55] By the compliance date, an investment company that chooses to comply with rule 35d–1(a)(2) and (a)(3) will have to adopt either an 80% investment policy as a fundamental policy, or a policy to notify investors 60 days prior to any change in its 80% investment policy. We believe that most investment companies will choose the latter option. The Commission estimates that in the event that such an investment company decides to change its investment policy, the required notice would take approximately 20 hours for an investment company to prepare, and would cost $1,260, based on an estimated hourly wage rate of $63 for in-house legal counsel.[56]

[48] See supra note 10.

[49] We estimate that approximately 83% of investment companies, with $6.142 trillion in assets, have names that would be covered by the rule. We estimate further that 7% of investment companies with names covered by the rule currently meet the Division's 65% investment requirement, but would not meet an 80% threshold.

[50] This estimate is based on an estimate of the total savings resulting from reductions in the costs of monitoring these investment companies, and the costs to investors of inefficient asset allocation.

[51] An additional 11,922 investment companies and series of investment companies would fall within the definition of ''Fund'' in the rule, but are unlikely to be significantly affected by the rule. The vast majority of these 11,922 investment companies and series are UITs or UIT offerings that are largely exempted from the 80% investment requirement by a grandfather provision. *See* Rule 35d–1(b).

[52] This estimate, and the estimate of the percentage of investment companies with descriptive names, are based on the Commission's analysis of a database of mutual fund annual and semi-annual reports and other data concerning portfolio holdings of funds, compiled by a large mutual fund data provider.

[53] These estimates of the cost to an investment company of changing its name or the name of one of its series are based on information provided to the staff by a large mutual fund complex. An investment company that changes the name of one of its series may need to provide a prospectus supplement or ''sticker'' to shareholders. Based on information provided to the staff by this mutual fund complex, we estimated that the ''sticker'' would cost $.25 per shareholder to print and mail.

[54] An investment company affected by Rule 35d–1(a)(4) (applying to tax-exempt funds) will either have to invest 80% of its assets, as defined by the rule, in securities the income from which is exempt from federal income tax or federal and state income tax, or will have to invest its assets so that at least 80% of the income that it distributes is so exempt.

[55] An investment company that changes its 80% investment policy would also be required to change its name, as necessary to comply with the requirements of rule 35d–1 in light of its new investment policy. It would therefore also incur estimated legal and administrative expenses of $1,000 and estimated printing and mailing costs of $7,000. *See supra* note and accompanying text.

[56] *See* Section V., *infra.* The wage rate used is based on salary information for the securities industry compiled by the Securities Industry Association. *See* Securities Industry Association,

Continued

Printing costs and the costs of mailing or otherwise providing the prior notice to shareholders will vary for each investment company, depending on the number of shareholders who are affected. However, because the notice may be a brief one-page document, and could be enclosed in the same envelope with other printed matter (e.g., an account statement, prospectus, or report), the Commission believes that this cost of the notice will be less than $.25 per shareholder, or $7,000 for an average-sized investment company or series, which we estimate has 28,000 shareholder accounts.[57] While it is impossible to predict accurately how many investment companies and series would send out notice in connection with a change in their investment policies, the Commission believes that a reasonable estimate over a three-year period is 72, or one percent of the estimated number of investment companies and series with descriptive names (7,200). Thus, we estimate the total cost to the investment company industry of providing prior notice to shareholders of changes in their 80% investment policies under the notice policy provision of the rule will be $594,720 over three years, or $198,240 annually.[58]

Fourth, an investment company with a name suggesting that it focuses its investments in a particular country or geographic region must disclose in its prospectus the specific criteria that are used to select investments that meet this standard. The staff has estimated that incorporating the required disclosure into the prospectus would take approximately two hours for each of the affected 202 open-end investment companies or series registered or to be registered on Form N–1A, and each of 26 affected closed-end investment companies registered on Form N–2, for a total annual industry burden of 456 hours.[59] The Commission, using an hourly wage rate of $63 for in-house legal counsel, estimates that the total annual industry cost of the hour burden imposed by the prospectus disclosure requirement under rule 35d–1 is $28,728 (456 (annual hour burden) × $63 (hourly wage rate)).[60]

IV. Summary of Final Regulatory Flexibility Analysis

A summary of the Initial Regulatory Flexibility Analysis (''IRFA'') regarding proposed rule 35d–1, which was prepared in accordance with 5 U.S.C. § 603, was published in the Proposing Release. No comments were received on the IRFA. We have prepared a Final Regulatory Flexibility Analysis (''FRFA'') in accordance with 5 U.S.C. § 604 relating to the adopted rule.

The FRFA discusses the need for, and objectives of, the new rule. The FRFA explains that the rule requires a registered investment company with a name suggesting that the company focuses on a particular type of investment to invest at least 80% of its assets in the type of investment suggested by its name. The FRFA also explains that the rule is intended to address investment company names that are likely to mislead investors about an investment company's investments and risks.

The FRFA discusses the impact of the rule on small entities, which are defined, for the purposes of the Investment Company Act, as investment companies with net assets of $50 million or less as of the end of the most recent fiscal year (17 CFR 270.0–10). As of June 2000, there were approximately 4,387 registered investment companies.[61] Of these 4,387, approximately 215 (4.9%) are investment companies that meet the Commission's definition of small entity for purposes of the Investment Company Act. The Commission estimates that 83% of these 215 small entities, or 179, have descriptive names and would therefore be subject to rule 35d–1.[62]

Only those investment companies that have names suggesting a particular investment emphasis are required to comply with the rule. In general, to comply with the rule, an investment company with a name that suggests that the company focuses on a particular type of investment will either have to adopt a fundamental policy to invest at least 80% of its assets in the type of investment suggested by its name or adopt a policy of notifying its shareholders at least 60 days prior to any change in its 80% investment policy. The 80% investment requirement will allow an investment company to maintain up to 20% of its assets in other investments. An investment company seeking maximum flexibility with respect to its investments will be free to use a name that does not connote a particular investment emphasis.

Additionally, an investment company with a name suggesting that it focuses its investments in a particular country or geographic region must disclose in its prospectus the specific criteria that are used to select investments that are tied economically to the particular country or region.

As stated in the FRFA, the Commission considered several alternatives to rule 35d–1 including, among others, establishing different compliance or reporting requirements for small entities or exempting them from all or part of the rule. Because an investment company could choose to use a name that does not suggest a particular investment, the Commission believes that the rule will not impose additional burdens on small entities and that separate treatment for small entities would be inconsistent with the protection of investors.

The FRFA is available for public inspection in File No. S7–11–97, and a copy may be obtained by contacting John L. Sullivan, Office of Disclosure Regulation, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549–0506.

V. Paperwork Reduction Act

Certain provisions of the rule contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), and the Commission has submitted the proposed collections of information to

Report on Management & Professional Earnings in the Securities Industry 1999 (Sept. 1999).

[57] This estimate is based on the Commission's estimate that the ''sticker'' that an investment company would have to provide to its shareholders, notifying them of a name change, would cost $.25 per shareholder. *See supra* note. We estimate that the notice that would be provided to shareholders of a change in investment policy would be a similarly brief document.

[58] The total cost of $594,720 was reached by adding printing and mailing costs of $7,000 (28,000 accounts × $.25 per shareholder) and the $1,260 cost of preparing the notice, and multiplying the total cost of $8,260 by the number of investment companies that are estimated to send out notice over a three-year period (72).

[59] These totals are based on an estimate of 193 open-end management investment companies or series currently registered on Form N–1A that have names suggesting an investment focus in a particular country or geographic region, and an estimate of 9 new open-end management investment companies or series with such names that are registered annually; and an estimate of 26 closed-end management investment companies that register annually with the Commission on Form N–2 that have names suggesting an investment focus on a particular country or geographic region. *See* Section V., *infra.*

[60] *See supra* note 56.

[61] For purposes of determining the existing number of registered investment companies and the number of small entities in this analysis, the Commission did not count a series of an investment company as an entity separate from the investment company. Many investment companies have multiple series. Thus, the total of registered investment companies (4,387) is significantly smaller than the total of investment companies and series that would fall within the definition of ''Fund'' under the rule (8,675). *See supra* note 51 and accompanying text.

[62] The Commission also used this 83% figure to compute the number of open-end and closed-end management investment companies and series that have descriptive names. *See supra* note 51 and accompanying text.

the Office of Management and Budget for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The titles for the collections of information are (1) ''Rule 35d–1 under the Investment Company Act of 1940, Investment Company Names''; (2) ''Form N–1A under the Investment Company Act of 1940 and Securities Act of 1933, Registration Statement of Open-End Management Investment Companies''; and (3) ''Form N–2 under the Investment Company Act of 1940 and Securities Act of 1933, Registration Statement of Closed-End Management Companies.'' 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.

Form N–1A (OMB Control No. 3235–0307) and Form N–2 (OMB Control No. 3235–0026) were adopted pursuant to section 8(a) of the Investment Company Act (15 U.S.C. 80a–8) and section 5 of the Securities Act (15 U.S.C. 77e). The Commission is proposing to create a new information collection entitled ''Rule 35d–1 under the Investment Company Act of 1940, Investment Company Names.'' This information collection will encompass the rule's notice policy provision described below.

Rule 35d–1 is designed to address certain broad categories of investment company names that, in the Commission's view, are likely to mislead an investor about a company's investments and risks. The rule requires registered investment companies to invest at least 80% of their assets in the type of investments suggested by their names, if their names suggest investments in:

- A particular type of investment (*e.g.,* the ABC Stock Fund, XYZ Bond Fund, or QRS U.S. Government Fund);
- A particular industry (*e.g.,* the ABC Utilities Fund or XYZ Health Care Fund); and
- A particular country or geographic region (*e.g.,* the ABC Japan Fund or XYZ Latin America Fund).

Rule 35d–1 also requires an investment company that uses a name suggesting that its distributions are exempt from federal income tax or from both federal and state income taxes to invest:

- At least 80% of its assets in securities the income from which is exempt, as applicable, from federal income tax or from both federal and state income tax; or
- Its assets so that at least 80% of the income that it distributes will be exempt, as applicable, from federal income tax or both federal and state income tax.

The rule also prohibits investment company names that represent or imply that the investment company or the securities issued by it are guaranteed, sponsored, recommended, or approved by the U.S. government or any U.S. government agency or instrumentality.

The rule will generally require that, following the compliance date, the 80% investment requirement either must be a fundamental policy of an investment company affected by the rule, or the investment company must have adopted a policy to provide notice to shareholders at least 60 days prior to any change in its 80% investment policy in order for its name not to be deemed misleading under the rule. Additionally, an investment company with a name suggesting that it focuses its investments in a particular country or geographic region must disclose in its prospectus the specific criteria that are used to select investments that meet this standard.

Notice Policy Provision Under Rule 35d–1

The Commission anticipates that any notice provided to shareholders under a notice policy that meets the requirements of rule 35d–1 will typically be a short, one-page document that may be enclosed with other written materials sent to shareholders, such as prospectuses, annual and semi-annual reports, and account statements. The number of burden hours spent preparing and arranging delivery of these notices therefore will be low. The Commission estimates that the annual burden associated with the notice requirement of the rule would be 20 hours per affected investment company or series. The Commission anticipates that each affected respondent would incur these burden hours only once.

The Commission estimates that there are currently 7,200 open-end and closed-end management investment companies and series that have descriptive names that would be covered by the rule.[63] The Commission estimates that 72, or 1%, of these investment companies and series will at some point provide prior notice to their shareholders of a change in their investment policies pursuant to a policy adopted in accordance with this rule. Of these estimated 72 investment companies and series that are expected to provide prior notice to their shareholders of a change in their investment policies, the Commission anticipates that 24, or one-third, will do so within one year of the rule's compliance date. The Commission estimates that each of these 24 investment companies and series will spend an average of 20 hours complying with the notice alternative provided by the rule, for an annual total of 480 hours.

Providing prior notice to shareholders under rule 35d-1 is not mandatory. An investment company may choose to have a non-descriptive name. Further, if an investment company has a descriptive name, it will only need to provide prior notice to shareholders of a change in its 80% investment policy if it first has adopted a policy to provide notice and then has decided to change this investment policy. There is no mandatory retention period associated with a notice policy that meets the requirements of the rule, and responses to such a notice policy will not be kept confidential.

Prospectus Disclosure

With respect to the prospectus disclosure regarding the specific criteria that are used to select investments for an investment company with a name suggesting that it focuses its investments in a particular country or geographic region, the Commission estimates that the annual burden will be two hours for each affected investment company and series of an investment company. The likely respondents to this information collection are open-end management investment companies registering with the Commission on Form N–1A and closed-end management investment companies registering with the Commission on Form N–2. Both Form N–1A and Form N–2 contain collection of information requirements. The purpose of Form N–1A and Form N–2 is to meet the registration and disclosure requirements of the Securities Act and Investment Company Act and to enable investment companies to provide investors with information necessary to evaluate an investment in the investment company.

Form N–1A

The Commission estimates that there are currently 193 open-end management investment companies or series registered with the Commission on Form N–1A that have names suggesting a focus on a particular country or geographic region. The Commission

[63] The Commission estimates that there are currently 8,675 open-end management investment companies, series of such investment companies, and closed-end investment companies that are registered with the Commission and would fall within the definition of ''Fund'' contained in rule 35d–1. Of this total, the Commission estimates that 83%, or 7,200, have descriptive names that would be covered by the rule. See supra notes 51–52 and accompanying text.

estimates that each of these investment companies and series will spend an average of two hours to prepare and incorporate the required disclosure into its annual update of its prospectus by post-effective amendment, for a total of 386 hours. In addition, we estimate that 298 open-end management investment companies and series file initial registration statements on Form N–1A annually. Based on the overall percentage of investment companies and series that have names suggesting a focus on a country or geographical region, we estimate that 9 of these registration statements annually will have to include disclosure required by the rule, at a cost of two hours per registrant, or 18 hours. Thus, we estimate that the required prospectus disclosure of rule 35d-1 will add 404 hours ((193 open-end management investment companies or series + 9 investment companies or series) x 2 hours) to the previous Form N–1A annual burden of 1,159,311, resulting in a new total Form N–1A annual hour burden, after adjusting for a decrease of 98 in the number of respondents filing on Form N–1A, of 1,145,843 hours.

Form N–2

The Commission estimates that 130 closed-end management investment companies file registration statements annually on Form N–2. We estimate that approximately 20% of these closed-end management investment companies, or 26, have names suggesting a focus on a particular country or geographic region. We believe that the disclosure burden of two hours will be the same for Form N–2 as for an open-end management investment company or series.[64] Thus, we estimate that the required prospectus disclosure of rule 35d-1 will add 52 hours (26 closed-end management investment companies x two hours) to the current Form N–2 annual burden of 61,760 hours, resulting in a total Form N–2 annual hour burden of 61,812 hours.

The prospectus disclosure required by the rule in Form N–1A and Form N–2 is mandatory for an investment company suggesting that it focuses its investments in a particular country or geographic region. There is no mandatory retention period for the information disclosed, and responses to the disclosure requirement will not be kept confidential.

[64] Closed-end management investment companies, however, generally do not file post-effective amendments.

Request for Comments

We request your comments on the accuracy of our estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 3208, New Executive Office Building, Washington, D.C. 20503, and should send a copy to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609, with reference to File No. S7–11–97. Request for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7–11–97, and be submitted to the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, Attention: Records Management, Office of Filings and Information Services. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this release.

VI. Statutory Authority

The Commission is adopting rule 35d-1 pursuant to the authority set forth in sections 8, 30, 34, 35, and 38 of the Investment Company Act (15 U.S.C. 80a-8, 80a-29, 80a-33, 80a-34, and 80a-37). The authority citations for the rule precede the text of the amendments.

List of Subjects in 17 CFR Part 270

Investment companies, Securities.

Text of Rule

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

1. The authority citation for Part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–34(d), 80a–37, 80a–39 unless otherwise noted.

2. Section 270.35d–1 is added to read as follows:

§ 270.35d–1 Investment company names.

(a) For purposes of section 35(d) of the Act (15 U.S.C. 80a–34(d)), a materially deceptive and misleading name of a Fund includes:

(1) *Names suggesting guarantee or approval by the United States government.* A name suggesting that the Fund or the securities issued by it are guaranteed, sponsored, recommended, or approved by the United States government or any United States government agency or instrumentality, including any name that uses the words ''guaranteed'' or ''insured'' or similar terms in conjunction with the words ''United States'' or ''U.S. government.''

(2) *Names suggesting investment in certain investments or industries.* A name suggesting that the Fund focuses its investments in a particular type of investment or investments, or in investments in a particular industry or group of industries, unless:

(i) The Fund has adopted a policy to invest, under normal circumstances, at least 80% of the value of its Assets in the particular type of investments, or in investments in the particular industry or industries, suggested by the Fund's name; and

(ii) Either the policy described in paragraph (a)(2)(i) of this section is a fundamental policy under section 8(b)(3) of the Act (15 U.S.C. 80a–8(b)(3)), or the Fund has adopted a policy to provide the Fund's shareholders with at least 60 days prior notice of any change in the policy described in paragraph (a)(2)(i) of this section that meets the requirements of paragraph (c) of this section.

(3) *Names suggesting investment in certain countries or geographic regions.* A name suggesting that the Fund focuses its investments in a particular country or geographic region, unless:

(i) The Fund has adopted a policy to invest, under normal circumstances, at least 80% of the value of its Assets in investments that are tied economically to the particular country or geographic region suggested by its name;

(ii) The Fund discloses in its prospectus the specific criteria used by the Fund to select these investments; and

(iii) Either the policy described in paragraph (a)(3)(i) of this section is a fundamental policy under section 8(b)(3) of the Act (15 U.S.C. 80a–8(b)(3)), or the Fund has adopted a policy to provide the Fund's shareholders with at least 60 days prior notice of any change in the policy described in paragraph (a)(3)(i) of this section that meets the requirements of paragraph (c) of this section.

(4) *Tax-exempt Funds.* A name suggesting that the Fund's distributions are exempt from federal income tax or from both federal and state income tax, unless the Fund has adopted a fundamental policy under section 8(b)(3) of the Act (15 U.S.C. 80–8(b)(3)):

(i) To invest, under normal circumstances, at least 80% of the value of its Assets in investments the income from which is exempt, as applicable, from federal income tax or from both federal and state income tax; or

(ii) To invest, under normal circumstances, its Assets so that at least 80% of the income that it distributes will be exempt, as applicable, from federal income tax or from both federal and state income tax.

(b) The requirements of paragraphs (a)(2) through (a)(4) of this section apply at the time a Fund invests its Assets, except that these requirements shall not apply to any unit investment trust (as defined in section 4(2) of the Act (15 U.S.C. 80a–4(2))) that has made an initial deposit of securities prior to July 31, 2002. If, subsequent to an investment, these requirements are no longer met, the Fund's future investments must be made in a manner that will bring the Fund into compliance with those paragraphs.

(c) A policy to provide a Fund's shareholders with notice of a change in a Fund's investment policy as described in paragraphs (a)(2)(ii) and (a)(3)(iii) of this section must provide that:

(1) The notice will be provided in plain English in a separate written document;

(2) The notice will contain the following prominent statement, or similar clear and understandable statement, in bold-face type: ''Important Notice Regarding Change in Investment Policy''; and

(3) The statement contained in paragraph (c)(2) of this section also will appear on the envelope in which the notice is delivered or, if the notice is delivered separately from other communications to investors, that the statement will appear either on the notice or on the envelope in which the notice is delivered.

(d) For purposes of this section:

(1) *Fund* means a registered investment company and any series of the investment company.

(2) *Assets* means net assets, plus the amount of any borrowings for investment purposes.

Dated: January 17, 2001.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 01–1967 Filed 1–31–01; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF EDUCATION

34 CFR Part 606

Developing Hispanic-Serving Institutions Program; Delay of Effective Date

AGENCY: Department of Education.

ACTION: Final regulations; delay of effective date.

SUMMARY: In accordance with the memorandum of January 20, 2001, from the Assistant to the President and Chief of Staff, entitled ''Regulatory Review Plan,'' this regulation temporarily delays the effective date of the regulations entitled Developing Hispanic-Serving Institutions Program published in the **Federal Register** on January 8, 2001 (66 FR 1262).

EFFECTIVE DATE: The effective date of the regulations amending 34 CFR Part 606 published at 66 FR 1262, January 8, 2001, is delayed 60 days until April 8, 2001.

FOR FURTHER INFORMATION CONTACT: Kenneth C. Depew, Acting Assistant General Counsel for Regulations, Office of the General Counsel, U.S. Department of Education, 400 Maryland Avenue, SW., room 6E227, FB–6, Washington, DC 20202–2241. Telephone: (202) 401–8300.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Dated: January 24, 2001.

Rod Paige,

Secretary of Education.

[FR Doc. 01–2779 Filed 1–31–01; 8:45 am]

BILLING CODE 4000–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 51

[FCC 01–21]

Procedures for Arbitrations Conducted in Accordance With the Communications Act of 1934

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission amends on its own motion a section of the rules in which FCC arbitrators are granted additional discretion when arbitrating interconnection disputes.

DATES: Effective February 1, 2001.

FOR FURTHER INFORMATION CONTACT: William Kehoe, Special Counsel, Common Carrier Bureau, Policy and Program Planning Division, (202) 418–1580.

SUPPLEMENTARY INFORMATION: This is a summary of the amendment to 47 CFR 51.807 in the Commission's *Order*, FCC 01–21, adopted January 17, 2001 and released January 19, 2001. The complete text of this Order is available for inspection and copying during regular business hours in the FCC Reference information Center, Courtyard Level, 445 12th Street, SW., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Services (ITS, Inc.), CY–B400, 445 12th Street, SW., Washington, DC.

Synopsis of the Amendment to Section 51.807

1. The Commission adopted an interim rule in the Local Competition Order establishing a scheme of ''final offer'' arbitration for section 252(e)(5) proceedings. This rule provides that, in issuing an arbitration award, the arbitrator ''shall use final offer arbitration,'' which may take the form of either entire package final offer arbitration or issue-by issue final offer arbitration.'' 47 CFR 51.807(d)(1). If the parties' offers do not meet the standards of section 251, the arbitrator may require the parties to submit additional final offers or may adopt a result offered by neither party. 47 CFR 51.807(f)(3) (1999).

2. Experience gained by states in arbitrating numerous interconnection disputes over the past five years suggest that ''final offer'' arbitration may not always afford the arbitrator sufficient flexibility to resolve complex interconnection issues. Accordingly, the Commission amends § 51.807(f)(3) to

provide the arbitrator additional flexibility in certain circumstances. The arbitrator shall have discretion to require the parties to submit new final offers, or adopt a result not submitted by any party, in circumstances where a final offer submitted by one or more of the parties fails to comply with the Act or the Commission's rules. There may be some unique circumstances where, even though the parties submit a final offer that complies with the Act and the Commission's rules, the arbitrator will have a basis for concluding that another result is more consistent with the requirements of section 252(c) of the Act, and the Commission's rules, although we do not identify those circumstances here.

3. Because this rule is a rule of agency procedure and practice, it may be adopted without affording prior notice and opportunity for comment. See 5 U.S.C. 553(b)(3)(A). In addition, we find good cause to make this change effective upon publication in the **Federal Register**. See 5 U.S.C. 553(d)(3). In an order released contemporaneously herewith, the Commission has preempted the jurisdiction of the Commonwealth of Virginia State Corporation Commission and therefore may soon need to begin the process of arbitrating complex interconnection agreement issues among carriers in Virginia. This rule change is necessary to facilitate the efficient and expeditious discharge of the Commission's statutory responsibility in the Virginia arbitration proceeding pursuant to section 252 of the Communications Act.

Paperwork Reduction Act

4. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public.

Regulatory Flexibility Analysis

5. The action contained herein relates to agency procedure and practice and does not change the Commission's Regulatory Flexibility Analysis in connection with the amended rule.

Ordering Clauses

4. This Order is effective February 1, 2001.

5. Pursuant to sections 4(i), 4(j), 201(b), 303(r), 251, and 252 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 201(b), 303(r), 251, and 252, that the amendment to § 51.807 *is adopted* as set forth in the appendix to this Order, to be effective February 1, 2001.

List of Subjects in 47 CFR Part 51

Communications common carriers, Telecommunications, Telephone, Arbitration.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

For the reasons set forth in the preamble, amend Part 51 of 47 CFR as follows:

1. The authority citation for part 51 continues to read:

Authority: 47 U.S.C. 154(i), 154(j), 201(b), 303 (r), 251, and 252.

2. Revise § 51.807, paragraph (f)(3) to read as follows:

§ 51.807 Arbitration and mediation of agreements by the Commission pursuant to section 252(e)(5) of the Act.

* * * * *

(f) * * *

(3) Provide a schedule for implementation of the terms and conditions by the parties to the agreement. If a final offer submitted by one or more parties fails to comply with the requirements of this section or if the arbitrator determines in unique circumstances that another result would better implement the Communications Act, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the Commission pursuant to that section.

* * * * *

[FR Doc. 01–2760 Filed 1–31–01; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 01–136; MM Docket No. 00–101; RM–9885]

Radio Broadcasting Services; Sparta and Buckhead, GA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: As the result of a Petition for Reconsideration filed by Barinoski Investment Company, this document substitutes Channel 274C3 for Channel 274A at Sparta, Georgia, reallots Channel 274C3 to Buckhead, Georgia, and modifies the Station WPMA license to specify operation on Channel 274C3 at Buckhead, Georgia. *See* 65 FR 4491, published January 27, 2000. The reference coordinates for the Channel 274C3A allotment at Buckhead, Georgia, are 33–31–40 and 83–18–45. With this action, the proceeding is terminated.

DATES: Effective as March 9, 2001.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Mass Media Bureau, (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Memorandum Opinion and Order* in MM Docket No. 00–101, adopted January 17, 2001, and released January 19, 2001. The full text of this decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street SW., Washington DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 1231 20th Street NW., Washington DC 20036.

List of Subjects in 47 CFR Part 73

Radio Broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Georgia, is amended by removing Channel 274A at Sparta.

3. Section 73.202(b), the Table of FM Allotments under Georgia, is amended by adding Buckhead, Channel 274C3.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 01–2752 Filed 1–31–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[MM Docket No. 99–339; FCC 01–7]

Video Description

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration.

SUMMARY: This document concerns rules and policies designed to make television programming more accessible to the many Americans who have visual disabilities by bringing video description to the commercial video marketplace. The intended effect of this action is to clarify and resolve issues raised in petitions for reconsideration pertaining to the application of the Commission's video description rules.

DATES: Effective April 1, 2002.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington DC 20554.

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SUPPLEMENTARY INFORMATION: This is a summary of the *Memorandum Opinion and Order on Reconsideration* (''*MO&O*'') in MM Docket No. 99–339, FCC 01–7, adopted on January 4, 2001, and released on January 18, 2001. The full text of this decision is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street, SW, Room CY–A257, Washington DC, and also may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 445 Twelfth Street, SW, Room CY–B402, Washington DC. The complete text is also available under the file name fcc01007.doc on the Commission's Internet site at *www.fcc.gov*.

Synopsis of Memorandum Opinion and Order on Reconsideration

1. On August 7, 2000, the Commission adopted rules requiring broadcasters and other video programming distributors to provide video description and to make emergency information more accessible to visually impaired viewers. In this *Order*, the Commission grants in part and denies in part eight petitions seeking reconsideration of the *Report and Order* (''*R&O*'') (65 FR 54805, September 11, 2000). The Commission also provides clarification on certain issues related to the video description rules.

2. The rules adopted in the *R&O* require affiliates of ABC, CBS, Fox, and NBC in the top 25 Designated Market Areas (DMAs) to provide 50 hours per calendar quarter of prime time or children's programming with video description. Multichannel video programming distributors (MVPDs) with 50,000 or more subscribers must provide 50 hours of video described programming each quarter on each of the top five national nonbroadcast networks they carry. All broadcast stations and MVPDs that have the technical capability to do so, regardless of market size or number of subscribers, must ''pass through'' any video description received from a programming provider. The *R&O* also adopted ''undue burden'' exemption procedures as well as enforcement procedures under which complaints alleging violations would be filed with the Commission. The video description rules become effective April 1, 2002. In addition, under new rules that become effective upon approval from the Office of Management and Budget broadcast stations and MVPDs that provide local emergency information must make the critical details of that information accessible to persons with visual disabilities through aural presentation or accompany a ''crawl'' or ''scroll'' with an aural tone to alert persons with disabilities to an emergency situation.

3. The Commission amends its rules to define the top five nonbroadcast networks as those that are ranked in the top five as defined by national audience share and that also reach 50 percent or more of MVPD households. The Commission amends the rules to allow broadcast stations and MVPDs to count previously aired programming one time toward quarterly requirements. The Commission clarifies that once a broadcast station or MVPD that is required under the rules to provide video description has aired a particular program with video description, all subsequent airings of that program by that broadcast station or MVPD on the *same* network or channel must contain the video description. The Commission further clarifies that broadcast stations and MVPDs may use the SAP channel to provide services other than video description when subsequently airing a video described program, as long as those services, such as foreign language translations, are program-related. Similarly, the Commission establishes an exception to the pass-through requirements, allowing broadcast stations and MVPDs to use the SAP channel to provide program-related services other than video description when airing a program that contains video description. The Commission amends its rules to allow programming providers, in addition to programming distributors, to file waivers for exemptions. The Commission will allow consumers to bring informal complaints to the Commission at any time. The Commission amends its rules, however, to require consumers to certify in any formal complaint to the Commission, and distributors to certify in their answers, that they have attempted to resolve the dispute prior to filing the complaint with the Commission. The Commission adopts a definition of ''prime time'' and clarifies the definition of ''technical error'' for purposes of determining compliance with the rules. The Commission believes that these modifications promote its goal of not imposing an undue burden on programming producers or distributors, while enhancing the availability of video description to the visually impaired segment of our society.

A. Entities To Provide Programming With Video Description

1. Distributors and Programmers

4. In the *R&O*, the Commission adopted a rule that requires broadcast stations in the top 25 DMAs affiliated with the top four commercial broadcast networks, ABC, CBS, Fox, and NBC, as well as ''larger'' MVPDs, MVPDs that serve 50,000 or more subscribers, to provide programming with video description. The Commission further explained that implicit in the rules is the decision to hold programming distributors, rather than programming producers, responsible for compliance with the rules.

5. One petitioner contends that the Commission's rules hold ''the wrong party'' responsible for providing video described programming, arguing that the Commission should hold programmers responsible for compliance with the video description rules because distributors have no ability to do so. If a programmer violates the rules, the petitioner asserts that MVPDs will be subject to costly litigation seeking indemnification for any liability incurred. As the Commission acknowledged and explained in the *Notice of Proposed Rulemaking* (''*NPRM*'') (64 FR 67236, December 1, 1999), while its expects that programming networks, and not broadcast stations or MVPDs, will describe the programming, the Commission should hold distributors responsible for compliance for ease of enforcement and monitoring of compliance with the rules. The

petitioner presents no new arguments or evidence that would lead the Commission to change its conclusion. Consistent with its findings in adopting closed captioning rules, while the Commission is placing the ultimate responsibility on program distributors, it expects that distributors will incorporate video description requirements into their contracts with program producers and owners, and that parties will negotiate for an efficient allocation of video description responsibilities. The Commission therefore denies the request to hold programming producers, rather than programming distributors, responsible for compliance with its rules.

2. DBS Operators

6. The video description rules require MVPDs that serve 50,000 or more subscribers to provide video description during prime time or on children's programming. The Commission recognized in the *R&O* that this standard would include within the scope of the rules two DBS systems that together reach 12 million subscribers: DIRECTV, Inc. (DIRECTV) and EchoStar Satellite Corporation (EchoStar). The Commission determined that while DIRECTV indicated that modifying its network to support three audio channels would cost ''tens of millions of dollars,'' those costs appeared to be more than offset by revenues. Specifically, the Commission found that DIRECTV had more than 8.5 million customers as of May 2000, and based on the DBS average programming price of $30 per month, it expects that DIRECTV subscriber revenues would be over $3 billion per year. Similarly, based on EchoStar's more than 4 million subscribers as of May 2000, the Commission expects that EchoStar's subscriber revenues would appear to be nearly $1.5 billion per year.

7. DIRECTV and EchoStar argue in their petitions that the Commission failed to adequately address the costs that the video description rules impose on DBS operators. DIRECTV asserts that the Commission based its decision ''on a fictitious revenue figure'' and that ''gross revenues are an inappropriate measure'' of its ability to bear the expenses associated with the new rules. Both petitioners claim that neither company is currently profitable. DIRECTV explains that, in addition to the costs needed to upgrade its system, the rules create staffing costs and missed opportunity costs, and impose costs for video describing programs ''estimated at $4,000 per hour.'' EchoStar asserts that ''[a] requirement supporting SAP feeds for all the hundreds of broadcast stations retransmitted by EchoStar would constitute a significant additional expenditure of bandwidth * * * approximately 6.25% of a channel of incremental bandwidth * * * comparable to, or even greater than, the 4% set-aside for public interest programming.'' Neither petitioner, however, explains how this information would lead the Commission to change its finding that MVPDs serving 50,000 or more subscribers should provide programming with video description. The Commission recognizes that the video description rules impose costs on DIRECTV and EchoStar, as they do on other MVPDs, as well as broadcast stations. DIRECTV and EchoStar have not provided information to convince the Commission, however, that direct broadcast satellite (DBS) providers should be categorically exempt from the rules. Neither petitioner explains how the rules impose an undue financial burden or an undue burden on available bandwidth sufficient for the Commission to determine that either should be exempt from the video description rules. While the Commission finds no reason at this time to change its standard for MVPDs, DIRECTV and EchoStar have the option of seeking individual exemptions by providing sufficiently detailed information under the rules demonstrating that compliance would result in an undue burden.

3. Premium Networks

8. MVPDs that fall within the scope of the video description rules must provide 50 hours of described programming quarterly on each of any of the top five nonbroadcast networks they carry, as defined by prime time national audience share. In the *NPRM,* the Commission proposed to require larger MVPDs to provide programming with video description on nonbroadcast networks that reach 50 percent or more of MVPD households. Noting, however, that, as one commenter pointed out, more than 40 cable networks serve 50 percent or more of MVPD households and that it might be burdensome for cable systems to retransmit video described programming on so many nonbroadcast networks, the Commission decided to limit the number of nonbroadcast networks to the top five. In the *R&O,* the Commission also stated that it believed its decision to require 50 hours per quarter would avoid any conflicts between competing uses of the SAP channel. In particular, the Commission noted that it did not expect certain premium networks, including the Home Box Office (HBO), to be among the top five nonbroadcast networks subject to the rules. The rule, as currently written, however, would require HBO to provide video description.

9. HBO asserts that the Commission never intended to include networks like HBO within the scope of the video description rules. In its petition, HBO contends that by modifying the standard from MVPDs that reach 50 percent of the MVPD households to the top five nonbroadcast networks, the Commission did not intend to expand the scope of the rule to include networks that would not have been subject to the rules originally proposed in the *NPRM.* HBO suggests several options to remedy this issue: change the definition of nonbroadcast networks covered by the rule to be either the top five national *non-premium* nonbroadcast networks, based on Nielsen Media Research, Inc. (Nielsen) national prime time audience share, or those national nonbroadcast networks that reach 50 percent or more of MVPD households and are ranked in the top five, based on Nielsen national prime time audience share; or exempting from the rules those networks that currently transmit a high percentage (such as 65 percent or more) of their prime time schedules with Spanish language audio using the SAP channel.

10. All parties that filed pleadings in response to its petition support HBO's request. Two parties urge the Commission to adopt one of HBO's options because they believe networks, like HBO, that provide substantial amounts of Spanish language programming should not be forced to eliminate or disrupt that programming. Other parties do not object to a rule modification based on an audience reach criterion, but urge the Commission to reject HBO's argument that the Commission could create an exemption based on use of the SAP channel for Spanish programming. They assert that Spanish language translations and video descriptions can be offered on alternate feeds to provide multiple broadcasts or cablecasts of the same programs.

11. The Commission did not intend, in adopting the video description rules, to include networks within the scope of those rules that would not have fallen within the scope of its proposal in the *NPRM.* Accordingly, the Commission amends § 79.3(b)(3) to clarify that the 50-hour requirement applies to the top five national nonbroadcast networks, based on Nielsen national prime time audience share, that reach 50 percent or more of MVPD households. This result is consistent with the Commission's

goal of enhancing the widespread availability of video description. The programming of each of the several nonbroadcast, non-premium networks with the highest ratings is available to more than 75 million subscribers. By contrast, while HBO is among the nonbroadcast networks with the highest ratings during prime time, only 27 million subscribers subscribe to its service. The Commission thus believes that limiting the top nonbroadcast networks to those that are ranked in the top five as defined by national audience share and that reach 50 percent or more of MVPD households best fulfills its goal of ensuring the widest availability of video description. The Commission also believes that this result reconciles its proposal in the *NPRM* and its intent to limit the number of nonbroadcast networks required to provide video described programming for the reasons set forth in the *R&O*.

4. ''Pass-Through'' of Video Description

12. In the *R&O*, the Commission adopted pass-through requirements for programming that contains video description. Broadcast stations, including NCE stations, that have the technical capability to do so, must pass through any second audio program containing video description that they receive from their affiliated networks. Similarly, MVPDs that have the technical capability to do so must pass through any second audio program containing video description that they receive from a broadcast station or nonbroadcast network.

13. One petitioner asks the Commission not to apply the pass-through requirement where a top 25 market broadcast station has already met its 50-hour quarterly requirement, if the station wants to provide Spanish language or any other SAP service for that particular program. Similarly, the petitioner asks the Commission not to apply the rule to a small market station not subject to any quarterly minimum, if the station wants to provide any other SAP service for that particular program. One party opposes the request, arguing that there is no reason to deprive the visually impaired community of described programming where the station already has the equipment in place and is receiving the programming in described format. Another party agrees that stations should be able to serve their non-English speaking viewers, but both parties express concern that allowing local stations to use their SAP channel to provide any other services would allow a local broadcaster to use its SAP channel for information or services that are not related to any programming, including radio feeds or farm reports.

14. The Commission agrees that it should provide some additional flexibility under the rule. Because the SAP channel cannot be used to provide two services simultaneously, broadcast stations and MVPDs should be able to provide another service on a SAP channel when airing a program that contains video description, as long as that service is related to the program. Accordingly, the Commission amends §§ 79.3(b)(2) and (4) to require broadcast stations and MVPDs that have the technical capability to do so to pass through video description, unless a program-related use of the SAP channel would cause a conflict with the video description. This holds true even if an entity subject to the video description rules has met the 50-hour requirement. The Commission believes this approach affords broadcast stations and MVPDs reasonable flexibility to meet the needs of visually impaired viewers and other viewers that might benefit from program-related use of the SAP channel.

5. Analog and Digital Television

15. In the *R&O*, the Commission stated that the newly adopted video description rules do not apply to digital broadcasts, but that it expects ultimately to require digital television broadcasts to contain video description. One petitioner argues that the Commission should not mandate video description in an analog environment because the costs for providing video description represent ''orphan'' investments in analog systems that are scheduled to be abandoned. Other parties, on the other hand, argue that video description rules should apply to both analog and digital broadcasts. The Commission rejects the argument that because it did not ''impose expenditures'' on the cable industry for new analog equipment in the navigation devices proceeding, the Commission should similarly not require broadcasters to provide video description with analog broadcasts. The purpose of the navigation devices proceeding was to make equipment, including cable television set-top boxes or direct broadcast satellite receivers previously available only from MVPDs, available for commercial retail purchase. The statutory authority underlying the proceeding is premised on the belief that consumers would benefit from competition in the manufacturing and sale of this equipment. The Commission determined, however, that there would not be a market demand for analog-only services, that analog devices would ''soon be obsolete,'' and that requiring the development of analog equipment would interfere with the development of competition in the digital marketplace.

16. The Commission found that these reasons are inapplicable here. One of the ways in which video description may be transmitted with digital broadcasts is by using an additional audio channel like the SAP channel. The petitioner simply presents no evidence supporting its contention that technical upgrades made to analog systems cannot be used after the transition to digital television (DTV). The Commission thus has no reason to believe that requiring video description with analog broadcasts will result in significant orphaned investments. As the Commission has previously stated and as several parties argue, the need for video description exists now and given that broadcasters will likely continue transmitting in analog format until at least December 2006, the Commission does not wish to wait for the transition to be complete before adopting video description requirements.

17. Certain parties argue that ''the Commission should make clear now that its mandate will extend to transmission and reception of video description in digital television.'' Both parties argue the Commission should implement rules that require manufacturers of digital consumer reception equipment to support the ancillary audio channel that video description can use in DTV, and provide a schedule for implementing video description on digital programming. One party warns that ''unless the Commission signals now that description will need to be supported in DTV, expensive retrofitting or substantial delays will occur down the road.'' As the Commission has stated throughout this proceeding, it expects ultimately to require DTV broadcasts to contain video description, but the Commission believes that the decision on how and when to develop those requirements should come after there has been further experience with both digital broadcasting and video description. The Commission fully intends to address the issues raised in a future periodic DTV review proceeding. Given its intent to require video description of digital programming at a later time, however, the Commission urges equipment manufacturers to design their products with video description in mind.

B. Programming to Contain Video Description

1. Amount of Programming

a. *Counting Repeats of Video Described Programming.* 18. In the *R&O*, the Commission clarified that, once the rules go into effect, broadcast stations and MVPDs may not count toward their 50-hour quarterly requirement programming that they have previously aired with video description. The Commission further explained in the *R&O* that broadcast stations and MVPDs may, however, count any programming they air in excess of their quarterly requirements, if and when they repeat the programming later. In addition, a broadcast station or MVPD may count any video described programming that they air before the effective date of the rule, if they repeat it after the effective date of the rule.

19. All parties that filed petitions or responses to petitions on this issue support flexibility in counting programming previously aired with video description toward the 50-hour quarterly requirement. Three petitioners argue that broadcast stations and MVPDs do not have enough programming each quarter to meet the 50-hour requirement and not counting repeats of video described programming will force broadcast stations and MVPDs to change regularly scheduled programming or describe programming, such as sports programming, to meet the requirement. Two petitioners also contend that the restriction will force cable program networks to pay to video describe licensed programming, programming that they do not own. Petitioners argue that there is no reason for counting repeat showings of captioned programming toward quarterly closed captioning requirements, but not repeats of video described programming toward video description requirements.

20. One party agrees with the petitioners that broadcast stations and MVPDs should be allowed to count previously described programming toward their quarterly requirement, whether the programming is distributed on the same channel for which it was originally described or on another channel. That party states that the blind and visually impaired audience is not interested in the description of programming such as sports. Similarly, two other parties believe some flexibility is warranted. One suggests that a maximum number of repeats in any one quarter could be established or broadcasters and MVPDs could be credited with the first repeat of a described program. Both parties, however, disagree with the petitioners that repeats for closed captioning can be compared with video description because the majority of television programs are now captioned, but the rules only require a few hours of video described programming per quarter. Certain parties believe that program distributors and producers can provide for description as part of licensing arrangements and, therefore, oppose any recommendation to exempt programming that is licensed, but not owned, from the rules.

21. The Commission agrees that some flexibility is warranted and will allow broadcast stations and MVPDs to count a repeat of a described program once toward their 50-hour requirement. Broadcast stations and MVPDs can count a repeat of a previously aired program in the same quarter or in a later quarter, but only once altogether. Based on the information provided in the petitions, the Commission recognizes that some entities may not have enough new programming each quarter that is appropriate for video description. For example, one petitioner explains that the four major networks do not produce new prime time programming during the summer rerun season and another asserts that program networks already have little flexibility because the rules are limited to children's and prime time programming. While the Commission is unwilling to allow broadcast stations and MVPDs to count all previously aired programming that contains video description toward quarterly requirements, it believes that allowing a limited number of repeats will provide broadcast stations and MVPDs reasonable flexibility to make programming more accessible to the blind or visually impaired without intruding unnecessarily into program production and distribution.

22. The Commission rejects the implicit argument that cable program networks should not have to pay to video describe licensed programming. The Commission agrees with several parties that programming distributors and producers can provide for video description as part of a licensing agreement. MVPDs may file waiver requests if the cost of providing video description for licensed programming creates an undue burden.

23. As noted, some parties argue that they do not have enough programming each quarter to enable them to meet the 50-hour requirement without counting repeats, unless they change their regularly scheduled programming to describe programming, such as sports programming, to meet the requirement. In the *R&O*, the Commission declined to exempt categories of programming, including sports programming, from the video description requirement. The Commission believed it was unnecessary to create these types of exemptions because of the limited nature of its initial requirement. That is, the Commission believed that the top networks subject to its rules would be able to select 50 hours per quarter without having to describe programming such as sports programming. If any entities subject to the Commission's rules find that they do not have enough prime time or children's programming to enable them to meet their requirement without describing sports programming or repeats, they may seek an undue burden exemption on that basis.

b. *Subsequent Airings.* 24. In addition to outlining rules on how to count repeats of video described programming, the Commission adopted rules in the *R&O* pertaining to when a station must provide the video description contained in a previously aired program. Specifically, the Commission stated that ''once a broadcast station or MVPD has aired a particular program with video description, all of that broadcast station's or MVPD's subsequent airings of that program should contain video description, unless another use is being made of the SAP channel.'' The Commission further explained that this requirement should not impose any burden because the cost of both describing programming and upgrading equipment and infrastructure to distribute it should be a one-time fixed cost.

25. A petitioner asks the Commission to modify this ''subsequent airing'' requirement as it applies to MVPDs. According to the petitioner, the assumption that the cost of both describing programming, and upgrading equipment and infrastructure should be a one-time fixed cost ''does not hold true if this obligation applies to cable operators.'' The petitioner argues that if, for example, ''a broadcast station carried by a cable operator airs a video-described program, and a cable program network later airs that same program, that cable network would have to create the entire infrastructure necessary to provide that one program with video description—even if that network would not be otherwise subject to the video description rules.'' One party agrees that the rule should be clarified and asserts that the Commission's rule on subsequent airing of video described programming refers to the particular programming network, not the MVPD.

26. The Commission clarifies that once an MVPD that must provide video description under the rules has aired a particular program with video description on a particular network, every subsequent time that MVPD transmits that program *on the same network*, it must include the video description, unless another program-related use is being made of the SAP channel. Applying this requirement only to the network that initially aired the video-described program is consistent with the finding in the *R&O* that the cost of describing programming and upgrading facilities should be a one-time cost. In addition, consistent with its earlier decision regarding the obligation to pass through video described programming, the Commission amends § 79.3(c)(3) to clarify that a broadcast station or MVPD may elect not to provide video description in subsequent airings of a program if the network is using the SAP channel to provide another program-related service.

27. The Commission does not agree, however, that this ''subsequent airing'' rule should apply to networks that are not subject to the quarterly requirement, but have the technical capability to provide video description. The Commission believes that imposing a ''subsequent airing'' requirement on networks not otherwise required to provide any video description might discourage those networks from voluntarily providing video description in the first place.

2. Clarification of the Definition of ''Prime-Time'' Programming

28. Broadcast stations and MVPDs must provide described programming either during prime time or in children's programming. The Commission explained in the *R&O* that prime time programming is the most watched programming, and so programming provided during this time will reach more people than programming provided at any other time.

29. While none of the petitioners challenged the requirement that video programming be described during prime time, one petitioner asked that the Commission clarify the definition of prime time. The petitioner notes that ''the predominant definition of 'prime time' in the industry is 8:00–11:00 p.m. local time in the Eastern and Pacific time zones Monday–Saturday, and 7:00–11:00 p.m. on Sunday. Under this definition, prime time in the Central time zone coincides with the Eastern time zone (an hour earlier local time) and prime time in the Mountain zone is divided between prime time in the Pacific time zone and prime time in the Central time zone.'' Other parties agree that clarification is needed and support the definition that the petitioner provides. The petitioner also asks the Commission to clarify that for TBS Superstation, a single-transponder nonbroadcast network, ''prime time'' nationwide will be considered prime time in the Eastern time zone. The other parties stated that they had no objection to this request.

30. The Commission adopts the industry definition of ''prime time'' for purposes of video description. Accordingly, the Commission amends § 79.3(a)(6) to define ''prime time'' as the period from 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10:00 p.m. Monday through Saturday, and 6 and 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday, or 7 to 10:00 p.m. Monday through Saturday, and 6 to 10:00 p.m. on Sunday. While part 76 of its rules provides a five-hour time period to define prime time, the Commission notes that the repealed prime-time access rules limited presentations of programs from national networks to a three-hour period during prime time. The Commission also notes that Nielsen uses a three-hour time period from Monday through Saturday, and the four-hour time period on Sunday to collect audience prime time viewing data. The Commission finds that using Nielsen's time periods is consistent with its decision to define the top five nonbroadcast networks based on the audience share during prime time as determined by Nielsen. The Commission notes that the parties are in agreement on this definition. The Commission also agrees that prime time for TBS Superstation, a single-transponder system, should be defined as prime time in the Eastern time zone. Again, as the petitioner points out, this definition coincides with Nielsen's standard practice and none of the parties object to this definition.

3. Text Information

31. In the *R&O,* the Commission recognized that making text information accessible to the blind and visually impaired is important, but that it believed a secondary audio program may not be the appropriate vehicle to provide text-based information. The Commission therefore encouraged programming producers with text information to provide that information aurally, by announcing, for example, the names of speakers. The Commission also adopted rules for providing emergency information to visually impaired viewers. All broadcast stations and MVPDs that provide emergency information intended to further life, health, safety, and property through regularly scheduled newscasts and newscasts that are sufficiently urgent to interrupt regular programming, must make the critical details of that information accessible to persons with visual disabilities through aural presentation. A broadcast station or MVPD that provides emergency information using a ''crawl'' or ''scroll'' must accompany the message with an aural tone to alert persons with visual disabilities to turn on a radio, the SAP channel, or a designated digital channel.

32. One petitioner contends that the Commission's final video description rules are fundamentally flawed because they give priority to describing programming over making printed information on the screen accessible. The petitioner argues that the Commission should rescind the final rules and begin an entirely new proceeding because ''[b]y the time anyone gets around to thinking about accessible information * * * the available resources will already be committed elsewhere.'' Several parties support the petitioner's concerns about providing described text information, but oppose its request, in effect, to ''start all over again.'' Instead, the parties encourage the Commission to initiate a separate proceeding to address the issue of video descriptions for text information. They also explain that while the technology and production outlets for delivering video description for television programs has been in place for years, the technology for described information is still being developed. Another petitioner likewise encourages programming producers with text information to provide that information aurally, but argues that the petitioner does not explain ''how any broader requirement to verbalize textual information could be accomplished without unduly disrupting the viewing experiences of many customers.''

33. The Commission emphasizes that it fully recognizes the importance of described text information. As certain parties explain, the industry has begun to examine the use of ''synthetic voice'' and the Commission encourages further development of this or any other technology that would address the issue of described information. The Commission agrees, however, that video description of programming should not

be delayed until the issues of describing text information are addressed. The petitioner has not presented any new arguments that would lead the Commission to change its finding that video described programming and video described text information are not mutually exclusive services. The Commission therefore denies the request to rescind the video description rules while recognizing the importance of addressing the issue of described information in a separate proceeding.

C. Use of SAP Channels

34. In the *R&O,* the Commission stated that it believed its decision to require 50 hours per quarter, or roughly 4 hours per week, of programming with video description would avoid any conflicts between competing uses of the SAP channel. One petitioner argues that mandatory requirements to use the SAP channel for video description will confuse customers and that consumer education will not alleviate the problem. The petitioner contends that it will be required to dedicate staff and resources to address these consumer issues on a permanent basis because ''one-time consumer education measures will not alleviate the problem.'' In response, another party states that ''both Spanish speaking and blind people can figure out program schedules and learn to adjust their viewing habits accordingly.''

35. The Commission recognized in the *R&O* that no technical solution to allow two uses of the SAP channel simultaneously is currently available, but that most networks that use the SAP channel to provide Spanish language audio do so on a limited basis. The Commission concluded that in the majority of cases its rules would not create conflicts between Spanish language audio and video description for use of the SAP channel and that any confusion could be corrected through viewer education. The petitioner presents no new arguments or evidence in its petition for reconsideration that would lead the Commission to change that conclusion. Any change in programming, whether voluntary or mandatory, requires some measure of consumer education and associated costs to provide that education. The petitioner fails to present any information that the cost of providing that education would outweigh the benefits of the rules. The Commission also believes that the minimal amount of programming required under its rules does not overly burden use of the SAP channel. Rather, the roughly 4-hour per week requirement reasonably accommodates competing uses of the SAP channel, such as providing programming that is accessible to Spanish-speaking viewers.

D. Waivers and Exemptions

36. In the *R&O,* the Commission adopted the ''undue burden'' exemption procedures and standards that it uses in the closed captioning context. The Commission will exempt any affected broadcast station or MVPD that can demonstrate through sufficient evidence that compliance would result in an ''undue burden,'' which means significant difficulty or expense. The Commission declined, however, to exempt any particular category of programming or class of programming providers, given the limited nature of the initial video description rules. The Commission stated that it would consider these issues when it considers expanding the scope of entities that must provide video described programming, and the amount of video description those entities must provide.

37. Several parties urge the Commission to amend the video description rules to permit program networks and producers, in addition to distributors, to file requests for waivers for undue burden as they are permitted to do under the closed captioning rules. Noting that cable program networks and program owners are not included within the definition of ''video programming distributor'' under part 79 of the Commission's rules, one petitioner asserts that these entities, rather than the cable operator, would be the appropriate entities to file for undue burden waivers in most cases. Another petitioner argues that while the rules place substantial burdens on networks, those networks have no opportunity to petition for an exemption from the requirements of the rules, leaving them no recourse. One party agrees, noting that program networks and producers must be involved and supportive partners with MVPDs to achieve successful provision of described programming. That party asserts that both networks and producers should have rights similar to distributors to request undue burden exemptions.

38. The Commission agrees that video programming providers should be allowed to file waivers for exemptions under the undue burden standard, as they are allowed under the Commission's closed captioning rules. Accordingly, the Commission amends § 79.3(d) to permit video programming providers, as defined under part 79 of its rules, to petition the Commission for a full or partial exemption from the video description requirements. As it similarly stated in the closed captioning proceeding, the undue burden exemption is intended to be ''sufficiently flexible to accommodate a wide variety of circumstances'' for which compliance with the video description requirements would pose a significant financial or technical burden. As the Commission has previously recognized, video description is most likely to be added to programming at the production stage prior to distribution, where it is most economically and technically efficient. To the extent a broadcast station's or MVPD's inability to comply with its rules stems from problems at, for example, the programming producer end, the Commission believes it should allow the programming producer to plead its hardship directly to the Commission. Otherwise, the programming producer would have to submit information to its local distribution outlets around the country, which would then file numerous separate waiver requests with the Commission. To avoid this inefficiency, therefore, the Commission will allow programming providers to seek exemptions under the undue burden standard. The Commission emphasizes, however, that while it will allow other programming providers to seek exemptions from its rules, it holds programming distributors responsible for compliance.

E. Enforcement

1. Initial Complaints

39. In the *R&O,* the Commission adopted procedures to enforce its initial video description rules. Under these procedures, complaints are not required to be submitted to a programming distributor before being filed with the Commission. A complainant may allege a violation of the video description rules by sending a complaint to the Consumer Information Bureau (CIB) at the Commission by any reasonable means, such as a letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, audio-cassette, Braille, or some other method that would best accommodate a complainant's disability. CIB will forward formal complaints to the Commission's Enforcement Bureau.

40. Petitioners note that the Commission has established enforcement procedures for its video description rules that differ from the enforcement procedures for the Commission's closed captioning rules. They contend that complaints should be submitted to a programming distributor before being filed with the Commission. According to one petitioner, ''requiring

the complainant to go to the video programming distributor first will allow the parties to more quickly and satisfactorily resolve the dispute.'' Another petitioner argues that there is no basis on which to adopt a different complaint procedure for the enforcement of video description rules than for closed captioning because ''the record does not indicate that the existing closed captioning rules have been ineffective or inadequate.'' Certain parties oppose the petitioners' request, arguing that obtaining information to contact programming distributors is too difficult for blind and visually impaired viewers. One party contends that ''[i]t would be simpler and far more efficient for visually impaired viewers to have a single point of contact.''

41. The Commission believes that viewers should try to resolve disputes with video programming distributors prior to filing a formal complaint with the Commission. The Commission therefore amends its rules to require complainants to certify in formal complaints to the Commission, and distributors to certify in their answers, that they have attempted in good faith to settle disputes prior to filing formal complaints and answers with the Commission. The Commission notes that this result is consistent with its recently revised rules for filing formal complaints against common carriers. The Commission also followed these rules when it adopted rules to implement section 255 of the Act, which requires manufacturers of telecommunications equipment, and providers of telecommunications services, to make such equipment and provide such services in a manner that is accessible to persons with disabilities. Prior to or instead of filing a formal complaint, however, viewers may contact CIB either to attempt to resolve disputes by filing an informal complaint, or to obtain information about how to contact the programming distributor. The Commission believes that these procedures will provide parties the opportunity to resolve disputes quickly and efficiently.

2. Clarification of ''Technical Errors''

42. The video description rules provide that, in evaluating whether a video programming distributor has complied with the requirement to provide video programming with video description, the Commission will consider a showing that any lack of video description was *de minimis* and reasonable under the circumstances. One petitioner asks the Commission to clarify that technical errors beyond an individual station's control will fall under the ''reasonable circumstances'' provision. The petitioner explains, for example, that ''if a station is ready and able to pass through to viewers described programming received from its network, but, due to technical difficulties beyond the station's control, the described programming is not properly received, then that 'lack of video description' should be deemed 'reasonable under the circumstances.'''' Stating that the Commission rarely faults a broadcaster or cablecaster for a temporary rule violation, one party argues that a technical error should not be construed to include the lack of equipment to provide video descriptions, but that a technical error is ''a temporary difficulty'' that is ''a short-term failure of equipment.''

43. The Commission clarifies that to be classified as a technical error, the problem must be beyond a station's control. In addition, the problem must be *de minimis* and reasonable under the circumstances. The Commission will examine carefully, however, any showings ascribed to technical error to ensure that those instances are only a temporary difficulty, such as that caused by short-term failure of equipment, and not by a station unreasonably failing to pass-through the described programming supplied by its network.

F. Jurisdiction

44. In the *R&O*, the Commission held that it has the authority to adopt video description rules. The Commission explained that Sections 1, 2(a), 4(i), and 303(r) of the Act, taken together, direct and empower the Commission to make available to all Americans a radio and wire communication service, and to make regulations to carry out this mandate, that are consistent with the public interest and not inconsistent with other provisions of the Act or other law. In reaching this decision, the Commission considered but rejected the arguments of commenters that video description rules would be inconsistent with other law, namely Sections 624(f) and 713(f) of the Act, as well as the First Amendment, and might also interfere with the rights of copyright holders.

45. Petitioners raise the same arguments raised before in this proceeding. For example, petitioners suggest that analysis of the issue of the Commission's authority to adopt video description rules begins and ends with Section 713(f) of the Act, which instructed the Commission to ''commence an inquiry * * * and report to Congress'' on video description, but not to make rules. Against the backdrop of Section 713, petitioners contend that the Commission cannot rely on other provisions of the Act to make rules. Petitioners also suggest that the rules are content-based, violating the First Amendment and, as applied to cable operators, Section 624(f) of the Act, which does not permit the government to ''impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI of the Act.]'' Petitioners further suggest that the rules interfere with the rights of copyright holders.

46. The Commission addressed most of the statutory arguments petitioners raised at the *R&O* stage, and they have offered no reason for the Commission to reconsider its conclusion. As discussed in detail in the *R&O*, Sections 1, 2(a), 4(i), and 303(r) make clear that the Commission's fundamental purpose is to make available so far as possible to all Americans a radio and wire communication service, and it has the power to make rules to carry out this mandate that are consistent with the public interest, and not inconsistent with other law. The video description rules further the public interest because they are designed to enhance the accessibility of video programming to persons with visual disabilities, but at the same time not impose an undue burden on the video programming production and distribution industries. The video description rules are not inconsistent with Sections 624(f) and 713(f) of the Act, the First Amendment, or copyright law. The rules are not inconsistent with Section 713(f), because that section neither authorizes nor prohibits a rulemaking on video description. The rules are not inconsistent with Section 624(f), because they do not require cable operators to carry any particular programming. The rules are not inconsistent with the First Amendment, because they are content-neutral regulations, and satisfy the applicable test of serving an important government interest without burdening substantially more speech than necessary. The rules are not inconsistent with copyright law because they do not violate any copyright holder's rights.

47. The Commission also rejects one petitioner's new argument that the rules are inconsistent with Section 255 of the Act. Section 255 requires manufacturers of telecommunications equipment, and providers of telecommunications services, to make such equipment and services accessible to persons with disabilities, but only ''if readily achievable.'' The petitioner suggests that the video description rules do not have a similar contingency. The petitioner also argues that the discrepancy

between the ''readily achievable'' standard and the video description rules further suggests that the Commission does not have authority to adopt such rules—Congress did not qualify the provision of video description because there was no access obligation to qualify in the first place. The petitioner overlooks, however, the fact that the video description rules contain procedures for waiver if compliance would create an undue burden. In sum, as the Commission explained in greater detail in the *R&O*, the Commission believes that the video description rules further the very purpose for which the Commission was created—''to make available, so far as possible, to all the people of the United States * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communication service''—and are within its power to adopt because they are ''not inconsistent with [the] Act'' and serve the ''public convenience, interest, and necessity'' and are ''not inconsistent with law.''

Procedural Matters

48. Authority for issuance of this *MO&O* is contained in sections 4(i), 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), 403, and 405.

49. *Supplemental Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act (RFA), the Commission has prepared a Supplemental Final Certification of the possible impact on small entities of the rules adopted in this *MO&O*. The Supplemental Final Certification is set forth in the *MO&O*.

Supplemental Final Regulatory Flexibility Analysis Certification

50. The Regulatory Flexibility Act (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemaking proceedings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' The *NPRM* in this proceeding proposed rules to provide video description on video programming to ensure the accessibility of video programming to persons with visual impairments. The *R&O* adopted rules requiring broadcasters and other video programming distributors to provide video description and to make emergency information more accessible to visually impaired viewers.

51. In an abundance of caution, the Commission published an Initial Regulatory Flexibility Analysis (IRFA) in the *NPRM,* even though the Commission was reasonably confident that the proposed rules would not have the requisite ''significant economic impact'' on a ''substantial number of small entities.'' The IRFA sought written public comment on the proposed rules. No written comments were received on the IRFA, nor were any general comments received that raised concerns about the impact of the proposed rules on small entities. Because the Commission believed the rules adopted in the *R&O* would have a negligible effect on small businesses, the Commission published a Final Certification that the rules adopted in that order would not have a significant economic impact on a substantial number of small entities.

52. The *MO&O* amends certain rules adopted in the *R&O*. The Commission amends its rules to define the top five nonbroadcast networks as those that are ranked in the top five as defined by national audience share and that also reach 50 percent or more of MVPD households. The amended rules allow broadcast stations and MVPDs to count previously aired programming one time toward quarterly requirements. Once a broadcast station or MVPD subject to the video description rules has aired a particular program with video description, only subsequent airings of that program by that broadcast station or MVPD on the *same* network or channel must contain the video description. Under both this ''subsequent airing'' rule and the ''pass-through'' rule, broadcast stations and MVPDs may now use the SAP channel to provide services other than video description, as long as those services, such as foreign language translations, are program-related. The rule amendments allow programming providers, in addition to programming distributors, to file waivers for exemptions. The rule amendments adopt a definition of ''prime time'' and clarify the definition of ''technical error'' for purposes of determining compliance with the rules. These amendments only affect large entities as discussed in the Final Certification included in the *R&O*. No small entities will experience an economic impact as a result of these amendments.

53. Under the rule amendments, consumers may bring informal complaints to the Commission at any time, but must include in a formal complaint to the Commission a certification that they have tried to resolve a dispute with the distributor prior to filing the complaint. In addition, distributors are required to make similar certifications in their answers. These amendments to the rules are created to attempt to resolve issues prior to filing a formal complaint. The Commission believes that requiring these certifications is necessary to assure a smooth process to address outstanding issues in a timely and efficient manner. The burden imposed by the inclusion of these certifications is nominal for both consumers and distributors because it will require no more than a single statement to be added to the initial formal complaint and its answer. These amendments will not have a significant economic impact on a substantial number of small entities.

54. The Commission therefore certifies, pursuant to the RFA, that the rule amendments adopted in the present *MO&O* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *MO&O*, including a copy of this Supplemental Final Certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act. In addition, the Commission will send a copy of the *MO&O*, including a copy of this Supplemental Final Certification, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, a copy of the *MO&O* and this Supplemental Final Certification will be published in the **Federal Register**.

Ordering Clauses

55. The petitions for reconsideration or clarification are granted to the extent provided herein and otherwise are denied pursuant to sections 1, 2(a), 4(i), 303(r), 307, 309, 310, 403, 405, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 303(r), 307, 309, 310, 403, 405, 613, and § 1.429(i) of the Commission's rules, 47 CFR 1.429(i).

56. Pursuant to sections 4(i) & (j), 303(r), 307, 308 and 309 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) & (j), 303(r), 307, 308, 309, part 79 of the Commission's rules, 47 CFR Part 79, is amended as set forth in the *MO&O*.

57. The rule amendments set forth in the *MO&O* that revise § 79.3 of the Commission's rules, 47 CFR 79.3, shall become effective on April 1, 2002.

58. The Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this *MO&O* in MM Docket No. 99–339, including the Supplemental Final Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

59. This proceeding is hereby terminated.

List of Subjects in 47 CFR Part 79

Cable television, Closed captioning and video description of video programming.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

For the reasons set forth in the preamble, part 79 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 79—CLOSED CAPTIONING AND VIDEO DESCRIPTION OF VIDEO PROGRAMMING

1. The authority citation for part 79 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 613

2. Section 79.3 is amended by

(a) adding paragraph (a)(6);

(b) revising paragraphs (b)(2), (b)(3), (b)(4)(i), (b)(4)(ii);

(c) revising paragraphs (c)(2) and (c)(3);

(d) redesignating paragraph (c)(4) as paragraph (c)(5);

(e) adding new paragraph (c)(4);

(f) revising paragraph (d)(1);

(g) revising paragraphs (e)(1)(iv) and (e)(1)(v);

(h) adding paragraph (e)(1)(vi); and

(i) revising paragraph (e)(2).

The revisions and additions read as follows:

§ 79.3 Video description of video programming.

* * * * *

(a) * * *

(6) *Prime time.* The period from 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday local time, except that in the central time zone the relevant period shall be between the hours of 7 and 10:00 p.m. Monday through Saturday, and 6 and 10:00 p.m. on Sunday, and in the mountain time zone each station shall elect whether the period shall be 8 to 11:00 p.m. Monday through Saturday, and 7 to 11:00 p.m. on Sunday, or 7 to 10:00 p.m. Monday through Saturday, and 6 to 10:00 p.m. on Sunday.

(b) * * *

(2) Television broadcast stations that are affiliated or otherwise associated with any television network, must pass through video description when the network provides video description and the broadcast station has the technical capability necessary to pass through the video description, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description;

(3) Multichannel video programming distributors (MVPDs) that serve 50,000 or more subscribers, as of September 30, 2000, must provide 50 hours of video description per calendar quarter during prime time or on children's programming, on each channel on which they carry one of the top five national nonbroadcast networks, as defined by an average of the national audience share during prime time of nonbroadcast networks, as determined by Nielsen Media Research, Inc., for the time period October 1999–September 2000, that reach 50 percent or more of MVPD households; and

(4) * * *

(i) must pass through video description on each broadcast station they carry, when the broadcast station provides video description, and the channel on which the MVPD distributes the programming of the broadcast station has the technical capability necessary to pass through the video description, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description; and

(ii) must pass through video description on each nonbroadcast network they carry, when the network provides video description, and the channel on which the MVPD distributes the programming of the network has the technical capability necessary to pass through the video description, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

(c) * * *

(2) Programming with video description that has been previously counted by a broadcaster or MVPD toward its minimum requirement for any quarter may be counted one additional time toward that broadcaster's or MVPD's minimum requirement for the same or any one subsequent quarter.

(3) Once a commercial television broadcast station as defined under paragraph (b)(1) of this section has aired a particular program with video description, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

(4) Once an MVPD as defined under paragraph (b)(3) of this section:

(i) has aired a particular program with video description on a broadcast station they carry, it is required to include video description with all subsequent airings of that program on that same broadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description; or

(ii) has aired a particular program with video description on a nonbroadcast station they carry, it is required to include video description with all subsequent airings of that program on that same nonbroadcast station, unless using the technology for providing video description in connection with the program for another purpose that is related to the programming would conflict with providing the video description.

* * * * *

(d) * * *

(1) A video programming provider may petition the Commission for a full or partial exemption from the video description requirements of this section, which the Commission may grant upon a finding that the requirements will result in an undue burden.

* * * * *

(e) * * *

(1) * * *

(iv) the specific relief or satisfaction sought by the complainant;

(v) the complainant's preferred format or method of response to the complaint (such as letter, facsimile transmission, telephone (voice/TRS/TTY), Internet e-mail, or some other method that would best accommodate the complaint's disability); and

(vi) a certification that the complainant attempted in good faith to resolve the dispute with the broadcast station or MVPD against whom the complaint is alleged.

(2) The Commission will promptly forward complaints satisfying the above requirements to the video programming distributor involved. The video programming distributor must respond to the complaint within a specified time, generally within 30 days. The Commission may authorize Commission staff either to shorten or lengthen the time required for responding to complaints in particular cases. The

answer to a complaint must include a certification that the video programming distributor attempted in good faith to resolve the dispute with the complainant.

* * * * *

[FR Doc. 01–2754 Filed 1–31–01; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AG29

Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Mexican Spotted Owl

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat under the Endangered Species Act of 1973, as amended (Act), for the Mexican spotted owl (*Strix occidentalis lucida*) (owl). The owl inhabits canyon and montane forest habitats across a range that extends from southern Utah and Colorado, through Arizona, New Mexico, and west Texas, to the mountains of central Mexico. We designate approximately 1.9 million hectares (ha) (4.6 million acres (ac)) of critical habitat in Arizona, Colorado, New Mexico, and Utah, on Federal lands. Section 7 of the Act requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to destroy or adversely modify designated critical habitat. As required by section 4 of the Act, we considered economic and other relevant impacts prior to making a final decision on what areas to designate as critical habitat.

DATES: This final rule is effective March 5, 2001.

ADDRESSES: The complete administrative record for this rule is on file at the New Mexico Ecological Services Field Office, 2105 Osuna Road NE, Albuquerque, New Mexico 87113. You may view the complete file for this rule, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Joy Nicholopoulos, Field Supervisor, New Mexico Ecological Services Field Office, at the above address; telephone 505/346–2525, facsimile 505/346–2542.

SUPPLEMENTARY INFORMATION:

Background

The Mexican spotted owl (*Strix occidentalis lucida*) is one of three subspecies of spotted owl occurring in the United States; the other two are the northern spotted owl (*S. o. caurina*) and the California spotted owl (S. o. occidentalis). The Mexican spotted owl is distinguished from the California and northern subspecies chiefly by geographic distribution and plumage. The Mexican spotted owl is mottled in appearance with irregular white and brown spots on its abdomen, back, and head. The spots of the Mexican spotted owl are larger and more numerous than in the other two subspecies, giving it a lighter appearance.

The Mexican spotted owl has the largest geographic range of the three subspecies. The range extends north from Aguascalientes, Mexico, through the mountains of Arizona, New Mexico, and western Texas, to the canyons of Utah and Colorado, and the Front Range of central Colorado. Much remains unknown about the species' distribution in Mexico, where much of the owl's range has not been surveyed. The owl occupies a fragmented distribution throughout its United States range, corresponding to the availability of forested mountains and canyons, and in some cases, rocky canyonlands. Although there are no estimates of the owl's historical population size, its historical range and present distribution are thought to be similar.

According to the Recovery Plan for the Mexican Spotted Owl (United States Department of the Interior 1995) (Recovery Plan), 91 percent of owls known to exist in the United States between 1990 and 1993 occurred on land administered by the U.S. Forest Service (FS); therefore, the primary administrator of lands supporting owls in the United States is the FS. These numbers are based upon preliminary surveys that were focused on National Forests in the southwest. Nevertheless, most owls have been found within Region 3 of the FS, which includes 11 National Forests in New Mexico and Arizona. FS Regions 2 and 4, including two National Forests in Colorado and three in Utah, support fewer owls. The range of the owl is divided into 11 Recovery Units (RU), 5 in Mexico and 6 in the United States, as identified in the Recovery Plan. The Recovery Plan also identifies recovery criteria and provides distribution, abundance, and density estimates by RU. Of the RUs in the United States, the Upper Gila Mountains RU, located in the central portion of the species' U.S. range in central Arizona and west-central New Mexico, contains over half of known owl sites. Owls here use a wide variety of habitat types, but are most commonly found inhabiting mature mixed-conifer and ponderosa pine-Gambel oak forests. The Basin and Range-East RU encompasses central and southern New Mexico, and includes numerous parallel mountain ranges separated by alluvial valleys and broad, flat basins.

Most breeding spotted owls occur in mature mixed-conifer forest. The Basin and Range-West RU contains mountain ranges separated by non-forested habitat. These ''sky island'' mountains of southern Arizona and far-western New Mexico contain mid-elevation mixed-conifer forest and lower elevation Madrean pine-oak woodlands that support spotted owls. The Colorado Plateau RU includes northern Arizona, southern Utah, southwestern Colorado, and northwestern New Mexico, with owls generally confined to deeply incised canyon systems and wooded areas of isolated mountain ranges. The Southern Rocky Mountains-New Mexico RU consists of the mountain ranges of northern New Mexico. Owls in this unit typically inhabit mature mixed-conifer forest in steep canyons. The smallest number of spotted owls occurs in the Southern Rocky Mountains-Colorado RU. This unit includes the southern Rocky Mountains in Colorado, where spotted owls are largely confined to steep canyons, generally with significant rock faces and various amounts of mature coniferous forest. The critical habitat units identified in this designation are all within these RUs.

A reliable estimate of the numbers of owls throughout its entire range is not currently available. Using information gathered by Region 3 of the FS, Fletcher (1990) calculated that 2,074 owls existed in Arizona and New Mexico in 1990. Based on more up-to-date information, we subsequently modified Fletcher's calculations and estimated a total of 2,160 owls throughout the United States (USDI 1991). However, these numbers are not considered reliable estimates of current population size for a variety of statistical reasons, and a pilot study (Ganey *et al.* 1999) conducted in 1999, estimated the number of owls for the upper Gila Mountains Recovery Unit (exclusive of tribal lands) as 2,950 (95 percent confidence interval 717–5,183).

Mexican spotted owls nest, roost, forage, and disperse in a diverse array of biotic communities. Nesting habitat is typically in areas with complex forest structure or rocky canyons, and contains uneven-aged, multi-storied mature or old-growth stands that have high

canopy closure (Ganey and Balda 1989, USDI 1991). In the northern portion of the range (Utah and Colorado), most nests are in caves or on cliff ledges in steep-walled canyons. Elsewhere, the majority of nests appear to be in Douglas fir (*Pseudotsuga menziesii*) trees (Fletcher and Hollis 1994, Seamans and Gutierrez 1995). A wide variety of tree species is used for roosting; however, Douglas fir is the most commonly used species in mixed conifer forests (Ganey 1988, Fletcher and Hollis 1994, Young *et al.* 1998). Owls generally use a wider variety of forest conditions for foraging than they use for nesting/roosting.

Seasonal movement patterns of Mexican spotted owls are variable. Some individuals are year-round residents within an area, some remain in the same general area but show shifts in habitat use patterns, and some migrate considerable distances (20–50 kilometers (km)) (12–31 miles (mi)) during the winter, generally migrating to more open habitat at lower elevations (Ganey and Balda 1989b, Willey 1993, Ganey *et al.*1998). The home-range size of Mexican spotted owls appears to vary considerably among habitats and/or geographic areas (USDI 1995), ranging in size from 261–1,487 ha (647–3,688 ac) for individuals birds, and 381–1,551 ha (945–3,846 ac) for pairs (Ganey and Balda 1989b, Ganey *et al.* 1999). Little is known about habitat use by juveniles dispersing soon after fledging. Ganey *et al.* (1998) found dispersing juveniles in a variety of habitats ranging from high-elevation forests to piñon-juniper woodlands and riparian areas surrounded by desert grasslands.

Mexican spotted owls do not nest every year. The owl's reproductive pattern varies somewhat across its range. In Arizona, courtship usually begins in March with pairs roosting together during the day and calling to each other at dusk (Ganey 1988). Eggs are typically laid in late March or early April. Incubation begins shortly after the first egg is laid, and is performed entirely by the female (Ganey 1988). The incubation period is about 30 days (Ganey 1988). During incubation and the first half of the brooding period, the female leaves the nest only to defecate, regurgitate pellets, or receive prey from the male, who does all or most of the hunting (Forsman *et al.* 1984, Ganey 1988). Eggs usually hatch in early May, with nestling owls fledging 4 to 5 weeks later, and then dispersing in mid-September to early October (Ganey 1988).

Little is known about the reproductive output for the spotted owl. It varies both spatially and temporally (White *et al.* 1995), but the subspecies demonstrates an average annual rate of about one young per pair. Based on short-term population and radio tracking studies, and longer-term monitoring studies, the probability of an adult owl surviving from 1 year to the next is 80 to 90 percent. Average annual juvenile survival is considerably lower, at 6 to 29 percent, although it is believed these estimates may be artificially low due to the high likelihood of permanent dispersal from the study area, and the lag of several years before marked juveniles reappear as territory holders and are detected as survivors through recapture efforts (White *et al.* 1995). Little research has been conducted on the causes of mortality, but predation by great horned owls (Bubo virginianus), northern goshawks (Accipter gentilis), red-tailed hawks (Buteo jamaicensis), and golden eagles (Aquila chrysaetos), as well as starvation, and collisions (e.g., with cars, powerlines), may all be contributing factors.

Mexican spotted owls consume a variety of prey throughout their range, but commonly eat small- and medium-sized rodents such as woodrats (*Neotoma* spp.), peromyscid mice (*Peromyscus* spp.), and microtine voles (*Microtus* spp.). Owls also may consume bats, birds, reptiles, and arthropods (Ward and Block 1995). Each prey species uses a unique habitat, so that the differences in the owl's diet across its range likely reflect geographic variation in population densities and habitats of both the prey and the owl (Ward and Block 1995). Deer mice (*P. maniculatus*) are widespread in distribution in comparison to brush mice (*P. boylei*), which are restricted to drier, rockier substrates, with sparse tree cover. Mexican woodrats (*N. mexicana*) are typically found in areas with considerable shrub or understory tree cover and high log volumes or rocky outcrops. Mexican voles (*M. mexicanus*) are associated with high herbaceous cover, primarily grasses, whereas long-tailed voles (*M. longicaudus*) are found in dense herbaceous cover, primarily forbs, with many shrubs and limited tree cover.

Two primary reasons were cited for listing the owl as threatened in 1993: (1) Historical alteration of its habitat as the result of timber management practices, specifically the use of even-aged silviculture, and the threat of these practices continuing; and (2) the danger of catastrophic wildfire. The Recovery Plan for the owl outlines management actions that land management agencies and Indian tribes should undertake to remove recognized threats and recover the spotted owl. This critical habitat designation is based on recovery needs and guidelines identified in the Recovery Plan.

Previous Federal Actions

The entire spotted owl species (*Strix occidentalis*) was classified in the January 6, 1989, Animal Notice of Review (54 FR 554) as a category 2 candidate species. A category 2 candidate species was one for which listing may have been appropriate, but for which additional biological information was needed to support a proposed rule.

On December 22, 1989, we received a petition submitted by Dr. Robin D. Silver requesting the listing of the Mexican spotted owl as an endangered or threatened species. On February 27, 1990, we found that the petition presented substantial information indicating that listing may be warranted and initiated a status review. In conducting our review, we published a notice in the **Federal Register** (55 FR 11413) on March 28, 1990, requesting public comments and biological data on the status of the Mexican spotted owl. On February 20, 1991, we made a finding, based on the contents of the status review, that listing the Mexican spotted owl under section 4(b)(3)(B)(I) of the Act was warranted. Notice of this finding was published in the **Federal Register** on April 11, 1991 (56 FR 14678). We published a proposed rule to list the Mexican spotted owl as threatened without critical habitat in the **Federal Register** on November 4, 1991 (56 FR 56344).

We published a final rule listing the Mexican spotted owl as a threatened species on March 16, 1993 (58 FR 14248). Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, we designate critical habitat at the time a species is determined to be endangered or threatened. The Act's implementing regulations (50 CFR 424.12(a)(2)) state that critical habitat is not determinable if information sufficient to perform required analyses of the impacts of the designation is lacking or if the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat. At the time of listing, we found that, although considerable knowledge of owl habitat needs had been gathered in recent years, habitat maps in sufficient detail to accurately delineate these areas were not available. After the listing, we began gathering the data necessary to develop a proposed rule to designate critical habitat.

On June 23, 1993, and again on August 16, 1993, we received petitions to remove the Mexican spotted owl from

the List of Endangered and Threatened Wildlife. In subsequent petition findings published in the **Federal Register** (58 FR 49467, 59 FR 15361), we addressed the issues raised in the petitions and determined that the delisting petitions did not present substantial information indicating that delisting the Mexican spotted owl was warranted. The petitioners challenged this decision in Federal District Court in New Mexico in *Coalition of Arizona/New Mexico Counties for Stable Economic Growth* v. *United States Fish and Wildlife Service, et al.,* CIV 94–1058–MV. The district court held that the Coalition failed to show that the Service violated any procedural rules that amounted to more than harmless error and failed to demonstrate that the Service acted arbitrarily or capriciously in listing or refusing to delist the Mexican spotted owl. A judgment was issued by the district court denying the plaintiff's petition to delist the owl.

On February 14, 1994, a lawsuit was filed in Federal District Court in Arizona against the Department of the Interior for failure to designate critical habitat for the owl (*Dr. Robin Silver, et al.* v. *Bruce Babbitt, et al.,* CIV–94–0337–PHX–CAM). On October 6, 1994, the Court ordered us to '' * * * publish a proposed designation of critical habitat, including economic exclusion pursuant to 16 U.S.C. Sec. 1533(b)(2), no later than December 1, 1994, [and] publish its final designation of critical habitat, following the procedure required by statute and Federal regulations for notice and comment,'' by submitting the final rule to the **Federal Register** no later than May 27, 1995. Under an extension granted by the court, we issued the proposed rule to designate critical habitat on December 7, 1994 (59 FR 63162).

We prepared a draft economic analysis, and published a notice of its availability in the **Federal Register** on March 8, 1995 (60 FR 12728; 60 FR 12730). The publication also proposed several revisions to the original proposal, solicited additional information and comments, opened an additional 60-day comment period extending to May 8, 1995, and announced the schedule and location of public hearings. We published a final rule designating critical habitat for the Mexican spotted owl on June 6, 1995 (60 FR 29914).

After the listing of the Mexican spotted owl, a Recovery Team was appointed by our Southwestern Regional Director to develop a Recovery Plan in March 1993. The Team assembled all available data on Mexican spotted owl biology, the threats faced across the subspecies' range, current protection afforded the subspecies, and other pertinent information. Using that information, the Team developed the Recovery Plan, which was finalized in the fall of 1995. In 1996, the Southwest Region of the FS incorporated elements of the Recovery Plan into their Forest Plans.

In 1996, the Tenth Circuit Court of Appeals in *Catron County Board of Commissioners* v. *United States Fish and Wildlife Service,* 75 F.3d 1429, 1439 (10th Cir. 1996), ruled that the Service had to comply with the National Environmental Policy Act (NEPA) before designating critical habitat for two desert fish, the spikedace and loach minnow. In addition, a Federal district court in New Mexico later set aside the final rule designating critical habitat for the owl and forbid the Service from enforcing critical habitat for the owl (*Coalition of Arizona-New Mexico Counties for Stable Economic Growth* v. *U.S. Fish and Wildlife Service,* No. 95–1285–M Civil). As a result of these court rulings, we removed the critical habitat designation for the owl from the Code of Federal Regulations on March 25, 1998 (63 FR 14378).

On March 13, 2000, the United States District Court for the District of New Mexico, (*Southwest Center for Biological Diversity and Silver* v. *Babbitt and Clark,* CIV 99–519 LFG/LCS–ACE), ordered us to propose critical habitat within 4 months of the court order, and to complete and publish a final designation of critical habitat for the Mexican spotted owl by January 15, 2001. On July 21, 2000, we published a proposal to designate critical habitat for the Mexican spotted owl in Arizona, Colorado, New Mexico, and Utah, mostly on Federal lands (65 FR 45336). The initial comment period was open until September 19, 2000. During this 60-day comment period, we held six public hearings on the proposed rule. On October 20, 2000, we published a notice announcing the reopening of the comment period and announced the availability of the draft economic analysis and draft environmental assessment on the proposal to designate critical habitat for the Mexican spotted owl (65 FR 63047). The final comment period was open until November 20, 2000.

Summary of Comments and Recommendations

In the July 21, 2000, proposed rule, we requested all interested parties to submit comments or information that might bear on the designation of critical habitat for the Mexican spotted owl (65 FR 45336). The first comment period closed September 19, 2000. The comment period was reopened from October 20 to November 20, 2000, to once again solicit comments on the proposed rule and to accept comments on the draft economic analysis and draft environmental assessment (65 FR 63047). We contacted all appropriate State and Federal agencies, Tribes, county governments, scientific organizations, and other interested parties and invited them to comment. In addition, we published newspaper notices inviting public comment and announcing the public hearings in the following newspapers in New Mexico: Albuquerque Journal, Albuquerque Tribune, Sante Fe New Mexican, Silver City Daily Press, Rio Grande Sun, Las Cruces Sun, and Alamogordo Daily News; Arizona: Arizona Republic, Arizona Daily Star, Arizona Daily Sun, Sierra Vista Daily Herald Dispatch, Navajo-Hopi Observer, White Mountain Independent, Lake Powell Chronicle, Verde-Independent-Bugle, Eastern Arizona Courier, and Prescott Daily Courier; Colorado: Rocky Mountain News, Pueblo Chiefton, Denver Post, Colorado Springs Gazette, and Canon City Daily; and Utah: The Spectrum Newspaper, Southern Utah News, Salt-Lake City Tribune, and Times Independent. We held six public hearings on the proposed rule: Sante Fe (August 14, 2000) and Las Cruces (August 15, 2000), New Mexico; Tucson (August 16, 2000) and Flagstaff (August 17, 2000), Arizona; Colorado Springs, Colorado (August 21, 2000); and Cedar City, Utah (August 23, 2000). Transcripts of these hearings are available for inspection (see **ADDRESSES** section).

We solicited seven independent expert ornithologists who are familiar with this species to peer review the proposed critical habitat designation. However, only two of the peer reviewers submitted comments. Both responding peer reviewers supported the proposal. We also received a total of 27 oral and 813 written comments (the majority of written comments were in the form of printed postcards). Of those oral comments, 10 supported critical habitat designation, 14 were opposed to designation, and 3 provided additional information but did not support or oppose the proposal. Of the written comments, 756 supported critical habitat designation, 38 were opposed to designation, and 19 were neutral but provided information. We reviewed all comments received for substantive issues and new data regarding critical habitat and the Mexican spotted owl. We address all comments received

during the comment periods and public hearing testimony in the following summary of issues. Comments of a similar nature are grouped into issues.

Issue 1: Biological Concerns

(1) *Comment:* The wording of the attributes of the primary constituent elements are not consistent with the definitions of forest cover types as described in the Mexican Spotted Owl Recovery Plan, and there is a high potential for confusion over exactly which areas are included in the proposed designation. Do all of the primary constituent elements have to be present or just one, for the area to be considered critical habitat? The constituent elements described are vague (violating 50 CFR Sec. 424.12(c)) and should include the required greater detail defining what constitutes critical habitat. The boundaries are impossible to identify.

Our Response: As stated in the critical habitat designation section, the critical habitat designation is consistent with the Mexican Spotted Owl Recovery Plan and includes areas within the mapped boundaries that meet the definition of protected and restricted areas. Protected areas are areas where owls are known to occur or are likely to occur. Protected areas include, (1) 600 acres around known owl sites within mixed conifer forests or (2) pine-oak forests with slopes greater than 40 percent and where timber harvest has not occurred in the past 20 years. Restricted habitat include areas outside of protected areas which may contain Mexican spotted owls. Restricted areas include mixed conifer forest, pine-oak forest and riparian areas.

We clarified the definitions and use of the terms protected and restricted habitat and the attributes of primary constituent elements of critical habitat in this rule. This final rule describes in the greatest detail possible the primary constituent elements important to Mexican spotted owls to the extent the elements are known at this time. If new information on the primary constituent elements becomes available, we will then evaluate whether a revision of designated critical habitat is warranted, depending on funding and staffing.

Critical habitat units are defined by Universal Transverse Mercator (UTM) coordinates. A list of those coordinates can be obtained by contacting the New Mexico Ecological Services Field Office (see **ADDRESSES** section). We believe that with the revisions to the description of primary constituent elements and the availability of UTM coordinates, the boundaries should be clear.

(2) *Comment:* Some areas proposed as critical habitat units contain a considerable amount of land that is not suitable for or occupied by Mexican spotted owls, and therefore, the areas should be mapped more accurately. Some commenters questioned whether 13.5 million acres are needed for Mexican spotted owls.

Our Response: There are some areas within the critical habitat boundaries that do not, and cannot, support the primary constituent elements and are, by definition, not considered to be critical habitat, even though they are within the identified mapped boundaries. We clarified the primary constituent element descriptions to assist landowners and managers in identifying areas containing these elements. However, a lack of precise habitat location data and the short amount of time allowed by the court to complete this final designation did not allow us to conduct the fine-scale mapping necessary to physically exclude all of the areas that do not contain suitable habitat. Critical habitat is limited to areas within the mapped boundaries that meet the definition of protected and restricted habitat in the Recovery Plan. In addition, the total gross area included within critical habitat boundaries in this final rule is 4.6 million acres, and the actual area designated as critical habitat is considerably less than the 4.6 million acre figure provided in Table 1.

(3) *Comment:* Lack of forest management has resulted in successional and structural changes to forests throughout the range of Mexican spotted owl. Designation and management of critical habitat will place an additional burden on land management agencies, further inhibiting their ability to prevent and suppress catastrophic wildfire, one of the greatest threats to the forest types this species inhabits. The risk and intensity of wildfire will increase. Therefore, designating critical habitat seems contradictory to the owl's recovery.

Our Response: Critical habitat designation does not prevent actions that alleviate the risk of wildfire, nor will it have an effect on suppression activities. The maintenance of mature forest attributes in mixed conifer and pine-oak habitat types over a portion of the landscape and in areas that support existing owl territories is important to the recovery of the Mexican spotted owl; however, critical habitat designation does not emphasize the creation of these features where they do not currently exist. It also does not preclude the proactive treatments necessary to reduce the risk of catastrophic fire. Clearly, the loss of owl habitat by catastrophic fire is counter to the intended benefits of critical habitat designation.

Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to ''jeopardize the continued existence'' of a species are those that would appreciably reduce the likelihood of the species' survival and recovery (50 CFR 402.02). Actions likely to ''destroy or adversely modify'' critical habitat are those that would appreciably reduce the value of critical habitat for the survival and recovery of the listed species (50 CFR 402.02). Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to destroy or adversely modify critical habitat would almost always result in jeopardy to the species concerned when the habitat is occupied by the species. Therefore, the designation of critical habitat likely will not require any additional restrictions for section 7 consultations, including projects designed to reduce the risk of wildfire (e.g., prescribed burns, mechanical thinning, etc.). Furthermore, we expect that some activities may be considered to be of benefit to Mexican spotted owl habitat and, therefore, would not be expected to adversely modify critical habitat or place an additional burden on land management agencies. Examples of activities that could benefit critical habitat may include some protective measures such as fire suppression, prescribed burning, brush control, snag creation, and certain silvicultural activities such as thinning.

We agree that many vegetative communities have undergone successional and structural changes as a result of past and current management practices. These practices include, to varying degrees, the combined effects of long-term and widespread fire suppression, reduction in surface fuels, rates of tree overstory removal and regeneration treatments on cycles shorter than those found in natural disturbance regimes, inadequate control of tree densities responding to fire suppression and tree harvest, and in xeric forest types, decreases in the proportion of the landscape in stands composed of more fire resistant large-diameter trees. We also agree that the vegetative structural and landscape changes may require proactive management to restore an appropriate distribution of age classes, control

regeneration densities, and reintroduce some measure of natural disturbance processes such as fire events. This may include prescribed fire and thinning treatments, restoration of the frequency and spatial extent of such disturbances as regeneration treatments, and implementation of prescribed natural fire management plans where feasible. We consider use of such treatments to be compatible with the ecosystem management of habitat mosaics and the best way to reduce the threats of catastrophic wildfire. We will fully support land management agencies in addressing the management of fire to protect and enhance natural resources under their stewardship.

(4) *Comment:* The designation of critical habitat for the Mexican spotted owl will conflict with the management objectives of other animal and plant species and ecosystem management. The designation of critical habitat will surely have an impact on many other species of wildlife.

Our Response: Critical habitat management primarily focuses on the maintenance of habitat features in mixed conifer and pine-oak habitat types that support Mexican spotted owls, and the maintenance of good montane riparian habitat conditions. It does not emphasize the creation of these features where they do not currently exist, or do not have the potential to naturally occur. The management approach to critical habitat addresses diversity at the landscape scale by maintaining spatial variation and distribution of age classes, and at the stand scale by managing for complex within-stand structure. The methods to attain or conserve the desired measure of diversity vary, but are designed to maintain existing mature/old forest characteristics while allowing some degree of timber harvest and management of other objectives such as tree density control and prescribed fire. Older forests are productive successional stages that provide favorable environments for diverse assemblages of plants and animals. The maintenance of this under represented seral stage at landscape and stand scales will provide and enhance biological diversity. Therefore, critical habitat management does not preclude managing for other objectives or other species. In addition, critical habitat management is adaptive and will incorporate new information on the interaction between natural disturbance events and forest ecology. We continue to support sound ecosystem management and the maintenance of biodiversity.

As outlined in our final environmental assessment, in areas within the geographic range occupied by the Mexican spotted owl, native fish, wildlife, and plants may directly or indirectly benefit as a result of ecosystem protections provided through the conservation of the owl and the associated requirements of section 7 of the Act. Designation of critical habitat in areas within the geographic range potentially occupied by the owl could provide similar ecological benefits to fish, wildlife, and plants.

(5) *Comment:* How does the critical habitat designation correspond to the reasons why the owl is listed?

Our Response: The two primary reasons for listing the Mexican spotted owl as threatened were historical alteration of its habitat as the result of timber management practices, and the threat of these practices continuing; and the risk of catastrophic wildfire (58 FR 14248). The Recovery Plan outlines management actions that land managers should undertake to remove recognized threats and recover the spotted owl. This critical habitat designation is based on recovery needs identified in the Recovery Plan, and therefore promotes the reduction in the threats that necessitated listing the Mexican spotted owl. By not adversely modifying or destroying critical habitat, the threat of alteration by timber management practices is reduced.

(6) *Comment:* Your list of constituent elements and condemnation of even-aged silviculture suggests that the constituent elements must occur on every acre of the 13.5 million acres. There appears to be an attempt to idealize and maximize owl populations over a very large area. The owl is flexible, adaptable, and capable of doing well with less and surviving.

Our Response: The determination of primary constituent elements and designation of critical habitat is consistent with the Mexican Spotted Owl Recovery Plan. In the Recovery Plan, we outline steps necessary to remove the owl from the list of threatened species (see response to comment 9). The Recovery Plan recognizes that Mexican spotted owls nest, roost, forage, and disperse in a diverse array of biotic communities. The Recovery Plan provides realistic goals for the recovery of the species (including a significant increase in owl population numbers), and these goals are flexible in that they require local land managers to make site-specific decisions, including silviculture management.

(7) *Comment:* Designation of critical habitat is not needed to conserve the owl, because there is information that shows the spotted owl is doing very well; a year ago you were in the process of delisting the spotted owl, because it was doing well. What happened to that activity?

Our Response: We never proposed nor began the process of delisting the Mexican spotted owl. Although the Mexican spotted owl appears to be doing well in some areas of its range (e.g., Sacramento Ranger District, Lincoln National Forest, New Mexico), other populations may be declining (Seamans *et al.* 1999). On September 23, 1993, and April 1, 1994, we announced separate 90-day findings on two petitions to remove the Mexican spotted owl from the list of endangered and threatened wildlife (FR 58 49467, FR 59 15361). We found that the petitions did not present substantial scientific or commercial information indicating that delisting the Mexican spotted owl was warranted.

(8) *Comment:* The designation of critical habitat will not provide any additional conservation benefit to the Mexican spotted owl, which is already protected under section 7.

Our Response: We agree that designation of critical habitat will provide no additional regulatory benefit in areas already managed compatibly with owl recovery. However, the designation of critical habitat may provide some additional conservation benefit to the Mexican spotted owl on lands that are within the geographic range potentially occupied or that may become unoccupied in the future since section 7 consultations required under the listing of the species may not always be done in these areas of potentially occupied habitat. Critical habitat designation requires Federal agencies to consult with us to ensure that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat.

(9) *Comment:* Several commenters questioned whether the designation of critical habitat will improve conservation of the Mexican spotted owl because the current Recovery Plan is being implemented.

Our Response: Lands managed by agencies who have formally adopted the Recovery Plan, as well as Indian Tribes who are implementing management plans compatible with owl recovery, have been excluded from the designation.

A recovery plan for the Mexican spotted owl was finalized in December 1995. This plan recommends recovery goals, strategies for varying levels of habitat protection, population and

habitat monitoring, a research program to better understand the biology of the Mexican spotted owl, and implementation procedures. In addition, we have continued working with the Mexican spotted owl recovery team since the plan was finalized. We believe this critical habitat designation is consistent with the Recovery Plan and recommendations of those team members, and will contribute to the conservation and eventual recovery of the species. Designation of critical habitat will help to implement the Recovery Plan because it helps to conserve habitat for the Mexican spotted owl; one of the actions outlined in the Recovery Plan.

(10) *Comment:* One commenter stated that not enough information is known about the total habitat requirements of the species to define critical habitat.

Our Response: Section 4(b)(2) of the Act states ''The Secretary shall designate critical habitat, and make revisions thereto, under section (a)(3) on the basis of the best scientific data available * * *'' We considered the best scientific information available at this time, as required by the Act. Our recommendation is based upon a considerable body of information on the biology of the Mexican spotted owl, as well as effects from land-use practices on their continued existence. Much remains to be learned about this species; should credible, new information become available which contradicts this designation, we will reevaluate our analysis and, if appropriate, propose to modify this critical habitat designation, depending on available funding and staffing.

Issue 2: Procedural and Legal Compliance

(11) *Comment:* The designation of critical habitat will place an additional burden on land management agencies above and beyond what the listing of the species would require. The number of section 7 consultations will increase; large areas where no Mexican spotted owls are known to occur will now be subject to section 7 consultation and will result in a waste of time and money by the affected agencies. Many Federal agencies have been making a ''no effect'' call within unoccupied suitable habitat. Now, with critical habitat there will be ''may effect'' determinations, and section 7 consultation will be required if any of the constituent elements are present.

Our Response: If a Federal agency funds, authorizes, or carries out an action that may affect either the Mexican spotted owl or its critical habitat, the Act requires that the agency consult with us under section 7 of the Act. For a project to affect critical habitat, it must affect the habitat features important to the Mexican spotted owl, which are defined in the regulation section in this final rule. Our view is and has been that any Federal action within the geographic area occupied or potentially occupied by the species that affects these habitat features should be considered a situation that ''may affect'' the Mexican spotted owl and should undergo section 7 consultation. This is true whether or not critical habitat is designated, even when the particular project site within the larger geographical area occupied by the species is not known to be currently occupied by an individual Mexican spotted owl. All areas designated as critical habitat are within the geographical area occupied or potentially occupied by the species, so Federal actions affecting essential habitat features of the species should undergo consultation. Thus, the need to conduct section 7 consultation should not be affected by critical habitat designation. As in the past, the Federal action agency will continue to make the determination as to whether their project may affect a species even when the particular project site is not known to be currently occupied by an individual Mexican spotted owl.

(12) *Comment:* Many commenters expressed concern that the Mexican Spotted Owl Recovery Plan is not being implemented, and that federally funded or authorized activities (i.e., logging, grazing, dam construction, etc.) within Mexican spotted owl habitat are not consistent with recovery for the species and/or are not undergoing section 7 consultation for potential impacts to the owl.

Our Response: We have consulted with Federal agencies on numerous projects since we issued the Recovery Plan. The Recovery Plan recognizes, as do we, that agencies must make management decisions for multiple use objectives, and that other pressing resource needs may not always be compatible with Mexican spotted owl recovery. Thus, agencies consult with us under section 7 when they propose actions that may be inconsistent with Recovery Plan recommendations, as well as when they propose actions may affect the species or critical habitat. However, there have been no consultations to date that have concluded that a proposed action is likely to jeopardize the continued existence of the Mexican spotted owl. Further, we are not aware of instances where action agencies have failed to properly consult on actions that may affect the species or its habitat.

(13) *Comment:* One commenter believes that the designation of critical habitat for the Mexican spotted owl conflicts with the Federal Land Policy and Management Act of 1976, the Mining and Minerals Policy Act of 1970, the National Materials and Minerals Policy, Research, and Development Act of 1980, and other State and county policies and plans within the four States.

Our Response: We read through the comments and information provided concerning the various acts and policies; however, the commenter failed to adequately explain the rationale for why they believe critical habitat designation conflicts with the above Federal laws and policies or other State and County policies and plans. We are unaware of any conflicts with the cited laws, policies, and plans.

(14) *Comment:* The Rocky Mountain Region of the Forest Service provided Geographic Information System (GIS) coverages for Pike and San Isabel National Forests and the Royal Gorge Resource area of the BLM. They requested that we revise the critical habitat units in these areas by reducing the size of one critical habitat unit and increasing the size of another. The FS indicated that suggested revisions are based upon digital elevation models, elevation, vegetation, Mexican spotted owl surveys, and BLM land management designations (i.e., wilderness study areas). There was an expressed concern that much of the area within the proposed critical habitat boundaries does not contain the combination of primary constituent elements and attributes to meet the definition of critical habitat and should not be included.

Our Response: We considered the information provided by the commenter and determined that the critical habitat units contain areas that meet the definition of protected areas in the Recovery Plan (e.g., slopes greater than 40 percent where timber harvest has not occurred in the past 20 years). The BLM land management designations (i.e., wilderness study areas) do not provide ''special management considerations or protections,'' pursuant to the definition of critical habitat in section 3 of the Act. Likewise, we have no formal documentation (e.g., consultation records) that demonstrates whether the FS or BLM is integrating the Mexican Spotted Owl Recovery Plan into their activities. Thus, these lands do not meet our criteria for exclusion and we conclude the areas should be designated as they were originally proposed.

We recognize that some areas within the critical habitat units do not contain protected habitat or restricted habitat. These areas are not considered critical habitat. Critical habitat is limited to areas within the mapped boundaries that meet the definition of protected or restricted habitat as described in the Recovery Plan.

(15) *Comment:* Some commenters expressed concern that there are areas containing Mexican spotted owls, but these were not within the critical habitat boundaries. Additional areas not identified in the proposed rule should be designated critical habitat.

Our Response: The critical habitat designation did not include some areas that are known to have widely scattered owl sites, low population densities, and/or marginal habitat quality, which are not considered to be essential to this species' survival or recovery. Section 3(5)(C) of the Act and our regulations (50 CFR Sec. 424.12(e)) state that, except in certain circumstances, not all suitable or occupied habitat be designated as critical habitat, rather only those areas essential for the conservation of the species. Additionally, section 4(b)(4) of the Act requires that areas designated as critical habitat must first be proposed as such. Thus, we cannot make additions in this final rule to include areas that were not included in the proposed rule. Designation of such areas would require a new proposal and subsequent final rule.

If, in the future, we determine from information or analysis that those areas designated in this final rule need further refinement or additional areas are identified which we determine are essential to the conservation of the species and require special management or protection, we will evaluate whether a revision of critical habitat is warranted at that time.

(16) *Comment:* Why are areas included in the designation that are not presently occupied by the Mexican spotted owl?

Our Response: The inclusion of both currently occupied and potentially occupied areas in this critical habitat designation is in accordance with section 3(5)(A) of the Act, which provides that areas outside the geographical area currently occupied by the species may meet the definition of critical habitat upon a determination that they are essential for the conservation of the species. Our regulations also provide for the designation of areas outside the geographical area currently occupied if we find that a designation limited to its present range would be inadequate to ensure the conservation of the species (50 CFR 424.12(e)). The species' Recovery Plan recommends that some areas be managed as ''restricted habitat'' in order to provide for future population expansion and to replace currently occupied areas that may be lost through time. We believe that such restricted habitat is essential and necessary to ensure the conservation of the species.

(17) *Comment:* If land has dual ownership of private and Federal, is it critical habitat? The land in question is under private ownership and the mineral rights are owned by the BLM.

Our Response: The surface ownership is what would contain the primary constituent elements of critical habitat. Because the surface ownership is private and we are not including private land in this designation, we would not consider the lands to be designated critical habitat. However, if a Federal agency (e.g., BLM) funds, authorizes, or carries out an action (e.g., mineral extraction) that may affect the Mexican spotted owl or its habitat, the Act requires that the agency consult with us under section 7 of the Act. This is required whether or not critical habitat is designated for a listed species.

(18) *Comment:* Fort Carson, Colorado, provided information during the comment period that indicated the Mexican spotted owl is not known to nest on the military installation and the species is a rare winter visitor. Protected and restricted habitat is also not known to exist on Fort Carson. Further, Fort Carson is updating the Integrated Natural Resources Management Plan (INRMP) to include specific guidelines and protection measures that have been recently identified through informal consultation with us. The INRMP will include measures to provide year-round containment and suppression of wildland fire and the establishment of a protective buffer zone around each roost tree. The target date of completion for this revision is early 2001. Fort Carson, through consultation with us, indicated they will ensure that the INRMP will meet the criteria for exclusion. They also provided additional information and support to indicate that no protected or restricted habitat exists on the base, and asked to be excluded from the final designation.

Our Response: We agree that Fort Carson should be excluded from the final designation (see discussion under Exclusions section). Nevertheless, Federal agencies are already required to consult with us on activities with a Federal nexus (i.e., when a Federal agency is funding, permitting, or in some way authorizing a project) when their activities may affect the Mexican spotted owl. For example, if Mexican spotted owls are present during certain times of the year (e.g., winter) and there is the potential for Fort Carson's activities to affect the species, the Act requires they consult with us under section 7, regardless of critical habitat designation.

(19) *Comment:* How will the exclusion of certain lands (e.g., State, private, Tribal) affect recovery and delisting of the Mexican spotted owl?

Our Response: In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, we are required to base critical habitat designation on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements) that are essential to conservation of the species and that may require special management considerations or protection. We designated critical habitat for those lands we determined are essential to conservation of the Mexican spotted owl. We did not include certain lands (e.g., State, private, and Tribal) because we determined these lands are either not essential to the recovery of the Mexican spotted owl or are already managed in a manner compatible with Mexican spotted owl conservation. The exclusion of State, private, and tribal lands in the designation of critical habitat for the Mexican spotted owl will not affect the recovery and future delisting of the species. Whether or not a species has designated critical habitat, it is protected both from any actions resulting in an unlawful take and from Federal actions that could jeopardize the continued existence of the species.

(20) *Comment:* The areas proposed as critical habitat in Colorado make up 4.2 percent of the total proposed critical habitat. Much of the areas proposed in Colorado do not contain the primary constituent elements for critical habitat of the Mexican spotted owl. It is difficult to understand how the small amount of habitat proposed in Colorado is essential for the survival and recovery of the owl. The current tree stocking levels, species composition, and stand structure of areas proposed as critical habitat in Colorado do not currently nor are they likely to meet the definition of threshold habitat as defined in the Recovery Plan.

Our Response: We carefully considered the information provided with the above comment. If habitat within the mapped boundaries does not meet the definition of protected or restricted habitat as described in the Recovery Plan, then it is not considered critical habitat. We agree that not all of the land within the critical habitat

boundaries in Colorado supports protected and restricted habitat and, therefore, is not critical habitat.

(21) *Comment:* The statement that continued grazing in upland habitat will not adversely affect or modify critical habitat is unsubstantiated and is counter to FS information that suggests grazing may affect Mexican spotted owl prey and increase the susceptibility of owl habitat to fire.

Our Response: Our data indicate that continued grazing in upland habitat has the potential to adversely impact the owl or its designated critical habitat. We concur with reports that there may be a link between continued grazing and an effect to Mexican spotted owl prey populations. We understand that the natural fire regime of frequent low-intensity and spatially extensive understory fire events has been interrupted by a variety of reasons (e.g., grazing eliminating fine fuels, suppression of wildfires, etc). When grazing activities involve Federal funding, a Federal permit, or other Federal action, consultation is required when such activities have the potential to adversely affect the Mexican spotted owl or its critical habitat. The consultation will analyze and determine to what degree those activities impact the Mexican spotted owl.

(22) *Comment:* A premise for the proposed rule is that the Service was ordered by the court on March 13, 2000, to designate critical habitat by January 15, 2001. The court may not order critical habitat to be designated. Rather, the court may order the Service to make a decision on whether to designate critical habitat. The designation of critical habitat is an action that is ultimately discretionary, and the Service must apply the criteria in the ESA and its regulations to decide whether to designate critical habitat. Thus, the Service should seek correction of that court order and reconsider whether and to what extent critical habitat should be designated.

Our Response: The commenter is correct that we cited a court order requiring actual designation of critical habitat. However, recent case law has indicated that critical habitat designation is required for listed species except in only rare instances (for example, *Natural Resources Defense Council* versus *U.S. Department of the Interior* 113 F. 3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii* versus *Babbitt*, 2 F. Supp. 2d 1280 (D. Hawaii 1998)). Thus, we saw no reason to challenge the court order.

(23) *Comment:* Are lands within a National Park that are already protected, but proposed as wilderness areas, considered critical habitat?

Our Response: Yes, we consider lands that are within critical habitat boundaries, that contain the primary constituent elements, and required special management and protection, as critical habitat, regardless of whether they are currently designated as wilderness.

(24) *Comment:* Military aircraft overflights and ballistic missile testing activities have no adverse effect on Mexican spotted owl critical habitat.

Our Response: The designation of critical habitat will not impede the ability of military aircraft to conduct overflights nor to conduct ballistic missile testing activities. Activities such as these that do not affect designated critical habitat will not require section 7 consultation. However, proposed low-level military aircraft overflights that could potentially affect the Mexican spotted owl will be reviewed during the consultation process as they have in the past.

(25) *Comment:* Explain the rationale for excluding, by definition, State and private lands from the proposed designation; there are documented nesting sites for the Mexican spotted owl in Colorado located on State-leased lands; State and private lands should be included; the majority of owl locations are from Federal lands because no one is doing surveys on private and State lands.

Our Response: Although we are aware of some Mexican spotted owl locations on State and private lands, the majority of owl locations are from Federal and Tribal lands. Thus, we believe that Mexican spotted owl conservation can best be achieved by management of Federal and Tribal lands, and determined that State and private lands are not essential to the species' recovery.

(26) *Comment:* Several commenters asked whether projects that have obtained a biological opinion pursuant to section 7 of the Act would be required to reinitiate consultation to address the designation of critical habitat. Will the FS have to reinitiate consultation on their Forest Plans when critical habitat is designated?

Service Response: In the case of projects that have undergone section 7 consultation and where that consultation did not address potential destruction or adverse modification of critical habitat for the Mexican spotted owl, reinitiation of section 7 consultation may be required. We expect that projects that do not jeopardize the continued existence of the Mexican spotted owl will not likely destroy or adversely modify its critical habitat and no additional modification to the project would be required.

(27) *Comment:* The El Paso Natural Gas Company questioned whether the designation of critical habitat will require consultation for routine maintenance and operations. For example, if a linear pipeline project crosses State, private, and FS lands, will consultation be required?

Our Response: Federal agencies are already required to consult with us on activities with a Federal nexus (i.e., when a Federal agency is funding, permitting, or in some way authorizing a project) when their activities may affect the species. We do not anticipate additional regulatory requirements beyond those required by listing the Mexican spotted owl as threatened. For routine maintenance and operations of public utilities or if a linear pipeline project crosses State, private, and FS lands and does not affect critical habitat, consultation will not be required. If maintenance activities would affect critical habitat and there is a Federal nexus, then section 7 consultation will be necessary.

(28) *Comment:* The National Forests in Arizona have amended their land and resource management plans to incorporate the Mexican Spotted Owl Recovery Plan. Consistent with the Service's justification for not designating critical habitat on certain tribal lands because habitat management plans are still valid and being implemented on these lands, the designation of critical habitat on FS lands may not be necessary because of existing land and resource management plans that are responsive to Mexican spotted owl conservation.

Our Response: We determined that FS lands in Arizona and New Mexico do not meet the definition of critical habitat, and have not been included in this designation (see Exclusions section).

(29) *Comment:* Several commenters questioned what the phrase, ''may require special management considerations,'' means; what kind of management activities might be implemented?

Our Response: Under the definition of critical habitat, an area must be both essential to a species' conservation and require ''special management considerations or protections.'' Our interpretation is that special management is not required if adequate management or protections are already in place. Adequate special management or protection is provided by a legally operative plan that addresses the maintenance and improvement of the

primary constituent elements important to the species and manages for the long term conservation of the species (see Exclusions Under Section 3(5)(A) Definition section).

(30) *Comment:* Maps and descriptions provided are vague and violate the Act and 50 CFR Sec. 424.12(c).

Our Response: The required descriptions of areas designated as critical habitat are available from the New Mexico Ecological Services Field Office (see **ADDRESSES** section), as are more detailed maps and GIS digital files. The maps published in the **Federal Register** are for illustration purposes, and the amount of detail that can be published is limited. If additional clarification is necessary, contact the New Mexico Ecological Services Field Office.

Issue 3: National Environmental Policy Act (NEPA) Compliance and Economic Analysis

(31) *Comment:* Several commenters questioned the adequacy of the Environmental Assessment (EA) and other aspects of our compliance with NEPA. They believe the Fish and Wildlife Service should prepare an Environmental Impact Statement (EIS) on this action.

Our Response: The commenters did not provide sufficient rationale to explain why they believed the EA was inadequate and an EIS necessary. An EIS is required only in instances where a proposed Federal action is expected to have a significant impact on the human environment. In order to determine whether designation of critical habitat would have such an effect, we prepared an EA of the effects of the proposed designation. We made the draft EA available for public comment on October 20, 2000, and published notice of its availability in the **Federal Register** (65 FR 63047). Following consideration of public comments, we prepared a final EA and determined that critical habitat designation does not constitute a major Federal action having a significant impact on the human environment. That determination is documented in our Finding of No Significant Impact (FONSI). Both the final EA and FONSI are available for public review (see **ADDRESSES** section).

(32) *Comment:* Several local and county governments, a coalition of Arizona and New Mexico counties, and a Soil and Water Conservation District requested Joint Lead Agency or Cooperating Agency status in preparation of the NEPA documents for this critical habitat designation. Why were those requests denied?

Our Response: The Village of Cloudcroft; Otero County, New Mexico; the Board of Coalition of Arizona/New Mexico Counties for Stable Economic Growth; and the San Francisco Soil and Water Conservation District, New Mexico, requested Joint Lead Agency status to assist us in preparation of the NEPA documents on the critical habitat designation. When preparing an EIS, a Joint Lead Agency may be a Federal, State, or local agency. However, a cooperating agency may only be another Federal agency (40 CFR 1501.5 and 1501.6). In our EA on the proposed action, we determined that an EIS was not necessary. Thus, the EA resulted in a FONSI, and the issue of Joint Lead Agency or Cooperating Agency status on preparation of an EIS became moot.

(33) *Comment:* The draft economic analysis failed to adequately estimate the potential economic impacts to landowners regarding various forest management practices.

Our Response: The economic analysis addressed a variety of forest management concerns that were voiced by stakeholders (e.g., fire and grazing management, timber harvesting, etc.). These activities are usually subject to a Federal nexus because the actions involve Federal funding, permitting, or authorizations. Although critical habitat designation may result in new or reinitiated consultations associated with activities on Federal lands, we believe these activities likely will not result in additional modifications beyond that required by listing. Whether or not a species has designated critical habitat, it is protected both from any actions resulting in an unlawful take and from Federal actions that could jeopardize the continued existence of the species.

(34) *Comment:* Several commenters voiced concern that they were not directly contacted for their opinions on the economic impacts of critical habitat designation.

Our Response: It was not feasible to contact every potential stakeholder in order for us to develop a draft economic analysis. We believe we were able to understand the issues of concern to the local communities based on public comments submitted on the proposed rule and draft economic analysis, on transcripts from public hearings, and from detailed discussions with Service representatives. To clarify issues, we solicited information and comments from representatives of Federal, State, Tribal, and local government agencies, as well as some landowners.

(35) *Comment:* The draft Economic Analysis and Environmental Assessment were not available for comment during the first comment period; the opportunity for public comment on these documents was limited.

Our Response: We published the proposed critical habitat determination in the **Federal Register** on July 21, 2000, and invited public comment for 60 days. We used comments received on the proposed critical habitat to develop the draft economic analysis. We reopened the comment period from October 20 to November 20, 2000, to allow for comments on the draft Economic Analysis, Environmental Assessment, and proposed rule. We believe that sufficient time was allowed for public comment given the short time frame ordered by the court.

(36) *Comment:* Your draft Economic Analysis did not consider watersheds, nor water rights, State water rights, nor adjudication with Texas on water rights, nor the effect on water rights of any of the people within those watersheds.

Our Response: In conducting our economic analysis, we read through these comments and concluded that the commenter failed to adequately explain the rationale for why they believe critical habitat designation for the Mexican spotted owl impacts watersheds or water rights.

(37) *Comment:* The draft economic analysis and proposed rule do not comply with Executive Order 12866, which requires each Federal agency to assess the costs and benefits of proposed regulations.

Our Response: We determined that this rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. Thus, a cost-benefit analysis is not required for purposes of Executive Order 12866 (see Required Determinations section).

(38) *Comment:* The draft economic analysis, draft environmental assessment, and proposed rule failed to adequately estimate and address the potential economic and environmental consequences and how timber, fuel wood, land acquisition and disposal, oil and gas development, and mining would be impacted by the designation.

Our Response: We solicited further information and comments associated with the potential impacts of designating critical habitat for the Mexican spotted owl. We read through all comments received during the two comment periods and have concluded that further information was not provided on how the designation of critical habitat would result in economic or environmental consequences beyond those already addressed in the economic analysis,

environmental assessment, or this final rule.

(39) *Comment:* One commenter questioned whether publishing the proposed rule on July 21, 2000, and not releasing the EA until October 20, 2000, violated the intent of NEPA by being pre-decisional. Others contend that the range of alternatives considered in the EA was inadequate.

Our Response: We began work on our Environmental Assessment at approximately the same time we began to draft the proposed rule. Our Proposed Alternative in the EA was to finalize the designation of critical habitat as described in the proposed rule published in the **Federal Register** on July 21, 2000 (65 FR 45336). The draft EA considered a no-action alternative and four action alternatives. We believe our EA was consistent with the spirit and intent of NEPA, and was not pre-decisional.

(40) *Comment:* The assumption applied in the economic analysis that the designation of critical habitat will cause no impacts above and beyond those caused by listing of the species is faulty, legally indefensible, and contrary to the ESA. ''Adverse modification'and ''jeopardy'' are different, will result in different impacts, and should be analyzed as such in the economic analysis.

Our Response: The statutory language in the Act prohibits us from considering economic impacts when determining whether or not a species should be added to the list of federally protected species. As a result, the designation of critical habitat for the Mexican spotted owl has been evaluated in the economic context known as ''with'' critical habitat and ''without'' critical habitat (i.e., the effects of listing alone). Elsewhere in this rule we discuss that the definitions of ''jeopardy'' to the species and ''adverse modification'' of critical habitat are nearly identical and that the designation of critical habitat will not have significant economic impacts above and beyond those already imposed by listing the Mexican spotted owl. Further, it is our position that both within and without critical habitat, Federal agencies should consult with us if a proposed action is (1) within the geographic areas occupied and potentially occupied by the species, whether or not owls have been detected on the specific project site; (2) the project site contains habitat features that can be used by the species; and (3) the proposed action is likely to affect that habitat (see response to comment 12).

(41) *Comment:* The proposed designation of critical habitat will impose economic hardship on private landowners. There is an expressed concern that the proposed critical habitat designation would have serious financial implications for grazing and sources of revenue that depend upon Federal ''multiple-use'' lands. The designation will have harmful impacts on the quality of life, education, and economic stability of small towns.

Our Response: As stated in the economic analysis, the proposed rule to designate critical habitat for the Mexican spotted owl is adding few, if any, new requirements to the current regulatory process. Since the adverse modification standard for critical habitat and the jeopardy standard are almost identical, the listing of the Mexican spotted owl itself initiated the requirement for consultation. The critical habitat designation adds no additional requirements not already in place due to the species' listing.

Issue 4: Tribal Issues

(42) *Comment:* Why are tribal lands included in the proposed designation?

Our Response: In our proposal to designate critical habitat, we found that lands of the Mescalero Apache, San Carlos Apache, and Navajo Nation likely met the definition of critical habitat with respect to the Mexican spotted owl, and portions of those lands were proposed as critical habitat. However, we worked with the tribes in developing voluntary measures adequate to conserve Mexican spotted owls on tribal lands. The Navajo Nation and Mescalero Apache Tribe completed management plans for the Mexican Spotted Owl that are consistent with the Recovery Plan. The San Carlos Apache Reservation management plan is substantially complete and is expected to be completed in March 2001. We reviewed a draft of their plan and found it to be consistent with the Recovery Plan. We determined that adequate special management is being provided for the Mexican spotted owl on the Navajo Nation and Mescalero Apache lands and, therefore, they were not included in the designation since they do not meet the definition of critical habitat (see Exclusions Under Section 3(5)(A) Definition section of this rule for further information). In the case of the San Carlos Apache Reservation we found, in accordance with section 4(b)(2) of the Act, that the benefits of excluding their lands outweighed the benefits of including them in the designation (see American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act section of this rule for further information).

(43) *Comment:* The Mescalero Apache Tribe believes the Service did not adequately consider how the designation of critical habitat on tribal lands will benefit the Mexican spotted owl or how the designation will impact the Mescalero Apache Reservation.

Our Response: We did not include the Mescalero Apache or other tribal lands in the final designation. As stated in our response above, we determined that adequate special management is being provided for the Mexican spotted owl on Mescalero Apache lands and, therefore, they were not included in the designation since they do not meet the definition of critical habitat.

Issue 5: Other Relevant Issues

(44) *Comment:* The designation of critical habitat would constitute a ''government land grab.'' The Mexican spotted owl is merely the vehicle by which environmental groups plan to stop harvest of ''old growth'' forests.

Our Response: The designation of critical habitat has no effect on non-Federal actions taken on private or State lands, even if the land is within the mapped boundary of designated critical habitat, because these lands were specifically excluded from the designation. We believe that the designation of critical habitat for the Mexican spotted owl does not impose any additional restrictions on land managers/owners within those areas designated as critical habitat, beyond those imposed due to the listing of the Mexican spotted owl (see response to comment 11). All landowners are responsible to ensure that their actions do not result in the unauthorized take of a listed species, and all Federal agencies are responsible to ensure that the actions they fund, permit, or carry out do not result in jeopardizing the continued existence of a listed species, regardless of where the activity takes place.

We also note that this designation is consistent with the Recovery Plan. While the Recovery Plan does not explicitly protect ''old-growth'' forests, it does recommend that large trees and other forest attributes that may be found in ''old-growth'' forests be retained to the extent practicable within certain forest types. Large trees are important ecosystem components, have been much reduced in the Southwest, and take many decades to replace once they are lost.

(45) *Comment:* The Mexican spotted owl by its very name is not exclusive to the United States. Typical of most Mexican fauna entering the United States, it appears rarer than it really is. Therefore, it is Mexico's duty to protect it.

Our Response: A significant portion of the species' entire population occurs in the United States. Furthermore, according to CFR 402.12(h) ''Critical habitat shall not be designated with foreign countries or in other areas outside of the United States jurisdiction.''

(46) *Comment:* Why were the public hearings in Utah held in the southwestern part of the State when most of the critical habitat is in the southeastern portion?

Our Response: The Act requires that at least one public hearing be held if requested. We held six public hearings throughout the four state region. We selected Cedar City, Utah, for a hearing location because of its proximity to four of the five proposed critical habitat units in the State.

(47) *Comment:* The designation of critical habitat abrogates the Treaty of Guadalupe Hidalgo. You do not have constitutional authority to do so.

Our Response: The Treaty of Guadalupe Hidalgo resulted in grants of land made by the Mexican government in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States. These grants of land were respected as valid, to the same extent that the same grants would have been valid within the territories if the grants of land had remained within the limits of Mexico. The designation of critical habitat has no effect on non-Federal actions taken on private land (*e.g.*, land grants), even if the private land is within the mapped boundary of designated critical habitat because we excluded State and private lands by definition. Critical habitat has possible effects on activities by private landowners only if the activity involves Federal funding, a Federal permit, or other Federal action. If such a Federal nexus exists, we will work with the landowner and the appropriate Federal agency to ensure that the landowner's project can be completed without jeopardizing the species or adversely modifying critical habitat. The designation of critical habitat for the Mexican spotted owl in no way abrogates any treaty of the United States.

(48) *Comment:* Many commenters were concerned that the designation of critical habitat would prohibit recreational and commercial activities from taking place.

Our Response: As stated in the economic analysis and this final rule, we do not believe the designation of critical habitat will have adverse economic effects on any landowner above and beyond the effects of listing of the species. It is correct that projects funded, authorized, or carried out by Federal agencies, and that may affect critical habitat, must undergo consultation under section 7 of the Act. This provision includes commercial activities. However, as stated elsewhere in this final rule, we do not expect the result of those consultations to result in any restrictions that would not be required as a result of listing the Mexican spotted owl as a threatened species.

Designation of critical habitat does not preclude commercial projects or activities such as riparian restoration, fire prevention/management, or grazing if they do not cause an adverse modification of critical habitat. We will work with Federal agencies that are required to consult with us under section 7 of the Act to ensure that land management will not adversely modify critical habitat (see responses to prior comments).

Critical Habitat

Critical habitat is defined in section 3(5)(A) of the Act as—(i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection and; (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. The term ''conservation,'' as defined in section 3(3) of the Act, means ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary'' (*i.e.*, the species is recovered and removed from the list of endangered and threatened species).

Section 4(b)(2) of the Act requires that we base critical habitat designation on the best scientific and commercial data available, taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation if we determine that the benefits of exclusion outweigh the benefits of including the areas as critical habitat, provided the exclusion will not result in the extinction of the species.

In order to be included in a critical habitat designation, the habitat must first be ''essential to the conservation of the species.'' Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Section 4 requires that we designate critical habitat at the time of listing and based on what we know at the time of the designation. When we designate critical habitat at the time of listing or under short court-ordered deadlines, we will often not have sufficient information to identify all areas of critical habitat. We are required, nevertheless, to make a decision and thus must base our designations on what, at the time of designation, we know to be critical habitat.

Within the geographic area occupied by the species, we will designate only areas currently known to be essential. We will not speculate about what areas might be found to be essential if better information became available, or what areas may become essential over time. If the information available at the time of designation does not show that an area provides essential life cycle needs of the species, then the area should not be included in the critical habitat designation.

Our regulations state that, ''The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographic area occupied by the species.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (Vol.59, p. 34271), provides criteria, establishes procedures, and provides guidance to ensure that decisions made by the Service represent the best scientific and commercial data available. It requires Service biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-

reviewed journals, conservation plans developed by states and counties, scientific status surveys and studies, and biological assessments or other unpublished materials (*i.e.* gray literature).

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, all should understand that critical habitat designations do *not* signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under Section 7(a)(1) and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the Section 9 take prohibition, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Primary Constituent Elements

In accordance with section 3(5)(A)(I) of the Act and regulations at 50 CFR 424.12, we are required to base critical habitat designation on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements) that are essential to conservation of the species and that may require special management considerations or protection. Such requirements include, but are not limited to—space for individual and population growth, and for normal behavior; food, water, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The primary constituent elements essential to the conservation of the Mexican spotted owl include those physical and biological features that support nesting, roosting, and foraging. These elements were determined from studies of Mexican spotted owl behavior and habitat use throughout the range of the owl. Although the vegetative communities and structural attributes used by the owl vary across the range of the subspecies, they consist primarily of warm-temperate and cold-temperate forests, and, to a lesser extent, woodlands and riparian deciduous forests. The mixed-conifer community appears to be the most frequently used community throughout most portions of the subspecies' range (Skaggs and Raitt 1988; Ganey and Balda 1989, 1994; USDI 1995). Although the structural characteristics of Mexican spotted owl habitat vary depending on uses of the habitat (*e.g.*, nesting, roosting, foraging) and variations in the plant communities over the range of the subspecies, some general attributes are common to the subspecies' life-history requirements throughout its range.

The Mexican Spotted Owl Recovery Plan provides for three levels of habitat management: protected areas, restricted areas, and other forest and woodland types. The Recovery Plan recommends that Protected Activity Centers (PACs) be designated around known owl sites. A PAC would include an area of at least 243 ha (600 ac) that includes the best nesting and roosting habitat in the area. Based on available data, the recommended size for a PAC includes, on average, 75 percent of the foraging area of an owl. Protected habitat includes PACs and all areas within mixed conifer or pine-oak types with slopes greater than 40 percent, where timber harvest has not occurred in the past 20 years.

Restricted habitat includes mixed conifer forest, pine-oak forest, and riparian areas outside of protected areas described above. Restricted habitat should be managed to retain or attain the habitat attributes believed capable of supporting nesting and roosting owls as depicted in Table III.B.1. on page 92 of the Recovery Plan. These areas are essential to the conservation of the species because the Recovery Plan identifies these areas as providing additional owl habitat that is needed for recovery.

Other forest and woodland types (ponderosa pine, spruce-fir, piñon-juniper, and aspen) are not expected to provide nesting or roosting habitat for the Mexican spotted owl (except when associated with rock canyons). Thus, these other forest and woodland types are not considered to be critical habitat unless specifically delineated within PACs.

Existing man-made features and structures within the boundaries of the mapped units, such as buildings, roads, aqueducts, railroads, airports, other paved areas, and other urban areas, do not contain Mexican spotted owl habitat and are not considered critical habitat.

We determined the primary constituent elements for Mexican spotted owl from studies of their habitat requirements and the information provided in the Recovery Plan and references therein. Since owl habitat can include both canyon and forested areas, we identified primary constituent elements in both areas. Within PACs, primary constituent elements include all vegetation and other organic material within the 243 ha (600 ac) areas delineated by land managers. Within restricted habitat (described in the Recovery Plan,Volume I, part III, pages 84–95, including Table III.B.1), the primary constituent elements that occur in mixed conifer, pine-oak, and riparian forest types, which currently contain or may attain the habitat attributes believed capable of supporting nesting and roosting owls include:

—High basal area of large diameter trees;
—Moderate to high canopy closure;
—Wide range of tree sizes suggestive of uneven-age stands;
—Multi-layered canopy with large overstory trees of various species;
—High snag basal area;
—High volumes of fallen trees and other woody debris;
—High plant species richness, including hardwoods; and
—Adequate levels of residual plant cover to maintain fruits, seeds, and regeneration to provide for the needs of Mexican spotted owl prey species.

For canyon habitat, the primary constituent elements include one or more of the following attributes:

—Cooler and often more humid conditions than the surrounding area;
—Clumps or stringers of trees and/or canyon wall containing crevices, ledges, or caves;
—High percent of ground litter and woody debris; and
—Riparian or woody vegetation (although not at all sites).

The forest habitat attributes listed above usually develop with increasing forest age, but their occurrence may vary by location, past forest management practices or natural disturbance events, forest type, and productivity. These characteristics may also develop in younger stands, especially when the stands contain remnant large trees or patches of large trees from earlier stands. Certain forest management

practices may also enhance tree growth and mature stand characteristics where the older, larger trees are allowed to persist.

Canyon habitats used for nesting and roosting are typically characterized by cooler conditions found in steep, narrow canyons, often containing crevices, ledges, and/or caves. These canyons frequently contain small clumps or stringers of ponderosa pine, Douglas fir, white fir, and/or piñon-juniper. Deciduous riparian and upland tree species may also be present. Adjacent uplands are usually vegetated by a variety of plant associations including piñon-juniper woodland, desert scrub vegetation, ponderosa pine-Gambel oak, ponderosa pine, or mixed conifer. Owl habitat may also exhibit a combination of attributes between the forested and canyon types.

Criteria for Identifying Critical Habitat Units

In designating critical habitat for the owl, we reviewed the overall approach to the conservation of the species undertaken by local, State, tribal, and Federal agencies and private individuals and organizations since the species' listing in 1993. We also considered the features and overall approach identified as necessary for recovery, as outlined in the species' Recovery Plan. We reviewed the previous proposed (59 FR 63162) and final critical habitat rules (60 FR 29914) for the owl, new location data, habitat requirements and definitions described in the Recovery Plan, and habitat and other information provided during the two comment periods, as well as utilized our own expertise.

The previous critical habitat designation included extensive use and evaluation of owl habitat and territory maps, vegetation maps, aerial photography, and field verification to identify areas for designation as critical habitat. We considered several qualitative criteria (currently suitable habitat, large contiguous blocks of habitat, occupied habitat, rangewide distribution, the need for special management or protection, adequacy of existing regulatory mechanisms) when identifying critical habitat areas. We finalized the previous designation prior to the completion of the Recovery Plan for the Mexican Spotted Owl. For this new designation, we examined the previously designated critical habitat units, but relied primarily on the Recovery Plan to provide guidance. We expanded or combined previous units to comply with the Recovery Plan. We also included wilderness areas and other areas containing protected and restricted habitat areas as defined in the Recovery Plan. Some lands were excluded if they did not meet our definition of critical habitat (see discussion below).

Critical Habitat Designation

The designated critical habitat constitutes our best assessment of areas needed for the conservation of the owl and that are in need of special management or protection. The areas designated are within the range of the species, and include (1) most known occupied sites, (2) some sites not surveyed but suspected to be occupied, and (3) other sites surveyed without detecting owls, but believed to be capable of periodically supporting owls. We consider these areas to be within the geographic range occupied or potentially occupied by the species. We've included these areas in the designation based on information contained within the Recovery Plan that finds them to be essential to the conservation of the species because they either currently support populations of the owl, or because they currently possess the necessary habitat requirements for nesting, roosting, and foraging (see description of primary constituent elements). All protected habitat and restricted habitat as described in the Recovery Plan that is within the designated boundaries, is considered critical habitat.

Critical habitat units are designated in portions of McKinley, Rio Arriba, Sandoval, Socorro, and Taos, Counties in New Mexico; Apache, Cochise, Coconino, Graham, Mohave, and Pima Counties in Arizona; Carbon, Emery, Garfield, Grand, Iron, Kane, San Juan, Washington, and Wayne Counties in Utah; and Custer, Douglas, El Paso, Fremont, Huerfano, Jefferson, Pueblo, and Teller Counties in Colorado. Precise legal descriptions of each critical habitat unit are on file at the New Mexico Ecological Services Field Office, as are digital files of each unit (see **ADDRESSES** section).

This critical habitat designation does not include tribal lands; FS lands within Arizona and New Mexico; Fort Carson, Colorado; and low-density areas (see discussion under Exclusions Under Section 3(5)(A) Definition). This critical habitat designation does include FS lands in Utah and Colorado, and other Federal lands used by currently known populations of Mexican spotted owls (Table 1).

We did not designate some areas that are known to have widely scattered owl sites, low population densities, and/or marginal habitat quality, which are not considered to be essential to this species' survival or recovery. These areas include Dinosaur National Park in northwest Colorado; Mesa Verde National Park, Ute Mountain Ute Reservation, Southern Ute Reservation, other FS and Bureau of Land Management land in southwest Colorado and central Utah; and the Guadalupe and Davis Mountains in southwest Texas. We also did not include isolated mountains on the Arizona Strip, such as Mount Trumbull, due to their small size, isolation, and lack of information about owls in the area.

State and private lands are not included in this designation. Some State and private parcels within the critical habitat boundaries likely support mid- and higher-elevation forests that are capable of providing nesting and roosting habitat. However, given that the majority of the owl's range occurs on Federal and tribal lands, we do not consider State and private lands essential to the recovery of the species and, therefore, we are not designating these areas as critical habitat. The overwhelming majority of Mexican spotted owl records are from Federal and tribal lands, indicating that those lands are essential to the species' recovery. Where feasible, we drew critical habitat boundaries so as to exclude State and private lands. However, the short amount of time allowed by the court to complete this designation did not allow us to conduct the fine-scale mapping necessary to physically exclude the smaller and widely scattered State and private parcels that remain within the mapped boundaries. Those areas under State or private ownership that are within mapped critical habitat unit boundaries are excluded from this designation of critical habitat by definition.

We significantly reduced some critical habitat units that we proposed as critical habitat (December 7, 1994; 59 FR 63162 and July 21, 2000; 65 FR 45336) within Arizona and New Mexico because, as discussed below, we are excluding FS lands governed by existing forest management plans. Nevertheless, the remaining Federal lands (e.g., Bureau of Land Management (BLM), National Park Service, etc.) within the mapped boundaries in Arizona and New Mexico, are designated as critical habitat. The critical habitat designation on Federal lands adjacent to FS lands within Arizona and New Mexico will ensure that ''special management considerations or protections'' are provided for the Mexican spotted owl on all Federal lands, pursuant to the definition of critical habitat in section 3 of the Act. (See Exclusion Under

Section 3(5)(A) Definition section for additional information.)

The approximate Federal ownership within the boundaries of owl critical habitat is shown in Table 1. Actual critical habitat is limited to areas within the mapped boundaries that meet the definition of protected and restricted habitat in the Recovery Plan. Therefore, the area actually designated as critical habitat is considerably less than the gross acreage indicated in Table 1.

TABLE 1.—CRITICAL HABITAT BY LAND OWNERSHIP AND STATE IN HECTARES (ACRES)

	Arizona	New Mexico	Colorado	Utah	Total
Forest Service	0	0	152,096 (375,837)	111,133 (274,616)	263,229 (650,453)
Bureau of Land Management	4,238 (10,473)	5,806 (14,346)	60,255 (148,894)	666,270 (1,646,388)	736,569 (1,820,101)
National Park Service	322,248 (796,292)	14,267 (35,255)	0	260,346 (643,328)	596,861 (1,474,875)
Department of Defense	9,728 (24,038)	1,677 (4,145)	0	0	11,405 (28,183)
Bureau of Reclamation	0	0	0	109,377 (270,276)	109,377 (270,276)
Other Federal [a]	0	0	0	156,207 (385,995)	156,207 (385,995)
Total	336,214 (830,803)	21,750 (53,747)	212,351 (524,731)	1,303,333 (3,220,603)	1,873,648 (4,629,883)
Total critical habitat units	11	6	2	5	24

[a] Includes land identified in the current Utah land ownership file as National Recreation Area or National Recreation Area/Power Withdrawal; Federal land ownership is unclear (may be NPS, BOR, or other).

Exclusions Under Section 3(5)(A) Definition

Section 3(5) of the Act defines critical habitat, in part, as areas within the geographical area occupied by the species ''on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations and protection.'' As noted above, special management considerations or protection is a term that originates in the definition of critical habitat. Additional special management is not required if adequate management or protection is already in place. Adequate special management considerations or protection is provided by a legally operative plan/agreement that addresses the maintenance and improvement of the primary constituent elements important to the species and manages for the long-term conservation of the species. We use the following three criteria to determine if a plan provides adequate special management or protection: (1) A current plan/agreement must be complete and provide sufficient conservation benefit to the species; (2) the plan must provide assurances that the conservation management strategies will be implemented; and (3) the plan must provide assurances that the conservation management strategies will be effective, i.e., provide for periodic monitoring and revisions as necessary. If all of these criteria are met, then the lands covered under the plan would no longer meet the definition of critical habitat.

We considered that the Southwest Region of the FS amended the Forest Plans in Arizona and New Mexico in 1996 to incorporate the Mexican Spotted Owl Recovery Plan guidelines as management direction, and these plan amendments underwent consultation (Biological Opinion 000031RO). We evaluated the Forest Plan Amendments against our three criteria used to determine whether lands require ''special management considerations or protections,'' under the definition of critical habitat in section 3 of the Act. We determined that the FS amended their National Forest Plans in Arizona and New Mexico to conform with the Mexican Spotted Owl Recovery Plan, and these plans adequately meet all of our three criteria. The plan provides a conservation benefit to the species since it incorporates all elements of the Recovery Plan; the plan provides assurances that the management plan will be implemented since the FS in the Southwest Region has authority to implement the plan and has obtained all the necessary authorizations or approvals; and the plan provides assurances that the conservation plan will be effective since it includes biological goals consistent with the Recovery Plan, monitoring, and adaptive management (65 FR 63438, 65 FR 63680, 65 FR 69693). Moreover, we consider that the Mexican spotted owl is receiving substantial protection on FS lands in Arizona and New Mexico. We, therefore, determined that FS lands in Arizona and New Mexico do not meet the definition of critical habitat, and we did not include them in this final designation.

At the time of the proposal these lands were included in the designation, even though the FS amended their Forest Plans in 1996 to follow the Recovery Plan. We had recently published a notice seeking public comment on the direction we should take in developing a national critical habitat policy (June 14, 1999; 64 FR 31871). Due to the diversity of comments that we received in response to this notice, we reopened this comment period and held two national workshops on February 8 and 11, 2000, to further discuss critical habitat issues with major stakeholders and the public to obtain their input. Based upon information we received from the public and in our internal discussions that followed these workshops, one issue which emerged was how to consistently interpret the term special management in our critical habitat designations. In the past, we removed areas from critical habitat designations, typically Federal lands, because we felt that the areas were adequately managed and provided for the conservation of the species. For example, we excluded National Park Lands and National Wildlife Refuges from the critical habitat designation for the cactus ferruginous pygmy-owl because we felt that they were adequately protected (July 12, 1999; 64 FR 37419). In the final rule designating critical habitat for the coastal California gnatcatcher (65 FR 63680), we identified three criteria we used to determine whether adequate special management was being provided for to determine, in this case, whether a Department of Defense INRMP was adequate. During our comment period on this proposal, we received two comments indicating that the FS is providing adequate special management through their Forest Plans. In light of these comments and information contained in our final designation of critical habitat for the gnatcatcher, we excluded National Forest lands in Arizona and New Mexico from this final designation since the FS is providing adequate special management through their Forest Plans.

The affected National Forests within the Rocky Mountain Region of the FS (i.e., Utah and Colorado) have not amended their Forest Plans to conform with the Mexican Spotted Owl Recovery Plan. The FS integrates the Mexican Spotted Owl Recovery Plan ''as much as possible'' into their forest management activities (Industrial Economics Inc., 2000). Nevertheless, we do not have formal documentation (e.g., completed consultation) that supports this contention. The National Forests in Utah and Colorado do not have ''special

management considerations or protections,'' pursuant to the definition of critical habitat in section 3 of the Act. Thus, within the mapped boundaries of the National Forests in Utah and Colorado, those lands that meet the definition of protected or restricted habitat are designated as critical habitat.

The Sikes Act Improvements Act of 1997 (Sikes Act) requires each military installation that includes land and water suitable for the conservation and management of natural resources to complete an INRMP by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found there. Each INRMP includes an assessment of the ecological needs on the installation, including needs to provide for the conservation of listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan. We consult with the military on the development and implementation of INRMPs for installations with listed species and critical habitat. We believe that bases that have completed and approved INRMPs that address the needs of listed species generally do not meet the definition of critical habitat discussed above, as they require no additional special management or protection. Therefore, we do not include these areas in critical habitat designations if they meet the three criteria described above.

Fort Carson provided information during the second comment period that indicated the Mexican spotted owl is not known to nest on the military installation and the species is a rare winter visitor. Similarly, protected and restricted habitat, as defined in the Recovery Plan, is not known to exist on Fort Carson. Therefore, lands on Fort Carson do not meet the definition of critical habitat and have been excluded from the final designation of critical habitat. Furthermore, Fort Carson, Colorado, is nearing completion of their updated INRMP, which includes specific guidelines for protection and management for the Mexican spotted owl. The target date of completion for this revision is early 2001, prior to the Sikes Act statutory deadline of November 17, 2001. Fort Carson, through consultation with us, indicated they will ensure that the INRMP meets the above criteria, and when Fort Carson's INRMP is complete, it will undergo formal consultation.

We indicated in the proposed rule (July 21, 2000; 65 FR 45336) that the Navajo Nation, Mescalero Apache, and San Carlos Apache were working on Mexican Spotted Owl Habitat Management Plans. We indicated that if any of these tribes submit management plans, we will consider whether these plans provide adequate special management considerations or protection for the species, or we will weigh the benefits of excluding these areas under section 4(b)(2).

During the second comment period, the Mescalero Apache and Navajo Nation completed management plans for the Mexican Spotted Owl. We reviewed these plans to determine whether adequate special management is being provided, through their consistency with the Recovery Plan. We determined that these plans conform with the Mexican Spotted Owl Recovery Plan, and therefore adequately meet all of our three criteria. Both plans provide a conservation benefit to the species since they are both complete and specifically written to provide for the conservation of the Mexican spotted owl. The Navajo Nation plan provide assurances that the management plan will be implemented since the Navajo Nation plan is within the scope of work of the Navajo Natural Heritage Program of the Navajo Nation. This program is contracted by the Bureau of Indian Affairs to collect and manage information on rare, and federally and tribally listed plant and animal species on the Navajo Nation and will ensure that the Mexican spotted owl plan will be properly implemented and funded. The Mescalero Apache plan has been approved by the Tribal council, indicating a commitment to implement the plan. Both plans provide assurances the conservation plan will be effective since they both include a monitoring component. We, therefore, determine that lands of the Mescalero Apache and virtually all lands of the Navajo Nation are not in need of special management considerations and protection, and therefore do not meet part 3(5)(A)(i)(II) of the definition of critical habitat and are not included in this designation.

During our review of the Navajo Nation management plan for the Mexican Spotted Owl, we concluded that there is a unique land ownership of Navajo National Monument and Canyon de Chelly wherein the land is owned by the Navajo Nation, but under the management authority and administration of the National Park Service. Although we excluded other lands owned by the Navajo Nation from critical habitat, we designated critical habitat on Navajo National Monument and Canyon de Chelly, because the National Park Service retains management authority over these lands, and any management that may have the potential to adversely affect the owl or its critical habitat would stem from their actions.

As reported in the proposed rule (65 FR 45336), the Southern Ute Reservation has not supported Mexican spotted owls historically, and our assessment revealed that the Southern Ute Reservation does not support habitat essential to the species' conservation. Thus, lands of the Southern Ute Reservation do not meet part 3(5)(A)(i)(I) of the definition of critical habitat stated above; we are, therefore, not designating these lands as critical habitat.

We are not designating lands of the Ute Mountain Ute Tribe as critical habitat. Due to the low owl population density and isolation from other occupied areas in Colorado, New Mexico, and Utah, the Mexican spotted owl habitat in southwestern Colorado is not believed to be essential for the survival or recovery of the species. Thus, these lands do not meet part 3(5)(A)(i)(I) of the definition of critical habitat stated above; we are, therefore, not designating these lands as critical habitat. Owls in these areas will retain the other protections of the Act, such as the prohibitions of section 9 and the prohibition of jeopardy under section 7.

In addition, other tribal lands including the Picuris, Taos, and Santa Clara Pueblos in New Mexico and the Havasupai Reservation in Arizona may have potential owl habitat. However, the available information, although limited, on the habitat quality and current or past owl occupancy in these areas does not indicate that these areas meet the definition of critical habitat. Therefore, we are not designating these lands as critical habitat.

American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act

In accordance with the Presidential Memorandum of April 29, 1994, we believe that, to the maximum extent possible, fish, wildlife, and other natural resources on tribal lands are better managed under tribal authorities, policies, and programs than through Federal regulation wherever possible and practicable. Based on this philosophy, we believe that, in most cases, designation of tribal lands as critical habitat provides very little additional benefit to threatened and endangered species. This is especially true where the habitat is occupied by the species and is therefore already subject to protection under the Act through section 7 consultations

requirements. Conversely, such designation is often viewed by tribes as unwarranted and an unwanted intrusion into tribal self governance, thus compromising the government-to-government relationship essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend.

Section 4(b)(2) of the Act requires us to consider the economic and other relevant impacts of critical habitat designation, and authorizes us to exclude areas from designation upon finding that the benefits of exclusion outweigh the benefits of including the areas as critical habitat, so long as excluding those areas will not result in the extinction of the species concerned. As mentioned above, in the proposed rule we indicated that if the San Carlos Apache Tribe submitted a management plan to us, we would considering excluding their land from the designation under section 4(b)(2) of the Act.

The San Carlos Apache Tribe submitted a draft management plan for the Mexican Spotted Owl to us in September 2000, which we reviewed and determined to be consistent with the Recovery Plan and substantially complete. The Tribe also commented on the proposed rule and indicated in their comments that their management plan was nearing completion. Based on recent conversations with the Tribe, their plan is expected to be completed in March 2001. In 1996 we reviewed the San Carlos Apache Reservation Tribe's Malay Gap Management Plan and determined that the plan provided adequate special management for the owl. We did not include areas covered by that plan in the proposed designation. Based on our review of their draft plan, it is similar to the Tribe's Malay Gap Management Plan as they are both consistent with the Recovery Plan. Their comment letter also indicates that suitable nesting and roosting habitat, as well as foraging habitat, on the reservation has been mapped and PACs have been established for all known owl pairs. Thus, any impacts from management activities to either PACs or owl habitat will trigger section 7, regardless of critical habitat, since the areas are presently occupied by the owl. In light of this and the fact that the Tribe will soon have their management plan completed, we find that the designation of critical habitat will provide little or no additional benefit to the species. The designation of critical habitat would be expected to adversely impact our working relationship with the Tribe and we believe that Federal regulation through critical habitat designation would be viewed as an unwarranted and unwanted intrusion into tribal natural resource programs. Our working relationships with the Tribe has been extremely beneficial in implementing natural resource programs of mutual interest.

After weighing the benefits of critical habitat designation on these lands against the benefits of excluding them, we find that the benefits of excluding the San Carlos Apache Tribe from the designation of critical habitat outweighs the benefits of including those areas as critical habitat. We also find that the exclusion of these lands will not lead to the extinction of the species. Therefore, we are not designating San Carlos Apache Tribal lands as critical habitat for the owl.

Effect of Critical Habitat Designation

Section 7 Consultation

Section 7(a) of the Act requires Federal agencies to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat to the extent that the action appreciably diminishes the value of the critical habitat for the survival and recovery of the species. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. If a species is listed and critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species and do not destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that we believe would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation with us on actions for which formal consultation has been completed if those actions may affect designated critical habitat.

Activities on Federal lands that may affect the Mexican spotted owl or its critical habitat will require section 7 consultation. Activities on State or private lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers (Army Corps) under section 404 of the Clean Water Act, or some other Federal action, including funding (e.g., Federal Highway Administration, Federal Aviation Administration, or Federal Emergency Management Agency) will continue to be subject to the section 7 consultation process only for actions that may affect the Mexican spotted owl, but not for critical habitat because areas under State or private ownership are excluded from the critical habitat designation by definition. Similarly, Federal lands that we did not designate as critical habitat (e.g., FS lands in Arizona and New Mexico) will also continue to be subject to the section 7 consultation process only for actions that may affect the Mexican spotted owl. Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded or regulated do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to evaluate briefly in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may adversely modify such habitat or that may be

affected by such designation. Adverse effects on one or more primary constituent elements or segments of critical habitat generally do not result in an adverse modification determination unless that loss, when added to the environmental baseline, is likely to appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species. In other words, activities that may destroy or adversely modify critical habitat include those that alter one or more of the primary constituent elements (defined above) of protected or restricted habitat to an extent that the value of critical habitat for both the survival and recovery of the Mexican spotted owl is appreciably reduced.

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to ''jeopardize the continued existence'' of a species are those that would appreciably reduce the likelihood of the species' survival and recovery (50 CFR 402.02). Actions likely to ''destroy or adversely modify'' critical habitat are those that would appreciably reduce the value of critical habitat for the survival and recovery of the listed species (50 CFR 402.02).

Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to destroy or adversely modify critical habitat would almost always result in jeopardy to the species concerned when the habitat is occupied by the species. The purpose of designating critical habitat is to contribute to a species' conservation, which by definition equates to survival and recovery. Section 7 prohibitions against the destruction or adverse modification of critical habitat apply to actions that would impair survival and recovery of the listed species, thus providing a regulatory means of ensuring that Federal actions within critical habitat are considered in relation to the goals and recommendations of any existing Recovery Plan for the species concerned. As a result of the direct link between critical habitat and recovery, the prohibition against destruction or adverse modification of the critical habitat should provide for the protection of the critical habitat's ability to contribute fully to a species' recovery.

A number of Federal agencies or departments fund, authorize, or carry out actions that may affect the Mexican spotted owl and its critical habitat. Among these agencies are the FS, Bureau of Indian Affairs, Bureau of Land Management, Department of Defense, Department of Energy, National Park Service, and Federal Highway Administration. We have reviewed and continue to review numerous activities proposed within the range of the Mexican spotted owl that are currently the subject of formal or informal section 7 consultations. Actions on Federal lands that we reviewed in past consultations on effects to the owl include land management plans; land acquisition and disposal; road construction, maintenance, and repair; timber harvest; livestock grazing and management; fire/ecosystem management projects (including prescribed natural and management ignited fire); powerline construction and repair; campground and other recreational developments; and access easements. We expect that the same types of activities will be reviewed in section 7 consultations for designated critical habitat.

Actions that would be expected to both jeopardize the continued existence of the Mexican spotted owl and destroy or adversely modify its critical habitat would include those that significantly and detrimentally alter the species' habitat over an area large enough that the likelihood of the Mexican spotted owls' persistence and recovery, either range-wide or within a recovery unit, is significantly reduced. Thus, the likelihood of an adverse modification or jeopardy determination would depend on the baseline condition of the RU and the baseline condition of the species as a whole. Some RUs, such as the Southern Rocky Mountains-New Mexico and Southern Rocky Mountains-Colorado, support fewer owls and owl habitat than other RUs and, therefore, may be less able to withstand habitat-altering activities than RUs with large contiguous areas of habitat supporting higher densities of spotted owls.

Actions not likely to destroy or adversely modify critical habitat include activities that are implemented in compliance with the Recovery Plan, such as thinning trees less than 9 inches in diameter in PACs; fuels reduction to abate the risk of catastrophic wildfire; ''personal use'' commodity collection such as fuelwood, latillas and vigas, and Christmas tree cutting; livestock grazing that maintains good to excellent range conditions; and most recreational activities including hiking, camping, fishing, hunting, cross-country skiing, off-road vehicle use, and various activities associated with nature appreciation. We do not expect any restrictions to those activities as a result of this critical habitat designation. In addition, some activities may be considered to be of benefit to Mexican spotted owl habitat and, therefore, would not be expected to adversely modify critical habitat. Examples of activities that could benefit critical habitat may include some protective measures such as fire suppression, prescribed burning, brush control, snag creation, and certain silvicultural activities such as thinning.

If you have questions regarding whether specific activities in New Mexico will likely constitute destruction or adverse modification of critical habitat, contact the Field Supervisor, New Mexico Ecological Services Field Office (see **ADDRESSES** section). In Arizona, Colorado, and Utah, refer to the regulation at the end of this final rule for contact information. If you would like copies of the regulations on listed wildlife or have questions about prohibitions and permits, contact the U.S. Fish and Wildlife Service, Division of Endangered Species, P.O. Box 1306, Albuquerque, New Mexico 87103 (telephone 505–248–6920; facsimile 505–248–6788).

Effects on Tribal Trust Resources From Critical Habitat Designation on Non-Tribal Lands

In complying with our tribal trust responsibilities, we communicated with all tribes potentially affected by the designation of critical habitat for the Mexican spotted owl. We solicited and received information from the tribes (see discussion above) and arranged meetings with the tribes to discuss potential effects to them or their resources that may result from critical habitat designation.

Summary of Changes From the Proposed Rule

In addition to the areas deleted from the proposed designation as described previously, this final rule differs from the proposal as follows:

We attempted to clarify the definitions and use of protected and restricted habitat and the attributes of primary constituent elements of critical habitat in this rule. As stated in the critical habitat designation section, critical habitat is limited to areas within the mapped boundaries that meet the definition of protected and restricted habitat.

In the proposed rule we stated that all ''reserved'' lands would be considered critical habitat and included ''designated'' wilderness areas. In this final rule, we are only considering lands that are within critical habitat boundaries and that meet the definition of protected and restricted habitat as critical habitat, regardless of whether they are currently designated as wilderness.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial data available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We based this designation on the best available scientific information, and believe it is consistent with the Recovery Plan and recommendations of those team members. We utilized the economic analysis, and took into consideration comments and information submitted during the public hearing and comment period to make this final critical habitat designation. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species.

The economic effects already in place due to the listing of the Mexican spotted owl as threatened is the baseline upon which we analyzed the economic effects of the designation of critical habitat. The critical habitat economic analysis examined the incremental economic and conservation effects of designating critical habitat. The economic effects of a designation were evaluated by measuring changes in national, regional, or local indicators. A draft analysis of the economic effects of the proposed Mexican spotted owl critical habitat designation was prepared and made available for public review (65 FR 63047). We concluded in the final analysis, which included review and incorporation of public comments, that no significant economic impacts are expected from critical habitat designation above and beyond that already imposed by listing the Mexican spotted owl. A copy of the economic analysis is included in our administrative record and may be obtained by contacting the New Mexico Ecological Services Field Office (see **ADDRESSES** section).

Required Determinations

Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, this rule is a significant regulatory action and has been reviewed by the Office of Management and Budget.

(a) This rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. A cost-benefit analysis is not required for purposes of Executive Order 12866. The Mexican spotted owl was listed as a threatened species in 1993. Since that time, we have conducted, and will continue to conduct, formal and informal section 7 consultations with other Federal agencies to ensure that their actions would not jeopardize the continued existence of the Mexican spotted owl.

Under the Act, critical habitat may not be adversely modified by a Federal agency action; critical habitat does not impose any restrictions on non-Federal persons unless they are conducting activities funded or otherwise sponsored or permitted by a Federal agency (see Table 2 below). Section 7 requires Federal agencies to ensure that they do not jeopardize the continued existence of the species. Based upon our experience with the species and its needs, we believe that any Federal action or authorized action that could potentially cause an adverse modification of the designated critical habitat would currently be considered as ''jeopardy'' to the species under the Act. Accordingly, we do not expect the designation of critical habitat in areas within the geographic range occupied by the species to have any incremental impacts on what actions may or may not be conducted by Federal agencies or non-Federal persons that receive Federal authorization or funding. Non-Federal persons who do not have a Federal ''sponsorship'' of their actions are not restricted by the designation of critical habitat (however, they continue to be bound by the provisions of the Act concerning ''take'' of the species).

TABLE 2.—IMPACTS OF DESIGNATING CRITICAL HABITAT FOR MEXICAN SPOTTED OWL.

Categories of activities	Activities potentially affected by the designation of critical habitat in areas occupied by the species (in addition to those activities affected from listing the species)	Activities potentially affected by the designation of critical habitat in unoccupied areas
Federal Activities Potentially Affected [1]	None	None.
Private or other non-Federal Activities Potentially Affected [2].	None	None.

[1] Activities initiated by a Federal agency.
[2] Activities initiated by a private or other non-Federal entity that may need Federal authorization or funding.

We evaluated any potential impact through our economic analysis, and found that we anticipate little, if any, additional impact due to designating areas within the geographic range potentially occupied by the owl, because the designated critical habitat units all occur within the Recovery Units. (See Economic Analysis section of this rule.)

(b) This rule will not create inconsistencies with other agencies' actions. Federal agencies have been required to ensure that their actions do not jeopardize the continued existence of the Mexican spotted owl since its listing in 1993. The prohibition against adverse modification of critical habitat is not expected to impose any additional restrictions to those that currently exist in areas of proposed critical habitat.

(c) This designation will not significantly impact entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Federal agencies are currently required to ensure that their activities do not jeopardize the continued existence of the species, and, as discussed above, we anticipate that the adverse modification prohibition (resulting from critical habitat designation) will have little, if any, incremental effects in areas of critical habitat.

(d) This rule will not raise novel legal or policy issues. The designation follows the requirements for determining critical habitat contained in the Endangered Species Act.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

In the economic analysis, we determined that designation of critical habitat will not have a significant effect on a substantial number of small entities. As discussed under Regulatory Planning and Review above, this designation is not expected to result in any restrictions in addition to those currently in existence.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

Our economic analysis demonstrated that designation of critical habitat will not cause (a) an annual effect on the economy of $100 million or more, (b) any increases in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions, or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act:

a. This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. Small governments will be affected only to the extent that any programs involving Federal funds, permits, or other authorized activities must ensure that their actions will not destroy or adversely modify critical habitat. However, as discussed above in the Regulatory Planning and Review section, these actions are currently subject to equivalent restrictions through the listing protections of the species, and no further restrictions are anticipated in areas of proposed critical habitat.

b. This rule will not produce a Federal mandate on State, local, or tribal governments or the private sector of more than $100 million or greater in any year, *i.e.,* it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments.

Takings

In accordance with Executive Order 12630, this designation does not have significant takings implications, and a takings implication assessment is not required. This designation will not ''take'' private property. In this designation, State and private lands were excluded by definition.

Federalism

In accordance with Executive Order 13132, this designation will not affect the structure or role of States, and will not have direct, substantial, or significant effects on States. A Federalism assessment is not required. As previously stated, critical habitat is applicable only to Federal lands or to non-Federal lands when a Federal nexus exists.

In keeping with Department of the Interior and Department of Commerce policy, we requested information from and coordinated development of this critical habitat designation with appropriate State resource agencies in Arizona, New Mexico, Colorado, and Utah. In addition, Arizona and Utah have representatives on the recovery team for this species.

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. The Office of the Solicitor reviewed this final determination. We made every effort to ensure that this final determination contained no drafting errors, provides clear standards, simplifies procedures, reduces burden, and is clearly written such that litigation risk is minimized.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any information collection requirements for which Office of Management and Budget approval under the Paperwork Reduction Act is required.

National Environmental Policy Act (NEPA)

Our position is that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. Ore. 1995), *cert. denied* 116 S. Ct. 698 (1996). However, when the range of the species includes States within the Tenth Circuit, such as that of the Mexican spotted owl, pursuant to the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we undertake a NEPA analysis for critical habitat designation. We completed an environmental assessment and finding of no significant impact on the designation of critical habitat for the Mexican spotted owl.

References Cited

A complete list of all references cited in this proposed rule is available upon request from the New Mexico Ecological Services Field Office (see **ADDRESSES** section).

Authors

The primary authors of this notice are the New Mexico Ecological Services Field Office staff (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h), by revising the entry for ''Owl, Mexican spotted'' under ''BIRDS'' to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
BIRDS							
*	*	*	*	*	*		*
Owl, Mexican spotted.	*Strix occidentalis lucida.*	U.S.A. (AZ, CO, NM, TX, UT), Mexico.	Entire	T	494	§ 17.95(b)	NA
*	*	*	*	*	*		*

3. Amend § 17.95(b) by adding critical habitat for the Mexican spotted owl (*Strix occidentalis lucida*) in the same alphabetical order as this species occurs in § 17.11(h).

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(b) Birds. * * *

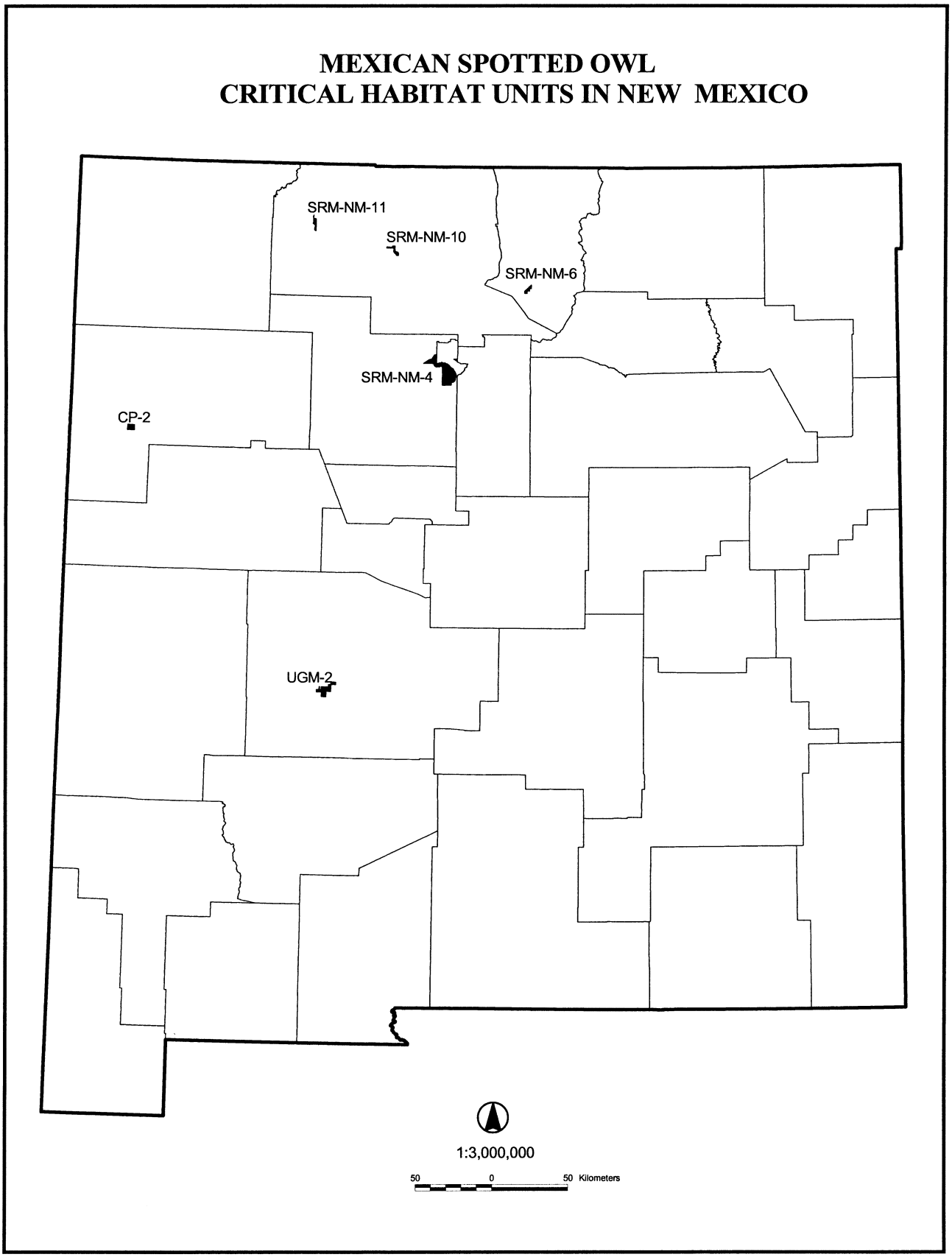
Mexican Spotted Owl (Strix occidentalis lucida)

Critical habitat is limited to areas within the mapped boundaries that meet the definition of protected habitat as described in the Recovery Plan (600 acres around known owl sites and mixed conifer or pine-oak forests with slopes greater than 40 percent where timber harvest has not occurred in the past 20 years). All restricted habitat as described in the Recovery Plan is also designated as critical habitat. Private and State lands within mapped boundaries are not designated as critical habitat. No Tribal lands other than those administered by the National Park Service are designated. Existing man-made features and structures, such as buildings, roads, railroads, and urban development, are not considered critical habitat. Critical habitat units for the States of Arizona, Colorado, New Mexico, and Utah are depicted on the maps below. Larger maps and digital files for all four States and maps of critical habitat units in the State of New Mexico are available at the New Mexico Ecological Services Field Office, 2105 Osuna N.E., Albuquerque, New Mexico 87113, telephone (505) 346–2525. For the States of Arizona, Colorado, and Utah, maps of the critical habitat units specific to each State are available at the following U.S. Fish and Wildlife Service offices—Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, Arizona 85021, telephone (602) 640–2720; Colorado State Sub-Office, 764 Horizon Drive South, Annex A, Grand Junction, Colorado 81506, telephone (970) 243–2778; and Utah Ecological Services Field Office, Lincoln Plaza, 145 East 1300 South, Suite 404, Salt Lake City, Utah 84115, telephone (801) 524–5001.

1. Critical habitat units are designated in portions of McKinley, Rio Arriba, Sandoval, Socorro, and Taos, Counties in New Mexico; Apache, Cochise, Coconino, Graham, Mohave, and Pima Counties in Arizona; Carbon, Emery, Garfield, Grand, Iron, Kane, San Juan, Washington, and Wayne Counties in Utah; and Custer, Douglas, El Paso, Fremont, Huerfano, Jefferson, Pueblo, and Teller Counties in Colorado. Precise descriptions of each critical habitat unit are on file at the New Mexico Ecological Services Field Office.

2. Within these areas, the primary constituent elements for Mexican spotted owl include, but are not limited to, those habitat components providing for nesting, roosting, and foraging activities. Primary constituent elements in Protected Activity Centers include all vegetation and other organic matter contained therein. Primary constituent elements on all other areas are provided in canyons and mixed conifer, pine-oak, and riparian habitat types that typically support nesting and/or roosting. The primary constituent elements that occur in mixed conifer, pine-oak, and riparian forest types, as described in the Recovery Plan, which currently contain or may attain the habitat attributes believed capable of supporting nesting and roosting owls include: high basal area of large-diameter trees; moderate to high canopy closure; wide range of tree sizes suggestive of uneven-age stands; multi-layered canopy with large overstory trees of various species; high snag basal area; high volumes of fallen trees and other woody debris; high plant species richness, including hardwoods; and adequate levels of residual plant cover to maintain fruits, seeds, and regeneration to provide for the needs of Mexican spotted owl prey species. For canyon habitats, the primary constituent elements include the following attributes: cooler and often higher humidity than the surrounding area; clumps or stringers of ponderosa pine, Douglas-fir, white fir, and/or piñon-juniper trees and/or canyon wall containing crevices, ledges, or caves; high percent of ground litter and woody debris; and riparian or woody vegetation (although not at all sites).

BILLING CODE 4310–55–P


MEXICAN SPOTTED OWL
CRITICAL HABITAT UNITS IN NEW MEXICO
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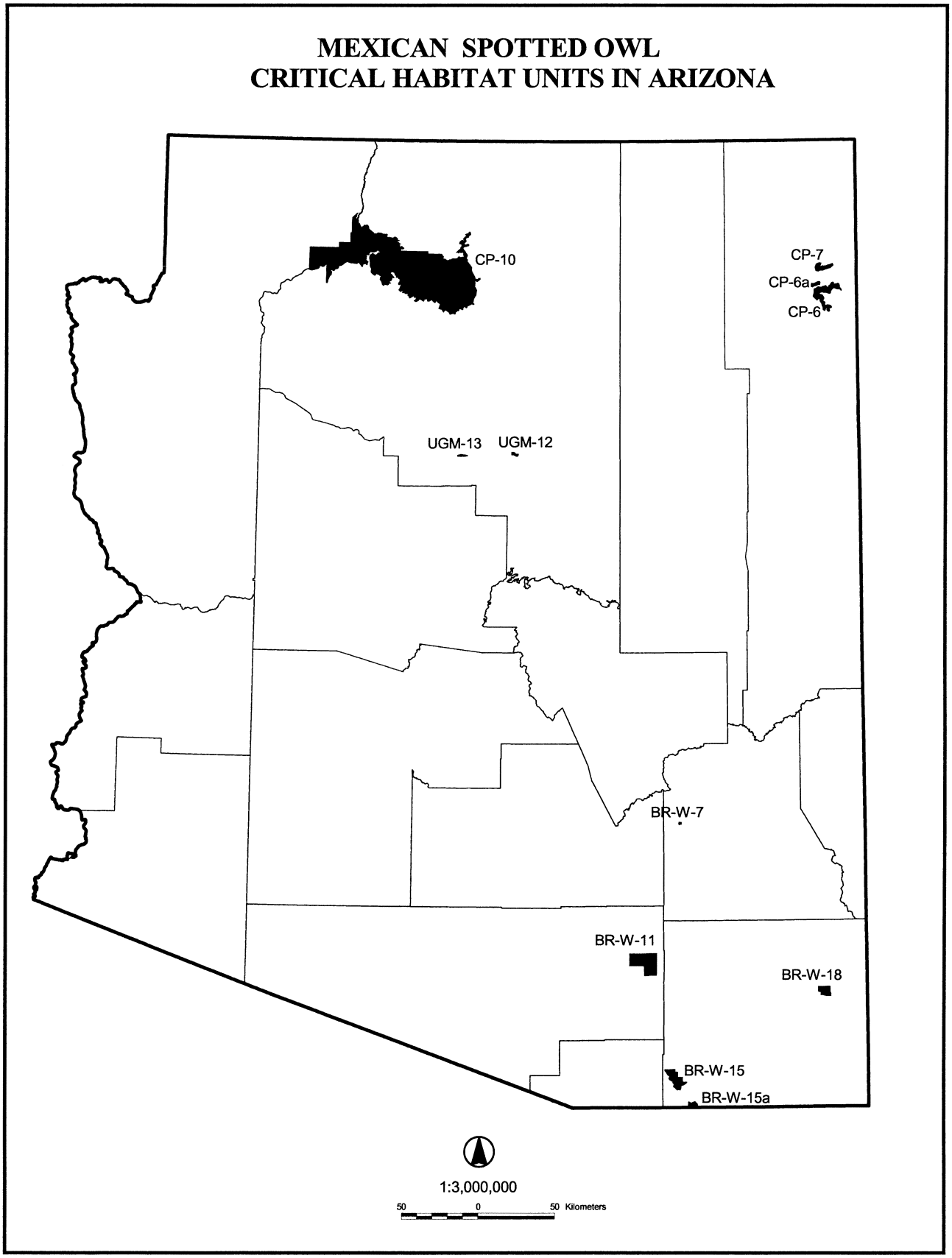
MEXICAN SPOTTED OWL
CRITICAL HABITAT UNITS IN ARIZONA
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CP-7
CP-6a
CP-6
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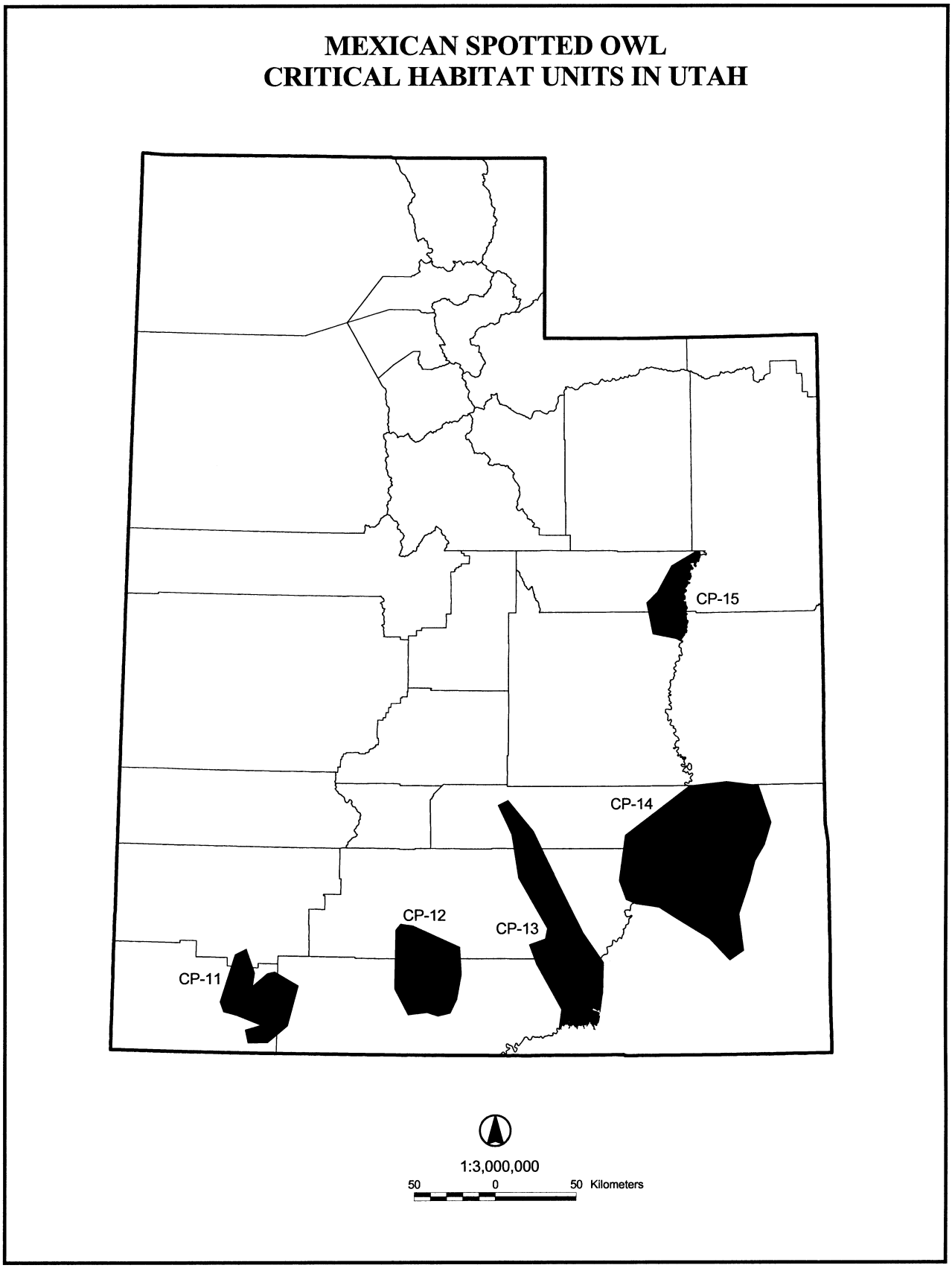
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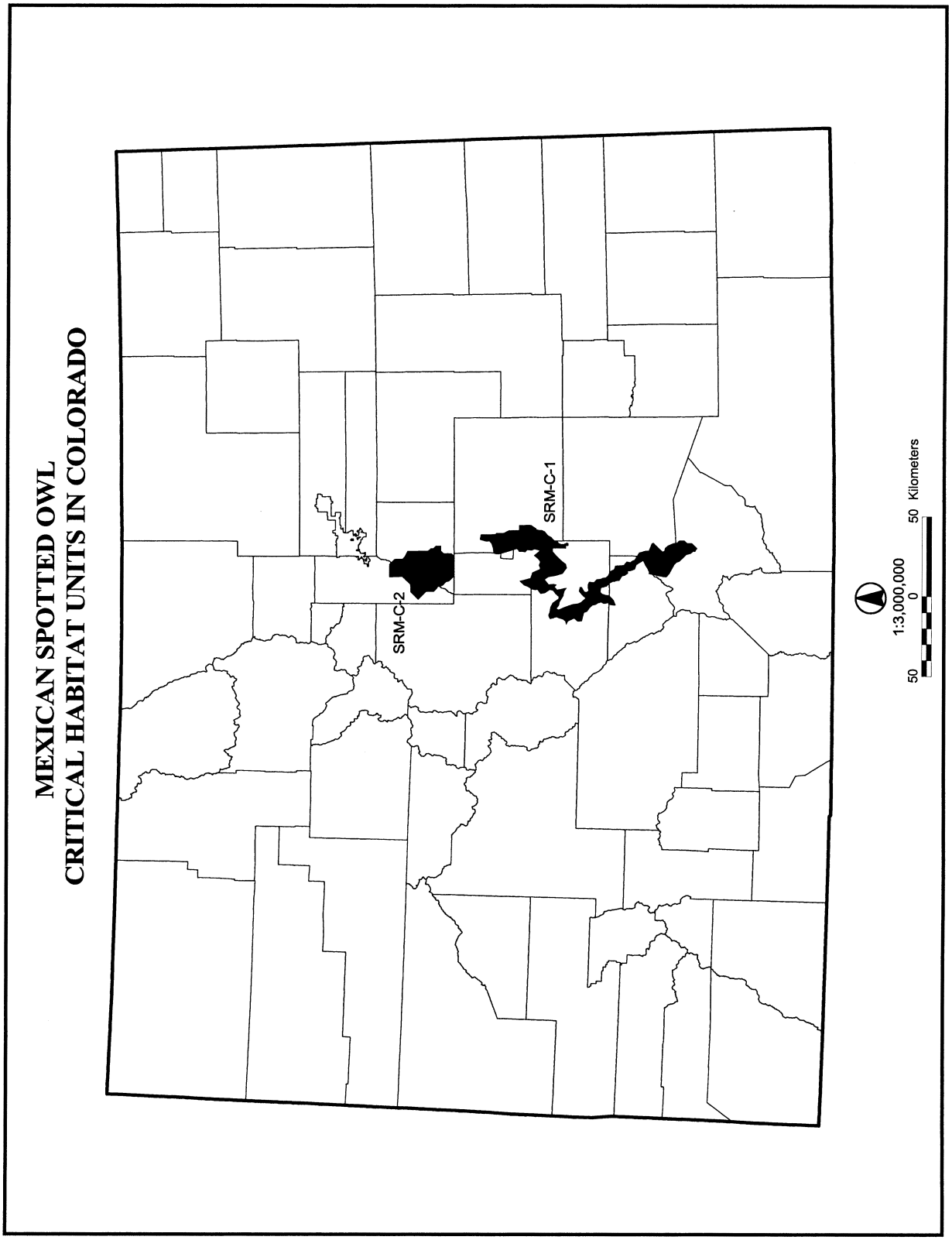

* * * * *

Dated: January 16, 2001.

Kenneth L. Smith,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 01–1798 Filed 1–30–01; 10:06 am]

BILLING CODE 4310–55–C

Proposed Rules

Federal Register
Vol. 66, No. 22
Thursday, February 1, 2001

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.

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 24 and 101

RIN 1515–AC77

Reimbursable Customs Inspectional Services: Increase in Hourly Rate Charge

AGENCY: Customs Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to increase the rate of charge for reimbursable Customs inspectional services. The present amount charged for the services of a Customs employee on a regular work week is computed at a rate per hour equal to 137 percent of the hourly rate of an employee's regular pay. A recent audit of Customs inspectional services charges by the Treasury's Office of the Inspector General determined that this rate does not represent full reimbursement to Customs for actual inspectional service costs, and that increasing the rate to 158 percent would recover the actual costs incurred by Customs for these services. This document proposes to increase the rate in accordance with the Inspector General's recommendation.

DATES: Comments must be received on or before April 2, 2001.

ADDRESSES: Written comments may be addressed to, and inspected at, U.S. Customs Service, Office of Regulations and Rulings—Regulations Branch, 1300 Pennsylvania Avenue NW., Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Dennis Lomax, Accounting Services Division, Office of Finance, Indianapolis, IN 46278; telephone (317) 298–1200, ext. 1404.

SUPPLEMENTARY INFORMATION:

Background

Under certain circumstances, Customs provides inspectional and supervisory services to parties-in-interest who require such Customs services during regular hours of duty or on Customs overtime assignments. However, under these circumstances, the private interest is required to reimburse the Government for the Customs employee's compensation. The amounts of the compensation and expenses chargeable to these parties-in-interest are determined based on a computational charge. The computational charge is provided at § 24.17(d) of the Customs Regulations (19 CFR 24.17(d)). Currently, the computational charge for reimbursable services is at a per hour rate that is equal to 137 percent of the hourly rate of regular pay of the employee performing the inspectional services.

A recent audit of Customs inspectional services charges by the Treasury's Office of the Inspector General (OIG) has determined that this computational rate does not represent full reimbursement to Customs for actual inspectional service costs and recommends that increasing the rate to 158 percent would recover the actual costs incurred by Customs for these services. The OIG noted that the formula used to determine the current computational charge of 137 percent now contains two outdated cost factors (the number of legal public holidays and the ratio of employer paid benefits to an employee's salary). The current 137 percent computational charge was calculated using 9 legal public holidays and an 11½ percent benefits ratio. However, there are now 10 legal public holidays (Martin Luther King Day was declared a legal public holiday in 1986), and the OIG has determined that the current benefit ratio is 28.55 percent instead of 11½ percent.

This document proposes to implement the recommended computational rate. Accordingly, the provisions of § 24.17(d) are proposed to be revised.

As a result of the proposed change to § 24.17(d), a corresponding change is proposed to § 101.6, which provides for the hours of business of Customs offices. Customs lists the legal public holidays as national holidays at § 101.6(a). The present provisions of § 101.6(a) enumerate only nine national holidays, when there are in fact ten national holidays observed. On November 2, 1983, the President signed into law a bill making the third Monday in January, starting in 1986, a legal public holiday honoring the Rev. Martin Luther King, Jr. Pub. L. 98–144, 97 Stat. 917, 5 U.S.C. 6103. While the Federal government has honored this date as indicated, the Customs Regulations have not been amended to incorporate this change. This document proposes to correct that oversight by adding the third Monday in January (Martin Luther King, Jr. Day) as a recognized national holiday.

Lastly, a typographical error (the word ''hours'' was type-set as ''hgurs'') has been discovered in the heading of paragraph (b) of § 101.6. This error is proposed to be corrected in this document.

Comments

Before adopting these proposed regulations as a final rule, consideration will be given to any written comments timely submitted to Customs, including comments on the clarity of this proposed rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, NW., Suite 3000, Washington, DC.

The Regulatory Flexibility Act and Executive Order 12866

Pursuant to provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities, because the proposed amendments will only effect those parties-in-interest who require Customs reimbursable inspectional services. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. Further, these proposed amendments do not meet the criteria for a ''significant regulatory action'' as specified in E.O. 12866.

Drafting Information

The principal author of this document was Gregory R. Vilders, Attorney, Regulations Branch, Office of Regulations and Rulings. However, personnel from other offices participated in its development.

List of Subjects

19 CFR Part 24

Accounting, Customs duties and inspection, Fees, Financial and accounting procedures, Reporting and recordkeeping requirements, User fees, Wages.

19 CFR Part 101

Customs duties and inspection, Organization and functions (Government agencies), Reporting and recordkeeping requirements, User fees, Wages.

Proposed Amendments to the Regulations

For the reasons set forth above, it is proposed to amend parts 24 and 101 of the Customs Regulations (19 CFR parts 24 and 101), as set forth below:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general authority citation for part 24 continues to read, and the specific authority for § 24.17 is revised to read, as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1505, 1624; 26 U.S.C. 4461; 4462; 31 U.S.C. 9701.

* * * * *

Section 24.17 also issued under 5 U.S.C. 6103; 19 U.S.C. 261, 267, 1450, 1451, 1452, 1456, 1524, 1557, 1562; 46 U.S.C. 2110, 2111, 2112;

* * * * *

2. Section 24.17(d) is revised to read as follows:

§ 24.17 Reimbursable services of Customs employees.

* * * * *

(d) *Computation charge for reimbursable services.* The charge for the services of a Customs employee on a regular workday during a basic 40-hour workweek will be computed at a rate per hour equal to 158 percent of the hourly rate of regular pay of the employee performing the services with an additional charge equal to any night pay differential actually payable under 5 U.S.C. 5545. The rate per hour equal to 158 percent of the hourly rate of regular pay will be computed as follows:

		Hours
Gross number of working hours in 52 40-hour weeks		2,080
Less:		
10 Legal Public Holidays—New Year's Day, Martin Luther King, Jr. Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day	80	
Annual Leave—26 days	208	
Sick Leave—13 days	104	
	392	392
Net number of working hours		1,688
Gross number of working hours in 52 40-hour weeks		2,080
Working hour equivalent of government contributions for employee uniform allowance, retirement, life insurance and health care benefits computed at 28.55 percent of annual rate of pay of employee (2,080 × .2855)		594
Equivalent annual working hours charged to Customs appropriation (2,080 + 594)		2,674
Ratio of annual number of working hours charged to Customs appropriation to net number of annual working hours (2,674 ÷ 1,688)		158%

* * * * *

PART 101—GENERAL PROVISIONS

1. The general authority citation for part 24 is revised to read as follows:

Authority: 5 U.S.C. 301, 6103; 19 U.S.C. 2, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

* * * * *

2. In § 101.6:

a. Paragraph (a) is revised; and

b. Paragraph (b) is amended by removing the word ''hgurs'' in the heading and adding, in its place, the word ''hours''.

The revision reads as follows:

§ 101.6 Hours of business.

* * * * *

(a) *Saturdays, Sundays, and national holidays.*—(1) *National holidays.* In addition to Saturdays, Sundays, and any other calendar day designated as a holiday by Federal statute or Executive Order, Customs offices will be closed on the following national holidays:

(i) January 1, New Year's Day;

(ii) The third Monday in January, Birthday of Martin Luther King, Jr.;

(iii) The third Monday in February, Washington's Birthday;

(iv) The last Monday in May, Memorial Day;

(v) July 4, Independence Day;

(vi) The first Monday in September, Labor Day;

(vii) The second Monday in October, Columbus Day;

(viii) November 11, Veterans Day;

(ix) The fourth Thursday in November, Thanksgiving Day; and

(x) December 25, Christmas Day.

(2) *Observance of national holidays.* If a national holiday falls on a Saturday, then the Friday preceding that Saturday will be observed as the national holiday for work purposes. If a national holiday falls on a Sunday, then the Monday following that Sunday will be observed as the national holiday for work purposes.

* * * * *

Raymond W. Kelly,

Commissioner of Customs.

Approved: December 4, 2000.

Timothy E. Skud,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 01–2783 Filed 1–31–01; 8:45 am]

BILLING CODE 4820–02–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 51

[CC Docket No. 96–98; DA 01–169]

Comments Sought On the Use of Unbundled Network Elements To Provide Exchange Access Service

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission issued a public notice requesting comment on the use of unbundled network elements to provide exchange access service. It seeks comment, in particular, on whether carriers are impaired in their ability to provide special access services without access to unbundled loop-transport combinations.

DATES: Comments are due March 5, 2001 and reply comments are due March 19, 2001.

FOR FURTHER INFORMATION CONTACT: Jodie Donovan-May or Tom Navin, Attorney Advisors, Policy and Program Planning Division, Common Carrier Bureau, (202) 418–1580.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Public Notice regarding CC Docket No. 96–98, released on January 24, 2001. The complete text of this Order is available for inspection and copying during regular business hours in the FCC Reference Information Center, Courtyard Level, 445 12th Street, SW., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Services (ITS, Inc.), CY–B400, 445 12th Street, SW., Washington, DC. It is also available on the Commission's website at *http://www.fcc.gov*.

Synopsis of Public Notice

1. Part of the inquiry that the Commission will undertake in addressing the issues raised in the *Fourth Further Notice of Proposed Rulemaking* (Fourth FNPRM) in CC Docket No. 96–98 (65 FR 2367, Jan. 14, 2000), regarding the ability of requesting carriers to use combinations of unbundled network elements, is whether the exchange access and local exchange markets are so interrelated from an economic and technological perspective that a finding that a network element meets the ''impair'' standard under section 251(d)(2) of the Act for the local exchange market would itself entitle competitors to use that network element solely or primarily in the exchange access market. The *Supplemental Order Clarification* in CC Docket No. 96–98 (65 FR 38214, June 20, 2000) also concluded that the Commission must take into account the market effects of the unbundling rules issued in the *Third Report and Order* in this same docket (65 FR 2542, Jan. 18, 2000) in order to evaluate whether or not carriers are impaired for special access service without access to combinations of unbundled network elements. The Commission stated that it would issue a Public Notice in early 2001 to gather evidence on these issues. Accordingly, we seek comment on the following specific questions and on any other relevant issues that will assist the Commission in determining whether combinations of unbundled network elements should be made available for the sole or primary purpose of providing exchange access service.

2. Is the exchange access market economically and technically distinct from the local exchange market? If the markets are distinct, are requesting carriers impaired in their ability to provide special access services without access to loop-transport combinations? Specifically, we seek comment on whether, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning or acquiring an alternative from a third-party supplier, lack of access to loop-transport combinations would materially diminish a requesting carrier's ability to provide special access service. Are the same facilities that are available to interexchange carriers (IXCs) for exchange access service equally available to competitive LECs to provide local exchange service, thereby making it technically or practically difficult to differentiate between the two markets for purposes of an ''impairment'' analysis? One commenter stated in response to the *Fourth FNPRM* that the Commission needs to undertake two separate impairment analyses for the special access and private line markets: (1) Whether IXCs are impaired in their ability to provide interexchange private line services without access to unbundled loop-transport combinations; and (2) whether competitive providers of special access and private line services are impaired without access to unbundled loop-transport combinations. We seek comment on whether this is necessary or whether it is appropriate to treat special access and private line service as a single market.

3. We stated in the *Third Report and Order* that in some markets, particularly those markets serving high-volume business customers, it may be practical and economical for carriers to compete using self-provisioned facilities, but that in other markets, typically those consisting of residential and small business customers, the delay and cost associated with self-provisioning will preclude carriers from serving that market without access to unbundled network elements. We seek comment on the nature of the special access and private line market in terms of the types of end user customers carriers typically serve in this market. Do these customers use high capacity facilities that carriers can self-provision or obtain without being impaired in terms of cost, timeliness, quality, ubiquity and impact on network operation, or in terms of any of the other factors identified as part of the Commission's unbundling analysis? Do these impairment criteria differ based on the type of facility that the customer uses (e.g. DS1 or DS3)? Given the point-to-point nature of the special access market, are alternative transport facilities ubiquitously available both to and from the specific points where requesting carriers need them? Consistent with our stated concerns regarding universal service, we also seek comment on whether a permanent local usage requirement for unbundled network element combinations could impact how carriers classify end user revenue for purposes of interstate universal service contributions.

4. The Commission also stated in the *Supplemental Order Clarification* that it would seek comment in this Public Notice on whether requesting carriers should be permitted to combine unbundled network elements with tariffed access services that they purchase from the incumbent LECs. This practice is referred to as ''co-mingling'' and is currently prohibited under the terms of the *Supplemental Order Clarification*. Specifically, if a requesting carrier converts special access circuits to combinations of unbundled network elements, we ask parties to comment on whether such circuits may remain connected to any existing access service circuits without regard to the nature of the traffic carried over the access circuits. Should incumbent LECs be required to co-mingle unbundled loops and loop-transport combinations for competitive carriers if they do so in their own networks? Does a prohibition on co-mingling force competitive carriers to operate two overlapping networks—one for local traffic and one for access traffic—even if there is spare capacity on the unconverted access circuits that could be used to carry local traffic? We also seek comment on what impact, if any, co-mingling may generally have on the Commission's unbundling requirements.

5. Parties submitting comments in response to this public notice must file initial comments 30 days after publication in the **Federal Register** and reply comments 45 days after publication in the **Federal Register**.

6. Ex parte presentations in this proceeding continue to be governed by the procedures set forth in § 1.1206 of the Commission's rules, 47 CFR 1.1206,

covering ''permit-but-disclose'' proceedings.

7. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24,121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html*. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit electronic comments by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, ''get form (your e-mail address).'' A sample form and directions will be sent in reply.

8. Parties who choose to file by paper must file an original and four copies of each filing with the Office of the Secretary, FCC, 445 12th Street, SW., Suite TW–A325, Washington, DC 20554. In addition, parties should send two copies to Janice Myles, Common Carrier Bureau Policy and Program Planning Division, 445 12th Street, SW., 5–C327, Washington, DC 20554. Comments and reply comments will be available for public inspection and copying during regular business hours in the Commission's Public Reference Center, 445 12th Street, SW., Suite CY–A257, Washington, DC 20554, 202–418–0270. Copies will also be available from International Transcription Service, 445 12th Street, SW., Suite CY–B400, Washington, DC 20554, or by calling 202–314–3070.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01–2759 Filed 1–31–01; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 01–163, MM Docket No. 01–17, RM–10037]

Digital Television Broadcast Service; Lubbock, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Cosmos Broadcasting Corporation, licensee of station KCBD(TV), NTSC channel 11, Lubbock, Texas, proposing the substitution of DTV channel 9 for station KCBD(TV)'s assigned DTV channel 43. DTV Channel 9 can be allotted to Lubbock, Texas, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates (33–32–32 N. and 101–50–14 W.). As requested, we propose to allot DTV Channel 9 to Lubbock with a power of 15.0 and a height above average terrain (HAAT) of 232 meters.

DATES: Comments must be filed on or before March 19, 2001, and reply comments on or before April 3, 2001.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: John. S. Logan, Scott S. Patrick, Dow, Lohnes & Albertson, PLLC, 1200 New Hampshire Avenue, NW., Suite 800, Washington, DC 20036–6802 (Counsel for Cosmos Broadcasting Corporation).

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 01–17, adopted January 25, 2001, and released January 26, 2001. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Digital television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—TELEVISION BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Texas is amended by removing DTV Channel 43 and adding DTV Channel 9 at Lubbock.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 01–2758 Filed 1–31–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 01–162, MM Docket No. 01–15, RM–10030]

Digital Television Broadcast Service; Missoula, MT

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by KPAX Communications, Inc., licensee of station KPAX–TV, NTSC channel 8, Missoula, Montana, requesting the substitution of DTV channel 7 for station KPAX–TV's assigned DTV channel 35. DTV Channel 7 can be allotted to Missoula, Montana, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates (47–01–06 N. and 114–00–

41 W.). As requested, we propose to allot DTV Channel 7 to Missoula with a power of 28.0 and a height above average terrain (HAAT) of 623 meters.

DATES: Comments must be filed on or before March 19, 2001, and reply comments on or before April 3, 2001.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Elizabeth A. McGeary, Scott S. Patrick, Dow, Lohnes & Albertson, PLLC, 1200 New Hampshire Avenue, NW, suite 800, Washington, DC 20036–6802 (Counsel for KPAX Communications, Inc.).

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 01–15, adopted January 25, 2001, and released January 26, 2001. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Digital television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—TELEVISION BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Montana is amended by removing DTV Channel 35 and adding DTV Channel 7 at Missoula.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 01–2757 Filed 1–31–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 01–164, MM Docket No. 01–16, RM–10029]

Digital Television Broadcast Service; Eugene, OR

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by KEZI, Inc., licensee of station KEZI–TV, NTSC channel 9, Eugene, Oregon, requesting substitution of DTV channel 44 for station KEZI–TV's assigned DTV channel 14. DTV Channel 44 can be allotted to Eugene, Oregon, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates (44–06–57 N. and 122–59–57 W.). As requested, we propose to allot DTV Channel 44 to Eugene with a power of 548 and a height above average terrain (HAAT) of 501.5 meters.

DATES: Comments must be filed on or before March 19, 2001, and reply comments on or before April 3, 2001.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Howard J. Braun, Laura A. Otis, Rosenman & Colin LLP, 805 15th Street, NW, 9th Floor, Washington, DC 20005 (Counsel for KEZI, Inc.).

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 01–16, adopted January 25, 2001, and released January 26, 2001. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Digital television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—TELEVISION BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Oregon is amended by removing DTV Channel 14 and adding DTV Channel 44 at Eugene.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Services Division, Mass Media Bureau.

[FR Doc. 01–2756 Filed 1–31–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 01–132; MM Docket No. 01–11, RM–10027]

Radio Broadcasting Services; Murrieta, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Helen Jones proposing the allotment of Channel 281A at Murrieta, California, as the community's first local aural transmission service. Channel 281A can be allotted at Murrieta in compliance with the Commission's minimum distance separation requirements with a site restriction of with respect to all domestic allotments, with a site restriction of 5.2 kilometers (3.2 miles) east to avoid a short-spacing to the licensed site of Station KBIG–FM, Channel 282B, Los Angeles, California. The coordinates for Channel 281A at Murrieta are 33–32–55 North Latitude and 117–09–26 West Longitude. The allotment will result in a short-spacing to Station XHBA–FM, Channel 281C, Mexicali, BN, Mexico. Therefore, since Murrieta is located within 320. kilometers (199 miles) of the U.S.-Mexican border, concurrence in the allotment as a specially-negotiated, short-spaced allotment will be sought from the Mexican government.

DATES: Comments must be filed on or before March 12, 2001, reply comments on or before March 27, 2001.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: David Tillotson, Esq., 4606 Charleston Terrace, NW., Washington, DC 20007 (Counsel for Petitioner).

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 01–11, adopted January 10, 2001, and released January 19, 2001. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY-A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 1231 20th Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 01–2749 Filed 1–31–01; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 01–133; MM Docket No. 01–12, RM–10039]

Radio Broadcasting Services; Arthur, ND

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Vision Media Incorporated requesting the substitution of Channel 280A for Channel 244A at Arthur, North Dakota, and the modification of Station's WVMI(FM)'s license accordingly. Channel 280A can be allotted at Arthur in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.35 kilometers (3.96 miles) west at petitioner's presently authorized site. The coordinates for Channel 280A at Arthur are 47–05–42 North Latitude and 97–18–01 West Longitude. Since Arthur is located within 320 kilometers (200 miles) of the U.S.-Canadian border, Canadian concurrence has been requested. We will not accept competing expressions of interest for the use of Channel 280A at Arthur, North Dakota, because the Commission's Rules do not contemplate the filing of expressions of interest in proceedings which seek to make equivalent channel substitutions.

DATES: Comments must be filed on or before March 12, 2001, reply comments on or before March 27, 2001.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Harry C. Martin, Esq., Fletcher, Heald & Hildreth, P.L.C., 1300 North 17th Street, 11th Floor, Arlington, Virginia 22209–3801 (Counsel for Petitioner).

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 01–12, adopted January 10, 2001, and released January 19, 2001. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 1231 20th Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 01–2750 Filed 1–31–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 01–134; MM Docket No. 01–13, RM–10038]

Radio Broadcasting Services; Woodbury, GA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Bernice P. Hedrick proposing the allotment of Channel 233A at Woodbury, Georgia, as the community's first local aural transmission service. Channel 233A can

be allotted at Woodbury in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.0 kilometers (8.1 miles) southeast to avoid short-spacings to the licensed sites of Station WSTR(FM), Channel 231C, Smyrna, Georgia, and Station WYSF(FM), Channel 233C, Birmingham, Alabama. The coordinates for Channel 233A at Woodbury are 32–54–40 North Latitude and 84–28–24 West Longitude.

DATES: Comments must be filed on or before March 12, 2001, reply comments on or before March 27, 2001.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Bernice P. Hedrick, P.O. Box 27, 317 Stonegables Court, Gray, Georgia 31032 (Petitioner).

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 01–13, adopted January 10, 2001, and released January 19, 2001. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 1231 20th Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 01–2751 Filed 1–31–01; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF ENERGY

48 CFR Parts 904, 952 and 970

RIN 1991–AB54

Acquisition Regulations; Conditional Payment of Fee, Profit, and Other Incentives

AGENCY: Department of Energy, (DOE).

ACTION: Notice of proposed rulemaking and opportunity for public comment.

SUMMARY: The Department of Energy (DOE) proposes to amend its Acquisition Regulation to: Implement, in part, the requirements of Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 relating to the safeguarding of classified information; establish more objective standards and procedures for considering and applying reductions of fee or other amounts payable for contractor performance failures relating to environment, safety, and health (ES&H); and make related technical and conforming amendments.

DATES: Written comments must be received on or before the close of business March 5, 2001.

ADDRESSES: Comments (3 copies) should be addressed to: Michael L. Righi, U.S. Department of Energy, Office of Procurement and Assistance Management, MA–51, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Michael L. Righi at *michael.l.righi@hq.doe.gov* or (202) 586–8175.

SUPPLEMENTARY INFORMATION:

I. Background
II. Section by Section Analysis
III. Public Comments
IV. Procedural Requirements
A. Review Under Executive Order 12866
B. Review Under Executive Order 12988
C. Review Under the Regulatory Flexibility Act
D. Review Under the Paperwork Reduction Act
E. Review Under the National Environmental Policy Act
F. Review Under Executive Order 13132
G. Review Under the Unfunded Mandates Reform Act of 1995
H. Review Under the Treasury and General Government Appropriations Act of 1999

I. Background

In addition to other performance requirements specified in their contracts, the Department's management and operating contractors and other designated contractors are subject to minimum performance requirements relating to environment, safety, and health (ES&H), and to safeguarding Restricted Data and other classified information. As a general rule, such performance requirements are so fundamental to the accomplishment of the Department's overall mission objectives that meeting expected levels of performance is considered a prerequisite for the payment of fee, profit, or a share of cost savings under DOE contracts which are subject to such requirements.

In March 1999, the Department amended its Acquisition Regulation to revise its fee policies and related procedures for management and operating contracts and other designated contracts. The objectives of the Department's fee policy are to ensure that fees: are reasonable and commensurate with performance, business and cost risks; create and implement tailored incentives for performance-based management contracts; are structured to attract best business partners; and afford flexibility to provide incentives to contractors to perform better at less cost. The rule prescribed the use of a clause entitled, ''Conditional Payment of Fee, Profit, or Incentives.'' The clause at 48 CFR 970.5204–86 establishes the portion of total available fee, profit, or incentives that is subject to recovery by DOE due to a contractor's failure to meet minimum requirements for a specified level of performance, including cost performance, with an emphasis on requirements relating to ES&H, and the prevention of catastrophic performance failures.

Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 (42 U.S.C. 2282b) requires, in part, that DOE contracts include a clause which provides for an appropriate reduction in the fees or amounts paid to the contractor under the contract in the event of a violation by the contractor or contractor employee of any rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified or sensitive information. The statute also prescribes that the clause must specify various degrees of violations and the amount of the reduction attributable to each degree of violation. It is noted that since there is currently no rule, regulation or order which defines the term ''sensitive information,'' as used in the Act, this category of information is not addressed in this proposed regulation.

In May 2000, the Secretary of Energy announced an initiative to improve contractor performance management by requiring greater responsibility and accountability from both the Department's senior managers and its

contractors. Due to the potentially serious consequences which can result from performance failures relating to the Department's ES&H and safeguards and security programs, a major provision of the Secretary's initiative is to better define objective standards and procedures for considering and applying fee reductions for contractor performance failures relating to ES&H and the safeguarding of Restricted Data and classified information.

In consideration of the foregoing, the Department proposes to amend its Acquisition Regulation to implement the aforementioned statutory requirements relating to the safeguarding of Restricted Data and other classified information and the Secretary's initiative for improving contractor performance management relating to ES&H. The proposed amendments to the Acquisition Regulation would apply to all DOE contracts and would be accomplished by use of one of two clauses.

This proposed rule would add a clause entitled, ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information.'' This clause would be prescribed for use in all DOE contracts which involve or are likely to involve classified information, except for DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee. The clause would provide for reductions of earned fee or profit that is otherwise payable under applicable contracts for contractor violations of laws, regulations, or directives relating to the safeguarding of Restricted Data and other classified information. As proposed, the clause sets forth the conditions which may precipitate a reduction of fee or profit, percentage reduction ranges which correlate to three degrees of violations relating to the safeguarding of Restricted Data or other classified information, and the methodology to be used in determining the amount of earned fee or profit that will be subject to reduction under the clause.

For DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee, the clause at 48 CFR 970.5204–86, would be renamed ''Conditional Payment of Fee, Profit, or Other Incentives—Facility Management Contracts'', and would be amended to provide for reductions of earned fee, fixed fee, profit, or share of cost savings which may otherwise be payable under the contract: for performance failures relating to ES&H; and, for contracts that involve or are likely to involve classified information, for contractor violations of laws, regulations, or DOE directives relating to the safeguarding of Restricted Data and other classified information. As proposed, the clause sets forth: the conditions that may precipitate a reduction of earned or fixed fee, profit, or share of cost savings under the contract; percentage fee, profit, or share of cost savings reduction ranges which correlate to three degrees of performance failures relating to ES&H and to the safeguarding of Restricted Data and other classified information; and the methodology to be used in determining the amount of earned or fixed fee, profit, or share of cost savings that will be subject to reduction under the clause.

II. Section-by-Section Analysis

1. Section 904.402 would be amended to prescribe the Department's implementation of Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 for DOE contracts which involve or are likely to involve the use of classified information, except DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee. The section is also proposed to be amended to prescribe related coordination and approval requirements.

2. Section 904.404 would be amended to add a prescription for the use of the new contract clause entitled, ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information.''

3. Section 952.204–XX would be added to incorporate the text of the new contract clause entitled, ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information.''

4. Section 970.0404–2 would be amended to prescribe the Department's implementation of Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 for DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee.

5. Section 970.15404–4–1 would be amended to prescribe the Department's policy pertaining to the payment of earned fee, fixed fee, profit, or share of cost savings under applicable DOE contracts for achieving minimum performance requirements relating to ES&H and to the safeguarding of Restricted Data and other classified information.

6. Section 970.15404–4–11 would be amended to revise the prescription for use of the clause at 48 CFR 970.5204–86.

7. Section 970.5204–86 would be amended to revise the title of the clause, and to provide for contractual implementation of the Department's policy prescribed at amended 970.15404–4–1 (see paragraph 5.).

8. Technical and conforming amendments would be made to various sections as a result of the amendments described in paragraphs 1. through 7.

III. Public Comments

Interested persons are invited to participate by submitting data, views or arguments with respect to the new regulation proposed in this notice. Three copies of written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice. All comments received will be available for public inspection as part of the administrative record on file for this rulemaking in the Department of Energy Reading Room, Room 1E–090, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–3142, between the hours 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. All written comments received by the date indicated in the **DATES** section of this notice of proposed rulemaking and all other relevant information in the record will be carefully assessed and fully considered prior to the publication of the final rule. Any information or data considered to be exempt from public disclosure by law must be so identified and submitted in writing, one copy, as well as one complete copy from which the information believed to be exempt from disclosure is deleted. The Department will determine if the information or data is exempt from disclosure.

IV. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' (58 FR 51735, October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting

errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department has completed the required review and determined that, to the extent permitted by law, the regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, requires that a Federal agency prepare a regulatory flexibility analysis for any rule for which the agency is required to publish a general notice of proposed rulemaking. Such an analysis is not required, however, if the agency certifies that the rule would not, if promulgated, have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)).

The Department certifies that today's proposal will not have a significant economic impact on a substantial number of small entities. This rule, which implements, in part, the requirements of Section 3147 of the National Defense Authorization Act for Fiscal Year 2000, applies predominantly to DOE's management and operating contractors which are not small entities. The rule will not directly regulate small entities, diminish any preference accorded to small businesses in Federal or DOE procurement programs, or impose requirements which may result in increased administrative costs to contractors.

D. Review Under the Paperwork Reduction Act

This proposed 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.*).

E. Review Under the National Environmental Policy Act

The Department has concluded that promulgation of this proposed rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by Department of Energy regulations (10 CFR part 1021, subpart D) implementing the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this proposed rule is categorically excluded from NEPA review because the amendments to the DEAR would be strictly procedural (categorical exclusion A6). Therefore, this proposed rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

F. Review Under Executive Order 13132

Executive Order 13132 (64 FR 43255, August 10, 1999) requires agencies 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.'' As defined in the Executive Order, policies that have federalism implications 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. The Department has examined this proposed rule and has determined that it 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. No further action is required by Executive Order 13132.

G. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires a Federal agency to perform a detailed assessment of costs and benefits of any rule imposing a Federal Mandate with costs to State, local or tribal governments, or to the private sector, of $100 million or more. This rulemaking affects private sector entities, and the impact is less than $100 million.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. Today's rule does not impact on the autonomy or integrity of the family institution. Accordingly, the Department has concluded that it is not necessary to prepare a Family Policymaking Statement.

List of Subjects in 48 CFR Parts 904, 952, and 970

Government procurement.

Issued in Washington, DC on January 10, 2001.

T.J. Glauthier,

Deputy Secretary, Department of Energy.

For the reasons set out in the preamble, DOE proposes to amend Chapter 9 of Title 48 of the Code of Federal Regulations as set forth below.

1. The authority citation for parts 904 and 952 is revised to read as follows:

Authority: 42 U.S.C. 7101 *et seq.;* 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

PART 904—ADMINISTRATIVE MATTERS

2. Section 904.402 is amended by adding a new paragraph (c) to read as follows:

904.402 General.

* * * * *

(c)(1) Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 (42 U.S.C. 2282b) requires that applicable DOE contracts include a clause which provides for an appropriate reduction in the fees or amounts paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified information. The clause is required to specify various degrees of violations and the amount of the reduction attributable to each degree of violation. The clause prescribed in 48 CFR 904.404(d)(5) shall be used for this purpose unless the clause prescribed at 48 CFR 970.15404–4–11(b) is used.

(2) The clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information'' provides for reductions of fee or profit that is earned by the

contractor and that may otherwise be payable under the contract depending upon the severity of the contractor's failure to comply with contract terms or conditions relating to the safeguarding of Restricted Data or other classified information. However, when reviewing performance failures that occur during the performance of the contract that would otherwise warrant a potential reduction of earned fee, the contracting officer may consider mitigating factors that may warrant a reduction below the applicable range specified in the clause, including a determination that no reduction should be made. Such factors may include situations in which a contractor self-identifies a problem requiring corrective action, and is actively working to correct the problem.

(3) The contracting officer must obtain the concurrence of the Head of the Contracting Activity—

(i) Prior to effecting any reduction of fee or amounts otherwise payable to the contractor in accordance with the terms and conditions of the clause entitled, ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information;'' and

(ii) For determinations that no reduction of fee is warranted for a particular performance failure(s) that would otherwise be subject to a reduction.

3. Section 904.404 is amended by adding a new paragraph (d)(5) to read as follows:

904.404 Contract clause.

(d) * * *

(5) Except as prescribed in 48 CFR 970.15404–4–11(b), the clause at 48 CFR 952.204–XX, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information, shall be inserted in all contracts which contain the clause at 48 CFR 952.204–2, Security.

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Section 952.204–XX is added in Subchapter H to read as follows:

952.204–XX Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information.

As prescribed in 48 CFR (DEAR) 904.404(d)(5) insert the following clause.

Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information (Month and Year TBD)

(a) General. (1) The payment of fee or profit (i.e., award fee, fixed fee, and incentive fee or profit) under this contract is dependent upon the contractor's compliance with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information (i.e., Formerly Restricted Data and National Security Information) including compliance with applicable law, regulation, and DOE directives. The term ''contractor'' as used in this clause to address failure to comply shall mean ''contractor or contractor employee.''

(2) In addition to other remedies available to the Federal Government, if the contractor fails to comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information, the contracting officer may unilaterally reduce the amount of earned fee, fixed fee, or profit which is otherwise payable to the contractor in accordance with the terms and conditions of this clause.

(3) Any reduction in the amount of fee or profit earned by the contractor will be determined by the severity of the contractor's failure to comply with contract terms and conditions relating to the safeguarding of Restricted data or other classified information pursuant to the degrees specified in paragraph (c) of this clause.

(b) Reduction Amount. (1) If it is found that the contractor has failed to comply with contract terms and conditions relating to the safeguarding of Restricted Data or other classified information, the contractor's earned or fixed fee, or profit may be reduced. Such reduction shall not be less than 51% nor greater than 100% of the total fee or profit earned for a first degree performance failure, not less than 26% nor greater than 50% for a second degree performance failure, and up to 25% for a third degree performance failure. The contracting officer may consider mitigating factors that may warrant a reduction below the specified range, including a determination that no reduction should be made (see 48 CFR 904.402(c)).

(2)(i) For purposes of this clause, the contracting officer will at the time of contract award allocate the total amount of fee or profit that is available under this contract to equal periods of [insert 6 or 12] months to run sequentially for the entire term of the contract (i.e., from the effective date of the contract to the expiration date of the contract, including all options). The amount of fee or profit to be allocated to each period shall be equal to the average monthly fee or profit that is available or otherwise payable during the entire term of the contract, multiplied by the number of months established above for each period.

(ii) The total amount of fee or profit that is subject to reduction under this clause, in combination with any reduction made under any other clause in the contract that provides for a reduction to the fee or profit, shall not exceed the amount of fee or profit that is earned by the contractor in the period established pursuant to paragraph (b)(2)(i) of this clause in which a performance failure warranting a reduction occurs.

(3) For performance-based firm-fixed-price contracts, the contracting officer will at the time of contract award include negative monetary incentives in the contract for contractor violations relating to the safeguarding of Restricted Data and other classified information.

(c) Safeguarding Restricted Data and Other Classified Information. The degrees of performance failures relating to the contractor's obligations under this contract for safeguarding of Restricted Data and other classified information are as follows:

(1) *First Degree:* Performance failures that have been determined, in accordance with applicable DOE regulation or directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security. The following performance failures or performance failures of similar import will be considered first degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating a risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other classified information classified as Top Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Restricted Data, or other classified information which is classified as Top Secret.

(iii) Failure to implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information classified as Top Secret.

(2) *Second Degree:* Performance failures that have been determined, in accordance with applicable DOE regulation or directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security. The following performance failures or performance failures of similar import will be considered second degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other classified information which is classified as Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Restricted Data, or other classified information which is classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information regardless of classification.

(iv) Failure to implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information classified as Secret.

(3) *Third Degree:* Performance failures that have been determined, in accordance with applicable DOE regulation or directive, to have actually resulted in, or that can reasonably be expected to result in, undue risk to the common defense and security. In addition, this category includes performance failures that result from a lack of contractor management and/or employee attention to the proper safeguarding of Restricted Data and other classified information. These performance failures may be indicators of

future, more severe performance failures and/or conditions, and if identified and corrected early would prevent serious incidents. The following performance failures or performance failures of similar import will be considered third degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other classified information which is classified as Confidential.

(ii) Failure to promptly report alleged or suspected violations of laws, regulations, or directives pertaining to the safeguarding of Restricted Data or other classified information.

(iii) Failure to identify or execute corrective actions to mitigate or eliminate identified vulnerabilities and reduce residual risk relating to the protection of Restricted Data or other classified information in accordance with the contractor's Safeguards and Security Plan or other security plan, as applicable.

(iv) Contractor actions that result in performance failures which unto themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the contractor's safeguards and security management system relating to the protection of Restricted Data and other classified information.

(End of Clause)

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

5. The authority citation for Part 970 continues to read as follows:

Authority: 42 U.S.C. 2201; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

6. Section 970.0404–2 is amended by adding paragraph (f) to read as follows:

970.0404–2 General.

* * * * *

(f) For DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee, the clause entitled, ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts,'' implements the requirements of Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 (see 48 CFR 904.402(c)(1)) for the use of a contract clause which provides for an appropriate reduction in the fee or amount paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified information. The clause, in part, provides for reductions in the amount of fee, profit, or share of cost savings that is otherwise earned by the contractor for performance failures relating to the safeguarding of Restricted Data and other classified information.

7. Section 970.1504–1–2 is amended by adding new paragraph (i) to read as follows:

970.1504–1–2 Fee policy.

* * * * *

(i)(1) In addition to other performance requirements specified in the contract, DOE management and operating contractors and other contracts designated by the Procurement Executive, or designee, are subject to minimum performance requirements relating to environment, safety, and health (ES&H), and to the safeguarding of Restricted Data and other classified information. Minimum performance requirements relating to ES&H will be set forth in a DOE approved Integrated Safety Management System (ISMS), or similar document, as required by the terms and conditions of the contract. As applicable, requirements relating to the safeguarding of Restricted Data and other classified information will be set forth in the clauses of the contract entitled ''Security'' and ''Laws, Regulations, and DOE Directives,'' and in other terms and conditions that may be included in the contract which prescribe requirements for the safeguarding of Restricted Data and other classified information.

(2) If the contractor fails to obtain DOE approval of the ISMS, fails to achieve the minimum performance requirements of the contract relating to ES&H, or violates any law, regulation, or directive relating to the safeguarding of Restricted Data and other classified information, otherwise earned fee, fixed fee, profit, or share of cost savings may be unilaterally reduced by the DOE Operations Office/Field Manager, or designee, in accordance with the terms and conditions of the clause entitled ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts.''

(3) The clause entitled ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts,'' provides for reductions of earned fee, fixed fee, profit, or share of cost savings under the contract depending upon the severity of a contractor performance failure relating to ES&H requirements and, if applicable, for the safeguarding of Restricted Data and other classified information. However, when reviewing performance failures that occur during the performance of the contract that would otherwise warrant a potential reduction of earned fee, fixed fee, profit, or share of cost savings, the DOE Operations Office/Field Manager, or designee, may consider mitigating factors that may warrant a reduction below the applicable range specified in the clause, including a determination that no reduction should be made. Such factors may include situations in which a contractor self-identifies a problem requiring corrective action, and is actively working to correct the problem.

(4) The DOE Operations Office/Field Manager, or designee, must obtain the concurrence of the Cognizant Secretarial Officer—

(i) Prior to effecting any reduction of fee or profit in accordance with the terms and conditions of the clause entitled, ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts;'' and

(ii) For determinations that no reduction of fee or profit is warranted for a particular performance failure(s) that would otherwise be subject to a reduction.

970.1504–1–3 [Amended]

8. Section 970.1504–1–3 is amended in paragraph (c)(1) by revising ''Conditional Payment of Fee, Profit, or Incentives'' to read ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts.''

9. Section 970.1504–5 is amended by revising paragraph (b) to read as follows:

970.1504–5 Solicitation provision contract clauses.

* * * * *

(b) (1) The contracting officer shall insert the clause at 48 CFR 970.5204–86, Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts, in all DOE management and operating contracts and other contracts determined by the Procurement Executive, or designee.

(2) The contracting officer shall include the clause with its Alternate I in contracts which do not contain the clause at 48 CFR 952.204–2, Security.

(3) The contracting officer shall include the clause with its Alternate II in contracts which are awarded on a cost-plus-award-fee, incentive fee, or multiple fee basis.

* * * * *

970.5215–1 [Amended]

10. Section 970.5215–1 is amended in paragraph (c)(3) by revising ''Conditional Payment of Fee, Profit, or Incentives'' to read ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts.''

11. Section 970.5215–3 is revised to read as follows:

970.5215–3 Conditional payment of fee, profit, and other incentives—facility management contracts.

As prescribed in 48 CFR 970.15404–4–11(b)(1), insert the following clause:

970.5204.86 Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts (Month and Year TBD)

(a) General. (1) The payment of earned fee, fixed fee, profit, or share of cost savings under this contract is dependent upon the contractor's development of, and performance under, an approved Integrated Safety Management System (ISMS), and the contractor's or contractor employee's compliance with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information.

(2) The minimum performance requirements of this contract relating to environment, safety, and health (ES&H) will be set forth in an approved ISMS, or similar document, as required by the terms and conditions of this contract. These minimum requirements are: (i) implementation of the DOE-approved ISMS; (ii) compliance with applicable laws, regulations, and DOE directives; (iii) accomplishment of annual performance commitments relating to ES&H and (iv) prevention of catastrophic performance failures (*e.g.,* fatality; serious workplace-related injury or illness to one or more federal, contractor, or subcontractor employees or the general public; significant damage to the environment).

(3) Requirements of this contract relating to the safeguarding of Restricted Data and other classified information will be set forth in the clauses of this contract entitled, ''Security'' and ''Laws, Regulations, and DOE Directives,'' as well as other terms and conditions that may be prescribed elsewhere in this contract.

(4) If the contractor fails to obtain approval of the ISMS, or otherwise fails to achieve the minimum performance requirements of this contract relating to ES&H or to the safeguarding of Restricted Data and other classified information during any performance evaluation period established under the contract pursuant to the clause of this contract entitled, ''Total Available Fee: Base Fee Amount and Performance Fee Amount,'' otherwise earned fee, fixed fee, profit or share of cost savings may be unilaterally reduced by the DOE Operations Office/Field Manager, or designee.

(b) Reduction Amount. (1) The amount of earned fee, fixed fee, profit, or share of cost savings that is subject to reduction will be determined by the severity of the performance failure relating to ES&H or to the safeguarding of Restricted Data and other classified information pursuant to the degrees specified in paragraphs (c) and (d) of this clause.

(2) If it is found that the facts and circumstances warrant a reduction of earned fee, fixed fee, profit, or share of cost savings, such reduction shall not be less than 51% nor greater than 100% of the amount of earned fee, fixed fee, profit, or the contractor's share of cost savings for a first degree performance failure, not less than 26% nor greater than 50% for a second degree performance failure, and up to 25% for a third degree performance failure. The DOE Operations Office/Field Manager, or designee, may consider mitigating factors that may warrant a reduction below the applicable range, including a determination that no reduction should be made (see 48 CFR 970.15404–4–1(h)).

(3)(i) The amount of fee, fixed fee, profit, or share of cost savings that is otherwise earned by a contractor during an evaluation period may be reduced in accordance with this clause if it is determined that a performance failure warranting a reduction under this clause occurs within the evaluation period.

(ii) The amount of reduction under this clause, in combination with any reduction made under any other clause in the contract, shall not exceed the amount of fee, fixed fee, profit, or the contractor's share of cost savings that is otherwise earned during the evaluation period.

(iii) For the purposes of this clause, earned fee, fixed fee, profit, or share of cost savings shall mean the amount determined by the contracting officer or fee determining official as otherwise payable based on the contractor's performance during an evaluation period. Where the contract provides for one or more financial incentives which extend beyond a single evaluation period, this amount shall also include any provisional incentive amounts determined otherwise payable, or if provisional payments are not provided for, the allocable amount of any incentive determined otherwise payable at the conclusion of a subsequent evaluation period. The allocable amount shall be the total amount of the earned incentive divided by the number of evaluation periods over which it is earned.

(iv) The Government will effect the reduction at the end of the evaluation period in which the performance failure occurs (unless the Government is not aware of the failure; in this case the Government will effect the reduction as soon as practical), except for that portion of the reduction requiring an allocation. The Government will effect this portion of the reduction at the end of the evaluation period in which it determines the total amount earned under the incentive. If at any time a reduction causes the sum of the payments the contractor has received for fee, fixed fee, profit, or share of cost savings to exceed the sum of fee, fixed fee, profit, or share of cost savings the contractor has earned (provisionally or otherwise), the contractor shall immediately return the excess to the Government. (What the contractor ''has earned'' reflects any reduction made under this or any other clause of the contract.)

(v) At the end of the contract:

(A) The Government will pay the contractor the amount by which the sum of fee, fixed fee, profit, or share of cost savings the contractor has earned exceeds the sum of the payments the contractor has received; or

(B) The contractor shall return to the Government the amount by which sum of the payments the contractor has received exceed the sum of fee, fixed fee, profit, or share of cost savings the contractor has earned. (What the contractor ''has earned'' reflects any reduction made under this or any other clause of the contract.)

(c) Environment, Safety and Health (ES&H). The degrees of ES&H performance failures under which reductions of earned or fixed fee, profit, or share of cost savings will be determined are as follows:

(1) *First Degree:* Performance failures that are considered catastrophic or could threaten the successful completion of a program or project. The following performance failures or performance failures of similar import will be considered first degree:

(i) Failure to develop and obtain required DOE approval of a Safety Management System.

(ii) Failure to comply with an approved Safety Management System which results in any of the following performance failures:

(A) Fatality.

(B) Serious workplace-related injury or illness to one or more Federal, contractor, or subcontractor workers or member(s) of the public.

(C) Significant damage to the environment.

(D) Contractor actions leading to a Type A accident investigation (reference DOE O 225.1A, ''Accident Investigations.'').

(E) Breakdown of the safety management system creating risk of a Type A performance failure.

(F) Non-compliance with applicable environmental, safety, and health laws, regulations, and DOE directives posing a Type A risk.

(G) Failure to notify DOE of an imminent danger situation after discovery.

(H) Failure to report performance failures that could warrant consideration of a Type A or Type B investigation.

(iii) Failure to implement corrective action(s) in response to the occurrence of any first degree performance failure.

(2) *Second Degree:* Performance failures that are significantly adverse to safety or could result in significant additional cost to the Federal Government. The following performance failures or performance failures of similar import will be considered second degree:

(i) Contractor actions leading to a Type B accident investigation (reference DOE O 225.1A, ''Accident Investigations'').

(ii) Breakdown of the safety management system creating the risk of a Type B performance failure.

(iii) Non-compliance with applicable environmental, safety, and health law, regulation, or DOE directive creating risk of a Type B performance failure.

(iv) Failure to execute DOE approved implementation plans in response to Defense Nuclear Facilities Safety Board recommendations.

(v) Failure to meet key program milestones designed to substantially reduce risk to workers, the public, and the environment.

(vi) Failure to implement corrective action(s) in response to the occurrence of any second degree performance failure.

(3) *Third Degree:* Performance failures that result from lack of management and/or worker attention to safety. These performance failures may be indicators of

future, more severe performance failures and/or conditions, and if identified and corrected early can prevent serious accidents. The following performance failures or performance failures of similar import will be considered third degree:

(i) Failure to implement corrective actions resulting from oversight evaluations, assessments, and inspections.

(ii) Failure to implement actions designed to integrate lessons-learned into work planning and execution.

(iii) Failure to implement corrective actions resulting from self-assessments.

(iv) Contractor actions that result in a lapse in Safety Management System implementation posing less than a Type B risk.

(v) Non-compliance with applicable environmental, safety, and health laws, regulations, and DOE directives posing less than a Type B risk.

(vi) Contractor actions that result in performance failures which unto themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the safety management system.

(vii) Failure to implement corrective action(s) in response to the occurrence of any third degree performance failure.

(d) Safeguarding Restricted Data and Other Classified Information. The degrees of performance failures relating to the contractor's and contractor employee's obligations under this contract for the safeguarding of Restricted Data and other classified information under which reductions of fee, profit, or share of cost savings will be determined are as follows:

(1) *First Degree:* Performance failures that have been determined, in accordance with applicable DOE regulation or directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security. The following performance failures or performance failures of similar import will be considered first degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating a risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other classified information classified as Top Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Restricted Data, or other classified information which is classified as Top Secret.

(iii) Failure to implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information classified as Top Secret.

(2) *Second Degree:* Performance failures that have been determined, in accordance with applicable DOE regulation or directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security. The following performance failures or performance failures of similar import will be considered second degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other classified information which is classified as Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Restricted Data, or other classified information which is classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information regardless of classification.

(iv) Failure to implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information classified as Secret.

(3) *Third Degree:* Performance failures that have been determined, in accordance with applicable DOE regulation or directive, to have actually resulted in, or that can reasonably be expected to result in, undue risk to the common defense and security. In addition, this category includes performance failures that result from a lack of contractor management and/or employee attention to the proper safeguarding of Restricted Data and other classified information. These performance failures may be indicators of future, more severe performance failures and/or conditions, and if identified and corrected early would prevent serious incidents. The following performance failures or performance failures of similar import will be considered third degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other classified information which is classified as Confidential.

(ii) Failure to promptly report alleged or suspected violations of laws, regulations, or directives pertaining to the safeguarding of Restricted Data or other classified information.

(iii) Failure to identify or execute corrective actions to mitigate or eliminate identified vulnerabilities and reduce residual risk relating to the protection of Restricted Data or other classified information in accordance with the contractor's Safeguards and Security Plan or other security plan, as applicable.

(iv) Contractor actions that result in performance failures which unto themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the contractor's safeguards and security management system relating to the protection of Restricted Data and other classified information.

(End of Clause)

Alternate I (Month and Year TBD). As prescribed in 48 CFR 970.15404–4–11(b)(2), replace paragraphs (a) and (b)(1) of the basic clause with the following paragraphs (a) and (b)(1), and delete paragraph (d).

(a) General. (1) The payment of earned fee, fixed fee, profit, or share of cost savings under this contract is dependent upon the contractor's development of, and performance under, an approved Integrated Safety Management System (ISMS).

(2) The minimum performance requirements of this contract relating to environment, safety, and health (ES&H) will be set forth in an approved ISMS, or similar document, as required by the terms and conditions of this contract. These minimum requirements are: (i) implementation of the DOE-approved ISMS; (ii) compliance with applicable laws, regulations, and DOE directives; (iii) accomplishment of annual performance commitments relating to ES&H; and (iv) prevention of catastrophic performance failures (e.g., fatality; serious workplace-related injury or illness to one or more federal, contractor, or subcontractor employees or the general public; significant damage to the environment).

(3) If the contractor fails to obtain approval of the ISMS, or otherwise fails to achieve the minimum performance requirements of this contract relating to ES&H during the performance evaluation period, otherwise earned fee, fixed fee, profit or share of cost savings may be unilaterally reduced by the DOE Operations Office/Field Manager, or designee.

(b) Reduction Amount. (1) The amount of earned fee, fixed fee, profit, or share of cost savings that is subject to reduction will be determined by the severity of the performance failure relating to ES&H pursuant to the degrees specified in paragraphs (c) of this clause.

Alternate II (Month and Year TBD). As prescribed in 48 CFR 970.15404–4–11(b)(3), insert the following as paragraphs (e) and (f) in contracts awarded on a cost-plus-award fee, incentive fee or multiple fee basis (if Alternate I is also used, redesignate the following as paragraphs (d) and (e)).

(e) Minimum requirements for specified level of performance. (1) At a minimum the contractor must perform the following:

(i) The requirements with specific incentives which do not require the achievement of cost efficiencies in order to be performed at the level of performance set forth in the Statement of Work, Work Authorization Directive, or similar document unless an otherwise minimal level of performance has been established in the specific incentive;

(ii) All of the performance requirements directly related to requirements specifically incentivized which do not require the achievement of cost efficiencies in order to be performed at a level of performance such that the overall performance of these related requirements is at an acceptable level; and

(iii) All other requirements at a level of performance such that the total performance of the contract is not jeopardized.

(2) The evaluation of the Contractor's achievement of the level of performance shall be unilaterally determined by the Government. To the extent that the Contractor fails to achieve the minimum performance levels specified in the Statement of Work, Work Authorization Directive, or similar document, during the performance evaluation period, the DOE Operations/Field Office Manager, or designee, may reduce any otherwise earned fee, fixed fee, profit, or shared net savings for the performance

evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit, or shared net savings being less than 25% of the total available fee amount. Such 25% shall include base fee, if any.

(f) Minimum requirements for cost performance. (1) Requirements incentivized by other than cost incentives must be performed within their specified cost constraint and must not adversely impact the costs of performing unrelated activities.

(2) The performance of requirements with a specific cost incentive must not adversely impact the costs of performing unrelated requirements.

(3) The contractor's performance within the stipulated cost performance levels for the performance evaluation period shall be determined by the Government. To the extent the contractor fails to achieve the stipulated cost performance levels, the DOE Operations/Field Office Manager, or designee, may reduce in whole or in part any otherwise earned fee, fixed fee, profit, or shared net savings for the performance evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit or shared net savings being less than 25% of the total available fee amount. Such 25% shall include base fee, if any.

[FR Doc. 01–1330 Filed 1–31–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[I.D. 011601A]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Public Hearings

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

ACTION: Notice of public hearings; request for comments.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene public hearings to receive comments on the proposed Charter Vessel/Headboat Permit Moratorium Amending the Reef Fish Fishery Management Plan (FMP) and Coastal Migratory Pelagics FMP (Draft Amendment).

DATES: Written comments will be accepted until 5 p.m., March 23, 2001. The public hearings will be held in February. For specific dates and times see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: Written comments should be sent to, and copies of the Draft Amendment are available from, the Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301, North, Suite 1000, Tampa, FL 33619. The public hearings will be held in the State of Texas in Port Isabel, Port Aransas, and Galveston; in Larose, LA; in Biloxi, MS; in Orange Beach, AL; and in the State of Florida in Panama City, Key West, Naples, and Madeira Beach. For specific location, see **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Mr. Wayne Swingle, Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 228-2815.

SUPPLEMENTARY INFORMATION: The public hearings will be convened to review new alternatives added by Council members at the November, 2000 Council meeting to the Draft Amendment. The additions principally include alternatives for a charter vessel quota for red snapper based on charter vessel landings for various periods in lieu of implementing the permit moratorium. The Council retained all of the alternatives proposed by the Ad Hoc Charter Vessel/Headboat Advisory Panel along with the preferred alternatives selected by the Council in September. The public hearing document includes a number of alternatives under each of the following issues: Duration of moratorium; a new Gulf permit for the Reef Fish and Coastal Migratory Pelagics Fisheries FMPs; initial eligibility requirements for permits and/or endorsements; annual permit and endorsement transfers during the moratorium; vessel passenger restriction on permit transfers; annual reissuance of permits not renewed (or permanently revoked); appeals process under the moratorium; and, reporting requirements to maintain the new gulf permit/endorsement.

Dates, Times, and Locations for Public Hearings

Public hearings for the Draft Amendment are scheduled as follows:

1. Monday, February 5, 2001 - 7 p.m.—Laguna Madre Learning Center, Port Isabel High School, Highway 100, Port Isabel, TX 78578; telephone: 956-943-0052;

2. Tuesday, February 6, 2001 - 7 p.m.—Port Aransas Community Center, 408 North Allister, Port Aransas, TX 78376; telephone: 361-749-4111;

3. Wednesday February 7, 2001 - 7 p.m.—Texas A&M University, 200 Seawolf Parkway, Galveston, TX 77553; telephone: 409-740-4416;

4. Monday, February 12 , 2001 - 7 p.m.—Larose Regional Park, 307 East 5th Street, Larose, LA 70373; telephone: 504-693-7380;

5. Tuesday, February 13, 2001 - 6 p.m.—MS Department of Marine Resources, 1141 Bayview Drive, Biloxi, MS 39530; telephone: 228-374-5000;

6. Wednesday, February 14, 2001 - 7 p.m.—Hilton Beachfront Garden Inn, 23092 Perdido Beach Boulevard, Orange Beach, AL 36561; telephone: 334-974-1600;

7. Thursday, February 15, 2001 - 7 p.m.—National Marine Fisheries Service, 3500 Delwood Beach Road, Panama City, FL 32408; telephone: 850-234-6541;

8. Monday, February 19, 2001 - 7 p.m.—Holiday Inn Beachside, 3841 North Roosevelt Boulevard, Key West, FL 33040; telephone: 305-294-2571;

9. Tuesday, February 20, 2001 - 7 p.m.—Naples Depot Civic Cultural Center, 1051 Fifth Avenue South, Naples, FL 34102; telephone: 941-262-1776; and

10. Wednesday February 21, 2001 - 7 p.m.—Madeira Beach City Hall, 300 Municipal Drive, Madeira Beach, FL 33708; telephone: 727-391-9951.

The Council will also hear public testimony at the March Council Meeting during the week of March 26-29, 2001, before taking final action on the Draft Amendment. The exact date for public testimony will be published at a later time.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Anne Alford at the Council (see **ADDRESSES**) by January 29, 2001.

Dated: January 23, 2001.

Bruce C. Morehead,

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

[FR Doc. 01–2692 Filed 1–31–01; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[I.D. 012401D]

Fisheries of the Northeastern United States; Supplemental Environmental Impact Statements (SEISs) for the Essential Fish Habitat (EFH) Components of the Northeast Multispecies Fishery Management Plan (FMP) and Atlantic Sea Scallop FMP

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

ACTION: Notification of intent to prepare an SEIS; request for comments; notice of scoping meeting.

SUMMARY: NMFS announces its intent to prepare SEISs in accordance with the National Environmental Policy Act of 1969 (NEPA) for the EFH components for both the Northeast Multispecies FMP and Atlantic Sea Scallop FMP. NMFS will hold a public scoping meeting and accept written comments to determine the range of management alternatives to be addressed in the SEISs to describe and identify EFH, minimize to the extent practicable the adverse effects of fishing on EFH, and identify other actions to encourage the conservation and enhancement of EFH.

DATES: NMFS will accept written comments through March 5, 2001. A public scoping meeting will be held on Thursday, February 22, 2001.

ADDRESSES: Written comments on the intent to prepare the SEISs and requests for the scoping document or other information should be directed to the National Marine Fisheries Service, 1 Blackburn Drive, Gloucester, MA 01930, Attn: Louis A. Chiarella. Telephone (978) 281–9277. Comments may also be sent via facsimile (fax) to (978) 281–9301. NMFS will not accept comments by e-mail. The public meeting will be held at the NMFS Northeast Regional Office, 1 Blackburn Drive, Gloucester, MA on February 22, 2001, 3:00– 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Louis A. Chiarella, Essential Fish Habitat Coordinator, (Lou.Chiarella@noaa.gov), (978) 281–9277, fax (978) 281–9301.

SUPPLEMENTARY INFORMATION: Sixteen groundfish species are managed through the Northeast multispecies complex and one species is managed under the Atlantic Sea Scallop FMP. In response to a U.S. district court order, NMFS is re-evaluating the EFH components originally developed as part of Amendment 11 to the Northeast Multispecies FMP and Amendment 9 to the Atlantic Sea Scallop FMP that were approved by the Secretary of Commerce on March 3, 1999. The SEISs will consider EFH and Habitat Areas of Particular Concern (HAPC), as well as fishing and non-fishing threats to EFH as required under the Magnuson-Stevens Fishery Conservation and Management Act.

NMFS is considering the need to revise EFH designations for Northeast multispecies and Atlantic sea scallops based upon any available new scientific information, and is considering potential HAPC designations. NMFS will consider a range of alternatives to minimize adverse effects of fishing activities on EFH.

This analysis and subsequent management alternatives may be presented within separate NEPA documents or may be included within NEPA documents currently being developed by NMFS and the New England Fishery Management Council (Council) for the Northeast Multispecies FMP and Atlantic Sea Scallops FMP.

The public is invited to assist NMFS and the Council in developing the scope of alternatives to be analyzed.

Public Information Meeting

The public scoping meeting will be held on: Thursday, February 22, 2001, from 3-5 p.m., NMFS Northeast Regional Office, 1 Blackburn Drive, Gloucester, MA, Conference Room.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Louis A. Chiarella (see **ADDRESSES**), (978) 281–9277, at least 5 days prior to the meeting date.

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

Dated: January 26, 2001.

Bruce Morehead,

Acting Director, Office of Sustainable Fisheries National Marine Fisheries Service

[FR Doc. 01–2695 Filed 1–31–01; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 66, No. 22
Thursday, February 1, 2001

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Producing Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration (EDA).

ACTION: To give firms an opportunity to comment.

Petitions have been accepted for filing on the dates indicated from the firms listed below.

Firm name	Address	Date petition accepted	Product
Ambu, Inc.	611 N. Hammonds Ferry Rd. Linthicum, MD 21090.	01/03/01	Medical devices—resuscitation equipment and surgical collars.
Super Steel Products Corp	7900 West Tower Avenue, Milwaukee, WI 53223.	01/03/01	Cabs, bodies and platforms of railroad locomotives, agricultural and construction equipment and industrial and electrical machinery.
Revelation Industries	101 East Oak Street, Bozeman, MT 59715.	01/03/01	LED illuminated signs, circuit boards, power cabinets, and cables.
Covers Unlimited, Inc	2205 Dutch Lane, Jeffersonville, IN 47130.	01/18/01	Boat tarpaulins, pillows, and upholstery.
Amendola General Woodwork Co., Inc.	529 Sherman Avenue, Hamden, CT 06514.	01/18/01	Wood furniture stock and components, wood flooring, humidors, wind chime components and wooden arms for lawn furniture.
Baker Microfarads, Inc	P.O. Box 697, Hillsville, VA 24343.	01/18/01	Aluminum electrolytic capacitors.
Doyle Enterprises, Inc	4330 Truevine Road, Rocky Mount, VA 24151.	01/24/01	Knit active wear—pants and sweatshirts.

The petitions were submitted pursuant to section 251 of the Trade Act of 1974 (19 U.S.C. 2341). Consequently, the United States Department of Commerce has initiated separate investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each firm contributed importantly to total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

Any party having a substantial interest in the proceedings may request a public hearing on the matter. A request for a hearing must be received by Trade Adjustment Assistance, Room 7315, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than the close of business of the tenth calendar day following the publication of this notice.

The Catalog of Federal Domestic Assistance official program number and title of the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance.

Dated: January 19, 2001.

Anthony J. Meyer,

Coordinator, Trade Adjustment and Technical Assistance.

[FR Doc. 01–2739 Filed 1–31–01; 8:45 am]

BILLING CODE 3510–24–U

DEPARTMENT OF COMMERCE

International Trade Administration

Request for Duty-Free Entry of Scientific Instrument or Apparatus

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burdens, invites the general public and other Federal agencies to take this opportunity to comment on the continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(2)(A)).

DATES: Written comments must be submitted on or before April 2, 2001.

ADDRESSES: Direct all written comments to Madeleine Clayton, Departmental Forms Clearance Officer, Department of Commerce, Room 6086, 14th & Constitution Avenue, NW, Washington, DC 20230; phone (202) 482–3129 or via the Internet at Mclayton@doc.gov.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to: Katie Stephenson, Room 4211, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW, Washington, DC 20230; phone (202) 482–2723, fax (202) 482–0949.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Departments of Commerce and Treasury are required to determine whether nonprofit institutions established for scientific or educational purposes are entitled to duty-free entry under the Florence Agreement of certain scientific instruments they import. Form ITA–338P enables (1) Treasury to determine whether the statutory eligibility requirements for the institution and the instrument are fulfilled, and (2) Commerce to make a comparison and finding as to the scientific equivalency of comparable instruments being manufactured in the United States. Without the collection of the information, Treasury and Commerce would not have the necessary information to carry out the responsibilities of determining eligibility for duty-free entry assigned by law.

II. Method of Collection

The Department of Commerce distributes Form ITA–338P to potential applicants upon request. The applicant completes the form and then forwards it to the Unites States Customs Service. Upon acceptance by Customs as a valid application, the application is transmitted to Commerce for processing.

III. Data

OMB Number: 0625–0037.

Form Number: ITA–338P.

Type of Review: Extension-Regular Submission.

Affected Public: State or local governments; Federal agencies; nonprofit institutions.

Estimated Number of Respondents: 50.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 100.

Estimated Total Annual Cost: $202,200 ($2200 for respondents and $200,000 for federal government).

IV. Request for Comments

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 (including hours and cost) 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.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 29, 2001.

Madeleine Clayton,

Departmental Forms Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 01–2775 Filed 1–31–01; 8:45 am]

BILLING CODE 3510–DS–U

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 010901B]

Incidental Take of Marine Mammals; Taking of Ringed Seals Incidental to On-ice Seismic Activities

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

ACTION: Notice of issuance of a letter of authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given that a letter of authorization to take ringed and bearded seals incidental to on-ice seismic operations in the Beaufort Sea off Alaska was issued on January 22, 2001, to Western Geophysical of Anchorage, AK.

DATES: This letter of authorization is effective from January 22, 2001, through May 31, 2001.

ADDRESSES: The application and letter is available for review in the following offices: Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, and Western Alaska Field Office, NMFS, 701 C Street, Anchorage, AK 99513.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Hollingshead, NMFS, (301) 713-2055, ext 128 or Brad Smith, Western Alaska Field Office, NMFS, (907) 271-5006.

SUPPLEMENTARY INFORMATION: Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs NMFS to allow, on request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region, if certain findings are made by NMFS and regulations are issued. Under the MMPA, the term ''taking'' means to harass, hunt, capture, or kill or to attempt to harass, hunt, capture or kill marine mammals.

Permission may be granted for periods up to 5 years if NMFS finds, after notification and opportunity for public comment, that the taking will have a negligible impact on the species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. In addition, NMFS must prescribe regulations that include permissible methods of taking and other means effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance. The regulations must include requirements pertaining to the monitoring and reporting of such taking. Regulations governing the taking of ringed and bearded seals incidental to on-ice seismic surveys were published on February 2, 1998 (63 FR 5277), and remain in effect until December 31, 2002.

Summary of Request

NMFS received a request for a letter of authorization on September 11, 2000, from Western Geophysical. This letter requested a take by harassment of a small number of ringed seals and bearded seals incidental to conducting vibroseis surveys in the Beaufort Sea off Alaska.

Issuance of the letter of authorization is based on findings that the total takings by this activity will have a negligible impact on the ringed seal stocks of the Western Beaufort Sea and that the applicant has met the requirements contained in the

implementing regulations, including monitoring and reporting requirements.

Dated: January 22, 2001.

Wanda L. Cain,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 01–2694 Filed 1–31–01; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: United States Patent and Trademark Office (USPTO).

Title: Trademark Trial and Appeal Board (TTAB) Actions (formerly Petition to Cancel).

Form Number(s): N/A.

Agency Approval Number: 0651–0040.

Type of Request: Extension of a currently approved collection.

Burden: 17,179 hours annually.

Number of Respondents: 61,572 responses per year. The USPTO estimates that of this total, 9,863 notices of opposition, 50,000 requests for extension of time to file an opposition, and 1,709 petitions to cancel a trademark registration will be submitted per year.

Avg. Hours Per Response: The USPTO estimates that it will take the public 45 minutes to complete a notice of opposition, 10 minutes to complete a request for an extension of time to file an opposition, and 45 minutes to complete a petition to cancel a trademark registration. This includes time to gather the necessary information, create the documents, and submit the completed requests.

Needs and Uses: Any individual or entity, believing that they are or will be damaged by the registration of a trademark or service mark, may file an opposition to the registration of a mark or a request for an extension of time to file an opposition under Section 13 of the Trademark Act, 15 U.S.C. 1063. Section 14 of the Trademark Act, 15 U.S.C. 1064, allows individuals and entities to file a petition to cancel the registration of a mark. The USPTO administers the Trademark Act according to 37 CFR Part 2. These actions are governed by the Trademark Trial and Appeal Board (TTAB), an administrative tribunal empowered to determine the right to register and subsequently determine the validity of a trademark. If a mark is successfully opposed or canceled, registration will not take place. There are no forms associated with this collection.

Affected Public: Individuals or households; business or other for-profit; not-for-profit institutions; farms; the federal Government; and state, local or tribal Government.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Susan K. Brown, Records Officer, Office of Data Management, Data Administration Division, (703) 308–7400, USPTO, Suite 310, 2231 Crystal Drive, Washington, DC 20231, or by e-mail at susan.brown@uspto.gov.

Written comments and recommendations for the proposed information collection should be sent on or before March 5, 2001, to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, D.C. 20503.

Dated: January 24, 2001.

Susan K. Brown,

Records Officer, USPTO, Office of Data Management, Data Administration Division.

[FR Doc. 01–2715 Filed 1–31–01; 8:45 am]

BILLING CODE 3510–16–U

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

RIN 0651–AB29

Extension of Comment Period: Standard for Declaring a Patent Interference

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice, extension of comment period.

SUMMARY: The period for commenting on the **Federal Register** notice dated December 20, 2000 (65 FR 79809) regarding the standard for declaring a patent interference is extended.

DATES: Submit comments on or before February 28, 2001.

ADDRESSES: Send all comments:

1. Electronically to ''Interference.Rules@uspto.gov'', Subject: ''Interference-in-fact'';
2. By mail to Director of the United States Patent and Trademark Office, BOX INTERFERENCE, Washington, D.C. 20231, ATTN: ''Interference-in-Fact''; or
3. By facsimile to 703–305–0942, ATTN: ''Interference-in-fact''.

FOR FURTHER INFORMATION CONTACT: Fred E. McKelvey or Richard Torczon at 703–308–9797.

SUPPLEMENTARY INFORMATION: In a **Federal Register** notice published December 20, 2000, the public was invited to comment on the standard used to declare patent interferences. In response to requests from the public to extend the period for public comment, the comment period is extended one month to ensure ample opportunity for public comment.

Comment Format

Comments should be submitted in electronic form if possible, either via the Internet or on a 3¼-inch diskette. Comments submitted in electronic form should be submitted as ASCII text. Special characters, proprietary formats, and encryption should not be used.

Authority: 35 U.S.C. 2(b)(2)(A), 3(a)(2), 135(a).

Dated: January 26, 2001.

Nicholas P. Godici,

Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office.

[FR Doc. 01–2820 Filed 1–31–01; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Appendix I, DoD Pilot Mentor Protégé OMB Number 0704–0332.

Type of Request: Revision.

Number of Respondents: 269.

Responses Per Respondent: 3.

Annual Responses: 393.

Average Burden Per Response: 1 hour reporting; 3.7 hours recordkeeping.

Annual Burden Hours: 931 (Includes 538 recordkeeping hours).

Needs and Uses: Dod needs this information to evaluate whether the purposes of the DoD Pilot Mentor-Protégé Program have been met. The purposes of the program are to: (1) Provide incentive to major DoD contractors to assist protégé firms in enhancing their capabilities to satisfy contract and subcontract requirements; (2) increase the overall participation of protégé firms as subcontractors and suppliers; and (3) foster the establishment of long-term relationships between protégé firms and major DoD contractors. This program implements Section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Pub. L. 101–510) and Section 811 of the National Defense Authorization Act for Fiscal Year 2000 (Pub. L. 106-65) (10 U.S.C. 2302 note).

Affected Public: Business or Other For-Profit; Not-For-Profit Institutions.

Frequency: On occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Mr. Lewis W. Oleinick.

Written comments and recommendations on the proposed information collection should be sent to Mr. Oleinick at the Office of Management and Budget, Desk Officer for DoD (Acquisition), Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: January 25, 2001.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–2696 Filed 1–31–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Form, and OMB Number: National Security Education Program NSEP Grants to Institutions of Higher Education); DD Forms 2729, 2730; OMB Number 0704–0366.

Type of Request: Extension.

Number of Respondents: 185.

Responses Per Respondent: 1.

Annual Responses: 185.

Average Burden Per Response: 8.75 hours.

Annual Burden Hours: 1,619.

Needs and Uses: The information collection requirement is necessary to obtain data on a candidate's background and aptitude in determining eligibility and selection to the Air Force Academy. The information is required by 10 U.S.C. 9346. Respondents are students who are applying for admission to the Air Force Academy. If the information on this form is not collected, the individual cannot be considered for admittance to the Air Force Academy.

Affected Public: Business or Other For-Profit; Not-For-Profit Institutions.

Frequency: On Occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Mr. Edward C. Springer.

Written comments and recommendations on the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: January 24, 2001.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–2697 Filed 1–31–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Deffense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Form, and OMB Number: National Security Education Program (Service Agreement Report for Scholarship and Fellowship Awards); DD Forms 2752, 2753; OMB Number 0704–0368.

Type of Request: Extension.

Number of Respondents: 300.

Responses Per Respondent: 2.

Annual Responses: 600.

Average Burden Per Response: 20 minutes.

Annual Burden Hours: 100.

Needs and Uses: The information collection requirement is necessary to obtain verification that applicable scholarship and fellowship recipients are fulfilling service obligations mandated by the National Security Education Act of 1991, Title VIII of Pub. L. 102–183, as amended. DD Form 2752 is the Service Agreement that award recipients sign in order to acknowledge their understanding of the service obligation, and agree to the obligation. DD Form 2753 is the Service Agreement Report Form on which the student provides an account of his or her work toward fulfilling the service obligation, or justifies a request for deferment.

Affected Public: Individuals or Households.

Frequency: Semi-Annually.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Mr. Edward C. Springer.

Written comments and recommendations on the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: January 24, 2001.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–2698 Filed 1–31–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Intelligence Agency, Science and Technology Advisory Board Closed Panel Meeting

AGENCY: Department of Defense, Defense Intelligence Agency.

ACTION: Notice.

SUMMARY: Pursuant to the provisions of Subsection (d) of Section 10 of Public

Law 92–463, as amended by Section 5 of Public Law 94–409, notice is hereby given that a closed meeting of the DIA Science and Technology Advisory Board has been scheduled as follows:

DATES: 15 February 2001 (0830am to 1600pm).

ADDRESSES: The Defense Intelligence Agency, 200 MacDill Blvd., Washington, DC 20340.

FOR FURTHER INFORMATION CONTACT: Victoria J. Prescott, Executive Secretary, DIA Science and Technology Advisory Board, Washington, DC 20340–1328, (202) 231–4936.

SUPPLEMENTARY INFORMATION: The entire meeting is devoted to the discussion of classified information as defined in Section 552b(c)(l), Title 5 of the U.S. Code, and therefore will be closed to the public. The Board will receive briefings on and discuss several current critical intelligence issues and advise the Director, DIA, on related scientific and technical matters.

Dated: January 26, 2001.

L.M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 01–2766 Filed 1–31–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

ACTION: Notice of Advisory Committee Meetings.

SUMMARY: The Defense Science Board (DSB) Task Force on Chemical Warfare Defense will meet in closed sessions on February 12, 2001; February 26, 2001; March 12–13, 2001; and March 26, 2001; at SAIC, Inc., 4001 N. Fairfax Drive, Arlington, VA. The Task Force will assess the possibility of controlling the risk and consequences of a chemical warfare (CW) attack to acceptable national security levels within the next five years.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings, the Task Force will assess current national security and military objectives with respect to CW attacks; CW threats that significantly challenge these objectives today and in the future; the basis elements (R&D, materiel, acquisition, personnel, training, leadership) required to control risk and consequences to acceptable levels, including counterproliferation; intelligence, warning, disruption; tactical detection and protection (active and passive); consequence management; attribution and deterrence; and policy. The Task Force will also assess the testing and evaluation necessary to demonstrate and maintain the required capability and any significant impediments to accomplishing this goal.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Pub.L. No. 92–463, as amended (5 U.S.C. App. II), it has been determined that these Defense Science Board meetings, concern matters listed in 5 U.S.C. 552b(c)(1), and that accordingly these meetings will be closed to the public.

Dated: January 26, 2001.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 01–2765 Filed 1–31–01; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Department of the Army

Board of Visitors, United States Military Academy

AGENCY: United States Military Academy.

ACTION: Notice of Open Meeting.

SUMMARY: In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following meeting:

Name of Committee: Board of Visitors, United States Military Academy.

Date of Meeting: 28 February 2001.

Place of Meeting: Veteran Affairs Conference Room, Room 418, Senate Russell Office Bldg., Washington, DC.

Start Time of Meeting: Approximately 9:30 a.m.

FOR FURTHER INFORMATION CONTACT: For further information, contact Lieutenant Colonel John L. Pothin, United States Military Academy, West Point, NY 10996–5000, (845) 938–4200.

SUPPLEMENTARY INFORMATION: *Proposed Agenda:* Organizational Meeting of the Board of Visitors. All proceedings are open.

Gregory D. Showalter,

Army Federal Register Liaison Officer.

[FR Doc. 01–2778 Filed 1–31–01; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement (DEIS) for the South Shore, Staten Island, New York, Beach Erosion Control and Storm Damage Protection Study: Feasibility Phase

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of Intent.

SUMMARY: The New York District of the U.S. Army Corps of Engineers is preparing a Draft Environmental Impact Statement (DEIS) to ascertain compliance with and to lead to the production of a National Environmental Policy Act (NEPA) document in accordance with the President's Council of Environmental Quality (CEQ) Rules and Regulations, as defined and amended in 40 Code Federal Regulations (CFR) Parts 1500–1508, Corps' Principals and Guidelines as defined in Engineering Regulation (ER) 1105–2–100 and (ER) 1105–1–200 and other applicable Federal and State environmental laws for the proposed beach erosion control and storm damage protection improvements to the south shore of Staten Island, New York.

The study area includes New York Harbor (Lower Bay), western Atlantic Ocean, southern Staten Island shoreline consisting of approximately 13 miles of coast in the Borough of Staten Island from Ft. Wadsworth to Tottenville.

FOR FURTHER INFORMATION CONTACT: To request additional information, please contact Jenine Gallo, Project Biologist at (212) 264–0912, Planning Division, Corps of Engineers, New York District, 26 Federal Plaza, New York, New York 10278–0090.

SUPPLEMENTARY INFORMATION: This study is authorized by a resolution of the U.S. House of Representatives Committee on Public Works and Transportation and adopted May 13, 1993 which reads:

''The Secretary of the Army, acting through the Chief of Engineers, is requested to review the report of the Chief of Engineers on the Staten Island Coast from Fort Wadsworth to Arthur Kill, New York, published as House Document 181, Eighty-ninth Congress, First Session, and other pertinent reports, to determine whether modifications of the recommendations contained therein are advisable at the present time, in the interest of beach erosion control and storm damage reduction and related purposes on the South Shore of Staten Island, New York,

particularly in and adjacent to the communities of New Dorp Beach, Oakwood Beach and Annandale Beach, New York.

1. Description of the Previously Authorized Project: The Federal project authorized in House Document 181, 89th Congress (October 27, 1965), 1st Session provided combined shore and hurricane protection between Ft. Wadsworth and Tottenville Beach; shore protection at Great Kills Park and between Arbutus Lake and Sequine Point. The recommended protective works included beach fill with dunes, groins, levees, floodwalls, interior drainage facilities including pumping stations and relocations. The authorized project was not constructed due to a lack of non-Federal support. The current study is based upon renewed local interest expressed by the New York State Department of Environmental Conservation and the New York City Department of Environmental Protection.

2. Two types of environmental analysis will be conducted; impacts associated with structural and non-structural storm damage reduction improvements and non-structural shore protection improvements, including sand borrow area investigations and analyses required for mitigation planning purposes.

3. Public scoping meeting(s) are expected to be scheduled in April 2001. Meeting(s) will be held in Staten Island at locations not yet determined. Results from the public scoping meeting(s) with the District and Federal, state and local agency coordination will be addressed in the DEIS. Parties interested in receiving notices of public scoping meeting(s) or copies of the Scoping Document should contact Jenine Gallo at the above address.

4. Federal agencies interested in participating as a Cooperating Agency are requested to submit a letter of intent to Colonel William H. Pearce, District Engineer at the above address.

5. Estimated Date of DEIS availability: December 2003.

Frank Santomauro,

Chief, Planning Division.

[FR Doc. 01–2777 Filed 1–31–01; 8:45 am]

BILLING CODE 3710–06–M

DEPARTMENT OF ENERGY

Office of Security and Emergency Operations; Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Department of Energy.

ACTION: Notice of proposed Agency information collection and request for comments.

SUMMARY: The Department of Energy (DOE) invites public comment on a proposed information collection that DOE is developing for submission to the Office of Management and Budget (OMB), pursuant to the Paperwork Reduction Act of 1995. This collection would gather information over a three-year period from DOE Federal and contractor employees concerning knowledge of DOE required security procedures.

DATES: Written comments must be submitted by April 2, 2001. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to Stephanie Grimes, U.S. Department of Energy, Headquarters, SO–213, 19901 Germantown Road, Germantown, MD, 20874–1290; or by FAX at (301) 903–4601; or by e-mail at stephanie.grimes@hq.doe.gov.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to Stephanie Grimes using the contact information listed above.

SUPPLEMENTARY INFORMATION:

Collection Title: Security Knowledge Survey.

OMB Control Number: None.

Type of Request: New collection.

Frequency of response: semi-annually.

Respondents: DOE Federal and contractor employees.

Estimated number of annual respondents: 12,000.

Estimated total annual burden hours: 2,000 hours.

Background

The Department of Energy, as part of its effort to comply with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35), provides the general public and other Federal agencies with opportunities to comment on collections of information conducted by or in conjunction with DOE. Any comments received help the Department to prepare data requests that maximize the utility of the information collected, and to assess the impact of collection requirements on the public. Also, DOE will later seek approval by the Office of Management and Budget (OMB) of the collections under Section 3506(c) of the Paperwork Reduction Act of 1995.

Data will be collected from DOE Federal and contractor employees to ascertain their general level of knowledge of DOE required security procedures. Data will be collected from employees using a web-based survey and will consist of 16 multiple choice questions. Participation is totally voluntary and anonymous. The data collected will indicate the general level of security awareness of the respondent population and indicate those security functional areas which require increased security education and awareness emphasis. The data will also provide input for an evaluation of the DOE Security Program performance in compliance with the Government Performance and Results Act 1993 (GPRA).

Request for Comments

DOE invites comments from prospective respondents and other interested parties on: (1) Whether the proposed collection of data is necessary to measure the knowledge of DOE employees regarding DOE security procedures; (2) the accuracy of DOE's estimate of the burden of the proposed information collection; or (3) any means of minimizing the burden of the collection of information on those who choose to respond. Additional information about DOE's proposed information collection may be obtained from the contact person named in this notice.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the form. They also will become a matter of public record.

Statutory Authority: Section 3506(c) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35).

Issued in Washington, DC on January 24, 2001.

Susan L. Frey,

Director, Records Management Division, Office of Records and Business Management, Office of the Chief Information Officer.

[FR Doc. 01–2761 Filed 1–31–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Security and Emergency Operations; Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Department of Energy.

ACTION: Notice of proposed Agency information collection and request for comments.

SUMMARY: The Department of Energy (DOE) invites public comment on a proposed information collection that

DOE is developing for submission to the Office of Management and Budget (OMB), pursuant to the Paperwork Reduction Act of 1995. This collection would gather information over a three-year period from DOE Federal and contractor employees concerning their opinion of the DOE security program in the workplace.

DATES: Written comments must be submitted by April 2, 2001. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to Stephanie Grimes, U.S. Department of Energy, Headquarters, SO–213, 19901 Germantown Road, Germantown, MD, 20874–1290; or by FAX at (301) 903–4601; or by e-mail at stephanie.grimes@hq.doe.gov.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to Stephanie Grimes using the contact information listed above.

SUPPLEMENTARY INFORMATION:

Collection Title: Security Opinion Survey.

OMB Control Number: None.

Type of Request: New collection.

Frequency of response: semi-annually.

Respondents: DOE Federal and contractor employees.

Estimated number of annual respondents: 12,000.

Estimated total annual burden hours: 4,000 hours.

Background

The Department of Energy, as part of its effort to comply with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35), provides the general public and other Federal agencies with opportunities to comment on collections of information conducted by or in conjunction with DOE. Any comments received help the Department to prepare data requests that maximize the utility of the information collected, and to assess the impact of collection requirements on the public. Also, DOE will later seek approval by the Office of Management and Budget (OMB) of the collections under Section 3506(c) of the Paperwork Reduction Act of 1995.

Data will be collected from DOE Federal and contractor employees to ascertain their opinion of the DOE security program. Data will be collected from employees using a web-based survey and will consist of 30 multiple choice opinion questions. Participation is totally voluntary and anonymous. The data collected will indicate the respondent's opinion of the effectiveness of the DOE security program in the workplace and indicate those security functional areas which require increased security education and awareness emphasis. The data will also provide input for an evaluation of the DOE Security Program performance in compliance with the Government Performance and Results Act 1993 (GPRA).

Request for Comments

DOE invites comments from prospective respondents and other interested parties on: (1) Whether the proposed collection of data is necessary to measure the opinion of DOE employees regarding the effectiveness of the DOE security program; (2) the accuracy of DOE's estimate of the burden of the proposed information collection; or (3) any means of minimizing the burden of the collection of information on those who choose to respond. Additional information about DOE's proposed information collection may be obtained from the contact person named in this notice.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the form. They also will become a matter of public record.

Statutory Authority: Section 3506(c) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35).

Issued in Washington, DC on January 24, 2001.

Susan L. Frey,

Director, Records Management Division, Office of Records and Business Management, Office of the Chief Information Officer.

[FR Doc. 01–2762 Filed 1–31–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC01–511–000, FERC–511]

Proposed Information Collection and Request for Comments

January 26, 2001.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed information collection and request for comments.

SUMMARY: In compliance with the requirements of Section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104–13), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Consideration will be given to comments submitted on or before April 2, 2001.

ADDRESSES: Copies of the proposed collection of information can be obtained from and written comments may be submitted to the Federal Energy Regulatory Commission, Attn: Michael Miller, Office of the Chief Information Officer, CI–1, 888 First Street NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 208–1415, by fax at (202) 208–2425, and by e-mail at *mike.miller@ferc.fed.us.*

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC–511 ''Application for Transfer of License'' (OMB No. 1902–0069) is used by the Commission to implement the statutory provisions of Part I, Sections 4(e) and 8 of the Federal Power Act (FPA) 16 U.S.C. 792–828c. Section 4(e) authorizes the Commission to issue licenses for the construction, operation and maintenance of reservoirs, power houses and transmission lines or other facilities necessary for development and improvement of navigation and for the development, transmission, and utilization of power from bodies of water Congress has jurisdiction over. Section 8 of the FPA provides that the voluntary transfer of any license can only be made with the written approval of the Commission. Any successor to the licensee may assign the rights of the original licensee but is subject to all of the conditions of the license. The information filed with the Commission is a mandatory requirement contained in the format of a written application for transfer of license, executed jointly by the parties of the proposed transfer. The transfer of a license may be occasioned by the sale or merger of a licensed hydroelectric project. It is used by the Commission's staff to determine the qualifications of the proposed transferee to hold the license, and to prepare the transfer of the license order. The Commission implements these filing requirements in the Code of Federal Regulations (CFR) under 18 CFR Part 9.

Action: The Commission is requesting a three-year extension of the current expiration date, with no changes to the existing collection of data.

Burden Statement: Public reporting burden for this collection is estimated as:

Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1) x (2) x (3)
23	1	40	920

Estimated cost burden to respondents: 920 hours/2,080 hours per year × $115,357 per year = $51,023. The cost per respondent is equal to $2,218.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) 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 those who are to respond, including 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.

David P. Boergers,

Secretary.

[FR Doc. 01–2726 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC01–515–000, FERC–515]

Proposed Information Collection and Request for Comments

January 26, 2001.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed information collection and request for comments.

SUMMARY: In compliance with the requirements of section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104–13), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Consideration will be given to comments submitted on or before April 2, 2001.

ADDRESSES: Copies of the proposed collection of information can be obtained from and written comments may be submitted to the Federal Energy Regulatory Commission, Attn: Michael Miller, Office of the Chief Information Officer, CI–1, 888 First Street NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 208–1415, by fax at (202) 208–2425, and by e-mail at *mike.miller@ferc.fed.us.*

SUPPLEMENTARY INFORMATION: The information collected under the requirementes of FERC–515 ''Hydropower Licensing, Declaration of Intention'' (OMB No. 1902-0079) is used by the Commission to implement the statutory provisions of part I, sections 23(b) of the Federal Power Act (FPA) 16 U.S.C. 817. Section 23(b) authorizes the Commission to make a determination as to whether it has jurisdiction over a proposed hydroelectric project. Section 23(b) also requires that any person intending to construct project works on a navigable commerce clause water must file a declaration of their intention to do so with the Commission. If the Commission finds the proposed project will have an impact on ''interstate or foreign commerce'', then the person intending to construct the project must obtain a Commission license or exemption before starting construction. Such sites are generally on streams defined by as U.S. navigation waters, and over which the Commission has jurisdiction under its authority to regulate foreign and interstate commerce. The information is collected in the form of a written application, declaring the applicant's intent and use by Commission staff to research the jurisdictional aspects of the project. This research includes examining maps and land ownership records to establish whether or not there is Federal jurisdiction over the lands and waters affected by the project. A finding of non-jurisdictional by the Commission eliminates a substantial paperwork burden for the applicant who might otherwise have to file for a license or exemption application. The Commission implements these filing requirements in the Code of Federal Regulations (CFR) under 18 CFR part 24.

Action: The Commission is requesting a three-year extension of the current expiration date, with no changes to the existing collection of data.

Burden Statement: Public reporting burden for this collection is estimated as:

Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1) x (2) x (3)
10	1	80	800

Estimated cost burden to respondents: 800 hours/2,080 hours per year × $115,357 per year = $44,368. The cost per respondent is equal to $4,436.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previous applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) search data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) 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 those who are to respond, including 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.

David P. Boergers,

Secretary.

[FR Doc. 01–2728 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC01–523–000, FERC–523]

Proposed Information Collection and Request for Comments

January 26, 2001.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed information collection and request for comments.

SUMMARY: In compliance with the requirements of section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104–13), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Consideration will be given to comments submitted on or before April 2, 2001.

ADDRESSES: Copies of the proposed collection of information can be obtained from and written comments may be submitted to the Federal Energy Regulatory Commission, Attn: Michael Miller, Office of the Chief Information Officer, CI–1, 888 First Street NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 208–1415, by fax at (202) 208–2425, and by e-mail at *mike.miller@ferc.fed.us.*

SUPPLEMENTARY INFORMATION: The information collected under the requirements of FERC–523 ''Applications for Authorization of Issuance of Securities'' (OMB No. 1902–0043) is used by the Commission to implement the statutory provisions of sections 19, 20 and 204 of the Federal Power Act (FPA), 16 U.S.C. 792–828c. Under the FPA a public utility or licensee must obtain Commission authorization for the issuance of securities or the assumption of liabilities pursuant to the sections identified above. Public utilities or licensees are not permitted to issue securities or assume any obligations or liabilities as guarantor, indorser, or surety or otherwise in respect of any other security of another person, unless and until, they have submitted an application to the Commission who will in turn, issues an order authorizing assumption of the liability or issuance of securities. The information filed in applications to the Commission is used to determine the Commission's acceptance and/or rejection for granting authorization for either issuances of securities or assumptions of obligations or liabilities to licensees and public utilities. The Commission implements these filing requirements in the Code of Federal Regulations (CFR) under 18 CFR parts 20, 34, 131.43, 131.50.

Action: The Commission is requesting a three-year extension of the current expiration date.

Burden Statement: Public reporting burden for this collection is estimated as:

No. of respondents annually (1)	No. of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1) x (2) x (3)
60	1	110	6,600

Estimated cost burden to respondents: 6,600 hours divided by 2080 hours per year times $115,357 per year equals $366,036. The cost per respondent is equal to $6,100.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the Commission'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 those who are to respond, including 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.

David P. Boergers,

Secretary.

[FR Doc. 01–2729 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC01–60–000]

Continental Energy Services, Inc. and BBI Power Corporation; Notice of Filing

January 26, 2001.

Take notice that on January 17, 2001, pursuant to Section 203 of the Federal Power Act and Part 33 of the Commission's regulations, Continental Energy Services, Inc. (Continental), BBI Power Corporation, and CES Acquisition Corporation (Applicants) filed an amendment to the joint application for approval of the disposition of Continental's jurisdictional facilities. The amendment was filed to reflect the fact that CES Acquisition Corporation, a subsidiary of BBI Power Corporation, instead of BBI Power Corporation itself, plans to acquire Continental.

Applicants state that the amendment to the joint application has been served upon the Public Utility Commission of Texas and the Montana Public Service Commission.

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before February 7, 2001. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm

David P. Boergers,

Secretary.

[FR Doc. 01–2719 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RT01–75–001]

Entergy Services, Inc.; Notice of Filing

January 26, 2001.

Take notice that on January 17, 2001, Entergy Services, Inc., on behalf of Entergy Operating Companies, Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. (collectively Entergy), filed the workpapers related to its Application for Approval of Transco's rate Structure, which Entergy filed on December 29, 2000.

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before February 7, 2001. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 01–2724 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER01–368–001]

ISO New England Inc.; Notice of Filing

January 26, 2001.

Take notice that on January 16, 2001, ISO New England Inc. (the ISO) tendered for filing with the Federal Energy Regulatory Commission (Commission) a supplemental

compliance report (including rule changes) with respect to NEPOOL Market Rule 17, Market Monitoring, Reporting and Market Power Mitigation.

Copies of said filing have been served upon all parties to this proceeding, upon NEPOOL Participants, and upon all non-Participant entities that are customers under the NEPOOL Open Access Transmission Tariff, as well as upon the utility regulatory agencies of the six New England States.

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before February 6, 2001. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 01–2721 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP01–71–000]

Texas Eastern Transmission Corporation; Notice of Application

January 26, 2001.

Take notice that on January 23, 2001, Texas Eastern Transmission Corporation (Texas Eastern), 5400 Westheimer Court, Houston, Texas 77056–5310, in Docket No. CP01–71–000 an application pursuant to Sections 7(c) and 7(b) of the Natural Gas Act for permission and approval for Texas Eastern to construct, own, operate, and maintain certain replacement compressor facilities and to abandon the compressor facilities being replaced due to the age and condition of the facilities, located in Westmoreland County, Pennsylvania, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

Texas Eastern proposes to replace an existing 10,500 horsepower (HP) Pratt and Whitney aeroderivative gas turbine compressor unit at the Delmont Compressor Station, currently consisting of 12 compressor units, totaling 43,600 HP, located in Westmoreland County, Pennsylvania, with a 13,300 HP Solar Mars 100S gas turbine compressor unit, and to abandon by removal of the existing compressor unit. Texas Eastern states that the proposed facilities will result in minor modifications to existing aboveground gas piping. Therefore, in addition, Texas Eastern proposes to construct auxiliary equipment, including: (a) An outdoor lube oil cooler, (b) a turbine exhaust silencer, (c) a turbine air intake filter system including an in-duct dissipative-type silencer, and (d) a new control building and controls.

Texas Eastern states that it constructed the existing unit in 1962, under the authority granted by the Commission's predecessor, the Federal Power Commission, in Docket No. CP61–203 (28 FPC 1035). Texas Eastern indicates that replacement of the existing unit is necessary to continue reliability of service to customers in accordance with their firm contract rights, provide additional flexibility to support non-firm contract rights, and to reduce the downtime of the existing gas turbine. Texas Eastern states that due to its age and deterioration, the existing unit needs to be replaced to ensure continued reliability of firm service. Texas Eastern asserts that replacement parts for the unit are no longer readily available, making repairs and maintenance difficult. Texas Eastern indicates that the replacement proposed is necessary to ensure the continued safe and reliable operation of their system and to maintain service to firm customers at existing contracted levels.

Texas Eastern states that it selected the new 13,300 HP unit rather than a 10,950 HP unit because the larger turbine will result in lower fuel consumption per HP and lower installed costs per HP than the smaller turbine. Texas Eastern asserts that the incremental increase in cost associated with using the larger turbine rather than the smaller turbine is approximately 5 percent of the total project cost. Texas Eastern indicates that due to the higher HP associated with the new unit, they will experience a slight increase in capacity on its mainline. Texas Eastern states that the slight increase in capacity is an ancillary benefit related to the decision to obtain the benefits of a larger compressor for its customers and not an effort to expand its mainline system. Texas Eastern asserts that the increase does not affect or change the firm rights existing customers have on its system, but will provide additional flexibility to the system that may support interruptible services.

Texas Eastern states that the total estimated cost for the proposed replacement 13,300 HP turbine compressor unit and related facilities (including associated construction and installation costs) and abandonment by removal of the existing facilities is approximately $13,978,000. Texas Eastern states that the proposed age and condition replacement and the benefits it provides to existing customers in overall reliability, flexibility, and efficiency to the system, qualifies for rolled-in rate treatment under the Commission's *Statement of Policy,* 88 FERC Paragraph 61,227 (1999) and consistent with other cases approved by the Commission. Therefore, Texas Eastern requests all project costs should be permitted roll-in treatment in Texas Eastern's next rate case.

Any questions regarding the application should be directed to Steven E. Tillman, Director, Regulatory Affairs, at (713) 627–5044, (713) 627–5947 (FAX), Texas Eastern Transmission Corporation, P.O. Box 1642, Houston, Texas 77251–1642.

Any person desiring to be heard or to make any protest with reference to said Application should on or before February 16, 2001, file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, a motion to intervene or a protest in accordance wit the requirements of the Commission's Rules of Practice and Procedure (18 CFR 85.211 or 18 CFR 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules. Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

Take further notice that pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this Application if no petition to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the abandonment is required by the public convenience and necessity. If a petition for leave to intervene is timely filed, or if the Commission, on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Applicant to appear or be represented at the hearing.

David P. Boergers,

Secretary.

[FR Doc. 01–2718 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TX95–2–000]

The Wisconsin Public Power Inc.; Notice of Filing

January 26, 2001.

Take notice that on January 12, 2001, The Wisconsin Public Power Inc. (WPPI) filed a Notice of Withdrawal of Application pursuant to Rule 216 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.216. WPPI seeks withdraw of its application because this proceeding is moot.

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before February 5, 2001. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–2725 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER99–3916–003]

Xcel Energy Operating Companies; Notice of Filing

January 26, 2001.

Take notice that on January 17, 2001, the Xcel Energy Operating Companies (Xcel Energy) submitted for filing the following corrected pages to their Joint Open Access Transmission Tariff (Joint OATT), Original Volume No. 1:

Substitute Original Sheet No. 2
Substitute Original Sheet No. 3
Substitute Original Sheet No. 4
Substitute Original Sheet No. 5
Substitute Original Sheet No. 6
Substitute Original Sheet No. 7
Substitute Original Sheet No. 8
Substitute Original Sheet No. 9
Original Sheet No. 9A
Substitute Original Sheet No. 135

Xcel Energy requests that the Commission accept the changes effective August 18, 2000, the date of the Joint OATT was accepted for filing by letter order in Docket No. ER99–3916–000 *et al.*

Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before February 7, 2001. Protests will be considered by the Commission to determine the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

David P. Boergers,

Secretary.

[FR Doc. 01–2720 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER01–160–002, et al.]

Consolidated Edison Company of New York, Inc., et al.; Electric Rate and Corporate Regulation Filings

January 26, 2001.

Take notice that the following filings have been made with the Commission:

1. Consolidated Edison Company of New York, Inc.

[Docket No. ER01–160–002]

Take notice that on January 23, 2001, Consolidated Edison Company of New York, Inc. (Con Edison), tendered for filing a revised rate schedule in the above-listed docket.

Con Edison states that a copy of this filing has been served upon O&R.

Comment date: February 13, 2001, in accordance with Standard Paragraph E at the end of this notice.

2. Avista Corporation

[Docket No. ER99–1435–002]

Take notice that on January 22, 2001, Avista Corporation (Avista Corp.), tendered for filing a report of ancillary service activities in the ancillary services markets conducted pursuant to Avista Corp.'s FERC Electric Tariff Volume No. 9.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

3. Consolidated Edison Company of New York, Inc.

[Docket No. ER01–161–002]

Take notice that on January 23, 2001, Consolidated Edison Company of New York, Inc. (Con Edison), tendered for filing a revised rate schedule in the above-listed docket.

Con Edison states that a copy of this filing has been served by mail upon Central Hudson.

Comment date: February 13, 2001, in accordance with Standard Paragraph E at the end of this notice.

4. Wisconsin Electric Power Company

[Docket No. ER01–384–001]

Take notice that on January 17, 2001, Wisconsin Electric Power Company (Wisconsin Electric), tendered for filing a Standby Service Facilities Agreement with New London Utilities and a revised Power Sales Agreement with Wisconsin Public Power, Inc.

Copies of the filing have been served on the customer, the Michigan Public Service Commission, and the Public Service Commission of Wisconsin.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

5. DPL Energy Resources, Inc.

[Docket No. ER01–462–001]

Take notice that on January 10, 2001, DPL Energy Resources, Inc., (DPLER), a wholly owned subsidiary of DPL Inc., tendered for filing a rate schedule to engage in sales at market-based rates. DPLER includes a proposed code of conduct.

Comment date: February 5, 2001, in accordance with Standard Paragraph E at the end of this notice.

6. Cook Inlet Power, LP

[Docket No. ER01–544–001]

Take notice that on January 23, 2001, Cook Inlet Power, LP (Cook Inlet LP), tendered for filing an original Rate Schedule FERC No. 1 with designations pursuant to the order dated January 3, 2001. The substance of this Rate Schedule is identical to the Rate Schedule filed on November 30, 2000. The only change to the Rate Schedule is the addition of designations, pursuant to Order No. 614, FERC Stats. & Regs. ¶31,096 (2000).

Comment date: February 13, 2001, in accordance with Standard Paragraph E at the end of this notice.

7. Harquahala Generating Company, LLC

[Docket No. ER01–748–001]

Take notice that on January 24, 2001, Harquahala Generating Company, LLC tendered for filing, pursuant to Section 205 of the Federal Power Act, and Part 35 of the Commission's Regulations, an amendment to its FERC Electric Tariff No. 1 that was included in its application for authorization to sell capacity, energy, and certain Ancillary Services at market-based rates filed with the Commission on December 21, 2000.

Comment date: February 14, 2001, in accordance with Standard Paragraph E at the end of this notice.

8. Entergy Services, Inc.

[Docket No. ER01–894–001]

Take notice that on January 22, 2001, Entergy Services, Inc. (Entergy), on behalf of the Entergy Operating Companies, tendered for filing an amendment to its January 5, 2001 filing in Docket No. ER01–894–000, which added the Second Amendment and Appendix A to the Network Integration Transmission Service Agreement (NITSA) between Entergy and East Texas Electric Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., and Tex-La Electric Cooperative, Inc. Entergy states that the amendment to the January 5 filing serves to include an Exhibit B to that filing, which includes the Network Resources designated under the NITSA.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

9. Otter Tail Power Company

[Docket No. ER01–1030–000]

Take notice that on January 22, 2001, Otter Tail Power Company (Otter Tail), tendered for filing with the Federal Energy Regulatory Commission a letter approving its membership in the Western Systems Power Pool (WSPP).

Otter Tail requests that the Commission allow its membership in the WSPP to become effective on January 19, 2001.

Otter Tail states that a copy of this filing has been provided to the WSPP Executive Committee, the Minnesota Public Utilities Commission, Michael E. Small, Esq., General Counsel to the WSPP and the members of the WSPP.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

10. The Dayton Power and Light Company

[Docket No. ER01–1031–000]

Take notice that on January 23, 2001, The Dayton Power and Light Company (DPL), tendered for filing service agreements between DPL and The Dayton Power and Light Company (Energy Services Department) under the terms of DPL's Open Access Transmission Tariff filed in Docket No. ER01–317–000.

Dayton requests an effective date of one day subsequent to this filing for the service agreements. Accordingly, Dayton requests waiver of the Commission's notice requirements.

Copies of this filing were served upon The Dayton Power and Light Company Energy Services Department and the Public Utilities Commission of Ohio.

Comment date: February 13, 2001, in accordance with Standard Paragraph E at the end of this notice.

11. Allegheny Energy Service Corporation on Behalf of Allegheny Energy Supply Conemaugh, LLC

[Docket No. ER01–1032–000]

Take notice that on January 23, 2001, Allegheny Energy Service Corporation on behalf of Allegheny Energy Supply Conemaugh, LLC tendered for filing Service Agreement No. 1 to add one (1) new Customer to the Market Rate Tariff under which Allegheny Energy Supply Conemaugh, LLC offers generation services.

Allegheny Energy Supply Conemaugh, LLC requests a waiver of notice requirements to make service available as of January 8, 2001 to Allegheny Energy Supply Company, LLC.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission, and all parties of record.

Comment date: February 13, 2001, in accordance with Standard Paragraph E at the end of this notice.

12. Allegheny Energy Service Corporation, on Behalf of Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company (Allegheny Power)

[Docket No. ER01–1033–000]

Take notice that on January 23, 2001, Allegheny Energy Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power), tendered for filing Service Agreement Nos. 335 and 336 to add Engage Energy America LLC to Allegheny Power's Open Access Transmission Service Tariff which has been accepted for filing by the Federal Energy Regulatory Commission in Docket No. ER96–58–000.

The proposed effective date under the Service Agreements is January 22, 2001 or a date ordered by the Commission.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, and the West Virginia Public Service Commission.

Comment date: February 13, 2001, in accordance with Standard Paragraph E at the end of this notice.

13. Cinergy Services, Inc.

[Docket No. ER01–1035–000]

Take notice that on January 23, 2001, Cinergy Services, Inc. (Cinergy), tendered for filing a Confirmation Letter under Cinergy's Market-Based Power Sales Standard Tariff-MB (the Tariff) entered into between Cinergy and NewEnergy, Inc. (NewEnergy).

Cinergy and NewEnergy are requesting an effective date of January 1, 2001.

Comment date: February 13, 2001, in accordance with Standard Paragraph E at the end of this notice.

14. Electric Energy, Inc.

[Docket No. ER01–1038–000]

Take notice that on January 23, 2001, Electric Energy, Inc. (EEInc.), tendered for filing an executed Transmission Service Agreement for Firm Point-to-Point Transmission Service between EEInc. and LG&E Energy Marketing, Inc., (LG&E).

Under the Transmission Service Agreement, EEInc. will provide Point-to-Point Transmission Service to LG&E pursuant to EEInc.'s open access transmission tariff filed in compliance with Order No. 888 and allowed to become effective by the Commission.

EEInc. has requested that the Service Agreement be allowed to become effective as of April 1, 2001.

Copies of this filing have been sent to LG&E.

Comment date: February 13, 2001, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 01–2767 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulataory Commission

[Docket No. EG01–104–000, et al.]

FPLE Rhode Island State Energy, L.P., et al.; Electric Rate and Corporate Regulation Filings

January 25, 2001.

Take notice that the following filings have been made with the Commission:

1. FPLE Rhode Island State Energy, L.P.

[Docket No. EG01–104–000]

Take notice that on January 18, 2001, FPLE Rhode Island State Energy, L.P. (FPLE RISE), with its principal office at 700 Universe Boulevard, Juno Beach, Florida, 33408, filed with the Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

FPLE RISE states that it is a Delaware limited partnership engaged directly and exclusively in the business of leasing, developing, and operating an approximately 535 MW megawatt facility located in Johnston, Rhode Island. Electric energy produced by the facility will be sold at wholesale or at retail exclusively to foreign consumers.

Comment date: February 15, 2001, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

2. Canal Electric Company

[Docket No. ER00–3766–002]

Take notice that on January 22, 2001, Canal Electric Company (Canal), tendered for filing a corrected copy of the Second Restated Sixth Amendment to the Power Contract between Canal and its retail affiliates Cambridge Electric Light Company and Commonwealth Electric Company (Canal Rate Schedule FERC No. 33, the ''Seabrook Power Contract''). This filing corrects Canal's filing made with the Commission in the above-referenced docket on December 18, 2000, whereby it submitted the Restated Sixth Amendment. This corrected filing re-designates the Seabrook Power Contract in accordance with the requirements of the Commission's Order 614. Except for the re-designation of the Seabrook Power Contract, Canal has proposed no other changes to its December 18, 2000 filing. Accordingly, Canal requests withdrawal of its filing made with the Commission on January 16, 2000 in the above-referenced docket.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

3. Dynegy Danskammer, L.L.C., Dynegy Roseton, L.L.C.

[Docket Nos. EC01–55–000 and EL01–28–000]

Take notice that on January 10, 2001 Dynegy Danskammer, L.L.C. and Dynegy Roseton, L.L.C. (collectively, Applicants) tendered for filing a request pursuant to section 203 of the Federal Power Act (FPA) that the Commission approve a series of transactions designed to effectuate a sale/leaseback of certain jurisdictional facilities that are associated with the Roseton Generating Station and the Danskammer Generating Station, and that are being acquired by Applicants in a separate transaction. Applicants also request that the Commission find that none of the passive financial participants in the proposed transaction will be a ''public utility'' as that term is defined in section 201(e) of the FPA.

Comment date: February 9, 2001, in accordance with Standard Paragraph E at the end of this notice.

4. Kentucky Utilities Company

[Docket No. ER00–3266–001]

Take notice that on January 22, 2001, Kentucky Utilities Company (KU), tendered for filing several executed contracts with its wholesale customers in compliance with Order No. 614, FERC Stats. & Regs. ¶31,096 (2000) under which the customers are to receive the benefit of power made available to them from the Southeastern Power Administration (SEPA).

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

5. New York Independent System Operator, Inc.

[Docket No. ER00–3740–001]

Take notice that on January 22, 2001, the New York Independent System Operator, Inc., (NYISO), tendered for filing a Compliance Filing in the above-captioned proceedings. The NYISO was required to submit this compliance filing pursuant to New York Independent System Operator, Inc., 93 FERC ¶61,186 (2000).

A copy of this filing was served upon all parties in Docket No. ER00–3740–000.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

6. Wisconsin Electric Power Company

[Docket No. ER01–218–001]

Take notice that on January 22, 2001, Wisconsin Electric Power Company (WEPCo), tendered for filing revised Service Schedules F, G, H, I, and J under WEPCo's FERC Electric Service Tariff Second Revised Volume No. 2 in compliance with the Commission's order of December 21, 2000.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

7. CMS Marketing, Services and Trading Company

[Docket Nos. ER01–570–002 ER01–171–002]

Take notice that on January 19, 2001, CMS Marketing, Services and Trading Company (CMS MST), tendered for filing, an amended Service Agreement for sales to its public utility affiliate, Consumers Energy Company (CECo). Specifically, CMS MST proposes to correct an error regarding CECo's commitment to exclude all purchases from CMS MST from any rate calculations for its wholesale requirements customers and special contracts customers, which appears in the currently effective service agreement.

CMS MST also seeks waiver of any regulations of the Federal Energy Regulatory Commission necessary to permit an effective date of January 1, 2001, and a shortened notice period.

Comment date: February 16, 2001, in accordance with Standard Paragraph E at the end of this notice.

8. Consumers Energy Company

[Docket No. ER01–766–001]

Take notice that on January 22, 2001 Consumers Energy Company (Consumers), tendered for filing a substitute Service Agreement between Consumers and Virginia Electric And Power Company (Virginia Electric), which agreement had originally been filed with one page inadvertently omitted.

Consumers requested that the substitute Service Agreement be allowed to become effective January 1, 2001.

Copies of the filing were served upon Virginia Electric and the Michigan Public Service Commission.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

9. Pacific Gas and Electric Company

[Docket No. ER01–833–000]

Take notice that on January 22, 2001, Pacific Gas and Electric Company (PG&E), tendered for filing a Request for Deferral of Consideration of the unexecuted Wholesale Distribution Tariff Service Agreement and Interconnection Agreement between Pacific Gas and Electric Company and Modesto Irrigation District (MID) filed in FERC Docket No. ER01–833–000 on December 29, 2000. PG&E and Modesto are still discussing the final terms of these Agreements and PG&E therefore is notifying the Commission that the executed WDT and IA will not be filed by January 22, 2001. PG&E requests that the Commission defer consideration of the WDT Service Agreement and IA filed in ER00–833–000 for 45 days beyond the normal period for consideration of such filings in order that the parties may finalize the Agreements.

Copies of this filing have been served upon MID, the California Independent System Operator Corporation, and the California Public Utilities Commission.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

10. MidAmerican Energy Company

[Docket No. ER01–1015–000]

Take notice that on January 22, 2001, MidAmerican Energy Company (MidAmerican), 666 Grand Avenue, Des Moines, Iowa 50309, filed with the Commission a Network Integration Transmission Service Agreement and Network Operating Agreement with the City of Wall Lake, Iowa. Each Agreement is dated December 29, 2000 and has been entered into pursuant to MidAmerican's Open Access Transmission Tariff.

MidAmerican requests an effective date of January 1, 2001 for each Agreement and seeks a waiver of the Commission's notice requirement.

MidAmerican has served a copy of the filing on the Iowa Utilities Board and the City of Wall Lake, Iowa.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

11. Southwest Power Pool, Inc.

[Docket No. ER01–1016–000]

Take notice that on January 22, 2001, Southwest Power Pool, Inc. (SPP), tendered for filing an executed service agreement for Firm Point-to-Point Transmission Service with the Oklahoma Municipal Power Authority (OMPA).

A copy of this filing was served on OMPA.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

12. Virginia Electric and Power Company

[Docket No. ER01–247–002]

Take notice that Virginia Electric and Power Company (Virginia Power), on January 22, 2001, tendered for filing revised tariff sheets from its FERC Electric Tariff, Second Revised Volume No. 5 Tariff (Tariff) in compliance with the Commission's orders issued December 22, 2000 and January 18, 2001. See Virginia Electric and Power Company, 93 FERC ¶61,307 (2000), *order granting clarification,* 94 FERC ¶61,045 (2001).

Copies of the filing were served upon the Virginia State Corporation Commission, the North Carolina Utilities Commission, and the parties listed in the Commission's official service list in the above-captioned proceedings. Virginia Power requested that the Commission waive its requirement to serve all parties taking service under Virginia Power's Tariff. Virginia Power will post the filing on the web at: http://www.dom.com/operations/elec-transmission/gi-main.html. A copy of Virginia Power's Tariff, including the revised interconnection procedures, will be posted on the Virginia Power's OASIS.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

13. MidAmerican Energy Company

[Docket No. ER01–1018–000]

Take notice that on January 22, 2001, MidAmerican Energy Company (MidAmerican), 666 Grand Avenue, Des Moines, Iowa 50309, tendered for filing with the Commission a Network Integration Transmission Service Agreement and Network Operating Agreement with the City of Breda, Iowa. Each Agreement is dated December 29, 2000 and has been entered into pursuant to MidAmerican's Open Access Transmission Tariff.

MidAmerican requests an effective date of January 1, 2001 for each Agreement and seeks a waiver of the Commission's notice requirement.

MidAmerican has served a copy of the filing on the Iowa Utilities Board and the City of Breda, Iowa.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

14. MidAmerican Energy Company

[Docket No. ER01–1019–000]

Take notice that on January 22, 2001, MidAmerican Energy Company (MidAmerican), 666 Grand Avenue, Des Moines, Iowa 50309, tendered for filing with the Commission a Network Integration Transmission Service Agreement and Network Operating Agreement with the City of Lake View, Iowa. Each Agreement is dated December 29, 2000 and has been entered into pursuant to MidAmerican's Open Access Transmission Tariff.

MidAmerican requests an effective date of January 1, 2001 for each Agreement and seeks a waiver of the Commission's notice requirement.

MidAmerican has served a copy of the filing on the Iowa Utilities Board and the City of Lake View, Iowa.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

15. Southwest Power Pool, Inc.

[Docket No. ER01–1022–000]

Take notice that on January 22, 2001, Southwest Power Pool, Inc. (SPP), tendered for filing two executed service agreements for Firm Point-to-Point Transmission Service with the Public Service Company of Colorado (Transmission Customer).

SPP seeks effective dates of January 1, 2001 and February 1, 2001 for these agreements.

A copy of this filing was served on the Transmission Customer.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

16. MidAmerican Energy Company

[Docket No. ER01–1017–000]

Take notice that on January 22, 2001, MidAmerican Energy Company (MidAmerican), 666 Grand Avenue, Des Moines, Iowa 50309, tendered for filing with the Commission a Network Integration Transmission Service Agreement and Network Operating Agreement with the City of Fonda, Iowa. Each Agreement is dated December 29, 2000 and has been entered into pursuant to MidAmerican's Open Access Transmission Tariff.

MidAmerican requests an effective date of January 1, 2001 for each Agreement and seeks a waiver of the Commission's notice requirement.

MidAmerican has served a copy of the filing on the Iowa Utilities Board and the City of Fonda, Iowa.

Comment date: January 25, 2001, in accordance with Standard Paragraph E at the end of this notice.

17. Louisville Gas and Electric Company/Kentucky Utilities Company

[Docket No. ER01–1023–000]

Take notice that on January 22, 2001, Louisville Gas and Electric Company (LG&E)/Kentucky Utilities (KU) (hereinafter Companies), tendered for filing an executed transmission service agreement with The Cincinnati Gas and Electric Company, PSI Energy, Inc. (collectively Cinergy Operating Companies) and Cinergy Services, Inc., as agent for and on behalf of the Cinergy Operating Companies. This agreement allows The Cinergy Operating Companies and its agent Cinergy Services, Inc. to take firm point-to-point transmission service from LG&E/KU. The point of receipt is CINERGY and the point of delivery is BREC.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

18. Louisville Gas and Electric Company/Kentucky Utilities Company

[Docket No. ER01–1024–000]

Take notice that on January 22, 2001, Louisville Gas and Electric Company (LG&E)/Kentucky Utilities (KU) (hereinafter Companies), tendered for filing an executed transmission service agreement with The Cincinnati Gas and Electric Company, PSI Energy, Inc. (collectively Cinergy Operating Companies) and Cinergy Services, Inc., as agent for and on behalf of the Cinergy Operating Companies. This agreement allows The Cinergy Operating Companies and its agent Cinergy Services, Inc. to take firm point-to-point transmission service from LG&E/KU. The point of receipt is CINERGY and the point of delivery is TVA.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

19. Louisville Gas and Electric Company/Kentucky Utilities Company

[Docket No. ER01–1025–000]

Take notice that on January 25, 2001, Louisville Gas and Electric Company (LG&E)/Kentucky Utilities (KU) (hereinafter Companies), tendered for filing executed transmission service agreement with FPL Energy Power Marketing, Inc (FPL). The agreement allows FPL to take firm point-to-point transmission service from LG&E/KU.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

20. Louisville Gas and Electric Company/Kentucky Utilities Company

[Docket No. ER01–1026–000]

Take notice that on January 22, 2001, Louisville Gas and Electric Company (LG&E)/Kentucky Utilities (KU) (hereinafter Companies), tendered for filing an executed unilateral Service Sales Agreement between Companies and Florida Power and Light Company under the Companies' Rate Schedule MBSS.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

21. Commonwealth Edison Company

[Docket No. ER01–1027–000]

Take notice that on January 22, 2001, Commonwealth Edison Company (ComEd), tendered for filing two Short-Term Firm Transmission Service Agreements with the City of Columbia, MO (City of Columbia) and Engage Energy America, LLC (EEA) and two Non-Firm Transmission Service Agreements with the City of Columbia and EEA under the terms of ComEd's Open Access Transmission Tariff (OATT).

ComEd requests an effective date of January 11, 2001, for the Agreements with the City of Columbia and an effective date of January 11, 2001 for the Agreements with EEA, and accordingly, seeks waiver of the Commission's notice requirements.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

22. Commonwealth Edison Company

[Docket No. ER01–1028–000]

Take notice that on January 22, 2001, Commonwealth Edison Company (ComEd) tendered for filing a Firm Transmission Service Agreement (Agreement) with Dynegy Power Marketing, Inc. (DYPM), and four Firm Agreements with PECO Energy Company (PECOPT) under the terms of ComEd's Open Access Transmission Tariff (OATT).

ComEd requests an effective date of January 1, 2001 for the Agreement with DYPM and an effective date of January 1, 2001 for the Agreements with PECOPT, and accordingly, seeks waiver of the Commission's notice requirements.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

23. American Transmission Company LLC

[Docket No. ER01–1029–000]

Take notice that on January 22, 2001, American Transmission Company LLC (ATCLLC), tendered for filing a Network Operating Agreement and Network Integration Transmission Service Agreement between ATCLLC and Adams-Columbia Electric Cooperative.

ATCLLC requests an effective date of January 1, 2001.

Comment date: February 12, 2001, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at *http://www.ferc.fed.us/online/rims.htm* (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 01–2768 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

January 26, 2001.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Project Use of Project Lands.

b. *Project No.:* P–1494–220.

c. *Date Filed:* November 30, 2000.

d. *Applicant:* Grand River Dam Authority.

e. *Name of Project:* Pensacola Project.

f. *Location:* The project is located on the Grand (Neosho) River in Craig, Delaware, Mayes, and Ottawa Counties, Oklahoma. This project does not utilize Federal or Tribal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Bob Sullivan, Grand River Dam Authority, P.O. Box 409, Vinita, OK 74301, (918) 256–5545.

i. *FERC Contact:* James Martin at *james.martin@ferc.fed.us,* or telephone (202) 208–1046.

j. *Deadline for filing comments, motions, or protests:* March 1, 2001.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Comments and protests may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

Please include the project number (P–1494–220) on any comments or motions filed.

k. *Description of Project:* Grand River Dam Authority, licensee for the Pensacola Project, requests approval to grant permission to Southwinds Marina to dredge approximately 19,444 cubic yards of material to increase water depth for future installation of boat slips. The proposed project is on Grand Lake in Section 35, Township 25 North, Range 22 East, Delaware County.

l. *Locations of the application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE, Room 2A, Washington, DC 20426, or by calling (202) 208–1371. The application may be viewed on the web at www.ferc.fed.us. Call (202) 208–2222 for assistance. A copy is also available for inspection and reproduction at the address in item h above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''RECOMMENDATIONS FOR TERMS AND CONDITIONS'', ''PROTEST'', OR ''MOTION TO INTERVENE'', as applicable, and the Projected Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–2722 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Scoping Meeting, Site Visit, and Soliciting Scoping Comments for an Applicant Prepared Environmental Assessment Using the Alternative Licensing Process

January 26, 2001.

a. *Type of Application:* Alternative Licensing Process.

b. *Project No.:* FERC No. 459.

c. *Applicant:* Union Electric Company (d/b/a Ameren/UE).

d. *Name of Project:* Osage Project.

e. *Location:* On the Osage River, in Benton, Camden, Miller and Morgan Counties, central Missouri. The project occupies federal lands.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

g. *Applicant Contact:* Jerry Hogg, Ameren/UE, 617 River Road, Eldon, MO 65026, (573) 365–9315; jhogg@ameren.com.

h. *FERC Contact:* Any questions on this notice should be addressed to Allan Creamer at (202) 219–0365, or at allan.creamer.@ferc.fed.us.

i. *Deadline for Comments:* March 23, 2001.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Protests, comments on filings, comments on environmental assessments and environmental impact statements, and reply comments may be filed electronically via the Internet in lieu of paper. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at http://www.ferc.fed.us/efi/doorbell.htm.

j. Description of the Project: The peaking project consists of an 2,583-foot-long, 148-foot-high concrete dam; a 92-mile-long, 55,000-acre impoundment at a full pool elevation of 660 feet mean sea level; a powerhouse containing eight main and two in-house generating units, having a total installed capacity of 176,200 kilowatts; and appurtenant facilities. The project generates approximately 675,000 megawatt-hours of electricity annually.

k. Scoping Process: Ameren/UE intends to utilize the Federal Energy Regulatory Commission's (Commission) alternative licensing process (ALP). Under the ALP, Ameren/UE will prepare an Applicant Prepared Environmental Assessment (APEA) and license application for the Osage Hydroelectric Project. Ameren/UE expects to file with the Commission, the APEA and the license application for the Osage Hydroelectric Project by February 28, 2004.

The purpose of this notice is to inform you of the opportunity to participate in the upcoming scoping meetings identified below, and to solicit your scoping comments.

Scoping Meetings

Ameren/UE and the Commission staff will hold two scoping meetings, one in the daytime and one in the evening, to help us identify the scope of issues to be addressed in the APEA.

The daytime scoping meeting will focus on resource agency concerns, while the evening scoping meeting is primarily for public input. All interested individuals, organizations, and agencies are invited to attend one or both of the meetings, and to assist the staff in identifying the environmental issues that should be analyzed in the APEA. The times and locations of these meetings are as follows:

Daytime Meeting

Wednesday, February 21, 2001, 1:30 p.m.–3:30 p.m., Marriott's Tan-Tar-A Resort, Suite G, Building D, State Road KK, Osage Beach, MO 65065

Evening Meeting

Wednesday, February 21, 2001, 7 p.m.–9 p.m., Marriott's Tan-Tar-A Resort, Suite G, Building D, State Road KK, Osage Beach, MO 65065

To help focus discussions, Scoping Document 1 (SD1), which outlines the subject areas to be addressed in the APEA, was mailed to the parties on the mailing list on January 12, 2001. Copies of the SD1 also will be available at the scoping meeting. Based will include a revised list of issues, based on the scoping sessions.

Site Visit

The Applicant (Ameren/UE) and FERC will conduct a project site visit beginning at 10 a.m. on February 22, 2001. All interested individuals, organizations, and agencies are invited to attend. All participants should meet at the Osage Power Plant in the town of Lakeside, Missouri. All participants are responsible for their own transportation to the site. Anyone with questions about the site visit should contact Mr. Jerry Hogg of Ameren/UE at 573–365–9315.

Objectives

At the scoping meetings, the staff will: (1) summarize the environmental issues tentatively identified for analysis in the APEA; (2) solicit from the meeting participants all available information, especially quantifiable data, on the resources at issue; (3) encourage statements from experts and the public on issues that should be analyzed in the APEA, including viewpoints in opposition to, or in support of, the staff's preliminary views; (4) determine the resource issues to be addressed in the APEA; and (5) identify those issues that require a detailed analysis, as well as those issues that do not require a detailed analysis.

Procedures

The meetings will be recorded by a stenographer and will become part of the formal record of the Commission proceeding on the project.

Individuals, organizations, and agencies with environmental expertise and concerns are encouraged to attend the scoping meetings and site visit, and to assist Ameren/UE in defining and clarifying the issues to be addressed in the APES

David P. Boergers,

Secretary.

[FR Doc. 01–2723 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Regulations Governing Off-the-Road Communications; Public Notice

January 26, 2001.

This constitutes notice, in accordance with 18 CFR 385.2201(h), of the receipt of exempt and prohibited off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive an exempt or a prohibited off-the-record communication relevant to the merits of a contested on-the-record proceeding, to delivery a copy of the communication, if written, or a summary of the substance of any oral communication, to the Secretary.

Prohibited communications will be included in a public, non-decisional file associated with, but not part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become part of the decisional record, the prohibit off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such requests only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication should serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications will be included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of exempt and prohibited off-the-record communications received in the Office of the Secretary within the preceding 14 days. The documents may be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

Exempt

1. CP98–150–000—01–17–01—Matthew J. Brower
2. CP01–141–000—01–17–01—Juan Polit
3. EL00–95–000—01–11–01—Jo Ann Sharp
4. Project No. 2042—01–22–01—Tim Bacheldler
5. CP00–452–000—01–23–01—Bio-Resources, Inc.
6. Project No. 2197–044—01–22–01—John Schrull, Nancy Schrull, Leonard Hunsucker, Bob Thompson, Joe Masters, Pat Masters, Anita Hunsucker, Pat Thompson, Tom Stokum, Roxane Stokum, Carroll Tysinger, Bob McFarland, Claudia McFarland, Karen Tysinger

David P. Boergers,

Secretary.

[FR Doc. 01–2727 Filed 1–31–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Western Area Power Administration

Floodplain/Wetlands Statement of Findings for the Boyd-Valley 115–kV Transmission Line Rebuild and Upgrade Project

AGENCY: Western Area Power Administration, DOE.

ACTION: Floodplain/Wetlands statement of findings.

SUMMARY: This Floodplain/Wetlands Statement of Findings for the Boyd-Valley 115–kilovolt (kV) Transmission Line Rebuild and Upgrade Project was prepared following the U.S. Department of Energy's (DOE) Floodplain/Wetland Review Requirements (10 CFR part 1022). Western Area Power Administration (Western) is the lead Federal agency rebuilding and upgrading 2 miles of Western's existing Boyd-Valley 115–kV transmission line, that is connected to Platte River Power Authority's (PRPA) Boyd and Valley 115–kV substations. This project is located in Loveland, Colorado. PRPA plans to replace Western's existing H-frame wood pole 115–kV single-circuit transmission line with two new circuits constructed on double-circuit single-pole steel structures. The rebuild and upgrade will use the same right-of-way as the existing transmission line. This work falls within a class of action that normally does not require preparation of an environmental assessment or environmental impact statement under the Department of Energy's National Environmental Policy Act (NEPA) Implementing Procedures (10 CFR part 1021).

Based on the Federal Emergency Management Administration (FEMA) Flood Insurance Maps, the project area is within the 100-year floodplain (base flood) for the Big Thompson River. Approximately 1 mile of the project right-of-way is located within the designated 100-year floodplain.

Western prepared a floodplain/wetlands assessment describing the effects, alternatives, and measures designed to avoid or minimize potential harm to, or within, the affected floodplain and wetlands. Western will allow 15 days of public review after publication of this statement of findings before implementing the proposed action.

FOR FURTHER INFORMATION CONTACT: Mr. Rodney Jones, Environmental Specialist, Rocky Mountain Region, Western Area Power Administration, P.O. Box 3700, Loveland, CO 80539–3003, telephone (970) 461–7371, e-mail rjones@wapa.gov. For further information on DOE Floodplain/Wetlands Environmental Review Requirements, contact: Ms. Carol M. Borgstrom, Director, NEPA Policy and Compliance, EH–42, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585, telephone (202) 586–4600 or (800) 472–2756.

SUPPLEMENTARY INFORMATION: This statement of findings for the proposal to rebuild and upgrade the Boyd-Valley transmission line was prepared following 10 CFR part 1022. A notice of floodplain involvement was published in the **Federal Register** on December 27, 2000 (65 FR 81858). No comments were received on the proposed floodplain/wetlands action. The proposal to rebuild and upgrade the Boyd-Valley transmission line would involve construction activities within the floodplain, including removal of 1 mile of the existing 115–kV wood pole H-frame transmission line and construction of 1 mile of new double-circuit single-pole steel transmission line. The floodplain/wetlands assessment examined the proposed rebuild and upgrade of the transmission line. The existing transmission line right-of-way is located within the 100-year floodplain. Previous stream bank stabilization and gravel mining operations have modified the floodplain in the project area. New transmission line structures associated with the rebuild would be located in approximately the same locations as the existing structures. There are no alternatives that would avoid rebuilding the transmission line within the floodplain. No watercourses or drainage patterns would be affected by implementing the project. No construction will occur within the river. Flood storage volume will not be affected. The transmission will span both the Big Thompson River and Big Thompson Ditch at the same locations as the existing transmission line.

During construction, sediments might be added to local drainages due to soil runoff, and oil or fuel might spill from malfunctioning equipment. Standard construction practices will be used to avoid or minimize effects to floodplain areas in the project area. These procedures include minimizing the size of the disturbance area to install the new transmission line structures, stream bank erosion control, measures to avoid or minimize soil erosion and sedimentation, and minimizing the potential for spills during construction activities and long-term line maintenance.

The rebuilt transmission line will span wetlands and riparian areas associated with the Big Thompson River and the nearby ditches. No disturbances to the banks or channels of surface waters are planned. Bank stabilization and historic gravel mining operations have previously modified much of the wetland areas in the project area. During construction, temporary, short-term minor effects will occur to the existing wetland/riparian habitat in the areas where the new transmission line structures are constructed. Because the new structures will be located at the approximate locations of the existing structures, the amount of wetland/riparian habitat affected by implementation of the project will be negligible. The disturbance areas associated with the project have been previously disturbed by construction of the existing transmission line, and the ongoing maintenance activities within the existing transmission line right-of-way. Other than standard construction practices, no special mitigation measures are recommended. The action will conform to applicable State or local floodplain protection standards.

Dated: January 19, 2001.

Michael S. Hacskaylo,

Administrator.

[FR Doc. 01–2764 Filed 1–31–01; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6941–5]

Agency Information Collection Activities: Proposed Collection; Comment Request

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 thirteen continuing Information Collection Requests (ICR) to the Office of Management and Budget (OMB). Before submitting the ICRs to OMB for review and approval, EPA is soliciting comments on specific aspects of the information collections as described at the beginning of the Supplementary Information.

DATES: Comments must be submitted on or before April 2, 2001.

ADDRESSES: U.S. EPA, 1200 Pennsylvania Avenue, Mail Code 2223A, Washington, DC 20460. A hard copy of an ICR may be obtained without charge by calling the identified information contact individual for each ICR in Section B of the Supplementary Information.

FOR FURTHER INFORMATION CONTACT: For specific information on the individual ICRs see Section B of the Supplementary Information.

SUPPLEMENTARY INFORMATION:

For All ICRs

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are displayed in 40 CFR part 9.

The EPA would like to solicit comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the prior approved collection of information;

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

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

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.

In the absence of such information collection requirements, enforcement personnel would be unable to determine whether the standards are being met on a continuous basis, as required by the Clean Air Act. Consequently, these information collection requirements are mandatory, and the records required by New Source Performance Standards (NSPS) must be retained by the owner or operator for at least two years; records required by the National Emission Standards for Hazardous Air Pollutants (NESHAP) must be retained by the owner or operator for at least five years; and records required by the NESHAP Maximum Achievable Control Technology standards (NESHAP–MACT) must be retained by the owner or operator for at least five years. In general, the required information consists of emissions data and other information deemed not to be private. However, any information submitted to the Agency for which a claim of confidentiality is made will be safeguarded according to the Agency policies set forth in Title 40, chapter 1, part 2, subpart B—Confidentiality of Business Information (See 40 CFR 2; 41 FR 36902, September 1, 1976; amended by 43 FR 39999, September 8, 1978; 43 FR 42251, September 28, 1978; 44 FR 17674, March 21979).

A. List of ICRs Planned To be Submitted

In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that EPA is planning to submit the following thirteen Information Collection Requests (ICR) to the Office of Management and Budget (OMB):

(1) *NSPS Subpart F:* New Source Performance Standards (NSPS) for Portland Cement Plants; EPA ICR Number 1051; OMB Number 2060–0025; expiration date September 30, 2001.

(2) *NSPS Subpart UU:* Asphalt Processing and Roofing; EPA ICR Number 0661; OMB Number 2060–0002; expiration date September 30, 2001.

(3) *NSPS Subpart BBB:* Rubber Tire Manufacturing; EPA ICR Number 1158; OMB Number 2060–0158; expiration date September 30, 2001.

(4) *NESHAP Subpart C:* National Emission Standards for Hazardous Air Pollutants (NESHAP) for Beryllium; EPA ICR Number 0193; OMB Number 2060–0092; expiration date September 30, 2001.

(5) *NESHAP Subpart F:* Vinyl Chloride; EPA ICR Number 0186; OMB Number 2060–0071; expiration date September 30, 2001.

(6) *NESHAP Subparts F, G, H and I:* The Hazardous Organic NESHAP (HON); EPA ICR Number 1414; OMB Number 2060–0282; expiration date February 28, 2001.

(7) *NESHAP Subpart V:* Equipment Leaks (Fugitive Emission Sources); EPA ICR Number 1153; OMB Number 2060–0068; expiration date August 31, 2001.

(8) *NESHAP–MACT Subpart S:* Pulp and Paper Production Source Category—Process Operations; EPA ICR Number 1657; OMB Number 2060–0387; expiration date September 30, 2001.

(9) *NESHAP–MACT Subpart W:* Epoxy Resins Production and Non-Nylon Polyamide Resin Production; EPA ICR Number 1681; OMB Number 2060–0290; expiration date September 30, 2001.

(10) *NESHAP–MACT Subpart X:* Secondary Lead Smelting; EPA ICR Number 1686; OMB Number 2060–0296; expiration date September 30, 2001.

(11) *NESHAP–MACT Subpart XXX:* Ferroalloys; EPA ICR Number 1831; OMB Number 2060–0391; expiration date September 30, 2001.

(12) *Source Compliance and State Action Reporting:* EPA ICR Number 0107; OMB Number 2060–0096; expiration date December 31, 2001.

(13) *Consolidated Federal Air Rule for the Synthetic Organic Chemical Industry:* EPA ICR Number 1854; no assigned OMB Number.

B. Contact Individuals for ICRs

(1) *NSPS Subpart F:* Portland Cement Plants; Franklin Smith of the Data Systems and Information Management Branch at (301) 459–7092 or via E-mail to *Smith.Franklin@epa.gov;* EPA ICR Number 1051; OMB Number 2060–

0025; expiration date September 30, 2001.

(2) *NSPS Subpart UU:* Asphalt Processing and Roofing; Franklin Smith of the Data Systems and Information Management Branch at (301) 459–7092 or via E-mail at Smith.Franklin@epa.gov; EPA ICR Number 0661; OMB Number 2060–0002; expiration date September 30, 2001.

(3) *NSPS Subpart BBB:* Rubber Tire Manufacturing; Maria Malave of the Air, Hazardous Waste, and Toxics Branch at (202) 564–7027 or via E-mail at *Malave.Maria@epa.gov;* EPA ICR Number 1158; OMB Number 2060–0156; expiration date September 30, 2001.

(4) *NESHAP Subpart C:* Beryllium; Debbie Thomas of the Planning and Analysis Branch at (202) 564–5041 or via E-mail at *Thomas.Deborah@epa.gov;* EPA ICR Number 0193; OMB Number 2060–0092; expiration date September 30, 2001.

(5) *NESHAP Subpart F:* Vinyl Chloride; Scott Throwe of the Air, Hazardous Waste, and Toxics Branch at (202) 564–7013 or via E-mail at *Throwe.Scott@epa.gov;* EPA ICR Number 0186; OMB Number 2060–0071; expiration date September 30, 2001.

(6) *NESHAP Subparts F, G, H and I:* the Hazardous Organic NESHAP (HON); Marcia Mia of the Air, Hazardous Waste, and Toxics Branch at (202) 564–7042 or via E-mail at *Mia.Marcia@epa.gov;* EPA ICR Number 1414; OMB Number 2060–0282; expiration date February 28, 2001.

(7) *NESHAP Subpart V:* Equipment Leaks (Fugitive Emission Sources); Rafael Sánchez of the Compliance Monitoring and Water Branch at (202) 564–7028 or via E-mail to *Sanchez.Rafael@epa.gov;* EPA ICR Number 1153; OMB Number 2060–0068, expiration date August 31, 2001.

(8) *NESHAP–MACT Subpart S:* Pulp and Paper Production Source Category—Process Operations; Scott Throwe of the Air, Hazardous Waste, and Toxics Branch at (202) 564–7013 or via E-mail at *Throwe.Scott@epa.gov;* EPA ICR Number 1657; OMB Number 2060–0387; expiration date September 30, 2001.

(9) *NESHAP–MACT Subpart W:* Epoxy Resins Production and Non-Nylon Polyamide Resin Production; Sally Sasnett of the Sector Analysis and Implementation Branch at (202) 564–7074 or via E-mail at *Sasnett.Sally@epa.gov;* EPA ICR Number 1681; OMB Number 2060–0290; expiration date September 30, 2001.

(10) *NESHAP–MACT Subpart X:* Secondary Lead Smelting; Debbie Thomas of the Planning and Analysis Branch at (202) 564–5041 or via E-mail at *Thomas.Deborah@epa.gov;* EPA ICR Number 1686; OMB Number 2060–0296; expiration date September 30, 2001.

(11) *NESHAP–MACT Subpart XXX:* Ferroalloys; Maria Malave of the Air, Hazardous Waste, and Toxics Branch at (202) 564–7027 or via E-mail at *Malave.Maria@epa.gov;* EPA ICR Number 1831; OMB Number 2060–0391; expiration date September 30, 2001.

(12) *Source Compliance and State Action Reporting:* Mark Antell of the Data Systems and Information Management Branch at (202) 564–5003 or via E-mail at Antell.Mark@epa.gov; EPA ICR Number 0107; OMB Number 2060–0096; expiration date December 31, 2001.

(13) *Consolidated Federal Air Rule for the Synthetic Organic Chemical Industry:* Marcia Mia of the Air, Hazardous Waste, and Toxics Branch at (202) 564–7042 or via E-mail at Mia.Marcia@epa.gov; EPA ICR Number 1854; no assigned OMB Number.

C. Individual ICRs

(1) *NSPS Subpart F:* New Source Performance Standards (NSPS) for Portland Cement Plants; EPA ICR Number 1051; OMB Number 2060–0025; expiration date September 30, 2001.

Affected Entities: Entities potentially affected by this action are those which are subject to New Source Performance Standards (NSPS) Subpart F, owners and operators of portland cement plants with the following facilities: kilns, clinker coolers, raw mill systems, raw mill dryers, raw material storage, clinker storage, finished product storage, conveyor transfer points, bagging and bulk loading and unloading facilities.

Abstract: The Agency has judged that PM emissions from portland cement plants cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Owners/operators of portland cement plants must notify EPA of construction, modification, startups, shut downs, date and results of initial performance test and excess emissions.

Burden Statement: In the previously approved ICR, the average annual burden to the industry to meet the recordkeeping and reporting requirements was estimated at 7,968 person-hours for the three years following the approval of that ICR. Two hundred seventy-nine of these person hours were for reporting only. The total annualized cost burden was estimated at $941,720. This is based on an estimated 113 respondents and a frequency of response of 2 times per year.

(2) *NSPS Subpart UU:* Asphalt Processing and Roofing; EPA ICR Number 0661; OMB Number 2060–0002; expiration date September 30, 2001.

Affected Entities: Entities potentially affected by this action are those which are subject to New Source Performance Standards (NSPS) Subpart UU, owners and operators of saturators and asphalt storage facilities at asphalt roofing plants, and each asphalt storage tank and each blowing still at asphalt processing plants, petroleum refineries, and asphalt roofing plants.

Abstract: The Agency has judged that PM emissions from asphalt processing and asphalt roof manufacture cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Owners/operators of these regulated facilities must notify EPA of construction, modification, startups, shut downs, date and results of initial performance test and excess emissions.

Burden Statement: In the previously approved ICR, the average annual burden to the industry to meet the recordkeeping and reporting requirements was estimated at 15,629 person-hours for the three years following approval of that ICR. Three hundred of these person hours were for reporting only. The total annualized cost burden was estimated at $3,210,000. This is based on an estimated 86 respondents and a frequency of response of once per year.

(3) *NSPS Subpart BBB:* Rubber Tire Manufacturing; EPA ICR Number 1158; OMB Number 2060–0158; expiration date September 30, 2001.

Affected Entities: Entities potentially affected by this action are those which are subject to New Source Performance Standards (NSPS) Subpart BBB, include the following facilities in rubber tire manufacturing plants: each undertread cementing operations, sidewall cementing operations, each tread end cementing operation, each bead cementing operation, each green tire spraying operation, each Michelin–A operation, each Michelin–B operation, and each Michelin–C-automatic operation.

Abstract: The Agency has judged that VOCs emissions from rubber tire manufacturing cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Owners/operators of rubber tire manufacturing plants must notify EPA of construction, modification, startups,

shut downs, date and results of initial performance test and excess emissions.

Burden Statement: In the previously approved ICR, the average annual burden to the industry to meet the recordkeeping and reporting requirements was estimated at 18,651 person-hours for the three years following approval of that ICR. Ten thousand ninety-five of these person hours were for reporting only. The total annualized cost burden was estimated at $1,152,730. This is based on an estimated 31 respondents and a frequency of response of twice per year.

(4) NESHAP Subpart C: National Emission Standards for Hazardous Air Pollutants (NESHAP) for Beryllium; EPA ICR Number 0193; OMB Number 2060–0092; expiration date September 30, 2001.

Affected Entities: Entities potentially affected by this action are those which are subject to the NESHAP Subpart C, owners and operators of extraction plants, foundries, incinerators, propellent plants, and machine shops which process beryllium ore, beryllium, beryllium oxide, beryllium alloys, or beryllium-containing waste.

Abstract: The Agency has judged that HAP emissions from sources associated with the production of Beryllium and many of its compounds cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Owners/operators of affected beryllium facilities must notify EPA of construction, modification, startups, shutdowns, date and results of the initial performance test and provide semiannual reports of excess emissions. They must also develop startup, shutdown, malfunction plans and develop a quality control plan for their continuous monitoring system. Affected facilities also must provide notification of compliance status and report quarterly monitoring exceedances.

Burden Statement: In the previously approved ICR, the average annual burden to the industry to meet the recordkeeping and reporting requirements was estimated at 2,232 person-hours for the three years following approval of that ICR. Two hundred forty of these person hours were for reporting only. The total annualized cost burden was estimated at $115,352. This is based on an estimated 33 respondents and frequency of response of twelve times per year.

(5) NESHAP Subpart F: Vinyl Chloride; EPA ICR Number 0186; OMB Number 2060–0071; expiration date September 30, 2001.

Affected Entities: Entities potentially affected by this action are those which are subject to National Emission Standards for Hazardous Air Pollutants (NESHAP) Subpart F, owners and operators of sources associated with the production of vinyl chloride, including but not limited to exhaust gases and oxychlorination vents at ethylene dichloride (EDC) plants; exhaust gases at vinyl chloride monomer (VCM) plants; and exhaust gases, reactors opening losses, manual vent valves and stripping residuals at polyvinyl chloride (PCV) plants. The standards also apply to relief valves and fugitive emission sources at all three types of plants.

Abstract: The Agency has judged that HAP emissions from sources associated with the production of vinyl chloride cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Owners/operators of affected vinyl chloride facilities must notify EPA of construction, modification, startups, shutdowns, date and results of initial performance test and provide semiannual reports of excess emissions. They must also develop startup, shutdown, malfunction plans and develop a quality control plan for their continuous monitoring system. Affected facilities also must provide notification of compliance status and report quarterly monitoring exceedances.

Burden Statement: In the previously approved ICR, the average annual burden to the industry to meet the recordkeeping and reporting requirements was estimated at 16,159 person-hours for the three years following approval of that ICR. Three hundred seventy-two of these person hours were for reporting only. The total annualized cost burden was estimated at $579,947. This is based on an estimated 44 respondents and a frequency of response of two times per year.

(6) NESHAP Subparts F, G, H and I: the Hazardous Organic NESHAP (HON); EPA ICR Number 1414; OMB Number 2060–0282; expiration date February 28, 2001.

Affected Entities: Entities potentially affected by this action are those which are subject to the HON with the exceptions listed in 40 CFR 63.100(f). Respondents are owners or operators of processes in SOCMI industries, styrene-butadiene rubber production, polybutadiene production, chloride production, pesticide production, chlorinated hydrocarbon use in production of chemicals, pharmaceutical production, and miscellaneous butadiene use.

Abstract: The Agency has judged that hazardous air pollutant (HAP) emissions in the synthetic organic chemical industry and other negotiated industries cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.

Generally, respondents are required by law to submit one time reports of start of construction, anticipated and actual start-up dates, and physical or operational changes to existing facilities. In addition, Subpart G requires respondents to submit four types of reports: (1) Initial Notification, (2) Notification of Compliance Status, (3) Periodic Reports, and (4) several event triggered reports. The Initial Notification report identifies sources subject to the rule and the provisions which apply to these sources. The Notification of Compliance Status is submitted to provide the information necessary to demonstrate that compliance has been achieved. The Periodic Reports provide the parameter monitoring data for the control devices, results of any performance tests conducted during the period, and information on instances where inspections revealed problems. Subparts H and I require the source to submit an initial report detailing the equipment and process units subject to, and schedule for implementing each phase of, the standard. Owners and operators also have to submit semiannual reports of the monitoring results from the leak detection and repair program in the equipment leak standard. All records are to be maintained by the source for a period of at least 5 years. The Initial Notification is due 180 days before commencement of construction or reconstruction for new sources.

The Notification of Compliance Status would be submitted 150 days after the source's compliance date for both new and existing sources.

Generally, periodic reports would be submitted semiannually. However, if monitoring results show that the parameter values for an emission point are outside the established range for more than 1 percent of the operating time in a reporting period, or the monitoring system is out of service for more than 5 percent of the time, the regulatory authority may request that the owner or operator submit quarterly reports for that emission point. After 1 year, semiannual reporting can be resumed, unless the regulatory authority requests continuation of quarterly reports.

Other reports would be submitted as required by the provisions for each kind of emission point. The due date for these kinds of reports is tied to the event that precipitated the report itself. Examples of these special reports include requests for extensions of repair, notification of scheduled

inspections for storage vessel and wastewater management units, process changes, and startup, shutdown, and malfunctions.

Subparts H and I, the equipment leak standards, would require the submittal of an initial report and semiannual reports of leak detection and repair experiences and any changes to the processes, monitoring frequency and/or initiation of a quality improvement program. For new sources, the initial report shall be submitted with the application for construction, as under Subpart G. Every 6 months after the initial report, a report must be submitted that summarizes the monitoring results from the leak detection and repair program and provides a notification of initiation of monthly monitoring or implementation of a quality improvement program, if applicable.

Burden Statement: In the previously approved ICR, the average annual burden to industry to meet the recordkeeping and reporting requirements was estimated at 1,727,724 person-hours for the three years following approval of that ICR. Five hundred twenty-three of these person hours were for reporting only. The total annualized cost burden was estimated at $98,460,900. This was based on 308 respondents.

(7) NESHAP Subpart V: Equipment Leaks (Fugitive Emission Sources); EPA ICR Number 1153; OMB Number 2060–0068; expiration date August 31, 2001.

Affected Entities: Entities potentially affected by this action are those which are subject to NESHAP Subpart V, owners or operators of process units operating in volatile hazardous air pollutant (VHAP) service (those containing or contacting fluids (liquid or gas) consisting by weight of at least 10 percent VHAP).

Abstract: The Agency has judged that VHAP emissions from sources associated with the operation of equipment in VHAP service: pumps, compressors, pressure relief devices, sampling connection systems, open-ended valves or lines, valves, flanges and other connectors, product accumulator vessels, and control devices or systems that contain or contact fluids (liquid or gas) consisting by weight of at least 10 percent VHAP, cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Owners or operators of the affected process units must notify EPA of construction, modification, startup, application of waiver of testing (if desired by source); application for equivalency (if desired by source), and an initial report. Owners or operators are also required to submit semiannual reports of the number of valves, pumps, and compressors for which leaks were detected, and explanations for any leak repair delays. Affected process units must be monitored to detect leaks by Method 21 of Appendix A of 40 CFR Part 60. The recordkeeping requirements of § 61.246 apply to leaks detected from pumps, compressors, valves, flanges, and pressure relief devices. Pumps are checked visually each calendar week, and pertinent information on each unit is recorded in a log, required in § 61.246(e). Compressor sensors are checked daily, and valves are monitored monthly. Recordkeeping requirements for these units are in effect only when a leak is detected (§§ 61.242–3, 242–7). Action taken to repair leaks must also be recorded and kept on file in a readily accessible location. The standards also require semiannual reporting of fugitive emissions and leak detection.

Burden Statement: In the previously approved ICR, the average annual burden to industry to meet the recordkeeping and reporting requirements was estimated at 23,539 person-hours for the three years following approval of that ICR. Thirty of these person hours were for reporting only. The total annualized cost burden was estimated at $1,046,073. This is based on an estimated 200 respondents and a frequency of response of two times per year.

(8) NESHAP–MACT Subpart S: Pulp and Paper Production Source Category—Process Operations; EPA ICR Number 1657; OMB Number 2060–0387; expiration date September 30, 2001.

Affected Entities: Entities potentially affected by this action are those which are subject to National Emission Standards for Hazardous Air Pollutants (NESHAP) Subpart S, owners and operators of sources associated with the production of wood pulp, including but not limited to kraft, soda, sulfite, semi-chemical, mechanical, non-wood pulping, secondary fiber, or any combination of these types of pulping processes. Affected processes at the wood pulping sources include pulping, bleaching, and wastewater handling.

Abstract: The Agency has judged that HAP emissions from pulping, bleaching, and wastewater treatment processes cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Owners/operators of affected pulp and paper process operations must notify EPA of construction, modification, startups, shutdowns, date and results of initial performance test and provide semiannual reports of excess emissions. They must also develop startup, shutdown, malfunction plans and develop a quality control plan for their continuous monitoring system. Affected facilities also must provide notification of compliance status and report quarterly monitoring exceedances.

Burden Statement: In the previously approved ICR, the average annual burden to the industry to meet the recordkeeping and reporting requirements was estimated at 53,924 person-hours for the three years following approval of that ICR. Two thousand seven hundred seventy-one of these person hours were for reporting only. The total annualized cost burden was estimated at $6,955,262. This is based on an estimated 162 respondents and a frequency of response of twice per year.

(9) NESHAP–MACT Subpart W: Epoxy Resins Production and Non-Nylon Polyamide Resin Production; EPA ICR Number 1681; OMB Number 2060–0290; expiration date September 30, 2001.

Affected Entities: Entities potentially affected by this action are those which manufacture polymers and resins from epichlorohydrin.

Abstract: The Agency has judged that HAP emissions from sources associated with epoxy and non-nylon resin production cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Owners/operators of affected polymers and resins production process operations must notify EPA of construction, modification, startups, shutdowns, date and results of initial performance test and provide semiannual reports of excess emissions. They must also develop startup, shutdown, malfunction plans and develop a quality control plan for their continuous monitoring system. Affected facilities also must provide notification of compliance status and report quarterly monitoring exceedances.

Burden Statement: In the previously approved ICR, the average annual burden to the industry to meet the recordkeeping and reporting requirements was estimated at 4,525 person-hours for the three years following approval of that ICR. One hundred twenty-four of these person hours were for reporting only. The total annualized cost burden was estimated at $160,226. This is based on an estimated 13 respondents and a frequency of response of twice per year.

(10) NESHAP–MACT Subpart X: Secondary Lead Smelting; EPA ICR Number 1686; OMB Number 2060–

0296; expiration date September 30, 2001.

Affected Entities: Entities potentially affected by this action are those which are subject to NESHAP–MACT Subpart X, owners or operators of secondary lead smelters that operate furnaces to reduce scrap lead metal and lead compounds to elemental lead. The rule applies to secondary lead smelters that use blast, reverbretory, rotary, or electric smelting furnaces to recover lead metal from scrap lead, primarily from used lead-acid automotive-type batteries.

Abstract: The Administrator has judged that HAP emissions from sources associated with secondary lead smelters cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Owners/operators of affected secondary lead smelters must notify EPA of construction, modification, startups, shutdowns, date and results of initial performance test and provide semiannual reports of excess emissions. They must also develop startup, shutdown, malfunction plans and develop a quality control plan for their continuous monitoring system. Affected facilities also must provide notification of compliance status and report quarterly monitoring exceedances.

Burden Statement: In the previously approved ICR, the average annual burden to the industry to meet the recordkeeping and reporting requirements was estimated at 16,033 person-hours for the three years following approval of that ICR. Three hundred sixty-eight of these person hours were for reporting only. The total annualized cost burden was estimated at $720,000. This was based on an estimated 23 respondents and a frequency of response of twice per year.

(11) NESHAP–MACT Subpart XXX: Ferroalloys; EPA ICR Number 1831; OMB Number 2060–0391; expiration date September 30, 2001.

Affected Entities: Entities potentially affected by this action are those which are subject to NESHAP Subpart XXX, owners and operators of all new and existing ferromanganese and silicomanganese production facilities that are major sources or are co-located at major sources.

Abstract: The Agency has judged that HAP emissions from ferroalloys production facilities, including metal HAP compounds and organic HAP compounds cause or contribute significantly to air pollution that may be reasonably anticipated to endanger public health or welfare. Owners/operators of affected ferroalloy production operations must notify EPA of construction, modification, startups, shutdowns, date and results of initial performance test and provide semiannual reports of excess emissions. They must also develop startup, shutdown, malfunction plans and develop a quality control plan for their continuous monitoring system. Affected facilities also must provide notification of compliance status and report quarterly monitoring exceedances.

Burden Statement: In the previously approved ICR, the average annual burden to the industry to meet the recordkeeping and reporting requirements was estimated at 1,684 person-hours for the three years following approval of that ICR. Ninety-six of these person hours were for reporting only. The total annualized cost burden was estimated at $46,875. This is based on an estimated 2 respondents and a frequency of response of two per year. There is currently only one facility subject to this subpart.

(12) Source Compliance and State Action Reporting; EPA ICR Number 0107; OMB Number 2060–0096; expiration date December 31, 2001.

Affected Entities: Entities potentially affected by this action are those State, District, Commonwealth and territorial governments that make air compliance information available to EPA on a quarterly basis via input to the AIRS Facility Subsystem (AFS) of the Aerometric Information Retrieval System (AIRS).

Abstract: Source Compliance and State Action Reporting is an activity whereby State, District, Commonwealth and territorial governments make air compliance information available to EPA on a quarterly basis via input to the AIRS Facility Subsystem (AFS) of the Aerometric Information Retrieval System (AIRS). The information provided to EPA includes compliance determinations and compliance activities. EPA uses this information to assess progress toward meeting emission requirements developed under the authority of the Clean Air Act to protect and maintain the atmospheric environment and the public health. The ten EPA Regional Offices, and most of the State agencies, access the data in AIRS to assist them in the management of their air pollution control programs. This collection activity is authorized and required in the following subsections of regulations implementing the Clean Air Act under ''Subpart Q—Reports'' in 40 CFR Part 51: Sections 51.323(c)(1), 51.323(c)(2), 51.324(a) and (b), and 51.327.

In addition to renewal, this ICR will also be updated as necessary to take into account the revisions that are currently being considered for the Agency's Clean Air Act Stationary Source Compliance Monitoring Strategy (CMS). The goal of CMS is to provide national consistency in developing stationary source air compliance monitoring programs, while at the same time providing States/locals with flexibility to address local air pollution and compliance concerns. Based upon the draft CMS revision, there will be additional collection activity associated with facility identification; compliance evaluations; investigations; annual inspection plans; and the results of stack tests and Title V self-certifications.

Burden Statement: In the previously approved ICR, the average annual burden to covered entities to meet the recordkeeping and reporting requirements was estimated at 59,364 person-hours for the three years following approval of that ICR. The total annualized cost burden was estimated as $1,886,407. This is based on an estimated 52 respondents and a frequency of at least four times per year. The average annual burden for reporting per source per response for reporting activities is dependent upon the size of the State. A small State, having 400 major sources or less, spends an average 22 hours per quarter; a medium size State, having between 400 and 900 major sources, spends an average 195 hours per quarter; and a large State, having more than 900 major sources, spends an average 344 hours per quarter.

(13) Consolidated Federal Air Rule for the Synthetic Organic Chemical Industry: EPA ICR Number 1854; no assigned OMB Number.

Affected Entities: Entities potentially affected by this action are owners or operators of plant sites subject to an identified referencing Subpart. Referencing Subparts include:

- Standards of Performance for Storage Vessels for Petroleum Liquids for Which Construction, Reconstruction, or Modification Commenced After May 18, 1978, and Prior to July 23, 1984 (NSPS Subpart Ka); EPA ICR Number 1050; OMB Number 2060–0121.
- Standards of Performance for Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels) for Which Construction, Reconstruction, or Modification Commenced after July 23, 1984 (NSPS Subpart Kb); EPA ICR Number 1332; OMB Number 2060–0074.
- Standards of Performance for Equipment Leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry (NSPS Subpart VV); EPA ICR Number 0662; OMB Number 2060–0012.

• Standards of Performance for Volatile Organic Compound Emissions from the Polymer Manufacturing Industry (NSPS Subpart DDD); EPA ICR Number 1150; OMB Number 2060–0145.

• Standards of Performance for Volatile Organic Compound (VOC) Emissions From the Synthetic Organic Chemical Manufacturing Industry (SOCMI) Air Oxidation Unit Processes (NSPS Subpart III); EPA ICR Number 0998; OMB Number 2060–0197.

• Standards of Performance for Volatile Organic Compound (VOC) Emissions from Synthetic Organic Chemical Manufacturing Industry Distillation Operations (NSPS Subpart NNN); EPA ICR Number 0998; OMB Number 2060–0197.

• Standards of Performance for Volatile Organic Compound (VOC) Emissions from Synthetic Organic Chemical Manufacturing Industry (SOCMI) Reactor Processes (NSPS Subpart RRR); EPA ICR Number 1178; OMB Number 2060–0269.

• National Emission Standard for Equipment Leaks (Fugitive Emission Sources) (NESHAP Subpart V); EPA ICR Number 1153; OMB Number 2060–0068.

• National Emission Standard for Benzene Emissions from Benzene Storage Vessels (NESHAP Subpart Y); EPA ICR Number 1080; OMB Number 2060–0185.

• National Emission Standard for Benzene Emissions from Benzene Transfer Operations (NESHAP Subpart BB); EPA ICR Number 1154; OMB Number 2060–0182.

• National Emission Standards for Organic Hazardous Air Pollutants from Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations, and Wastewater (NESHAP/MACT Subpart G, the HON); EPA ICR Number 1414; OMB Number 2060–0282.

• National Emission Standards for Organic Hazardous Air Pollutants for Equipment Leaks (NESHAP/MACT Subpart H, the HON); EPA ICR Number 1414; OMB Number 2060–0282.

Abstract: This ICR contains a consolidation of recordkeeping and reporting requirements that are mandatory for compliance with the applicable Subparts listed above of 40 CFR part 60, 61, 63 & 65. Under an initiative issued on March 16, 1995 aimed at reinventing environmental regulation, President Clinton called on EPA to consolidate all federal air rules for an industry sector into a single rule, thereby enhancing understanding and eliminating duplicative or unnecessary compliance activities. The outcome of this for the synthetic organic chemical industry (SOCMI) was the Consolidated Federal Air Rule, or CAR. The CAR is an optional alternative compliance approach for plant sites that must comply with existing subparts in the Code of Federal Regulations (CFR). The CAR is a consolidation of major portions of 13 different New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) pertaining to storage vessels, process vents, transfer racks, and equipment leaks as well as the general provisions for the three applicable parts (40 CFR parts 60, 61, and 63). These subparts from 40 CFR parts 60, 61, and 63 are referred to as referencing subparts because they have been amended to refer to the CAR as a compliance alternative. The referencing subparts include 40 CFR part 60 subpart Ka, 40 CFR part 60 subpart Kb, 40 CFR part 60 subpart VV, 40 CFR part 60 subpart DDD, 40 CFR part 60 subpart III, 40 CFR part 60 subpart NNN, 40 CFR part 60 subpart RRR, 40 CFR part 61 subpart V, 40 CFR part 61 subpart Y, 40 CFR part 61 subpart BB, 40 CFR part 63 subpart F, 40 CFR part 63 subpart G, and 40 CFR part 63 subpart H.

Compliance with the CAR is a voluntary alternative; sources may continue to comply with existing applicable rules or may choose to comply with the consolidated rule. The CAR, therefore, does not constitute additional requirements per se. Rather, the recordkeeping and reporting activities in the CAR would be carried out in place of existing requirements. Because the overall intent and effect of the CAR are to reduce the recordkeeping and reporting burden for plant sites, and because the CAR is an optional compliance alternative, there is effectively no additional burden incurred pursuant to the CAR. In an effort to account for the burden hours which may move from a referencing subpart in the CAR, it is the Agency's intent to consolidate the underlying ICR's for each of the referencing subparts into one ICR. This will allow the Agency to account for those sources which may opt to comply with the CAR without having to amend the ICR's for the referencing subparts upon each CAR renewal or to amend the CAR ICR upon each referencing Subpart renewal.

Burden Statement: The Agency computed the burden for each of the recordkeeping and reporting requirements applicable to the industry based on the totals of the currently approved ICRs. A consolidation of the referencing Subparts and the CAR results in a total annual burden of 1,750,398 person-hours at a cost of $111,707,233. The estimate was based on the assumption that there would be 324 SOCMI facilities (from the most recent HON ICR renewal) and that 25 percent of these facilities, or 81, would elect to comply with the CAR.

Dated: January 26, 2001.

Michael M. Stahl,

Director Office of Compliance.

[FR Doc. 01–2770 Filed 1–31–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6941–2]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, National Emission Standards for Hazardous Air Pollutants, (NESHAP) Benzene Emissions From Benzene Storage Vessels and Coke By-Product Recovery Plants

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 the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: NESHAP for Benzene Emissions from Benzene Storage Vessels—40 CFR part 61, subpart Y, and Coke By-Product Recovery Plants, Subpart L, OMB No. 2060–0185, Expiration Date: January 31, 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 April 2, 2001.

ADDRESSES: Send comments, referencing EPA ICR No.1080.10 and OMB Control No. 2060–0185, 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* and refer to EPA ICR No.1080.10. For technical questions about the ICR contact Mr. Rafael Sánchez, telephone: (202) 564–7028, facsimile: (202) 564–0050.

SUPPLEMENTARY INFORMATION:

Title: National Emission Standards for Hazardous Air Pollutants, Benzene Emissions from Benzene Storage Vessels and Coke By-Product Recovery Plants, OMB Control No. 2060–0185; EPA ICR No.1080.10, expiring January 31, 2001. This is a request for extension of a currently approved collection.

Abstract: Respondents are all owners or operators of benzene storage vessels and Coke By Product Recovery Plants. It is estimated that 162 existing plants are subject to the standard. All owners and operators of new or reconstructed plants would also have to respond. In the General Provisions of 40 CFR part 61 applicable to storage vessels, up to four separate onetime-only reports are required for each owner or operator: notification of construction or reconstruction, initial source report, notification of physical/operational changes, notification of anticipated and actual startup. The initial source report is the only one of these reports that would be required from existing sources under the standard. Certain records and reports are necessary to assist EPA and State agencies to which enforcement has been delegated in determining compliance with the standard.

An initial emissions test is not required because conducting an emission test is not feasible. Therefore, the format of the standard is that of an equipment standard. Owners or operators of vessels equipped with the specified controls are required to submit, along with the notifications required by the General Provisions, a report that describes the control equipment used to comply with the regulation. Thereafter, an annual visual inspection is required of the primary seal of internal floating roof vessels (IFR's) (in cases where no secondary seal is present). An annual seal gap measurement of the secondary seal system on external floating roof vessels (EFR's) is required. The following inspections are required every five years: (1) internal inspection of seal system on IFR's equipped with primary and secondary seals in situations where the owner or operator has decided to forego the annual visual inspection; and (2) measurement of gaps between the tank wall and primary seal on EFR's. An internal inspection in which the tank is emptied and degassed is required at least every 10 years for IFR's.

Subpart L was revised on September 19, 1991 to allow for the use of carbon adsorbers and vapor incinerators as alternative means of complying with the standards for process vessels, storage tanks and tar-intercepting sumps. The use of carbon absorbers and vapor incinerators instead of gas blanketing, the control technology on which the standards were based, is optional. The provisions include recordkeeping and reporting requirements specific to these alternative control devices. An information collection request (ICR number 1080.07) was developed for that revision and is consolidated into this ICR with this review.

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 July 12, 1999 (64 FR 37530); no comments were received.

Burden Statement: The annual public reporting and record keeping burden for this collection of information is estimated to average 93 hours per combined subpart L & Y 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: Owners or operators of Benzene Storage Vessels and Coke By-Product Recovery Plants.

Estimated Number of Respondents: 40.

Frequency of Response: Quarterly.

Estimated Total Annual Hour Burden: 7,131.

Estimated Total Annualized Capital, O&M Cost Burden: $0.

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 No. 1080.10 and OMB Control No.2060–0185 in any correspondence.

Dated: January 25, 2001.

Oscar Morales,

Director, Collection Strategies Division.

[FR Doc. 01–2770 Filed 1–31–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–50874A; FRL–6764–6]

Experimental Use Permit; Receipt of Application; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; extension of comment period.

SUMMARY: This notice announces receipt of an application 524–EUP–OU from Monsanto Company requesting an experimental use permit (EUP) for the plant-pesticide Cry2Ab protein and the genetic material necessary for its production in corn (Vector ZMBK28L). The Agency has determined that the application may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Comments, identified by docket control number OPP–50874A, must be received on or before February 15, 2001.

ADDRESSES: Comments and data may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**. To ensure proper receipt by EPA, it is imperative that you identify docket control number OPP–50874A in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Mike Mendelsohn, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–8715; e-mail address: mendelsohn.mike@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to those persons interested in plant-pesticides or those persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug and Cosmetic Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?

1. *Electronically*. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at http://www.epa.gov/. To access this document, on the Home Page select ''Laws and Regulations,'' ''Regulations and Proposed Rules,'' and then look up the entry for this document under the ''**Federal Register**—Environmental Documents.'' You can also go directly to the **Federal Register** listings at http://www.epa.gov/fedrgstr/.

2. *In person*. The Agency has established an official record for this action under docket control number OPP–50874A. The official record consists of the documents specifically referenced in this action, and other information related to this action, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

C. How and to Whom Do I Submit Comments?

You may submit comments through the mail, in person, or electronically. To ensure proper receipt by EPA, it is imperative that you identify docket control number OPP–50874A in the subject line on the first page of your response.

1. *By mail*. Submit your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

2. *In person or by courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA. The PIRIB is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

3. *Electronically*. You may submit your comments electronically by e-mail to: opp-docket@epa.gov, or you can submit a computer disk as described above. Do not submit any information electronically that you consider to be CBI. Avoid the use of special characters and any form of encryption. Electronic submissions will be accepted in WordPerfect 6.1/8.0 or ASCII file format. All comments in electronic form must be identified by docket control number OPP–50874A. Electronic comments may also be filed online at many Federal Depository Libraries.

D. How Should I Handle CBI That I Want to Submit to the Agency?

Do not submit any information electronically that you consider to be CBI. You may claim information that you submit to EPA in response to this document 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. In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public version of the official record. Information not marked confidential will be included in the public version of the official record without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Offer alternative ways to improve the notice.

7. Make sure to submit your comments by the deadline in this document.

8. To ensure proper receipt by EPA, be sure to identify the docket control number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. Background

EPA announced receipt of an application from Monsanto Company, 700 Chesterfield Parkway North, St. Louis, MO 63198 for an EUP for Cry2Ab protein and the genetic material necessary for its production (Vector ZMBK28L) in corn in the **Federal Register** of December 20, 2000 (65 FR 79853) (FRL–6754–2). The original comment period was to end on January 19, 2001. The comment period is being extended to February 15, 2001.

III. What Action is the Agency Taking?

Following the review of the Monsanto Company application and any comments and data received in response to this notice, EPA will decide whether to issue or deny the EUP request for this EUP program, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

IV. What is the Agency's Authority for Taking this Action?

The Agency's authority for taking this action is under FIFRA section 5.

List of Subjects

Environmental protection, Experimental use permits.

Dated: January 19, 2001.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 01–2774 Filed 1–31–01; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted to OMB for Review and Approval

January 23, 2001.

SUMMARY: The Federal Communications Commissions, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before March 5, 2001. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *lesmith@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collections contact Les Smith at (202) 418–0217 or via the Internet at *lesmith@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0405.

Title: Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station.

Form Number: FCC 349.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit entities; and Not-for-profit institutions.

Number of Respondents: 1,050.

Estimated Time per Response: 1 to 3 hours.

Frequency of Response: Recordkeeping; On occasion reporting requirements; Third party disclosure.

Total Annual Burden: 2,750 hours.

Total Annual Costs: $2,689,500.

Needs and Uses: FCC Form 349 is used to apply for authority to construct a new FM translator or FM booster broadcast station, or to make changes in the existing facilities of such stations. To satisfy the ''third party requirement'' under 47 CFR 73.3580, applicants must give notice of their application for new or major changes in facilities in a local newspaper within 30 days, and a copy of both the notice and the application must be placed in the public inspection file. In addition, all mutually exclusive NCE proposals for the reserved band currently on file with the FCC will be required to supplement their applications with portions of the revised FCC Form 349 that are necessary to make a selection under the new point system. The FCC will issue a public notice announcing the procedures to be used in this process. The data help the FCC to determine whether an applicant meets basic statutory requirements and will not cause interference to other licensed broadcast services. When there are mutually exclusive, qualified applicants, the information will also help to determine which proposal will best serve the public interest.

OMB Control Number: 3060–0798.

Title: FCC Application for Wireless Telecommunications Bureau Radio Service Authorization.

Form Number: FCC 601.

Type of Review: Revision of a currently approved collection.

Respondents: Businesses or other for-profit entities; Individuals or households; Not-for-profit institutions; and State, local, or tribal governments.

Number of Respondents: 240,320.

Estimated Time per Response: 0.5 to 1.25 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure.

Total Annual Burden: 210,280 hours.

Total Annual Costs: $48,364,400.

Needs and Uses: FCC Form 601 is used as the general application (long form) for market-based licensing and site-by-site licensing in the Wireless Telecommunications Radio Services. This revision makes the necessary form changes for the Tribal Lands bidding credits, adjusts or clarifies various instructions including those for implementation of Coast and Ground Radio Services to ULS, and adds a general certification statement for RF certification as adopted in the Report and Order, FCC 96–326. The FCC will use this information to determine whether an applicant is legally, technically, and financially qualified to be licensed.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01–2755 Filed 1–31–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 00–217; FCC 01–29]

Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Service in the States of Kansas and Oklahoma

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Federal Communications Commission (Commission) grants the section 271 application of Southwestern Bell Telephone Company (SWBT) for authority to enter the interLATA telecommunications market in the States of Kansas and Oklahoma. The Commission grants SWBT's application based on our conclusion that SWBT has satisfied all of the statutory requirements for entry, and opened its local exchange markets to full competition. This document represents the first time that the Commission has approved a section 271 application for a more rural state, and the first time we have ruled on a section 271 application for a second state within a Bell Operating Company (BOC) region.

DATES: Date of approval of section 271 application is: March 7, 2001.

FOR FURTHER INFORMATION CONTACT: John Stanley, Attorney, Policy and Program Planning Division, Common Carrier Bureau, at (202) 418–1580, or via the

Internet at *jstanley@fcc.gov.* The full text of the Order is available for inspection and copying during normal business hours in the FCC Reference Information Center, CY–A257, 445 12th Street, Washington, DC 20554. Further information may also be obtained by calling the Common Carrier Bureau's TTY number: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This document is a brief description of the Commission's Memorandum Opinion and Order adopted January 19, 2001, and released January 22, 2001. The full text also may be obtained through the World Wide Web, at <<http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/sbcksok/welcome.html>>, or may be purchased from the Commission's copy contractor, International Transcription Service Inc. (ITS), CY B–400, 445 12th Street, SW., Washington, DC.

Synopsis of the Memorandum Opinion and Order

1. *History of the application.* On October 26, 2000, SWBT filed a joint application, pursuant to section 271 of the Telecommunications Act of 1996 with the Commission to provide in-region, interLATA service in the States of Kansas and Oklahoma.

2. *The State Commissions' evaluations.* The Kansas Corporation Commission and Oklahoma Corporation Commission both advised the Commission that, following more than two years of extensive review, SWBT met the checklist requirements of section 271(c) and had taken the statutorily required steps to open its local markets to competition. Specifically, both commissions stated that SWBT met its obligation under ''Track A'' or section 271(c)(1)(A) by entering into interconnection agreements with competing carriers that are serving residential and business customers either exclusively or predominantly over their own facilities. Both state commissions found that SWBT had fully complied with section 271, and each voted to support the application.

3. *The Department of Justice's evaluation.* The Department of Justice submitted its evaluation of SWBT's application on December 4, 2000. In its evaluation, the Department of Justice focused on the prices at which SWBT provides interconnection and unbundled network elements (UNEs) in Kansas and Oklahoma. The Department of Justice recommended that the Commission undertake an independent determination of recurring and nonrecurring UNE rates in Oklahoma, and nonrecurring UNE rates in Kansas. The Department of Justice also questioned the sufficiency of SWBT's evidence in support of its operations support systems (OSS) in Kansas and Oklahoma. The Department of Justice urged the Commission to establish the kind of evidentiary showing that will be expected of future applicants who seek to rely on findings from prior section 271 proceedings.

4. *Compliance with section 271(c)(1)(A).* We conclude that SWBT demonstrates that it satisfies the requirements of section 271(c)(1)(A) based on the interconnection agreements it has implemented with competing carriers in Kansas and Oklahoma. Specifically, we find that a sufficient number of residential and business customers are being served by competing LECs through the use of their own facilities in both Kansas and Oklahoma. The Kansas and Oklahoma Commissions also conclude that SWBT has met the requirements of section 271(c)(1)(A).

5. *Checklist item 2—Access to unbundled network elements.* We conclude that SWBT satisfies the requirements of checklist item 2 in both Kansas and Oklahoma. For the purposes of the checklist, SWBT's obligation to provide ''access to unbundled network elements,'' or the individual components of the telephone network, includes access to its OSS—the term used to describe the systems, databases and personnel necessary to support the network elements or services. Nondiscriminatory access to OSS ensures that new entrants have the ability to order service for their customers and communicate effectively with SWBT regarding basic activities such as placing orders, providing maintenance and repair service for customers. We find that, for each of the primary OSS functions (pre-ordering, ordering, provisioning, maintenance and repair, and billing, as well as change management and technical assistance), SWBT provides access that enables competing carriers to perform the function in substantially the same time and manner as SWBT or, if there is not an appropriate retail analogue in SWBT's systems, in a manner that permits an efficient competitor a meaningful opportunity to compete. In reaching this conclusion, we rely on detailed evidence provided by SWBT in this proceeding and, in certain circumstances, on our findings from the SWBT Texas section 271 Order. *See Application of SWBT Texas for Authorization Under Section 271 of the Communications Act,* 65 FR 42361 (2000)

6. With respect to pre-ordering, or the activities that a competing carrier undertakes to gather and verify the information necessary to place an order, SWBT demonstrates that it is provides nondiscriminatory access to its pre-ordering functions. Specifically, we find that SWBT demonstrates that: (i) SWBT offers nondiscriminatory access to OSS pre-ordering functions associated with determining whether a loop is capable of supporting xDSL advanced technologies; (ii) competing carriers successfully have built and are using application-to-application interfaces to perform pre-ordering functions and are able to integrate pre-ordering and ordering interfaces; and (iii) its pre-ordering systems provide reasonably prompt response times and are consistently available in a manner that affords competitors a meaningful opportunity to compete.

7. In terms of the interfaces and systems that enable competing carriers to place an order for service, SWBT demonstrates that its systems return timely order confirmation, rejection notices, jeopardy and order completion notifications, and are capable of achieving high overall levels of order flow-through. We also find that SWBT makes available sufficiently detailed interface design specifications for EDI that enable competing carriers to modify or design their own systems in a manner that will allow them to communicate with SWBT's systems and interfaces. In terms of provisioning, we find that SWBT provisions competing carriers' orders for resale and UNE-P services in substantially the same time and manner that it provisions orders for its own retail customers.

8. In addition, with respect to maintenance and repair, we find that SWBT offers maintenance and repair interfaces and systems that enable a requesting carrier to access all the same functions that are available to SWBT's representatives. SWBT provides competing carriers with several options for requesting maintenance and reporting troubles. Similarly, SWBT resolves problems associated with customers of competing carriers in substantially the same time and manner and at the same level of quality that it performs repair work for its own customers. With respect to billing, SWBT demonstrates that it provides complete and accurate reports on the service usage of competing carriers' customers in the same manner that SWBT provides such information to itself. SWBT also demonstrates that it provides the documentation and support necessary to provide competitive carriers nondiscriminatory

access to its OSS by showing that it has an adequate change management process in its five-state region, which includes Kansas and Oklahoma.

9. Pursuant to this checklist item, SWBT must also provide nondiscriminatory access to network elements in a manner that allows other carriers to combine such elements. Based on the evidence in the record, and upon SWBT's legal obligations under interconnection agreements offered in Kansas and Oklahoma, SWBT demonstrates that it provides to competitors combinations of already-combined network elements as well as nondiscriminatory access to unbundled network elements in a manner that allows competing carriers to combine those elements themselves.

10. Finally, we find that SWBT satisfies the pricing requirements of checklist item 2 in both Kansas and Oklahoma. In fulfilling its obligation under this checklist item, SWBT demonstrates that it provides nondiscriminatory access to UNEs at any technically feasible point at rates, terms and conditions that are just, reasonable, and nondiscriminatory. We find that Kansas' recurring UNE rates fall within the reasonable range of total long run incremental cost (TELRIC) prices, and that Kansas' nonrecurring charges for UNE rates were guided by basic TELRIC principles. In Oklahoma, we find that both the recurring and nonrecurring charges for UNEs provide competitive carriers with rates that are within the range that a reasonable application of TELRIC principles would produce. We base our approval on SWBT's permanent UNE rates in Kansas and Oklahoma, as well as discounts SWBT made to some of those rates in December 2000. We waive our procedural requirements that an application be complete when filed in order to consider SWBT's voluntary rate reductions filed December 28, 2000. We find that special circumstances warrant this waiver, notably the limited nature of the rate reductions and the Commission's and commenters' ability to fully evaluate the impact of the rate reductions.

11. *Checklist item 4—Unbundled local loops.* SWBT satisfies the requirements of checklist item 4 in both Kansas and Oklahoma. Local loops are the wires that connect the telephone company end office to the customer's home or business. To satisfy the nondiscrimination requirement under checklist item 4, SWBT must demonstrate that it can efficiently furnish unbundled local loops to other carriers within a reasonable time frame, with a minimum level of service disruption, and of a quality similar to that which it provides for its own retail customers. Nondiscriminatory access to unbundled local loops ensures that new entrants can provide quality telephone service promptly to new customers without constructing new loops to each customer's home or business.

12. SWBT provides evidence and performance data establishing that it can efficiently furnish unbundled loops, for the provision of both traditional voice services and various advanced services, to other carriers in a nondiscriminatory manner. More specifically, SWBT establishes that it provides coordinated cutovers of voice grade loops, *i.e.,* hot cuts, in a manner that permits competing carriers a meaningful opportunity to compete. SWBT's performance in Kansas and Oklahoma on hot cut timeliness appears consistent with its current performance in Texas, where SWBT uses the same CHC process. Moreover, upon review of the evidence in the record regarding hot cut installation quality, and specifically the outage rate associated with failed SWBT CHCs, and the trouble rate following CHC installation, we find that SWBT demonstrates that it provisions CHCs in a manner that meets the requirements of this checklist.

13. SWBT also establishes that it provides competing carriers with voice grade unbundled loops through new stand-alone loops in substantially the same time and manner as SWBT does for its own retail services. Moreover, SWBT demonstrates that it provides maintenance and repair functions for competing carriers in substantially the same time and manner as it provides for SWBT retail customers for both hot cut loops and new stand-alone loops. SWBT also demonstrates that it provides xDSL-capable loops to competing carriers in a nondiscriminatory manner, providing timely order processing and installation that provides an efficient competitor a meaningful opportunity to compete. Furthermore, SWBT demonstrates that it provides maintenance and repair functions for competing carriers in substantially the same time and manner that it provides such services for SWBT retail customers.

14. *Checklist item 1—Interconnection.* Based on the evidence in the record, we conclude that SWBT satisfies the requirements of checklist item 1 in both Kansas and Oklahoma. Pursuant to this checklist item, SWBT must allow other carriers to interconnect their networks to its network for the mutual exchange of traffic, using any available method of interconnection at any available point in SWBT's network. We find that SWBT demonstrates that it provides interconnection at any technically feasible point, including the option to interconnect at only one technically feasible point within a LATA, within its network. We likewise find that SWBT adequately demonstrates that it provides collocation in Kansas and Oklahoma in accordance with the Commission's rules. Furthermore, interconnection between networks must be equal in quality whether the interconnection is between SWBT and an affiliate, or between SWBT and another carrier. SWBT demonstrates that it provides interconnection that meets this standard.

15. SWBT also offers interconnection in Kansas and Oklahoma to other telecommunications carriers at just, reasonable, and nondiscriminatory rates, in compliance with checklist item 1. SWBT's collocation rates meet the standards for interim rates set forth in our order approving SWBT's Texas section 271 application and Bell Atlantic's New York section 271 application. *See Application of SWBT Texas for Authorization Under Section 271 of the Communications Act,* 65 FR 42361 (2000); *Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act,* 64 FR 73555 (1999). The mere presence of interim rates will not generally threaten a section 271 application so long as an interim solution to a particular rate dispute is reasonable under the circumstances, the state commission has demonstrated its commitment to our pricing rules, and provision is made for refunds or true-ups once permanent rates are set. Here, we find that the interim solutions adopted by the Kansas and Oklahoma Commissions are reasonable under the circumstances. The Oklahoma Commission rates, which are the Texas collocation rates based on a TELRIC model, are reasonable starting points for interim rates for the same carrier in an adjoining state. The Kansas Commission also made a reasonable attempt to set an interim TELRIC-based rate pending its final determination. The Kansas and Oklahoma Commissions have pending cost proceedings to set permanent rates for collocation, and each has ordered that the interim rates be subject to a true-up.

16. *Checklist item 6—Unbundled local switching.* Based on the evidence in the record, we find that SWBT satisfies the requirements of checklist item 6 in both Kansas and Oklahoma. We find that SWBT satisfies the requirements of checklist item 6, because SWBT demonstrates that it provides competing carriers all of the features, functions, and capabilities of

the switch. With regard to the provision of unbundled packed switching, SWBT demonstrates that it has a legal obligation in Kansas and Oklahoma to provide packet switching according to the rules set forth in the UNE Remand Order. *See Revision of the Commission's Rules Specifying the Portions of the Nation's Local Telephone Networks That Incumbent Local Telephone Companies Must Make Available to Competitors,* 65 FR 2542 (2000).

17. *Checklist item 8—White pages directory listings.* SWBT satisfies the requirements of checklist item 8 in both Kansas and Oklahoma. This checklist item ensures that white pages listings for customers of different carriers are comparable, in terms of accuracy and reliability, notwithstanding the identity of the customer's telephone service provider. SWBT demonstrates that its provision of white pages listings to customers of competitive LECs is nondiscriminatory in terms of their appearance and integration, and that it provides white pages listings for competing carriers' customers with the same accuracy and reliability that it provides to its own customers.

18. *Checklist item 13—Reciprocal compensation.* SWBT satisfies the requirements of checklist item 13 in both Kansas and Oklahoma. SWBT demonstrates that it has reciprocal compensation arrangements in accordance with section 252(d)(2), and that it is making all required payments in a timely manner. Given that the Commission had not yet determined the status of ISP-bound traffic, refusing to pay reciprocal compensation does not violate the requirements of checklist item 13 at the present time.

19. *Checklist item 14—Resale.* SWBT demonstrates that it makes telecommunications services available for resale in accordance with sections 251(c)(4) and 252(d)(3), and thus satisfies the requirements of checklist item 14 in both Kansas and Oklahoma. SWBT also makes its retail telecommunications services available for resale without unreasonable or discriminatory conditions or limitations. We also find that SWBT satisfies the provisioning requirements of checklist item 14 in both Kansas and Oklahoma because SWBT provisions competitive LECs' orders for resale in substantially the same time and manner as for its retail customers.

20. *Checklist items 3, 5, 7, 9, 10, 11 and 12.* An applicant under section 271 must also demonstrate that it complies with checklist item 3 (poles, ducts, conduits and rights of way), item 5 (unbundled local transport), item 7 (911/E911 access and directory assistance/operator services), item 9 (numbering administration), item 10 (databases and associated signaling), item 11 (number portability), and item 12 (local dialing parity). Based upon the evidence in the record, we conclude that SWBT demonstrates that it is in compliance with checklist items 3, 5, 7, 9, 10, 11 and 12 in both Kansas and Oklahoma. The Kansas and Oklahoma Commissions also conclude that SWBT complies with the requirements of each of these checklist items.

21. *Section 272 compliance.* SWBT demonstrates that it will comply with the requirements of section 272. Pursuant to section 271(d)(3), SWBT must demonstrate that it will comply with the structural, transitional, and nondiscriminatory requirements of section 272, as well as certain requirements governing its marketing arrangements. SWBT shows that it will provide interLATA telecommunications through structurally separate affiliates, and that it will operate in a nondiscriminatory manner with respect to these affiliates and unaffiliated third parties. In addition, SWBT demonstrates that it will comply with public disclosure requirements of section 272, which requires SWBT to post on the Internet certain information about transactions with its affiliates. Finally, SWBT demonstrates compliance with the joint marketing requirements of section 272.

22. *Public interest standard.* We conclude that approval of this application is consistent with the public interest, convenience, and necessity. While no single factor is dispositive in our public interest analysis, our overriding goal is to ensure that nothing undermines our conclusion, based on our analysis of checklist compliance, that markets are open to competition. We note that a strong public interest showing cannot overcome failure to demonstrate compliance with one or more checklist items.

23. Among other factors, we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of this Application. We find that, consistent with our extensive review of the competitive checklist, barriers to competitive entry in the local market have been removed and the local exchange market today is open to competition. We also find that the record confirms our view that a BOC's entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist.

24. We also find that the performance monitoring and enforcement mechanisms developed in Kansas and Oklahoma, in combination with other factors, provide meaningful assurance that SWBT will continue to satisfy the requirements of section 271 after entering the long distance market. Where, as here, a BOC relies on performance monitoring and enforcement mechanisms to provide such assurance, we review the mechanisms involved to ensure that they are likely to perform as promised. We conclude that these mechanisms have a reasonable design and are likely to provide incentives sufficient to foster post-entry checklist compliance.

25. *Section 271(d)(6) enforcement authority.* Congress sought to create incentives for BOCs to cooperate with competitors by withholding long distance authorization until they satisfy various conditions related to local competition. We note that these incentives may diminish with respect to a given state once a BOC receives authorization to provide interLATA service in that state. The statute nonetheless mandates that a BOC comply fully with section 271's requirements both before and after it receives approval from the Commission and competes in the interLATA market. Working in concert with state commissions, we intend to monitor closely post-entry compliance and to enforce vigorously the provisions of section 271 using the various enforcement tools Congress provided us in the Communications Act. Swift and effective post-approval enforcement of section 271's requirements is essential to Congress' goal of achieving last competition in local markets.

Federal Communications Commission.

Shirley Suggs,

Chief, Publications Group.

[FR Doc. 01–2748 Filed 1–31–01; 8:45 am]

BILLING CODE 6712–01–U

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 February 26, 2001.

A. Federal Reserve Bank of Atlanta (Cynthia C. Goodwin, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303–2713:

1. WB&T Bankshares, Inc., Waycross, Georgia; to acquire 100 percent of the voting shares of Guardian Bank, Valdosta, Georgia (in organization).

B. Federal Reserve Bank of Chicago (Phillip Jackson, Applications Officer) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. BSB Community Bancorporation, Inc., Benton, Wisconsin; to become a bank holding company by acquiring 100 percent of the voting shares of Benton State Bank, Benton, Wisconsin.

Board of Governors of the Federal Reserve System, January 26, 2001.

Robert deV. Frierson

Associate Secretary of the Board.

[FR Doc. 01–2716 Filed 1–31–01; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30DAY–16–01]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–7090. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, room 10235, Washington, DC 20503. Written comments should be received within 30 days of this notice.

Proposed Project: Developing Communication to Reduce Workplace Violence and Assault Against Taxicab Drivers—New—The mission of the National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC) is to promote ''safety and health at work for all people through research and prevention.'' In order to carry out this goal effectively and efficiently, NIOSH and the occupational safety and health community implemented the National Occupational Research Agenda (NORA) in 1996. NORA is the first step in an ongoing, synergistic effort by the various institutions of the occupational safety and health community to identify and research the most important workplace safety and health issues. In order to accomplish the NORA objectives in preventing violence and assault in the workplace, NIOSH is conducting health communication research to determine the most effective means of promoting preventive behavior among taxicab drivers, a high risk occupational group. This research is based upon the following NIOSH publications: ''Alert: Preventing Homicide in the Workplace'' (NIOSH, 1993) and ''Violence in the Workplace—Risk Factors and Prevention Strategies'' (NIOSH, 1996).

Violence is a significant cause of injury and death in the workplace. It was the second leading cause of death in 1997, accounting for approximately 18% of worker fatalities during that year (BLS, 1998). Approximately 85% of occupational homicides involved robberies, and approximately four-fifths of the homicides were the result of shootings. An increased risk of workplace homicide was clustered within certain occupational areas including sales occupations, protective service occupations, and taxicab drivers. Furthermore, 60% of occupational fatalities within taxicab drivers were due to homicide (BLS, 1998). Although these statistics are significant, a limited amount of information is known concerning the level of worker awareness about the risk of workplace violence. In addition, little is known about the level of worker self-efficacy in regard to recommended preventive measures or the current status of the prevention strategies utilized by both the worker and employer. Therefore, the goal of this study is to identify those communication variables that are most effective in increasing the following in regard to workplace violence prevention: worker awareness, comprehension, and use of recommendations in the workplace.

The study will accomplish the following specific aims: (1) To conduct three phases of message pretesting for the purpose of determining the appropriate versions of the print variables, supporting graphics, and survey instruments to include in the study; (2) to conduct a small-scale pilot study using the communication variables and survey instruments developed in aim #1; (3) to conduct a large scale study with taxicab drivers for the purpose of determining the most effective combination of communication variables that influence attitudes, intentions, and behavior regarding the prevention of workplace violence and assault against taxicab drivers; and (4) to propose a health communication template using message framing and appropriate issue involvement manipulations that can be tested in the future for its potential use in promoting the prevention of workplace violence among high-risk occupational groups such as taxicab drivers. In addition, a follow-up survey at 1, 3, and 6 months will assess any corresponding behavior change over time.

The total burden for this project is 2,300 hours.

Respondents	Number of respondents	Number of responses	Average hour per response
Phase I Pretest	60	1	1
Phase II Pretest	60	1	1
Phase III Pretest	15	1	1
Pilot Test	300	1	30/60

Respondents	Number of respondents	Number of responses	Average hour per response
Main Study	1,500	1	20/60
Follow-up Study	[1] 1,500	3	20/60

[1] Same as in Main Study.

Dated: January 25, 2001.

Nancy E. Cheal,

Acting Associate Director for Policy, Planning and Evaluation, Centers for Disease Control and Prevention (CDC).

[FR Doc. 01–2741 Filed 1–31–01; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 01019]

Initiative To Educate State Legislatures About Priority Public Health Issues; Notice of Availability of Funds

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year (FY) 2001 funds for a cooperative agreement for the Initiative to Educate State Legislatures About Priority Public Health Issues.

The purposes of this cooperative agreement are to:

1. Develop educational initiatives and provide informational forums on public health issues for policymakers and;

2. Provide access to accurate, comprehensive, and timely information on public health issues to state policymakers for the development of effective public health policy at the state level.

Priority areas for these activities are prevention, early detection, and control of diseases and injury, the promotion of healthy behaviors, and the strengthening of state and local public health agencies.

This program addresses the ''Healthy People 2010'' focus areas: Arthritis, Osteoporosis and Chronic Back Conditions; Cancer; Diabetes; Disability and Secondary Conditions; Educational and Community-Based Programs; Environmental Health; Family Planning; Food Safety; Health Communication; Heart Disease and Stroke; HIV; Immunization and Infectious Diseases; Injury and Violence Prevention; Maternal, Infant and Child Health; Nutrition and Overweight; Occupational Safety and Health; Oral Health; Physical Activity and Fitness; Public Health Infrastructure; Respiratory Diseases; Sexually Transmitted Diseases; Substance Abuse; Tobacco Use; and Vision and Hearing. This program also addresses epilepsy, health issues affecting older Americans, and health disparities.

B. Eligible Applicants

Eligible applicants are national, non-profit, non-partisan or bi-partisan organizations that consist of requisite memberships representing legislatures from all 50 states, and provide tailored policy research, publications, consulting services, and educational and networking forums to state legislators, committees, and their staff. Therefore, eligible organizations should have a minimum of 5 years experience in assisting legislators and their staff from all 50 state legislatures and using a variety of information technologies and resources will be considered eligible applicants.

Limited competition is justified under this program announcement due to limited number of organizations having expertise interacting with all 50 state legislatures on existing and emerging public health issues.

Note: Public Law 104–65 states that an organization described in section 501(c)(4) of the Internal Revenue Code of 1986 that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, cooperative agreement, contract, loan, or any other form.

C. Availability of Funds

Approximately $1,412,800 is available in FY 2001 to fund one award. It is expected that the award will begin on or about July 1, 2001, and will be for a 12-month budget period within a project period of up to three years. Funding estimates may change.

Continuation awards within an approved project period will be made on the basis of satisfactory progress as evidenced by required reports and the availability of funds. See Attachment A for funding sources and approximation amounts.

Direct Assistance

You may request Federal personnel in lieu of a portion of financial assistance.

D. Program Requirements

In conducting activities to achieve the purposes of this program, the recipient will be responsible for the activities under 1. (Recipient Activities), and CDC will be responsible for the activities listed under 2. (CDC Activities).

1. Recipient Activities

Core Activities

a. Track relevant state legislation and legislative activities related to public health. Provide quarterly updates to state policymakers on legislation and legislative actions on public health issues such as adolescent health; aging; arthritis, osteoporosis and chronic back conditions; cancer; diabetes; epilepsy; obesity; disability and secondary conditions; educational and community-based programs; environmental health issues, including childhood lead poisoning, safe drinking water, and pediatric asthma; heart disease and stroke; HIV infection; immunization and infectious diseases; maternal, infant and child health; injury and violence prevention; nutrition; oral health including water fluoridation; physical activity and fitness; sexually transmitted diseases; tobacco use; the public health infrastructure; and other topics. This activity shall not be intended to support or defeat particular state legislation.

b. Develop and coordinate activities with state, local health department contacts, and public health experts, to ensure that state legislatures are aware of public health issues, programs, and activities in their state or region.

c. Monitor and report the status of legislative trends in public health on a quarterly basis.

d. Enhance relationships with and consult with key organizations to inform state legislators about prevention and public health goals.

e. Respond to legislative requests about prevention and public health issues and provide public health experts with a compendium of contact inquiries on a quarterly basis.

f. Examine existing research in order to develop and distribute publications tailored to the information needs of legislators on disease control and prevention and public health in order to educate legislators about relevant policy and program issues.

g. Provide forums for state health officials, policy makers, and legislative staff to share ideas and learn about public health issues.

h. Create, update, publicize and maintain electronic services and other communication venues to inform legislators, other stakeholders, and the general public about emerging and current public health issues.

i. Ensure that funded activities are complimentary and do not duplicate each other. Ensure that activities related to public health and education funded by other organizations are also coordinated with the activities funded under this program announcement.

j. Conduct workshops on priority public health issues at national health conferences and through other venues.

k. Plan, conduct, and evaluate (using both process and outcome measures), an annual meeting in the most cost efficient location involving exchange between public health experts, legislators, and their staff. The purposes of this meeting are to:

(1) Provide legislators and their staff with information regarding priority public health issues;

(2) Give legislators an opportunity to share ideas and strategies with other legislators and public health experts about how to improve public health in their state.

l. Provide a forum and/or publication for newly-elected state legislators, so they can learn about priority public health issues.

m. Collaborate with national public health experts and organizations on public health law and other topics.

n. Develop and measure outcome indicators for all major activities funded under this program announcement.

Categorical Activities

Categorical funding is available for FY 2001 from the following sources: cancer; chronic disease; environmental health, HIV and STD; immunization; school health; tobacco; oral health; epilepsy; arthritis; heart disease and stroke; and the Racial and Ethnic Approaches to Community Health (REACH 2010) program to address health disparities. Attachment B delineates the letter of the activity below that corresponds to each funding source.

a. Enhance working relationships and consult with key organizations to inform state legislators about prevention and public health goals.

b. Create, update, publicize and maintain electronic services and other communication venues to inform legislators, other stakeholders, and the general public about emerging and current public health issues.

c. Examine existing research in order to develop and distribute publications tailored to the information needs of legislators on disease prevention and public health in order to educate legislators' about relevant policy and program issues.

d. Coordinate meetings and sessions so state legislators and legislative staff, state government employees, and other key figures can discuss policy issues related to public health.

e. Create and provide for ongoing tracking of relevant state legislation and legislative activities related to public health.

f. Examine existing research to identify the critical policy issues facing state legislatures and remain appraised of key public health issues and concerns as they relate to states and state legislatures.

g. Coordinate activities with state and local health department contacts, including public health experts, to ensure that organization members from each state legislature are aware of public health issues, programs, and activities in their state or region.

Activities h and i apply to school health funding ONLY:

h. Participate in meetings actively to ensure joint work groups on social marketing of positive messages for HIV prevention and school health; teen pregnancy prevention; and adolescent and/or school health goals are met.

i. Demonstrate the capability of updating the 50 state School Health Programs Finance Project's database including both the block grant funding and state legislative appropriations information.

Activity j applies to HIV and STD funding ONLY:

j. Develop, update, and disseminate, as needed, an educational video on HIV issues for newly elected state legislators and staff that can be easily accessed via the organization's website.

2. CDC Activities

a. Provide and periodically update programmatic information as it relates to core and categorical activities.

b. Provide consultation and guidance related to program planning, implementation, surveillance, and evaluation; assessment of program objectives; and dissemination of successful strategies, experiences, and evaluation results.

c. Collaborate in developing plans for and convening of national, regional and other meetings.

d. Provide technical assistance regarding the scope, development, and accomplishment of activities undertaken as part of this cooperative agreement.

e. Conduct periodic site visits in order to assess current activities, review progress, and discuss future plans.

E. Application Content

Use the information in the Program Requirements, Other Requirements, and Evaluation Criteria sections to develop the application content. Your application will be evaluated on the criteria listed, so it is important to follow them in laying out your program plan. The narrative should be no more than 30 double-spaced pages, printed on one side, with one-inch margins, and unreduced font. The narrative must describe how the applicant's activities in each part will complement one another, and how planned activities will be coordinated.

To request direct assistance Federal assignees, include:

1. The number of assignees requested;
2. A description of the position and proposed duties;
3. An organizational chart and the name of the intended supervisor;
4. Assignee access to computer equipment for electronic communication with CDC.

F. Submission and Deadline

Application

Submit the original and two copies of PHS 5161–1 (OMB Number 0937–0189). Forms are available at the following internet address: *http://www.cdc.gov/od/pgo/forminfo.htm* or in the application kit.

On or before March 28, 2001, submit the application to the Grants Management Specialist identified in the ''Where to Obtain Information'' section of this announcement.

Deadline: Applications shall be considered as meeting the deadline if they are either:

(a) Received on or before the deadline date; or

(b) Sent on or before the deadline date and received in time for submission to the independent review group.

(Applicants must request a legibly dated U.S. Postal service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

Late Applications: Applications which do not meet the criteria in (a) or (b) above are considered late applications, will not be considered, and will be returned to the applicant.

G. Evaluation Criteria

Each application will be evaluated according to the following criteria by an independent review group appointed by CDC.

1. Capacity (25 Points)

Demonstrate and provide evidence of the capacity and ability of the

organization and its constituency to address identified needs, and develop, implement, and evaluate program activities.

2. Plan (5 Points)

Describe the proposed plan that will be implemented and the need for such work.

3. Objectives (10 Points)

Provide short-term (one-year) and long-term (three-year) objectives for the proposed project that are specific, time-phased, measurable, realistic, and related to identified needs in the Plan section.

4. Methods (25 Points)

Submit a plan that describes methodologies for conducting activities outlined in the ''Recipient Activities'' in the Program Requirements section and explain how planned activities relate to the purpose of this Program Announcement. Describe the networking and information dissemination capacity of the organization to reach all 50 state legislatures effectively regarding public health issues. Establish a time line for the completion of each component or major activity and identify the party responsible.

5. Administration and Management (15 Points)

a. Provide job descriptions for existing and proposed positions.

b. Demonstrate that staff have the necessary background and qualifications for the proposed responsibilities; ensure for each position the education, experience, and licensure required; and include curriculum vitae (limit two pages per individual) for existing staff.

c. Provide an organizational chart that identifies lines of communication, accountability, reporting, authority, and describe the management and control systems.

6. Evaluation Plan (20 Points)

Describe how activities and their impact will be evaluated, and how progress will be monitored toward meeting project objectives. Include both process and outcome evaluations, specification of indicators of program success, methods of obtaining data, ways of reporting results, use of results for programmatic improvement, timing for evaluative techniques, and staff responsibility.

7. Budget and Justification (Not scored)

Provide a detailed budget for each funding source specified in Attachment A and line-item justification for all operating expenses that are consistent with proposed objectives and planned activities.

H. Other Requirements

Technical Reporting Requirements

Provide CDC with the original plus two copies of:

1. Semi-annual progress reports:

The progress reports must summarize the following for all forums and activities specified in this program announcement: (1) A comparison of actual accomplishments to the objectives established for the period; (2) the reasons for failure if established objectives were not met; (3) a description of how evaluation data will be used to strengthen future programmatic activities; (4) copies of reports and other publications funded under this program announcement; and (5) other pertinent information, when appropriate. The progress report will also include a summary of the project's progress in achieving performance measures, which will be developed and established during the first budget period.

2. Financial status report, no more than 90 days after the end of the budget period.

3. Final financial report and performance report, no more than 90 days after the end of the project period.

Send all reports to the Grants Management Specialist identified in the ''Where to Obtain Additional Information'' section of this announcement.

The following additional requirements are applicable to this program. For a complete description of each, see Attachment C in the application kit.

AR–9 Paperwork Reduction Act Requirements
AR–10 Smoke-Free Workplace Requirements
AR–11 Healthy People 2010
AR–12 Lobbying Restrictions
AR–15 Proof of Nonprofit Status

I. Authority and Catalog of Federal Domestic Assistance Number

This program is authorized under sections 301(a), 317(k)(2), and 1706 [42 U.S.C. 241(a), 247b(k)(2)] of the Public Health Service Act, as amended. The Catalog of Federal Domestic Assistance number is 93.283.

J. Where to Obtain Additional Information

This and other CDC announcements can be found on the CDC home page Internet address—http://www.cdc.gov. Click on ''Funding'' then ''Grants and Cooperative Agreements.''

To obtain additional information, contact: Cynthia R. Collins, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), Program announcement 01019, 2920 Brandywine Rd., Room 3000, Atlanta, GA 30341–4146, telephone: (770) 488–2757, email: *coc9@cdc.gov*

For program technical assistance, contact: Angel Roca, Deputy Director for Planning, Evaluation and Legislation, National Center for Chronic Disease Prevention and Health Promotion, Program Announcement 01019, Centers for Disease Control and Prevention (CDC), 4770 Buford Highway, NE MS K–40, Atlanta, GA 30341, telephone (770) 488–5706, e-mail: axr4@cdc.gov

Dated: January 26, 2001.

John L. Williams,

Director, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 01–2740 Filed 1–31–01; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Voluntary Surveys of Program Partners to Implement Executive Order.

OMB No: 0980–0266.

Description: Under the provisions of the Federal Paperwork Reduction Act of 1995 (Pub. L. 104–13), the Administration for Children and Families (ACF) is requesting clearance for instruments to implement Executive Order 12862 within the ACF. The purpose of the data collection is to obtain customer satisfaction information from those entities who are funded to be our partners in the delivery of services to the American public. ACF partners are those entities that receive funding to deliver services or assistance from ACF programs. Examples of partners are States and local governments, territories, service providers, Indian Tribes and Tribal organizations, grantees, researchers, or other intermediaries serving target populations identified by and funded directly or indirectly by ACF. The surveys will obtain information about how well ACF is meeting the needs or our partners in operating the ACF programs.

Respondents: State, Local, Tribal Govt. or Not-for-Profit Institutions.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
State Governments	51	10	1	510
Head Start Grantees & Delegates	200	1	.5	100
Other Discretionary Grant Programs	200	10	.5	1,000
Indian Tribes & Tribal Organizations	25	10	.5	50
Estimated Total Annual Burden Hours				1,660

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection.

The Department specifically requests comments 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) 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 within 60 days of this publication.

Dated: January 26, 2001.

Bob Sargis,

Reports Clearance Officer.

[FR Doc. 01–2712 Filed 1–31–01; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Extension of a Currently Approved Collection; Comment Request, Juvenile Residential Facility Census

ACTION: Notice of information collection under review; extension of a currently approved collection.

The Department of Justice, Office of Juvenile Justice and Delinquency Prevention has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. Office of Management and Budget approval is being sought for the information collection listed below. This proposed information collection was previously published in the **Federal Register** on [enter date published in FR], allowing for a 60-day public comment period.

The purpose of this notice is to allow an additional 30 days for public comment until March 5, 2001. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20530. Additionally, comments may be Department of Justice Desk Officer, Washington, DC 20530. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285. Comments may also be submitted to the Department of Justice (DOJ), Justice Management Division, Information Management and Security Staff, Attention: Department Deputy Clearance Officer, Suite 1220, National Place, 1331 Pennsylvania Avenue, NW., Washington, DC 20530.

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

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

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

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

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

Overview of This Information

(1) *Type of Information Collection:* Reinstatement, without change, of a previously approved collection for which approval has expired.

(2) *The Title of the Form/Collection:* Juvenile Residential Facility Census.

(3) *The Agency Form Number, if any, and the Applicable Component of the Department Sponsoring the Collection;* The form number is CJ–15, Office of Juvenile Justice and Delinquency Prevention, United States Department of Justice.

(4) *Affected Public who will be Asked or Required to Respond, as well as a Brief Abstract:*

Primary: Federal Government, State, Local or Tribal.

Other: Not-for-profit institutions; Business of other for-profit. This

collection will gather information necessary to routinely monitor the types of facilities into which the juvenile justice system places young persons and the services available in these facilities.

(5) *An Estimate of the Total Number of Respondents and the Amount of Time Estimated for an Average Respondent to Respond/Reply:* It is estimated that 3,500 respondents will complete a 2-hour questionnaire.

(6) *An Estimate of the Total Public Burden (in Hours) Associated with the Collection:* The total hour burden to complete the nominations is 7,000 the annual burden hours.

If additional information is required contact: Ms. Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 1220, National Place Building, 1331 Pennsylvania Avenue, NW., Washington, DC 20530.

Dated: January 26, 2001.

Brenda E. Dyer,

Department Deputy Clearance Officer, United States Department of Justice.

[FR Doc. 01–2738 Filed 1–31–01; 8:45 am]

BILLING CODE 4410–18–M

NATIONAL COUNCIL ON DISABILITY

Advisory Committee Meeting/ Conference Call

AGENCY: National Council on Disability (NCD).

SUMMARY: This notice sets forth the schedule of the forthcoming meeting/ conference call for NCD's advisory committee—International Watch. Notice of this meeting is required under Section 10(a)(1)(2) of the Federal Advisory Committee Act (P.L. 92–463).

INTERNATIONAL WATCH: The purpose of NCD's International Watch is to share information on international disability issues and to advise NCD's Foreign Policy Team on developing policy proposals that will advocate for a foreign policy that is consistent with the values and goals of the Americans with Disabilities Act.

DATES: February 15, 2001, 12 p.m.–1 p.m. EST.

FOR INTERNATIONAL WATCH INFORMATION, CONTACT: Kathleen A. Blank, Attorney/ Program Specialist, NCD, 1331 F Street NW., Suite 1050, Washington, DC 20004; 202–272–2004 (Voice), 202–272–2074 (TTY), 202–272–2022 (Fax), kblank@ncd.gov (e-mail).

AGENCY MISSION: NCD is an independent federal agency composed of 15 members appointed by the President of the United States and confirmed by the U.S. Senate. Its overall purpose is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all people with disabilities, regardless of the nature of severity of the disability; and to empower people with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

This committee is necessary to provide advice and recommendations to NCD on international disability issues.

We currently have balanced membership representing a variety of disabling conditions from across the United States.

OPEN MEETING/CONFERENCE CALL: This advisory committee meeting/conference call of NCD will be open to the public. However, due to fiscal constraints and staff limitations, a limited number of additional lines will be available. Individuals can also participate in the conference call at the NCD office. Those interested in joining this conference call should contact the appropriate staff member listed above.

Records will be kept of all International Watch meetings/ conference calls and will be available after the meeting for public inspection at NCD.

Signed in Washington, DC, on January 26, 2001.

Ethel D. Briggs,

Executive Director.

[FR Doc. 01–2733 Filed 1–31–01; 8:45 am]

BILLING CODE 6820–MA–M

NATIONAL INSTITUTE FOR LITERACY

Proposed Agency Information Collection Activities; Comment Request

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 350l et seq., this notice announces an Information Collection Request (ICR) by the NIFL. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: Comments must be submitted on or before March 5, 2001.

ADDRESSES: Submit written comments to: National Institute for Literacy, 1775 I Street, NW, Suite 730, Washington, DC 20006, Attention: Jennifer Cromley. Copies of the complete ICR and the accompanying regulations may be obtained from the above address or by contacting Jennifer Cromley at (202) 233–2053, or on-line at *http://www.nifl.gov/nifl/news_events.html.* Comments also may be submitted electronically by sending electronic mail (e-mail) to: jcromley@nifl.gov. All written comments will be available for public inspection from 8:00 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

SUPPLEMENTARY INFORMATION:

Title: Application for Literacy Leader Fellowship Program.

Abstract: The National Institute for Literacy (NIFL) was created by the National Literacy Act of 1991 and amended by the Workforce Investment Act of 1998 and authorized the NIFL to award fellowships to outstanding individuals pursuing careers in adult education or literacy in the areas of instruction, management, research, or innovation. Evaluations to determine successful applications will be made by a panel of literacy experts and information specialists using the published criteria. The NIFL will use this information to issue a minimum of 2–3 fellowships for a period of up to one year.

Burden Statement: The burden for this collection of information is estimated at 52 hours per response for the first year. This estimate includes the time needed to review instructions, complete the form, and review the collection of information. No more than 2–3 applicants will be awarded a fellowship grant. Each awardee will have an annual update of the application requiring an average of 52 hours per response for each continuation year.

Respondents: Public and private nonprofit organizations.

Estimated Number of Respondents: 50.

Estimated Number of Responses Per Respondent: 1.

Estimated Total Annual Burden on Respondents: 52 hours.

Frequency of Collection: One time. Send comments regarding the burden estimate or any other aspect of the information collection, including suggestions for reducing the burden to Jennifer Cromley at the above address.

Request for Comments: NIFL solicits comments to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. (ii) Evaluate the accuracy of the agency's estimates of the burden of the proposed collection of information. (iii) Enhance the quality, utility, and clarity of the information to be collected. (iv) Minimize the burden of the collection of information on those who are to respond, including through

the use of appropriate automated or electronic collection technologies of other forms of information technology, e.g., permitting electronic submission of responses.

Dated: January 26, 2001.

Andrew J. Hartman,

Director, NIFL.

[FR Doc. 01–2736 Filed 1–31–01; 8:45 am]

BILLING CODE 6055–01–P

NUCLEAR REGULATORY COMMISSION

Public Meeting on Standard Review Plan

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of meeting.

SUMMARY: NRC will host a public meeting in Rockville, Maryland. The meeting will provide an opportunity for discussion on the draft NUREG–1520, Standard Review Plan (SRP), Chapter 3. The revised SRP Chapter 3 can be found on the Internet at the following website: http://techconf.llnl.gov/cgi-bin/library?source=*& library=Part_70_lib The web site can also be reached by the following method:

1. Go the main NRC web site at: http://www.nrc.gov
2. Scroll down to the bottom of that page and click on the word ''Rulemaking.''
3. Scroll down on the Rulemaking page until the words ''Technical Conference'' appear. Click on those words.
4. On the page titled ''Welcome to the NRC Technical Conference Forum,'' click on the link to participate in Technical Conferences.
5. Scroll down to the topic ''Draft Standard Review Plan and Guidance on Amendment to 10 CFR Part 70.''
6. Select ''Document Library.''

PURPOSE: This meeting will provide an opportunity to discuss comments on the staff's revised Chapter 3, including the Nuclear Energy Institute's November 16, 2000 comment letter to the NRC.

DATES: The meeting is scheduled for Thursday, February 8, 2001, from 1:30 p.m. to 5:30 p.m. The meeting is open to the public.

ADDRESSES: One White Flint North, 11555 Rockville Pike, Room O–16–B4, Rockville, Maryland. Visitor parking around the NRC building is limited; however, the meeting site is located adjacent to the White Flint Station on the Metro Red Line.

FOR FURTHER INFORMATION CONTACT: Thomas Cox, Project Manager, Fuel Cycle Licensing Branch, Division of Fuel Cycle and Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 415–8107, e-mail *thc@nrc.gov.*

Dated at Rockville, Maryland this 24th day of January, 2001.

For the Nuclear Regulatory Commission.

Philip Ting,

Chief, Fuel Cycle Licensing Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 01–2745 Filed 1–31–01; 8:45 am]

BILLING CODE 7590–01–U

NUCLEAR REGULATORY COMMISSION

Risk-Based Performance Indicators: Results of Phase-1 Development

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for comment and notice of two public meetings.

SUMMARY: The Nuclear Regulatory Commission is announcing the availability of the draft document entitled: ''Risk-Based Performance Indicators: Results of Phase-1 Development,'' dated January 2001 for review and comment by external stakeholders. Interested individuals may obtain a copy of this document from the person identified under the caption: **FOR FURTHER INFORMATION CONTACT.**

DATES: Submit comments by April 16, 2001. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

Two public meetings will be held on February 21, 2001 from 8:30 am to 12:30 pm, and April 24, 2001 from 8:30 am to 12:30 pm.

ADDRESSES: Submit comments to: Chief, Rules and Directives Branch, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Deliver comments to: 11545 Rockville Pike, Rockville, Maryland, between 7:30 am and 4:15 pm Federal workdays.

Two public meetings to be held at Two White Flint North, Room T–10A1 for the first meeting, and Two White Flint North Auditorium for the second meeting, 11545 Rockville Pike, Rockville, Maryland 20852.

The draft document and certain other documents related to this action, including comments received, may be examined in the NRC Public Document Room, 11555 Rockville Pike, Rockville, Maryland.

FOR FURTHER INFORMATION CONTACT: Hossein G. Hamzehee, Division of Risk Analysis and Applications, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Telephone: 301–415–6228, e-mail: hgh@nrc.gov

SUPPLEMENTARY INFORMATION: The Reactor Oversight Process (ROP) was recently revised to improve the NRC's regulatory oversight of licensee operation of commercial nuclear power plants. It is intended to better risk-inform agency actions and bring more objectivity to the regulatory process. The revised ROP is consistent with the goals of the Commission's PRA Policy Statement and the NRC's Strategic Plan (NUREG–1614), which include increased use of the PRA technology in ''* * * regulatory matters to the extent supported by the state-of-the-art in PRA methods and data and in a manner that complements the NRC's deterministic approach and supports the NRC's traditional defense-in-depth philosophy.'' The ROP is reflective of the NRC's efforts to better risk-inform its core processes.

SECY–99–007 and 99–007A described the ROP. The ROP was implemented at all plants, except DC Cook, in April 2000 following a six-month pilot program conducted in 1999. The results of this pilot program were described in SECY–00–0049. A fundamental aspect of the ROP is the use of both performance indicators and inspection findings to determine whether the objectives of the ROP's cornerstones of safety are being met on a plant-specific basis.

In addition to these changes at the NRC, the industry is using more performance-based approaches to enhance its operations, including gathering and analyzing both plant-specific and industry-wide data. Furthermore, technological advances such as the Internet and microcomputer use have resulted in improved capabilities to gather and share such data. Through such technological developments, both the industry and the NRC have expanded their capabilities to model and assess the risk-significance of plant operations.

In light of these evolving capabilities and the movement toward more risk-informed and performance-based oversight, the Risk-based Performance Indicators were developed to (1) address specific areas in the current ROP that were identified in SECY–00–0049 as possible enhancements and (2) potentially support any future development of performance indicators

using improved risk analysis tools. This report discusses the technical feasibility of using currently available risk models and data to enhance the NRC's ability to monitor plant-specific safety performance of reactors in a risk-informed and performance-based manner. This development activity is designed to fit into the ROP concept for indicators, thresholds, and performance monitoring while continuing to move the NRC's programs forward in accordance with the PRA Policy Statement and the goals of the Strategic Plan.

There are several key implementation issues summarized below that should be considered prior to any integration of the RBPIs with the ROP. These issues are further explained in the Phase-1 RBPI development report, which is attached to this document. The potential integration of the RBPIs into the ROP would follow the guidelines in IMC0608, ''Performance Indicator Program.'' This would likely include a pilot program prior to the full implementation of any of the RBPIs.

A white paper entitled ''Development of Risk-based Performance Indicators: Program Overview'' was issued for public comment in March 2000. This white paper described the concepts for the RBPI development. The development of the RBPI white paper was closely coordinated with the Office of Nuclear Reactor Regulation (NRR) and the Regions. On April 28, 2000, a public meeting with external stakeholders was held to discuss their comments on the overall concept and technical approach outlined in the RBPI development white paper. Attendees included representatives from the Nuclear Energy Institute (NEI), the Institute of Nuclear Power Operations (INPO), the Union of Concerned Scientists, and Public Citizen. The final version of the white paper was issued as part of SECY–00–0146.

The NRC staff is seeking external stakeholder comments on the draft Phase-1 report. Specifically, we are requesting comments regarding the technical adequacy of the proposed performance indicators, and the potential implementation issues. The white paper, ''Development of Risk-based Performance Indicators: Program Overview,'' and this report list the technical criteria for RBPI development. We are interested in comments regarding these key technical criteria as summarized below:

- The RBPIs are compatible with, and complementary to, the risk-informed inspection activities of the oversight process.
- The RBPIs cover all modes of plant operation.
- Within each mode, the RBPIs cover risk-important SSCs to the extent practical.
- To the extent practical, the RBPIs identify declining performance before performance becomes unacceptable, without incorrectly identifying normal variations as degradations (i.e., avoid false-positive indications and false-negative indications).
- The RBPIs are capable of implementation without excessive burdens to licensees or NRC in the areas of data collection and quantification.
- The RBPIs are amenable to establishment of plant-specific thresholds consistent with the ROP.

In addition, we are seeking comments on the key issues that affect the potential implementation of the results of the RBPI development in the ROP. These issues evolved out of both the technical aspects of RBPI development as well as programmatic feedback from the ROP implementation. Each is discussed briefly below.

Are any additional performance indicators needed to enhance the ROP? Interactions with stakeholders commenting on the White Paper indicated differing views on this subject. Industry representatives questioned whether NRC needed to have a broader coverage of risk measured in the ROP indicators, especially if it did not result in a corresponding reduction in the inspection program. Other external stakeholder comments favored more indicators as well as additional inspections. The ROP is in its first year of full implementation. The NRR staff will provide the Commission with its assessment of the process in June 2001. The RBPI development program is focused on demonstrating the technical feasibility of providing additional objective indicators that cover a broader spectrum of risk-significant plant performance.

Is the number of potential new indicators appropriate?/Which of the proposed indicators would be most beneficial? The RBPI Phase-1 development identified 21 potential indicators for PWRs and 16 potential indicators for BWRs. If all of these performance indicators were implemented, they could potentially replace 8 (3 initiating event and 5 mitigating system) of 18 existing indicators in whole or in part bringing the total number of indicators per plant to about 30. In addition to the issue of the appropriate risk scope of ROP indicators (noted above), it will be necessary to assess whether potentially expanding the total number of indicators to approximately 30 per plant is reasonable from a logistics/process point of view. For example, the criteria that result in plants entering various columns of the Action Matrix would have to be reconsidered. If deemed appropriate, future RBPI development will examine the feasibility of developing indicators at a higher level (systems) by combining results of lower level data and models. The program will also examine means to use risk insights to develop a shorter list at the component/train level.

Do the data sources for RBPIs exist and have sufficient quality for use in the ROP? A significant portion of the RBPIs require access to and use of data from the Equipment Performance and Information Exchange (EPIX) system. These data are voluntarily provided by industry in response to the Commission decision to forgo the Reliability Data Rule. Full industry participation, verification and validation of existing EPIX, and development of guidelines for consistent data reporting are important to the feasibility of many RBPIs as potential improvements to the ROP. In addition, certain data for shutdown and containment systems will need to be developed in order to have RBPIs in those areas. The issue of the regulatory mechanisms for certifying the accuracy of data used in RBPIs for the ROP will be dealt with through the ROP change process if a decision is made to proceed with potential implementation of some or all of the identified RBPIs.

Will SPAR Revision 3i models be available for setting plant-specific thresholds for all plants? Approximately 30 Standardized Plant Accident Risk (SPAR) Revision 3i models are currently available. Completion of all 70 SPAR Revision 3i models is scheduled for the end of calendar year 2002. As more models are made available for use in the RBPI development program, it will be possible to determine if plants can be grouped so that a few models can be used to set thresholds for all plants or individual models will be needed for each. The RBPI development program will continue to use the SPAR Revision 3i models as they are developed. External stakeholder comments on the White Paper indicated that peer review by licensees should be included in the development of these models. An additional implementation issue relates to whether licensees or NRC will calculate the thresholds and indicators as well as whether licensee models (meeting as yet to be developed NRC specifications) could be used instead of the SPAR models.

Will LERF models be available for setting thresholds for mitigating and containment systems? There are a limited number of large, early release frequency (LERF) models available to set thresholds for performance of systems that impact the integrity of the containment barrier. In addition, currently available data are inadequate for establishing performance measures for the containment systems. Also, for some systems under the mitigating systems cornerstone, the thresholds associated with changes in core damage frequency (CDF) due to performance degradations may not be limiting compared to changes in LERF. To assess that condition, LERF models that reflect the impact of potential CDF changes are needed. The current plan for developing LERF models over the next several years will support only limited capability for identifying RBPIs or setting plant-specific LERF thresholds.

The NRC has scheduled two public meetings on this matter. The purpose of the first public meeting is to brief external stakeholders on the results of Phase 1 of Risk-Based Performance Indicator development. The purpose of the second public meeting is to discuss external stakeholder comments on the results of Phase-1 RBPI development, and the technical feasibility of applying these concepts in the ROP.

Dated at Rockville, Maryland, this 25th day of January, 2001.

For the Nuclear Regulatory Commission.

Thomas L. King,

Director, Division of Risk Analysis and Applications, Office of Nuclear Regulatory Research.

[FR Doc. 01–2746 Filed 1–31–01; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF STATE

[Public Notice 3563]

Culturally Significant Objects Imported for Exhibition Determinations: ''Andreas Gursky''

AGENCY: United States Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236 of October 19, 1999, as amended, I hereby determine that the objects to be included in the exhibition ''Andreas Gursky,'' imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign lender. I also determine that the exhibition or display of the exhibit objects at the Museum of Modern Art, in New York, NY, from on or about February 28, 2001 to on or about May 15, 2001 and the Museum of Contemporary Art in Chicago, IL from on or about June 15, 2002 to on or about September 22, 2002, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Carol Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/619–6981). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: January 24, 2001.

Helena Kane Finn,

Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State.

[FR Doc. 01–2860 Filed 1–31–01; 8:45 am]

BILLING CODE 4710–08–U

DEPARTMENT OF STATE

[Public Notice Number 3542]

Meetings; United States International Telecommunication Advisory Committee (ITAC)—Telecommunication Standardization Sector (ITAC–T) National Committee and U.S. Study Groups A, B, and D and International Telecommunication Advisory Committee (ITAC)—Telecommunication Development Sector (ITAC–D)

The Department of State announces meetings of the U.S. International Telecommunication Advisory Committee—Telecommunication Standardization (ITAC–T) National Committee, and U.S. Study Groups A, B, and D. The purpose of the Committees is to advise the Department on policy and technical issues with respect to the International Telecommunication Union and international telecommunication standardization and development. Except where noted, meetings will be held at the Department of State, 2201 ''C'' Street, NW, Washington, DC. The ITAC–T National Committee will meet on February 12, and February 27, 2001, from 9:30 to noon. The agenda will be preparations for the ITU–T Telecommunication Standardization Advisory Group (TSAG) meeting starting on March 19, 2001. The ITAC–T will also meet on April 11 for a review of TSAG, and on July 11, September 20, October 24, and November 7, 2001, to prepare for TSAG of November 26, 2001.

The ITAC–T U.S. Study Group A will meet from 9:30 to noon on April 10, May 22, August 15, and October 25 to prepare for ITU–T Study Group 2 and 3 meetings.

The ITAC–T U.S. Study Group B will meet from 9:00 to 4:30 on April 6 and 27, and on May 1 to prepare for meetings of Study Groups 11, 13, and the Special Study Group. It will meet June 14 to prepare for Study Group 4, and on September 25 to prepare for Study Group 15.

The ITAC–T Study Group D will meet by email to prepare for Study Group 9. People who are not presently on the SGD reflector and who desire to participate should provide their email address to <*minardje@state.gov*> by February 5; they will be added to the SGD reflector. Members must post their contributions to the reflector by February 6 indicating whether they are to be USA or company contributions. Comments must be posted by February 9, and final versions of the contributions, accommodating the comments, posted by drafters February 14. If the Department of State disapproves any contribution, notice will be given on the reflector by February 14.

Study Group D will meet physically on May 10 to prepare for Study Group 16, on August 14 to prepare for Study Group 7, and on November 15 to prepare for an additional Study Group 9 meeting. These meetings will be from 9:30 until 4:30.

The ITAC–D will meet on February 6 from 2 to 4 in Room 1205 to prepare for the Telecommunication Development Sector Advisory Group (TDAG) meeting of February 22–23, 2001.

Members of the general public may attend these meetings. Directions to meeting locations and actual room assignments may be determined by calling the Secretariat at 202 647–0965/2592. For meetings held at the Department of State: entrance to the building is controlled; people intending to attend any of the ITAC meetings should send a fax to (202) 647–7407 not later than 24 hours before the meeting for preclearance. This fax should display the name of the meeting (ITAC–T, U. S. Study Group) and date of meeting, your name, social security number, date of birth, and

organizational affiliation. One of the following valid photo identifications will be required for admission: U.S. driver's license, passport, U.S. Government identification card. Enter the Department of State from the C Street Lobby; in view of escorting requirements, non-Government attendees should plan to arrive not less than 15 minutes before the meeting begins.

Attendees may join in the discussions, subject to the instructions of the Chair. Admission of members will be limited to seating available.

Dated: January 23, 2001.

Doreen McGirr,

Chairman, ITAC–D, U.S. Department of State.

[FR Doc. 01–2861 Filed 1–30–01; 3:39 pm]

BILLING CODE 4710–45–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and its implementing regulations, the Federal Railroad Administration (FRA) hereby announces that it is seeking renewal of the following currently approved information collection activities. Before submitting these information collection requirements for clearance by the Office of Management and Budget (OMB), FRA is soliciting public comment on specific aspects of the activities identified below.

DATES: Comments must be received no later than April 2, 2001.

ADDRESSES: Submit written comments on any or all of the following proposed activities by mail to either: Mr. Robert Brogan, Office of Safety, Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 17, Washington, DC 20590, or Ms. Dian Deal, Office of Information Technology and Productivity Improvement, RAD–20, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 35, Washington, DC 20590. Commenters requesting FRA to acknowledge receipt of their respective comments must include a self-addressed stamped postcard stating, ''Comments on OMB control number 2130–0545.'' Alternatively, comments may be transmitted via facsimile to (202) 493–6265 or (202) 493–6170, or E-mail to Mr. Brogan at robert.brogan@fra.dot.gov, or to Ms. Deal at dian.deal@fra.dot.gov. Please refer to the assigned OMB control number in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 17, Washington, DC 20590 (telephone: (202) 493–6292) or Dian Deal, Office of Information Technology and Productivity Improvement, RAD–20, Federal Railroad Administration, 1120 Vermont Ave., NW., Mail Stop 35, Washington, DC 20590 (telephone: (202) 493–6133). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104–13, § 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60-days notice to the public for comment on information collection activities before seeking approval for reinstatement or renewal by OMB. 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1), 1320.10(e)(1), 1320.12(a). Specifically, FRA invites interested respondents to comment on the following summary of proposed information collection activities regarding (i) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (ii) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (iii) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (iv) ways for FRA to minimize the burden of information collection activities on the public by automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses). *See* 44 U.S.C. 3506(c)(2)(A)(i)–(iv); 5 CFR 1320.8(d)(1)(i)–(iv). FRA believes that soliciting public comment will promote its efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by Federal regulations. In summary, FRA reasons that comments received will advance three objectives: (i) Reduce reporting burdens; (ii) ensure that it organizes information collection requirements in a ''user friendly'' format to improve the use of such information; and (iii) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

Below is a brief summary of currently approved information collection activities that FRA will submit for clearance by OMB as required under the PRA:

Title: Passenger Train Emergency Preparedness.

OMB Control Number: 2130–0545.

Abstract: The collection of information is due to the passenger train emergency preparedness regulations set forth in 49 CFR Parts 223 and 239 which require railroads to meet minimum Federal standards for the preparation, adoption, and implementation of emergency preparedness plans connected with the operation of passenger trains, including freight railroads hosting operations of rail passenger service. The regulations require luminescent or lighted emergency markings so that passengers and emergency responders can readily determine where the closest and most accessible exit routes are located and how the emergency exit mechanisms are operated. Windows and doors intended for emergency access by responders for extrication of passengers must be marked with retro-reflective material so that emergency responders—particularly in conditions of poor visibility—can easily distinguish them from the less accessible doors and windows. Records of the inspection, maintenance and repairs of emergency windows and door exits, as well as records of operational efficiency tests, will be used to ensure compliance with the regulations.

Affected Public: Businesses.

Respondent Universe: 18 railroads.

Frequency of Submission: On occasion.

Reporting Burden:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
223.9(d); 239.107—Doors/windows	18 railroads	10,475 decals	5 minutes	873	$25,317
Emergency Egress—Markings.	18 railroads	7,620 decals	4/5 minutes	614	17,806
Doors/Windows—Markings with Retro-reflective Material.					
239.107(b)—Records of Inspection, Maintenance, Repair.	18 railroads	3,600 tests/rcds	20 min./3 min.	690	20,060
239.101, 239.201—Filing of Emergency Preparedness Plan.	2 railroads	2 plans	158 hours	316	20,856
—Amendments to Emergency Plans	2 railroads	2 amendments	3.2 hours	6	228
239.101(ii)—Maintenance of Current Emergency Phone Numbers.	2 railroads	2 records	1 hour	2	76
—Subsequent Years	20 railroads	20 records	30 minutes	10	380
239.101(a)(3)—Joint Operations	4 railroad pairs	4 plans	16 hours	64	3,328
—Subsequent Years	1 railroad pair	1 plan	16 hours	16	832
239.101(a)(5)—Liaison with Emergency Responders.	2 railroads	2 plans	6 hours	12	456
—Subsequent Years	20 railroads	20 plans/1,200 copies.	30 min./5 min.	110	4,180
239.101(a)(7)(ii) Passenger Safety Information.	5/12 railroads	1,300 cards/5 progs./5 safety messages/12 progs./12 msgs.	5 min./16 hrs./48 hrs./8 hrs.	812	30,060
239.105—Debriefing and Critique	20 railroads	5 debrief sess.	27 hours	135	2,190
239.301—Operational Efficiency Tests	18 railroads	11,075 tests/rcds.	5 minutes	923	38,766

Total Responses: 35,362.

Estimated Total Annual Burden: 4,583.

Status: Extension of a Currently Approved Collection.

Pursuant to 44 U.S.C. 3507(a) and 5 CFR 1320.5(b), 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, D.C. on January 26, 2001.

Kathy A. Weiner,

Director, Office of Information Technology and Support Systems, Federal Railroad Administration.

[FR Doc. 01–2700 Filed 1–31–01; 8:45 am]

BILLING CODE 4910–06–U

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From Requirements

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroads have petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR Part 236 as detailed below.

[Docket No. FRA–2000–8502]

Applicant: Union Pacific Railroad Company, Mr. Phil Abaray, Chief Engineer—Signals, 1416 Dodge Street, Room 1000, Omaha, Nebraska 68179–1000.

Union Pacific Railroad Company seeks approval of the proposed modification of the automatic block signal system, on the single main track of the Salina Subdivision, consisting of the discontinuance and removal of signals 1650 and 1651 near West Abilene, Kansas, milepost 165.0, and the discontinuance and removal signals 1859 and 1860 near Salina, Kansas, milepost 186.0.

The reason given for the proposed changes is that the signals are no longer needed due to crew change location revisions, and improve signal spacing for braking distance.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and contain a concise statement of the interest of the party in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

All communications concerning this proceeding should be identified by the docket number and must be submitted to the Docket Clerk, DOT Central Docket Management Facility, Room PI–401, Washington, DC 20590–0001. Communications received within 45 days of the date of this notice will be considered by the FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9:00 a.m.–5:00 p.m.) at DOT Central Docket Management Facility, Room PI–401 (Plaza Level), 400 Seventh Street, SW., Washington, DC 20590–0001. All documents in the public docket are also available for inspection and copying on the internet at the docket facility's Web site at *http://dms.dot.gov.*

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

Issued in Washington, DC on January 24, 2001.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 01–2701 Filed 1–31–01; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From Requirements

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroads have petitioned the Federal Railroad Administration (FRA) seeking approval

for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR Part 236 as detailed below.

[Docket No. FRA–2001–8621]

Applicant: Union Pacific Railroad Company, Mr. Phil Abaray, Chief Engineer—Signals, 1416 Dodge Street, Room 1000, Omaha, Nebraska 68179–1000.

Union Pacific Railroad Company seeks approval of the proposed modification of the traffic control system, on the two main tracks, near Provo, Utah, milepost 701.3, on the Provo Subdivision, consisting of the discontinuance and removal of four controlled intermediate holding signals, 7013W, 7013E, 7014W, and 7014E.

The reason given for the proposed changes is that the signals are no longer needed due to changes in operating practices, and will eliminate blockage of nearby highway-rail grade crossings which create delays to public traffic and possible emergency vehicles, when trains are stopped at the holding signals.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and contain a concise statement of the interest of the party in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

All communications concerning this proceeding should be identified by the docket number and must be submitted to the Docket Clerk, DOT Central Docket Management Facility, Room PI–401, Washington, DC 20590–0001. Communications received within 45 days of the date of this notice will be considered by the FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9:00 a.m.–5:00 p.m.) at DOT Central Docket Management Facility, Room PI–401 (Plaza Level), 400 Seventh Street, SW., Washington, D.C. 20590–0001. All documents in the public docket are also available for inspection and copying on the internet at the docket facility's Web site at *http://dms.dot.gov.*

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

Issued in Washington, DC on January 24, 2001.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 01–2702 Filed 1–31–01; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Application for Approval of Discontinuance or Modification of a Railroad Signal System or Relief From Requirements

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroads have petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal system or relief from the requirements of 49 CFR Part 236 as detailed below.

[Docket No. FRA–2001–8622]

Applicant: Wheeling & Lake Erie Railway Company, Mr. Dan Reinsel, Signal & Communications Supervisor, 100 East First Street, Brewster, Ohio 44613.

The Wheeling & Lake Erie Railway Company seeks approval of the proposed discontinuance and removal of the traffic control system on the single main track and sidings between Spencer, Ohio, milepost 92.0 and Bellevue, Ohio, milepost 54.5, on the Hartland Subdivision, a distance of approximately 37.5 miles, and operate by Track Warrant Control. The proposed changes include retention of the approach signals and interlocking circuits, for the CSX rail crossing at grade, near Wellington, Ohio; conversion of three existing sidings, that have power-operated switches, to radio control; and installation of DC coded track circuits, between mileposts 63.8 and 68.7 at Norwalk, Ohio, as a broken rail detection system.

The reason given for the proposed changes is to retire facilities no longer required for present operations and provide uniformity of our operating system throughout the property. Also, due to the age of the system, inclement weather results in a failure of the code line and prevents proper communication with the control points.

Any interested party desiring to protest the granting of an application shall set forth specifically the grounds upon which the protest is made, and contain a concise statement of the interest of the party in the proceeding. Additionally, one copy of the protest shall be furnished to the applicant at the address listed above.

All communications concerning this proceeding should be identified by the docket number and must be submitted to the Docket Clerk, DOT Central Docket Management Facility, Room PI–401, Washington, D.C. 20590–0001. Communications received within 45 days of the date of this notice will be considered by the FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9:00 a.m.–5:00 p.m.) at DOT Central Docket Management Facility, Room PI–401 (Plaza Level), 400 Seventh Street, S.W., Washington, D.C. 20590–0001. All documents in the public docket are also available for inspection and copying on the internet at the docket facility's Web site at *http://dms.dot.gov.*

FRA expects to be able to determine these matters without an oral hearing. However, if a specific request for an oral hearing is accompanied by a showing that the party is unable to adequately present his or her position by written statements, an application may be set for public hearing.

Issued in Washington, D.C. on January 24, 2001.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 01–2703 Filed 1–31–01; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

January 24, 2001.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before March 5, 2001 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1458.

Regulation Project Number: REG–209835–86 Final (formerly INTL–933–86 Final).

Type of Review: Extension.

Title: Computation of Foreign Taxes Deemed Paid Under Section 902 Pursuant to a Pooling Mechanism for Undistributed Earnings and Foreign Taxes.

Description: These regulations provide rules for computing foreign taxes deemed paid under section 902. The regulations affect foreign corporations and their U.S. corporate shareholders.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 1.

Estimated Burden Hours Per Respondent: 1 hour.

Frequency of Response: Annually.

Estimated Total Reporting Burden: 1 hour.

Clearance Officer: Garrick Shear, Internal Revenue Service, Room 5244, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Alexander T. Hunt (202) 395–7860, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 01–2717 Filed 1–31–01; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Customs Service

[T.D. 01–08]

Customs Broker License Revocations

AGENCY: U.S. Customs Service, Department of the Treasury.

I, as Assistant Commissioner, Office of Field Operations, pursuant to Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), and the Customs Regulations (19 CFR 111), hereby revoke the following Customs broker's licenses based on the authority as annotated:

Name	Port	License No.	Authority
Overseas Transport Company	Norfolk	14738	19 CFR 111.45(a)
World Freight Services, Inc.	Houston	16735	19 CFR 111.45(a)

Dated: January 26, 2001.

Bonni G. Tischler,

Assistant Commissioner, Office of Field Operations.

[FR Doc. 01–2704 Filed 1–31–01; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF THE TREASURY

Customs Service

[T.D. 01–07]

Customs Broker License Cancellations

AGENCY: U.S. Customs Service, Department of the Treasury I, as Assistant Commissioner, Office of Field Operations, pursuant to Section 641 of the Tariff Act of 1930, as amended (19 U.S.C. 1641), and the Customs Regulations (19 CFR 111), hereby cancel the following Customs broker's licenses without prejudice based on the authority as annotated:

Name	Port	License No.	Authority
SDV Logistics (Texas), Inc.	Houston	12876	19 CFR 111.51(a)
Brinkley and Associates, Inc.	Los Angeles	11152	19 CFR 111.51(a)
Lynx International, Inc.	Minneapolis	14829	19 CFR 111.51(a)
KCC Transport Systems, Inc.	Chicago	16441	19 CFR 111.51(a)

Dated: January 26, 2001.

Bonni G. Tischler,

Assistant Commissioner, Office of Field Operations.

[FR Doc. 01–2705 Filed 1–31–01; 8:45 am]

BILLING CODE 6820–02–P

DEPARTMENT OF THE TREASURY

Customs Service

[T.D. 01–13]

Bonds; Approval To Use Authorized Facsimile Signatures and Seals

The use of facsimile signatures and seals on Customs bonds by the following corporate surety has been approved effective this date: Granite State Insurance Company. Authorized facsimile signatures on file for: Glenn A. Stebbings, Attorney-in-fact; DeAnn M. Dowell, Attorney-in-fact.

The corporate surety has provided the Customs Service with copies of the signatures to be used, a copy of the corporate seal, and a certified copy of the corporate resolution agreeing to be bound by the facsimile signatures and seals. This approval is without prejudice to the surety's right to affix signatures and seals manually.

Dated: January 26, 2001.

Larry L. Burton,

Chief, Entry Procedures and Carriers Branch.

[FR Doc. 01–2706 Filed 1–31–01; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF THE TREASURY

Customs Service

[T.D. 01–12]

Bonds; Approval To Use Authorized Facsimile Signatures and Seals

The use of facsimile signatures and seals on Customs bonds by the following corporate surety has been approved effective this date: National Union Fire Insurance Company. Authorized facsimile signature on file for: Glenn A. Stebbings, Attorney-in-fact; DeAnn M. Dowell, Attorney-in-fact.

The corporate surety has provided the Customs Service with copies of the signatures to be used, a copy of the corporate seal, and a certified copy of the corporate resolution agreeing to be bound by the facsimile signatures and seals. This approval is without prejudice to the surety's right to affix signatures and seals manually.

Dated: January 26, 2001.

Larry L. Burton,

Chief, Entry Procedures and Carriers Branch.

[FR Doc. 01–2707 Filed 1–31–01; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF THE TREASURY

Customs Service

[T.D. 01–11]

Bonds; Approval To Use Authorized Facsimile Signatures and Seals

The use of facsimile signatures and seals on Customs bonds by the following corporate surety has been approved effective this date: American Home Assurance Company. Authorized facsimile signature on file for: Glenn A. Stebbings, Attorney-in-fact, DeAnn M. Dowell, Attorney-in-fact.

The corporate surety has provided the Customs Service with copies of the signatures to be used, a copy of the corporate seal, and a certified copy of the corporate resolution agreeing to be bound by the facsimile signatures and seals. This approval is without prejudice to the surety's right to affix signatures and seals manually.

Dated: January 26, 2001.

Larry L. Burton,

Chief, Entry Procedures and Carriers Branch.

[FR Doc. 01–2708 Filed 1–31–01; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF THE TREASURY

Customs Service

[T.D. 01–10]

Bonds; Approval To Use Authorized Facsimile Signatures and Seals

The use of facsimile signatures and seals on Customs bonds by the following corporate surety has been approved effective this date: Insurance Company of the State of Pennsylvania. Authorized facsimile signature on file for: Glenn A. Stebbings, Attorney-in-fact; DeAnn M. Dowell, Attorney-in-fact.

The corporate surety has provided the Customs Service with copies of the signatures to be used, a copy of the corporate seal, and a certified copy of the corporate resolution agreeing to be bound by the facsimile signatures and seals. This approval is without prejudice to the surety's right to affix signatures and seals manually.

Dated: January 26, 2001.

Larry L. Burton,

Chief, Entry Procedures and Carriers Branch.

[FR Doc. 01–2709 Filed 1–31–01; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF THE TREASURY

Customs Service

[T.D. 01–09]

Bonds; Approval To Use Authorized Facsimile Signatures and Seals

The use of facsimile signatures and seals on Customs bonds by the following corporate surety has been approved effective this date: Highlands Insurance Company. Authorized facsimile signature on file for: Glenn A. Stebbings, Attorney-in-fact.

The corporate surety has provided the Customs Service with copies of the signatures to be used, a copy of the corporate seal, and a certified copy of the corporate resolution agreeing to be bound by the facsimile signatures and seals. This approval is without prejudice to the surety's right to affix signatures and seals manually.

Dated: January 26, 2001.

Larry L. Burton,

Chief, Entry Procedures and Carriers Branch.

[FR Doc. 01–2710 Filed 1–31–01; 8:45 am]

BILLING CODE 4820–02–P

Corrections

Federal Register

Vol. 66, No. 22

Thursday, February 1, 2001

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

[Docket No. RP01-206-000]

Texas Eastern Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

Correction

In notice document 01–1141 appearing on page 3576 in the issue of Tuesday, January 16, 2001, the docket number should read as set forth above.

[FR Doc. C1–1141 Filed 1–31–01; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 31, 35, 36, 40, 301, 601

[REG-107176-00

RIN 1545-AY10

Removal of Federal Reserve Banks as Federal Depositaries

Correction

In proposed rule document 00–32568 beginning on page 81453 in the issue of Tuesday, December 26, 2000, make the following correction:

§1.6302–2 [Corrected]

On page 81454, in the table, under the heading ''Add'', remove the eighth entry, ''203''.

[FR Doc. C0–32568 Filed 1–31–01; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Thursday,
February 1, 2001

Part II

Department of the Treasury

Office of the Comptroller of the Currency
Office of Thrift Supervision

Federal Reserve System

Federal Deposit Insurance Corporation

12 CFR Part 30, et al.
Interagency Guidelines Establishing Standards for Safeguarding Customer Information and Rescission of Year 2000 Standards for Safety and Soundness; Final Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 30

[Docket No. 00–35]

RIN 1557–AB84

FEDERAL RESERVE SYSTEM

12 CFR Parts 208, 211, 225, and 263

[Docket No. R–1073]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 308 and 364

RIN 3064–AC39

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 568 and 570

[Docket No. 2000–112]

RIN 1550–AB36

Interagency Guidelines Establishing Standards for Safeguarding Customer Information and Rescission of Year 2000 Standards for Safety and Soundness

AGENCIES: The Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); and Office of Thrift Supervision (OTS), Treasury.

ACTION: Joint final rule.

SUMMARY: The Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of Thrift Supervision (collectively, the Agencies) are publishing final Guidelines establishing standards for safeguarding customer information that implement sections 501 and 505(b) of the Gramm-Leach-Bliley Act (the G–L–B Act or Act).

Section 501 of the G-L-B Act requires the Agencies to establish appropriate standards for the financial institutions subject to their respective jurisdictions relating to administrative, technical, and physical safeguards for customer records and information. As described in the Act, these safeguards are to: insure the security and confidentiality of customer records and information; protect against any anticipated threats or hazards to the security or integrity of such records; and protect against unauthorized access to or use of such records or information that could result in substantial harm or inconvenience to any customer. The Agencies are to implement these standards in the same manner, to the extent practicable, as standards prescribed pursuant to section 39(a) of the Federal Deposit Insurance Act (FDI Act). These final Guidelines implement the requirements described above.

The Agencies previously issued guidelines establishing Year 2000 safety and soundness standards for insured depository institutions pursuant to section 39 of the FDI Act. Since the events for which these guidelines were issued have passed, the Agencies have concluded that the guidelines are no longer necessary and are rescinding these guidelines.

EFFECTIVE DATE: The joint final rule is effective July 1, 2001.

Applicability date: The Year 2000 Standards for Safety and Soundness are no longer applicable as of March 5, 2001.

FOR FURTHER INFORMATION CONTACT:

OCC

John Carlson, Deputy Director for Bank Technology, (202) 874–5013; or Deborah Katz, Senior Attorney, Legislative and Regulatory Activities Division, (202) 874–5090.

Board

Heidi Richards, Assistant Director, Division of Banking Supervision and Regulation, (202) 452–2598; Stephanie Martin, Managing Senior Counsel, Legal Division, (202) 452–3198; or Thomas E. Scanlon, Senior Attorney, Legal Division, (202) 452–3594. For the hearing impaired only, contact Janice Simms, Telecommunication Device for the Deaf (TDD) (202) 452–3544, Board of Governors of the Federal Reserve System, 20th and C Streets, NW, Washington, DC 20551.

FDIC

Thomas J. Tuzinski, Review Examiner, Division of Supervision, (202) 898–6748; Jeffrey M. Kopchik, Senior Policy Analyst, Division of Supervision, (202) 898–3872; or Robert A. Patrick, Counsel, Legal Division, (202) 898–3757.

OTS

Jennifer Dickerson, Manager, Information Technology, Examination Policy, (202) 906–5631; or Christine Harrington, Counsel, Banking and Finance, Regulations and Legislation Division, (202) 906–7957.

SUPPLEMENTARY INFORMATION: The contents of this preamble are listed in the following outline:

I. Background
II. Overview of Comments Received
III. Section-by-Section Analysis
IV. Regulatory Analysis
  A. Paperwork Reduction Act
  B. Regulatory Flexibility Act
  C. Executive Order 12866
  D. Unfunded Mandates Act of 1995

I. Background

On November 12, 1999, President Clinton signed the G–L–B Act (Pub. L. 106–102) into law. Section 501, titled ''Protection of Nonpublic Personal Information'', requires the Agencies, the National Credit Union Administration, the Securities and Exchange Commission, and the Federal Trade Commission to establish appropriate standards for the financial institutions subject to their respective jurisdictions relating to the administrative, technical, and physical safeguards for customer records and information. As stated in section 501, these safeguards are to: (1) Insure the security and confidentiality of customer records and information; (2) protect against any anticipated threats or hazards to the security or integrity of such records; and (3) protect against unauthorized access to or use of such records or information that would result in substantial harm or inconvenience to any customer.

Section 505(b) of the G–L–B Act provides that these standards are to be implemented by the Agencies in the same manner, to the extent practicable, as standards prescribed pursuant to section 39(a) of the FDI Act.[1] Section 39(a) of the FDI Act authorizes the Agencies to establish operational and managerial standards for insured depository institutions relative to, among other things, internal controls, information systems, and internal audit systems, as well as such other operational and managerial standards as the Agencies determine to be appropriate.[2]

[1] Section 39 applies only to insure depository institutions, including insured branches of foreign banks. The Guidelines, however, will also apply to certain uninsured institutions, such as bank holding companies, certain nonbank subsidiaries of bank holding companies and insured depository institutions, and uninsured branches and agencies of foreign banks. *See* sections 501 and 505(b) of the G–L–B Act.

[2] OTS has placed its information security guidelines in appendix B to 12 CFR part 570, with the provisions implementing section 39 of the FDI Act. At the same time, OTS has adopted a regulatory requirement that the institutions OTS regulates comply with the proposed Guidelines. Because information security guidelines are similar to physical security procedures, OTS has included a provision in 12 CFR part 568, which covers primarily physical security procedures, requiring

II. Overview of Comments Received

On June 26, 2000, the Agencies published for comment the proposed Interagency Guidelines Establishing Standards for Safeguarding Customer Information and Rescission of Year 2000 Standards for Safety and Soundness in the **Federal Register** (65 FR 39472). The public comment period closed August 25, 2000. The Agencies collectively received a total of 206 comments in response to the proposal, although many commenters sent copies of the same letter to each of the Agencies. Those combined comments included 49 from banks, 7 from savings associations, 60 from financial institution holding companies; 50 from financial institution trade associations; 33 from other business entities; and four from state regulators. The Federal Reserve also received comments from three Federal Reserve Banks.

The Agencies invited comment on all aspects of the proposed Guidelines, including whether the rules should be issued as guidelines or as regulations. Commenters overwhelmingly supported the adoption of guidelines, with many commenters offering suggestions for ways to improve the proposed Guidelines as discussed below. Many commenters cited the benefits of flexibility and the drawbacks of prescriptive requirements that could become rapidly outdated as a result of changes in technology.

The Agencies also requested comments on the impact of the proposal on community banks, recognizing that community banks operate with more limited resources than larger institutions and may present a different risk profile. In general, community banks urged the Agencies to issue guidelines that are not prescriptive, that do not require detailed policies or reporting by banks that share little or no information outside the bank, and that provide flexibility in the design of an information security program. Some community banks indicated that the Guidelines are unnecessary because they already have information security programs in place. Others requested clarification of the impact of the Guidelines on banks that do not share any information in the absence of a customer's consent.

In light of the comments received, the Agencies have decided to adopt the Guidelines, with several changes as discussed below to respond to the commenters' suggestions. The respective texts of the Agencies' Guidelines are substantively identical. In directing the Agencies to issue standards for the protection of customer records and information, Congress provided that the standards apply to all financial institutions, regardless of the extent to which they may disclose information to affiliated or nonaffiliated third parties, electronically transfer data with customers or third parties, or record data electronically. Because the requirements of the Act apply to a broad range of financial institutions, the Agencies believe that the Guidelines must establish appropriate standards that allow each institution the discretion to design an information security program that suits its particular size and complexity and the nature and scope of its activities. In many instances, financial institutions already will have information security programs that are consistent with these Guidelines, because key components of the Guidelines were derived from security-related supervisory guidance previously issued by the Agencies and the Federal Financial Institutions Examination Council (FFIEC). In such situations, little or no modification to an institution's program will be required.

Below is a section-by-section analysis of the final Guidelines.

III. Section-by-Section Analysis

The discussion that follows applies to each Agency's Guidelines.

I. Introduction

Paragraph I. of the proposal set forth the general purpose of the Guidelines, which is to provide guidance to each financial institution in establishing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information. This paragraph also set forth the statutory authority for the Guidelines, including section 39(a) of the FDI Act (12 U.S.C. 1831p–1) and sections 501 and 505(b) of the G–L–B Act (15 U.S.C. 6801 and 6805(b)). The Agencies received no comments on this paragraph, and have adopted it as proposed.

I.A. Scope

Paragraph I.A. of the proposal described the scope of the Guidelines. Each Agency defined specifically those entities within its particular scope of coverage in this paragraph of the Guidelines.

The Agencies received no comments on the issue of which entities are covered by the Guidelines, and have adopted paragraph I.A. as proposed.

I.B. Preservation of Existing Authority

Paragraph I.B. of the proposal made clear that in issuing these Guidelines none of the Agencies is, in any way, limiting its authority to address any unsafe or unsound practice, violation of law, unsafe or unsound condition, or other practice, including any condition or practice related to safeguarding customer information. As noted in the preamble to the proposal, any action taken by any Agency under section 39(a) of the FDI Act and these Guidelines may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the Agency. The Agencies received no comments on this paragraph, and have adopted paragraph I.B. as proposed.

I.C.1. Definitions

Paragraph I.C. set forth the definitions of various terms for purposes of the Guidelines.[3] It also stated that terms used in the Guidelines have the same meanings as set forth in sections 3 and 39 of the FDI Act (12 U.S.C. 1813 and 1831p–1).

The Agencies received several comments on the proposed definitions, and have made certain changes as discussed below. The Agencies also have reordered proposed paragraph I.C. so that the statement concerning the reliance on sections 3 and 39(a) of the FDI Act is now in paragraph I.C.1., with the definitions appearing in paragraphs I.C.2.a.-e. The defined terms have been placed in alphabetical order in the final Guidelines.

I.C.2.a. Board of Directors

The proposal defined ''board of directors'' to mean, in the case of a branch or agency of a foreign bank, the managing official in charge of the branch or agency.[4] The Agencies received no comments on this proposed definition, and have adopted it without change.

I.C.2.b. Customer

The proposal defined ''customer'' in the same way as that term is defined in section __.3(h) of the Agencies' rule captioned ''Privacy of Consumer Financial Information'' (Privacy Rule).[5]

compliance with the Guidelines in appendix B to part 570.

[3] In addition to the definitions discussed below, the Board's Guidelines in 12 CFR parts 208 and 225 contain a definition of ''subsidiary'', which described the state member bank and bank holding company subsidiaries that are subject to the Guidelines.

[4] The OTS version of the Guidelines does not include this definition because OTS does not regulate foreign institutions. Paragraph I of the OTS Guidelines has been renumbered accordingly.

[6] *See* 65 FR 35162 (June 1, 2000). Citations to the interagency Privacy Rule in this preamble are to

Continued

The Agencies proposed to use this definition in the Guidelines because section 501(b) refers to safeguarding the security and confidentiality of ''customer'' information. Given that Congress used the same term for both the 501(b) standards and for the sections concerning financial privacy, the Agencies have concluded that it is appropriate to use the same definition in the Guidelines that was adopted in the Privacy Rule.

Under the Privacy Rule, a customer is a consumer who has established a continuing relationship with an institution under which the institution provides one or more financial products or services to the consumer to be used primarily for personal, family or household purposes. ''Customer'' does not include a business, nor does it include a consumer who has not established an ongoing relationship with a financial institution (*e.g.,* an individual who merely uses an institution's ATM or applies for a loan). *See* sections__.3(h) and (i) of the Privacy Rule. The Agencies solicited comment on whether the definition of ''customer'' should be broadened to provide a common information security program for all types of records under the control of a financial institution.

The Agencies received many comments on this definition, almost all of which agreed with the proposed definition. Although a few commenters indicated they would apply the same security program to both business and consumer records, the vast majority of commenters supported the use of the same definition of ''customer'' in the Guidelines as is used in the Privacy Rule. They observed that the use of the term ''customer'' in section 501 of the G–L–B Act, when read in the context of the definitions of ''consumer'' and ''customer relationship'' in section 509, reflects the Congressional intent to distinguish between certain kinds of consumers for the information security standards and the other privacy provisions established under subtitle A of Title V.

The Agencies have concluded that the definition of ''customer'' used in the Guidelines should be consistent with the definition established in section__.3(h) of the Privacy Rule. The Agencies believe, therefore, that the most reasonable interpretation of the applicable provisions of subtitle A of Title V of the Act is that a financial institution is obligated to protect the security and confidentiality of the nonpublic personal information of its consumers with whom it has a customer relationship. As a practical manner, a financial institution may also design or implement its information security program in a manner that encompasses the records and information of its other consumers and its business clients.[6]

I.C.2.c. Customer Information

The proposal defined ''customer information'' as any records containing nonpublic personal information, as defined in section__.3(n) of the Privacy Rule, about a customer. This included records, data, files, or other information in paper, electronic, or other form that are maintained by any service provider on behalf of an institution. Although section 501(b) of the G–L–B Act refers to the protection of both customer ''records'' and ''information'', for the sake of simplicity, the proposed Guidelines used the term ''customer information'' to encompass both information and records.

The Agencies received several comments on this definition. The commenters suggested that the proposed definition was too broad because it included files ''containing'' nonpublic personal information. The Agencies believe, however, that a financial institution's security program must apply to files that contain nonpublic personal information in order to adequately protect the customer's information. In deciding what level of protection is appropriate, a financial institution may consider the fact that a given file contains very little nonpublic personal information, but that fact would not render the file entirely beyond the scope of the Guidelines. Accordingly, the Agencies have adopted a definition of ''customer record'' that is substantively the same as the proposed definition. The Agencies have, however, deleted the reference to ''data, files, or other information'' from the final Guidelines, since each is included in the term ''records'' and also is covered by the reference to ''paper, electronic, or other form''.

I.C.2.d. Customer Information System

The proposal defined ''customer information system'' to be electronic or physical methods used to access, collect, store, use, transmit, or protect customer information. The Agencies received a few comments on this definition, mostly from commenters who stated that it is too broad. The Agencies believe that the definition needs to be sufficiently broad to protect all customer information, wherever the information is located within a financial institution and however it is used. Nevertheless, the broad scope of the definition of ''customer information system'' should not result in an undue burden because, in other important respects, the Guidelines allow a high degree of flexibility for each institution to design a security program that suits its circumstances.

For these reasons, the Agencies have adopted the definition of ''customer information system'' largely as proposed. However, the phrase ''electronic or physical'' in the proposal has been deleted because each is included in the term ''any methods''. The Agencies also have added a specific reference to records disposal in the definition of ''customer information system.'' This is consistent with the proposal's inclusion of access controls in the list of items a financial institution is to consider when establishing security policies and procedures (*see* discussion of paragraph III.C.1.a., below), given that inadequate disposal of records may result in identity theft or other misuse of customer information. Under the final Guidelines, a financial institution's responsibility to safeguard customer information continues through the disposal process.

I.C.2.e. Service Provider

The proposal defined a ''service provider'' as any person or entity that maintains or processes customer information for a financial institution, or is otherwise granted access to customer information through its provision of services to an institution. One commenter urged the Agencies to modify this definition so that it would not include a financial institution's attorneys, accountants, and appraisers. Others suggested deleting the phrase ''or

sections only, leaving blank the citations to the part numbers used by each agency.

[6] The Agencies recognize that ''customer'' is defined more broadly under Subtitle B of Title V of the Act, which, in general, makes it unlawful for any person to obtain or attempt to obtain customer information of a financial institution by making false, fictitious, or fraudulent statements. For the purpose of that subtitle, the term ''customer'' means ''any person (or authorized representative of a person) to whom the financial institution provides a product or service, including that of acting as a fiduciary.'' (*See* section 527(1) of the Act.) In light of the statutory mandate to ''prescribe such revisions to such regulations and guidelines as may be necessary to ensure that such financial institutions have policies, procedures, and controls in place to prevent the unauthorized disclosure of customer financial information'' (section 525), the Agencies considered modifying these Guidelines to cover other customers, namely, business entities and individuals who obtain financial products and services for purposes other than personal, family, or household purposes. The Agencies have concluded, however, that defining ''customer'' to accommodate the range of objectives set forth in Title V of the Act is unnecessary. Instead, the Agencies have included a new paragraph III.C.1.a, described below, and plan to issue guidance and other revisions to the applicable regulations, as may be necessary, to satisfy the requirements of section 525 of the Act.

is otherwise granted access to customer information through its provision of services to an institution''.

The Agencies believe that the Act requires each financial institution to adopt a comprehensive information security program that is designed to protect against unauthorized access to or use of customers' nonpublic personal information. Disclosing information to a person or entity that provides services to a financial institution creates additional risks to the security and confidentiality of the information disclosed. In order to protect against these risks, a financial institution must take appropriate steps to protect information that it provides to a service provider, regardless of who the service provider is or how the service provider obtains access. The fact that an entity obtains access to customer information through, for instance, providing professional services does not obviate the need for the financial institution to take appropriate steps to protect the information. Accordingly, the Agencies have determined that, in general, the term ''service provider'' should be broadly defined to encompass a variety of individuals or companies that provide services to the institution.

This does not mean, however, that a financial institution's methods for overseeing its service provider arrangements will be the same for every provider. As explained in the discussion of paragraph III.D., a financial institution's oversight responsibilities will be shaped by the institution's analysis of the risks posed by a given service provider. If a service provider is subject to a code of conduct that imposes a duty to protect customer information consistent with the objectives of these Guidelines, a financial institution may take that duty into account when deciding what level of oversight it should provide.

Moreover, a financial institution will be responsible under the final Guidelines for overseeing its service provider arrangements only when the service is provided directly to the financial institution. The Agencies clarified this point by amending the definition of ''service provider'' in the final Guidelines to state that it applies only to a person or entity that maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to the financial institution. Thus, for instance, a payment intermediary involved in the collection of a check but that has no correspondent relationship with a financial institution would not be considered a service provider of that financial institution under this rule. By contrast, a financial institution's correspondent bank would be considered its service provider. Nevertheless, the financial institution may take into account the fact that the correspondent bank is itself a financial institution that is subject to security standards under section 501(b) when it determines the appropriate level of oversight for that service provider.[7]

In situations where a service provider hires a subservicer,[8] the subservicer would not be a ''service provider'' under the final Guidelines. The Agencies recognize that it would be inappropriate to impose obligations on a financial institution to select and monitor subservicers in situations where the financial institution has no contractual relationship with that person or entity. When conducting due diligence in selecting its service providers (*see* discussion of paragraph III.D., below), however, a financial institution must determine that the service provider has adequate controls to ensure that the subservicer will protect the customer information in a way that meets the objectives of these Guidelines.

II. Standards for Safeguarding Customer Information

II.A. Information Security Program

The proposed Guidelines described the Agencies' expectations for the creation, implementation, and maintenance of a comprehensive information security program. As noted in the proposal, this program must include administrative, technical, and physical safeguards appropriate to the size and complexity of the institution and the nature and scope of its activities.

Several commenters representing large and complex organizations were concerned that the term ''comprehensive information security program'' required a single and uniform document that must apply to all component parts of the organization. In response, the Agencies note that a program that includes administrative, technical, and physical safeguards will, in many instances, be composed of more than one document. Moreover, use of this term does not require that all parts of an organization implement a uniform program. However, the Agencies will expect an institution to coordinate all the elements of its information security program. Where the elements of the program are dispersed throughout the institution, management should be aware of these elements and their locations. If they are not maintained on a consolidated basis, management should have an ability to retrieve the current documents from those responsible for the overall coordination and ongoing evaluation of the program.

The Board received comment on its proposal to revise the appendix to Regulation Y regarding the provision that would require a bank holding company to ensure that each of its subsidiaries is subject to a comprehensive information security program.[9] This comment urged the Board to eliminate that provision and argued, in part, that the requirement assumes that a bank holding company has the power to impose such controls upon its subsidiary companies. These commenters recommended, instead, that the standards should be limited to customer information in the possession or control of the bank holding company.

Under the Bank Holding Company Act of 1956 and the Board's Regulation Y, a subsidiary is presumed to be controlled directly or indirectly by the holding company. 12 U.S.C. 1841(d); 12 CFR 225.2(o). Moreover, the Board believes that a bank holding company is ultimately responsible for ensuring that its subsidiaries comply with the standards set forth under these Guidelines. The Board recognizes, however, that a bank holding company may satisfy its obligations under section 501 of the GLB Act through a variety of measures, such as by including a subsidiary within the scope of its information security program or by causing the subsidiary to implement a separate information security program in accordance with these Guidelines.

II.B. Objectives

Paragraph II.B. of the proposed Guidelines described the objectives that each financial institution's information security program should be designed to achieve. These objectives tracked the objectives as stated in section 501(b)(1)–(3), adding only that the security

[7] Similarly, in the case of a service provider that is not subject to these Guidelines but is subject to standards adopted by its primary regulator under section 501(b) of the G–L–B Act, a financial institution may take that fact into consideration when deciding what level of oversight is appropriate for that service provider.

[8] The term ''subservicer'' means any person who has access to an institution's customer information through its provision of services to the service provider and is not limited to mortgage subservicers.

[9] The appendix provided that the proposed Guidelines would be applicable to customer information maintained by or on behalf of bank holding companies and their nonbank subsidiaries or affiliates (except brokers, dealers, persons providing insurance, investment companies, and investment advisors) for which the Board has supervisory authority. *See* 65 FR 39484 (June 26, 2000).

program is to protect against unauthorized access that could risk the safety and soundness of the institution. The Agencies requested comment on whether there are additional or alternative objectives that should be included in the Guidelines.

The Agencies received several comments on this proposed paragraph, most of which objected to language that, in the commenters' view, required compliance with objectives that were impossible to meet. Many commenters stated, for instance, that no information security program can *ensure* that there will be no problems with the security or confidentiality of customer information. Others criticized the objective that required protection against *any* anticipated threat or hazard. A few commenters questioned the objective of protecting against unauthorized access that could result in inconvenience to a customer, while others objected to the addition of the safety and soundness standard noted above.

The Agencies do not believe the statute mandates a standard of absolute liability for a financial institution that experiences a security breach. Thus, the Agencies have clarified these objectives by stating that each security program is to be *designed* to accomplish the objectives stated. With the one exception discussed below, the Agencies have otherwise left unchanged the statement of the objectives, given that these objectives are identical to those set out in the statute.

In response to comments that objected to the addition of the safety and soundness standard, the Agencies have deleted that reference in order to make the statement of objectives identical to the objectives identified in the statute. The Agencies believe that risks to the safety and soundness of a financial institution may be addressed through other supervisory or regulatory means, making it unnecessary to expand the statement of objectives in this rulemaking.

Some commenters asked for clarification of a financial institution's responsibilities when a customer authorizes a third party to access that customer's information. For purposes of the Guidelines, access to or use of customer information is not ''unauthorized'' access if it is done with the customer's consent. When a customer gives consent to a third party to access or use that customer's information, such as by providing the third party with an account number, PIN, or password, the Guidelines do not require the financial institution to prevent such access or monitor the use or redisclosure of the customer's information by the third party. Finally, unauthorized access does not mean disclosure pursuant to one of the exceptions in the Privacy Rule.

III. Develop and Implement Information Security Program

III.A. Involve the Board of Directors

Paragraph III.A. of the proposal described the involvement of the board and management in the development and implementation of an information security program. As explained in the proposal, the board's responsibilities are to: (1) Approve the institution's written information security policy and program; and (2) oversee efforts to develop, implement, and maintain an effective information security program, including reviewing reports from management. The proposal also laid out management's responsibilities for developing, implementing, and maintaining the security program.

The Agencies received a number of comments regarding the requirement of board approval of the information security program. Some commenters stated that each financial institution should be allowed to decide for itself whether to obtain board approval of its program. Others suggested that approval by either a board committee or at the holding company level might be appropriate. Still others suggested modifying the Guidelines to require only that the board approve the initial information security program and delegate subsequent review and approval of the program to either a committee or an individual.

The Agencies believe that a financial institution's overall information security program is critical to the safety and soundness of the institution. Therefore, the final Guidelines continue to place responsibility on an institution's board to approve and exercise general oversight over the program. However, the Guidelines allow the entire board of a financial institution, or an appropriate committee of the board to approve the institution's written security program. In addition, the Guidelines permit the board to assign specific implementation responsibilities to a committee or an individual.

One commenter suggested that the Guidelines be revised to provide that if a holding company develops, approves, and oversees the information security program that applies to its bank and nonbank subsidiaries, there should be no separate requirement for each subsidiary to do the same thing, as long as those subsidiaries agree to abide by the holding company's security program. The Agencies agree that subsidiaries within a holding company can use the security program developed at the holding company level. However, if subsidiary institutions choose to use a security program developed at the holding company level, the board of directors or an appropriate committee at each subsidiary institution must conduct an independent review to ensure that the program is suitable and complies with the requirements prescribed by the subsidiary's primary regulator. *See* 12 U.S.C. 505. Once the subsidiary institution's board, or a committee thereof, has approved the security program, it must oversee the institution's efforts to implement and maintain an effective program.

The Agencies also received comments suggesting that use of the term ''oversee'' conveyed the notion that a board is expected to be involved in day-to-day monitoring of the development, implementation, and maintenance of an information security program. The Agencies' use of the term ''oversee'' is meant to convey a board's conventional supervisory responsibilities. Day-to-day monitoring of any aspect of an information security program is a management responsibility. The final Guidelines reflect this by providing that the board must oversee the institution's information security program but may assign specific responsibility for its implementation.

The Agencies invited comment on whether the Guidelines should require that the board designate a Corporate Information Security Officer or other responsible individual who would have the authority, subject to the board's approval, to develop and administer the institution's information security program. The Agencies received a number of comments suggesting that the Agencies should not require the creation of a new position for this purpose. Some financial institutions also stated that hiring one or more additional staff for this purpose would impose a significant burden. The Agencies believe that a financial institution will not need to create a new position with a specific title for this purpose, as long as the institution has adequate staff in light of the risks to its customer information. Regardless of whether new staff are added, the lines of authority and responsibility for development, implementation, and administration of a financial institution's information security program need to be well defined and clearly articulated.[10]

[10] The Agencies note that other regulations already require a financial institution to designate a security officer for different purposes. *See* 12 CFR 21.2; 12 CFR 208.61(b).

The proposal identified three responsibilities of management in the development of an information security program. They were to: (1) Evaluate the impact on a financial institution's security program of changing business arrangements and changes to customer information systems; (2) document compliance with these Guidelines; and (3) keep the board informed of the overall status of the institution's information security program. A few commenters objected to the Agencies assigning specific tasks to management. These commenters did not object to the tasks *per se,* but suggested that the Agencies allow an institution's board and management to decide who within the institution is to carry out the tasks.

The Agencies agree that a financial institution is in the best position to determine who should be assigned specific roles in implementing the institution's security program. Accordingly, the Agencies have deleted the separate provision assigning specific roles to management. The responsibilities that were contained in this provision are now included in other paragraphs of the Guidelines.

III.B. Assess Risk

Paragraph III.B. of the proposal described the risk assessment process to be used in the development of the information security program. Under the proposal, a financial institution was to identify and assess the risks to customer information. As part of that assessment, the institution was to determine the sensitivity of the information and the threats to the institution's systems. The institution also was to assess the sufficiency of its policies, procedures, systems, and other arrangements in place to control risk. Finally, the institution was to monitor, evaluate, and adjust its risk assessment in light of changes in areas identified in the proposal.

The Agencies received several comments on these provisions, most of which focused on the requirement that financial institutions do a sensitivity analysis. One commenter noted that ''customer information'' is defined to mean ''nonpublic personal information'' as defined in the G–L–B Act, and that the G–L–B Act provides the same level of coverage for all nonpublic personal information. The commenter stated that it is therefore unclear how the level of sensitivity would affect an institution's obligations with respect to the security of this information.

While the Agencies agree that all customer information requires protection, the Agencies believe that requiring all institutions to afford the same degree of protection to all customer information may be unnecessarily burdensome in many cases. Accordingly, the final Guidelines continue to state that institutions should take into consideration the sensitivity of customer information. Disclosure of certain information (such as account numbers or access codes) might be particularly harmful to customers if the disclosure is not authorized. Individuals who try to breach the institution's security systems may be likely to target this type of information. When such information is housed on systems that are accessible through public telecommunications networks, it may require more and different protections, such as encryption, than if it were located in a locked file drawer. To provide flexibility to respond to these different security needs in the way most appropriate, the Guidelines confer upon institutions the discretion to determine the levels of protection necessary for different categories of information. Institutions may treat all customer information the same, provided that the level of protection is adequate for all the information.

Other commenters suggested that the risk assessment requirement be tied to reasonably foreseeable risks. The Agencies agree that the security program should be focused on reasonably foreseeable risks and have amended the final Guidelines accordingly.

The final Guidelines make several other changes to this paragraph to improve the order of the Guidelines and to eliminate provisions that were redundant in light of responsibilities outlined elsewhere. For instance, while the proposal stated that the risk assessment function included the need to monitor for relevant changes to technology, sensitivity of customer information, and threats to information security and make adjustments as needed, that function has been incorporated into the discussion of managing and controlling risk in paragraphs III.C.3. and III.E.

Thus, under the Guidelines as adopted, a financial institution should identify the reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information or customer information systems. Next, the risk assessment should consider the potential damage that a compromise of customer information from an identified threat would have on the customer information, taking into consideration the sensitivity of the information to be protected in assessing the potential damage. Finally, a financial institution should conduct an assessment of the sufficiency of existing policies, procedures, customer information systems, and other arrangements intended to control the risks it has identified.

III.C. Manage and Control Risk

Paragraph III.C. describes the steps an institution should take to manage and the control risks identified in paragraph III.B.

Establish policies and procedures (III.C.1.). Paragraph III.C.1 of the proposal described the elements of a comprehensive risk management plan designed to control identified risks and to achieve the overall objective of ensuring the security and confidentiality of customer information. It identified eleven factors an institution should consider in evaluating the adequacy of its policies and procedures to effectively manage these risks.

The Agencies received a large number of comments on this paragraph. Most of the comments were based on a perception that every institution would have to adopt every security measure listed in proposed III.C.1.a.-k. as part of the institution's policies and procedures. In particular, a number of commenters were concerned that the proposed Guidelines would require the encryption of all customer data.

The Agencies did not intend for the security measures listed in paragraph III.C.1. to be seen as mandatory for all financial institutions and for all data. Rather, the Agencies intended only that an institution would consider whether the protections listed were appropriate for the institution's particular circumstances, and, if so, adopt those identified as appropriate. The Agencies continue to believe that these elements may be adapted by institutions of varying sizes, scope of operations, and risk management structures. Consistent with that approach, the manner of implementing a particular element may vary from institution to institution. For example, while a financial institution that offers Internet-based transaction accounts may conclude that encryption is appropriate, a different institution that processes all data internally and does not have a transactional web site may consider other kinds of access restrictions that are adequate to maintain the confidentiality of customer information. To underscore this point, the final Guidelines have been amended to state that each financial institution must consider whether the security elements discussed in paragraphs III.C.1.a.-h. are appropriate for the institution and, if so, adopt those

elements an institution concludes are appropriate.

The Agencies invited comment on the degree of detail that should be included in the Guidelines regarding the risk management program, including which elements should be specified in the Guidelines, and any other components of a risk management program that should be listed. With the exception of those commenters who thought some or all of the elements of the risk management program were intended to be mandatory for all financial institutions, the comments supported the level of detail conveyed in the proposed Guidelines. The Agencies have adopted the provision regarding management and control of risks with the changes discussed below. Comments addressing proposed security measures that have been adopted without change also are discussed below.

Access rights. The Agencies received a number of comments suggesting that the reference to ''access rights to customer information'' in paragraph III.C.1.a. of the proposal could be interpreted to mean providing customers with a right of access to financial information. The reference was intended to refer to limitations on employee access to customer financial information, not to customer access to financial information. However, this element has been deleted since limitations on employee access are covered adequately in other parts of paragraph III.C.1. (*See* discussion of ''access controls'' in paragraph III.C.1.a. of the final Guidelines, below.)

Access controls. Paragraph III.C.1.b. of the proposed Guidelines required a financial institution to consider appropriate access controls when establishing its information security policies and procedures. These controls were intended to address unauthorized access to an institution's customer information by anyone, whether or not employed by the institution.

The Agencies believe that this element sufficiently addresses the concept of unauthorized access, regardless of who is attempting to obtain access. This would cover, for instance, attempts through pretext calling to gather information about a financial institution's customers.[11] The Agencies have amended the final Guidelines to refer specifically to pretext calling in new III.C.1.a. The Agencies do not intend for the final Guidelines to require a financial institution to provide its customers with access to information the institution has gathered. Instead, the provision in the final Guidelines addressing access is limited solely to the issue of preventing unauthorized access to customer information.

The Agencies have deleted the reference in the proposed paragraph III.C.1.b. to providing access to authorized companies. This change was made partly in response to commenters who objected to what they perceived to be an inappropriate expansion of the scope of the Guidelines to include company records and partly in recognition of the fact that access to records would be obtained, in any case, only through requests by individuals. The final Guidelines require an institution to consider the need for access controls in light of the institution's various customer information systems and adopt such controls as appropriate.

Dual control procedures. Paragraph III.C.1.f. of the proposed Guidelines stated that financial institutions should consider dual control procedures, segregation of duties, and employee background checks for employees with responsibility for, or access to, customer information. Most of the comments on this paragraph focused on dual control procedures, which refers to a security technique that uses two or more separate persons, operating together to protect sensitive information. Both persons are equally responsible for protecting the information and neither can access the information alone.

According to one commenter, dual controls are part of normal audit procedures and did not need to be restated. Other commenters suggested that dual control procedures are not always necessary, implying that these procedures are not the norm. The Agencies recognize that dual-control procedures are not necessary for all activities, but might be appropriate for higher-risk activities. Given that the Guidelines state only that dual control procedures should be considered by a financial institution and adopted only if appropriate for the institution, the Agencies have retained a reference to dual control procedures in the items to be considered (paragraph III.C.1.e).

Oversight of servicers. Paragraph III.C.1.g. of the proposal was deleted. Instead, the final Guidelines consolidate the provisions related to service providers in paragraph III.D.

Physical hazards and technical failures. The paragraphs of the proposed Guidelines addressing protection against destruction due to physical hazards and technological failures (paragraphs III.C.1.j. and k., respectively, of the proposal) have been consolidated in paragraph III.C.1.h. of the final Guidelines. The Agencies believe that this change improves clarity and recognizes that disaster recovery from environmental and technological failures often involve the same considerations.

Training (III.C.2.). Paragraph III.C.2. of the proposed Guidelines provided that an institution's information security program should include a training component designed to train employees to recognize, respond to, and report unauthorized attempts to obtain customer information. The Agencies received several comments suggesting that this provision directed staff of financial institutions to report suspected attempts to obtain customer information to law enforcement agencies rather than to the management of the financial institution. The Agencies did not intend that result, and note that nothing in the Guidelines alters other applicable requirements and procedures for reporting suspicious activities. For purposes of these Guidelines, the Agencies believe that, as part of a training program, staff should be made aware both of federal reporting requirements and an institution's procedures for reporting suspicious activities, including attempts to obtain access to customer information without proper authority.

The final Guidelines amend the provision governing training to state that a financial institution's information security program should include a training component designed to implement the institution's information security policies and procedures. The Agencies believe that the appropriate focus for the training should be on compliance with the institution's security program generally and not just on the limited aspects identified in proposed III.C.2. The provisions governing reporting have been moved to paragraph III.C.1.g., which addresses response programs in general.

Testing (III.C.3.). Paragraph III.C.3. of the proposed Guidelines provided that an information security program should include regular testing of key controls, systems, and procedures. The proposal provided that the frequency and nature of the testing should be determined by the risk assessment and adjusted as necessary to reflect changes in both internal and external conditions. The proposal also provided that the tests are to be conducted, where appropriate, by independent third parties or staff independent of those that develop or maintain the security program. Finally, the proposal stated that test results are to be reviewed by independent third parties or staff independent of those that

[11] Pretext calling is a fraudulent means of obtaining an individual's personal information by persons posing as bank customers.

conducted the test. The Agencies requested comment on whether specific types of security tests, such as penetration tests or intrusion detection tests, should be required.

The most frequent comment regarding testing of key controls was that the Agencies should not require specific tests. Commenters noted that because technology changes rapidly, the tests specified in the Guidelines will become obsolete and other tests will become the standard. Consequently, according to these commenters, the Guidelines should identify areas where testing may be appropriate without requiring a financial institution to implement a specific test or testing procedure. Several commenters noted that periodic testing of information security controls is a sound idea and is an appropriate standard for inclusion in these Guidelines.

The Agencies believe that a variety of tests may be used to ensure the controls, systems, and procedures of the information security program work properly and also recognize that such tests will progressively change over time. The Agencies believe that the particular tests that may be applied should be left to the discretion of management rather than specified in advance in these Guidelines. Accordingly, the final Guidelines do not require a financial institution to apply specific tests to evaluate the key control systems of its information security program.

The Agencies also invited comment regarding the appropriate degree of independence that should be specified in the Guidelines in connection with the testing of information security systems and the review of test results. The proposal asked whether the tests or reviews of tests be conducted by persons who are not employees of the financial institution. The proposal also asked whether employees may conduct the testing or may review test results, and what measures, if any, are appropriate to assure their independence.

Some commenters interpreted the proposal as requiring three separate teams of people to provide sufficient independence to control testing: one team to operate the system; a second team to test the system; and a third team to review test results. This approach, they argued, would be too burdensome and expensive to implement. The Agencies believe that the critical need for independence is between those who operate the systems and those who either test them or review the test results. Therefore, the final Guidelines now require that tests should be conducted *or* reviewed by persons who are independent of those who operate the systems, including the management of those systems.

Whether a financial institution should use third parties to either conduct tests or review their results depends upon a number of factors. Some financial institutions may have the capability to thoroughly test certain systems in-house and review the test results but will need the assistance of third party testers to assess other systems. For example, an institution's internal audit department may be sufficiently trained and independent for the purposes of testing certain key controls and providing test results to decision makers independent of system managers. Some testing may be conducted by third parties in connection with the actual installation or modification of a particular program. In each instance, management needs to weigh the benefits of testing and test review by third parties against its own resources in this area, both in terms of expense and reliability.

Ongoing adjustment of program. Paragraph III.C.4. of the proposal required an institution to monitor, evaluate and adjust, as appropriate, the information security program in light of any relevant changes in technology, the sensitivity of its customer information, and internal or external threats to information security. This provision was previously located in the paragraph titled ''Manage and Control Risk''. While there were no comments on this provision, the Agencies wanted to highlight this concept and clarify that this provision is applicable to an institutions' entire information security program. Therefore, this provision is now separately identified as new paragraph III.E. of the final Guidelines, discussed below.

III.D. Oversee Service Provider Arrangements

The Agencies' proposal addressed service providers in two provisions. The Agencies provided that an institution should consider contract provisions and oversight mechanisms to protect the security of customer information maintained or processed by service providers as one of the proposed elements to be considered in establishing risk management policies and procedures (proposed paragraph III.C.1.g.). Additionally, proposed paragraph III.D. provided that, when an institution uses an outsourcing arrangement, the institution would continue to be responsible for safeguarding customer information that it gives to the service provider. That proposed paragraph also provided that the institution must use due diligence in managing and monitoring the outsourcing arrangement to confirm that its service providers would protect customer information consistent with the Guidelines.

The Agencies requested comment on the appropriate treatment of outsourcing arrangements, such as whether industry best practices are available regarding effective monitoring of service provider security precautions, whether service providers accommodate requests for specific contract provisions regarding information security, and, to the extent that service providers do not accommodate these requests, whether financial institutions implement effective information security programs. The Agencies also requested comment on whether institutions would find it helpful if the Guidelines contained specific contract provisions requiring service provider performance standards in connection with the security of customer information.

The Agencies received one example of best practices, but the commenter did not recommend that they be included in the Guidelines. While some commenters suggested that the Guidelines include best practices, other commenters stated that, given the various types of financial institutions, there could be a variety of best industry practices. Another commenter stated that best practices could become minimum requirements that result in inappropriate burdens. The Agencies recognize that information security practices are likely to evolve rapidly, and thus believe that it is inappropriate to include best practices in the final Guidelines.

Commenters were mixed as to whether service providers are receptive to contract modifications to protect customer information. Commenters were uniform, however, in stating that an institution's obligation to monitor service providers should not include on-site audits by the institution or its agent. The commenters stated that, in addition to the expense for financial institutions, the procedure would place an inordinate burden on many service providers that process customer information for multiple institutions. Several commenters noted that the service providers often contract for audits of their systems and that institutions should be able to rely upon those testing procedures. Some commenters recommended that an institution's responsibility for information given to service providers require only that the institution enter into appropriate contractual arrangements. However, commenters also indicated that requiring specific

contract provisions would not be consistent with the development of flexible Guidelines and recommended against the inclusion of specific provisions.

The Agencies believe that financial institutions should enter into appropriate contracts, but also believe that these contracts, alone, are not sufficient. Therefore, the final Guidelines, in paragraph III.D., include provisions relating to selecting, contracting with, and monitoring service providers.

The final Guidelines require that an institution exercise appropriate due diligence in the selection of service providers. Due diligence should include a review of the measures taken by a service provider to protect customer information. As previously noted in the discussion of ''service provider'', it also should include a review of the controls the service provider has in place to ensure that any subservicer used by the service provider will be able to meet the objectives of these Guidelines.

The final Guidelines also require that a financial institution have a contract with each of its service providers that requires each provider to implement appropriate measures designed to meet the objectives of these Guidelines (as stated in paragraph II.B.). This provision does not require a service provider to have a security program in place that complies with each paragraph of these Guidelines. Instead, by stating that a service provider's security measures need only achieve the *objectives* of these Guidelines, the Guidelines provide flexibility for a service provider's information security measures to differ from the program that a financial institution implements. The Agencies have provided a two-year transition period during which institutions may bring their outsourcing contracts into compliance. (*See* discussion of paragraph III.F.) The Agencies have not included model contract language, given our belief that the precise terms of service contracts are best left to the parties involved.

Each financial institution must also exercise an appropriate level of oversight over each of its service providers to confirm that the service provider is implementing the provider's security measures. The Agencies have amended the Guidelines as proposed to include greater flexibility with regard to the monitoring of service providers. A financial institution need only monitor its outsourcing arrangements if such oversight is indicated by an institution's own risk assessment. The Agencies recognize that not all outsourcing arrangements will need to be monitored or monitored in the same fashion. Some service providers will be financial institutions that are directly subject to these Guidelines or other standards promulgated by their primary regulator under section 501(b). Other service providers may already be subject to legal and professional standards that require them to safeguard the institution's customer information. Therefore, the final Guidelines permit an institution to do a risk assessment taking these factors into account and determine for themselves which service providers will need to be monitored.

Even where monitoring is warranted, the Guidelines do not require on-site inspections. Instead, the Guidelines state that this monitoring can be accomplished, for example, through the periodic review of the service provider's associated audits, summaries of test results, or equivalent measures of the service provider. The Agencies expect that institutions will arrange, when appropriate, through contracts or otherwise, to receive copies of audits and test result information sufficient to assure the institution that the service provider implements information security measures that are consistent with its contract provisions regarding the security of customer information. The American Institute of Certified Public Accountants Statement of Auditing Standards No. 70, captioned ''Reports on the Processing of Transactions by Service Organizations'' (SAS 70 report), is one commonly used external audit tool for service providers. Information contained in an SAS 70 report may enable an institution to assess whether its service provider has information security measures that are consistent with representations made to the institution during the service provider selection process.

III.E. Adjust the Program

Paragraphs III.B.3 and III.C.4. of the proposed Guidelines both addressed a financial institution's obligations when circumstances change. Both paragraph III.B.3. (which set forth management's responsibilities with respect to its risk assessment) and paragraph III.C.4. (which focused on the adequacy of an institution's information security program) identified the possible need for changes to an institution's program in light of relevant changes to technology, the sensitivity of customer information, and internal or external threats to the information security.

The Agencies received no comments objecting to the statements in these paragraphs of the need to adjust a financial institution's program as circumstances change. While the Agencies have not changed the substance of these provisions in the final Guidelines, we have, however, made a stylistic change to simplify the Guidelines. The final Guidelines combine, in paragraph III.E., the provisions previously stated separately. Consistent with the proposal, this paragraph provides that each financial institution must monitor, evaluate, and adjust its information security program in light of relevant changes in technology, the sensitivity of its customer information, internal or external threats to information, and the institution's own changing business arrangements. This would include an analysis of risks to customer information posed by new technology (and any needed program adjustments) before a financial institution adopts the technology in order to determine whether a security program remains adequate in light of the new risks presented.[12]

III.F. Report to the Board

Paragraph III.A.2.c. of the proposal set out management's responsibilities for reporting to its board of directors. As previously discussed, the final Guidelines have removed specific requirements for management, but instead allow a financial institution to determine who within the organization should carry out a given responsibility. The board reporting requirement thus has been amended to require that a financial institution report to its board, and that this report be at least annual. Paragraph III.F. of the final Guidelines sets out this requirement.

The Agencies invited comment regarding the appropriate frequency of reports to the board, including whether reports should be monthly, quarterly, or annually. The Agencies received a number of comments recommending that no specific frequency be mandated by the Guidelines and that each financial institution be permitted to establish its own reporting period.

[12] For additional information concerning how a financial institution should identify, measure, monitor, and control risks associated with the use of technology, *see* OCC Bulletin 98–3 concerning technology risk management, which may be obtained on the Internet at *http://www.occ.treas.gov/ftp/bulletin/98–3.txt.*; Federal Reserve SR Letter 98–9 on Assessment of Information Technology in the Risk-Focused Frameworks for the Supervision of Community Banks and Large Complex Banking Organizations, April 20, 1998, http://www.federalreserve.gov/boarddocs/SRLETTERS/1998/SR9809.HTM; FDIC FIL 99–68 concerning risk assessment tools and practices for information security systems at *http://www.fdic.gov/news/news/financial/1999/fil9968.html.*; OTS's CEO Letter 70, Statement on Retail On-Line Personal Computer Banking, (June 23, 1997), available at *http://www.ots.treas.gov/docs/25070.pdf.*

Several commenters stated that if a reporting period is required, then it should be not less than annually unless some material event triggers the need for an interim report.

The Agencies expect that in all cases, management will provide its board (or the appropriate board committee) a written report on the information security program consistent with the Guidelines at least annually. Management of financial institutions with more complex information systems may find it necessary to provide information to the board (or a committee) on a more frequent basis. Similarly, more frequent reporting will be appropriate whenever a material event affecting the system occurs or a material modification is made to the system. The Agencies expect that the content of these reports will vary for each financial institution, depending upon the nature and scope of its activities as well as the different circumstances that it will confront as it implements and maintains its program.

III.G. Implement the Standards

Paragraph III.E. of the proposal described the timing requirements for the implementation of these standards. It provided that each financial institution is to take appropriate steps to fully implement an information security program pursuant to these Guidelines by July 1, 2001.

The Agencies received several comments suggesting that the proposed effective date be extended for a period of 12 to 18 months because financial institutions are currently involved in efforts to meet the requirements of the final Privacy Rule by the compliance deadline, July 1, 2001. The Agencies believe that the dates for full compliance with these Guidelines and the Privacy Rule should coincide. Financial institutions are required, as part of their initial privacy notices, to disclose their policies and practices with respect to protecting the confidentiality and security of nonpublic personal information. *See* § __.6(a)(8). Each Agency has provided in the appendix to its Privacy Rule that a financial institution may satisfy this disclosure requirement by advising its customers that the institution maintains physical, electronic, and procedural safeguards that comply with federal standards to guard customers' nonpublic personal information. *See* appendix A–7. The Agencies believe that this disclosure will be meaningful only if the final Guidelines are effective when the disclosure is made. If the effective date of these Guidelines is extended beyond July 1, 2001, then a financial institution may be placed in the position of providing an initial notice regarding confidentiality and security and thereafter amending the privacy policy to accurately refer to the federal standards once they became effective. For these reasons, the Agencies have retained July 1, 2001, as the effective date for these Guidelines.

However, the Agencies have included a transition rule for contracts with service providers. The transition rule, which parallels a similar provision in the Privacy Rule, provides a two-year period for grandfathering existing contracts. Thus a contract entered into on or before the date that is 30 days after publication of the final Guidelines in the **Federal Register** satisfies the provisions of this part until July 1, 2003, even if the contract does not include provisions delineating the servicer's duties and responsibilities to protect customer information described in paragraph III.D.

Location of Guidelines: These guidelines have been published as an appendix to each Agency's Standards for Safety and Soundness. For the OCC, those regulations appear at 12 CFR part 30; for the Board, at 12 CFR part 208; for the FDIC, at 12 CFR part 364; and for the OTS, at 12 CFR part 570. The Board also is amending 12 CFR parts 211 and 225 to apply the Guidelines to other institutions that it supervises.

The Agencies will apply the rules already in place to require the submission of a compliance plan in appropriate circumstances. For the OCC, those regulations appear at 12 CFR part 30; for the Board at 12 CFR part 263; for the FDIC at 12 CFR part 308, subpart R; and for the OTS at 12 CFR part 570. The final rules make conforming changes to the regulatory text of these parts.

Rescission of Year 2000 Standards for Safety and Soundness: The Agencies previously issued guidelines establishing Year 2000 safety and soundness standards for insured depository institutions pursuant to section 39 of the FDI Act. Because the events for which these standards were issued have passed, the Agencies have concluded that the guidelines are no longer necessary and proposed to rescind the standards as part of this rulemaking. The Agencies requested comment on whether rescission of these standards is appropriate. Those commenters responding to this request were unanimous in recommending the rescission of the Year 2000 Standards, and the Agencies have rescinded these standards. These standards appeared for the OCC at 12 CFR part 30, appendix B and C; for the Board at 12 CFR part 208, appendix D–2; for the FDIC at 12 CFR part 364, appendix B; and for the OTS at 12 CFR part 570, appendix B. Accordingly, the Agencies hereby rescind the Year 2000 Standards for Safety and Soundness, effective thirty (30) days after the publication date of this notice of the joint final rule.

IV. Regulatory Analysis

A. Paperwork Reduction Act

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

B. Regulatory Flexibility Act

OCC: Under the Regulatory Flexibility Act (RFA), the OCC must either provide a Final Regulatory Flexibility Analysis (FRFA) with these final Guidelines or certify that the final Guidelines ''will not, if promulgated'', have a significant economic impact on a substantial number of small entities.[13] The OCC has evaluated the effects of these Guidelines on small entities and is providing the following FRFA.

Although the OCC specifically sought comment on the costs to small entities of establishing and operating information security programs, no commenters provided specific cost information. Instead, commenters confirmed the OCC's conclusion that most if not all institutions already have information security programs in place, because the standards reflect good business practices and existing OCC and FFIEC guidance. Some comments indicated, however, that institutions will have to formalize or enhance their information security programs. Accordingly, the OCC considered certifying, under section 605(b) of the RFA, that these Guidelines will not have a significant economic impact on a substantial number of small entities. However, given that the guidance previously issued by the OCC and the FFIEC is not completely identical to the Guidelines being adopted in this rulemaking, the Guidelines are likely to have some impact on all affected institutions. While the OCC believes that this impact will not be substantial in the case of most small entities, we nevertheless have prepared the following FRFA.

[13] The RFA defines the term ''small entity'' in 5 U.S.C. 601 by reference to a definition published by the Small Business Administration (SBA). The SBA has defined a ''small entity'' for banking purposes as a national or commercial bank, or savings institution with less than $100 million in assets. *See* 13 CFR 121.201.

1. Reasons for Final Action

The OCC is issuing these Guidelines under section 501(b) of the G–L–B Act. Section 501(b) requires the OCC to publish standards for financial institutions subject to its jurisdiction relating to administrative, technical and physical standards to: (1) insure the security and confidentiality of customer records and information; (2) protect against any anticipated threats or hazards to the security or integrity of such records; and (3) protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.

2. Objectives of and Legal Basis for Final Action

The objectives of the Guidelines are described in the Supplementary Information section above. The legal bases for the Guidelines are: 12 U.S.C. 93a, 1818, 1831p–1, and 3102(b) and 15 USC 6801 and 6805(b)(1).

3. Small Entities to Which the Rule Will Apply

The OCC's final Guidelines will apply to approximately 2300 institutions, including national banks, federal branches and federal agencies of foreign banks, and certain subsidiaries of such entities. The OCC estimates that approximately 1125 of these institutions are small institutions with assets less than $100 million.

4. Projected Reporting, Recordkeeping, and Other Compliance Requirements; Skills Required

The Guidelines do not require any reports to the OCC, however, they require all covered institutions to develop and implement a written information security program comprised of several elements. Institutions must assess the risks to their customer information and adopt appropriate measures to control those risks. Institutions must then test these security measures and adjust their information security programs in light of any relevant changes. In addition, institutions must use appropriate due diligence in selecting service providers, and require service providers, by contract, to implement appropriate security measures. The Guidelines also require institutions to monitor their service providers, where appropriate, to confirm they have met their contractual obligations. Finally, the Guidelines require the board of directors or an appropriate committee of the board of each institution to approve the institution's information security program and to oversee its implementation. To facilitate board oversight, the institution must provide to the board or to the board committee a report, at least annually, describing the overall status of the institution's information security program and the institution's compliance with the Guidelines.

Because the information security program described above reflects existing supervisory guidance, the OCC believes that most institutions already have the expertise to develop, implement, and maintain the program. However, if they have not already done so, institutions will have to retain the services of someone capable of assessing threats to the institution's customer information. Institutions that lack an adequate information security program also will have to have personnel capable of developing, implementing and testing security measures to address these threats. Institutions that use service providers may require legal skills to draft appropriate language for contracts with service providers.

5. Public Comment and Significant Alternatives

The OCC did not receive any public comment on its initial regulatory flexibility analysis, although it did receive comments on the proposed Guidelines, and on the impact of the Guidelines on small entities in particular. The comments received by the OCC and the other Agencies are discussed at length in the supplementary information above. While some commenters suggested that the OCC exempt small institutions altogether, the OCC has no authority under the statute to do so. The discussion below reviews the changes adopted in the final Guidelines that will minimize the economic impact of the Guidelines on all businesses.

The OCC carefully considered comments from small entities that encouraged the Agencies to issue guidelines that are not overly prescriptive, that provide flexibility in the design of an information security program, but that still provide small entities with some guidance. After considering these comments, the OCC determined that it is appropriate to issue the standards as Guidelines that allow each institution the discretion to design an information security program that suits its particular size and complexity and the nature and scope of its activities. The OCC considered issuing broader Guidelines that would only identify objectives to be achieved while leaving it up to each institution to decide what steps it should take to ensure that it meets these objectives. However, the OCC concluded that such broad guidance ultimately would be less helpful than would be guidelines that combine the flexibility sought by commenters with meaningful guidance on factors that an institution should consider and steps that the institution should take. The OCC also considered the utility of more prescriptive guidelines, but rejected that approach out of concern that it likely would be more burdensome, could interfere with innovation, and could impose requirements that would be inappropriate in a given situation. While the Guidelines are not overly detailed, they provide guidance by establishing the process an institution will need to follow in order to protect its customer information and by identifying security measures that are likely to have the greatest applicability to national banks in general.

Most commenters supported the use of the more narrow definition of ''customer'' in the Guidelines as is used in the Privacy Rule rather than a broad definition that would apply to all records under the control of a financial institution. Commenters maintained that two different definitions would be confusing and also inconsistent with the use of the term ''customer'' in section 501 of the G–L–B Act. The OCC considered using the broader definition, but determined that information security could be addressed more broadly through other vehicles. For the sake of consistency, the final Guidelines adopt the narrower definition and apply only to records of consumers who have established a continuing relationship with an institution under which the institution provides one or more financial products or services to the consumer to be used primarily for personal, family or household purposes, the definition used in the Privacy Rule.

Many commenters criticized the list of proposed objectives for each financial institution's information security program which generally reflected the statutory objectives in section 501(b). According to these comments, the objectives were stated in a manner that made them absolute, unachievable, and therefore burdensome. The final Guidelines have been drafted to clarify these objectives by stating that each security program is to be ''designed'' to accomplish the objectives stated.

Commenters wanted board involvement in the development and implementation of an information security program left to the discretion of the financial institution. Commenters also asked the OCC to clarify that the board may delegate to a committee responsibility for involvement in the

institution's security program. While the final Guidelines as drafted continue to place responsibility on an institution's board to approve and exercise general oversight over the program, they now clarify that a committee of the board may approve the institution's written security program. In addition, the Guidelines permit the board to assign specific implementation responsibilities to a committee or an individual.

The OCC considered requiring an institution to designate a Corporate Security Officer. However, the agency agreed with commenters that a financial institution is in the best position to determine who should be assigned specific roles in implementing the institution's security program. Therefore, the Guidelines do not include this requirement.

The proposal identifying various security measures that an institution should consider in evaluating the adequacy of its policies and procedures was criticized by many commenters. These commenters misinterpreted the list of measures and believed each measure to be mandatory. Small entities commented that these measures were overly comprehensive and burdensome. As discussed previously in the preamble, the OCC did not intend to suggest that every institution must adopt every one of the measures. To highlight the OCC's intention that an institution must determine for itself which measures will be appropriate for its own risk profile, the final Guidelines now clearly state that each financial institution must consider whether the security elements listed are appropriate for the institution and, if so, adopt those elements an institution concludes are appropriate.

Commenters noted that testing could be burdensome and costly, especially for small entities. The OCC considered mandating specific tests, but determined that with changes in technology, such tests could become obsolete. Therefore, the final Guidelines permit management to exercise its discretion to determine the frequency and types of tests that need to be conducted. The OCC considered required testing or the review of tests to be conducted by outside auditors. The OCC determined that these duties could be performed effectively by an institution's own staff, if staff selected is sufficiently independent. Therefore, the Guidelines permit financial institutions to determine for themselves whether to use third parties to either conduct tests or review their results or to use staff independent of those that develop or maintain the institution's security program.

Many commenters objected to provisions in the proposal requiring institutions to monitor their service providers. Commenters asserted that it would be burdensome to require them to monitor the activities of their service providers and that information security of service providers should be handled through contractual arrangements. The final Guidelines include greater flexibility with regard to the monitoring of service providers than was provided in the proposal. The final Guidelines recognize that some service providers will be financial institutions that are directly subject to these Guidelines or other standards promulgated under section 501(b) and that other service providers may already be subject to legal and professional standards that require them to safeguard the institution's customer information. Therefore, the final Guidelines permit an institution to do a risk assessment taking these factors into account and to determine for themselves which service providers will need to be monitored. Where monitoring is warranted, the Guidelines now specify that monitoring can be accomplished, for example, through the periodic review of the service provider's associated audits, summaries of test results, or equivalent measures of the service provider.

In addition, after considering the comments about contracts with service providers and the effective date of the Guidelines, the OCC also adopted a transition rule, similar to a provision in the Privacy Rule, that grandfathers existing contracts for a two-year period.

One commenter requested that smaller community banks be given additional time to comply with the Guidelines because having to comply with the new Privacy Rule and these Guidelines will put a strain on the resources of smaller banks. The OCC considered this request but did not change the effective date of the Guidelines given the importance of safeguarding customer information. In addition, most institutions already have information security programs in place, and the OCC has addressed this concern by adding flexibility to the final Guidelines in a variety of other areas as described above.

Board: The Regulatory Flexibility Act (5 U.S.C. 604) requires an agency to publish a final regulatory flexibility analysis when promulgating a final rule that was subject to notice and comment.

Need for and objectives of Guidelines: As discussed above, these Guidelines implement section 501 of the GLB Act. The objective of the Guidelines is to establish standards for financial institutions that are subject to the Board's jurisdiction to protect the security and confidentiality of their customers' information. In particular, the Guidelines require those financial institutions to implement a comprehensive written information security program that includes:

(1) Assessing the reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information;

(2) Adopting security measures that the financial institution concludes are appropriate for it; and

(3) Overseeing its arrangements with its service provider(s).

Comments on the initial regulatory flexibility analysis: Although few commenters addressed the initial regulatory flexibility analysis specifically, many commenters addressed the regulatory burdens that were discussed in that analysis. Several commenters noted that certain aspects of the proposal may tax the comparatively limited resources of small institutions, yet few commenters quantified the potential costs of compliance. The comments received by the Board and the other Agencies were discussed in the supplementary information above. Those comments that are closely related to regulatory burden are highlighted below:

The Board requested comment on the scope of the term ''customer'' for purposes of the Guidelines. Many commenters opposed expanding the proposed scope of the Guidelines to apply to information about business customers and consumers who have not established continuing relationships with the financial institution. The commenters stated that an expanded scope would impose higher costs of developing an information security program and would be inconsistent with the use of the term ''customer'' in section 501 of the GLB Act and the Agencies' Privacy Rule. As explained in the supplementary information above, the Board has defined ''customer'' in the final Guidelines in the same way as that term is defined in section __.3(h) of the Agencies' Privacy Rule.

Many commenters urged the Board to reduce the level of detail about the kinds of measures that would be required to implement an information security program under the proposed Guidelines. Commenters argued, for instance, that requiring particular testing procedures of security systems would make the standards too onerous for those institutions for which other kinds of tests and audits would be more suitable. In a similar vein, some commenters proposed that the Board

should issue examples that would illustrate the kinds of security measures that, if adopted, would constitute compliance with the Guidelines.

The Board believes that many commenters may have misinterpreted the intent of the original proposal regarding the particular safeguards that would be expected. The provision that requires each financial institution to consider a variety of security measures has been redrafted in an effort to clarify that the institution must determine for itself which measures will be appropriate to its own risk profile. Although an institution is required to consider each of the security measures listed in paragraph III.C.1., it is not obligated to incorporate any particular security measures or particular testing procedures into its information security program. Rather, the institution may adopt those measures and use those tests that it concludes are appropriate. The Board is mindful that institutions' operations will vary in their complexity and scope of activities and present different risk profiles to their customer information. Accordingly, the Board has not established definitive security measures that, if adopted, would constitute compliance with the Guidelines.

The Board asked for comments on several issues related to the appropriate security standards pertaining to an institution's arrangements with its service providers. As discussed above, many comments addressed these issues and, notably, objected to a provision that would require an institution to monitor its service providers through on-site audits. Several commenters noted that the service providers often contract for audits of their systems and argued that an institution should be able to rely upon those testing procedures. Commenters also recommended that an institution's responsibility for information given to service providers require only that the institution enter into appropriate contractual arrangements. The Board has modified the Guidelines to clarify an institution's responsibilities with respect to service providers. The Board has not designed a standard that would require a financial institution to conduct an on-site audit of its service provider's security program. Instead, the Board adopted a standard that requires an institution to monitor its service provider to confirm that it has satisfied its contractual obligations, depending upon the institution's risk assessment. In the course of conducting its risk assessment and determining which service providers will need to be monitored, an institution may take into account the fact that some of its service providers may be financial institutions that are directly subject to these Guidelines or other standards promulgated by their primary regulator under section 501(b). Furthermore, after considering the comments about contracts with service providers and the effective date of the Guidelines, the Board also adopted a transition rule, which parallels a similar provision in the Privacy Rule, that provides a two-year period for grandfathering existing contracts.

Many commenters addressed the burdens that would be imposed by the proposal due to the effective date and urged the Board to extend the proposed July 1, 2001, effective date for period ranging from one to two years. Most of these commenters argued that complying with the proposed Guidelines by July 1, 2001, would place a considerable burden on their businesses, particularly because the Guidelines would mandate changes to computer software, employee training, and compliance systems. As discussed above, the Board believes that the dates for full compliance with these Guidelines and the Privacy Rule should coincide. Financial institutions are required, as part of their initial privacy notices, to describe their policies and practices with respect to protecting the confidentiality and security of nonpublic personal information (12 CFR 216.6). The Board believes that if the effective date of these Guidelines is extended beyond July 1, 2001, then a financial institution may be placed in the position of providing an initial notice regarding confidentiality and security and thereafter amending the privacy policy to accurately refer to the federal standards once they became effective. Accordingly, the Board has adopted the proposed effective date of July 1, 2001.

Institutions covered. The Board's final Guidelines will apply to approximately 9,500 institutions, including state member banks, bank holding companies and certain of their nonbank subsidiaries or affiliates, state uninsured branches and agencies of foreign banks, commercial lending companies owned or controlled by foreign banks, and Edge and Agreement corporations. The Board estimates that over 4,500 of the institutions are small institutions with assets less than $100 million.

New compliance requirements. The final Guidelines contain new compliance requirements for all covered institutions, many of which are contained in existing supervisory guidance and examination procedures. Nonetheless, each must develop and implement a written information security program. As part of that program, institutions will be required to assess the reasonably foreseeable risks, taking into account the sensitivity of customer information, and assess the sufficiency of policies and procedures in place to control those risks. Institutions that use third party service providers to process customer information must exercise appropriate due diligence in selecting them, require them by contract to implement appropriate measures designed to meet the objectives of these Guidelines, and depending upon the institution's risk assessment, monitor them to confirm that they have satisfied their contractual obligations. As part of its compliance measures, an institution may need to train its employees or hire individuals with professional skills suitable to implementing the policies and procedures of its information security program, such as those skills necessary to test or review tests of its security measures. Some institutions may already have programs that meet these requirements, but others may not.

Minimizing impact on small institutions. The Board believes the requirements of the Act and these Guidelines may create additional burden for some small institutions. The Guidelines apply to all covered institutions, regardless of size. The Act does not provide the Board with the authority to exempt a small institution from the requirement of implementing administrative, technical, and physical safeguards to protect the security and confidentiality of customer information. Although the Board could develop different guidelines depending on the size and complexity of a financial institution, the Board believes that differing treatment would not be appropriate, given that one of the stated purposes of the Act is to protect the confidentiality and security of customers' nonpublic personal information.

The Board believes that the compliance burden is minimized for small institutions because the Guidelines expressly allow institutions to develop security measures that are ''appropriate to the size and complexity of the [institution]''. The Guidelines do not mandate any particular policies, procedures, or security measures for any institution other than general requirements, such as to ''train staff'' or ''monitor its service providers to confirm that they have satisfied their [contractual] obligations''. The Board believes that the final Guidelines vest a small institution with a broad degree of discretion to design and implement an

information security program that suits its own organizational structure and risk profile.

FDIC: The Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA) requires, subject to certain exceptions, that federal agencies prepare an initial regulatory flexibility analysis (IRFA) with a proposed rule and a final regulatory flexibility analysis (FRFA) with a final rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[14] At the time of issuance of the proposed Guidelines, the FDIC could not make such a determination for certification. Therefore, the FDIC issued an IRFA pursuant to section 603 of the RFA. After reviewing the comments submitted in response to the proposed Guidelines, the FDIC believes that it does not have sufficient information to determine whether the final Guidelines would have a significant economic impact on a substantial number of small entities. Hence, pursuant to section 604 of the RFA, the FDIC provides the following FRFA.

This FRFA incorporates the FDIC's initial findings, as set forth in the IRFA; addresses the comments submitted in response to the IRFA; and describes the steps the FDIC has taken in the final rule to minimize the impact on small entities, consistent with the objectives of the Gramm-Leach-Bliley Act (G–L–B Act). Also, in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), in the near future the FDIC will issue a compliance guide to assist small entities in complying with these Guidelines.

Small Entities to Which the Guidelines Will Apply

The final Guidelines will apply to all FDIC-insured state-nonmember banks, regardless of size, including those with assets of under $100 million. As of September 2000, there were 3,331 small banks out of a total of 5,130 FDIC-insured state-nonmember banks with assets of under $100 million. Title V, Subtitle A, of the GLBA does not provide either an exception for small banks or statutory authority upon which the FDIC could provide such an exception in the Guidelines.

[14] The RFA defines the term ''small entity'' in 5 U.S.C. 601 by reference to definitions published by the Small Business Administration (SBA). The SBA has defined a ''small entity'' for banking purposes as a national or commercial bank, or savings institution with less than $100 million in assets. See 13 CFR 121.201.

Statement of the Need and Objectives of the Rule

The final Guidelines implement the provisions of Title V, Subtitle A, Section 501 of the GLBA addressing standards for safeguarding customer information. Section 501 requires the Agencies to publish standards for financial institutions relating to administrative, technical, and physical standards to:

Insure the security and confidentiality of customer records and information.

Protect against any anticipated threats or hazards to the security or integrity of such records.

Protect against unauthorized access to or use of such records or information, which could result in substantial harm or inconvenience to any customer.

The final Guidelines do not represent any change in the policies of the FDIC; rather they implement the G–L–B Act requirement to provide appropriate standards relating to the security and confidentiality of customer records.

Summary of Significant Issues Raised by the Public Comments; Description of Steps the Agency Has Taken in Response to the Comments to Minimize the Significant Economic Impact on Small Entities.

In the IRFA, the FDIC specifically requested information on whether small entities would be required to amend their operations in order to comply with the final Guidelines and the costs for such compliance. The FDIC also requested comment or information on the costs of establishing information security programs. The FDIC also sought comment on any significant alternatives, consistent with the G–L–B Act that would minimize the impact on small entities. The FDIC received a total of 63 comment letters. However, none of the comment letters specifically addressed the initial regulatory flexibility act section of the proposed Guidelines. Instead, many commenters, representing banks of various sizes, addressed the regulatory burdens in connection with their discussion of specific Guideline provisions.

The FDIC has sought to minimize the burden on all businesses, including small entities, in promulgating this final Guidelines. The statute does not authorize the FDIC to create exemptions from the G–L–B Act based on an institution's asset size. However, the FDIC carefully considered comments regarding alternatives designed to minimize the economic and overall burden of complying with the final Guidelines. The discussion below reviews some of the significant changes adopted in the final Guidelines to accomplish this purpose.

1. Issue the Rule as Guidelines or Regulations. The FDIC sought comment on whether to issue the rule as Guidelines or as regulations. All the comment letters stated that the rule should be issued in the form of Guidelines. Some community banks stated that the Guidelines were unnecessary because they already have information security programs in place but would prefer Guidelines to regulations. The commentary supported the use of Guidelines because guidelines typically provide more flexibility than regulations. Since technology changes rapidly, Guidelines would allow institutions to adapt to a changing environment more quickly than regulations, which may become outdated. The FDIC has issued these standards as Guidelines. The final Guidelines establish standards that will allow each institution the flexibility to design an information security program to accommodate its particular level of complexity and scope of activities.

2. Definition of Customer. In the proposed Guidelines, the FDIC defined ''customer'' in the same manner as in the Privacy Rule. A ''customer'' is defined as a consumer who has established a continuing relationship with an institution under which the institution provides one or more financial products or services to the consumer to be used primarily for personal, family, or household purposes. This definition does not include a business or a consumer who does not have an ongoing relationship with a financial institution. Almost all of the comments received by the FDIC agreed with the proposed definition and agreed that the definition should not be expanded to provide a common information security program for all types of records under the control of a financial institution. The Guidelines will apply only to consumer records as defined by the Privacy Rule, not business records. This will allow for a consistent interpretation of the term ''customer'' between the Guidelines and the Privacy Rule.

3. Involvement of the Bank's Board of Directors. The FDIC sought comment on how frequently management should report to the board of directors concerning the bank's information security program. Most of the comment letters stated that the final Guidelines should not dictate how frequently the bank reports to the board of directors and that the bank should have discretion in this regard. The comment letters clearly conveyed a preference to not have a reporting requirement. However, if there was to be one, commenters suggested that it be annual.

The Agencies have amended the Guidelines to require that a bank report at least annually to its board of directors. However, more frequent reporting will be necessary if a material event affecting the information security system occurs or if material modifications are made to the system.

4. *Designation of Corporate Information Security Officer.* The Agencies considered whether the Guidelines should require that the bank's board of directors designate a ''Corporate Information Security Officer'' with the responsibility to develop and administer the bank's information security program. Most of the comment letters requested that this requirement not be adopted because adding a new personnel position would be financially burdensome. The FDIC agrees that a new position with a specific title is not necessary. The final Guidelines do, however, require that the authority for the development, implementation, and administration of the bank's information security program be clearly expressed although not assigned to a particular individual.

5. *Managing and Controlling Risk.* Many comments focused on the eleven factors in the proposed Guidelines that banks should consider when evaluating the adequacy of their information security programs. The Agencies did not intend to mandate the security measures listed in section III.C. of the proposed Guidelines for all banks and all data. Instead the Agencies believe the security measures should be followed as appropriate for each bank's particular circumstances. Some concern was expressed that the proposed Guidelines required encryption of all customer information. The FDIC believes that a bank that has Internet-based transaction accounts or a transactional Web site may decide that encryption is appropriate, but a bank that processes all data internally may need different access restrictions. While a bank is to consider each element in section III.C. in the design of its information security program, this is less burdensome than a requirement to include each element listed that section.

The proposed Guidelines provided that institutions train employees to recognize, respond to, and report suspicious attempts to obtain customer information directly to law enforcement agencies and regulatory agencies. Some comment letters stated that suspicious activity should be reported to management, not directly to law enforcement agencies and regulatory agencies. The FDIC believes employees should be made aware of federal reporting requirements and an institution's procedures for reporting suspicious activity. However, the Guidelines have been amended to allow financial institutions to decide who is to file a report to law enforcement agencies, consistent with other applicable regulations.

A significant number of comments stated that the FDIC should not require specific tests to ensure the security and confidentiality of customer information. Some comments stated that periodic testing is appropriate. The final Guidelines do not specify particular tests but provide that management should decide on the appropriate testing. Also, the final Guidelines require tests to be conducted or reviewed by people independent of those who operate the systems. Further, banks must review their service provider's security program to determine that it is consistent with the Guidelines. However, the final Guidelines do not require on-site inspections.

6. *Effective Date.* The effective date for the final Guidelines is July 1, 2001. As discussed in the section-by-section analysis, many of the comment letters urged the FDIC to extend the effective date of the Guidelines, particularly since this is the effective date for complying with the Privacy Rule. Several of the comments suggested the proposed effective date be extended for 12 to 18 months. However, the FDIC believes that the effective date for the Guidelines and the Privacy Rule should coincide. The Privacy Rule requires a financial institution to disclose to its customers that the bank maintains physical, electronic, and procedural safeguards to protect customers' nonpublic personal information. Appendix A of the Privacy Rule provides that this disclosure may refer to these federal guidelines. This is only meaningful if the final Guidelines for safeguarding customer information are effective when the disclosure is made. The Guidelines do provide a transition rule for contracts with service providers—essentially allowing a two-year compliance period for service provider contracts. A contract entered into on or before March 5, 2001, satisfies the provisions of this part until July 1, 2003, even if the contract does not include provisions delineating the servicer's duties and responsibilities to protect customer information described in section III.D. This additional time will allow financial institutions to make all necessary changes to service provider contracts and to comply with this segment of the Guidelines.

Summary of the Agency Assessment of Issues Raised in Public Comments

Most of the comment letters did not discuss actual compliance costs for implementing the provisions of the Guidelines. Some commenters stated that their bank has an established information security program and that information security is a customary business practice. The new compliance and reporting requirements will create additional costs for some institutions. These costs include: (1) Training staff; (2) monitoring outsourcing agreements; (3) performing due diligence before contracting with a service provider; (4) testing security systems; and (5) adjusting security programs due to technology changes. The comments did not provide data from which the FDIC could quantify the cost of implementing the requirements of the GLBA. The compliance costs will vary among institutions.

Description/Estimate of Small Entities To Which the Guidelines Will Apply

The Guidelines will apply to approximately 3,300 FDIC insured State nonmember banks that are small entities (assets less than $100 million) as defined in the RFA.

Description of Projected Reporting, Record-Keeping, and Other Compliance Requirements

The final Guidelines contain standards for the protection of customer records and information that apply to all FDIC-insured state-nonmember banks. Institutions will be required to report annually to the bank's board of directors concerning the bank's information security program. Institutions will need to develop a training program that is designed to implement the institution's information security policies and procedures. An institution's information security system will be tested to ensure the controls and procedures of the program work properly. However, the final Guidelines do not specify what particular tests the bank should undertake. The final Guidelines state that the tests are to be conducted or reviewed by persons who are independent of those who operate the systems. Institutions will have to exercise due diligence in the selection of service providers to ensure that the bank's customer information will be protected consistent with these Guidelines. And institutions will have to monitor these service provider arrangements to confirm that the institution's customer information is protected, which may be accomplished by reviewing service provider audits

and summaries of test results. Also, institutions will need to adjust their security program as technology changes.

The types of professional skills within the institution necessary to prepare the report to the board would include an understanding of the institution's information security program, a level of technical knowledge of the hardware and software systems to evaluate test results recommending substantial modifications; and the ability to evaluate and report on the institution's steps to oversee service provider arrangements.

OTS: The Regulatory Flexibility Act (RFA),[15] requires OTS to prepare a final regulatory flexibility analysis with these final Guidelines unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. OTS has evaluated the effects these Guidelines will have on small entities. In issuing proposed Guidelines, OTS specifically sought comment on the costs of establishing and operating information security programs, but no commenters provided specific cost information. Institutions cannot yet know how they will implement their information security programs and therefore have difficulty quantifying the associated costs. The Director of OTS considered certifying, under section 605(b) of the RFA, that these guidelines will not have a significant economic impact on a substantial number of small entities. However, because OTS cannot quantify the impact the Guidelines will have on small entities, and in the interests of thoroughness, OTS does not certify that the Guidelines will not have a significant economic impact on a substantial number of small entities. Instead, OTS has prepared the following final regulatory flexibility analysis.

A. Reasons for Final Action

OTS issues these Guidelines pursuant to section 501 of the G-L-B Act. As described in this preamble and in the notice of proposed action, section 501 requires OTS to publish standards for the thrift industry relating to administrative, technical, and physical safeguards to: (1) Insure the security and confidentiality of customer records and information; (2) protect against any anticipated threats or hazards to the security or integrity of such records, and (3) protect against unauthorized access to or use of such records or information which could result in the substantial harm or inconvenience to any customer.

[15] U.S.C. 604(a).

B. Objectives of and Legal Basis for Final Action

The objectives of the Guidelines are described in the Supplementary Information section above. The legal bases for the final action are: section 501 of the G-L-B Act; section 39 of the FDI Act; and sections 2, 4, and 5 of the Home Owners' Loan Act (12 U.S.C. 1462, 1463, and 1464).

C. Description of Entities To Which Final Action Will Apply

These Guidelines will apply to all savings associations whose deposits are FDIC insured, and subsidiaries of such savings associations, except subsidiaries that are brokers, dealers, persons providing insurance, investment companies, and investment advisers.[16]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements; Skills Required

The Guidelines do not require any reports to OTS. As discussed more fully above, they do require institutions to have a written information security program, and to make an appropriate report to the board of directors, or a board committee, at least annually. The Guidelines require institutions to establish an information security program, if they do not already have one. The Guidelines require institutions to assess the risks to their customer security and to adopt appropriate measures to control those risks. Institutions must also test the key controls, commensurate with the risks. Institutions must use appropriate due diligence in selecting outside service providers, and require service providers, by contract, to implement appropriate security measures. Finally, where appropriate, the Guidelines require institutions to monitor their service providers.

Professional skills, such as skills of computer hardware and software, will be necessary to assess information security needs, and to design and implement an information security program. The particular skills needed will be commensurate with the nature of each institution's system, i.e. more skills will be needed in institutions with sophisticated and extensive computerization. As a result, small entities with less extensive computerization are likely to have less burdensome compliance needs than large entities. Institutions that use outside service providers may require legal skills to draft appropriate language for contracts with service providers.

[16] For purposes of the Regulatory Flexibility Act, a small savings association is one with less than $100 million in assets. 13 CFR 121.201 (Division H). There are approximately 487 such small savings associations, approximately 97 of which have subsidiaries.

E. Public Comment and Significant Alternatives

OTS did not receive any public comment on its initial regulatory flexibility analysis, although it did receive comments on the proposal in general, and on the Guidelines' impact on small entities in particular. OTS addresses these below.

OTS has considered publishing standards using only the broad language in section 501(b) of the G–L–B Act, as supported by one commenter. The Agencies rejected this alternative in favor of more comprehensive Guidelines. Using only the general statutory language would permit institutions maximum flexibility in implementing information security protections and would not put institutions at a competitive disadvantage with respect to institutions not subject to the same security standards. However, using the statutory language alone would not provide enough guidance to institutions about what risks need to be addressed or what types of protections are appropriate. Small institutions in particular may need guidance in this area. One trade association that represents community banks commented that institutions need guidance to determine what level of information security the Agencies will look for, and that community banks in particular need guidance in this area. OTS believes that the alternative it chose, more comprehensive standards, provides helpful guidance without sacrificing flexibility.

OTS has also considered the alternative of defining ''service provider'' more narrowly than in the proposed Guidelines to reduce regulatory burden. The Guidelines require a financial institution to take appropriate steps to protect customer information provided to a service provider. Due to limited resources, small institutions may need to outsource a disproportionately larger number of functions than large institutions outsource, and accordingly have a greater need for service providers. Thus, the burdens associated with service providers may fall more heavily on small institutions than on large institutions. But the risks to information security do not necessarily vary depending on a service provider's identity. Rather, they vary depending on the type and volume of information to which a service provider has access, the safeguards it has in place, and what the service provider does with the

information. Basing the requirements as to service providers on a service provider's identity would not necessarily focus protections on areas of risk. For this reason, the final Guidelines focus the protections regarding service providers on the risks involved rather than on the service provider's identity. This approach should provide the necessary protections without unnecessary burden on small institutions.

OTS reviewed the alternative of requiring an institution's board of directors to designate a Corporate Information Security Officer who would have authority, with approval by the board, to develop and administer the institution's information security program. However, ultimately, the agencies rejected the idea of having financial institutions create a new position to fulfill this purpose. Instead, the Guidelines allow financial institutions the flexibility to determine who should be assigned specific roles in implementing the institution's security program. As a result, small institutions will be relieved of a potential burden.

The final Guidelines incorporate new provisions not in the proposed Guidelines designed to add flexibility to assist all institutions, large and small. For example, the final Guidelines, unlike the proposal, do not specify particular tasks for management. Instead, the final Guidelines allow each institution the flexibility to decide for itself the most efficient allocation of its personnel. Similarly, the final Guidelines allow institutions to delegate board duties to board committees. Additionally, in the final guidelines the Agencies removed the requirement that information security programs ''shall * * * ensure'' the security and confidentiality of customer information. Instead, the guidelines say the program ''shall be designed to * * * ensure'' the security and confidentiality of customer information. The final Guidelines further incorporate more flexibility than the proposal concerning testing systems. The proposal required third parties of staff independent of those who maintain the program to test it, and required third parties or staff independent of the testers to review test results. To add flexibility, the final Guidelines more simply require staff or third parties independent of those who develop or maintain the programs to conduct or review the tests. These changes should serve to reduce the burden of the Guidelines.

C. Executive Order 12866

The Comptroller of the Currency and the Office of Thrift Supervision have determined that this rule does not constitute a ''significant regulatory action'' for the purposes of Executive Order 12866. The OCC and OTS are issuing the Guidelines in accordance with the requirements of Sections 501 and 505(b) of the G–L–B Act and not under their own authority. Even absent the requirements of the G–L–B Act, if the OCC and OTS had issued the rule under their own authority, the rule would not constitute a ''significant regulatory action'' for purposes of Executive Order 12866.

The standards established by the Guidelines are very flexible and allow each institution the discretion to have an information security program that suits its particular size , complexity and the nature and scope of its activities. Further, the standards reflect good business practices and guidance previously issued by the OCC, OTS, and the FFIEC. Accordingly, most if not all institutions already have information security programs in place that are consistent with the Guidelines. In such cases, little or no modification to an institution's program will be required.

D. 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 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 the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. However, an agency is not required to assess the effects of its regulatory actions on the private sector to the extent that such regulations incorporate requirements specifically set forth in law. 2 U.S.C. 1531.

The OCC and OTS believe that most institutions already have established an information security program because it is a sound business practice that also has been addressed in existing supervisory guidance. Therefore, the OCC and OTS have determined that the Guidelines will not result in expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, the OCC and OTS have not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects

12 CFR Part 30

Banks, banking, Consumer protection, National banks, Privacy, Reporting and recordkeeping requirements.

12 CFR Part 208

Banks, banking, Consumer protection, Federal Reserve System, Foreign banking, Holding companies, Information, Privacy, Reporting and recordkeeping requirements.

12 CFR Part 211

Exports, Federal Reserve System, Foreign banking, Holding companies, Investments, Privacy, Reporting and recordkeeping requirements.

12 CFR Part 225

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

12 CFR Part 263

Administrative practice and procedure, Claims, Crime, Equal access in justice, Federal Reserve System, Lawyers, Penalties.

12 CFR Part 308

Administrative practice and procedure, Banks, banking, Claims, Crime, Equal access of justice, Lawyers, Penalties, State nonmember banks.

12 CFR Part 364

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Reporting and recordkeeping requirements, Safety and soundness.

12 CFR Part 568

Reporting and recordkeeping requirements, Savings associations, Security measures. Consumer protection, Privacy, Savings associations.

12 CFR Part 570

Consumer protection, Privacy, Savings associations.

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons set forth in the joint preamble, part 30 of the chapter I of title 12 of the Code of Federal Regulations is amended as follows:

PART 30—SAFETY AND SOUNDNESS STANDARDS

1. The authority citation for part 30 is revised to read as follows:

Authority: 12 U.S.C. 93a, 1818, 1831–p, 3102(b); 15 U.S.C. 6801, 6805(b)(1).

2. Revise § 30.1 to read as follows:

§ 30.1 Scope.

(a) The rules set forth in this part and the standards set forth in appendices A and B to this part apply to national banks and federal branches of foreign banks, that are subject to the provisions of section 39 of the Federal Deposit Insurance Act (section 39)(12 U.S.C. 1831p–1).

(b) The standards set forth in appendix B to this part also apply to uninsured national banks, federal branches and federal agencies of foreign banks, and the subsidiaries of any national bank, federal branch or federal agency of a foreign bank (except brokers, dealers, persons providing insurance, investment companies and investment advisers). Violation of these standards may be an unsafe and unsound practice within the meaning of 12 U.S.C. 1818.

3. In § 30.2, revise the last sentence to read as follows:

§ 30.2 Purpose.

* * * The Interagency Guidelines Establishing Standards for Safety and Soundness are set forth in appendix A to this part, and the Interagency Guidelines Establishing Standards for Safeguarding Customer Information are set forth in appendix B to this part.

4. In § 30.3, revise paragraph (a) to read as follows:

§ 30.3 Determination and notification of failure to meet safety and soundness standard and request for compliance plan.

(a) *Determination.* The OCC may, based upon an examination, inspection, or any other information that becomes available to the OCC, determine that a bank has failed to satisfy the safety and soundness standards contained in the Interagency Guidelines Establishing Standards for Safety and Soundness set forth in appendix A to this part, and the Interagency Guidelines Establishing Standards for Safeguarding Customer Information set forth in appendix B to this part.

* * * * *

5. Revise appendix B to part 30 to read as follows:

Appendix B to Part 30—Interagency Guidelines Establishing Standards For Safeguarding Customer Information

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D. Oversee Service Provider Arrangements
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F. Report to the Board
G. Implement the Standards

I. Introduction

The Interagency Guidelines Establishing Standards for Safeguarding Customer Information (Guidelines) set forth standards pursuant to section 39 of the Federal Deposit Insurance Act (section 39, codified at 12 U.S.C. 1831p–1), and sections 501 and 505(b), codified at 15 U.S.C. 6801 and 6805(b), of the Gramm-Leach-Bliley Act. These Guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information.

A. *Scope.* The Guidelines apply to customer information maintained by or on behalf of entities over which the OCC has authority. Such entities, referred to as ''the bank,'' are national banks, federal branches and federal agencies of foreign banks, and any subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).

B. *Preservation of Existing Authority.* Neither section 39 nor these Guidelines in any way limit the authority of the OCC to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices. The OCC may take action under section 39 and these Guidelines independently of, in conjunction with, or in addition to, any other enforcement action available to the OCC.

C. *Definitions.* 1. Except as modified in the Guidelines, or unless the context otherwise requires, the terms used in these Guidelines have the same meanings as set forth in sections 3 and 39 of the Federal Deposit Insurance Act (12 U.S.C. 1813 and 1831p–1).

2. For purposes of the Guidelines, the following definitions apply:

a. *Board of directors,* in the case of a branch or agency of a foreign bank, means the managing official in charge of the branch or agency.

b. *Customer* means any customer of the bank as defined in § 40.3(h) of this chapter.

c. *Customer information* means any record containing nonpublic personal information, as defined in § 40.3(n) of this chapter, about a customer, whether in paper, electronic, or other form, that is maintained by or on behalf of the bank.

d. *Customer information systems* means any methods used to access, collect, store, use, transmit, protect, or dispose of customer information.

e. *Service provider* means any person or entity that maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to the bank.

II. Standards for Safeguarding Customer Information

A. *Information Security Program.* Each bank shall implement a comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to the size and complexity of the bank and the nature and scope of its activities. While all parts of the bank are not required to implement a uniform set of policies, all elements of the information security program must be coordinated.

B. *Objectives.* A bank's information security program shall be designed to:

1. Ensure the security and confidentiality of customer information;

2. Protect against any anticipated threats or hazards to the security or integrity of such information; and

3. Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.

III. Development and Implementation of Information Security Program

A. *Involve the Board of Directors.* The board of directors or an appropriate committee of the board of each bank shall:

1. Approve the bank's written information security program; and

2. Oversee the development, implementation, and maintenance of the bank's information security program, including assigning specific responsibility for its implementation and reviewing reports from management.

B. *Assess Risk.* Each bank shall:

1. Identify reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information or customer information systems.

2. Assess the likelihood and potential damage of these threats, taking into consideration the sensitivity of customer information.

3. Assess the sufficiency of policies, procedures, customer information systems, and other arrangements in place to control risks.

C. *Manage and Control Risk.* Each bank shall:

1. Design its information security program to control the identified risks, commensurate with the sensitivity of the information as well as the complexity and scope of the bank's activities. Each bank must consider whether the following security measures are appropriate for the bank and, if so, adopt those measures the bank concludes are appropriate:

a. Access controls on customer information systems, including controls to authenticate and permit access only to authorized individuals and controls to prevent employees from providing customer information to unauthorized individuals who may seek to obtain this information through fraudulent means.

b. Access restrictions at physical locations containing customer information, such as buildings, computer facilities, and records storage facilities to permit access only to authorized individuals;

c. Encryption of electronic customer information, including while in transit or in storage on networks or systems to which unauthorized individuals may have access;

d. Procedures designed to ensure that customer information system modifications are consistent with the bank's information security program;

e. Dual control procedures, segregation of duties, and employee background checks for employees with responsibilities for or access to customer information;

f. Monitoring systems and procedures to detect actual and attempted attacks on or intrusions into customer information systems;

g. Response programs that specify actions to be taken when the bank suspects or detects that unauthorized individuals have gained access to customer information systems, including appropriate reports to regulatory and law enforcement agencies; and

h. Measures to protect against destruction, loss, or damage of customer information due to potential environmental hazards, such as fire and water damage or technological failures.

2. Train staff to implement the bank's information security program.

3. Regularly test the key controls, systems and procedures of the information security program. The frequency and nature of such tests should be determined by the bank's risk assessment. Tests should be conducted or reviewed by independent third parties or staff independent of those that develop or maintain the security programs.

D. *Oversee Service Provider Arrangements.* Each bank shall:

1. Exercise appropriate due diligence in selecting its service providers;

2. Require its service providers by contract to implement appropriate measures designed to meet the objectives of these Guidelines; and

3. Where indicated by the bank's risk assessment, monitor its service providers to confirm that they have satisfied their obligations as required by section D.2. As part of this monitoring, a bank should review audits, summaries of test results, or other equivalent evaluations of its service providers.

E. *Adjust the Program.* Each bank shall monitor, evaluate, and adjust, as appropriate, the information security program in light of any relevant changes in technology, the sensitivity of its customer information, internal or external threats to information, and the bank's own changing business arrangements, such as mergers and acquisitions, alliances and joint ventures, outsourcing arrangements, and changes to customer information systems.

F. *Report to the Board.* Each bank shall report to its board or an appropriate committee of the board at least annually. This report should describe the overall status of the information security program and the bank's compliance with these Guidelines. The reports should discuss material matters related to its program, addressing issues such as: risk assessment; risk management and control decisions; service provider arrangements; results of testing; security breaches or violations and management's responses; and recommendations for changes in the information security program.

G. *Implement the Standards.* 1. *Effective date.* Each bank must implement an information security program pursuant to these Guidelines by July 1, 2001.

2. *Two-year grandfathering of agreements with service providers.* Until July 1, 2003, a contract that a bank has entered into with a service provider to perform services for it or functions on its behalf satisfies the provisions of section III.D., even if the contract does not include a requirement that the servicer maintain the security and confidentiality of customer information, as long as the bank entered into the contract on or before March 5, 2001.

6. Appendix C to part 30 is removed.

Dated: December 21, 2000.

John D. Hawke, Jr.,

Comptroller of the Currency.

Federal Reserve System

12 CFR Chapter II

Authority and Issuance

For the reasons set forth in the joint preamble, parts 208, 211, 225, and 263 of chapter II of title 12 of the Code of Federal Regulations are amended as follows:

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

1. The authority citation for 12 CFR part 208 is revised 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, 78w, 6801, and 6805; 31 U.S.C. 5318; 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

2. Amend § 208.3 to revise paragraph (d)(1) to read as follows:

§ 208.3 Application and conditions for membership in the Federal Reserve System.

* * * * *

(d) *Conditions of membership.* (1) *Safety and soundness.* Each member bank shall at all times conduct its business and exercise its powers with due regard to safety and soundness. Each member bank shall comply with the Interagency Guidelines Establishing Standards for Safety and Soundness prescribed pursuant to section 39 of the FDI Act (12 U.S.C. 1831p–1), set forth in appendix D–1 to this part, and the Interagency Guidelines Establishing Standards for Safeguarding Customer Information prescribed pursuant to sections 501 and 505 of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 and 6805), set forth in appendix D–2 to this part.

* * * * *

3. Revise appendix D–2 to read as follows:

Appendix D–2 To Part 208—Interagency Guidelines Establishing Standards For Safeguarding Customer Information

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C. Manage and Control Risk
D. Oversee Service Provider Arrangements
E. Adjust the Program
F. Report to the Board
G. Implement the Standards

I. Introduction

These Interagency Guidelines Establishing Standards for Safeguarding Customer Information (Guidelines) set forth standards pursuant to sections 501 and 505 of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 and 6805), in the same manner, to the extent practicable, as standards prescribed pursuant to section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1). These Guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information.

A. *Scope.* The Guidelines apply to customer information maintained by or on behalf of state member banks (banks) and their nonbank subsidiaries, except for brokers, dealers, persons providing insurance, investment companies, and investment advisors. Pursuant to §§ 211.9 and 211.24 of this chapter, these guidelines also apply to customer information maintained by or on behalf of Edge corporations, agreement corporations, and uninsured state-licensed branches or agencies of a foreign bank.

B. *Preservation of Existing Authority.* Neither section 39 nor these Guidelines in any way limit the authority of the Board to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices. The Board may take action under

section 39 and these Guidelines independently of, in conjunction with, or in addition to, any other enforcement action available to the Board.

C. *Definitions.*

1. Except as modified in the Guidelines, or unless the context otherwise requires, the terms used in these Guidelines have the same meanings as set forth in sections 3 and 39 of the Federal Deposit Insurance Act (12 U.S.C. 1813 and 1831p–1).

2. For purposes of the Guidelines, the following definitions apply:

a. *Board of directors,* in the case of a branch or agency of a foreign bank, means the managing official in charge of the branch or agency.

b. *Customer* means any customer of the bank as defined in § 216.3(h) of this chapter.

c. *Customer* information means any record containing nonpublic personal information, as defined in § 216.3(n) of this chapter, about a customer, whether in paper, electronic, or other form, that is maintained by or on behalf of the bank.

d. *Customer information systems* means any methods used to access, collect, store, use, transmit, protect, or dispose of customer information.

e. *Service provider* means any person or entity that maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to the bank.

f. *Subsidiary* means any company controlled by a bank, except a broker, dealer, person providing insurance, investment company, investment advisor, insured depository institution, or subsidiary of an insured depository institution.

II. Standards for Safeguarding Customer Information

A. *Information Security Program.* Each bank shall implement a comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to the size and complexity of the bank and the nature and scope of its activities. While all parts of the bank are not required to implement a uniform set of policies, all elements of the information security program must be coordinated. A bank also shall ensure that each of its subsidiaries is subject to a comprehensive information security program. The bank may fulfill this requirement either by including a subsidiary within the scope of the bank's comprehensive information security program or by causing the subsidiary to implement a separate comprehensive information security program in accordance with the standards and procedures in sections II and III of this appendix that apply to banks.

B. *Objectives.* A bank's information security program shall be designed to:

1. Ensure the security and confidentiality of customer information;

2. Protect against any anticipated threats or hazards to the security or integrity of such information; and

3. Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.

III. Development and Implementation of Information Security Program

A. *Involve the Board of Directors.* The board of directors or an appropriate committee of the board of each bank shall:

1. Approve the bank's written information security program; and

2. Oversee the development, implementation, and maintenance of the bank's information security program, including assigning specific responsibility for its implementation and reviewing reports from management.

B. *Assess Risk.* Each bank shall:

1. Identify reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information or customer information systems.

2. Assess the likelihood and potential damage of these threats, taking into consideration the sensitivity of customer information.

3. Assess the sufficiency of policies, procedures, customer information systems, and other arrangements in place to control risks.

C. *Manage and Control Risk.* Each bank shall:

1. Design its information security program to control the identified risks, commensurate with the sensitivity of the information as well as the complexity and scope of the bank's activities. Each bank must consider whether the following security measures are appropriate for the bank and, if so, adopt those measures the bank concludes are appropriate:

a. Access controls on customer information systems, including controls to authenticate and permit access only to authorized individuals and controls to prevent employees from providing customer information to unauthorized individuals who may seek to obtain this information through fraudulent means.

b. Access restrictions at physical locations containing customer information, such as buildings, computer facilities, and records storage facilities to permit access only to authorized individuals;

c. Encryption of electronic customer information, including while in transit or in storage on networks or systems to which unauthorized individuals may have access;

d. Procedures designed to ensure that customer information system modifications are consistent with the bank's information security program;

e. Dual control procedures, segregation of duties, and employee background checks for employees with responsibilities for or access to customer information;

f. Monitoring systems and procedures to detect actual and attempted attacks on or intrusions into customer information systems;

g. Response programs that specify actions to be taken when the bank suspects or detects that unauthorized individuals have gained access to customer information systems, including appropriate reports to regulatory and law enforcement agencies; and

h. Measures to protect against destruction, loss, or damage of customer information due to potential environmental hazards, such as fire and water damage or technological failures.

2. Train staff to implement the bank's information security program.

3. Regularly test the key controls, systems and procedures of the information security program. The frequency and nature of such tests should be determined by the bank's risk assessment. Tests should be conducted or reviewed by independent third parties or staff independent of those that develop or maintain the security programs.

D. *Oversee Service Provider Arrangements.* Each bank shall:

1. Exercise appropriate due diligence in selecting its service providers;

2. Require its service providers by contract to implement appropriate measures designed to meet the objectives of these Guidelines; and

3. Where indicated by the bank's risk assessment, monitor its service providers to confirm that they have satisfied their obligations as required by paragraph D.2. As part of this monitoring, a bank should review audits, summaries of test results, or other equivalent evaluations of its service providers.

E. *Adjust the Program.* Each bank shall monitor, evaluate, and adjust, as appropriate, the information security program in light of any relevant changes in technology, the sensitivity of its

customer information, internal or external threats to information, and the bank's own changing business arrangements, such as mergers and acquisitions, alliances and joint ventures, outsourcing arrangements, and changes to customer information systems.

F. *Report to the Board.* Each bank shall report to its board or an appropriate committee of the board at least annually. This report should describe the overall status of the information security program and the bank's compliance with these Guidelines. The reports should discuss material matters related to its program, addressing issues such as: risk assessment; risk management and control decisions; service provider arrangements; results of testing; security breaches or violations and management's responses; and recommendations for changes in the information security program.

G. *Implement the Standards.*

1. *Effective date.* Each bank must implement an information security program pursuant to these Guidelines by July 1, 2001.

2. *Two-year grandfathering of agreements with service providers.* Until July 1, 2003, a contract that a bank has entered into with a service provider to perform services for it or functions on its behalf satisfies the provisions of section III.D., even if the contract does not include a requirement that the servicer maintain the security and confidentiality of customer information, as long as the bank entered into the contract on or before March 5, 2001.

PART 211—INTERNATIONAL BANKING OPERATIONS (REGULATION K)

4. The authority citation for part 211 is revised to read as follows:

Authority: 12 U.S.C. 221 *et seq.*, 1818, 1835a, 1841 *et seq.*, 3101 *et seq.*, and 3901 *et seq.*; 15 U.S.C. 6801 and 6805.

5. Add new § 211.9 to read as follows:

§ 211.9 Protection of customer information.

An Edge or agreement corporation shall comply with the Interagency Guidelines Establishing Standards for Safeguarding Customer Information prescribed pursuant to sections 501 and 505 of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 and 6805), set forth in appendix D–2 to part 208 of this chapter.

6. In § 211.24, add new paragraph (i) to read as follows:

§ 211.24 Approval of offices of foreign banks; procedures for applications; standards for approval; representative-office activities and standards for approval; preservation of existing authority; reports of crimes and suspected crimes; government securities sales practices.

* * * * *

(i) *Protection of customer information.* An uninsured state-licensed branch or agency of a foreign bank shall comply with the Interagency Guidelines Establishing Standards for Safeguarding Customer Information prescribed pursuant to sections 501 and 505 of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 and 6805), set forth in appendix D–2 to part 208 of this chapter.

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

7. The authority citation for part 225 is revised to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3907, and 3909; 15 U.S.C. 6801 and 6805.

8. In § 225.1, add new paragraph (c)(16) to read as follows:

§ 225.1 Authority, purpose, and scope.

* * * * *

(c) * * *

(16) *Appendix F* contains the Interagency Guidelines Establishing Standards for Safeguarding Customer Information.

9. In § 225.4, add new paragraph (h) to read as follows:

§ 225.4 Corporate practices.

* * * * *

(h) *Protection of nonpublic personal information.* A bank holding company, including a bank holding company that is a financial holding company, shall comply with the Interagency Guidelines Establishing Standards for Safeguarding Customer Information, as set forth in appendix F of this part, prescribed pursuant to sections 501 and 505 of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 and 6805).

10. Add new appendix F to read as follows:

Appendix F To Part 225—Interagency Guidelines Establishing Standards For Safeguarding Customer Information

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D. Oversee Service Provider Arrangements
E. Adjust the Program
F. Report to the Board
G. Implement the Standards

I. Introduction

These Interagency Guidelines Establishing Standards for Safeguarding Customer Information (Guidelines) set forth standards pursuant to sections 501 and 505 of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 and 6805) . These Guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information.

A. *Scope.* The Guidelines apply to customer information maintained by or on behalf of bank holding companies and their nonbank subsidiaries or affiliates (except brokers, dealers, persons providing insurance, investment companies, and investment advisors), for which the Board has supervisory authority.

B. *Preservation of Existing Authority.* These Guidelines do not in any way limit the authority of the Board to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices. The Board may take action under these Guidelines independently of, in conjunction with, or in addition to, any other enforcement action available to the Board.

C. *Definitions.* 1. Except as modified in the Guidelines, or unless the context otherwise requires, the terms used in these Guidelines have the same meanings as set forth in sections 3 and 39 of the Federal Deposit Insurance Act (12 U.S.C. 1813 and 1831p–1).

2. For purposes of the Guidelines, the following definitions apply:

a. *Board of directors,* in the case of a branch or agency of a foreign bank, means the managing official in charge of the branch or agency.

b. *Customer* means any customer of the bank holding company as defined in § 216.3(h) of this chapter.

c. *Customer information* means any record containing nonpublic personal information, as defined in § 216.3(n) of this chapter, about a customer, whether in paper, electronic, or other form, that is maintained by or on behalf of the bank holding company.

d. *Customer information systems* means any methods used to access, collect, store, use, transmit, protect, or dispose of customer information.

e. *Service provider* means any person or entity that maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to the bank holding company.

f. *Subsidiary* means any company controlled by a bank holding company, except a broker, dealer, person providing insurance, investment company, investment advisor, insured depository institution, or subsidiary of an insured depository institution.

II. Standards for Safeguarding Customer Information

A. *Information Security Program.* Each bank holding company shall implement a comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to the size and complexity of the bank holding company and the nature and scope of its activities. While all parts of the bank holding company are not required to implement a uniform set of policies, all elements of the information security program must be coordinated. A bank holding company also shall ensure that each of its subsidiaries is subject to a comprehensive information security program. The bank holding company may fulfill this requirement either by including a subsidiary within the scope of the bank holding company's comprehensive information security program or by causing the subsidiary to implement a separate comprehensive information security program in accordance with the standards and procedures in sections II and III of this appendix that apply to bank holding companies.

B. *Objectives.* A bank holding company's information security program shall be designed to:

1. Ensure the security and confidentiality of customer information;

2. Protect against any anticipated threats or hazards to the security or integrity of such information; and

3. Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.

III. Development and Implementation of Information Security Program

A. *Involve the Board of Directors.* The board of directors or an appropriate committee of the board of each bank holding company shall:

1. Approve the bank holding company's written information security program; and

2. Oversee the development, implementation, and maintenance of the bank holding company's information security program, including assigning specific responsibility for its implementation and reviewing reports from management.

B. *Assess Risk.* Each bank holding company shall:

1. Identify reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information or customer information systems.

2. Assess the likelihood and potential damage of these threats, taking into consideration the sensitivity of customer information.

3. Assess the sufficiency of policies, procedures, customer information systems, and other arrangements in place to control risks.

C. *Manage and Control Risk.* Each bank holding company shall:

1. Design its information security program to control the identified risks, commensurate with the sensitivity of the information as well as the complexity and scope of the bank holding company's activities. Each bank holding company must consider whether the following security measures are appropriate for the bank holding company and, if so, adopt those measures the bank holding company concludes are appropriate:

a. Access controls on customer information systems, including controls to authenticate and permit access only to authorized individuals and controls to prevent employees from providing customer information to unauthorized individuals who may seek to obtain this information through fraudulent means.

b. Access restrictions at physical locations containing customer information, such as buildings, computer facilities, and records storage facilities to permit access only to authorized individuals;

c. Encryption of electronic customer information, including while in transit or in storage on networks or systems to which unauthorized individuals may have access;

d. Procedures designed to ensure that customer information system modifications are consistent with the bank holding company's information security program;

e. Dual control procedures, segregation of duties, and employee background checks for employees with responsibilities for or access to customer information;

f. Monitoring systems and procedures to detect actual and attempted attacks on or intrusions into customer information systems;

g. Response programs that specify actions to be taken when the bank holding company suspects or detects that unauthorized individuals have gained access to customer information systems, including appropriate reports to regulatory and law enforcement agencies; and

h. Measures to protect against destruction, loss, or damage of customer information due to potential environmental hazards, such as fire and water damage or technological failures.

2. Train staff to implement the bank holding company's information security program.

3. Regularly test the key controls, systems and procedures of the information security program. The frequency and nature of such tests should be determined by the bank holding company's risk assessment. Tests should be conducted or reviewed by independent third parties or staff independent of those that develop or maintain the security programs.

D. *Oversee Service Provider Arrangements.* Each bank holding company shall:

1. Exercise appropriate due diligence in selecting its service providers;

2. Require its service providers by contract to implement appropriate measures designed to meet the objectives of these Guidelines; and

3. Where indicated by the bank holding company's risk assessment, monitor its service providers to confirm that they have satisfied their obligations as required by paragraph D.2. As part of this monitoring, a bank holding company should review audits, summaries of test results, or other equivalent evaluations of its service providers.

E. *Adjust the Program.* Each bank holding company shall monitor, evaluate, and adjust, as appropriate, the information security program in light of any relevant changes in technology, the sensitivity of its customer information, internal or external threats to information, and the bank holding company's own changing business arrangements, such as mergers and acquisitions, alliances and joint ventures, outsourcing arrangements, and changes to customer information systems.

F. *Report to the Board.* Each bank holding company shall report to its board or an appropriate committee of the board at least annually. This report should describe the overall status of the information security program and the bank holding company's compliance with these Guidelines. The reports should discuss material matters related to its program, addressing issues such as: risk assessment; risk management and control decisions; service provider arrangements; results of testing; security breaches or violations and management's responses; and recommendations for changes in the information security program.

G. *Implement the Standards.*

1. *Effective date.* Each bank holding company must implement an information security program pursuant to these Guidelines by July 1, 2001.

2. *Two-year grandfathering of agreements with service providers.* Until July 1, 2003, a contract that a bank holding company has entered into with a service provider to perform services for it or functions on its behalf satisfies the provisions of section III.D., even if the contract does not include a requirement that the servicer maintain the security and confidentiality of customer information, as long as the bank holding company entered into the contract on or before March 5, 2001.

PART 263—RULES OF PRACTICE FOR HEARINGS

11. The authority citation for part 263 is revised to read as follows:

Authority: 5 U.S.C. 504; 12 U.S.C. 248, 324, 504, 505, 1817(j), 1818, 1828(c), 1831o, 1831p–1, 1847(b), 1847(d), 1884(b), 1972(2)(F), 3105, 3107, 3108, 3907, 3909; 15 U.S.C. 21, 78o–4, 78o–5, 78u–2, 6801, 6805; and 28 U.S.C. 2461 note.

12. Amend § 263.302 to revise paragraph (a) to read as follows:

§ 263.302 Determination and notification of failure to meet safety and soundness standard and request for compliance plan.

(a) *Determination.* The Board may, based upon an examination, inspection, or any other information that becomes available to the Board, determine that a bank has failed to satisfy the safety and soundness standards contained in the Interagency Guidelines Establishing Standards for Safety and Soundness or the Interagency Guidelines Establishing Standards for Safeguarding Customer Information, set forth in appendices D–1 and D–2 to part 208 of this chapter, respectively.

* * * * *

By order of the Board of Governors of the Federal Reserve System, January 4, 2001.

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, parts 308 and 364 of chapter III of title 12 of the Code of Federal Regulations are amended as follows:

PART 308—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 308 is revised to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1815(e), 1817, 1818, 1820, 1828, 1829, 1829b, 1831i, 1831o, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717; 15 U.S.C. 78(h) and (i), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3 and 78w; 6801(b), 6805(b)(1), 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Sec. 3100(s), Pub. L. 104–134, 110 Stat. 1321–358.

1. Amend § 308.302 to revise paragraph (a) to read as follows:

§ 308.302 Determination and notification of failure to meet a safety and soundness standard and request for compliance plan.

(a) *Determination.* The FDIC may, based upon an examination, inspection or any other information that becomes available to the FDIC, determine that a bank has failed to satisfy the safety and soundness standards set out in part 364 of this chapter and in the Interagency Guidelines Establishing Standards for Safety and Soundness in appendix A and the Interagency Guidelines Establishing Standards for Safeguarding Customer Information in appendix B to part 364 of this chapter.

* * * * *

PART 364—STANDARDS FOR SAFETY AND SOUNDNESS

2. The authority citation for part 364 is revised to read as follows:

Authority: 12 U.S.C. 1819(Tenth), 1831p–1; 15 U.S.C. 6801(b), 6805(b)(1).

3. Amend § 364.101 to revise paragraph (b) to read as follows:

§ 364.101 Standards for safety and soundness.

* * * * *

(b) *Interagency Guidelines Establishing Standards for Safeguarding Customer Information.* The Interagency Guidelines Establishing Standards for Safeguarding Customer Information prescribed pursuant to section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1) and sections 501 and 505(b) of the Gramm-Leach-Bliley Act (15 U.S.C. 6801, 6805(b)), as set forth in appendix B to this part, apply to all insured state nonmember banks, insured state licensed branches of foreign banks, and any subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).

4. Revise appendix B to part 364 to read as follows:

Appendix B to Part 364—Interagency Guidelines Establishing Standards for Safeguarding Customer Information

Table of Contents

I. Introduction
A. Scope
B. Preservation of Existing Authority
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II. Standards for Safeguarding Customer Information
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B. Objectives
III. Development and Implementation of Customer Information Security Program
A. Involve the Board of Directors
B. Assess Risk
C. Manage and Control Risk
D. Oversee Service Provider Arrangements
E. Adjust the Program
F. Report to the Board
G. Implement the Standards

I. Introduction

The Interagency Guidelines Establishing Standards for Safeguarding Customer Information (Guidelines) set forth standards pursuant to section 39 of the Federal Deposit Insurance Act (section 39, codified at 12 U.S.C. 1831p–1), and sections 501 and 505(b), codified at 15 U.S.C. 6801 and 6805(b), of the Gramm-Leach-Bliley Act. These Guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information.

A. *Scope.* The Guidelines apply to customer information maintained by or on behalf of entities over which the Federal Deposit Insurance Corporation (FDIC) has authority. Such entities, referred to as ''the bank'' are banks insured by the FDIC (other than members of the Federal Reserve System), insured state branches of foreign banks, and any subsidiaries of such entities (except brokers, dealers, persons providing insurance, investment companies, and investment advisers).

B. *Preservation of Existing Authority.* Neither section 39 nor these Guidelines in any way limit the authority of the FDIC to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices. The FDIC may take action under section 39 and these Guidelines independently of, in conjunction with, or in addition to, any other enforcement action available to the FDIC.

C. *Definitions.* 1. Except as modified in the Guidelines, or unless the context otherwise requires, the terms used in these Guidelines have the same meanings as set forth in sections 3 and 39 of the Federal Deposit Insurance Act (12 U.S.C. 1813 and 1831p–1).

2. For purposes of the Guidelines, the following definitions apply:

a. *Board of directors,* in the case of a branch or agency of a foreign bank, means the managing official in charge of the branch or agency.

b. *Customer* means any customer of the bank as defined in § 332.3(h) of this chapter.

c. *Customer information* means any record containing nonpublic personal information, as defined in § 332.3(n) of this chapter, about a customer, whether in paper, electronic, or other form, that is maintained by or on behalf of the bank.

d. *Customer information systems* means any methods used to access, collect, store, use, transmit, protect, or dispose of customer information.

e. *Service provider* means any person or entity that maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to the bank.

II. Standards for Safeguarding Customer Information

A. *Information Security Program.* Each bank shall implement a comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to the size and complexity of the bank and the nature and scope of its activities. While all parts of the bank are not required to implement a uniform set of policies, all elements of the information security program must be coordinated.

B. *Objectives.* A bank's information security program shall be designed to:

1. Ensure the security and confidentiality of customer information;

2. Protect against any anticipated threats or hazards to the security or integrity of such information; and

3. Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.

III. Development and Implementation of Information Security Program

A. *Involve the Board of Directors.* The board of directors or an appropriate committee of the board of each bank shall:

1. Approve the bank's written information security program; and

2. Oversee the development, implementation, and maintenance of the bank's information security program, including assigning specific responsibility for its implementation and reviewing reports from management.

B. *Assess Risk.*

Each bank shall:

1. Identify reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information or customer information systems.

2. Assess the likelihood and potential damage of these threats, taking into consideration the sensitivity of customer information.

3. Assess the sufficiency of policies, procedures, customer information systems, and other arrangements in place to control risks.

C. *Manage and Control Risk.* Each bank shall:

1. Design its information security program to control the identified risks, commensurate with the sensitivity of the information as well as the complexity and scope of the bank's activities. Each bank must consider whether the following security measures are appropriate for the bank and, if so, adopt those measures the bank concludes are appropriate:

a. Access controls on customer information systems, including controls to authenticate and permit access only to authorized individuals and controls to prevent employees from providing customer information to unauthorized individuals who may seek to obtain this information through fraudulent means.

b. Access restrictions at physical locations containing customer information, such as buildings, computer facilities, and records storage facilities to permit access only to authorized individuals;

c. Encryption of electronic customer information, including while in transit or in storage on networks or systems to which unauthorized individuals may have access;

d. Procedures designed to ensure that customer information system modifications are consistent with the bank's information security program;

e. Dual control procedures, segregation of duties, and employee background checks for employees with responsibilities for or access to customer information;

f. Monitoring systems and procedures to detect actual and attempted attacks on or intrusions into customer information systems;

g. Response programs that specify actions to be taken when the bank suspects or detects that unauthorized individuals have gained access to customer information systems, including appropriate reports to regulatory and law enforcement agencies; and

h. Measures to protect against destruction, loss, or damage of customer information due to potential environmental hazards, such as fire and water damage or technological failures.

2. Train staff to implement the bank's information security program.

3. Regularly test the key controls, systems and procedures of the information security program. The frequency and nature of such tests should be determined by the bank's risk assessment. Tests should be conducted or reviewed by independent third parties or staff independent of those that develop or maintain the security programs.

D. *Oversee Service Provider Arrangements.* Each bank shall:

1. Exercise appropriate due diligence in selecting its service providers;

2. Require its service providers by contract to implement appropriate measures designed to meet the objectives of these Guidelines; and

3. Where indicated by the bank's risk assessment, monitor its service providers to confirm that they have satisfied their obligations as required by paragraph D.2. As part of this monitoring, a bank should review audits, summaries of test results, or other equivalent evaluations of its service providers.

E. *Adjust the Program.* Each bank shall monitor, evaluate, and adjust, as appropriate, the information security program in light of any relevant changes in technology, the sensitivity of its customer information, internal or external threats to information, and the bank's own changing business arrangements, such as mergers and acquisitions, alliances and joint ventures, outsourcing arrangements, and changes to customer information systems.

F. *Report to the Board.* Each bank shall report to its board or an appropriate committee of the board at least annually. This report should describe the overall status of the information security program and the bank's compliance with these Guidelines. The report, which will vary depending upon the complexity of each bank's program should discuss material matters related to its program, addressing issues such as: risk assessment; risk management and control decisions; service provider arrangements; results of testing; security breaches or violations, and management's responses; and recommendations for changes in the information security program.

G. *Implement the Standards.* 1. *Effective date.* Each bank must implement an information security program pursuant to these Guidelines by July 1, 2001.

2. *Two-year grandfathering of agreements with service providers.* Until July 1, 2003, a contract that a bank has entered into with a service provider to perform services for it or functions on its behalf, satisfies the provisions of paragraph III.D., even if the contract does not include a requirement that the servicer maintain the security and confidentiality of customer information as long as the bank entered into the contract on or before March 5, 2001.

By order of the Board of Directors.

Dated at Washington, D.C., this 21st day of December, 2000.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

Office of Thrift Supervision

12 CFR Chapter V

Authority and Issuance

For the reasons set forth in the joint preamble, parts 568 and 570 of chapter V of title 12 of the Code of Federal regulations are amended as follows:

PART 568—SECURITY PROCEDURES

1. The authority citation of part 568 is revised to read as follows:

Authority: Secs. 2–5, 82 Stat. 294–295 (12 U.S.C. 1881–1984); 12 U.S.C. 1831p-1; 15 U.S.C. 6801, 6805(b)(1).

2. Amend § 568.1 by revising paragraph (a) to read as follows:

§ 568.1 Authority, purpose, and scope.

(a) This part is issued by the Office of Thrift Supervision (OTS) pursuant to section 3 of the Bank Protection Act of 1968 (12 U.S.C. 1882), and sections 501 and 505(b)(1) of the Gramm-Leach-Bliley Act (12 U.S.C. 6801, 6805(b)(1)). This part is applicable to savings associations. It requires each savings association to adopt appropriate security procedures to discourage robberies, burglaries, and larcenies and to assist in the identification and prosecution of persons who commit such acts. Section 568.5 of this part is applicable to savings associations and their subsidiaries (except brokers, dealers, persons providing insurance, investment companies, and investment advisers). Section 568.5 of this part requires covered institutions to establish and implement appropriate administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information.

* * * * *

3. Add new § 568.5 to read as follows:

§ 568.5 Protection of customer information.

Savings associations and their subsidiaries (except brokers, dealers, persons providing insurance, investment companies, and investment advisers) must comply with the Interagency Guidelines Establishing Standards for Safeguarding Customer Information prescribed pursuant to sections 501 and 505 of the Gramm-Leach-Bliley Act (15 U.S.C. 6801 and 6805), set forth in appendix B to part 570 of this chapter.

PART 570—SUBMISSION AND REVIEW OF SAFETY AND SOUNDNESS COMPLIANCE PLANS AND ISSUANCE OF ORDERS TO CORRECT SAFETY AND SOUNDNESS DEFICIENCIES

4. Amend § 570.1 by adding a sentence at the end of paragraph (a) and revising the last sentence of paragraph (b) to read as follows:

§ 570.1 Authority, purpose, scope and preservation of existing authority.

(a) * * *Appendix B to this part is further issued under sections 501(b) and 505 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338 (1999)).

(b)* * *Interagency Guidelines Establishing Standards for Safeguarding Customer Information are set forth in appendix B to this part.

* * * * *

5. Amend § 570.2 by revising paragraph (a) to read as follows:

§ 570.2 Determination and notification of failure to meet safety and soundness standards and request for compliance plan.

(a) *Determination.* OTS may, based upon an examination, inspection, or any other information that becomes available to OTS, determine that a savings association has failed to satisfy the safety and soundness standards contained in the Interagency Guidelines Establishing Standards for Safety and Soundness as set forth in appendix A to this part or the Interagency Guidelines Establishing Standards for Safeguarding Customer Information as set forth in appendix B to this part.

* * * * *

6. Revise appendix B to part 570 to read as follows:

Appendix B to Part 570—Interagency Guidelines Establishing Standards for Safeguarding Customer Information

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A. Involve the Board of Directors
B. Assess Risk
C. Manage and Control Risk
D. Oversee Service Provider Arrangements
E. Adjust the Program
F. Report to the Board
G. Implement the Standards

I. Introduction

The Interagency Guidelines Establishing Standards for Safeguarding Customer Information (Guidelines) set forth standards pursuant to section 39 of the Federal Deposit Insurance Act (section 39, codified at 12 U.S.C. 1831p–1), and sections 501 and 505(b), codified at 15 U.S.C. 6801 and 6805(b), of the Gramm-Leach-Bliley Act. These Guidelines address standards for developing and implementing administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of customer information.

A. *Scope.* The Guidelines apply to customer information maintained by or on behalf of entities over which OTS has authority. For purposes of this appendix, these entities are savings associations whose deposits are FDIC-insured and any subsidiaries of such savings associations, except brokers, dealers, persons providing insurance, investment companies, and investment advisers. This appendix refers to such entities as ''you'.

B. *Preservation of Existing Authority.* Neither section 39 nor these Guidelines in any way limit OTS's authority to address unsafe or unsound practices, violations of law, unsafe or unsound conditions, or other practices. OTS may take action under section 39 and these Guidelines independently of, in conjunction with, or in addition to, any other enforcement action available to OTS.

C. *Definitions.* 1. Except as modified in the Guidelines, or unless the context otherwise requires, the terms used in these Guidelines have the same meanings as set forth in sections 3 and 39 of the Federal Deposit Insurance Act (12 U.S.C. 1813 and 1831p–1).

2. For purposes of the Guidelines, the following definitions apply:

a. *Customer* means any of your customers as defined in § 573.3(h) of this chapter.

b. *Customer information* means any record containing nonpublic personal information, as defined in § 573.3(n) of this chapter, about a customer, whether in paper, electronic, or other form, that you maintain or that is maintained on your behalf.

c. *Customer information systems* means any methods used to access, collect, store, use, transmit, protect, or dispose of customer information.

d. *Service provider* means any person or entity that maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to you.

II. Standards for Safeguarding Customer Information

A. *Information Security Program.* You shall implement a comprehensive written information security program that includes administrative, technical, and physical safeguards appropriate to your size and complexity and the nature and scope of your activities. While all parts of your organization are not required to implement a uniform set of policies, all elements of your information security program must be coordinated.

B. *Objectives.* Your information security program shall be designed to:

1. Ensure the security and confidentiality of customer information;

2. Protect against any anticipated threats or hazards to the security or integrity of such information; and

3. Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.

III. Development and Implementation of Information Security Program

A. *Involve the Board of Directors.* Your board of directors or an appropriate committee of the board shall:

1. Approve your written information security program; and

2. Oversee the development, implementation, and maintenance of your information security program, including assigning specific responsibility for its implementation and reviewing reports from management.

B. *Assess Risk.* You shall:

1. Identify reasonably foreseeable internal and external threats that could result in unauthorized disclosure, misuse, alteration, or destruction of customer information or customer information systems.

2. Assess the likelihood and potential damage of these threats, taking into consideration the sensitivity of customer information.

3. Assess the sufficiency of policies, procedures, customer information systems, and other arrangements in place to control risks.

C. *Manage and Control Risk.* You shall:

1. Design your information security program to control the identified risks, commensurate with the sensitivity of the information as well as the complexity and scope of your activities. You must consider whether the following security measures are appropriate for you and, if so, adopt those measures you conclude are appropriate:

a. Access controls on customer information systems, including controls to authenticate and permit access only to authorized individuals and controls to prevent employees from providing customer information to unauthorized individuals who may seek to obtain this information through fraudulent means.

b. Access restrictions at physical locations containing customer information, such as buildings, computer facilities, and records storage facilities to permit access only to authorized individuals;

c. Encryption of electronic customer information, including while in transit or in storage on networks or systems to which unauthorized individuals may have access;

d. Procedures designed to ensure that customer information system modifications are consistent with your information security program;

e. Dual control procedures, segregation of duties, and employee background checks for employees with responsibilities for or access to customer information;

f. Monitoring systems and procedures to detect actual and attempted attacks on or intrusions into customer information systems;

g. Response programs that specify actions for you to take when you suspect or detect that unauthorized individuals have gained access to customer information systems, including appropriate reports to regulatory and law enforcement agencies; and

h. Measures to protect against destruction, loss, or damage of customer information due to potential environmental hazards, such as fire and water damage or technological failures.

2. Train staff to implement your information security program.

3. Regularly test the key controls, systems and procedures of the information security program. The frequency and nature of such tests should be determined by your risk assessment. Tests should be conducted or reviewed by independent third parties or staff independent of those that develop or maintain the security programs.

D. *Oversee Service Provider Arrangements.* You shall:

1. Exercise appropriate due diligence in selecting your service providers;

2. Require your service providers by contract to implement appropriate measures designed to meet the objectives of these Guidelines; and

3. Where indicated by your risk assessment, monitor your service providers to confirm that they have satisfied their

obligations as required by paragraph D.2. As part of this monitoring, you should review audits, summaries of test results, or other equivalent evaluations of your service providers.

E. *Adjust the Program.* You shall monitor, evaluate, and adjust, as appropriate, the information security program in light of any relevant changes in technology, the sensitivity of your customer information, internal or external threats to information, and your own changing business arrangements, such as mergers and acquisitions, alliances and joint ventures, outsourcing arrangements, and changes to customer information systems.

F. *Report to the Board.* You shall report to your board or an appropriate committee of the board at least annually. This report should describe the overall status of the information security program and your compliance with these Guidelines. The reports should discuss material matters related to your program, addressing issues such as: risk assessment; risk management and control decisions; service provider arrangements; results of testing; security breaches or violations and management's responses; and recommendations for changes in the information security program.

G. *Implement the Standards.* 1. *Effective date.* You must implement an information security program pursuant to these Guidelines by July 1, 2001.

2. *Two-year grandfathering of agreements with service providers.* Until July 1, 2003, a contract that you have entered into with a service provider to perform services for you or functions on your behalf satisfies the provisions of paragraph III.D., even if the contract does not include a requirement that the servicer maintain the security and confidentiality of customer information, as long as you entered into the contract on or before March 5, 2001.

Dated: December 19, 2000.

By the Office of Thrift Supervision.

Ellen Seidman,

Director.

[FR Doc. 01–1114 Filed 1–31–01; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P; 6720–01–P

Federal Register

Thursday,
February 1, 2001

Part III

Department of Transportation

Research and Special Programs Administration

49 CFR Parts 171, 172, 173 and 176

Harmonization with the United Nations Recommendations and the International Maritime Dangerous Goods Code; Final Rule

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171, 172, 173 and 176

[Docket No. RSPA–2000–7702 (HM–215D)]

RIN 2137–AD41

Harmonization With the United Nations Recommendations and the International Maritime Dangerous Goods Code

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule.

SUMMARY: This final rule updates three incorporations by reference in the Hazardous Materials Regulations (HMR) to include the most recent amendments to the International Maritime Dangerous Goods Code (IMDG Code), the United Nations Recommendations on the Transport of Dangerous Goods (UN Recommendations) and the UN Recommendations Manual of Tests and Criteria. This action is necessary to facilitate the continued transport of hazardous materials in international commerce by vessel and to authorize compliance with the updated UN Recommendations and UN Recommendations Manual of Tests and Criteria when these international standards become effective. Action is being deferred on the proposal to incorporate the 2001–2002 edition of the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions) because it will not be authorized for use until July 1, 2001.

DATES: *Effective Date:* July 1, 2001.

Voluntary Compliance Date: Compliance with the regulations, as amended herein, is authorized as of January 1, 2001.

Incorporation by Reference Date: The incorporations by reference of the publications listed in these amendments have been approved by the Director of the Federal Register as of July 1, 2001.

FOR FURTHER INFORMATION CONTACT: Joan McIntyre, Office of Hazardous Materials Standards, telephone (202) 366–8553, or Bob Richard, Assistant International Standards Coordinator, telephone (202) 366–0656, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Background

On October 23, 2000, RSPA (hereafter, ''we'' and ''our'' means ''RSPA'') published a notice of proposed rulemaking (NPRM) under Docket HM–215D (65 FR 63294) that proposed changes to more fully align the HMR with international regulations. Among the changes, we proposed to amend the HMR by incorporating by reference the most recent editions of the IMDG Code, the UN Recommendations and the UN Recommendations Manual of Tests and Criteria. With respect to these proposed amendments, we received about 25 comments from industry trade associations, an international supplier of industrial gases and chemicals and various other commenters.

Discussion of Comments

Some commenters requested that we extend the December 22, 2000 comment closing date. Several industry commenters requested a one- or two-month extension. One comment co-signed by 13 private organizations requested a six-month extension. Because of our intention to publish a subsequent final rule under Docket HM–215D before July 1, 2001, and in order to facilitate the international transportation of hazardous materials, we are not granting an extension of the comment period. However, as provided in 49 CFR 106.23, we will accept and consider late-filed comments to the extent practicable.

The Hazardous Materials Advisory Council (HMAC) and an international supplier requested publication of a final rule to incorporate Amendment 30 to the IMDG Code by its effective date, January 1, 2001. We also received comments from industry trade associations supporting the proposal to incorporate by reference the International Atomic Energy Agency (IAEA) safety standard, ''Regulations for the Safe Transport of Radioactive Material, No. ST–1.'' The identification number ST–1 was revised to TS–R–1 following minor editorial revisions to the standards and will hereafter be referred to as TS–R–1.

Several other commenters expressed opposition to adopting TS-R–1 into the HMR. Several commenters also opposed adoption of the updated editions of the IMDG Code and the UN Recommendations because both incorporate TS-R–1. The commenters stated that adopting the radioactive standard would lower the level of safety and pose hazards to the public. They did not address the technical basis of TS-R–1 and provided no technical basis for their comments. We maintain that the risk associated with the transport of radioactive materials remains unchanged. Several of the commenters claimed that the TS-R–1's revised definition of radioactive material, in allowing certain ''exempt amounts,'' lowers the level of safety. We disagree. In TS-R–1, IAEA changed to a more scientific, radiation protection based definition that provides the same, if not a better, level of safety. This revised definition of radioactive material is calculated using an algorithm that ensures the doses received by hazardous materials employees and the general public are lower than allowed by the international radiation protection standards.

Several commenters also stated that the requirements for Type B packagings are ''weakened'' in the TS-R–1. This is incorrect. The TS-R–1 standards strengthen Type B packaging standards by adding immersion and crush testing to the previously required performance tests. In addition, the standards also place additional limits on the contents of Type B packaging when being transported by aircraft. Commenters also claimed that uranium hexafluoride packaging requirements are ''weakened'' in TS-R–1. Again, this is incorrect. The criticality requirements for packages containing uranium hexafluoride did not change.

Several commenters complained that sufficient time was not provided for the public to review the IAEA standards. The commenters also asserted that we provided no public access to the proposed rulemaking (HM–215D) or the materials proposed to be incorporated by reference and insisted that we supply them with the documents. We disagree. The new edition of the IAEA standards was published in December 1996, and copies were available by mid-1997. Furthermore, on December 28, 1999, we published an advance notice of proposed rulemaking (ANPRM) under Docket HM–230 (64 FR 72633) that solicited comments on the changes contained in TS-R–1. Readers were informed that copies of the standard could be obtained from the United States distributor, Bernan Associates, 4611-F Assembly Drive, Lanham, MD 20706–4391, telephone (301) 459–7666. Also, readers were informed that the standard was available for review in the RSPA Record Center located in Room 8421 of the Nassif Building, 400 Seventh Street, SW., Washington, DC 20590–0001 between the hours of 8:30 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. Public dockets and written comments submitted to the docket may be reviewed at the Dockets Management

System (DMS) located on the Plaza level of the Nassif Building or on-line at the DMS web site at *http://dms.dot.gov/*. To aid persons in reviewing the changes in TS-R–1, we obtained permission from IAEA to publish certain portions of the standard and we made the information available for review at our DOT HazMat website at *http://hazmat.dot.gov*. Moreover, on March 1, 2000, we published in the **Federal Register** an ANPRM under Docket HM–230 (65 FR 11028) to extend the period for filing comments from March 29, 2000 to June 29, 2000.

All rulemakings are published and accessible through the **Federal Register** in Washington, DC and our HazMat website. All materials proposed to be incorporated by reference are available for public inspection at the RSPA Records Center at the above address and times.

Based on the above discussion, we maintain that adopting the IMDG Code and the UN Recommendations will not lower the safety standards for transporting radioactive materials in international commerce. Therefore, we are adopting the latest editions of the IMDG Code and the UN Recommendations as proposed.

Discussion of Amendments

Due to an unanticipated delay in the publication of the NPRM and the 60-day comment period, which ended December 22, 2000, the issuance of a comprehensive final rule was not possible by January 1, 2001. Therefore, to avoid disruption for persons transporting hazardous materials in international commerce, we are issuing this final rule to amend the HMR by incorporating Amendment 30 to the IMDG Code, the eleventh revised edition of the UN Recommendations and the third revised edition of the UN Recommendations Manual of Tests and Criteria. Also, we are allowing voluntary compliance with these international standards from January 1, 2001.

Because of the significant revisions contained in Amendment 30 to the IMDG Code, the International Maritime Organization authorizes, as an alternative, continued use of Amendment 29 to the IMDG Code until January 1, 2002. Thus this final rule adopts a similar provision. In addition, as proposed in the NPRM, we are revising § 171.12(b)(3) to require that viscous flammable liquids, which are excepted from the IMDG Code when in packagings of less than 450 liters (118.9 gallons) capacity, must meet the requirements in the HMR. We are taking this action in this final rule because it coincides with the adoption of the IMDG Code.

With respect to the ICAO Technical Instructions, ICAO approved an implementation date of July 1, 2001 for the 2001–2002 edition. The current 1999–2000 edition of the ICAO Technical Instructions remains in effect through June 30, 2001. The proposed incorporation by reference of the 2001–2002 edition of the ICAO Technical Instructions and all other changes proposed in the NPRM will be addressed in a subsequent final rule under Docket HM–215D.

We are also making minor editorial amendments by adding a reference to ''see § 171.7'' in sections containing the updated IBR references incorporated in this final rule based on a request from the Office of the **Federal Register**.

Rulemaking Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This final rule is not considered a significant rule under the Regulatory Policies and Procedures of the Department of Transportation [44 FR 11034].

B. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This final rule would preempt State, local and Indian tribe requirements but does not propose any regulation that has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

The Federal hazardous material transportation law, 49 U.S.C. 5101–5127, contains an express preemption provision (49 U.S.C. 5125(b)) that preempts State, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

(1) The designation, description, and classification of hazardous materials;

(2) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;

(3) The preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents, and placement of those documents;

(4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous; or

(5) The design, manufacture, fabrication, marking, maintenance, recondition, repair, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

This final rule addresses covered subject items (1), (2), (3), and (5) above and would preempt State, local, and Indian tribe requirements not meeting the ''substantively the same'' standard.

Federal hazardous materials transportation law provides at § 5125(b)(2) that, if DOT issues a regulation concerning any of the covered subjects, DOT must determine and publish in the **Federal Register** the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. The effective date of Federal preemption will be 180 days from publication of a final rule in the **Federal Register**.

C. Executive Order 13084

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because this final rule does not significantly or uniquely affect the communities of the Indian tribal governments and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13084 do not apply.

D. Regulatory Flexibility Act

This final rule updates three incorporations by reference, the eleventh revised edition of the UN Recommendations, the 2001–2002 ICAO Technical Instructions, and Amendment 30 to the IMDG Code. The changes in this rule apply to offerors and carriers of hazardous materials and will facilitate the transportation of hazardous materials in international commerce by providing consistency with international requirements. This final rule is necessary to incorporate changes in international standards that become effective on January 1, 2001. If the changes in this final rule are not adopted in the HMR, U.S. companies, including numerous small entities competing in foreign markets, will be at an economic disadvantage. The changes are intended to avoid this result. The costs associated with this final rule are considered to be so minimal as to not

warrant preparation of a regulatory impact analysis or regulatory evaluation. Therefore, I certify that this final rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

E. Paperwork Reduction Act

This final rule contains no new information collection burdens.

F. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

G. Unfunded Mandates Reform Act

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $100 million or more to either State, local or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

List of Subjects

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

49 CFR Part 172

Education, Hazardous materials transportation, Hazardous waste, Labeling, Markings, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

49 CFR Part 176

Hazardous materials transportation, Maritime carriers, Radioactive materials, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR Chapter I is amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

1. The authority citation for part 171 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

2. In § 171.7, in the paragraph (a)(3) table:

a. Under the entry ''International Maritime Organization (IMO)'', a new entry is added in alphabetical order; and

b. Under the entry ''United Nations'', the existing entries are removed and new entries are added in alphabetical order.

The additions read as follows:

§ 171.7 Reference material.

(a) *Matter incorporated by reference* * * *

* * * * *

(3) *Table of material incorporated by reference.* * * *

Source and name of material	49 CFR reference
* * * * * * *	
International Maritime Organization (IMO):	
* * * * * * *	
International Maritime Dangerous Goods (IMDG) Code, 2000 edition, including Amendment 30–00 (English edition)	171.12; 172.401; 172.502; 173.21; 176.2; 176.5; 176.11; 176.27; 176.30.
* * * * * * *	
United Nations:	
* * * * * * *	
UN Recommendations on the Transport of Dangerous Goods, Eleventh Revised Edition (1999)	172.401; 172.407; 172.502; 173.24.
UN Recommendations on the Transport of Dangerous Goods, Manual of Tests and Criteria, Third Revised Edition (1999).	172.102; 173.21; 173.56; 173.57; 173.124; 173.128; 173.166; 173.185.

* * * * *

3. In § 171.12, the paragraph (b) heading is revised and in paragraph (b)(3), a sentence is added at the end of the paragraph to read as follows:

§ 171.12 Import and export shipments.

* * * * *

(b) *IMDG Code (see § 171.7 of this subchapter).* * * *

* * * * *

(3) * * * For example, internal combustion engines, and viscous flammable liquids having a flash point of 23 °C (73.4 °F) or greater and less than or equal to 60.5 °C (140.9 °F) as provided in 2.3.2.5 of the IMDG Code may not be transported under the provisions of this section and are subject to the requirements of this subchapter.

* * * * *

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS

4. The authority citation for part 172 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

5. In § 172.102, in paragraph (c)(1), the following changes are made:

a. In Special Provisions 23, 39, 44, 57, 125 and 129, the words ''(see § 171.7 of this subchapter)'' are added following the words ''Tests and Criteria''.

b. In Special Provision 43, the words ''(see § 171.7 of this subchapter)'' are added following the words ''Tests and Criteria, Part I, Test series 1(a)''.

c. In Special Provision 132, the words ''(see § 171.7 of this subchapter)'' are added following the words ''Tests and Criteria, Part III, sub-section 38.2''.

d. In Special Provision 133, the words ''(see § 171.7 of this subchapter)'' are added following the words ''Tests and Criteria, Part 1''.

6. In § 172.401, paragraphs (c)(1) and (c)(2) are revised to read as follows:

§ 172.401 Prohibited labeling.

* * * * *

(c) * * *

(1) Any applicable requirement, including the class number (see § 172.407), in the document entitled ''UN Recommendations on the Transport of Dangerous Goods'' (see § 171.7 of this subchapter);

(2) The International Maritime Organization (IMO) requirements, including the class number (§ 172.407), in the document entitled ''International Maritime Dangerous Goods Code'' (see § 171.7 of this subchapter);

* * * * *

7. In § 172.407, paragraph (f) is revised to read as follows:

§ 172.407 Label specifications.

* * * * *

(f) *Exceptions.* A label conforming to specifications in the UN Recommendations (see § 171.7 of this subchapter) may be used in place of a corresponding label which conforms to the requirements of this subpart.

* * * * *

8. In § 172.502, paragraph (b) (1) is revised to read as follows:

§ 172.502 Prohibited and permissive placarding.

* * * * *

(b) *Exceptions.* (1) The restrictions in paragraph (a) of this section do not apply to a bulk packaging, freight container, unit load device, transport vehicle or rail car which is placarded in conformance with the ICAO Technical Instructions, the IMDG Code or the UN Recommendations (see § 171.7 of this subchapter).

* * * * *

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

9. The authority citation for part 173 continues to read as follows:

Authority: 49 U.S.C. 5101–5127, 44701; 49 CFR 1.45, 1.53.

10. In § 173.21, the following changes are made:

a. In paragraph (f) introductory text, in the second sentence, the words ''(see § 171.7 of this subchapter)'' are added following the words ''UN Manual of Tests and Criteria''.

b. In paragraph (f)(3)(ii), the words ''(see § 171.7 of this subchapter)'' are added following the words ''(IMDG Code)''.

11. In § 173.24, in paragraph (d)(2) introductory text, the words ''(see § 171.7 of this subchapter)'' are added following the words ''UN Recommendations on the Transport of Dangerous Goods''.

12. In § 173.124, in paragraph (a)(2)(iii)(C), the words ''(see § 171.7 of this subchapter)'' are added following the words ''Tests and Criteria''.

13. In § 173.128, in paragraph (e), the words ''(see § 171.7 of this subchapter)'' are added following the words ''Tests and Criteria''.

14. In § 173.166, in paragraph (b)(2), the words ''(see § 171.7 of this subchapter)'' are added following the words ''Tests and Criteria''.

15. In § 173.185, in paragraph (c)(3), the words ''(see § 171.7 of this subchapter)'' are added following the words ''Tests and Criteria''.

PART 176—CARRIAGE BY VESSEL

16. The authority citation for part 176 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

17. In § 176.2, for the definition ''*Explosive article*'', the words ''(see § 171.7 of this subchapter)'' are added following the words ''IMDG Code''.

18. In § 176.5, in paragraph (b)(8), the words ''(see § 171.7 of this subchapter)'' are added following the words ''IMDG Code''.

19. In § 176.11, in paragraph (a) introductory text, in the first sentence, the words ''(see § 171.7 of this subchapter)'' are added following the words ''IMDG Code''.

20. In § 176.27, in paragraph (b), in the first sentence, the words ''(see § 171.7 of this subchapter)'' are added following the words ''IMDG Code''.

21. In § 176.30, in paragraph (a) introductory text, in the second sentence, the words ''(see § 171.7 of this subchapter)'' are added following the words ''IMDG Code''.

Issued in Washington, D.C. on January 17, 2001, under authority delegated in 49 CFR part 1.

John P. Murray,

Acting Administrator.

[FR Doc. 01–2185 Filed 1–31–01; 8:45 am]

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Federal Register

Thursday,
February 1, 2001

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for Peninsular Bighorn Sheep; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AG17

Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for Peninsular Bighorn Sheep

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for Peninsular bighorn sheep pursuant to the Endangered Species Act of 1973, as amended (Act). A total of approximately 341,919 hectares (844,897 acres) in Riverside, San Diego, and Imperial counties, California, are designated as critical habitat for Peninsular bighorn sheep.

Critical habitat identifies specific areas that have the physical and biological features that are essential to the conservation of a listed species, and that may require special management considerations or protection. The primary constituent elements for the Peninsular bighorn sheep are those habitat components that are essential for the primary biological needs of feeding, sheltering, reproduction, dispersal, and genetic exchange. All areas designated as critical habitat for the Peninsular bighorn sheep contain one or more of the primary constituent elements.

Section 7 of the Act prohibits destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Section 4 of the Act requires us to consider economic and other impacts of specifying any particular area as critical habitat. We solicited data and comments from the public on all aspects of the proposed rule and economic analysis.

DATES: This rule will be effective March 5, 2001.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this final rule, will be available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2730 Loker Avenue West, Carlsbad, California 92008.

FOR FURTHER INFORMATION CONTACT: Field Supervisor, Carlsbad Fish and Wildlife Office, at the above address (telephone: 760/431–9440; facsimile 760/431–9624).

SUPPLEMENTARY INFORMATION:

Background

The bighorn sheep (*Ovis canadensis*) is a large mammal (family Bovidae) originally described by Shaw in 1804 (Wilson and Reeder 1993). Wild sheep became established in North America after crossing the Bering land bridge from Eurasia during the late Pleistocene (Geist 1971), and their range has since spread to include desert habitats as far south as northern Mexico (Manville 1980). In North America, two species of wild sheep currently are recognized: the thinhorn sheep (*Ovis dalli*) and the bighorn sheep (*Ovis canadensis*).

Bighorn sheep were once divided into seven recognized subspecies based on differences in skull measurements (Cowan 1940; Buechner 1960; Shackleton 1985). These subspecies included Audubon bighorn sheep (*Ovis canadensis auduboni*), Peninsular bighorn sheep (*O. c. cremnobates*), Nelson bighorn sheep (*O. c. nelsoni*), Mexican bighorn sheep (*O. c. mexicana*), Weems bighorn sheep (*O. c. weemsi*), California bighorn sheep (*O. c. californiana*), and Rocky Mountain bighorn sheep (*O. c. canadensis*). Audubon bighorn sheep are now extinct. As described below, bighorn sheep taxonomy has since been revised.

The term ''desert bighorn'' is used to describe bighorn sheep that inhabit dry and relatively barren desert environments and typically includes bighorn sheep subspecies that have, to date, been classified as *Ovis canadensis nelsoni, O. c. mexicana, O. c. cremnobates,* and *O. c. weemsi* (Manville 1980). The validity of these subspecies delineations has been questioned and reassessed. Based on morphometric and genetic analyses, Wehausen and Ramey (1993) synonymized Peninsular bighorn with the subspecies *nelsoni,* which is the current taxonomy.

In the Peninsular Mountain Ranges, bighorn sheep are found from the San Jacinto Mountains of southern California south into the Volcan Tres Virgenes Mountains near Santa Rosalia, Baja California, Mexico, a total distance of approximately 800 kilometers (km) (500 miles (mi)). The area occupied by the distinct vertebrate population segment covered herein coincides with the range of the former subspecies *Ovis canadensis cremnobates* in California. The California Fish and Game Commission listed *O. c. cremnobates* as ''rare'' in 1971. The designation was changed to ''threatened'' by the California Department of Fish and Game (CDFG) to conform with terminology of the amended California Endangered Species Act.

The Peninsular bighorn sheep is similar in appearance to other desert bighorn sheep. The coat is pale brown, and the permanent horns, which become rough and scarred with age, vary in color from yellowish-brown to dark brown. The horns are massive and coiled in males; in females, they are smaller and not coiled. In comparison to other desert bighorn sheep, the Peninsular bighorn sheep is generally described as having paler coloration and having horns with very heavy bases (Cowan 1940).

Peninsular bighorn sheep occur on steep, open slopes, canyons, and washes in hot and dry desert regions where the land is rough, rocky, and sparsely vegetated. Most of these sheep live between 91 and 1,219 meters (m) (300 and 4,000 feet (ft)) in elevation, where average annual precipitation is less than 10 centimeters (cm) (4 inches (in)) and daily high temperatures average 104° Fahrenheit in the summer. Caves and other forms of shelter (*e.g.,* rock outcrops) are used during inclement weather and for shade during the hotter months. Lambing areas are associated with ridge benches or canyon rims adjacent to steep slopes or escarpments. Alluvial fans (sloping deposits of gravel, sand, clay, and other sediments that spread fan-like at the base of canyons and washes) are also used for breeding, feeding, and movement.

Peninsular bighorn sheep use a wide variety of plant species as their food source (Turner 1976; Scott 1986). Cunningham (1982) determined that the bighorn sheep diet in Carrizo Canyon (at the south end of the U.S. Peninsular Ranges) consisted of 57 percent shrubs, 32 percent herbaceous annuals and perennials, 8 percent cacti, and 2 percent grasses. Scott (1986) and Turner (1976) reported similar diet compositions at the north end of the range. Diet composition varied among seasons (Cunningham 1982; Scott 1986), presumably because of variability in forage availability, selection of specific plant species during different times of the year (Scott 1986), and seasonal movements of bighorn sheep. As discussed in the approved Recovery Plan (Service 2000), the high metabolic demands of ewes during pregnancy and lactation require the seasonal availability of high protein forage sources such as found on the deeper, more productive soils of alluvial fans and canyon bottoms.

Peninsular bighorn sheep typically produce only one lamb per year. In the Peninsular Ranges, ewes estimated to be

between 2 and 16 years of age have been documented to produce lambs (Ostermann *et al.* in press; Rubin *et al.* 2000). Lambs are born after a gestation of approximately 174 days (Shackleton *et al.* 1984). Lambing occurs from January through August (Service 1999); however, most lambsare born between February and April (Rubin *et al.* 2000). Ewes and lambs frequently occupy steep terrain that provides escape cover and shelter from excessive heat; they tend to congregate near dependable water sources during the summer. Lambs are able to eat native forage within 2 weeks of their birth and are weaned between 4 and 6 months of age.

Bighorn ewes exhibit a high degree of site fidelity to their home range, and this behavior is learned by their offspring (Geist 1971). Ewes that share portions of a range, referred to as ''ewe groups'' in this rule, are likely to be more closely related to each other than they are to other ewes (Festa-Bianchet 1991; Boyce *et al.* 1999). However, bighorn ewes occasionally move well beyond their traditional home ranges (Rubin *et al.* 1998), and may even between mountain ranges (Bleich *et al.* 1990, 1996). By following older animals, young bighorn sheep gather knowledge regarding escape terrain, migration routes, water sources, and lambing habitat (Geist 1971). Rams do not show the same level of site fidelity and tend to range more widely, often moving among ewe groups and mountain ranges. As young rams reach 2 to 4 years of age, they follow older rams away from their birth group during the fall breeding period, or rut, and may rejoin ewe groups following the fall breeding (Geist 1971; Festa-Bianchet 1991).

From May through October, permanent water sources greatly enhance the ability of Peninsular bighorn sheep to survive high temperatures, and their distribution is typically more localized. Bighorn sheep populations aggregate during this period due to a combination of breeding activities and diminishing water sources. Summer concentration areas are associated primarily with dependable water sources, and ideally provide a diversity of vegetation to meet the forage requirements of bighorn sheep. Once rains arrive in the fall, desert bighorn sheep typically expand or shift their home ranges to include areas farther from water sources (McQuivey 1978; Leslie and Douglas 1979; Krausman *et al.* 1989). These home range expansions may allow the heavily used forage around permanent water sources a chance to recover.

Bighorn sheep are primarily diurnal (Krausman *et al.* 1985) but may be active at any time of day or night (Miller *et al.* 1984). Their daily activity pattern includes feeding and resting periods. As bighorn sheep rely on vigilance to detect predators, they benefit from gregariousness and group alertness (Geist 1971; Berger 1978). Within each ewe group, ewes appear to associate with other ewes based on their availability rather than on their matrilineal (descent through the mother) relationships (Festa-Bianchet 1991; Boyce *et al.* 1999). These subgroups are dynamic, that is, they may split, reform, or change membership on a daily or hourly basis as animals move through their home ranges.

The decline of the Peninsular bighorn sheep is attributed to a combination of factors, including: (1) the effects of disease and parasitism (Buechner 1960; DeForge and Scott 1982; DeForge *et al.* 1982; Jessup 1985; Wehausen *et al.* 1987; Elliott *et al.* 1994); (2) low lamb recruitment (DeForge *et al.* 1982; Wehausen *et al.* 1987; DeForge *et al.* 1995); (3) habitat loss, degradation, and fragmentation (Service 2000; Rubin *et al.* 1998); and (4) predation (DeForge *et al.* 1997; Hayes *et al.* 2000).

Disease has been identified as one of the factors responsible for population declines in the Peninsular Ranges and elsewhere. Analysis of exposure to disease-causing agents between 1978 and 1990 showed that Peninsular bighorn sheep populations and surrounding populations in southern California have higher levels of pathogen exposure than other populations of bighorn sheep in the State (Elliott *et al.* 1994). However, tests of exposure to pathogens have revealed the presence of antibodies to several infectious disease agents in healthy as well as in clinically ill animals (Clark *et al.* 1993; Elliott *et al.* 1994; DeForge *et al.* 1997), and essentially all of the viruses, bacteria, and parasites that have been reported extant in Peninsular bighorn sheep appear to be widespread among desert bighorn sheep in the western United States (Jessup *et al.* 1990). All evidence indicates that the influence of disease in the Peninsular Ranges has subsided in more recent years. For example, examinations of bighorn sheep throughout the range indicate that most animals are clinically normal (DeForge *et al.* 1997; Borjesson *et al.* 2000). The reduced influence of disease on Peninsular bighorn sheep (at the same time they are in decline) suggests that other factors, such as predation, habitat loss and modification, and human-related disturbance, currently limit the population.

In the Peninsular Ranges, a growing human population and increased activity adjacent to and within bighorn sheep habitat are adversely affecting bighorn sheep by altering their normal behavior, which has evolved in the absence of excessive human disturbance. Human development impacts sheep through habitat loss, fragmentation, or other modifications. At least 7,490 hectares (ha) (18,500 acres (ac) or about 30 square miles) of suitable habitat has been lost to urbanization and agriculture along the urban interface between Palm Springs and La Quinta (Service 2000). Much of the lost habitat consisted of low elevation alluvial fans and washes that furnished important sources of nutrients to ewes while they were rearing their lambs. Moreover, in the northern Santa Rosa Mountains, from 1991 to 1996, thirty-four percent of adult mortalities appear to have been directly caused by urbanization. Five bighorn sheep were killed by cars; 5 bighorns died from feeding on toxic, non-native ornamental plants; and 1 was strangled in a wire fence (DeForge and Ostermann 1997).

Impacts also extend into bighorn sheep habitat beyond the urban edge. These may include increased noise and lighting, an increased number of humans and their pets venturing into sheep habitat, and potentially an increase in some predators, such as coyotes, along the wildland/urban interface. Numerous researchers have expressed concern over the impact human activity has on bighorn sheep (*e.g.,* Light and Weaver 1973; Jorgensen and Turner 1973; Hicks 1978; Olech 1979; Graham 1980; Cunningham 1982; DeForge and Scott 1982; Gross 1987; Smith and Krausman 1988; Sanchez *et al.* 1988; Krausman *et al.* in prep.). Although cases have been cited in which bighorn sheep populations did not appear to be negatively impacted by human activity (*e.g.,* Hicks and Elder 1979; Hamilton *et al.* 1982), numerous researchers, including the previous authors, have documented altered bighorn sheep behavior in response to human-related disturbance. Bighorn sheep avoided using areas while humans were present. In addition to development, a variety of other human activities, such as hiking, mountain biking, horseback riding, camping, hunting, livestock grazing, and use of aircraft and off-road vehicles, have the potential to disrupt normal bighorn sheep social behaviors. Bighorn sheep may also alter their use of essential resources resulting in negative physiological effects or they may abandon traditional habitat as a result of human disturbance (McQuivey 1978; MacArthur *et al.* 1979; Olech 1979;

Leslie and Douglas 1980; Graham 1980; MacArthur *et al.* 1982; Bates and Workman 1983; Miller and Smith 1985; Krausman and Leopold 1986; Krausman *et al.* 1989; Papouchis *et al.* 1999). Desert bighorn sheep populations next to rapidly growing urban areas in Arizona and New Mexico gradually declined to extinction, or nearly so (Krausman *et al.* in prep.). Disease and predation did not appear to be responsible for the extinctions. However, greatly increased numbers of humans entering bighorn sheep habitat, a loss of low elevation habitat to urbanization, and loss of additional habitat due to fire suppression coincided with the declines (Krausman *et al.* in prep.). Fire suppression caused habitat loss because bighorn sheep quit using areas when vegetation became too dense. In the northern part of their range, specifically the Santa Rosa and San Jacinto Mountains, Peninsular bighorn sheep currently face a situation similar to those described above. Housing developments, golf courses, and urban areas have been built within or immediately adjacent to bighorn sheep habitat, and recreational use of bighorn sheep habitat is increasing.

Mountain lion predation was an apparent limiting factor to some ewe groups in the Peninsular Ranges (Hayes *et al.* 2000). Previously, incidents of lion predation were not common, and predation was not considered to regulate or limit Peninsular bighorn sheep populations (Weaver and Mensch 1970; Jorgensen and Turner 1975; Cunningham 1982). However, the increase in the number of radio-collared bighorn sheep since 1993 may have increased the detection of such mortalities. Bighorn sheep have lived with predators for thousands of years; and larger, healthier bighorn sheep populations would have normally absorbed predation losses. However, a combination of other mortality factors, such as disease, urbanization, and habitat loss, may have decreased the population to such low levels that predation became an important mortality factor, possibly preventing the population from recovering (Caughley and Sinclair 1994). Predation by other species, such as coyotes and bobcats, could reduce lamb recruitment; however, the impact of these predators is not well understood.

The Peninsular bighorn sheep in the United States declined from an estimated 1,171 individuals in 1971 to about 570 individuals in 1991 (Bleich *et al.* 1992). A rangewide census in October, 2000 estimated a population of approximately 400 in about eight ewe groups in the wild in the United States (Steve Torres, CDFG, pers. comm. 2000).

There are also two captive populations of Peninsular bighorn sheep. The Living Desert Museum, an educational and zoo facility in Palm Desert, California, maintains a small group (seven adult females and two adult males) that is not used to augment wild populations. The Bighorn Institute, also in Palm Desert, maintains a small captive herd of approximately 15 to 20 animals. This private, nonprofit organization, established in 1982 through a Memorandum of Understanding with the CDFG, conducts research and maintains a breeding herd at its facility. Since 1985, seventy-nine animals from this herd have been released into the wild. Releases have occurred in the northern Santa Rosa Mountains (76 releases from 1985 to 2000) and in the San Jacinto Mountains (3 during 1997; Ostermann *et al.,* in press).

Essential habitat for the Peninsular bighorn sheep in the United States is managed by the California Department of Parks and Recreation (167,839 ha (414,739 ac) or 49 percent); CDFG (10,009 ha (24,732 ac) or 3 percent), Bureau of Land Management (BLM) (91,470 ha (226,026 ac) or 27 percent), private landowners (53,285 ha (131,670 ac) or 16 percent), Trust (Tribal and allotted lands) (7,359 ha (18,184 ac) or 2 percent), U.S. Forest Service (Forest Service) (7,277 ha (17,982 ac) or 2 percent), and other State and local entities (4,680 ha (11,564 ac) or 1 percent).

The Santa Rosa Mountains National Monument (Monument) was designated in October 2000. The Monument includes approximately 110,075 ha (272,000 ac) in the Santa Rosa and San Jacinto Mountains. Private land within the Monument may be purchased from willing sellers, and Federal public lands will be jointly managed by the BLM and Forest Service. Approximately 76,657 ha (189,423 ac) of Peninsular bighorn sheep critical habitat are within the Monument boundary.

Previous Federal Action

Bighorn sheep occupying the Peninsular Ranges of southern California were listed as endangered on March 18, 1998; a complete discussion of the history of Federal actions prior to listing can be found in the final rule (63 FR 13134). At the time of the listing, we concluded that designation of critical habitat was not prudent. Our regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent when one or both of the following situations exist: (1) The identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species. We concluded that critical habitat designation for the Peninsular bighorn sheep was not prudent because both of the described situations existed. We were concerned that publishing detailed maps of bighorn habitat would encourage human disturbance in sensitive areas, such as lambing habitat, rutting areas, and water sources, and result in increased disruption of bighorn sheep. We cited the rapidly growing human population in the Coachella Valley and the increasing recreational interest within bighorn habitat. We also concluded that designation of critical habitat did not add an additional regulatory benefit to bighorn sheep due to the limited Federal regulatory jurisdiction, through section 7 of the Act, for the majority of habitat necessary for conservation of the species. Therefore, we concluded that designation of critical habitat could increase the degree of threats to the species and would not provide any additional protection beyond existing regulatory mechanisms.

On December 18, 1998, the Southwest Center for Biological Diversity (Center) and Desert Survivors filed a complaint against the Service alleging that our ''not prudent'' finding was unsubstantiated. On September 17, 1999, we entered into a Settlement Agreement with the Center and Desert Survivors that stipulated a schedule for reviewing our prudency determination and publishing a Recovery Plan for Peninsular bighorn sheep. The schedule included the following dates—draft Recovery Plan, December 31, 1999; new proposed critical habitat determination, June 30, 2000; final Recovery Plan, October 31, 2000; and final determination of critical habitat as not prudent, September 30, 2000, or final critical habitat, by December 31, 2000. The latter deadline was extended to January 15, 2001 by agreement with the plaintiffs. On December 31, 1999, we published the draft Recovery Plan for the Bighorn Sheep in the Peninsular Ranges (Service 1999). On July 5, 2000, we published a proposed critical habitat determination (65 FR 41405), and on October 31, 2000, the approved Recovery Plan for Bighorn Sheep in the Peninsular Ranges, California, was published.

As required by the Settlement Agreement, we reconsidered our previous prudency determination regarding the threats posed by a potential increase in disturbance at especially sensitive bighorn use areas,

such as lambing areas, resulting from critical habitat designation. As discussed in the proposal to designate critical habitat for the Peninsular bighorn sheep (65 FR 41405), we have now determined that such threats are not sufficient to preclude the designation of critical habitat for the following reasons: (1) Peninsular bighorn sheep distribution and persistence is not solely dependent on isolated habitat features, but requires many essential resources spread across the greater landscape that allows the species to adapt to natural and unnatural environmental processes (McCutchen 1981; Krausman *et al.* 1989; Miller and Gaud 1989); (2) though bighorn sheep ewes typically exhibit a high degree of site fidelity to their immediate home range, rams travel widely across desert valleys and mountain ranges (Bleich *et al.* 1990, 1996) and their long-term distributions change in response to a dynamic environment (McQuivey 1978; Leslie and Douglas 1979; Krausman *et al.* 1989); and, (3) bighorn sheep in the Peninsular Ranges consist of a series of interconnected subpopulations (termed a metapopulation by Levins (1970)) that exchange individuals and/or genetic material (Rubin *et al.* 1998; Bleich *et al.* 1990, 1996). The interchange of individuals within this metapopulation can prevent otherwise isolated sub-populations from going extinct and enhance the genetic fitness and demographic augmentation of subpopulations. As in any metapopulation, habitat destruction and fragmentation can impede movement, thereby degrading the ability of the subpopulations to interact and persist (Ough and DeVos 1984; Bleich *et al.* 1990, 1996; Boyce *et al.* 1997; Rubin *et al.* 1998; Boyce *et al.* 1999). This is particularly true for large mammals that range widely to locate and exploit unpredictably changing sources of food, water, and shelter (Krausman *et al.* 1989; Miller and Gaud 1989; Longshore and Douglas 1995). Accordingly, we have used an ecosystem approach (Armentrout and Boyd 1995; Douglas and Leslie 1999) to delineate critical habitat that includes all of the essential habitat components needed for recovery of bighorn sheep metapopulation in the Peninsular Ranges.

Furthermore, we determined that the limited section 7 nexus for the majority of Peninsular bighorn habitat, as discussed in the final listing rule, was not, by itself, an adequate basis for making a ''not prudent'' finding. Designation of critical habitat will also provide some educational benefit by identifying the range-wide habitat essential to the conservation of bighorn sheep in the Peninsular Ranges, and help provide a focus for interagency recovery efforts. Therefore, we now conclude that the benefits of designating critical habitat outweigh the potential negative impacts.

On July 5, 2000, we published a proposed determination for the designation of critical habitat for Peninsular bighorn sheep (65 FR 41405). A total of approximately 354,343 ha (875,613 ac) was proposed as critical habitat for bighorn sheep in Riverside, San Diego, and Imperial counties, California. The comment period was open until August 31, 2000. During this comment period, a public hearing was held on July 20, 2000, in Palm Springs, Riverside County. On October 19, 2000, we published a notice (65 FR 62691) announcing the reopening of the comment period on the proposal to designate critical habitat for bighorn sheep and a notice of availability of the draft economic analysis on the proposed determination. The comment period was open until November 20, 2000.

Critical Habitat

Critical habitat is defined in section 3 of the Act as—(I) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 also requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as ''* * * the direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' Aside from the added protection that may be provided under section 7, the Act does not provide other forms of protection to lands designated as critical habitat. Because consultation under section 7 of the Act does not apply to activities on private or other non-Federal lands that do not involve a Federal nexus, critical habitat designation would not afford any additional protections under the Act against such activities.

To be included in a critical habitat designation, the habitat must first be ''essential to the conservation of the species.'' Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Section 4 requires that we designate critical habitat at the time of listing and based on what we know at the time of the designation. When we designate critical habitat at the time of listing or under short court-ordered deadlines, we will often not have sufficient information to identify all areas of critical habitat. We are required, nevertheless, to make a decision and thus, must base our designations on what, at the time of designation, we know to be critical habitat.

Within the geographic area occupied by the species, we will designate only areas currently known to be essential. Essential areas should already have the features and habitat characteristics that are necessary to sustain the species. We will not speculate about what areas might be found to be essential if better information became available, or what areas may become essential over time. If the information available at the time of designation does not show that an area provides essential life cycle needs of the species, then the area should not be included in the critical habitat designation. Within the geographic area occupied by the species, we will not designate areas that do not now have the primary constituent elements , as defined at 50 CFR 424.12(b), that provide essential life cycle needs of the species.

Our regulations state that, ''The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' (50 CFR 424.12(e)). Accordingly, when

the best available scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (Vol. 59, p. 34271), provides criteria, establishes procedures, and provides guidance to ensure that decisions made by the Service represent the best scientific and commercial data available. It requires Service biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, unpublished materials, and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, all should understand that critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1), and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9 take prohibition, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

In identifying areas that are essential to conserve the Peninsular bighorn sheep, we used the best scientific and commercial data available. This included data from research and survey observations published in peer-reviewed articles; recovery criteria, habitat analyses, and other information in the approved Recovery Plan (Service 2000); discussions with, and data made available through, the Peninsular Bighorn Sheep Recovery Team and the Coachella Valley Multiple Species Habitat Conservation Plan program; meetings with the County of Riverside, the cities of Palm Springs, Cathedral City, Rancho Mirage, Palm Desert, and La Quinta, and private landowners; and regional Geographic Information System (GIS) coverages. Further, information provided in comments on the proposed designation and draft economic analysis were evaluated and taken into consideration in the development of this final designation.

Primary Constituent Elements

In accordance with section 3(5)(A)(I) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we are required to consider those physical and biological features (primary constituent elements) that are essential to the conservation of the species. These include, but are not limited to, space for individual and population growth, and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction and rearing of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of a species.

The areas designated as critical habitat are designed to maintain the metapopulation of bighorn sheep in the Peninsular Ranges, and provide some or all of those habitat components essential for the biological needs of feeding, resting, reproduction and population recruitment, isolation from detrimental human disturbance, as well as dispersal and connectivity between ewe groups. The primary biological and physical constituent elements that are essential to the conservation of Peninsular bighorn sheep include space for the normal behavior of groups and individuals; protection from disturbance; availability of the various native desert plant communities found on different topographic slopes, aspects, and landforms, such as steep slopes, rolling foothills, alluvial fans, and canyon bottoms; a range of habitats that provide forage, especially during periods of drought; steep, remote habitat for lambing, rearing of young, and escape from disturbance and/or predation; water sources; suitable linkages allowing individual bighorn to move freely between ewe groups, and maintain connections between subpopulations within the Peninsular Range metapopulation; and other essential habitat components to accommodate population expansion to a recovery level. Given the importance and magnitude of the threats to the habitat of this species discussed above, we believe that these areas may require special management considerations or protection.

Criteria Used To Identify Critical Habitat

The criteria for delineating Peninsular bighorn habitat were based on biological information in pertinent literature (*e.g.,* the approved Recovery Plan) and the expert opinion of those most familiar with bighorn sheep in the Peninsular Ranges (*i.e.,* the Recovery Team). The upper elevation boundary was largely determined by relatively dense chaparral and pine-juniper vegetation communities. Bighorn sheep require open terrain to detect and avoid predators, such as mountain lions, and they generally will not frequent dense vegetation.

The lower elevation boundary was determined by the topography, existing urbanization, and bighorn sheep foraging behavior and movement patterns. Along the eastern boundary, habitat within 0.8 km (0.5 mi) of slopes greater than or equal to 20 percent were included in the delineated critical habitat. Researchers have documented bighorn sheep descending from steeper habitat and venturing out upon alluvial fans and washes to acquire the nutritious forage found on these more gentle slopes. Following the delineation of essential habitat, over 22,000 past observations of bighorn sheep were plotted, and the distribution of these observations were compared to the essential habitat boundary to insure that only those areas needed for the recovery of bighorn sheep were included in essential habitat. The similarity of the Recovery Plan definition of essential habitat, and the statutory definition of critical habitat, indicated that the two habitat delineation processes should be coordinated to improve scientific rigor and minimize the potential for legal and biological conflicts.

We used a quarter-section grid based on the Public Land Survey to delineate critical habitat in the proposed rule. A small area of San Diego County within the Valle de San Felipe Land Grant was defined using Universal Transverse Mercator (UTM) coordinates. In response to public comments, we have redelineated critical habitat along the urban edge from Palm Springs to La Quinta using a finer scale of resolution, a 100-meter UTM grid.

In defining critical habitat boundaries, we made an effort to avoid developed areas, such as towns and other similar lands, which do not provide primary constituent elements. Though the minimum mapping unit we used to designate critical habitat does not exclude all developed areas, such as scattered residential housing in sparsely inhabited regions, our 100-meter UTM grid minimum mapping unit was designed to minimize the amount of commercial development along the urban edge. Road and railroad rights-of-way, flood control facilities, or other facilities that must be traversed by bighorn sheep to maintain connectivity between subpopulations, or otherwise may provide food, water, or cover for Peninsular bighorn sheep, are considered to support primary constituent elements, and therefore are included as critical habitat.

We excluded habitat that is not considered essential to bighorn conservation from the critical habitat boundary. This includes areas such as those that were historically used for migration between other mountain ranges but have since been eliminated due to urban and agriculture development. While bighorn are regularly documented to use areas outside of critical habitat, these areas are considered to be non-essential, for a variety of reasons, including fragmentation and/or proximity to development, non-native vegetation, human-caused hazardous conditions, and not necessary for population movement and individual dispersal within the range of the metapopulation.

Maintaining connectivity between ewe groups is a necessary component for continued viability of metapopulations (Bleich *et al.* 1990, 1996) and to achieve population recovery of bighorn sheep in the Peninsular Ranges (Service 2000). Furthermore, because the environment is dynamic, resources, such as forage, are not distributed evenly across the landscape, and their spatial distribution, abundance and nutritional quality change over time. Consequently, bighorn sheep need to also adjust their distributions to meet their nutritional needs. Bighorn sheep may range widely within home ranges or may even shift home ranges to find areas with a suitable combination of food, water, and security (Leslie and Douglas 1979). These periodic shifts are important because they allow forage plants an opportunity to regrow and recover from herbivory by bighorn sheep. Given their wide-ranging capabilities, fluctuating habitat requirements, and dynamic habitat conditions, we are not aware of any information suggesting that particular areas within designated critical habitat are currently unsuitable or unused over the generational time-frame needed for the long-term conservation of bighorn sheep in the Peninsular Ranges.

In summary, the critical habitat designated below constitutes our best assessment of areas needed for the species' survival and recovery.

Critical Habitat Designation

The approximate area of designated critical habitat by county and land ownership is shown in Table 1.

TABLE 1.—APPROXIMATE DESIGNATED CRITICAL HABITAT AREA (HECTARES (ACRES)) BY COUNTY AND LAND OWNERSHIP [1]

County	Federal [2]	Trust (Tribal and allotted lands)	Local/State	Private	Total
Riverside	36,625 ha (90,501 ac)	5,672 ha (14,016 ac)	16,685 ha (41,231 ac)	27,877 ha (68,886 ac)	86,859 ha (214,634)
San Diego	20,112 ha (49,699 ac)	0 ha (0 ac)	152,841 ha (377,677 ac)	16,245 ha (40,143 ac)	189,198 ha (467,519 ac)
Imperial	42,010 ha (103,808 ac)	1,687 ha (4,168 ac)	13,001 ha (32,126 ac)	9,163 ha (22,642 ha)	65,861 ha (162,744 ac)
Total	98,747 ha (244,008 ac)	7,359 ha (18,184 ac)	182,527 ha (451,034 ac)	53,285 ha (131,671 ac)	341,918 ha (844,897 ac)

[1] Approximate hectares have been converted to acres (1 ha = 2.47 ac). Based on the level of imprecision of mapping at this scale, approximate hectares have been rounded to the nearest hectare when applicable.
[2] Federal lands include BLM and Forest Service lands.

Designated critical habitat is located in Riverside, San Diego, and Imperial Counties, California, from the San Jacinto Mountains south to the U.S.-Mexican border, generally along the eastern escarpment of the Peninsular Ranges that steeply descends into the Sonoran Desert along the Coachella Valley, Anza-Borrego Desert, and Salton Trough. Critical habitat is designated typically within a narrow elevational band that ranges from the lower alluvial slopes and habitats along the base of the Peninsular Ranges upslope to approximately 5,000 feet in elevation, which typically corresponds to a vegetational transition from Sonoran Desert plant communities to more coastally influenced chaparral habitats. This area generally includes the desert slopes of the San Jacinto Mountains, Santa Rosa Mountains, San Ysidro Mountains, Pinyon Mountains, Vallecitos Mountains, Fish Creek Mountains, Tierra Blanca Mountains, Sawtooth Mountains, In-Ko-Pah Mountains, Coyote Mountains, and Jacumba Mountains. Lands proposed are under private, local/State, Trust (Tribal and allotted lands), and Federal ownership, with Federal lands including those lands managed by the BLM and Forest Service.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat to the extent that the action appreciably diminishes the value of the critical habitat for the survival and recovery of the species. Individuals, organizations,

States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated or proposed. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain a biological opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no significant new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)).

If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, we ensure that the permitted actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conferencing with us on actions for which formal consultation has been completed if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Activities on Federal lands that may affect the Peninsular bighorn sheep or its critical habitat will require section 7 consultation. Activities on private or State lands requiring funding or a permit from a Federal agency, such the Federal Highway Administration, Federal Aviation Administration, or Federal Emergency Management Agency, will also be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to evaluate briefly, in any proposed or final regulation that designates critical habitat, those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for both the survival and recovery of the bighorn is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species. Activities that, when carried out, funded, or authorized by a Federal agency, may directly or indirectly adversely affect critical habitat include, but are not limited to:

(1) Unauthorized destruction or degradation of habitat (as defined in the primary constituent elements discussion), including, but not limited to, clearing vegetation, bulldozing terrain, overgrazing, construction, road building, mining, and disturbing natural hydrology; and

(2) Appreciably decreasing habitat value or quality through indirect effects (*e.g.,* noise, edge effects, low-flying aircraft, invasion of exotic plants or animals, or fragmentation).

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to ''jeopardize the continued existence'' of a species are those that would appreciably reduce the likelihood of the species survival and recovery. Actions likely to ''destroy or adversely modify'' critical habitat are those that would appreciably reduce the value of critical habitat for the survival and recovery of the listed species.

Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to destroy or adversely modify critical habitat would almost always result in jeopardy to the species concerned, particularly when the area of the proposed action is occupied by the species. In those cases, the ramifications of designation of critical habitat are few or none. However, if occupied habitat becomes unoccupied in the future, there is a potential benefit to the species of designation of critical habitat in such areas.

Federal agencies already consult with us on activities in areas currently inhabited by the species to ensure that their actions do not jeopardize the continued existence of the species. These actions include, but are not limited to:

(1) Regulation of activities affecting waters of the United States by the Army Corps of Engineers under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization by Federal agencies;

(3) Regulation of grazing, mining, and recreation by the BLM and Forest Service;

(4) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities by Federal agencies;

(5) Regulation of airspace and flight plans within the Federal Aviation Administration jurisdiction;

(6) Military training, maneuvers, and flights;

(7) Construction of roads and fences along the international border with Mexico, and associated immigration enforcement activities by the Immigration and Naturalization Service;

(8) Hazard mitigation and post-disaster repairs funded by the Federal Emergency Management Agency;

(9) Construction of communication sites licensed by the Federal Communications Commission; and

(10) Activities funded by the U.S. Environmental Protection Agency, U.S. Department of Energy, or any other Federal agency.

Since Federal agencies already consult with us on projects that may affect listed species, we do not anticipate additional regulatory protection or project modifications will result from critical habitat designation.

If you have questions regarding whether specific activities will constitute adverse modification of critical habitat, contact the Field Supervisor, Carlsbad Fish and Wildlife Offices (see **ADDRESSES** section). Requests for copies of the regulations on listed wildlife, and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 N.E. 11th Ave, Portland, Oregon 97232 (telephone 503/231–2063; facsimile 503/231–6243).

Relationship to Habitat Conservation Plans

Section 4(b)(2) of the Act allows us broad discretion to exclude from critical habitat designation areas where the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in the extinction of the species. We expect that critical habitat may be used as a tool to identify those areas essential for the conservation of the species, and we will encourage development of Habitat Conservation Plans (HCPs) for such areas on non-Federal lands. Habitat conservation plans currently under development are intended to provide for protection and management of habitat areas essential for the conservation of the Peninsular bighorn sheep, while directing development and habitat modification to nonessential areas of lower habitat value.

Several HCP efforts are currently under way that address listed and non-listed species in areas within the range of the Peninsular bighorn sheep and in areas we are designating as critical habitat. We are providing technical assistance and will continue to work closely with applicants throughout the development of future HCPs to identify lands essential for the long-term conservation of the Peninsular bighorn sheep and appropriate management for those lands. The take minimization and mitigation measures provided under these HCPs are expected to protect the essential habitat lands designated as critical habitat in this rule. The HCP development process provides an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by the Peninsular bighorn sheep. The process also enables us to conduct detailed evaluations of the importance of such lands to the long-term survival of the species in the context of constructing a biologically configured system of interlinked habitat blocks. If an HCP that addresses bighorn sheep as a covered species is ultimately approved, we will reassess the critical habitat boundaries in light of the HCP and applicable law, regulation, policy, and funding constraints.

The Coachella Valley Multiple Species Habitat Conservation Plan, currently under preparation, proposes coverage for Peninsular bighorn sheep. This effort represents an important opportunity to address the long-term conservation needs of Peninsular bighorn sheep throughout the private lands under city and county jurisdiction in Riverside County, and to integrate management with intermixed public lands. The Agua Caliente Band of Cahuilla Indians also is preparing a multi-species HCP for their Reservation. Within Imperial and San Diego counties, Federal land ownership patterns, Federal funding and permitting, and extensive habitat protection on State lands, limit the prospects for HCPs that would include Peninsular bighorn sheep. We fully expect that HCPs undertaken by local jurisdictions (*e.g.,* counties, cities) and other parties will identify, protect, and provide appropriate management for those specific lands within the boundaries of the plans that are essential for the long-term conservation of the species. We believe and fully expect that any HCPs approved in the future will show that covered activities carried out in accordance with the provisions of those HCPs would not result in destruction or adverse modification of critical habitat.

Summary of Comments and Recommendations

In the July 5, 2000, proposed rule (65 FR 41405), we requested all interested parties to submit comments on the specifics of the proposal including information, policy, treatment of HCPs, and proposed critical habitat boundaries as provided in the proposed rule. The first comment period closed on August 31, 2000. The comment period was reopened from October 19, 2000, to November 20, 2000 (65 FR 62691), to allow for additional comments on the proposed rule and comments on the draft economic analysis of the proposed critical habitat.

We contacted all appropriate State and Federal agencies, Tribes, county governments, elected officials, and other interested parties and invited them to comment. In addition, we invited public comment through the publication of notices in the following newspapers in southern California: *The Desert Sun, The Riverside Press Enterprise,* and the *San Diego Union-Tribune.* The inclusive dates of these publications were July 5, 2000, for *The Riverside Press Enterprise* and the *San Diego Union-Tribune,* and July 6, 2000, for *The Desert Sun.* In these notices and the proposed rule, we announced the date and times of two public hearings that were to be held on the proposed rule. These hearings were held in Palm Springs, California on July 20, 2000. Transcripts of these hearings are available for inspection (see **ADDRESSES** section). A public workshop with biological and economic experts was held on November 2, 2000, in Palm Desert, to provide additional opportunity for discussion of issues and promote understanding of biology, economic, and procedural issues.

We requested four scientists, who have familiarity with Peninsular bighorn sheep, to review the proposed critical habitat designation. None of the peer reviewers submitted comments on the proposed critical habitat designation.

We received a total of 29 oral and 90 written comments during the two comment periods. Of these comments, 12 of the commenters who submitted oral testimony also submitted duplicative written comments. In total, oral and written comments were received from 3 Tribal governments, 1 Federal agency, 1 State agency, 1 State elected official, 3 local agencies, and 60 private organizations or individuals. We reviewed all comments received for substantive issues and new data regarding critical habitat and bighorn sheep. Comments of a similar nature are grouped under four general issues relating specifically to the proposed critical habitat determination and draft economic analysis on the proposed determination. These are addressed in the following summary.

Issue 1: Habitat Delineation

Comment: Many commenters noted that delineating the proposed critical habitat boundary on a quarter-section grid created the impression that areas that were clearly developed were included in critical habitat and should be removed.

Our Response: One of the challenges to legally describing bighorn sheep critical habitat in the Santa Rosa and San Jacinto Mountains is that development hugs the highly contorted toe of slope. Even though the proposed rule stated that existing development within the critical habitat boundary did not support constituent elements, using a quarter-section grid was confusing to many due to its coarse resolution. In the proposed rule, a quarter-section grid was chosen as a practical means of defining critical habitat over a large area, without an unduly complex legal description. In the final designation, we have decided to reduce public confusion and increase biological precision by refining the delineation and using a 100-meter grid in Riverside County that minimizes the inclusion of existing development.

Comment: Several commenters cited 16 U.S.C. 1532(5)(C), stating that critical habitat could not include the entire geographic range of bighorn sheep; others stated that critical habitat should be expanded to include all areas used by Peninsular bighorn sheep. One commenter felt that critical habitat should encompass a smaller area than essential habitat. Another commenter stated that critical habitat does not include some areas that should be included, specifically, ''the southern extension of the In-Ko-Pah Mountains'' in San Diego County, including ''Goat Mountain, Old George Mountain, Music Mountain and Rattlesnake Mountain''. Several commenters expressed support for the proposed critical habitat designation.

Our Response: 16 U.S.C. 1532(5)(C) states that ''critical habitat should not include the entire geographic area that can be occupied by the threatened or endangered species'' absent a finding of exceptional circumstances by the Secretary. We based our critical habitat designation on the Recovery Team's delineation of essential habitat in the approved Recovery Plan, dated October 25, 2000. The Team used their collective experience and knowledge of the ecology of bighorn sheep in the Peninsular Ranges to develop a method for delineating essential habitat, which is described in Appendix B of the Recovery Plan. The upper elevation boundary was largely determined by dense vegetation types, because bighorn sheep require open terrain to detect and avoid predators, such as mountain lions. The lower elevation boundary was determined by the topography, existing urbanization, and bighorn sheep foraging behavior and movement patterns. The Recovery Team did not include all areas that have documented historic and current use by bighorn sheep; only those areas that are regarded as essential for recovery were included. Because the Recovery Plan definition of essential habitat is essentially the same as the statutory definition of critical habitat, we have elected to make them as similar as possible, given the practical limitations of legal boundary descriptions.

While portions of the In-Ko-Pah Mountains are included in critical habitat, we did not include the specific lands listed above in the proposal because we concluded these lands were not essential for the conservation of bighorn sheep. This conclusion was based largely on the lack of bighorn sightings and the dominance of dense chaparral vegetation in the area, which bighorn sheep generally don't use.

Comment: Several commenters suggested that certain lands proposed within critical habitat be excluded. Suggested land for exclusion included: areas with flood control and water supply structures; and lands with mining interests.

Our Response: We evaluated all submitted site-specific documentation to determine whether modifications to the proposal were appropriate. Based on discussions with Riverside County Flood Control and Water Conservation District, Desert Water Agency, and Coachella Valley Water District, normal operations and maintenance of existing facilities would not conflict with the management objectives for essential habitat. Flood control facilities typically occur in washes and alluvial habitats that still support the same important habitat values as surrounding areas. As such, these facilities are not *de facto* unsuitable or detrimental to bighorn sheep use. If reasonably managed, these areas can fulfill their intended function while at the same time contributing to bighorn sheep conservation. As described above, we met with numerous local jurisdictions and private landowners to refine critical habitat boundaries along the heavily parcelized urban interface with Coachella Valley. Our objective was to collaboratively blend the critical habitat designation with the essential habitat in the Recovery Plan, as well as the preserve design in the ongoing multi-species planning effort to increase biological precision and minimize the potential for unnecessary social and economic effects.

There appear to be very few active mines within critical habitat and, as with the construction and maintenance of infrastructural facilities, any future project proposals will be reviewed case by case under the regulatory provisions of sections 7 and 9 of the Act to determine whether mining is compatible with sheep survival and recovery.

Comment: One commenter questioned why private lands were included when so much public land was available for designation.

Our Response: The location and distribution of private lands mandated their inclusion. Many of the valuable lower elevation habitats with key forage and water resources essential to the conservation of the species are located on private lands. In addition, the prevailing checkerboard landownership pattern of intermixed public and private lands in many areas of the Peninsular Ranges requires their inclusion because the primary constituent elements transcend ownership boundaries.

Comment: Several commenters noted that their lands should be excluded because their expert sheep consultants have studied their properties and concluded that they are unsuitable or of low value.

Our Response: Some commenters have submitted consultant reports, but then refused to meet with us to discuss the information or visit the proposed project site, whereas others allege they have site specific information but did not submit it for our review. Either way, we cannot rely upon such data in making regulatory decisions if we are unable to discuss, clarify, or inspect site specific information. In other circumstances, we had in our possession reliable information which contradicted what was provided by the commenter. In situations such as these, we did not modify the proposed critical habitat boundary.

Comment: Several commenters criticized the critical habitat proposal for not specifically excluding previously approved projects.

Our Response: Many project proponents have reached an agreement with us on the details of project proposals and, consequently, we have refined the final designation from that in the proposed rule to more closely conform with the actual essential habitat, using a combination of a 100-meter grid system and conveniently located landmarks. In this way, we avoided designation over as much of the non-essential portion of project sites as

possible. We will continue to work with applicants with whom we have yet to reach agreement on how to avoid jeopardy or adverse modification of habitat deemed essential to the conservation of the species.

Comment: One comment suggested that areas below the 2000-foot contour should be excluded; another suggested the 1000-foot contour; while another suggested the 700-foot contour.

Our Response: These conflicting comments appear to address the objectives of specific proposed developments and not bighorn biology. This rule and the Recovery Plan clearly document the importance of the unique habitat values provided by lower elevation habitats, such as washes and alluvial fans, and the critical role these areas play in bighorn sheep recovery. These lower elevation areas support different vegetation communities than adjacent steep rocky areas, because of the different soil compositions and moisture regimes in less steep areas. Consequently, these areas produce nutritious forage at critical times of the year for bighorn sheep. Much of this low elevation habitat has already been lost to development. Rather than choosing an arbitrary contour, we based the boundary on biological criteria discussed in the Recovery Plan and included habitat providing the primary constituent elements within 0.8 km (0.5 mi) of slopes greater than or equal to 20 percent.

Comment: Tribal lands should be excluded from critical habitat.

Our Response: We have a trust responsibility to work with Tribes in designating critical habitat. We have been working with the affected Tribes to address their concerns and develop compatible management strategies. Though these discussions are ongoing, the current absence of agreements or completed land-use management plans does not allow us to exclude Tribal lands from designation. We have determined that Tribal lands are important to bighorn conservation because they provide critical physical and biological features that are essential to the conservation of the species.

Comment: Numerous commenters requested that areas without documented evidence of bighorn use be removed from critical habitat. They also claimed that all habitat is not occupied by bighorn sheep, contrary to statements in the proposed rule, and only a portion of designated lands contain suitable habitat.

Our Response: Most of these comments refer to developed areas that were excluded by text within the proposed rule but were located within the critical habitat boundary. Most of these areas have been removed by using the finer resolution of the 100-meter grid mapping approach. Other comments suggested that if a focused survey for bighorn sheep was negative, the surveyed area should be removed from critical habitat. Such logic overlooks the fact that bighorn sheep are wide-ranging animals adapted to exploiting sparsely distributed resources over large tracts of habitat for feeding, breeding, sheltering, and dispersing. Bighorn sheep use certain areas more frequently than others, and these areas are termed home ranges or core use areas. The home range concept implies that the probability of locating an individual bighorn sheep will be greater within its home range, not that bighorns confine all of their movements to home ranges. Furthermore, home ranges may shift over time, and the resources bighorn sheep require from outside their home ranges may be critical for their survival.

Rams and ewes have been documented to move many miles beyond their normal home ranges and may infrequently use certain areas on a seasonal or annual basis. This differs from the common public perception that occupancy means the detectable presence of bighorn sheep in a particular area at any time throughout the breeding and non-breeding seasons. Furthermore, the present reduced population level has a contracted geographic distribution. As the population recovers, the number and size of home ranges should expand, providing increased connectivity to areas where bighorn sheep were formerly more common. The goal is to delineate an area that provides the opportunity for a reduced population to survive and recover. Given the bighorn sheep's wide-ranging habits, as well as numerous historic and recent distributional records extending outside the area designated as critical habitat, we find no basis for concluding that bighorn sheep are absent from or incapable of using particular areas within designated critical habitat.

Comment: The proposed rule should exclude the area governed by existing and pending HCPs.

Our Response: Since no approved HCPs currently exist within the proposed critical habitat boundary, none were excluded. Our approach to any HCPs approved in the future is discussed in response to the next comment.

Comment: Two commenters stated that the final critical habitat rule should provide automatic removal from critical habitat of areas covered by future HCPs, while one commenter stated that adjustments could not be automatically made and any proposed changes need to be published in the **Federal Register**.

Our Response: We anticipate that future HCPs in the range of bighorn sheep may include it as a covered species. We expect that HCPs undertaken by local jurisdictions (e.g., counties, cities) and other parties will identify, protect, and provide appropriate management for those specific lands within the boundaries of the plans that are essential for the long-term conservation of bighorn sheep. We fully expect that any future approval of HCPs and section 10(a)(1)(B) permits would show that covered activities carried out in accordance with the provisions of the HCPs and section 10(a)(1)(B) permits would not result in the destruction or adverse modification of critical habitat designated for Peninsular bighorn sheep. By law, any proposed changes to critical habitat cannot be automatically made and must be published in the **Federal Register**.

Comment: Several commenters recommended that we postpone issuing a final determination until a more specific and defensible critical habitat proposal can be written and an accurate and quantitative economic analysis be conducted.

Our Response: We are required to use the best available information in designating critical habitat. Under our settlement agreement, we must complete the designation of bighorn critical habitat by January 15, 2001. We solicited any new biological data, invited public participation during the comment period, conducted public hearings on the proposed rule and subsequent comment periods, and held a public workshop for the draft economic analysis and proposed rule. These comments have been taken into account in the development of this final determination. Accordingly, we have used the best scientific and commercial information available in the designation.

Comment: Some landowners expressed concern that because their properties were located within critical habitat, they would be subject to additional constraints under the California Environmental Quality Act (CEQA).

Our Response: According to section 15065 of the CEQA guidelines, environmental impact reports are required by local lead agencies when, among other things, a project has the potential to ''reduce the number or restrict the range of an endangered, rare or threatened species.'' Thus, local lead agencies must address potential effects to listed species regardless of whether

critical habitat is designated. Local lead agencies would make the determination of whether critical habitat is pertinent under State law for separate projects.

Comment: Several landowners expressed concern about how critical habitat designation may affect their particular properties and what they would and would not be allowed to do in the future because of the designation. Some of these landowners expressed concerns that they would need to seek incidental take authorization from the Service for every type of action taken on their property.

Our Response: We are sensitive to the concerns of individuals concerning their property rights. As described in the rule, critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. The designation of critical habitat for bighorn sheep does not impose any additional requirements or conditions on property owners beyond those required by the listing of bighorn sheep as a federally endangered species, unless a Federal nexus (*e.g.,* permit, funding, right-of-way, loan guarantee) is involved. If a Federal nexus exists on private property, the involved Federal agency would have a responsibility under section 7 to consult with us on any proposed actions that may affect a listed species.

All landowners, public and private, are responsible for making sure their actions do not result in the unauthorized ''take'' of a listed species, regardless of whether or not the activity occurs within designated critical habitat. ''Take'' is defined by regulation to include ''significant habitat modification or degradation that actually kills or injures wildlife''. The definition was upheld by the U.S. Supreme Court in *Sweet Home Chapter of Communities for a Great Oregon et al.* v. *Babbitt.* Take prohibitions apply regardless and are independent of critical habitat designation. The designation of critical habitat does not expand the requirement for incidental take authorization.

Issue 2: Bighorn Sheep Biology and Management

Comment: Connectivity needs to be maintained between ewe groups and areas needed for long-term recovery, *e.g.,* south of Interstate 8.

Our Response: Connectivity is a primary constituent element for Peninsular bighorn sheep, and the current critical habitat configuration attempts to provide long-term connectivity between ewe groups, including the area south of Interstate 8. Within the areas designated as critical habitat, we will work with affected interests to resolve existing barriers to bighorn sheep movement, such as fences and high traffic roads, as outlined in the Recovery Plan.

Comment: Two commenters felt that cattle grazing was compatible with bighorn sheep recovery, and that cattle grazing had been unfairly targeted by the designation of critical habitat.

Our Response: Federal agencies that issue grazing permits on lands containing endangered species are required to consult with us. These consultations are required by section 7 of the Act, and result from the listing of the species, even in the absence of the designation of critical habitat. The purposes of section 7 consultations are to analyze the effects of grazing practices, to determine if they jeopardize the continued existence of the endangered species, to avoid and minimize the impact of incidental take, and, if needed, to suggest reasonable and prudent alternatives that will avoid jeopardy. Although they will also have to consult on whether they will destroy or adversely modify critical habitat, the designation of critical habitat does not necessarily affect grazing allotments beyond the initial requirements of listing the species. Some grazing operations are currently involved in disputes with land management agencies. These legal actions and their settlements are separate from the designation of critical habitat and the section 7 process.

Comment: Several commenters felt that the designation of critical habitat was unnecessary, because the decline of bighorn sheep in the Peninsular Ranges has been caused solely or mainly by mountain lion predation. They felt that controlling mountain lions would, by itself, result in the recovery of bighorn sheep.

Our Response: Bighorn sheep evolved during the Ice Ages with a suite of large predators, including mountain lions. Consequently, they developed effective defenses, such as good eyesight, vigilance, herding behavior, and the ability to move with great agility and speed across steep, rocky terrain. Many of these traits were shaped by the presence of large carnivores, some of which became extinct long ago. However, both bighorn sheep and mountain lions have survived to present times. The two species have coexisted in the Peninsular Ranges for thousands of years.

Research indicates that in certain circumstances individual mountain lions may develop a preference for bighorn sheep, while other resident lions spend little time pursuing bighorn sheep. In the past, larger, healthier bighorn populations were capable of withstanding the periodic mortality caused by mountain lions. However, once a population declines below a certain threshold, predation can have a limiting effect. Man has impacted the landscape greatly, and other factors, such as disease, urbanization, highway construction, human disturbance, and habitat loss, have reduced the population to such a low level that any mortality, including mountain lion predation, becomes very significant. Thus, the decline of bighorn sheep has not been caused by one single factor, and a recovery strategy must address a complex array of interacting mortality factors to be successful.

Comment: Several commenters stated that recreational opportunities need to be considered when designating critical habitat. Two commenters suggested that the Coral Reef Mountains, adjacent to La Quinta, be removed from critical habitat to accommodate present and perceived future recreation needs in the area. One commenter requested that the Lake Cahuilla Recreation Area be removed because of the potential for affecting recreational activities, especially trail use. Other commenters were concerned that traditional hikes would be curtailed and popular areas closed, especially in Anza-Borrego Desert State Park.

Our Response: Critical habitat designation does not automatically eliminate recreational opportunities. With proper management recreational activities can be compatible with bighorn recovery. Regardless of critical habitat, we are working with local interests, including State and Federal land management agencies, to prepare a trails management plan as part of existing agency responsibilities and the Coachella Valley multi-species planning program. Bighorn sheep have been recently documented using the Coral Reef Mountains as lambing habitat. Given the current low population numbers in the Peninsular Ranges, protection of lambing habitat is essential to recovery. We have discussed with the City of La Quinta and project proponents in the area alternative trail alignments and other opportunities that are compatible with bighorn recovery.

Lake Cahuilla and surrounding areas at the southern end of the Coral Reef Mountains are owned by the Bureau of Reclamation, which we assume will consult with us through section 7 on any potential activities that may affect bighorn sheep. We anticipate that recreational activities associated with an

urban lake will be compatible with bighorn recovery. A regional trails plan involving Federal, State and local entities is in preparation and can be designed to be compatible with bighorn sheep conservation. In Anza-Borrego Desert State Park, critical habitat designation is unlikely to affect recreational hiking because most Park activities lack a Federal nexus and the State is implementing a land-use plan that appears to be compatible with bighorn sheep conservation.

Comment: Several commenters stated that the proposed critical habitat designation was ''not specific'' and was too ''expansive'' and ''overbroad'' and, therefore, failed to comply with Congressional intent to restrict critical habitat to those areas ''essential to the conservation of the species.'' Other commenters stated that the designation was not inclusive enough and failed to include areas that bighorn have used and are necessary for recovery of the species.

Our Response: Determination of critical habitat for bighorn sheep in the Peninsular Ranges was based on information and expertise provided through the recovery planning process. We assembled a Recovery Team to prepare a Recovery Plan, which included the delineation of essential habitat. During the development of the essential habitat boundary, in conjunction with the Coachella Valley multiple species planning effort, affected stakeholders were included in discussions to refine the essential habitat boundary area and a reserve design for the multi-species plan. During a succession of meetings, areas without long-term conservation value were excluded from delineated essential habitat. This process resulted in the essential habitat delineation that was described in the approved Recovery Plan. The designation of critical habitat reflects these efforts by adhering to the delineation of essential habitat as closely as possible. We believe this to be a logically and scientifically sound approach to critical habitat designation that provides the specific habitat necessary for survival and recovery, while taking into consideration the concerns of local government and landowners.

Comment: The primary constituent elements described in the proposed rule were too vague, and the exact locations of each of the primary constituent elements should be discussed in the final designation of critical habitat.

Our Response: The biological needs of bighorn sheep can be discussed at several levels of complexity. The primary constituent elements are intended to denote the most basic habitat components required by bighorn sheep for survival. Within individual primary constituent elements, additional layers of complexity could be described, especially for complex higher organisms, such as bighorn sheep. For example, availability of adequate forage could be further described by listing each of the forage species utilized by bighorn sheep, and then further described by listing the nutritional composition of each forage species. Since bighorn sheep forage on a wide variety of plant species (Turner (1973) recorded 43 species), attempts to comprehensively list them, as well as all of the other biological requirements of bighorn sheep would not be possible. Similarly, an attempt to precisely describe the location of each resource would also be impractical. For example, water sources change in response to weather patterns and temporary water sources can be as important as permanent sources. Scientists and land managers are continually learning more about bighorn sheep and the ecosystem that they depend on, therefore, a reductionist approach to describing the biological needs of bighorn sheep would likely fail to include all of the environmental, physiological, and behavioral complexities needed for their survival. Therefore, we chose to discuss the biological requirements of bighorn sheep at an ecosystem level, thus insuring that none of the particular requirements of bighorn sheep would be excluded. More detailed information for specific proposed activities will be developed during the section 7 consultation process.

Comment: Several commenters questioned the applicability of metapopulation theory to bighorn sheep in the Peninsular Ranges.

Our Response: As described in more detail in the Recovery Plan, Peninsular bighorn sheep are considered a metapopulation because ewe groups are connected by movement of rams and ewes. However, bighorn sheep are slow colonizers and the processes of colonization and extinction extend over long time periods. Without proper management, an unstable metapopulation could result if extinctions occurred at a faster rate than colonizations, thereby lessening the likelihood of successful recovery of the species.

Comment: One commenter recommended moving sheep out of areas proposed for development to make critical habitat more achievable.

Our Response: The proposal to move bighorn sheep and critical habitat out of conflict areas presumes that the areas in question would not be essential to conservation. We have coordinated this designation through the recovery planning and section 10(a)(1)(B) regional habitat conservation planning program in the Coachella Valley to determine where critical habitat boundaries needed movement and refinement. The results of this coordination are reflected in the final designation, which removed approximately 12,430 ha (30,716 ac) from the proposed designation.

Issue 3: Procedural Issues

Comment: Critical habitat should not have been proposed before an economic and other impact analyses were completed, and the opportunity to comment on the economic analysis and the proposed rule was limited.

Our Response: Pursuant to 50 CFR 424.19, we are not required to conduct an economic analysis at the time critical habitat is initially proposed. We realize that under ideal circumstances we would provide the draft economic analysis at the same time as the proposal. However, due to the short time frame available to us to complete the proposal and a heavy economic analysis workload, we were unable to do so. We published the proposed determination in the **Federal Register** (65 FR 41405), invited public comment, and held two public hearings. We used comments received on the proposed critical habitat to assist in developing the draft economic analysis. We then reopened public comment period on the draft economic analysis and the proposed designation for 33 days, and held a public workshop. Furthermore, we were unable to provide a longer comment period given the short time frame ordered by the Court.

Comment: Critical habitat designation requires a National Environmental Policy Act (NEPA) review.

Our Response: As stated in the proposed rule, we have determined that compliance with NEPA is not required in connection with regulations adopted pursuant to section 4(a) of the Act. Further, the Ninth Circuit Court of Appeals has ruled that, within its Circuit, compliance with NEPA for critical habitat designations is not required. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Comment: The role of the Service as the sole determiner of physical and biological features is inappropriate and dictatorial. The unwillingness to recognize scientific peer reviews is further evidence of the Service's unresponsiveness to public comment.

Our Response: Section 3(5)(A)(I) of the Act and regulations at 50 CFR 424.12 require us to determine the physical and biological features (primary constituent elements) that are essential to the conservation of the species. In this case, we used the best science available, including published scientific literature, expertise of Recovery Team members, other biologists familiar with Peninsular bighorn sheep, and the Recovery Plan. The Recovery Team includes scientists from a variety of Federal and State agencies, Tribal, and other public, and private research institutions with an impressive depth of experience working with bighorn sheep in the Peninsular Ranges. The public hearings, a public workshop, and two comment periods, provided ample opportunity for public involvement. All input from the public was evaluated for incorporation into the final rule. We also solicited peer review comments from four scientists familiar with Peninsular bighorn sheep.

Comment: Map exhibits in the proposed rule and at the public hearings did not show enough detail.

Our Response: The maps in the **Federal Register** are meant to provide a general location and shape of critical habitat. At the public hearings and workshop, these maps were expanded into wall-size aerial photos to assist the public in better understanding the proposal. These larger scale GIS products also were provided to individuals upon request. The legal descriptions, based on the Public Land Survey system, are readily plotted and transferable to a variety of mapping formats.

Comment: Conclusions drawn in the proposed rule lack scientific citations and/or rely on unpublished science.

Our Response: We used the recovery planning process to assist in the preparation of the proposed and final critical habitat designation. Integration of these processes strengthened the scientific basis and minimized the potential contradictions or discrepancies between the two processes. Please refer to the approved Recovery Plan for a more detailed treatment of the biological literature and recovery concepts. Additional biological explanation and references were added to this final rule in response to public comments.

Comment: Two commenters stated that Peninsular bighorn sheep are *Ovis canadensis nelsoni* and, therefore, are not deserving of a critical habitat designation.

Our Response: The bighorn sheep in the Peninsular Ranges are listed as a distinct vertebrate population segment. Please refer to 63 FR 13134, dated March 18, 1998, for a discussion of the applicability of our policy on implementing the Act's provisions for listing distinct vertebrate population segments.

Comment: Several commenters requested that additional hearings be held in other areas to accommodate a wider group of affected groups and individuals. Suggested areas included San Diego and Orange counties.

Our Response: Holding public hearings in multiple areas would have been more convenient for some people. However, administrative costs, staffing limitations, and the limited attendance at the hearings that were held, were all taken into consideration in deciding on the appropriate number of hearings to be held. Palm Springs was chosen for the public hearing because it is the closest urban center to the proposed critical habitat boundary and, therefore, accommodated most interests directly affected. While much of the proposed critical habitat is in the Anza-Borrego Desert State Park portion of San Diego County, this area is remotely located from populous regions. Since the Park has management goals that are largely compatible with bighorn sheep recovery, and the likelihood of Federal involvement is limited, the effect of critical habitat designation in this area is likely to be small. Since no critical habitat for Peninsular bighorn sheep was proposed in Orange County, and attendance was relatively small at the Palm Springs hearing, meetings in outlying areas were not considered to be a priority use of the limited resources available to us in developing this rule.

Comment: Tribal interests contended that not enough was known about bighorn use on their lands to warrant designation of critical habitat.

Our Response: Past survey efforts for bighorn sheep have been led by the CDFG and other cooperators. We have obtained much of their information and provided it to the Tribes and public in the approved Recovery Plan, and in a separate bighorn sheep distribution map, dated October 13, 2000. Though the State and its cooperators did not agree to provide many of the attributes behind the data, we are convinced by the best available information that the area that we are designating as critical habitat is essential to the conservation of the species. We intend to continue to work with the Tribes on obtaining additional information so that we can fulfill our responsibilities to the them.

Comment: One commenter raised a series of questions related to Tribal lands and the Recovery Plan.

Our Response: Questions related to the Recovery Plan are better addressed separately, and we are available to discuss these issues within the recovery planning context. For critical habitat, Tribal lands were assessed using the same physical and biological criteria as other lands in determining their potential contribution to bighorn conservation. These criteria, and the approach described in Appendix B of the Recovery Plan, indicated that some Tribal lands merited inclusion as critical habitat.

Comment: One Tribe commented that their past and present land management practices have been compatible with bighorn sheep conservation, and that their future HCP precludes the necessity of designating critical habitat on Tribal lands.

Our Response: Though past management practices of Tribal lands have apparently, for the most part, been compatible with bighorn sheep recovery, Tribes have not informed us of the details of their current and past management practices. We are preparing agreements with some of the Tribes that better define coordination protocols for addressing issues relating to the Act. If these agreements lead to future HCPs that contain measures that conserve bighorn sheep habitat, critical habitat could be revised and areas covered by the HCP either excluded under a section 4(b)(2) analysis or removed because they no longer meet the definition of critical habitat. Pursuant to the definition of critical habitat in section 3 of the Act, any area so designated may require ''special management considerations or protections.'' Adequate special management or protection is provided by a legally operative plan that addresses the maintenance and improvement of the essential elements and provides for the long-term conservation of the species. The Service considers a plan adequate when it meets all of the following three criteria: (1) The plan provides a conservation benefit to the species (*i.e.,* the plan must maintain or provide for an increase in the species' population or the enhancement or restoration of its habitat within the area covered by the plan; (2) the plan provides assurances that the management plan will be implemented (*i.e.,* those responsible for implementing the plan are capable of accomplishing the objectives, have an implementation schedule and/or have adequate funding to implement the management plan); and, (3) the plan provides assurances the conservation plan will be effective (*i.e.,* it identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the

plan and achieve the plan's goals and objectives). If an area is covered by a plan that meets these criteria, it does not constitute critical habitat as defined by the Act.

Issue 4: Economics

Comment: Some commenters disagreed with the assumption applied in the economic analysis that the designation of critical habitat will cause no impacts above and beyond those caused by the listing of the species within the essential habitat line identified in the Peninsular bighorn sheep Recovery Plan. They assert that ''adverse modification'' and ''jeopardy'' are different, will result in different impacts, and should be analyzed as such in the economic analysis.

Our Response: Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to ''jeopardize the continued existence'' of a species are those that would appreciably reduce the likelihood of both the survival and recovery of a listed species. Actions likely to result in the destruction or adverse modification of critical habitat are those that would appreciably reduce the value of critical habitat for the survival and recovery of a listed species. Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to result in the destruction or adverse modification of critical habitat would typically result in jeopardy to Peninsular bighorn sheep. Through broad distribution of the Recovery Plan, Federal agencies are aware of our concern for bighorn sheep within this area. Given the similarities of essential and critical habitat, the designation likely will not result in any appreciable increase in the number of section 7 consultations or the impacts of these consultations on actions.

Comment: Some commenters were concerned that, while we discussed impacts that are more appropriately attributable to the listing of bighorn sheep than to the proposed designation of critical habitat, we did not include in the baseline those costs attributable to the listing.

Our Response: The Act is clear that listing decisions be based solely on scientific criteria, using the best available scientific and commercial data available (section 4(b) of the Act). Congress also made it clear in the Conference Report accompanying the 1982 amendments to the Act that ''economic considerations have no relevance to determinations regarding the status of species''. If we were to consider the economic impacts of listing in the critical habitat designation analysis it would lead to confusion, because the designation analysis is meant to determine whether areas should be excluded from the designation of critical habitat based solely upon the costs and benefits of the designation, and not upon the costs and benefits of the listing. Additionally, because the Act specifically precludes us from considering the economic impacts of the listing, it would be improper to consider those impacts in the context of an economic analysis of the critical habitat designation. Our economic analyses address how the actions we are currently considering may affect current or planned activities and practices; they do not address impacts associated with previous Federal actions, which in this case includes the listing of Peninsular bighorn sheep as an endangered species. This method is consistent with the standards published by the Office of Management and Budget for preparing economic analyses under Executive Order 12866.

Comment: Some commenters stated that we should have estimated the cumulative effect of the critical habitat designation for bighorn sheep along with the effect of future pending and proposed critical habitat for other species in Southern California.

Our Response: Future pending and proposed critical habitat designations for other species in the area will be part of separate rulemakings and consequently, their economic effects will be considered separately. We are required to only consider the effect of the proposed government action, which in this case is the designation of critical habitat for bighorn sheep. Again, the appropriate baseline to use in an analysis of a Federal action is the future without the proposed regulation. Against this baseline, we attempt to identify and measure the incremental costs and benefits associated with the government action. Because the Peninsular bighorn sheep is already a federally protected species, any effect this listing has on the regulated community is considered part of the baseline scenario, which remains largely unaffected by our critical habitat designation.

Comment: Some commenters believe that the draft economic analysis underestimated the potential costs of critical habitat designation.

Our Response: In preparing the economic analysis, we estimated the potential effects from critical habitat designation. As previously stated, we believe that many of the effects perceived by the public to be attributable to critical habitat would actually occur regardless of critical habitat designation because Peninsular bighorn sheep are a federally protected species. Because we are attempting to estimate potential future effects from critical habitat designation, our estimates are based on potential future activities that are typical for the area. In reality, some individuals may experience impacts greater than we estimated, while others experience less. On the whole, however, we have provided a reasonable estimation of the potential future impacts of critical habitat designation for Peninsular bighorn sheep.

Comment: Some commenters believe that the economic analysis is flawed because it ignores regional and local government economic projection data and that critical habitat designation could have an effect on projected housing demand in the area.

Our Response: Our draft economic analysis provided a socio-economic profile of the proposed critical habitat area, which was based on Federal, State, and local government data. While we acknowledged that critical habitat designation within the ''uncertain lands'' could have a small impact due to an increase in section 7 consultations, we do not believe that these potential future consultations will have significant impacts on land development patterns within the Coachella Valley.

Comment: Some commenters believed we should have speculated about property value effects to private landowners due to critical habitat designation.

Our Response: Our economic analysis acknowledged that critical habitat designation may, in some instances, have short-term effects on private property values. However, as we stated in the analysis, we did not attempt to quantify such effects due to their highly speculative nature and propensity to have offsetting effects. Since we conducted the draft economic analysis, a study was released by the Coalition for Sonoran Desert Protection that examined the impact of designating habitat for the cactus ferruginous pygmy-owl in southern Arizona. Performed 1 year after the designation, the study found that dire predictions made by developers in that region have not materialized. Specifically, high-density housing development has not

slowed, the value of vacant land has risen, land sales have continued, and the construction sector has continued its steady growth (McKenney 2000). We similarly believe that critical habitat designation for bighorn sheep will also not likely exert a measurable influence on real estate development within the Coachella Valley.

Comment: Some commenters believe that the economic analysis overstated potential benefits of critical habitat designation.

Our Response: Our draft economic analysis discussed the potential benefits associated with preserving bighorn sheep, but did not attempt to differentiate between benefits attributable to listing, and benefits attributable to critical habitat designation. Because critical habitat designation for bighorn sheep will have little effect on the current and planned activities in the Coachella Valley, we also believe that the benefits from designation will likewise be limited.

Comment: Some commenters believed that the draft economic analysis failed to estimate the potential project modification and delay costs that could be associated with potential additional section 7 consultations due to critical habitat designation.

Our Response: Our economic analysis attempted to quantify the effects of future section 7 consultations likely to occur due to critical habitat designation. This estimate included many of the discrete activities that may occur during the consultation process, which included project modification and delay costs. We estimated these costs to range between $25,000 and $900,000. These cost estimates were only meant to represent potential average changes in a ''typical'' development project's description that sometimes occur during the course of the consultation process and that may be attributed to critical habitat designation. Often project designs are changed or projects are delayed due to factors outside the scope of the Act, which may be caused by other Federal or State regulations and local zoning ordinances. As previously stated, due to the similarity in definitions, we believe that planned projects that could adversely modify critical habitat in most cases would also cause jeopardy to the continued existence of the species. Consequently, such effects would occur regardless of critical habitat designation.

Comment: One commenter stated that the without critical habitat baseline conditions need to include the recent creation of the Santa Rosa and San Jacinto National Monument.

Our Response: At the time the draft was written, the Santa Rosa and San Jacinto National Monument Act had yet to be signed into law. However, our economic analysis discussed the potential effect creating the Santa Rosa and San Jacinto National Monument would have on proposed critical habitat. Both the BLM and Forest Service are required to develop a management plan within 3 years following enactment. Because these agencies are already aware of our concern for bighorn sheep within these areas, we do not believe the designation of critical habitat will have incremental effects on the need to consult.

Comment: Several commenters voiced concern that they were not directly contacted for their opinions on the economic impacts of critical habitat designation.

Our Response: We are not required to contact every potential stakeholder to develop an economic analysis. We were able to understand the issues of concern to the local community based on public comments submitted on the proposed rule, on transcripts from public hearings, and from detailed discussions with Service representatives. To clarify issues, we also contacted representatives from other Federal, State, and local government agencies, as well as private landowners. When the draft economic analysis was completed, we provided notice of its availability in the **Federal Register** and local newspapers, and requested public comment. In particular, we requested comments on the adequacy of the economic analysis.

Summary of Changes From the Proposed Rule

Based on a review of public comments received on the proposed determination of critical habitat for bighorn sheep, we re-evaluated our proposed designation of critical habitat. This resulted in one significant change that is reflected in this final determination. Based on public comment, due to the highly urbanized interface from Palm Springs to La Quinta in Riverside County, we refined the minimum mapping unit for the designation from one-quarter PLS section (approximately ¼ square mile), or UTM equivalent in the Spanish Land Grant areas, to a 100-m UTM grid that approximates the boundary of lands essential to bighorn sheep conservation. Where feasible, identifiable landmarks, such as flood control channels and streets were used to further refine the boundary and increase on-the-ground clarity. This resulted in the removal of significant urban or developed areas. The overall refinement of critical habitat boundaries due to the revised mapping scale resulted in a reduction of approximately 12,430 ha (30,716 ac).

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial data available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species.

Economic effects caused by listing bighorn sheep as an endangered species and by other statutes are the baseline against which the effects of critical habitat designation are evaluated. The economic analysis must then examine the incremental economic and conservation effects and benefit of the critical habitat designation. Economic effects are measured as changes in national income, regional jobs, and household income. An analysis of the economic effects of bighorn sheep critical habitat designation was prepared (Industrial Economics, Inc. 2000) and made available for public review (65 FR 62691). The final analysis, which reviewed and incorporated public comments, concluded that no significant economic impacts are expected from critical habitat designation above and beyond that already caused by listing Peninsular bighorn sheep.

The most likely economic effects of critical habitat designation are on activities funded, authorized, or carried out by a Federal agency. The final analysis examined the effects of the designation on: (1) areas included in the proposed critical habitat designation, but removed from the final rule; (2) re-initiation of section 7 consultations; (3) length of time in which section 7 consultations are completed; and (4) new consultations resulting from the determination. Because areas proposed for critical habitat are within the geographic range of bighorn sheep, activities that may affect critical habitat may also affect the species, and would thus be subject to consultation whether or not critical habitat is designated. We believe that any project that would adversely modify or destroy critical habitat likely would also jeopardize the continued existence of the species, and that reasonable and prudent alternatives to avoid jeopardizing the species would

also avoid adverse modification of critical habitat. Thus, no regulatory burden or associated significant additional costs would accrue because of critical habitat above and beyond that resulting from listing. Our economic analysis does recognize that there may be costs from delays associated with reinitiating completed consultations after the critical habitat designation is made final. There also may be economic effects due to the reaction of the real estate market to critical habitat designation, as real estate values may be lowered due to perceived increase in the regulatory burden. We believe this impact will be short-term, however, and does not justify exclusion of any areas.

A copy of the final economic analysis and description of the exclusion process with supporting documents are included in our administrative record and may be obtained by contacting our office (see **ADDRESSES** section).

Required Determinations

Regulatory Planning and Review

This document has been reviewed by the Office of Management and Budget (OMB), in accordance with Executive Order 12866. OMB makes the final determination under Executive Order 12866.

(a) This rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. Peninsular bighorn sheep were listed as an endangered species in 1998. In fiscal years 1998 through 2000, we have conducted three formal section 7 consultations with other Federal agencies to ensure that their actions would not jeopardize the continued existence of the species.

The areas designated as critical habitat are currently within the geographic range inhabited by bighorn sheep. Under the Act, critical habitat may not be adversely modified by a Federal agency action; it does not impose any restrictions on non-Federal persons unless they are conducting activities funded or otherwise sponsored or permitted by a Federal agency (see Table 2 below).

TABLE 2.—IMPACTS OF PENINSULAR BIGHORN SHEEP LISTING AND CRITICAL HABITAT DESIGNATION

Categories of activities	Activities potentially affected by species listing only	Additional activities potentially affected by critical habitat designation
Federal activities potentially affected.	Activities such as those affecting U.S. waters by the Army Corps of Engineers under section 404 of the Clean Water Act; Regulation of water flows, damming, diversion, and channelization by Federal agencies; Regulation of grazing, mining, and recreation by the Bureau of Land Management and U.S. Forest Service; Road construction and maintenance, right-of-way designation, and regulation of agricultural activities; Regulation of airspace and flight plans within the Federal Aviation Administration jurisdiction; Military training, maneuvers, and flights; Construction of roads and fences along the international border with Mexico, and associated immigration enforcement activities by the Immigration and Naturalization Service; Hazard mitigation and post-disaster repairs funded by the Federal Emergency Management Agency; Construction of communication sites licensed by the Federal Communications Commission; and Activities funded by the U.S. Environmental Protection Agency, U.S. Department of Energy, or any other Federal agency.	None.
Private or other non-Federal Activities potentially affected.	Activities that affect bighorn whether directly (e.g., grading, overgrazing, construction, road building, mining, etc.) or through indirect effects (e.g., noise, edge effects, invasion of exotic species, or fragmentation) that require a Federal action (permit, authorization, or funding).	None.

Section 7 requires Federal agencies to ensure that they do not jeopardize the continued existence of the species. Based upon our experience with the species and its needs, we conclude that any Federal action or authorized action that could potentially cause an adverse modification of the proposed critical habitat would currently be considered as ''jeopardy'' under the Act. Accordingly, the designation of critical habitat does not have any incremental impacts above the listing on what actions may or may not be conducted by Federal agencies or non-Federal persons that receive Federal authorization or funding. Non-Federal persons that do not have any Federal involvement with their actions are not restricted by the designation of critical habitat, however, they continue to be bound by the provisions of the Act concerning ''take'' of the species.

(b) This rule will not create inconsistencies with other agencies' actions. As discussed above, Federal agencies have been required to ensure that their actions do not jeopardize the continued existence of the Peninsular bighorn sheep since the listing in 1998. The prohibition against adverse modification of critical habitat is not expected to impose any restrictions in addition to those that currently exist because all designated critical habitat is within the geographic range inhabited by bighorn sheep.

(c) This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Federal agencies are currently required to ensure that their activities do not jeopardize the continued existence of the species, and as discussed above we do not anticipate that the adverse modification prohibition (resulting from critical habitat designation) will have any significant incremental effects.

(d) This rule will not raise novel legal or policy issues. This final determination follows the requirements for determining critical habitat contained in the Act.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

In the economic analysis, we determined that designation of critical habitat will not have a significant effect on a substantial number of small entities. As discussed under Regulatory Planning and Review above, and in this final determination, this designation of critical habitat for bighorn sheep is not expected to result in any restrictions in addition to those currently in existence. As indicated on Table 1 (see Critical Habitat Designation section), we have designated property owned by Federal,

State and local governments, and private property.

Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are:

(1) Regulation of activities affecting waters of the United States by the Army Corps under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization by Federal agencies;

(3) Regulation of grazing, mining, and recreation by the BLM or Forest Service;

(4) Road construction and maintenance, right of way designation, and regulation of agricultural activities by Federal agencies;

(5) Regulation of airport improvement activities within the Federal Aviation Administration jurisdiction;

(6) Military training and maneuvers and flights;

(7) Construction of roads and fences along the International Border with Mexico, and associated immigration enforcement activities by the Immigration and Naturalization Service;

(8) Hazard mitigation and post-disaster repairs funded by the Federal Emergency Management Agency;

(9) Construction of communication sites licensed by the Federal Communications Commission; and

(10) Activities funded by the U. S. Environmental Protection Agency, Department of Energy, or any other Federal agency.

Many of these activities sponsored by Federal agencies within critical habitat areas are carried out by small entities (as defined by the Regulatory Flexibility Act) through contract, grant, permit, or other Federal authorization. As discussed in section 1 above, Federal agencies engaging in these actions are currently required to comply with the listing protections of the Act, and the designation of critical habitat is not anticipated to have any additional effects on these activities.

For actions on non-Federal property that do not have a Federal connection (such as funding or authorization), the current restrictions concerning take of the species remain in effect, and this final determination will have no additional restrictions.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

Based on our economic analysis of this action, we have determined that designation of critical habitat will not cause (a) any effect on the economy of $100 million or more, (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions in the economic analysis, or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. Small governments will only be affected to the extent that any Federal funds, permits or other authorized activities must ensure that their actions will not adversely affect the critical habitat. However, as discussed in section 1, these actions are currently subject to equivalent restrictions through the listing protections of the species, and no further restrictions are anticipated.

(b) This rule will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments.

Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. As discussed above, the designation of critical habitat affects only Federal agency actions. The rule will not increase or decrease the current restrictions on private property concerning take of bighorn sheep. Due to current public knowledge of the species protection, the prohibition against take of the species both within and outside of the designated areas, and the fact that critical habitat provides no incremental restrictions, we do not anticipate that property values will be affected by the critical habitat designation. While real estate market values may temporarily decline following designation, due to the perception that critical habitat designation may impose additional regulatory burdens on land use, we expect any such impacts to be short term. Additionally, critical habitat designation does not preclude development of HCPs and issuance of incidental take permits. Landowners in areas that are included in the designated critical habitat will continue to have the opportunity to utilize their property in ways consistent with the survival of bighorn sheep.

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this critical habitat proposal with, appropriate State resource agencies in California, as well as during the listing process. The designation of critical habitat for Peninsular bighorn sheep imposes no additional restrictions to those currently in place, and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur) and may lead to quicker recovery of the species.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We designate critical habitat in accordance with the provisions of the Act and held public hearings on the proposed designation during the comment period. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of Peninsular bighorn sheep.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any information collection requirements for which Office of Management and Budget approval under the Paperwork Reduction Act is required.

National Environmental Policy Act

We have determined that we do not need to prepare an Environmental Assessment and/or an Environmental Impact Statement as defined by the

National Environmental Policy Act of 1969 in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

We have determined that there are Tribal Trust lands essential for the conservation of the Peninsular bighorn sheep because they contain the primary constituent elements that support Peninsular bighorn sheep populations, and provide essential linkages between ewe groups in the Peninsular Ranges metapopulation. Therefore, we are designating critical habitat for bighorn sheep on Trust lands of the Morongo Band of Mission Indians, Agua Caliente Band of Cahuilla Indians, and Torres-Martinez Desert Cahuilla Indians. In the future, we may revise this designation to exclude some or all of these lands from critical habitat upon a determination that the benefits of excluding them outweighs the benefits of designating these areas as critical habitat, as provided under section 4(b)(2) of the Act.

Lands within the Agua Caliente Reservation necessary to the survival and recovery of Peninsular bighorn sheep occur within the current home range of the San Jacinto Mountains ewe group and provide a dispersal linkage to the northern Santa Rosa Mountains ewe group. The Tribe and Service are coordinating on the development of a habitat management plan that would protect Peninsular bighorn sheep and more clearly define how Indian lands would contribute to regional conservation planning and the overall recovery program for Peninsular bighorn sheep. We understand that this management plan will be proposed as an HCP and will be considered in any future critical habitat revisions.

On the Torres-Martinez Reservation, the Tribe and Service have discussed coordinating on a habitat analysis and management plan, if appropriate, that would be considered in any future revisions to critical habitat.

On the Morongo Reservation, the Tribe and Service are working on the development of an agreement that would describe coordination protocols for land use management decisions that would be considered in any future revisions to critical habitat.

References Cited

A complete list of all references cited in this final rule is available upon request from the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

Author: The primary authors of this notice are the Carlsbad Fish and Wildlife Office staff (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and record keeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

1. The authority citation for Part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat 3500; unless otherwise noted.

2. In § 17.11(h) revise the entry for ''Sheep, bighorn'' under ''MAMMALS'' to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
MAMMALS							
*	*	*	*	*	*		*
Sheep, bighorn	*Ovis canadensis*	U.S.A. (western conterminous States), Canada (southwestern), Mexico (northern).	U.S.A. (CA) Peninsular Ranges.	E	634	17.95(a)	NA
*	*	*	*	*	*		*

3. In § 17.95 add critical habitat for the bighorn sheep (Peninsular Ranges) *(Ovis canadensis)* under paragraph (a) in the same alphabetical order as this species occurs in § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(a) *Mammals.*

* * *

Bighorn Sheep (Peninsular Ranges) *(Ovis canadensis)*

1. The following map shows the general location of three contiguous designated critical habitat units for the Peninsular bighorn sheep in Riverside, San Diego, and Imperial counties, California, respectively.

Note: Map follows:

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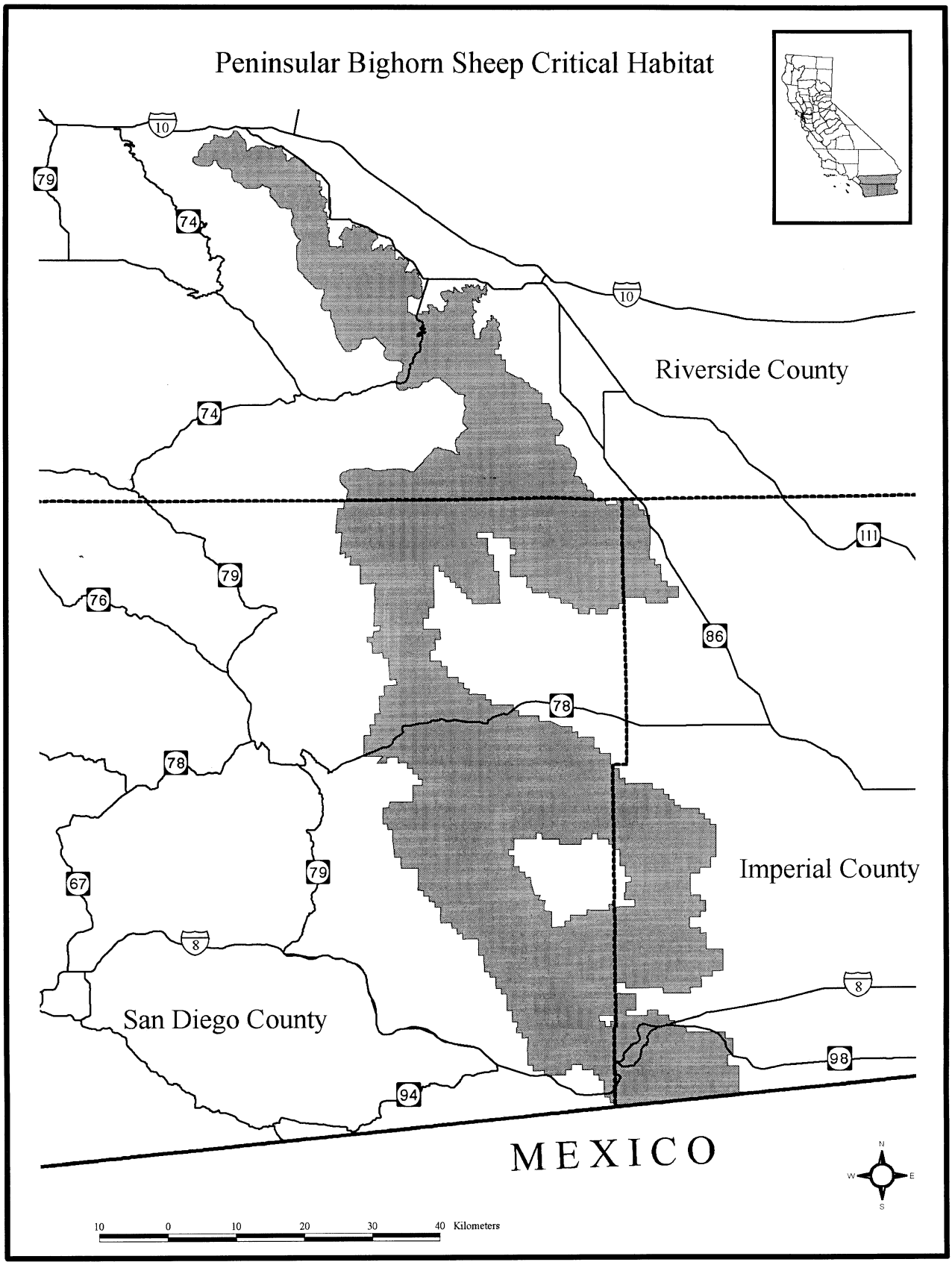

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2. Within these areas, the primary constituent elements for Peninsular bighorn sheep are those habitat components that are essential for the primary biological needs of feeding, resting, reproduction and population recruitment, dispersal, connectivity between ewe groups, and isolation from detrimental human disturbance. The principal biological and physical constituent elements that are essential to the conservation of Peninsular bighorn sheep include: space for the normal behavior of groups and individuals; protection from disturbance; availability of the various native desert plant communities found on different topographic slopes, aspects, and landforms, such as steep slopes, rolling foothills, alluvial fans, and canyon bottoms; a range of habitats that provide forage, especially during periods of drought; steep, remote habitat for lambing, rearing of young, and escape from disturbance and/or predation; water sources; suitable linkages allowing individual bighorn to move freely between ewe groups and maintain connections between subpopulations.

3. Towns and similar developed lands, which do not provide primary constituent elements, are not critical habitat. Road and railroad rights-of-way, flood control facilities, or other facilities that must be traversed by bighorn sheep to maintain connectivity between subpopulations, or otherwise may provide food, water, or cover for Peninsular bighorn sheep, are considered to support primary constituent elements, and therefore are included as critical habitat.

Critical Habitat Unit 1: Riverside County, California. From USGS 1:100,000 quadrangle maps Borrego Valley (1982), and Palm Springs (1982), California, beginning at the Riverside-San Diego County line at Universal Transverse Mercator (UTM) Zone 11, North American Datum of 1927 (NAD27) X-coordinate 544400, land bounded by the following UTM NAD27 coordinates (X, Y): 544400, 3698700; 544500, 3698700; 544500, 3699200; 544600, 3699200; 544600, 3699600; 544700, 3699600; 544700, 3700200; 544600, 3700200; 544600, 3700300; 544500, 3700300; 544500, 3700400; 544300, 3700400; 544300, 3700500; 544200, 3700500; 544200, 3700600; 544100, 3700600; 544100, 3700700; 544000, 3700700; 544000, 3700800; 543900, 3700800; 543900, 3700900; 543800, 3700900; 543800, 3701100; 543700, 3701100; 543700, 3701200; 543600, 3701200; 543600, 3701500; 543500, 3701500; 543500, 3702200; 543600, 3702200; 543600, 3702400; 543700, 3702400; 543700, 3702500; 543800, 3702500; 543800, 3702600; 543900, 3702600; 543900, 3702700; 544100, 3702700; 544100, 3702800; 544500, 3702800; 544500, 3702900; 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then northward along Eldorado Drive to Y-coordinate 3730000; then east to UTM NAD27 coordinate 561800, 3730000; then north to Eldorado Drive at X-coordinate 561800; then eastward along Eldorado Drive past X-coordinate 562000 and northward back to X-coordinate 562000; then eastward and southward along UTM NAD27 coordinates (X, Y) 562000, 3730500; 562100, 3730500; 562100, 3730400; 562500, 3730400; 562500, 3730200; 562600, 3730200; 562600, 3730100; 562700, 3730100; 562700, 3730200; 562800, 3730200; 562800, 3730400; 563000, 3730400; 563000, 3730300; 563100, 3730300; 563100, 3730200; 563200, 3730200; 563200, 3730400; 563300, 3730400; 563300, 3730000; 563500, 3730000; 563500, 3730100; 563600, 3730100; 563600, 3730200; 563700, 3730200; 563700, 3730300; 563800, 3730300; 563800, 3730400; 564000, 3730400; 564000, 3730300; 564100, 3730300; 564100, 3730200; 564200, 3730200; 564200, 3730000; 564100, 3730000; 564100, 3729900; 564200, 3729900; 564200, 3729800; 564300, 3729800; 564300, 3729600; 564500, 3729600; 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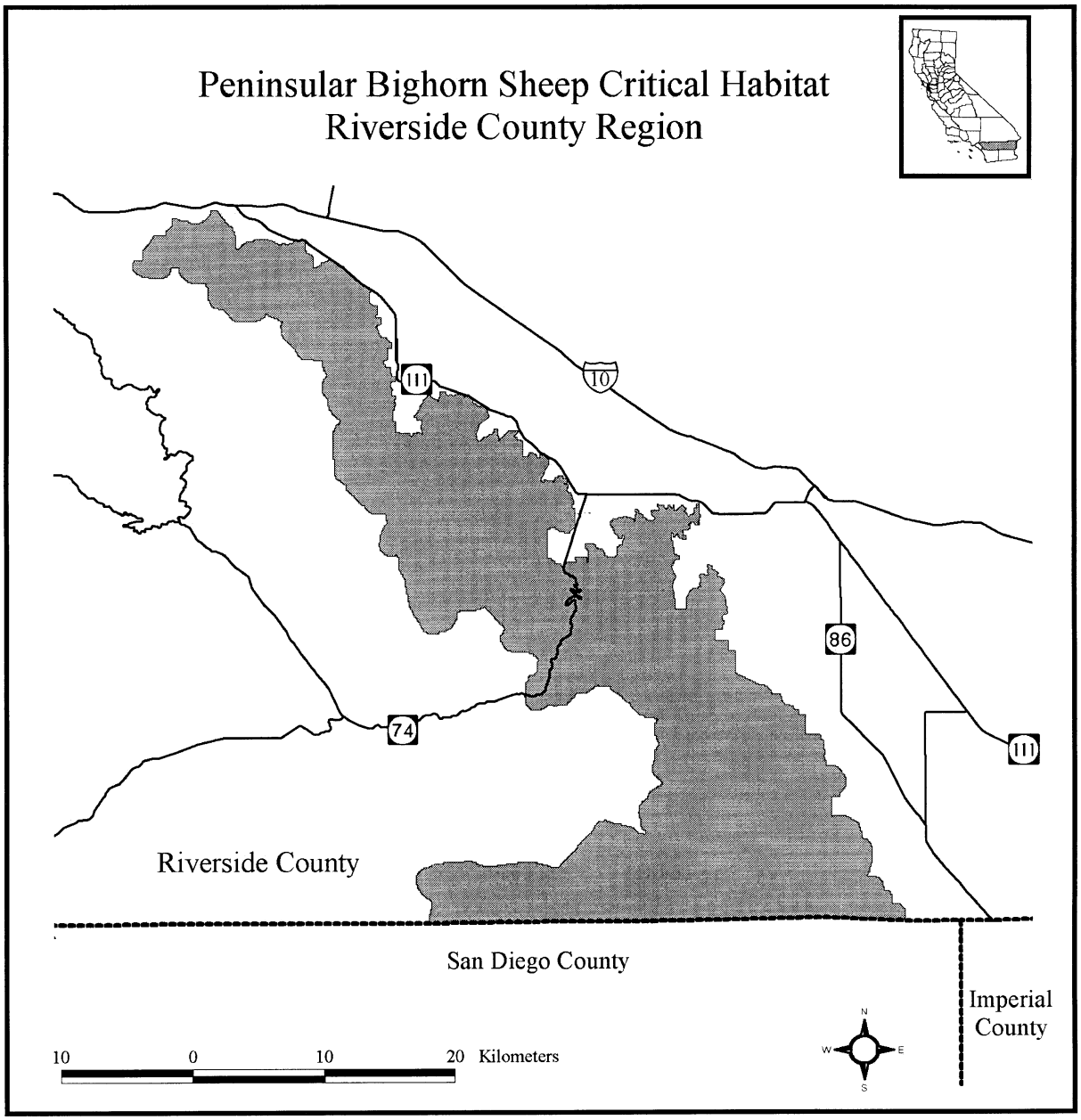
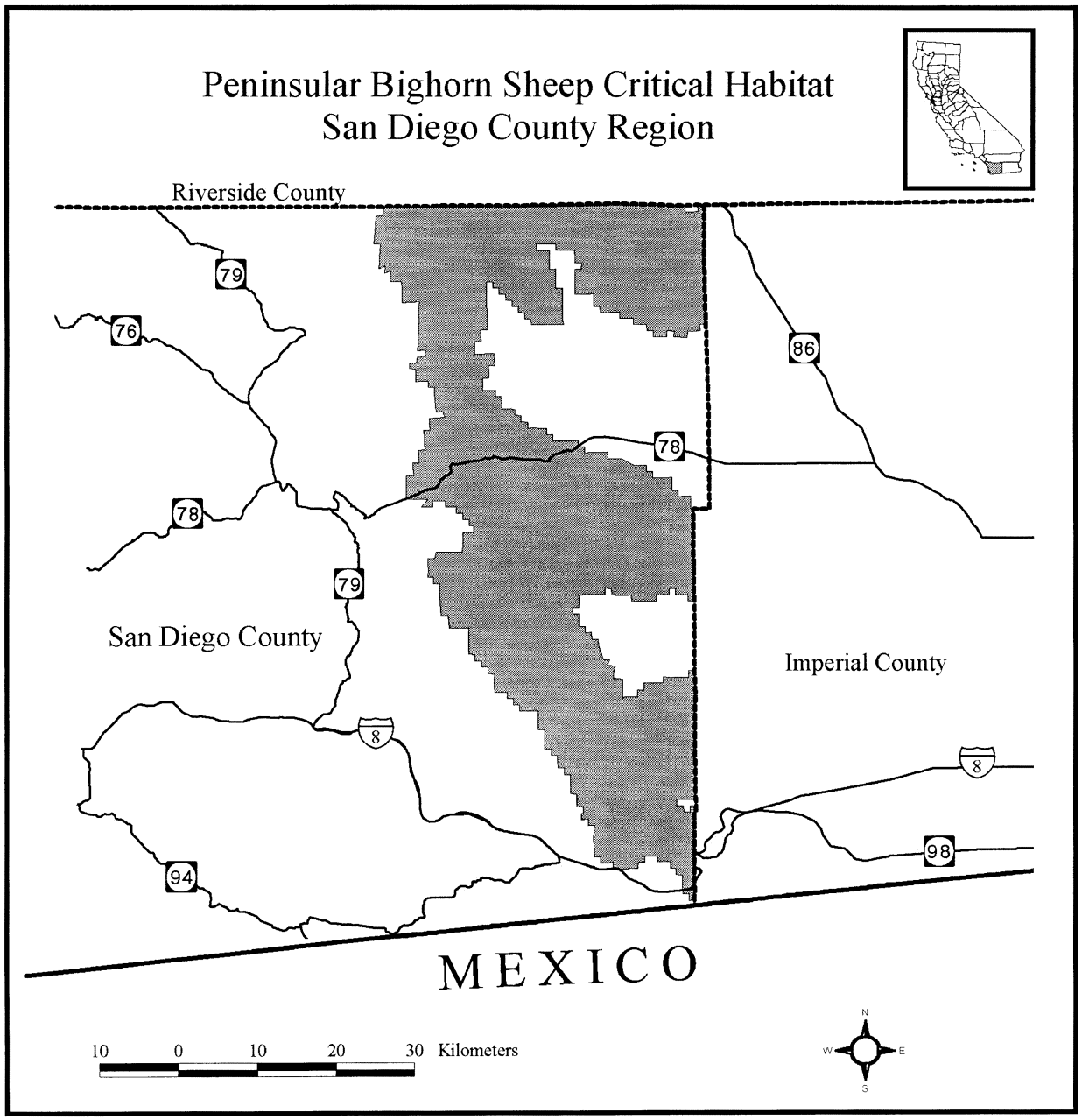
Note: Map follows:



Critical Habitat Unit 2: San Diego County, California. From USGS 1:100,000 quadrangle maps Borrego Valley (1982) and El Cajon (1979), California. Lands in San Diego County within T9S, R4E, S1; T9S, R4E, S2SE; T9S, R4E, S11NE; T9S, R4E, S11SE; T9S, R4E, S12–S13; T9S, R4E, S14NE; T9S, R4E, S24; T9S, R4E, S25NW; T9S, R4E, S25NE; T9S, R4E, S25SE; T9S, R5E, S1–S36; T9S, R6E, S1–13; T9S, R6E, S14NW; T9S, R6E, S14NE; T9S, R6E, S15–S23; T9S, R6E, S24SW; T9S, R6E, S24SE; T9S, R6E, S25–S36; T9S, R7E, S1–S18; T9S, R7E, S19NE; T9S, R7E, S20NW; T9S, R7E, S20NE; T9S, R7E, S21–S27; T9S, R7E, S28NW; T9S, R7E, S28NE; T9S, R7E, S28SE; T9S, R7E, S31NW; T9S, R7E, S31SW; T9S, R7E, S33–S36; T9S, R8E, S1NE; T9S, R8E, S1SE; T9S, R8E, S1SW; T9S, R8E, S2NW; T9S, R8E, S2SW; T9S, R8E, S2SE; T9S, R8E, S3–S36; T10S, R5E, S1–S5; T10S, R5E, S8NW; T10S, R5E, S8NE; T10S, R5E, S9–S28; T10S, R5E, S33NE; T10S, R5E, S33NW; T10S, R5E, S33SE; T10S, R5E, S34–S36; T10S, R6E, S1–S4; T10S, R6E, S5NE; T10S, R6E, S6–S7; T10S, R6E, S9NE; T10S, R6E, S10–S14; T10S, R6E, S15NE; T10S, R6E, S18–S19; T10S, R6E, S23NE; T10S, R6E, S24NW; T10S, R6E, S24NE; T10S, R6E, S30NW; T10S, R6E, S30SW; T10S, R7E, S1–S4; T10S, R7E, S6NW; T10S, R7E, S6SW; T10S, R7E, S6SE; T10S, R7E, S7; T10S, R7E, S10NE; T10S, R7E, S10SE; T10S, R7E, S11–S12; T10S, R7E, S13NW; T10S, R7E, S13NE; T10S, R7E, S13SE; T10S, R7E, S14NW; T10S, R7E, S14NE; T10S, R7E, S18; T10S, R7E, S19NW; T10S, R7E, S19NE; T10S, R8E, S1–S18; T10S, R8E, S19NE; T10S, R8E, S20NE; T10S, R8E, S20NW; T10S, R8E, S20SE; T10S, R8E, S21–S23; T10S, R8E, S24NW; T10S, R8E, S24NE; T10S, R8E, S24SW; T10S, R8E, S26NW; T10S, R8E, S27NE; T10S, R8E, S28NW; T10S, R8E, S28NE; T11S, R5E, S1–S4; T11S, R5E, S5SE; T11S, R5E, S9–S14; T11S, R5E, S15NE; T11S, R5E, S15NW; T11S, R5E, S15SE; T11S, R5E, S22NE; T11S, R5E, S22SE; T11S, R5E, S23–S26; T11S, R5E, S27NE; T11S, R5E, S34–S36; T11S, R6E, S5NW; T11S, R6E, S5SW; T11S, R6E,

S6–S7; T11S, R6E, S18NW; T11S, R6E, S18SW; T11S, R6E, S19; T11S, R6E, S20NW; T11S, R6E, S20SW; T11S, R6E, S20SE; T11S, R6E, S28SW; T11S, R6E, S28SE; T11S, R6E, S29–S33; T11S, R6E, S34NW; T11S, R6E, S34SW; T11S, R6E, S34SE; T12S, R5E, S1–S3; T12S, R5E, S4NE; T12S, R5E, S4SE; T12S, R5E, S9NE; T12S, R5E, S9SE; T12S, R5E, S9SW; T12S, R5E, S10–S16; T12S, R5E, S17SE; T12S, R5E, S20NE; T12S, R5E, S20SE; T12S, R5E, S20SW; T12S, R5E, S21–S33; T12S, R5E, S34NE; T12S, R5E, S34NW; T12S, R5E, S35–S36; T12S, R6E, 1NW; T12S, R6E, S1SW; T12S, R6E, S1SE; T12S, R6E, S2–S36; T12S, R7E, S7–S8; T12S, R7E, S9SW; T12S, R7E, S13SE; T12S, R7E, S13SW; T12S, R7E, S14SW; T12S, R7E, S15–S36; T12S, R8E, S18SE; T12S, R8E, S18SW; T12S, R8E, S19; T12S, R8E, S20NW; T12S, R8E, S20SW; T12S, R8E, S20SE; T12S, R8E, S21SW; T12S, R8E, S21SE; T12S, R8E, S27SW; T12S, R8E, S28–S34; T12S, R8E, S35NW; T12S, R8E, S35SW; T13S, R5E, S1NW; T13S, R5E, S1NE; T13S, R5E, S1SE; T13S, R5E, S13SE; T13S, R5E, S13NE; T13S, R5E, S22SE; T13S, R5E, S23SW; T13S, R5E, S23SE; T13S, R5E, S24NE; T13S, R5E, S24SW; T13S, R5E, S24SE; T13S, R5E, S25–S27; T13S, R5E, S34NW; T13S, R5E, S34NE; T13S, R5E, S34SE; T13S, R5E, S35–S36; T13S, R6E, S1–S6; T13S, R6E, S7NW; T13S, R6E, S7NE; T13S, R6E, S7SE; T13S, R6E, S8–S36; T13S, R7E, S1–S36; T13S, R8E, S1–S36; T14S, R5E, S1–S2; T14S, R5E, S11–S13; T14S, R5E, S14NW; T14S, R5E, S14NE; T14S, R5E, S14SE; T14S, R5E, S23NE; T14S, R5E, S24NE; T14S, R5E, S24NW; T14S, R6E, S1–S30; T14S, R6E, S31NW; T14S, R6E, S31NE; T14S, R6E, S31SE; T14S, R6E, S32–S36; T14S, R7E, S1NW; T14S, R7E, S1NE; T14S, R7E, S1SE; T14S, R7E, S2–S9; T14S, R7E, S16NW; T14S, R7E, S16SE; T14S, R7E, S16SW; T14S, R7E, S17–S21; T14S, R7E, S22SW; T14S, R7E, S26SW; T14S, R7E, S27–S34; T14S, R7E, S35NW; T14S, R7E, S35SW; T14S, R8E, S1; T14S, R8E, S2NE; T14S, R8E, S2NW; T14S, R8E, S2SE; T14S, R8E, S3–S6; T14S, R8E, S8NW; T14S, R8E, S8NE; T14S, R8E, S9NW; T14S, R8E, S9NE; T14S, R8E, S12NE; T15S, R6E, S1–S4; T15S, R6E, S5NW; T15S, R6E, S5NE; T15S, R6E, S5SE; T15S, R6E, S9–S15; T15S, R6E, S16NW; T15S, R6E, S16NE; T15S, R6E, S22NE; T15S, R6E, S23–S24; T15S, R6E, S25NE; T15S, R6E, S25SE; T15S, R6E, S36NE; T15S, R7E, S1SW; T15S, R7E, S2–S11; T15S, R7E, S12NW; T15S, R7E, S12SW; T15S, R7E, S12SE; T15S, R7E, S13–S36; T15S, R8E, S10SE; T15S, R8E, S11SW; T15S, R8E, S11SE; T15S, R8E, S12NE; T15S, R8E, S12SW; T15S, R8E, S12SE; T15S, R8E, S13–S16; T15S, R8E, S17SE; T15S, R8E, S19–S36; T16S, R7E, S1–S6; T16S, R7E, S7NE; T16S, R7E, S8–S16; T16S, R7E, S17NW; T16S, R7E, S17NE; T16S, R7E, S17SE; T16S, R7E, S21–S27; T16S, R7E, S28NW; T16S, R7E, S28NE; T16S, R7E, S28SE; T16S, R7E, S33NE; T16S, R7E, S34–36; T16S, R8E, S1–S34; T16S, R8E, S35NW; T16S, R8E, S35SW; T16S, R8E, S35SE; T16S, R8E, S36SE; T17S, R7E, S1–S2; T17S, R7E, S3NE; T17S, R7E, S3NW; T17S, R7E, S3SE; T17S, R7E, S11–S14; T17S, R7E, S23NW; T17S, R7E, S23NE; T17S, R7E, S23SE; T17S, R7E, S24; T17S, R7E, S25NE; T17S, R8E, S1–S20; T17S, R8E, S21NW; T17S, R8E, S21NE; T17S, R8E, S22–S25; T17S, R8E, S26NW; T17S, R8E, S26NE; T17S, R8E, S26SE; T17S, R8E, S29NW; T17S, R8E, S30NW; T17S, R8E, S30NE; T17S, R8E, S36; T18S, R8E, S1NW; T18S, R8E, S1NE; T18S, R8E, S1SE. The following lands within the Valle de San Felipe Land Grant bounded by UTM NAD27 coordinates (X, Y): 547000, 3664000; 548000, 3664000; 548000, 3663000; 552000, 3663000; 552000, 3662000; 551000, 3662000; 551000, 3661000; 547000, 3661000; 547000, 3664000.

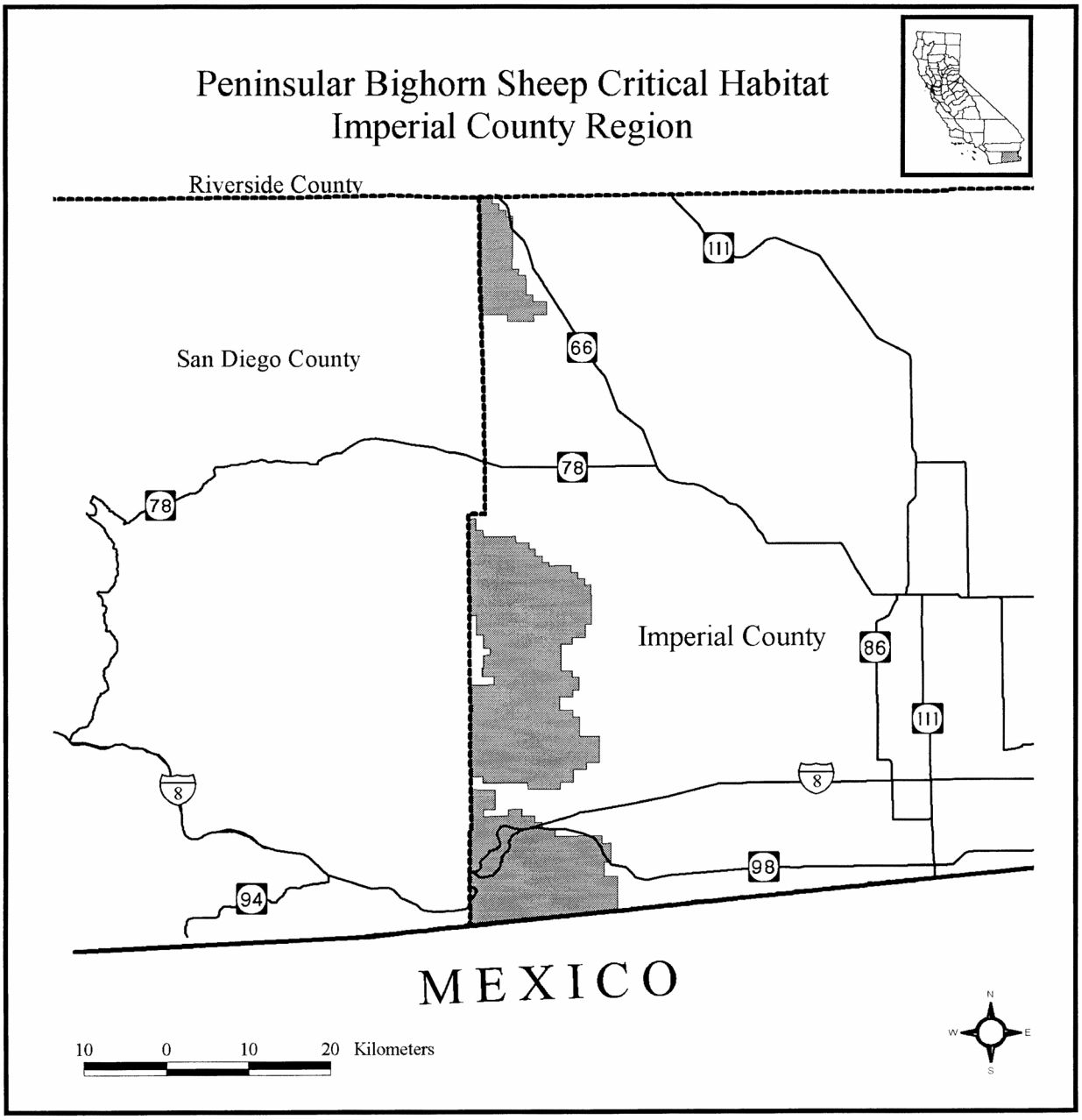
Note: Map follows:



Critical Habitat Unit 3: Imperial County, California. From USGS 1:100,000 quadrangle maps Borrego Valley (1982), El Cajon (1979), Salton Sea (1982), and El Centro (1982), California. Lands in Imperial County within T9S, R9E, S5SW; T9S, R9E, S6–S8; T9S, R9E, S9SW; T9S, R9E, S16NW; T9S, R9E, S16SW; T9S, R9E, S17–S20; T9S, R9E, S21NW; T9S, R9E, S21SW; T9S, R9E, S28NW; T9S, R9E, S28SW; T9S, R9E, S29–S32; T9S, R9E, S33NW; T9S, R9E, S33SE; T9S, R9E, S33SW; T10S, R9E, S3NW; T10S, R9E, S3SW; T10S, R9E, S4–S9; T10S, R9E, S10NW; T10S, R9E, S10SE; T10S, R9E, S10SW; T10S, R9E, S14–S18; T10S, R9E, S21NE; T10S, R9E, S21NW; T10S, R9E, S22NE; T10S, R9E, S22NW; T13S, R9E, S6SW; T13S, R9E, S7NW; T13S, R9E, S7SE; T13S, R9E, S7SW; T13S, R9E, S14SW; T13S, R9E, S15NW; T13S, R9E, S15SE; T13S, R9E, S15SW; T13S, R9E, S16–S23; T13S, R9E, S24SW; T13S, R9E, S25–S36; T13S, R10E, S29SW; T13S, R10E, S30–S32; T13S, R10E, S33SW; T14S, R9E, S1–S17; T14S, R9E, S18NE; T14S, R9E, S18SE; T14S, R9E, S19NE; T14S, R9E, S20–S28; T14S, R9E, S29NE; T14S, R9E, S29NW; T14S, R9E, S29SE; T14S, R9E, S32–S36; T14S, R10E, S4NW; T14S, R10E, S4SW; T14S, R10E, S5–S8; T14S, R10E, S9NW; T14S, R10E, S9SW; T14S, R10E, S16NW; T14S, R10E, S17–S19; T14S, R10E, S20NE; T14S, R10E, S20NW; T14S, R10E, S30NW; T14S, R10E, S30SW; T14S, R10E, S31NW; T14S, R10E, S31SW; T15S, R9E, S1–S5; T15S, R9E, S6NE; T15S, R9E, S7–S36; T15S, R10E, S5SW; T15S, R10E, S6–S7; T15S, R10E, S8NW; T15S, R10E, S19; T15S, R10E, S20SW; T15S, R10E, S29NW; T15S, R10E, S29SW; T15S, R10E, S30–S33; T16.5S, R9.5E, S1NW; T16.5S, R9.5E, S1SE; T16.5S, R9.5E, S1SW; T16.5S, R9.5E, S2; T16.5S, R10E, S4SE; T16.5S, R10E, S4SW; T16.5S, R10E, S5SE; T16.5S, R10E, S5SW; T16.5S, R10E, S6SE; T16.5S, R10E, S6SW; T16S, R9E, S1–S14; T16S, R9E, S15NE; T16S, R9E,

S15NW; T16S, R9E, S15SE; T16S, R9E, S16NE; T16S, R9E, S16NW; T16S, R9E, S17NE; T16S, R9E, S17NW; T16S, R9E, S18NE; T16S, R9E, S19; T16S, R9E, S28SE; T16S, R9E, S28SW; T16S, R9E, S30NE; T16S, R9E, S30NW; T16S, R9E, S30SW; T16S, R9E, S31–S34; T16S, R9E, S35SW; T16S, R10E, S4–S7; T16S, R10E, S8NE; T16S, R10E, S8NW; T16S, R10E, S18NE; T16S, R10E, S18NW; T17S, R9E, S1–S36; T17S, R10E, S2–S10; T17S, R10E, S11NW; T17S, R10E, S11NE; T17S, R10E, S11SW; T17S, R10E, S13SW; T17S, R10E, S14NW; T17S, R10E, S14SW; T17S, R10E, S14SE; T17S, R10E, S15–S23; T17S, R10E, S24NW; T17S, R10E, S24SW; T17S, R10E, S25NW; T17S, R10E, S25SW; T17S, R10E, S26–S35; T17S, R10E, S36NW; T17S, R10E, S36SW; T18S, R9E, S1–S6; T18S, R9E, S7NE; T18S, R9E, S7SE; T18S, R9E, S7NW; T18S, R9E, S8–S11.

Note: Map follows:



Dated: January 12, 2001.

Kenneth L. Smith,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 01–1704 Filed 1–29–01; 11:24 am]

BILLING CODE 4310–55–P

Federal Register

Thursday,
February 1, 2001

Part V

Federal Trade Commission

16 CFR Parts 2, 801, 802, and 803

Premerger Notification; Reporting and Waiting Period Requirements and Rules of Practice; Final Rules

16 CFR Parts 801 and 802

Premerger Notification; Reporting and Waiting Period Requirements; Proposed Rule

FEDERAL TRADE COMMISSION

16 CFR Parts 801, 802 and 803

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Interim rules with request for comment.

SUMMARY: The Federal Trade Commission is amending the premerger notification rules, which require the parties to certain mergers or acquisitions to file reports with the Commission and with the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice and to wait a specified period of time before consummating such transactions, pursuant to Section 7A of the Clayton Act. The filing and waiting period requirements enable these enforcement agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation. The rule amendments are necessary to implement recent amendments to the Clayton Act, and will increase the clarity and improve the effectiveness of the rules and the Notification and Report Form.

DATES: These interim rules are effective February 1, 2001. Comments should be filed no later than March 19, 2001.

ADDRESSES: Address comments concerning these interim rules to the Secretary, Federal Trade Commission, Room 159, 600 Pennsylvania Avenue, NW, Washington, DC 20580, or by e-mail to hsr-rules@ftc.gov. With regard to the Paperwork Reduction Act, send a copy of any comments concerning the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, Washington, DC 20503 (ATTN.: Edward Clarke, Desk Officer for the Federal Trade Commission).

FOR FURTHER INFORMATION CONTACT: Marian R. Bruno, Assistant Director, or Karen E. Berg, Attorney, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580. Telephone: (202) 326–3100.

SUPPLEMENTARY INFORMATION:

Background

Section 7A of the Clayton Act, 15 U.S.C. 18a (''the act''), as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (''HSR Act''), Pub. L. 94–435, 90 Stat. 1390, requires all persons contemplating certain mergers or acquisitions to file notification with the Federal Trade Commission (''FTC'' or ''Commission'') and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (''Assistant Attorney General'') and to wait a designated period of time before consummating such transactions. Congress empowered the Commission, with the concurrence of the Assistant Attorney General, to require ''that the notification * * * be in such form and contain such documentary material and information * * * as is necessary and appropriate'' to enable the agencies ''to determine whether such acquisitions may, if consummated, violate the antitrust laws.'' Congress similarly granted rulemaking authority to, inter alia, ''prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.'' See 15 U.S.C. 18a(d).

Pursuant to that authority, the Commission, with the concurrence of the Assistant Attorney General, developed the Antitrust Improvements Act Rules (''the rules''), which are codified in 16 CFR parts 801, 802 and 803, and the Notification and Report Form for Certain Mergers and Acquisitions (''the Form''), which appears at part 803—Appendix. The Commission has amended or revised the rules and Form on fourteen prior occasions since they were first introduced.

On December 21, 2000, the President signed into law certain amendments to Section 7A(a) of the Clayton Act, 15 U.S.C. 18a(a). *See* Pub. L. 106–553, 114 Stat. 2762 (''2000 Amendments''). These amendments are effective on February 1, 2001. The 2000 Amendments are the first significant changes to Section 7A since the passage of the HSR Act in 1976. These changes include:

- An increase in the size-of-transaction threshold to $50 million (in place of the previous $15 million threshold).
- Elimination of the 15 percent size-of-transaction threshold.
- Reportability of transactions valued at greater than $200 million without regard to ''size-of-person.'' The current size-of-person test will continue in place for transactions valued between $50 million and $200 million.
- Adjustment to the size-of-transaction threshold each fiscal year, beginning with FY 2005, for changes in GNP during the previous year.
- Implementation of a tiered fee structure. The fee that the acquiring person must pay will be based on the value of the voting securities or assets held as a result of the transaction:

Size (value) of transaction	Fee ($)
< $100 million	45,000
$100 million to < $500 million	125,000
$500 million or more	280,000

The filing fee tiers will be adjusted annually, beginning with FY 2005, for changes in GNP during the previous year.

- Extension of the waiting period that follows substantial compliance with requests for additional information and documentary material to 30 days for most transactions. The 10-day post-compliance period for cash tender offers (and bankruptcy transactions) is not changed.
- The end of any waiting period that would be on a Saturday, Sunday or legal public holiday shall be the next regular business day.

Statement of Basis and Purpose of the Amendments to the Rules and Form

To implement these statutory changes, the Commission, with the concurrence of the Assistant Attorney General, is promulgating additional amendments and revisions to the rules and Form, as described below. Generally, all references to Section 7A(a)(3) of the Clayton Act and all examples have been modified where necessary to reflect the higher $50 million size-of-transaction threshold and elimination of the 15 percent size-of-transaction threshold. In addition, the Commission has taken this opportunity to make minor ministerial changes to update the rules and Form. In a separate **Federal Register** document, the Commission is amending Part 2 of its Rules of Practice to incorporate procedures, as required by the 2000 Amendments, for internal agency review, upon petition, of requests for additional or documentary material (''second requests'') regarding the transaction at issue.

Part 801—Coverage Rules

Section 801.1(h): Notification Threshold

Section 801.1(h) of the rules defines the term ''notification threshold.'' This term does not appear in the act, and its principal appearance in the rules is in connection with Section 802.21, an exemption for certain incremental acquisitions. In general, the notification thresholds specify the levels of ownership of the assets or voting

securities of an acquired person that cannot be attained or exceeded without observing the filing and waiting period requirements of the Clayton Act.

Section 801.1(h), as originally promulgated in 1978 (43 FR 33450, July 31, 1978), contained four notification thresholds: $15 million; 15 percent; 25 percent; and 50 percent. Several of the changes Congress made in the act have, however, necessitated a complete revision of this rule. In particular, the elimination of the 15 percent size-of-transaction test, the increase of the monetary size of transaction test to $50 million, and the introduction of a three-tiered filing fee structure have all affected this provision. The 2001 thresholds are: Assets and voting securities valued at greater than $50 million but less than $100 million; assets and voting securities valued at $100 million or greater but less than $500 million; assets and voting securities valued at $500 million or greater; 25 percent of the voting securities of an issuer if valued at greater than $1 billion; and 50 percent of the voting securities of an issuer if valued at greater than $50 million.

To understand the function of the notification thresholds in the rules, it is necessary to look closely at the requirements of the act. Under the act as amended, one must file notification and observe a waiting period if at least one of the parties is engaged in commerce or in any activity affecting commerce, in certain transactions if the size-of-person test is met, and if *''as a result of such acquisition, the acquiring person would hold* an aggregate total amount of voting securities and assets of the acquired person'' in excess of $50 million (emphasis added). The rules interpret this provision to mean that all prior acquisitions of voting securities of an issuer are held as a result of any subsequent acquisition of voting securities from that issuer. See Section 801.13(a). This means that once the $50 million level is reached, every acquisition of voting securities is potentially reportable, not just the one that first exceeds this amount.

This result is overly burdensome and serves no law enforcement purpose. To avoid this consequence, the drafters of the 1978 rules added the concept of notification thresholds and Section 802.21. The thresholds establish certain levels of acquisition likely to be of competitive significance. Section 802.21 exempts all acquisitions between these levels not meeting or exceeding the next threshold for a period of five years after expiration or termination of the waiting period for the transaction which initially crossed the prior threshold. (For more regarding the function of the notification thresholds, see the discussion of Section 802.21 below.) The thresholds, in conjunction with Section 802.21, thus operate to inform the agencies that if a reported transaction is not challenged, the acquiring person can acquire up to the next highest threshold without having to file again.

Enactment of the new legislation has required some amendments to the Section 801.1(h) thresholds and has led the Commission to make other changes as well. Raising the statutory size-of-transaction threshold from $15 million to $50 million has required changing the lowest dollar threshold in Section 801.1(h) in the same fashion. At the same time, it appears logical that for voting securities, 50 percent (as long as valued in excess of the act's $50 million threshold) should continue to be the highest reporting threshold. Transactions resulting in an acquiring person holding at least 50 percent of the voting securities of an issuer transfer control of the issuer within the meaning of the rules and can have greater antitrust significance than acquisitions between the same parties resulting in minority interests. Any additional acquisitions by an acquiring person that already holds 50 percent of the voting securities of an issuer are exempted by Section 7A(c)(3) of the act.

The Commission thus began its consideration of appropriate Section 801.1(h) thresholds recognizing that $50 million should be the lowest reporting threshold and 50 percent (if greater than $50 million) the highest. The Commission then addressed what thresholds—if any—to have in addition to them. As with the 1976 statute, it was readily apparent that intermediate thresholds are desirable. Absent additional thresholds, a person intending to acquire 1 percent of an issuer for $51 million would be able to acquire any amount up to (but not including) 50 percent without another reporting obligation. The agencies would thus have to regard the one percent/$51 million acquisition as a much more significant acquisition than may have been contemplated by the parties.

While the original 1978 rules interposed two intermediate percentage thresholds for voting securities transactions—15 percent and 25 percent—the Commission has determined that the 2001 rules, with one exception noted below, should instead interpose intermediate dollar thresholds ($100 million and $500 million).

There are several reasons for this change. First, in enacting the new legislation, Congress eliminated the alternative 15 percent size-of-transaction test, leaving the size-of-transaction test based solely on the dollar value of the transaction. Second, in the 2000 Amendments, Congress established a tiered filing fee based on the dollar value of the transaction. In so doing, Congress appears to have concluded that there is a positive correlation between dollar value of transactions and agency resources devoted to investigating them. The tiered fee structure thus appears to reflect the view that larger dollar value transactions are more likely to require more antitrust review than smaller ones. These statutory changes led the Commission to conclude that there was no longer any special significance to be attached to the 15 percent level and that there is some significance to the $100 million and $500 million levels.

In addition to these reasons for adopting intermediate dollar thresholds in Section 801.1(h), the Commission believes this change will avoid certain administrative difficulties for the parties and the agencies. The existence of two different sets of thresholds, one for fees and another for notification requirements, would create difficult administrative problems. For example, suppose that the 15 percent and 25 percent thresholds were retained, and that A plans to acquire 26 percent of the voting securities of B in year 1 for $85 million. Under Section 802.21, A's filing would enable A to acquire up to 50 percent of B up through year 5, which would put A well above $100 million. In such a scenario, should A be required to pay a $125,000 filing fee at the time of its filing? Or should A be allowed to pay a $45,000 filing fee and to proceed up to 50 percent without paying any additional fee even though it would hold in excess of $100 million of the voting securities of B? Or should A be allowed to proceed up to 50 percent without filing but be required to pay an additional $125,000 fee for crossing the higher fee threshold (or, perhaps, be required to pay $80,000, crediting A for the $45,000 fee it had already paid)? Using the fee thresholds as Section 801.1(h) thresholds avoids these problems. In addition, as described above, doing so appears consistent with congressional intent and with encouraging efficient antitrust review.

The 25-percent-if-valued-at-greater-than-$1-billion threshold is intended to apply to progressive acquisitions of the stock of very large issuers. For such companies, even $500 million may represent a relatively small percentage

of the stock and therefore an additional threshold between $500 million and 50 percent is necessary. In the case of smaller issuers where just under 50 percent of the issuer's stock is valued less than $1 billion, the 25 percent threshold would be inapplicable.

Although these new thresholds are fairly self-explanatory, two features of the new thresholds deserve mention. First, the three monetary thresholds apply to acquisitions of voting securities or of assets but the percentage thresholds apply only to acquisitions of voting securities (as is indicated by the use of the word ''issuer''). These new thresholds thus do not introduce percentage notification thresholds for asset transactions. Second, the 50 percent threshold is the highest threshold regardless of the corresponding dollar value. That is, depending on the size of the issuer whose voting securities are being acquired, the 50 percent threshold may come after any of the monetary thresholds. If, however, 50 percent of the stock of an issuer is valued at $480 million, for example, there is no higher threshold at, say, $500 million because Section 7A(c)(3) of the act exempts acquisitions above the 50 percent level. Two examples have been added to illustrate the operation of the new thresholds.

Section 801.1(j): Engaged in Manufacturing

As a housekeeping matter, the definition of ''engaged in manufacturing'' has been amended to reference the current 1987 edition of the Standard Industrial Classification Manual.

Section 801.1(m): The Act

The definition of ''The act'' has been amended to include reference to the 2000 Amendments.

Section 801.10: Value of Voting Securities and Assets To Be Acquired

The last sentence in the example to Section 801.10 has been deleted, together with corresponding language in the Instructions that requests ''approximate value ''or ''estimated total value'' of assets in Item 2(d) of the Form. The Commission removed this language because a filing person must make as precise a valuation as it can under the new filing fee structure.

Section 801.11: Annual Net Sales and Total Assets

In Section 801.11(e)(2)(ii) the reference to Section 801.40(c) has been changed to Section 801.40(d) to reflect the renumbering of that section.

Section 801.12: Calculating Percentage of Voting Securities or Assets

Paragraphs (c) and (d) of Section 801.12, and the examples that follow have been removed because they are relevant only to a determination whether the percentage of assets being held or acquired meets the 15 percent size-of-transaction test. Because this test has been eliminated in the 2000 Amendments, these paragraphs and the corresponding examples are no longer applicable. The title of the section has also been changed by dropping ''or assets.''

Section 801.15: Aggregation of Voting Securities and Assets the Acquisition of Which Was Exempt

The reference to ''A's'' acquisition of less than 15 percent of the voting common stock of X has been deleted from Example 1 following Section 801.15. The reference was originally included to make clear that ''A's'' acquisition of the common stock alone would meet neither the $15 million nor the 15 percent the size-of-transaction threshold. The elimination of the 15 percent size-of-transaction threshold in the 2000 Amendments renders the reference meaningless, and it has been deleted.

Section 801.40: Exempt Formation of Joint Venture or Other Corporations

Section 801.40 has been amended to eliminate the size-of-person test for transactions valued at greater than $200 million. Specifically, a new paragraph (b) has been added to the section which makes an acquiring person in a joint venture subject to the act if the commerce test is satisfied and the size of transaction is valued at greater than $200 million. The only other changes to this section are minor and follow from the addition of new paragraph (b). They are: Redesignating the paragraph that follow (b); the addition of ''and (c)'' to new paragraph (d) (old paragraph (c)), which discusses what assets of the joint venture are to be included; requisite amendments to the example following the rule to reflect section and paragraph changes in the rule itself; addition of a new example demonstrating the application of new paragraph (b); and dollar changes to reflect the general increase in the filing threshold.

Part 802—Exemption Rules

Section 802.4: Acquisitions of Voting Securities of Issuers Holding Certain Assets the Direct Acquisition of Which Is Exempt

Section 802.4 exempts the acquisition of voting securities of issuers that hold certain assets the direct acquisition of which is exempt under the act or the rules. The rationale for this rule is that the applicability of an exemption should not depend on the form the acquisition takes, since the antitrust analysis would be the same whether voting securities or assets are being acquired. A change to the $15 million non-exempt assets threshold in this section is not mandated by the general increase in the size-of-transaction threshold from $15 million to $50 million, since the acquisition still would be an acquisition of voting securities of an issuer valued in excess of $50 million. However, since the threshold functions in the same manner as the size-of-transaction test in an asset acquisition, it appears consistent with Congressional intent to increase this threshold to the higher level as well. Accordingly, the Commission is amending the references from $15 million to $50 million in this rule and its Examples 1 and 2.

Section 802.20: Minimum Dollar Value

The preamble to Section 802.20, the Minimum Dollar Value Exemption, states that this provision applies to ''acquisition[s] which would be subject to the requirements of the act and which satisf[y] section 7A(a)(3)(A) [the 15 percent size-of-transaction test] but * * * not * * * section 7A(a)(3)(B) [the $15 million monetary size-of-transaction test].'' This rule exempts acquisitions of assets valued at less than $15 million regardless of the percentage of the assets of the acquired person they represent, and also exempts acquisitions of less than $15 million of voting securities unless the acquisition would confer control of an issuer with sales or assets of $25 million or more.

The need for Section 802.20 arose from the dual nature of the size-of-transaction test which made reportable certain very small transactions between parties meeting the size-of-person test. Absent Section 802.20, transactions could meet the statutory size-of-transaction test even though they fell below the monetary size-of-transaction test—a situation, as described below, that cannot occur under the 2000 Amendments. The most extreme example is that of a $100 million acquiring person acquiring 15 percent of the stock of a subsidiary of a $10 million acquired person for a price well below $15 million. Without Section 802.20, this transaction would have been reportable no matter how small the acquisition price was. Similarly, the acquisition of 15 percent of the assets of a $10 million person would have been reportable despite its small dollar value.

One of the 2000 Amendments eliminates the 15 percent size-of-transaction test. The removal of this test does away with the primary cause of the reportability of very small transactions and eliminates any need for Section 802.20. In addition, Congress has also increased the monetary size-of-transaction test to $50 million. These two measures assure that very small transactions are never reportable under the new statutory scheme. The $50 million threshold will be an absolute floor, with no transaction resulting in an acquiring person holding less than that amount of assets or voting securities'' of an acquired person being reportable. Because the $50 million statutory size-of-transaction threshold will be an absolute floor, the minimum dollar value exemption contained in Section 802.20 exempting transactions falling below that dollar threshold is no longer needed, and is removed.

Section 802.21: Acquisitions of Voting Securities Not Meeting or Exceeding Greater Notification Threshold

Section 802.21 is amended by the addition of paragraph (b), which addresses acquisitions of voting securities up to the next notification threshold by ''transitional'' filers, *i.e.,* acquiring persons who filed using the 1978 notification thresholds and who have met or crossed the threshold for which they filed within a year of the waiting period's expiration, but whose five-year period for making additional acquisitions under Section 802.21(a) has not expired as of February 1, 2001 (the effective date of the 2000 Amendments). Section 802.21(b) is an effort to strike a balance between the interests of these filers in being able to rely on rules that were in effect when they filed, and the need of the Premerger Notification Office to minimize the burden of administering two different sets of notification thresholds after February 1, 2001. Thus, transitional filers have one year from the effective date of the amendments or until the end of the original 5-year period for making additional acquisitions, whichever comes first, to acquire up to what was the next reporting threshold at the time that they filed, and they may do so without filing another notification, even though they might cross a new 2001 threshold. Thereafter, these acquiring persons, along with any other acquiring persons filing on or after February 1, 2001, must observe the 2001 thresholds contained in Section 801.1(h). The 1978 notification thresholds of $15 million, 15 percent, and 25 percent (for transactions valued at $1 billion and under) will be inapplicable to new filings as of February 1, 2001. Four new examples illustrate the application of Section 802.21(b).

Section 802.31: Acquisitions of Convertible Voting Securities

The reference to the acquisition of convertible voting securities being exempt ''even though they may be converted into 15 percent or more of the issuer's voting securities'' has been removed from the example to Section 802.31 in response to the elimination of the 15 percent size-of-transaction threshold by the 2000 Amendments.

Section 802.64: Acquisitions of Voting Securities by Certain Institutional Investors

Paragraphs (b)(4) and (b)(5)(ii) of Section 802.64 have been removed as unnecessary and example 1 has been revised to correct an inaccuracy. Paragraphs (b)(4) and (b)(5)(ii) made the acquisition of voting securities by an institutional investor exempt if the criteria in paragraphs (b)(1) through (b)(3) are satisfied and if, as a result of the acquisition, the institutional investor would not control the issuer and would hold voting securities of an issuer valued at $25 million or less. Given the increase in the general filing threshold to $50 million, the acquisition described in (b)(5)(ii) would be nonreportable, so there is no need to retain this exemption. Since the control test in (b)(4) was included only to prevent the exemption from being applied to acquisitions of more than 50 percent of the stock of an issuer for $25 million or less, it is no longer required with the deletion of the $25 million alternative because acquisitions at that dollar amount are no longer covered by the act. Section 802.64 now exempts acquisitions by certain institutional investors which are greater than $50 million but 15 percent or less. Example 1 has been revised to remove in two places the inaccurate statement that aggregate holdings equal to 15 percent would not be exempt under this section.

Part 803—Transmittal Rules

Section 803.1: Notification and Report Form

Section 803.1 has been revised to update the address for the Federal Trade Commission from 6th Street & Pennsylvania Avenue, N.W., to 600 Pennsylvania Avenue, NW, as now designated by the U.S. Postal Service. The Federal Trade Commission's Web site has also been added as a source for the Notification and Report Form.

Section 803.2: Instructions Applicable to Notification and Report Form

Section 803.2 has been revised to change references to Item 9 of the Notification and Report Form to Item 8, reflecting the reorganization of the Notification and Report Form. Paragraph (b) was also reorganized to correct an original drafting error. There is no additional revision of the text of this paragraph.

Section 803.5: Affidavits Required

Examples 2 and 3 to this section have been amended to reflect the new notification thresholds. A minor typographical error in example 2 was also corrected.

Section 803.9: Filing Fee

Section 803.9 is a new section on the payment of filing fees. Previously, the requirement of payment of a filing fee was not contained in the Clayton Act or in the HSR rules themselves, but was found at Pub. L. 103–317, amending Section 605 of Title VI of Pub. L. 101–162, 103 Stat. 1031. The 2000 Amendments build a filing fee structure into the Clayton Act for the first time and base the filing fee on the aggregate total amount of voting securities and assets held as a result of the acquisition. Because ''aggregate total amount * * * held'' is a concept defined and developed in the rules, the Commission believes it is appropriate that the rules contain instructions for the application of this concept to the proper payment of fees required under the statute.

Section 803.9 is very straightforward: paragraph (a) mandates that each acquiring person (except as provided in paragraphs (b) and (c), explained below) shall pay the filing fee required by the Clayton Act (as amended) to the Federal Trade Commission, and that no additional fee is due to the Department of Justice. Paragraph (a) is followed by a number of examples designed to illustrate how to apply the new graduated fee schedule to various types of transactions.

Paragraphs (b) and (c) create exceptions, in the case of consolidations and in certain cases where an acquiring entity has two ultimate parent entities, to the rule that every acquiring person must pay a filing fee. Consolidations are transactions where both parties lose their pre-acquisition identities, and a new corporation is formed. Both parties are deemed ''acquiring persons'' under the rules and, absent these exceptions, each would have to pay a filing fee. Similarly, where an entity is owned 50/50 by two persons, each is deemed to control the entity and to be an

''acquiring person'' when that entity makes an acquisition. While the 2000 Amendments do not mandate these changes, we believe they are appropriate in these limited circumstances. Consolidations are reviewed by the agencies in the same manner as mergers, which require only one filing fee. The absence of additional resource requirements to review consolidations argues against requiring two filing fees in such transactions. In transactions in which there are two acquiring persons that would have the same responses to items 5 through 8 of the Notification and Report Form, those two acquiring persons would have no significant business activities outside of the jointly controlled acquisition vehicle. Accordingly, the agencies are again essentially reviewing one transaction and a single filing fee seems appropriate for this type of transaction as well. Eliminating the double fee for these transactions is non-controversial and benefits potential filing parties; thus this change has been included with the interim amendments so it can take effect on February 1.

Paragraph (d) of Section 803.9 contains specific instructions for payment of the filing fee and refers filers to the Instructions to the Form for more specific electronic wire transfer payment (''EWT'') information. The preferred method of payment is EWT; thus this method of payment is highlighted.

Paragraph (e) provides that no filing fee or part of the filing fee shall be refunded, except where Commission staff determines the transaction was not reportable on its face under the rules. It is currently Commission practice to refund filing fees only in such instances, but paragraph (e) is added to codify that practice and give notice that acquiring persons will not receive partial reimbursement of their fee in the event they overvalue a transaction.

Section 803.10: Running of Time

Section 803.10 has been amended to reflect the fact that under the 2000 Amendments the waiting period for requests for additional information or documentary materials expires 30 days following substantial compliance. The section is also amended such that a waiting period that would expire on a Saturday, Sunday or legal public holiday, is extended to the end of the next regular business day. Section 803.10 has also been amended to correct the addresses of the Commission and the Department of Justice for the delivery of premerger notifications. As a housekeeping matter, paragraph (b) now contains a reference to 11 U.S.C. 363(b) to codify the current practice that bankruptcy matters are subject to the shortened waiting period afforded cash tender offers. Paragraph (c) was also reorganized to correct an original drafting error. There is no additional revision of the text of this paragraph.

In addition, Example 1 following Section 803.10 has been removed. It originally illustrated the concept that the 20-day second request waiting period cannot cut short the original 30-day waiting period for a non-801.30 acquisition. The 2000 Amendments extend the second request waiting period for non-801.30 transactions from 20 to 30 days; thus, the hypothetical situation in Example 1 could no longer occur, and it is pointless to retain this example in the rules. Former example 2 has been amended to reflect the 30-day second request waiting period.

Section 803.20: Requests for Additional Information or Documentary Material

Section 803.20(c)(2) and its example have been amended in response to the 2000 Amendments to change the request for additional information or documentary material waiting period from 20 to 30 days. As with Section 803.10 above, the rule now contains added references to 11 U.S.C. 363(b) to codify that bankruptcy matters are subject to the shortened waiting periods afforded cash tender offers.

This section has also been amended to reflect the fact that a second request to an acquired person in a bankruptcy transaction covered by 11 U.S.C. 363(b) does not extend the waiting period. That section of the Bankruptcy Code provides that subsection (e)(2) of Section 7A of the Clayton Act, which deals with how second requests affect the waiting period, shall apply to such bankruptcy transactions in the same manner as such subsection (e)(2) applies to a cash tender offer.

Part 803—Appendix: Premerger Notification and Report Form

The first Premerger Notification and Report Form (the ''Form'') was published on July 31, 1978, and was subsequently amended in 1987, with additional minor changes made in 1990 and 1995. The Commission is altering the Form again to accommodate the 2000 Amendments, as well as to implement some administrative changes that were proposed and received public comment in 1994. *See* 59 FR 30545 (June 14, 1994), *id.* at 46365 (Sept. 8, 1994) (extending comment period). Not all of the changes proposed in 1994 have been implemented, since several of the proposed changes were controversial, and re-proposal and comment regarding those changes would be appropriate prior to implementation. Those proposed changes will be addressed again in subsequent rulemakings.

Substantively, there is little change in the Form and the additions are relatively minor. The first page will now solicit information on the filing fee paid and method of payment. The first page of the Form will also ask for a voluntary listing of foreign competition authorities which the filing party believes will be notified of the proposed transaction. There will be boxes to check if the filing is a corrective filing for a transaction that has already been consummated or a filing subject to the special shortened waiting period afforded bankruptcy transactions under 11 U.S.C. 363(b). Former Items 10(a) and (b) are redesignated as Items 1(g) and (h), and Items 1–3 are reorganized with certain items redesignated for clarity and ease of completion and processing. The only amendment to Item 4 is a revision to reflect a change in Securities and Exchange Commission filing requirements. Items 5–7 are unchanged. Former Item 8 (Vendor-Vendee relationships) is removed. Former Item 9 is redesignated as Item 8. These changes are discussed in more detail below, in the order in which they appear on the Form.

General Instructions

Several minor changes have been made to update the general instructions. The address in the Information paragraph for the Federal Trade Commission has been updated from ''6th St. & Pa. Avenue, N.W.,'' to ''600 Pennsylvania Ave, NW,'' as now designated by the U.S. Postal Service. The Definition paragraph will include a reference to the **Federal Register** cite for these rules. The general instruction for Items 5 though 8 and the Appendix is expanded to clarify that the acquired person should limit its response to these items to the assets being sold or to the issuer(s) whose voting securities are being acquired as provided in Section 803.2(b). Acquired persons have often failed to limit their responses in this manner, and this clarification should remove any confusion. This expanded direction is also reiterated in the specific instructions for these items.

The Filing section of the general instructions is updated to give the current addresses of the Commission and the Department of Justice. It has also been revised to limit the number of original affidavits and certification pages which must accompany premerger filings as provided by Formal Interpretation 16 (Nov. 24, 1999).

Formal Interpretation 16 changed the policy of the Premerger Notification Office to allow filing persons to submit only one original affidavit and certification with their filings instead of five originals as previously required. The notarized original and one copy (with one set of documentary materials) should be submitted to the Commission's Premerger Notification Office and three copies (with one set of documentary materials) should be submitted to the Department of Justice.

Item by Item

Fee Information. With the new tiered fee schedule, a space has been added to the first page of the Form to elicit information regarding payment of the filing fee. The filing fee is based on the aggregate total amount of assets and voting securities to be held as a result of the acquisition.

Amount paid. The payer should enter the amount of the fee paid in the space where indicated. Should the fee be based on an amount that differs from the acquisition price, or if the acquisition price is undetermined and may fall within a range that straddles two filing fee thresholds, an explanation of the value reported is required to be submitted with the Form. The explanation should include discussion of adjustments to the acquisition price, a description of any exempt assets and their value, and the valuation methods used. To assist parties in making a proper determination of the value of the assets or voting securities to be held, a separate Valuation Worksheet can be obtained from the Premerger Notification Office (''PNO''). Although the PNO initially considered making this Worksheet an appendix to the Form, the Commission chose to make this Worksheet optional in order to ease the burden on filing parties. However, use of the Worksheet or something similar is strongly encouraged and should facilitate an accurate valuation of the acquisition.

Method of Payment. This section has been added to the Form to facilitate processing of fee payments with a minimal burden on the filing parties. Although instructions concerning the filing fee and the transmission of EWT payments have not previously appeared on the Form, these instructions closely track the filing fee information that historically has been available informally from the PNO. The acquiring person is responsible for ensuring full payment of the fee at the time of filing. Fees are payable in U.S. currency to the Federal Trade Commission by bank cashier's check, certified check or electronic wire transfer, although the preferred method of payment is by electronic wire transfer. Section 31001 of the Debt Collection Improvement Act of 1996, Pub. L. 104–134, 110 Stat. 1321–358 (''DCIA''), provides that Federal agencies shall require each person doing business with those agencies to furnish the person's taxpayer identification number to that agency. The DCIA defines ''doing business with'' to include entities that have been assessed a fine, fee, royalty or penalty by an agency, which would appear to include persons required to pay HSR filing fees. Thus, this section requests the taxpayer identification number or social security number of the acquiring person, and the payer of the fee if different from the acquiring person. If the acquiring person or payer of the fee is a natural person, a social security number should be given instead of the taxpayer identification number. If the acquiring person or payer is a foreign person, an identifying number need not be provided.

For EWTs, additional payment information is requested in this section of the Form. As the use of EWT for payment of the filing fee has increased, it has become apparent that additional information is needed for Commission staff to accurately pair each EWT with the HSR filing to which it pertains. Experience has shown that the EWT confirmation number, the name of the institution where the wire transfer originated, and the name of the payer if it differs from the person filing are all needed. The information received will ensure rapid and accurate identification of receipt of payment for payers utilizing EWT.

Notification for an Acquisition That Has Been Consummated in Violation of the HSR Act

As proposed in 1994, a question has been added to the preamble of the Form that requires reporting persons to indicate if the filing is a corrective filing being made for an acquisition that has already been consummated in violation of the act. Several times each year, persons file premerger notifications for acquisitions that have been consummated without filing notification and observing the appropriate waiting period. Persons who have consummated acquisitions in violation of the act are advised to make a corrective filing as soon as possible.

As explained in the 1994 Notice of Proposed Rulemaking, the PNO has established procedures for processing corrective filings and conducting a preliminary review to determine whether to refer the violation to the appropriate litigation office for further investigation and a possible civil penalty action. The PNO also monitors persons who have violated the act in order to identify repeat offenders. Responses to this question will enable the PNO to identify corrective filings promptly thereby assisting the PNO in its processing of these filings. Additional information and procedures for submission of corrective filings can be found on the PNO Web page at *www.ftc.gov/bc/hsr/hsr.htm.*

If, after February 1, 2001, parties discover that there was an acquisition made prior to February 1, 2001, that was subject to the reporting requirements of the act but for which a filing was not made, the parties must file a corrective filing even though the transaction would not be reportable under the 2000 Amendments. The acquisition is governed by the law in effect at the time of closing. Note also that the corrective filing would be subject to the new filing fee structure (*i.e.,* a violation valued in excess of $500MM would require a $280,000 filing fee with the corrective filing).

Transactions Subject to Foreign Antitrust Reporting Requirements

The Form is further amended to add a space for reporting persons to indicate if the filing is subject to foreign antitrust reporting requirements and requests the voluntary submission of the name(s) of any foreign antitrust or competition authority that, based upon the knowledge or belief of the filing person at the time of the filing, has been or will be notified of the proposed transaction and the date or anticipated date of such notification. This question on the Form was originally proposed in 1994 as mandatory but, based on the comments received, the Commission has decided to make providing this information voluntary. The filing person should respond based on its knowledge or belief ''at the time of the filing.'' The reasons for such amendments are discussed below.

Since the implementation of the HSR premerger notification program on September 5, 1978, the potential for multiple jurisdiction notifications relating to a proposed merger or acquisition has grown substantially. This growth appears to be due to the significant increase in the number of foreign antitrust authorities with a wide variety of mandatory or voluntary pre- or post-acquisition notification requirements, as well as to an increase in companies that conduct a variety of businesses in different countries.

Because of the development of merger notification programs in other countries, the U.S. antitrust enforcement agencies

have engaged in efforts to foster communication and cooperation among antitrust authorities. Providing premerger notification that a transaction is subject to review by other jurisdictions alerts the U.S. enforcement agencies to the presence of assets in those jurisdictions that may directly affect U.S. commerce. It may also facilitate identification of competitors in those jurisdictions that participate in a U.S. market identified in the subject transaction. The experience of the enforcement agencies has shown that cooperative efforts with foreign jurisdictions can enhance the enforcement of the antitrust laws against foreign mergers that may adversely affect U.S. commerce. Alerting the agencies at the time of filing that multiple jurisdiction filings will be made will enable the agencies to communicate with foreign counterparts only to the extent that statutorily protected information is not disclosed. However, early notice of multiple jurisdiction filings will also enable the agencies, where appropriate, to seek consent of the parties to enable more extensive cooperation between or among antitrust authorities in conducting their investigations. Because numerous foreign jurisdictions may be involved, some of which may not have been identified at the time the parties to a transaction are otherwise prepared to file their notification, the question has been modified from the 1994 proposal to provide that the response to this item should be made ''to the knowledge or belief of the filing person at the time of the filing of this notification.''

Transactions Subject to the Bankruptcy Code

A new question in the preamble of the Form requires both the acquiring and the acquired persons to identify whether the acquired person's filing is being made by a trustee in bankruptcy or debtor-in-possession subject to Section 363(b) of the Bankruptcy Code, 11 U.S.C. 363(b). This information will provide immediate notice to the enforcement agencies that the transaction is subject to the special, truncated waiting period of Section 363(b), with an initial waiting period of 15 days.

The rule as proposed in the 1994 Notice of Proposed Rulemaking required only the acquired person to respond. However, the agencies' goal of a more expeditious and efficient review of acquisitions subject to Section 363(b) of the Bankruptcy Code would be better achieved by requiring all filing persons to respond to this question. Parties to an acquisition do not always file simultaneously and in those instances when the acquiring person may file first, the agencies will be alerted immediately that the shortened waiting period is applicable and that expedited review is necessary.

Early Termination

The first page of the Form provides a box for requesting early termination of the waiting period. The former instructions for this item noted that notification of each grant of early termination would be published in the **Federal Register** as required by Section 7A(b)(2) of the act. This instruction has been amended to include mention of the current PNO practice of publishing grants of early termination on the Commission's web site. As the use of electronic communications has grown enormously, it is often easier for parties to seek information on the World Wide Web rather than wait for publication of the **Federal Register**. The PNO has been posting grants of early termination on its Web page since 1998.

Items 1 Through 3

These three items have been reorganized and some subsections are redesignated for ease of completion by the parties and efficiency of processing and review by the agencies. These items request the same basic information as before, with minor additions and deletions.

Item 1, as before, seeks background information about the person making the filing. The primary change is that former Item 10 is now redesignated as Items 1(g) and 1(h). These items are updated to request the fax number and e-mail address of contact persons.

Item 2 seeks information about the ultimate parent entities and the value of the assets or voting securities to be held, and reflects the new filing thresholds. This item has one new addition in Item 2(e) which requires the acquiring persons to provide the name of the person(s) who performed any fair market valuation used to determine the aggregate total value of the transaction. Now that the amount of the filing fee is based on the value of the acquired person's assets or voting securities to be held by the acquiring person, the determination of that value has increased in importance. Although the agencies would initially contact the person listed for that purpose in Items 1(g) and (h) should any questions arise regarding information supplied on the Form, this addition should help the parties and the agencies pinpoint who would be most knowledgeable on the issue of valuation.

Item 3 focuses on the description of the acquisition and the details of the assets and voting securities being acquired. References to ''approximate'' or ''estimated'' values have been deleted as the new tiered fee structure requires valuation to be made with greater certainty. As a housekeeping matter, Item 3(b)(i), which requests information for acquisitions of assets, has been amended to remove the reference to Section 801.40. This reference has proven to be irrelevant to completion of this item. Item 3(c), requesting information about voting securities acquisitions, has been amended by deleting the last sentence referencing the 15 percent and $15 million size-of-transaction tests. Former Item 2(c)(vii), requesting the percentage of each class of securities which will be held by the acquiring person, has also been removed because this information has proven to be of minimal benefit in the agencies' premerger analysis.

Item 4 The SEC eliminated Schedule 14D–1 effective January 24, 2000, by combining the existing schedules for issuer and third-party tender offers into one schedule available for all tender offers, entitled ''Schedule TO.'' *See* 17 CFR 240.14D–100; www.sec.gov/rules/final/33–7760.htm. Consequently, Item 4(a) is now amended to require production of a Schedule TO instead of a Schedule 14d–1 if the acquisition is a tender offer.

Removal of Former Item 8: Vendor/Vendee Relationships

Former Item 8 asked for information about any vendor-vendee relationship between reporting parties during the most recent year with respect to any manufactured product. Responses to this item were intended to alert the enforcement agencies to the potential risks of vertical foreclosure or increased vertical integration in a given industry. However, the agencies have found that they have not needed to rely on Item 8 to learn about transactions that present vertical concerns. In addition, the specific data provided in response to Item 8 on manufactured product sales between filing persons are of limited use in determining whether the proposed acquisition will result in a vertical integration or foreclosure that will unreasonably restrain trade. In view of both the burden that Item 8 may place on vendees, particularly large diversified persons that may purchase from other filing persons a wide variety of manufactured products through numerous subsidiaries and divisions, and the record of the agencies' limited use of such vendor/vendee data, Item 8 is removed from the Form.

Removal of Former Item 8 does not mean that vertical acquisitions present no potential competitive risks. The agencies simply have determined that the information provided in response to this item has not been particularly useful in identifying vertical relationships that may pose serious threats to competition.

Administrative Procedure Act

The requirement to publish a notice of proposed rulemaking and afford an opportunity for public comment under the Administrative Procedure Act (''APA''), 5 U.S.C. 553(b), with respect to substantive rule amendments, if any, does not apply where an agency for good cause finds that such procedure would be ''impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(A). To the extent the rule amendments described above are required by the 2000 Amendments to the Clayton Act, as explained earlier, the time period between the signing of 2000 Amendments into law and the legislation's effective date is extremely brief. These rule changes are basic and necessary to conform the rules to the 2000 Amendments, particularly the new $50 million size-of-transaction threshold and the new tiered fee structure, so that the Hart-Scott-Rodino premerger notification program remains functional with minimal confusion to persons required to file. To delay implementation beyond the effective date of the 2000 Amendments in order to solicit and consider public comment would leave rules in place that do not reflect the statutory changes, thereby creating conflict between the statute and rules. Accordingly, the Commission has determined that prior notice of and comment on these rule amendments would be impracticable, unnecessary and contrary to the public interest.

These rule amendments also include certain minor modifications to the Form not directly related to the 2000 Amendments, most of which were already published in proposed form for public comment, as previously noted. To the extent these Form modifications include certain additional housekeeping matters, they are simple clarifications or corrections, with respect to which the Commission finds that a separate notice-and-comment period would be unnecessary and not in the public interest. Nonetheless, the Commission invites comments on the amended rules and Forms, and reserves the right to make further modifications based on its experience and on any comments that may be received after the amendments have taken effect.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on small businesses, except where the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605.

Because of the size of the transactions necessary to invoke a Hart-Scott-Rodino filing, the premerger notification rules rarely, if ever, affect small businesses. Indeed, the recent amendments to Section 7A of the Clayton Act, which these rule amendments implement, were intended to reduce the burden of the premerger notification program by exempting all transactions valued at less than $50 million. Further, none of the rule amendments expands the coverage of the premerger notification rules in a way that would affect small business. Accordingly, the Commission certifies that these rules will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3518, requires agencies to submit requirements for ''collections of information'' to the Office of Management and Budget (''OMB'') and obtain clearance prior to instituting them. Such collections of information include reporting, recordkeeping, or disclosure requirements contained in regulations. The HSR premerger notification rules and Form contain information collection requirements as defined by the Paperwork Reduction Act that have been reviewed and approved by the Office of Management and Budget under OMB Control No. 3084–0005 (preceding the latest HSR amendments). As noted earlier, the interim rules implement amendments to Section 7A of the Clayton Act, which reduce the burden of the premerger reporting program by exempting all transactions valued at less than $50 million. Because the interim rules would affect the information collection requirements of the premerger notification program, they are being submitted to OMB for review pursuant to the Paperwork Reduction Act. The Supporting Statement accompanying the Request for OMB Review states that the total burden imposed on the members of the public subject to the requirements of the Act, including the interim rules, is estimated to be 192,089 hours per year (based on fiscal year 2000 filings). This constitutes approximately a 47% reduction from what the burden estimate would be absent the interim rules and based on the number of fiscal year 2000 filings. As the public comment period extends beyond the interim rules' effective date, the Commission is seeking emergency paperwork clearance from OMB for the collections of information and burden estimates associated with the rules' amendments. The Commission will seek the ordinary 3-year clearance immediately thereafter with the requisite submissions to OMB.

List of Subjects in 16 CFR Parts 801, 802, and 803

Antitrust, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, the Federal Trade Commission amends 16 CFR parts 801, 802, and 803 as follows:

PART 801—COVERAGE RULES

1. Revise the authority citation for part 801 to read as follows:

Authority: 15 U.S.C. 18a(d).

2. Amend § 801.1 by revising paragraphs (h), (j), and (m) to read as follows:

§ 801.1 Definitions.

* * * * *

(h) *Notification threshold.* The term ''notification threshold'' means:

(1) An aggregate total amount of voting securities and assets of the acquired person valued at greater than $50 million but less than $100 million;

(2) An aggregate total amount of voting securities and assets of the acquired person valued at $100 million or greater but less than $500 million;

(3) An aggregate total amount of voting securities and assets of the acquired person valued at $500 million or greater;

(4) Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than $1 billion; or

(5) Fifty percent of the outstanding voting securities of an issuer if valued at greater than $50 million.

Examples:

1. Person ''A'' will acquire 10 percent of the voting securities of corporation ''B'' for $60 million. ''A'' would indicate the $50 million notification threshold. ''A'' later will acquire all of the outstanding voting securities of ''B'' and will hold as a result voting securities of ''B'' valued at $600 million. ''A'' would indicate the 50 percent notification threshold for the later filing,

even though the $100 million and $500 million notification thresholds would also be crossed as a result of the acquisition.

2. Person ''A'' will acquire 26 percent of the voting securities of corporation ''B'' for $550 million. ''A'' files for the $500 million notification threshold. Later ''A'' will acquire an additional 20 percent of the voting securities of ''B'' and as a result will hold 46 percent of the voting securities of ''B'' valued at $1.1 billion. ''A'' is now required to file for the 25 percent notification threshold despite the fact that it already holds in excess of 25 percent of the voting securities of ''B'' prior to the current acquisition. The 25 percent threshold is crossed when as the result of an acquisition, 25 percent or more, but less than 50 percent, of an issuer's voting securities are held and those securities are valued in excess of $1 billion.

* * * * *

(j) *Engaged in manufacturing.* A person is ''engaged in manufacturing'' if it produces and derives annual sales or revenues in excess of $1 million from products within industries 2000–3999, as coded in the Standard Industrial Classification Manual (1987 edition) published by the Executive Office of the President, Office of Management and Budget.

* * * * *

(m) *The act.* References to ''the act'' refer to Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1390, and as amended by Pub. L. 106–553, 114 Stat. 2762. References to ''Section 7A( )'' refer to subsections of Section 7A of the Clayton Act. References to ''this section'' refer to the section of these rules in which the term appears.

3. Amend § 801.2 by revising Examples 2 and 3 in paragraph (d) to read as follows:

§ 801.2 Acquiring and acquired persons.

* * * * *

(d) * * *

Examples: * * *

2. In the above example, suppose the consideration for Y consists of $8 million worth of the voting securities of A. With regard to the transfer of this consideration, ''B'' is an acquiring person because it will hold voting securities it did not previously hold, and ''A'' is an acquired person because its voting securities will be held by B. Since these voting securities are worth less than $50 million, however, the acquisition of these securities is not reportable. ''A'' will therefore report as an acquiring person only and ''B'' as an acquired person only.

3. In the above example, suppose that, as consideration for Y, A transfers to B a manufacturing plant valued at $51 million. ''B'' is thus an acquiring person and ''A'' an acquired person in a reportable acquisition of assets. ''A'' and ''B'' will each report as both an acquiring and an acquired person in this transaction because each occupies each role in a reportable acquisition.

* * * * *

4. Amend § 801.4 by revising Examples 1 and 5 in paragraph (b) to read as follows:

§ 801.4 Secondary acquisitions.

* * * * *

(b) * * *

Examples: 1. Assume that acquiring person ''A'' proposes to acquire all the voting securities of corporation B. This section provides that the acquisition of voting securities of issuers held but not controlled by B or by any entity which B controls are secondary acquisitions by ''A.'' Thus, if B holds more than $50 million of the voting securities of corporation X (but does not control X), and ''A'' and ''X'' satisfy Sections 7A (a)(1) and (a)(2), ''A'' must file notification separately with respect to its secondary acquisition of voting securities of X. ''X'' must file notification within fifteen days (or in the case of a cash tender offer, 10 days) after ''A'' files, pursuant to § 801.30.

5. In example 4 above, suppose the consideration paid by A for the acquisition of B is $60 million worth of the voting securities of A. By virtue of § 801.2(d)(2), ''A'' and ''B'' are each both acquiring and acquired persons. A will still be deemed to have acquired control of B, and therefore the resulting acquisition of the voting securities of X is a secondary acquisition. Although ''B'' is now also an acquiring person, unless B gains control of A in the transaction, B still makes no secondary acquisitions of stock held by A. If the consideration paid by A is the voting securities of one of A's subsidiaries and B thereby gains control of that subsidiary, B will make secondary acquisitions of any minority holdings of that subsidiary.

* * * * *

5. Amend § 801.10 by revising its example to read as follows:

§ 801.10 Value of voting securities and assets to be acquired.

* * * * *

Example: Corporation A, the ultimate parent entity in person ''A,'' contracts to acquire assets of corporation B, and the contract provides that the acquisition price is not to be determined until after the acquisition is effected. Under paragraph (b) of this section, for purposes of the act, the value of the assets is to be the fair market value of the assets. Under paragraph (c)(3), the board of directors of corporation A must in good faith determine the fair market value. That determination will control for 60 days whether ''A'' and ''B'' must observe the requirements of the act; that is, ''A'' and ''B'' must either file notification or consummate the acquisition within that time. If ''A'' and ''B'' neither file nor consummate within 60 days, the parties would no longer be entitled to rely on the determination of fair market value, and, if in doubt about whether required to observe the requirements of the act, would have to make a second determination of fair market value.

6. Amend § 801.11 by revising the introductory text and the example to paragraph (b), paragraph (e)(2)(ii), and Examples 1 through 4 to paragraph (e), to read as follows:

§ 801.11 Annual net sales and total assets.

* * * * *

(b) Except for the total assets of a joint venture or other corporation at the time of its formation which shall be determined pursuant to § 801.40(d) the annual net sales and total assets of a person shall be as stated on the financial statements specified in paragraph (c) of this section: *Provided:*

* * * * *

Example: Person ''A'' is composed of entity A, subsidiaries B1 and B2 which A controls, subsidiaries C1 and C2 which B1 controls, and subsidiary C3 which B2 controls. Suppose that A's most recent financial statement consolidates the annual net sales and total assets of B1, C1, and C2, but not B2 or C3. In order to determine whether person ''A'' meets the criteria of Section 7A(a)(2)(B), as either an acquiring or an acquired person, A must recompute its annual net sales and total assets to reflect consolidation of the nonduplicative annual net sales and nonduplicative total assets of B2 and C3.

* * * * *

(e) * * *

(2) * * *

(ii) Where applicable, its assets as determined in accordance with § 801.40(d).

Examples: For examples 1–4, assume that A is a newly-formed company which is not controlled by any other entity. Assume also that A has no sales and does not have the balance sheet described in paragraph (c)(2) of this section.

1. A will borrow $105 million in cash and will purchase assets from B for $100 million. In order to establish whether A's acquisition of B's assets is reportable, A's total assets are determined by subtracting the $100 million that it will use to acquire B's assets from the $105 million that A will have at the time of the acquisition. Therefore, A has total assets of $5 million and does not meet any size-of-person test of Section 7A(a)(2).

2. Assume that A will acquire assets from B and that, at the time it acquires B's assets, A will have $85 million in cash and a factory valued at $60 million. A will exchange the factory and $80 million cash for B's assets. To determine A's total assets, A should subtract from the $85 million cash the $80 million that will be used to acquire assets from B and add the remainder to the value of the factory. Thus, A has total assets of $65 million. Even though A will use the factory as part of the consideration for the acquisition, the value of the factory must still be included in A's total assets. Note that A and B may also have to report the acquisition by B of A's non-cash assets (i.e., the factory). For that acquisition, the value of the cash A will use to buy B's assets is not excluded from A's total assets. Thus, in the acquisition by B, A's total assets are $145 million.

3. Assume that company A will make a $150 million acquisition and that it must pay a loan origination fee of $5 million. A borrows $161 million. A does not meet the size-of-person test in Section 7A(a)(2) because its total assets are less than $10 million. $150 million is excluded because it will be consideration for the acquisition and $5 million is excluded because it is an expense incidental to the acquisition. Therefore, A is only a $6 million person. Note that if A were making an acquisition valued at over $200 million, the acquisition would be reportable without regard to the sizes of the persons involved.

4. Assume that ''A'' borrows $165 million to acquire $100 million of assets from ''B'' and $60 million of voting securities of ''C.'' To determine its size for purposes of its acquisition from ''B,'' ''A'' subtracts the $100 million that it will use for that acquisition. Therefore, A has total assets of $65 million for purposes of its acquisition from ''B.'' To determine its size with respect to its acquisition from ''C,'' ''A'' subtracts the $60 million that will be paid for ''C's'' voting securities. Thus, for purposes of its acquisition from ''C'', ''A'' has total assets of $105 million. In the first acquisition ''A'' meets the $10 million size-of-person test and in the second acquisition ''A'' meets the $100 million size-of-person test of Section 7A(a)(2).

7. Amend § 801.12 as follows:

a. Revise the heading of the section to read ''Calculating percentage of voting securities.'';

b. Remove paragraphs (c) and (d), including the examples thereto.

8. Amend § 801.13 by revising Examples 1 and 4 to paragraph (a), and by revising paragraph (b)(2)(ii) and its example, to read as follows:

§ 801.13 Voting securities or assets to be held as a result of acquisition.

* * * * *

(a) * * *

Examples: 1. Assume that acquiring person ''A'' holds $52 million of the voting securities of X, and is to acquire another $1 million of the same voting securities. Since under paragraph (a) of this section all voting securities ''A'' will hold after the acquisition are held ''as a result of'' the acquisition, ''A'' will hold $53 million of the voting securities of X as a result of the acquisition. ''A'' must therefore observe the requirements of the act before making the acquisition, unless the present acquisition is exempt under Section 7A(c), § 802.21 or any other rule.

* * * * *

Examples: 4. On January 1, company A acquired $60 million of voting securities of company B. ''A'' and ''B'' filed notification and observed the waiting period for that acquisition. Company A plans to acquire $1 million of assets from company B on May 1 of the same year. Under § 801.13(a)(3), ''A'' and ''B'' do not aggregate the value of the earlier acquired voting securities to determine whether the acquisition is subject to the act. Therefore, the value of the acquisition is $1 million and it is not reportable.

* * * * *

(b) * * *

(2) * * *

(ii) Subject to the provisions of § 801.15, if the acquiring person has acquired from the acquired person within the 180 calendar days preceding the signing of such agreement any assets which are presently held by the acquiring person, and the acquisition of which was not previously subject to the requirements of the act or the acquisition of which was subject to the requirements of the act but they were not observed, then for purposes of the size-of-transaction tests of Section 7A(a)(2) and for § 801.1(h), both the acquiring and the acquired persons shall treat such assets as though they had not previously been acquired and are being acquired as part of the present acquisition. The value of any assets previously acquired which are subject to this paragraph shall be determined in accordance with § 801.10(b) as of the time of their prior acquisition.

Example: Acquiring person ''A'' proposes to make two acquisitions of assets from acquired person ''B,'' 90 days apart, and wishes to determine whether notification is necessary prior to the second acquisition. For purposes of the size-of-transaction tests in Section 7A(a)(2), ''A'' must aggregate both of its acquisitions and must value each as of the time of its occurrence.

* * * * *

9. Amend § 801.14 by revising the introductory text of the section and Examples 1 and 2 following paragraph (b), to read as follows:

§ 801.14 Aggregate total amount of voting securities and assets.

For purposes of Section 7A(a)(2) and § 801.1(h), the aggregate total amount of voting securities and assets shall be the sum of:

* * * * *

(b) * * *

Examples: 1. Acquiring person ''A'' previously acquired $36 million of the voting securities (not convertible voting securities) of corporation X. ''A'' now intends to acquire $8 million of X's assets. Under paragraph (a) of this section, ''A'' looks to § 801.13(a) and determines that the voting securities are to be held ''as a result of'' the acquisition. Section 801.13(a) also provides that ''A'' must determine the present value of the previously acquired securities. Under paragraph (b) of this section, ''A'' looks to § 801.13(b)(1) and determines that the assets to be acquired will be held ''as a result of'' the acquisition, and are valued under § 801.10(b) at $8 million. Therefore, if the voting securities have a present value of more than $42 million, the asset acquisition is subject to the requirements of the act since, as a result of it, ''A'' would hold an aggregate total amount of the voting securities and assets of ''X'' in excess of $50 million.

2. In the previous example, assume that the assets acquisition occurred first, and that the acquisition of the voting securities is to occur within 180 days of the first acquisition. ''A'' now looks to § 801.13(b)(2) and determines that because the second acquisition is of voting securities and not assets, the asset and voting securities acquisitions are not treated as one transaction. Therefore, the second acquisition would not be subject to the requirements of the act since the value of the securities to be acquired does not exceed the $50 million size-of-transaction test.

10. Amend § 801.15 by revising the introductory text of the section by revising the Examples 1, 2, 4, 6 and 7 following paragraph (c), to read as follows:

§ 801.15 Aggregation of voting securities and assets the acquisition of which was exempt.

Notwithstanding § 801.13, for purposes of determining the aggregate total amount of voting securities and assets of the acquired person held by the acquiring person under Section 7A(a)(2) and § 801.1(h), none of the following will be held as a result of an acquisition:

* * * * *

(c) * * *

Examples: 1. Assume that acquiring person ''A'' is simultaneously to acquire $51 million of the convertible voting securities of X and $12 million of the voting common stock of X. Although the acquisition of the convertible voting securities is exempt under § 802.31, since the overall value of the securities to be acquired is greater than $50 million, ''A'' must determine whether it is obliged to file notification and observe a waiting period before acquiring the securities. Because § 802.31 is one of the exemptions listed in paragraph (a)(2) of this rule, ''A'' would not hold the convertible voting securities as a result of the acquisition. Therefore, since as a result of the acquisition ''A'' would hold only the common stock, the size-of-transaction tests of Section 7A(a)(2) would not be satisfied, and ''A'' need not observe the requirements of the act before acquiring the common stock. (Note, however, that the $51 million of convertible voting securities would be reflected in ''A's'' next regularly prepared balance sheet, for purposes of § 801.11.)

2. In the previous example, the rule was applied to voting securities the present acquisition of which is exempt. Assume instead that ''A'' had acquired the convertible voting securities prior to its acquisition of the common stock. ''A'' still would not hold the convertible voting securities as a result of the acquisition of the common stock, because the rule states that voting securities the previous acquisition of which was exempt also fall within the rule. Thus, the size-of-transaction tests of Section 7A(a)(2) would again not be satisfied, and ''A'' need not observe the requirements of the act before acquiring the common stock.

* * * * *

4. Assume that acquiring person ''B,'' a United States person, acquired from corporation ''X'' two manufacturing plants located abroad, and assume that the acquisition price was $60 million. In the most recent year, sales into the United States attributable to the plants were $15 million, and thus the acquisition was exempt under § 802.50(a)(2). Within 180 days of that acquisition, ''B'' seeks to acquire a third plant from ''X,'' to which United States sales of $12 million were attributable in the most recent year. Since under § 801.13(b)(2), as a result of the acquisition, ''B'' would hold all three plants of ''X,'' and the $25 million limitation in § 802.50(a)(2) would be exceeded, under paragraph (b) of this rule, ''B'' would hold the previously acquired assets for purposes of the second acquisition. Therefore, as a result of the second acquisition, ''B'' would hold assets of ''X'' exceeding $50 million in value, would not qualify for the exemption in § 802.50(a)(2), and must observe the requirements of the act and file notification for the acquisition of all three plants before acquiring the third plant.

* * * * *

6. ''X'' acquired 55 percent of the voting securities of M, an entity controlled by ''Z,'' six months ago and now proposes to acquire 50 percent of the voting stock of N, another entity controlled by ''Z.'' M's assets consist of $150 million worth of producing coal reserves plus $47 million worth of non-exempt assets and N's assets consist of a producing coal mine worth $100 million together with non-exempt assets with a fair market value of $36 million. ''X's'' acquisition of the voting securities of M was exempt under § 802.4(a) because M held exempt assets pursuant to § 802.3(b) and less than $50 million of non-exempt assets. Because ''X'' acquired control of M in the earlier transaction, M is now within the person of ''X,'' and the assets of M need not be aggregated with those of N to determine if the subsequent acquisition of N will exceed the limitation for coal reserves or for non-exempt assets. Since the assets of N alone do not exceed these limitations, ''X's'' acquisition of N also is not reportable.

7. In Example 6, above, assume that ''X'' acquired 30 percent of the voting securities of M and proposes to acquire 40 percent of the voting securities of N, another entity controlled by ''Z.'' Assume also that M's assets at the time of ''X's'' acquisition of M's voting securities consisted of $90 million worth of producing coal reserves and non-exempt assets with a fair market value of $39 million, and that N's assets currently consist of $60 million worth of producing coal reserves and non-exempt assets with a fair market value of $28 million. Since ''X'' acquired a minority interest in M and intends to acquire a minority interest in N, and since M and N are controlled by ''Z,'' the assets of M and N must be aggregated, pursuant to §§ 801.15(b) and 801.13, to determine whether the acquisition of N's voting securities is exempt. ''X'' is required to determine the current fair market value of M's assets. If the fair market value of M's coal reserves is unchanged, the aggregated exempt assets do not exceed the limitation for coal reserves. However, if the present fair market value of N's non-exempt assets also is unchanged, the present fair market value of the non-exempt assets of M and N when aggregated is greater than $50 million. Thus the acquisition of the voting securities of N is not exempt. If ''X'' proposed to acquire 50 percent or more of the voting securities of both M and N in the same acquisition, the assets of M and N must be aggregated to determine if the acquisition of the voting securities of both issuers is exempt. Since the fair market value of the aggregated non-exempt assets exceeds $50 million, the acquisition would not be exempt.

* * * * *

11. Amend § 801.20 by revising its Examples 1 and 2 to read as follows:

§ 801.20 Acquisitions subsequent to exceeding threshold.

* * * * *

Examples: 1. Person ''A'' acquires $10 million of the voting securities of person ''B'' before the effective date of these rules. If ''A'' wishes to acquire an additional $41 million of the voting securities of ''B'' after the effective date of the rules, notification will be required by reason of Section 7A(a)(2).

2. In example 1, assume that the value of the voting securities of ''B'' originally acquired by ''A'' has reached a present value exceeding $50 million. If ''A'' wishes to acquire any additional voting securities or assets of ''B,'' notification will be required. See § 801.13(a).

12. Amend § 801.21 by revising the introductory text to read as follows:

§ 801.21 Securities and cash not considered assets when acquired.

For purposes of determining the aggregate total amount of assets under Section 7A(a)(2) and §§ 801.1(h)(1) and 801.13(b):

* * * * *

13. Amend § 801.30 by revising paragraph (b)(2) and Example 2 to read as follows:

§ 801.30 Tender offers and acquisitions of voting securities from third parties.

* * * * *

(b) * * *

(2) The acquired person shall file the notification required by the act, in accordance with these rules, no later than 5 p.m. Eastern Time on the 15th (or, in the case of cash tender offers, the 10th) calendar day following the date of receipt, as defined by § 803.10(a), by the Federal Trade Commission and Assistant Attorney General of the notification filed by the acquiring person. Should the 15th (or, in the case of cash tender offers, the 10th) calendar day fall on a weekend day or federal holiday, the notification shall be filed no later than 5 p.m. Eastern Time on the next following business day.

* * * * *

Examples: * * *

2. Acquiring person ''A'' proposes to acquire $60 million of the voting securities of corporation X on a securities exchange. The waiting period begins when ''A'' files notification. ''X'' must file notification within 15 calendar days thereafter. The seller of the X shares is not subject to any obligations under the act.

* * * * *

14. Amend § 801.31 by revising the example to read as follows:

§ 801.31 Acquisitions of voting securities by offerees in tender offers.

* * * * *

Example: Assume that ''A,'' which has annual net sales exceeding $100 million, makes a tender offer for voting securities of corporation X. The consideration for the tender offer is to be voting securities of A. ''S,'' a shareholder of X with total assets exceeding $10 million, wishes to tender its holdings of X and in exchange would receive shares of A valued at $56 million. Under this section, ''S's'' acquisition of the shares of A would be an acquisition separately subject to the requirements of the act. Before ''S'' may acquire the voting securities of A, ''S'' must first file notification and observe a waiting period—which is separate from any waiting period that may apply with respect to ''A'' and ''X.'' Since § 801.30 applies, the waiting period applicable to ''A'' and ''S'' begins upon filing by ''S,'' and ''A'' must file with respect to ''S's'' acquisition within 15 days pursuant to § 801.30(b). Should the waiting period with respect to ''A'' and ''X'' expire or be terminated prior to the waiting period with respect to ''S'' and ''A,'' ''S'' may wish to tender its X-shares and place the A-shares into a nonvoting escrow until the expiration or termination of the latter waiting period.

15. Amend § 801.32 by revising the example to read as follows:

§ 801.32 Conversion an acquisition.

* * * * *

Example: Assume that acquiring person ''A'' wishes to convert convertible voting securities of issuer X, and is to receive common stock of X valued at $80 million. If ''A'' and ''X'' satisfy the criteria of Section 7A(a)(1) and Section 7A(a)(2)(B)(ii), then ''A'' and ''X'' must file notification and observe the waiting period before ''A'' completes the acquisition of the X common stock, unless exempted by Section 7A(c) or these rules. Since § 801.30 applies, the waiting period begins upon notification by ''A,'' and ''X'' must file notification within 15 days.

16. Amend § 801.40 by revising paragraphs (b), (c) and (d), by adding paragraph (e), by revising the example at the end of the section and redesignating it as Example 1, and by adding an Example 2, to read as follows:

§ 801.40 Formation of joint venture or other corporations.

* * * * *

(b) Unless exempted by the act or any of these rules, upon the formation of a joint venture or other corporation, in a

transaction meeting the criteria of Section 7A(a)(1) and 7A(a)(2)(A) (other than in connection with a merger or consolidation), an acquiring person shall be subject to the requirements of the act.

(c) Unless exempted by the act or any of these rules, upon the formation of a joint venture or other corporation, in a transaction meeting the criteria of Section 7A(a)(1) and the criteria of Section 7A(a)(2)(B)(i) (other than in connection with a merger or consolidation), an acquiring person shall be subject to the requirements of the act if:

(1)(i) The acquiring person has annual net sales or total assets of $100 million or more;

(ii) The joint venture or other corporation will have total assets of $10 million or more; and

(iii) At least one other acquiring person has annual net sales or total assets of $10 million or more; or

(2)(i) The acquiring person has annual net sales or total assets of $10 million or more;

(ii) The joint venture or other corporation will have total assets of $100 million or more; and

(iii) At least one other acquiring person has annual net sales or total assets of $10 million or more.

(d) For purposes of paragraphs (b) and (c) of this section and determining whether any exemptions provided by the act and these rules apply to its formation, the assets of the joint venture or other corporation shall include:

(1) All assets which any person contributing to the formation of the joint venture or other corporation has agreed to transfer or for which agreements have been secured for the joint venture or other corporation to obtain at any time, whether or not such person is subject to the requirements of the act; and

(2) Any amount of credit or any obligations of the joint venture or other corporation which any person contributing to the formation has agreed to extend or guarantee, at any time.

(e) The commerce criterion of Section 7A(a)(1) is satisfied if either the activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the activities of the joint venture or other corporation will be in or will affect commerce.

Examples: 1. Persons ''A,'' ''B,'' and ''C'' agree to create new corporation ''N,'' a joint venture. ''A,'' ''B,'' and ''C'' will each hold one third of the shares of ''N.'' ''A'' has more than $100 million in annual net sales. ''B'' has more than $10 million in total assets but less than $100 million in annual net sales and total assets. Both ''C''s total assets and its annual net sales are less than $10 million. ''A,'' ''B,'' and ''C'' are each engaged in commerce. ''A,'' ''B,'' and ''C'' have agreed to make an aggregate initial contribution to the new entity of $18 million in assets and each to make additional contributions of $21 million in each of the next three years. Under paragraph (d), the assets of the new corporation are $207 million. Under paragraph (c), ''A'' and ''B'' must file notification. Note that ''A'' and ''B'' also meet the criterion of Section 7A(a)(2)(B)(i) since they will be acquiring one third of the voting securities of the new entity for $69 million. N need not file notification; see § 802.41.

2. In the preceding example ''A'' has over $10 million but less than $100 million in sales and assets, ''B'' and ''C'' have less than $10 million in sales and assets. ''N'' has total assets of $500 million. Assume that ''A'' will acquire 50 percent of the voting securities of ''N'' and ''B'' and ''C'' will each acquire 25 percent. Since ''A'' will acquire in excess of $200 million in voting securities of ''N'', the size-of-person test in § 801.40(c) is inapplicable and ''A'' is required to file notification.

17. Amend § 801.90 by revising Examples 1 and 2 to read as follows:

§ 801.90 Transactions or devices for avoidance.

* * * * *

Examples: 1. Suppose corporations A and B wish to form a joint venture. A and B contemplate a total investment of over $100 million in the joint venture; persons ''A'' and ''B'' each have total assets in excess of $100 million. Instead of filing notification pursuant to § 801.40, A creates a new subsidiary, A1, which issues half of its authorized shares to A. Assume that A1 has total assets of $3000. ''A'' then sells 50 percent of its A1 stock to ''B'' for $1500. Thereafter, ''A'' and ''B'' each contribute $53 million to A1 in exchange for the remaining authorized A1 stock (one-fourth each to ''A'' and ''B''). A's creation of A1 was exempt under Sec. 802.30; its $1500 sale of A1 stock to ''B'' did not meet the size-of-transaction filing threshold in Section 7A(a)(2)(B); and the second acquisition of stock in A1 by ''A'' and ''B'' was exempt under § 802.30 and Sections 7A(c)(3) and (10). Since this scheme appears to be for the purpose of avoiding the requirements of the act, the sequence of transactions will be disregarded. The transactions will be viewed as the formation of a joint venture corporation by ''A'' and ''B'' having over $10 million in assets. Such a transaction would be covered by § 801.40 and ''A'' and ''B'' must file notification and observe the waiting period.

2. Suppose ''A'' wholly owns and operates a chain of twenty retail hardware stores, each of which is separately incorporated and has assets of less than $10 million. The aggregate fair market value of the assets of the twenty store corporations is $60 million. ''A'' proposes to sell the stores to ''B'' for $60 million. For various reasons it is decided that ''B'' will buy the stock of each of the store corporations from ''A.'' Instead of filing notification and observing the waiting period as contemplated by the act, ''A'' and ''B'' enter into a series of five stock purchase-sale agreements for $12 million each. Under the terms of each contract, the stock of four stores will pass from ''A'' to ''B''. The five agreements are to be consummated on five successive days. Because after each of these transactions the store corporations are no longer part of the acquired person (§ 801.13(a) does not apply because control has passed, see § 801.2), and because $12 million is below the size-of-transaction filing threshold of Section 7A(a)(2)(B), none of the contemplated acquisitions would be subject to the requirements of the act. However, if the stock of all of the store corporations were to be purchased in one transaction, no exemption would be applicable, and the act's requirements would have to be met. Because it appears that the purpose of making five separate contracts is to avoid the requirements of the act, this section would ignore the form of the separate transactions and consider the substance to be one transaction requiring compliance with the act.

PART 802—EXEMPTION RULES

18. Revise the authority citation for part 802 to read as follows:

Authority: 15 U.S.C. 18a(d).

19. Amend § 802.1 by revising Examples 1 through 7 and 9 through 10 to read as follows:

§ 802.1 Acquisitions of goods and realty in the ordinary course of business.

* * * * *

Examples: 1. Greengrocer Inc. intends to sell to ''A'' all of the assets of one of the 12 grocery stores that it owns and operates throughout the metropolitan area of City X. Each of Greengrocer's stores constitutes an operating unit, i.e., a business undertaking in a particular location. Thus ''A's'' acquisition is not exempt as an acquisition in the ordinary course of business. However, the acquisition will not be subject to the notification requirements if the acquisition price or fair market value of the store's assets does not exceed $50 million.

2. ''A,'' a manufacturer of airplane engines, agrees to pay $52 million to ''B,'' a manufacturer of airplane parts, for certain new engine components to be used in the manufacture of airplane engines. The acquisition is exempt under § 802.1(b) as new goods as well as under § 802.1(c)(3) as current supplies.

3. ''A,'' a power generation company, proposes to purchase from ''B,'' a coal company, $75 million of coal under a long-term contract for use in its facilities to supply electric power to a regional public utility and steam to several industrial sites. This transaction is exempt under § 802.1(c)(2) as an acquisition of current supplies. However, if ''A'' proposed to purchase coal reserves rather than enter into a contract to acquire output of a coal mine, the acquisition would not be exempt as an acquisition of goods in the ordinary course of business. The acquisition may still be exempt pursuant to § 802.3(b) as an acquisition of reserves of coal if the requirements of that section are met.

4. ''A,'' a national producer of canned fruit, preserves, jams and jellies, agrees to purchase

from ''B'' for $60 million a total of 20,000 acres of orchards and vineyards in several locations throughout the U.S. ''A'' plans to harvest the fruit from the acreage for use in its canning operations. The acquisition is not exempt under § 802.1 because orchards and vineyards are real property, not ''goods.'' If, on the other hand, ''A'' had contracted to acquire from ''B'' the fruit and grapes harvested from the orchards and vineyards, the acquisition would qualify for the exemption as an acquisition of current supplies under § 802.1(c)(3). Although the transfer of orchards and vineyards is not exempt under § 802.1, the acquisition would be exempt under § 802.2(g) as an acquisition of agricultural property.

5. ''A,'' a railcar leasing company, will purchase $55 million of new railcars from a railcar manufacturer in order to expand its existing fleet of cars available for lease. The transaction is exempt under § 802.1(b) as an acquisition of new goods and § 802.1(c), as an acquisition of current supplies. If ''A'' subsequently sells the railcars to ''C,'' a commercial railroad company, that acquisition would be exempt under § 802.1(d)(2), provided that ''A'' acquired and held the railcars solely for resale or leasing to an entity not within itself.

6. ''A,'' a major oil company, proposes to sell two of its used oil tankers for $75 million to ''B,'' a dealer who purchases oil tankers from the major U.S. oil companies. ''B's'' acquisition of the used oil tankers is exempt under § 802.1(d)(1) provided that ''B'' is actually acquiring beneficial ownership of the used tankers and is not acting as an agent of the seller or purchaser.

7. ''A,'' a cruise ship operator, plans to sell for $58 million one of its cruise ships to ''B,'' another cruise ship operator. ''A'' has, in good faith, executed a contract to acquire a new cruise ship with substantially the same capacity from a manufacturer. The contract specifies that ''A'' will receive the new cruise ship within one month after the scheduled date of the sale of its used cruise ship to ''B.'' Since ''B'' is acquiring a used durable good that ''A'' has contracted to replace within six months of the sale, the acquisition is exempt under § 802.1(d)(3).

* * * * *

9. Three months ago ''A,'' a manufacturing company, acquired several new machines that will replace equipment on one of its production lines. ''A's'' capacity to produce the same products increased modestly when the integration of the new equipment was completed. ''B,'' a manufacturing company that produces products similar to those produced by ''A,'' has entered into a contract to acquire for $66 million the machinery that ''A'' replaced. Delivery of the equipment by ''A'' to ''B'' is scheduled to occur within thirty days. Since ''A'' purchased new machinery to replace the productive capacity of the used equipment, which it sold within six months of the purchase of the new equipment, the acquisition by ''B'' is exempt under § 802.1(d)(3).

10. ''A'' will sell to ''B'' for $56 million all of the equipment ''A'' uses exclusively to perform its billing requirements. ''B'' will use the equipment to provide ''A's'' billing needs pursuant to a contract which ''A'' and ''B'' executed 30 days ago in conjunction with the equipment purchase agreement. Although the assets ''B'' will acquire make up essentially all of the assets of one of ''A's'' management and administrative support services divisions, the acquisition qualifies for the exemption under § 802.1(d)(4) because a company's internal management and administrative support services, however organized, are not an operating unit as defined by Sec. 802.1(a). Management and administrative support services are not a ''business undertaking'' as that term is used in Sec. 802.1(a). Rather, they provide support and benefit to the company's operating units and support the company's business operations. However, if the assets being sold also derived revenues from providing billing services for third parties, then the transfer of these assets would not be exempt under Sec. 802.1(d)(4), since the equipment is not being used solely to provide management and administrative support services to ''A''.

* * * * *

20. Amend § 802.2 by revising examples 3 through 5, 7, 9, 10, and 12 to read as follows:

§ 802.2 Certain acquisitions of real property assets.

* * * * *

Examples: * * *

3. ''A'' proposes to acquire a $200 million tract of wilderness land from ''B.'' Copper deposits valued at $57 million and timber reserves valued at $60 million are situated on the land and will be conveyed as part of this transaction. During the last three fiscal years preceding the sale, the property generated $50,000 from the sale of a small amount of timber cut from the reserves two years ago. ''A's'' acquisition of the wilderness land from ''B'' is exempt as an acquisition of unproductive real property because the property did not generate revenues exceeding $5 million during the thirty-six months preceding the acquisition. The copper deposits and timber reserves are by definition unproductive real property and, thus, are not separately subject to the notification requirements.

4. ''A'' proposes to purchase from ''B'' for $140 million an old steel mill that is not currently operating to add to ''A's'' existing steel production capacity. The mill has not generated revenues during the 36 months preceding the acquisition but contains equipment valued at $56 million that ''A'' plans to refurbish for use in its operations. ''A's'' acquisition of the mill and the land on which it is located is exempt as unproductive real property. However, the transfer of the equipment and any assets other than the unproductive property is not exempt and is separately subject to the notification requirements of the act.

5. ''A'' proposes to purchase two downtown lots, Parcels 1 and 2, from ''B'' for $70 million. Parcel 1, located in the southwest section, contains no structures or improvements. A hotel is located in the northeast section on Parcel 2, and it has generated $9 million in revenues during the past three years. The purchase of Parcel 1 is exempt if it qualifies as unproductive real property, i.e., it has not generated annual revenues in excess of $5 million in the three fiscal years prior to the acquisition. Parcel 2 is not unproductive real property, but its acquisition is exempt under § 802.2(e) as the acquisition of a hotel.

* * * * *

7. ''A'' proposes to purchase from ''B,'' for $60 million, a 100 acre parcel of land that includes a currently operating factory occupying 10 acres. The other 90 adjoining acres are vacant and unimproved and are used by ''B'' for storage of supplies and equipment. The factory and the unimproved acreage have fair market values of $32 million and $28 million, respectively. The transaction is not exempt under § 802.2(c) because the vacant property is adjacent to property occupied by the operating factory. Moreover, if the 90 acres were not adjacent to the 10 acres occupied by the factory, the transaction would not be exempt because the 90 acres are being used in conjunction with the factory being acquired and thus are not unproductive property.

* * * * *

9. ''A'' intends to acquire three shopping centers from ''B'' for a total of $180 million. The anchor stores in two of the shopping centers are department stores, the businesses of which ''A'' is buying from ''B'' as part of the overall transaction. The acquisition of the shopping centers is an acquisition of retail rental space that is exempt under § 802.2(h). However, ''A's'' acquisition of the department store businesses, including the portion of the shopping centers that the two department stores being purchased occupy, are separately subject to the notification requirements. If the value of these assets exceeds $50 million, ''A'' must comply with the requirements of the act for this part of the transaction.

10. ''A'' wishes to purchase from ''B'' a parcel of land for $67 million. The parcel contains a race track and a golf course. The golf course qualifies as recreational land pursuant to § 802.2(f), but the race track is not included in the exemption. Therefore, if the value of the race track is more than $50 million, ''A'' will have to file notification for the purchase of the race track.

* * * * *

12. ''A'' proposes to purchase the prescription drug wholesale distribution business of ''B'' for $80 million. The business includes six regional warehouses used for ''B's'' national wholesale drug distribution business. Since ''A'' is acquiring the warehouses in connection with the acquisition of ''B's'' prescription drug wholesale distribution business, the acquisition of the warehouses is not exempt.

* * * * *

21. Amend § 802.3 by revising Examples 2 and 3 to read as follows:

§ 802.3 Acquisitions of carbon-based mineral reserves.

* * * * *

Examples: * * *

2. ''A,'' an oil company, proposes to acquire for $180 million oil reserves currently in production along with field

pipelines and treating and metering facilities which serve such reserves exclusively. The acquisition of the reserves and the associated assets are exempt. ''A'' will also acquire from ''B'' for $51 million a natural gas processing plant and its associated gathering pipeline system. This acquisition is not exempt since § 802.3(c) excludes these assets from the exemption in § 802.3 for transfers of associated exploration or production assets.

3. ''A,'' an oil company, proposes to acquire a coal mine currently in operation and associated production assets for $90 million from ''B,'' an oil company. ''A'' will also purchase from ''B'' producing oil reserves valued at $100 million and an oil refinery valued at $13 million. The acquisition of the coal mine and the oil reserves is exempt pursuant to § 802.3. Although § 802.3(c) excludes the refinery from the exemption in § 802.3 for transfers of associated exploration and production assets, ''A's'' acquisition of the refinery is not subject to the notification requirements of the act because its value does not exceed $50 million.

* * * * *

22. Amend § 802.4 by revising paragraph (a) and Examples 1 and 2 following paragraph (c) to read as follows:

§ 802.4 Acquisitions of voting securities of issuers holding certain assets the direct acquisition of which is exempt.

(a) An acquisition of voting securities of an issuer whose assets together with those of all entities it controls consist or will consist of assets whose purchase would be exempt from the requirements of the act pursuant to Section 7A(c)(2) of the act, § 802.2, § 802.3 or § 802.5 of these rules is exempt from the reporting requirements if the acquired issuer and all entities it controls do not hold other non-exempt assets with an aggregate fair market value of more than $50 million.

* * * * *

(c) * * *

Examples: 1. ''A,'' a real estate investment company, proposes to purchase 100 percent of the voting securities of C, a wholly-owned subsidiary of ''B,'' a construction company. C's assets are a newly constructed, never occupied hotel, including fixtures, furnishings and insurance policies. The acquisition of the hotel would be exempt under § 802.2(a) as a new facility and under § 802.2(d). Therefore, the acquisition of the voting securities of C is exempt pursuant to § 802.4(a) since C holds assets whose direct purchase would be exempt under § 802.2 and does not hold non-exempt assets exceeding $50 million in value.

2. ''A'' proposes to acquire 60 percent of the voting securities of C from ''B.'' C's assets consist of a portfolio of mortgages valued at $55 million and a small manufacturing plant valued at $26 million. The manufacturing plant is an operating unit for purposes of § 802.1(a). Since the acquisition of the mortgages would be exempt pursuant to Section 7A(c)(2) of the act and since the value of the non-exempt manufacturing plant is less than $50 million, this acquisition is exempt under § 802.4(a).

* * * * *

23. Amend § 802.5 by revising Example 2 to read as follows:

§ 802.5 Acquisitions of investment rental property assets.

* * * * *

Examples: * * *

2. ''X'' intends to buy from ''Y'' a development commonly referred to as an industrial park. The industrial park contains a warehouse/distribution center, a retail tire and automobile parts store, an office building, and a small factory. The industrial park also contains several parcels of vacant land. If ''X'' intends to acquire this industrial park as investment rental property, the acquisition will be exempt pursuant to § 802.5. If, however, ''X'' intends to use the factory for its own manufacturing operations, this exemption would be unavailable. The exemptions in § 802.2 for warehouses, rental retail space, office buildings, and undeveloped land may still apply and, if the value of the factory is $50 million or less, the entire transaction may be exempted by that section.

24. Amend § 802.6 by revising paragraph (b)(2)(ii) and its example as set forth below.

§ 802.6 Federal agency approval.

* * * * *

(b) * * *

(2) * * *

(ii) If the transaction is an acquisition of voting securities, or is treated under the rules as an acquisition of voting securities, and the acquiring person will, as a result of the acquisition, hold voting securities of the acquired person valued in excess of $50 million, the business or businesses of the acquired issuer (and all entities which it controls) which are not engaged in aeronautics or air transportation as defined in section 101 of the Federal Aviation Act, 49 U.S.C. 1301.

Example: Assume that A (an entity included within person ''A'') proposes to acquire voting securities of B (an entity included within person ''B'') for $100 million. A and B are both air carriers who meet the size-of-person test, but B also owns a commercial data processing business located in the United States with a value of $60 million. Assume that this transaction requires CAB approval under 49 U.S.C. 1378. Since the acquired person has a business other than aeronautics or air transportation, the parties must report under § 802.6(b)(2) because the parties meet the size-of-person test, no other exemption applies to the acquisition of the data processing business, and the acquisition of the non-aeronautic business is deemed to be an acquisition of assets valued at $60 million.

25. Amend § 802.9 by revising Example 1 to read as follows:

§ 802.9 Acquisition solely for the purpose of investment.

* * * * *

Examples: 1. Suppose that acquiring person ''A'' acquires 6 percent of the voting securities of issuer X, valued at $52 million. If the acquisition is solely for the purpose of investment, it is exempt under Section 7A(c)(9).

* * * * *

26. Remove and reserve § 802.20.

27. Amend § 802.21 as follows:

a. Remove the introductory text;

b. Revise paragraph (a) and add Examples 1 through 4 thereto to read as set forth below;

c. Revise paragraph (b) and add Examples 1 through 4 thereto to read as set forth below; and

d. Remove Examples 1 through 5 following paragraph (c):

§ 802.21 Acquisitions of voting securities not meeting or exceeding greater notification threshold.

(a) An acquisition of voting securities shall be exempt from the requirements of the act if:

(1) The acquiring person and all other persons required by the act and these rules to file notification filed notification with respect to an earlier acquisition of voting securities of the same issuer;

(2) The waiting period with respect to the earlier acquisition has expired, or been terminated pursuant to § 803.11, and the acquisition will be consummated within 5 years of such expiration or termination; and

(3) The acquisition will not increase the holdings of the acquiring person to meet or exceed a notification threshold greater than the greatest notification threshold met or exceeded in the earlier acquisition.

Examples: 1. Corporation A acquires $53 million of the voting securities of corporation B and both ''A'' and ''B'' file notification as required, indicating the $50 million threshold. Within five years of the expiration of the original waiting period, ''A'' acquires additional voting securities of B but not in an amount sufficient to meet or exceed $100 million or 50 percent of the voting securities of B. No additional notification is required.

2. In Example 1, ''A'' continues to acquire B's securities. Before ''A's'' holdings meet or exceed $100 million or 50 percent of B's outstanding voting securities, ''A'' and ''B'' must file notification and wait the prescribed period, regardless of whether the acquisition occurs within five years after the expiration of the earlier waiting period.

3. In Example 2, suppose that ''A'' and ''B'' file notification at the $500 million level and that, within 5 years after expiration of the waiting period, ''A'' continues to acquire voting securities of B. No further notification is required until ''A'' plans to make the acquisition that will give it 25 percent of B's

voting securities valued at over $1 billion; or 50 percent ownership of B. (Once ''A'' holds 50 percent, further acquisitions of voting securities are exempt under Section 7A(c)(3)).

4. This section also allows a person to recross any of the threshold notification levels—$50 million, $100 million, $500 million, 25 percent (if valued over $1 billion) and 50 percent—any number of times within 5 years of the expiration of the waiting period following notification for that level. Thus, if in Example 1, ''A'' had disposed of some voting securities so that it held less than $50 million of the voting securities of B, and thereafter had increased its holdings to more than $50 million but less than $100 million or 50 percent of B, notification would not be required if the increase occurred within 5 years of the expiration of the original waiting period. Similarly, in Examples 2 and 3, ''A'' could decrease its holdings below, and then increase its holdings above, $50 million and $500 million, respectively without filing notification, if done within 5 years of the expiration of those respective waiting periods.

(b) *Year 2001 Transition.* For transactions filed using the 1978 thresholds where the waiting period expired after February 1, 1996, an acquiring person may acquire up to what was the next percentage threshold at the time it made its filing without filing another notification, even if in doing so it crosses a 2001 notification threshold in § 801.1(h). However, it has only one year from February 1, 2001, or until the end of the original 5-year period following expiration of the waiting period, whichever comes first, to acquire additional securities up to the previous next threshold. Any acquisition thereafter must be the subject of a new notification if it meets or exceeds a 2001 threshold in § 801.1(h).

Examples: 1. Corporation A filed to acquire 20 percent of the voting securities of corporation B and indicated the 15 percent threshold. The waiting period expired on October 3, 1999. ''A'' acquired the 20 percent within the year following expiration of the waiting period. ''A'' has until February 1, 2002 to acquire additional securities up to 25 percent of ''B''s voting securities, and need not make another filing before doing so, even though such acquisition by ''A'' may cross the $50 million, $100 million or $500 million notification threshold in § 801.1(h). After February 1, 2002, ''A'' and ''B'' must observe the 2001 notification thresholds set out in § 801.1(h).

2. Same facts as in Example 1 above, except that the waiting period on corporation A's filing expired on October 3, 1996. ''A'' has until October 3, 2001 to make additional acquisitions up to the 25 percent threshold. The one year transition period in § 802.21(b) cannot be used to extend the 5-year period for additional acquisitions provided for in § 802.21(a).

3. Prior to February 1, 2001, ''A'' filed to acquire 12 percent of the voting securities of corporation B and indicated the $15 million notification threshold. In March, 2001, ''A'' determines that it will make an additional acquisition which will result in it holding 16 percent of the voting securities of B, valued at $60 million. ''A'' is required to file notification at the $50 million notification threshold prior to making the acquisition.

4. Prior to February 1, 2001, ''A'' filed to acquire 26 percent of the voting securities of ''B'' and indicated the 25 percent notification threshold. After February 1, 2002, ''A'' will acquire additional shares of ''B'' which will result in it holding 30 percent of the voting securities of ''B'', valued at $125 million. ''A'' is required to file notification at the $100 million notification threshold prior to making the acquisition. ''A'' could, however, have reached this level (30 percent valued at $125 million) prior to February 1, 2002 without making an additional filing. If ''A'' had done this, and then wanted to acquire any additional voting securities of ''B'' after February 1, 2002, ''A'' would have to file for the $100 million notification threshold.

* * * * *

28. Amend § 802.23 by revising Example 2 to read as follows:

§ 802.23 Amended or renewed tender offers.

* * * * *

Examples: * * *

2. In the previous example, assume that A makes an amended tender offer for 27 percent of the voting securities of B, valued at greater than $1 billion. Since a new notification threshold will be crossed, this section requires that ''A'' must again file notification and observe a new waiting period. Paragraph (a) of this section, however, provides that ''B'' need not file notification again.

* * * * *

29. Amend § 802.31 by revising its example to read as follows:

§ 802.31 Acquisitions of convertible voting securities.

* * * * *

Example: This section applies regardless of the dollar value of the convertible voting securities held or to be acquired. Note, however, that subsequent conversions of convertible voting securities may be subject to the requirements of the act. See § 801.32.

30. Amend § 802.35 by revising Examples 1 and 2 to read as follows:

§ 802.35 Acquisitions by employee trusts.

* * * * *

Examples: 1. Company A establishes a trust for its employees that meets the qualifications of section 401 of the Internal Revenue Code. Company A has the power to designate the trustee of the trust. That trust then acquires 30% of the voting securities of Company A for $120 million. Later, the trust acquires 20% of the stock of Company B, a wholly-owned subsidiary of Company A, for $58 million. Neither acquisition is reportable.

2. Assume that in the example above, ''A'' has total assets of $100 million. ''C'' also has total assets of $100 million and is not controlled by Company A. The trust controlled by Company A plans to acquire 40 percent of the voting securities of Company C for $80 million. Since Company C is not included within ''A,'' ''A'' must observe the requirements of the act before the trust makes the acquisition of Company C's shares.

* * * * *

31. Amend § 802.41 by revising Examples 1 and 2 to read as follows:

§ 802.41 Joint venture or other corporations at time of formation.

* * * * *

Examples: 1. Corporations A and B, each having sales of $200 million, each propose to contribute $80 million in cash in exchange for 50 percent of the voting securities of a new corporation, N. Under this section, the new corporation need not file notification, although both ''A'' and ''B'' must do so and observe the waiting period prior to receiving any voting securities of N.

2. In addition to the facts in example 1 above, A and B have agreed that upon creation N will purchase 100 percent of the voting securities of corporation C for $55 million. Because N's purchase of C is not a transaction in connection with N's formation, and because in any event C is not a contributor to the formation of N, ''A,'' ''B'' and ''C'' must file with respect to the proposed acquisition of C and must observe the waiting period.

32. Amend § 802.64 by revising paragraphs (b)(3) and (b)(4), by removing paragraph (b)(5), and by revising Example 1 following paragraph (c), to read as follows:

§ 802.64 Acquisitions of voting securities by certain institutional investors.

* * * * *

(b) * * *

(3) Made solely for the purpose of investment; and

(4) As a result of the acquisition the acquiring person would hold fifteen percent or less of the outstanding voting securities of the issuer.

(c) * * *

Examples: 1. Assume that A and its subsidiary, B, are both institutional investors as defined in paragraph (a) of this section, that X is not, and that the conditions set forth in paragraphs (b)(2), (3) and (4) of this section are satisfied. Either A or B may acquire voting securities of X worth in excess of $50 million as long as the aggregate amount held by person ''A'' as a result of the acquisition does not exceed 15 percent of X's outstanding voting securities. If the aggregate holdings would exceed 15 percent, ''A'' may acquire no more than $50 million worth of voting securities without being subject to the requirements of the act.

* * * * *

PART 803—TRANSMITTAL RULES

33. Revise the authority citation for part 803 to read as follows:

Authority: 15 U.S.C. 18a(d).

34. Revise § 803.1(a) to read as follows:

§ 803.1 Notification and Report Form.

(a) The notification required by the act shall be the Notification and Report Form set forth in the appendix to this part (803), as amended from time to time. All acquiring and acquired persons required to file notification by the act and these rules shall do so by completing and filing the Notification and Report Form, or a photostatic or other equivalent reproduction thereof, in accordance with the instructions thereon and these rules. Copies of the Notification and Report Form may be obtained in person from the Public Reference Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC, 20580, or by writing to the Premerger Notification Office, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580. The Notification and Report Form also can be downloaded from the Federal Trade Commission's web site at www.ftc.gov.

* * * * *

35. Amend § 803.2 by adding introductory text to paragraph (b), by revising paragraphs (b)(1) introductory text and (b)(2) and the example thereto, and by revising the introductory text to paragraph (c), as set forth below.

§ 803.2 Instructions applicable to Notification and Report Form.

* * * * *

(b) Except as provided in paragraph (b)(2) of this section and paragraph (c) of this section:

(1) Items 5–8 and the appendix to the Notification and Report Form must be completed—

* * * * *

(2) For purposes of items 7 and 8 of the Notification and Report Form, the acquiring person shall regard the acquired person in the manner described in paragraphs (b)(1) (ii) and (iii) of this section.

Example: Person ''A'' is comprised of entities separately engaged in grocery retailing, auto rental, and coal mining. Person ''B'' is comprised of entities separately engaged in wholesale magazine distribution, auto rental and book publishing. ''A'' proposes to purchase 100 percent of the voting securities of ''B''s book publishing subsidiary. For purposes of item 5, under clause (b)(1)(i), ''A'' reports the activities of all its entities; under clause (b)(1)(iii), ''B'' reports only the operations of its book publishing subsidiary. For purposes of items 7 and 8, under paragraph (b)(2) of this section, ''A'' must regard ''B'' as consisting only of its book publishing subsidiary and must disregard the fact that ''A'' and ''B'' are both engaged in the auto rental business.

(c) In response to items 5, 7, and 8 and the appendix to the Notification and Report Form—

* * * * *

36. Amend § 803.5 by revising Examples 2 and 3 to paragraph (a)(2), to read as follows:

§ 803.5 Affidavits required.

(a) * * *

(2) * * *

Examples: * * *

2. ''A'' holds 100,000 shares of the voting securities of Company B. ''A'' has a good faith intention to acquire an additional 900,000 shares of Company B's voting securities. ''A'' states in its notice to B, inter alia, that as a result of the acquisition it will hold 1,000,000 shares. If 1,000,000 shares of Company B represent 20 percent of Company B's outstanding voting securities, the statement will be deemed by the enforcement agencies a notification for the $100 million threshold.

3. Company A intends to acquire voting securities of Company B. ''A'' does not know exactly how many shares it will acquire, but it knows it will definitely acquire $51 million worth and may acquire 50 percent of Company B's shares. ''A''s notice to the acquired person would meet the requirements of § 803.5(a)(1)(iii) if it states, inter alia, either: ''Company A has a present good faith intention to acquire $51 million of the outstanding voting securities of Company B, and depending on market conditions, may acquire more of the voting securities of Company B and thus designates the 50 percent threshold,'' or ''Company A has a present good faith intention to acquire $51 million of the outstanding voting securities of Company B, and depending on market conditions may acquire 50 percent or more of the voting securities of Company B.'' The Commission would deem either of these statements as intending to give notice for the 50 percent threshold.

* * * * *

37. Amend § 803.7 by revising its example to read as follows:

§ 803.7 Expiration of notification.

* * * * *

Example: A files notification that $125 million of the voting securities of corporation B are to be acquired. One year after the expiration of the waiting period, A has acquired only $95 million of B's voting securities. Although § 802.21 will permit ''A'' to purchase any amount of B's voting securities short of $100 million within 5 years from the expiration of the waiting period, A's holdings may not meet or exceed the $100 million notification threshold without ''A'' and ''B'' again filing notification and observing a waiting period.

38. Add § 803.9 to read as follows:

§ 803.9 Filing fee.

(a) Each acquiring person shall pay the filing fee required by the act to the Federal Trade Commission, except as provided in paragraphs (b) and (c) of this section. No additional fee is to be submitted to the Antitrust Division of the Department of Justice.

Examples: 1. ''A'' wishes to acquire voting securities issued by B, where the greater of the acquisition price and the market price is $64 million, pursuant to § 801.10. When ''A'' files notification for the transaction, it must indicate the $50 million threshold and pay a filing fee of $45,000 because the aggregate total amount of the acquisition is less than $100 million, but greater than $50 million.

2. ''A'' acquires $40 million of assets from ''B.'' The parties meet the size of person criteria of Section 7A(a)(2)(B), but the transaction is not reportable because it does not exceed the $50 million size of transaction threshold of that provision. Two months later ''A'' acquires additional assets from ''B'' valued at $90 million. Pursuant to the aggregation requirements of § 801.13(b)(2)(ii), the aggregate total amount of ''B's'' assets that ''A'' will hold as a result of the second acquisition is $130 million. Accordingly, when ''A'' files notification for the second transaction, ''A'' must indicate the $100 million threshold and pay a filing fee of $125,000 because the aggregate total amount of the acquisition is less than $500 million, but not less than $100 million.

3. ''A'' acquires $60 million of voting securities issued by B after submitting its notification and $45,000 filing fee and indicates the $50 million threshold. Two years later, ''A'' files to acquire additional voting securities issued by B valued at $50 million because it will exceed the next higher reporting threshold (see § 801.1(h)). Assuming the second transaction is reportable and the value of its initial holdings is unchanged (see § 801.13(a)(2) and 801.10(c)), the provisions of § 801.13(a)(1) require that ''A'' report that the value of the second transaction is $110 million because ''A'' must aggregate previously acquired securities in calculating the value of B's voting securities that it will hold as a result of the second acquisition. ''A'' should pay a filing fee of $125,000.

4. ''A'' signs a contract with a stated purchase price of $110 million, subject to adjustments, to acquire all of the assets of ''B.'' If the amount of adjustments can be reasonably estimated, the acquisition price—as adjusted to reflect that estimate—is determined. If the amount of adjustments cannot be reasonably estimated, the acquisition price is undetermined. In either case the board or its delegee must also determine in good faith the fair market value. (§ 801.10(b) states that the value of an asset acquisition is to be the fair market value or the acquisition price, if determined and greater than fair market value.) ''A'' files notification and submits a $45,000 filing fee. ''A''s decision to pay that fee may be justified on either of two bases, and ''A'' should submit an attachment to the Notification and Report Form explaining the valuation. First, ''A'' may have concluded that the acquisition

price can be reasonably estimated to be $98 million, because of anticipated adjustments—e.g., based on due diligence by ''A's'' accounting firm indicating that one third of the inventory is not saleable. If fair market value is also determined in good faith to be less than $100 million, the $45,000 fee is appropriate. Alternatively, ''A'' may conclude that because the adjustments cannot reasonably be estimated, acquisition price is undetermined. If so, ''A'' would base the valuation on the good faith determination of fair market value. The acquiring party's execution of the Certification also attests to the good faith valuation of the value of the transaction.

5. ''A'' contracts to acquire all of the assets of ''B'' for $1 billion. The assets include hotels, office buildings, and rental retail property with a total value of $850 million, all of which are exempted by § 802.2. Section 802.2 directs that these assets are exempt from the requirements of the act and that reporting requirements for the transaction should be determined by analyzing the remainder of the acquisition as if it were a separate transaction. Furthermore, § 801.15(a)(2) states that those exempt assets are never held as a result of the acquisition. Accordingly, the aggregate amount of the transaction is $150 million. ''A'' will be liable for a filing fee of $125,000, rather than $280,000, because the value of the transaction is not less than $100 million but less than $500 million. Note, however, that ''A'' must include an attachment in its Notification and Report Form setting out both the $1 billion total purchase price and the basis for its determination that the aggregate total amount of the acquisition under the rules is $150 million rather than $1 billion, in accordance with the Instructions to the Form.

6. ''A'' acquires coal reserves from ''B'' valued at $150 million. No notification or filing fee is required because the acquisition is exempted by § 802.3(b). Three months later, A proposes to acquire additional coal reserves from ''B'' valued at $450 million. This transaction is subject to the notification requirements of the act because the value of the acquisition exceeds the $200 million limitation on the exemption in § 802.3(b). As a result of § 801.13(b)(2)(ii), the prior $150 million acquisition must be added because the additional $450 million of coal reserves were acquired from the same person within 180 days of the initial acquisition. Because aggregating the two acquisitions exceeds the $200 million exemption threshold, § 801.15(b) directs that ''A'' will also hold the previously exempt $150 million acquisition; thus, the aggregate amount held as a result of the $450 million acquisition is $600 million. Accordingly, ''A'' must file notification to acquire the coal reserves valued at $600 million and pay a filing fee of $280,000.

(b) For a transaction described by § 801.2(d)(2)(iii), the parties shall pay only one filing fee. In accordance with § 801.2(d)(2)(iii), both parties to a consolidation are acquiring and acquired persons and must submit a Notification and Report Form where the transaction meets the reporting requirements of that act; however, only one filing fee is required in connection with such a transaction, and is payable by either party to the transaction. The filing fee is based on the greater of the two sizes of transaction in the consolidation.

(c) For a reportable transaction in which the acquiring entity has two ultimate parent entities, both ultimate parent entities are acquiring persons; however, if the responses for both ultimate parent entities would be the same for items 5 through 8 of the Notification and Report Form, only one filing fee is required in connection with the transaction.

(d) *Manner of payment.* Fees may be paid by United States postal money order, bank money order, bank cashier's check, certified check or by electronic wire transfer (EWT). The fee must be paid in U.S. currency.

(1) Fees paid by money order or check shall be made payable to the ''Federal Trade Commission,'' omitting the name or title of any official of the Commission, and shall be submitted to the Premerger Notification Office of the Federal Trade Commission along with the Notification and Report Form.

(2) Fees paid by EWT shall be deposited to the Treasury's account at the New York Federal Reserve Bank. Specific instructions for making EWT payments are contained in the Instructions to the Notification and Report Form.

(e) *Refunds.* Except as provided in this paragraph, no filing fee received by the Commission will be returned to the payer and no part of the filing fee shall be refunded. The filing fee shall be refunded only if the Commission's staff determines, based on the information and representations contained in the filing person's notification, that premerger notification was not required by the act. Once the Commission's staff has determined that the notification was required, the filing fee shall not be refunded even if it appears at the time of consummation that the transaction does not meet the reporting requirements established in the act.

39. Amend § 803.10 by:

a. Revising paragraphs (b)(1) and (b)(2),

b. Adding a new paragraph (b)(3),

c. Revising paragraph (c)(1),

d. Removing the first example, and

e. Revising the second example thereto.

The addition and revisions read as follows:

§ 803.10 Running of time.

* * * * *

(b) *Expiration of waiting period.* (1) Subject to paragraph (b)(3) of this section, for purposes of Section 7A(b)(1)(B), the waiting period shall expire at 11:59 p.m. Eastern Time on the 30th (or in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), the 15th) calendar day (or if § 802.23 applies, such other day as that section may provide) following the beginning of the waiting period as determined under paragraph (a) of this section, unless extended pursuant to Section 7A(e) and § 803.20, or Section 7A(g)(2), or unless terminated pursuant to Section 7A(b)(2) and § 803.11.

(2) Unless further extended pursuant to Section 7A(g)(2), or terminated pursuant to Section 7A(b)(2) and § 803.11, any waiting period which has been extended pursuant to Section 7A(e)(2) and § 803.20 shall, subject to paragraph (b)(3) of this section, expire at 11:59 p.m. Eastern Time—

(i) On the 30th (or, in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), the 10th) day following the date of receipt of all additional information or documentary material requested from all persons to whom such requests have been directed (or, if a request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance in accordance with § 803.3), by the Federal Trade Commission or Assistant Attorney General, whichever requested additional information or documentary material, at the office designated in paragraph (c) of this section, or

(ii) As provided in paragraph (b)(1) of this section, whichever is later.

(3) If any waiting period would expire on a Saturday, Sunday, or legal public holiday (as defined in 5 U.S.C. 6103(a)) the waiting period shall be extended to 11:59 p.m. Eastern Time of the next regular business day.

(c) *Date of receipt and means of delivery.* (1) For purposes of this section, the date of receipt shall be the date on which delivery is effected to the designated offices (Premerger Notification Office, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, and Director of Operations and Merger Enforcement, Antitrust Division, Department of Justice, Patrick Henry Building, 601 D Street, NW, Room #10013, Washington, DC 20530) during normal business hours. Delivery effected after 5:00 p.m. Eastern Time on a regular business day, or at any time on any day other than a regular business day, shall be deemed effected on the next following regular business day. Delivery should be effected directly to

the designated offices, either by hand or by certified or registered mail. If delivery of all required filings to all offices required to receive such filings is not effected on the same date, the date of receipt shall be the latest of the dates on which delivery is effected.

Example: In an acquisition other than a tender offer, assume that requests for additional information are issued to both the acquiring and acquired persons on the 26th day of the waiting period. One person submits the additional information on the 35th day, while the other responds on the 44th day. Under this section, the waiting period expires thirty days following the last receipt of additional information, that is, it expires on the 74th day (unless that day is a Saturday, Sunday or legal public holiday).

* * * * *

40. Amend § 803.20 by revising paragraphs (b)(2)(i) and (ii), and by revising paragraph (c)(2) and the example thereto, to read as follows:

§ 803.20 Requests for additional information or documentary material.

* * * * *

(b) * * *

(2) * * *

(i) In the case of a written request, upon receipt of the request by the ultimate parent entity of the person to which the request is directed (or, if another entity included within the person filed notification pursuant to § 803.2(a), then by such entity), within the original 30-day (or, in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), 15-day) waiting period (or, if § 802.23 applies, such other period as that section provides); or

(ii) In the case of a written request, upon notice of the issuance of such request to the person to which it is directed within the original 30-day (or, in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), 15-day) waiting period (or, if § 802.23 applies, such other period as that section provides), provided that written confirmation of the request is mailed to the person to which the request is directed within the original 30-day (or, in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), 15-day) waiting period (or, if § 802.23 applies, such other period as that section provides). Notice to the person to which the request is directed may be given by telephone or in person. The person filing notification shall keep a designated individual reasonably available during normal business hours throughout the waiting period at the telephone number supplied in the Notification and Report Form. Notice of a request for additional information or documentary material need be given by telephone only to that individual or to the individual designated in accordance with paragraph (b)(2)(iii) of this section. Upon the request of the individual receiving notice of the issuance of such a request, the full text of the request will be read. The written confirmation of the request shall be mailed to the ultimate parent entity of the person filing notification, or if another entity within the person filed notification pursuant to § 803.2(a), then to such entity.

* * * * *

(c) * * *

(2) A request for additional information or documentary material to any person other than, in the case of a tender offer, the person whose voting securities are being acquired pursuant to the tender offer (or any officer, director, partner, agent or employee thereof), shall in every instance extend the waiting period for a period of 30 (or, in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), 10) calendar days from the date of receipt (as determined under § 803.10) of the additional information or documentary material requested.

Example: Acquiring person ''A'' desires to acquire voting securities of corporation X on a securities exchange, and files notification. Under § 801.30, the waiting period begins upon filing by ''A,'' and ''X'' must file within 15 days thereafter. Assume that before the end of the waiting period, the Assistant Attorney General issues a request for additional information to ''X.'' Since the transaction is not a tender offer, under paragraph (c)(1) the waiting period is extended until ''X'' supplies the requested information; under paragraph (c)(2), the waiting period is extended for 30 days beyond the date on which ''X'' responds. Note that under § 803.21 ''X'' is obliged to respond to the request within a reasonable time; nevertheless, the Federal Trade Commission and Assistant Attorney General could, notwithstanding the pendency of the request for additional information, terminate the waiting period sua sponte pursuant to § 803.11(c).

* * * * *

41. Revise the Appendix to part 803 to read as follows:

ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM for Certain Mergers and Acquisitions

INSTRUCTIONS

GENERAL

The Answer Sheets (pp. 1-16) constitute the Notification and Report Form ("the Form") required to be submitted pursuant to § 803.1(a) of the premerger notification rules ("the rules"). Filing persons need not, however, record their responses on the Form.

These instructions specify the information which must be provided in response to the Items on the Answer Sheets. Only the completed Answer Sheets, together with all documentary attachments, are to be filed with the Federal Trade Commission and the Department of Justice.

Persons providing responses on attachment pages rather than on answer sheets must submit a complete set of attachment pages with each copy of the Form.

The term "documentary attachments" refers to materials supplied in responses to Item 3(d), Item 4 and to submissions pursuant to §§ 803.1(b) and 803.11 of the rules.

Information-The central office for information and assistance concerning the rules, 16 CFR Parts 801-803, and the Form is Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, phone (202) 326-3100.

Definitions-The definitions and other provisions governing this Form are set forth in the rules, 16 CFR Parts 801-803. The governing statute, the rules, and the Statement of Basis and Purpose for the rules are set forth at 43 FR 33450 (July 31, 1978), 44 FR 66781 (November 22, 1979) 48 FR 34427 (July 29, 1983) and Pub. L. No. 106-533, 114 Stat. 2762.

Affidavit-Attach the affidavit required by § 803.5 to page 1 of the Form. Affidavits are not required if the person filing notification is an acquired person in a transaction covered by § 801.30. (See § 803.5(a)).

Responses-*Each answer* should identify the Item to which it is addressed. Use the reverse side of the corresponding answer sheet or attach separate additional sheets as necessary in answering each Item. Each additional sheet should identify at the top of the page the Item to which it is addressed. Voluntary submissions pursuant to § 803.1(b) should also be identified.

Enter the name of the person filing notification appearing in Item 1(a) on page 1 of the Form and the date on which the Form is completed at the top of each page of the Form, at the top of any sheets attached to complete the response to any Item, and at the top of the first or cover page of each documentary attachment.

If unable to answer any Item fully, give such information as is available and provide a statement of reasons for non-compliance as required by § 803.3. If exact answers to any Item cannot be given, enter best estimates and indicate the sources or bases of such estimates. Estimated data should be followed by the notation, "est." All information should be rounded to the nearest thousand dollars.

Year-All references to "year" refer to calendar year. If the data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period which most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recent calendar or fiscal year for which the requested information is available.

SIC Data-This Notification and Report Form requests information regarding dollar revenues and lines of commerce at three levels with respect to operations conducted within the United States. (See § 803.2(c)(1).) *All persons* must submit certain data at the 4-digit (SIC code) *industry level*. To the extent that dollar revenues are derived from *manufacturing operations* (SIC major groups 20-39), data must also be submitted at the *5-digit product class and 7-digit product levels* (SIC based codes). The term "dollar revenues" is defined in § 803.2(d).

References-In reporting information by "4-digit (SIC code) industry" refer to the 1987 edition of the *Standard Industrial Classification Manual* published by the Executive Office of the President, Office of Management and Budget.

In reporting information by "5-digit product class" and "7-digit product" refer to the following reference publication published by the U.S. Bureau of the Census: Numerical List of Manufactured and Mineral Products, 1992 *Census of Manufactures and Census of Mineral Industries* (MC92-R-1). Make sure that the Numerical List you use has MC92-R-1 printed on the cover.

Furthermore, when the Numerical List cites footnote 3, which refers to Appendices A and C for detail collected in a specified Current Industrial Report, you must provide revenue information using the 7-digit products listed in Appendix A.

Privacy Act Statement-Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. The primary use of this information is to determine whether the merger or acquisition reported in the Notification and Report Form may violate the antitrust laws. Furnishing the information on this Form is voluntary.

Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to $11,000 per day.

Items 5,7,8 and the Insurance Appendix-Supply information only with respect to operations conducted within the United States, including its commonwealths, territories, possessions and the District of Columbia. (See §§ 801.1(k), 803.2(c)(1).)

Information need not be supplied regarding assets or voting securities currently being acquired, when the acquisition is exempt under the statute or rules. (See § 803.2(c)(2).)

The acquired person should limit its response in the case of an acquisition of assets, to the assets being sold, and in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such issuer. Separate responses may be required where a person is both acquiring and acquired. (See § 803.2(b) and (c).)

Filing-Complete and return two copies (with one notarized original affidavit and certification and one set of documentary attachments) of this Notification and Report Form to the Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Three copies (with one set of documentary attachments) should be sent to: Director of Operations, Antitrust Division, Department of Justice, Patrick Henry Bldg., 601 D Street, NW, Room #10-013, Washington, D.C. 20530. (For FEDEX airbills to the Department of Justice, do not use the 20530 zip code; use zip code 20004.)

ITEM BY ITEM

Affidavit-Attach the affidavit required by § 803.5 to page 1 of the Answer Sheets. Acquiring persons in transactions covered by § 801.30 are required to also submit a copy of the notice served on the acquired person pursuant to § 803.5(a)(1). (See § 803.5(a)(3).)

Fee Information-The fee for filing the Notification and Report Form is based on the aggregate total amount of assets and voting securities to be held as a result of the acquisition:

Value of assets or voting securities to be held	Fee Amount
greater than $50 million but less than $100 million	$45,000
$100 million or greater but less than $500 million	$125,000
$500 million or greater	$280,000

Amount Paid-Indicate the amount of the filing fee paid. This amount should be net of any banking or financial institution charges. Where an explanatory attachment is required, include in your explanation any adjustments to the acquisition price that serve to lower the fee from that which would otherwise be due. If there is no acquisition price or if the acquisition price may fall within a range that straddles two filing fee thresholds, state the transaction value on which the fee is based and explain the valuation method used. Include in your explanation a description of any exempt assets, the value assigned to each, and the valuation method used.

A Valuation Worksheet available from the Premerger Notification Office will be helpful in determining the value of a transaction for filing and fee purposes. This Worksheet need not be submitted with the Notification and Report Form, but it or something similar should be utilized and retained by the acquiring person in the event Commission staff has questions about the valuation of the transaction.

Payer Identification- Provide the 9-digit Taxpayer Identification Number (TIN) of the acquiring person and, if different from the filing person, the TIN of the payer(s) of the filing fee. A payer or filing person who is a natural person having no TIN must provide the name and social security number (SSN) of the payer. If the payer or filing person is a foreign person, only the name of the payer and the name of the filing person need be supplied if different.

Method of Payment-Check the box indicating the method of fee payment. If paying by electronic wire transfer (EWT), provide the name of the financial institution from which the EWT is being sent and the confirmation number.

To insure filing fees paid by EWT are attributed to the appropriate payer filing notification, the payer must provide the following information to the financial institution initiating the EWT:

The Department of Treasury's ABA Number: 021030004;
and
The Federal Trade Commission's ALC Number: 29000001.

If the name used to transmit the EWT differs from the filer's name, provide the alternative name. If the confirmation number is unavailable at the time notification is filed, provide this information by letter within one business day of filing.

Corrective Filing-Put an X in the appropriate box to indicate whether the notification is a corrective filing being made for an acquisition that has already taken place in violation of the statute. Attach a detailed, written explanation signed by a company official explaining (1) how the violation occurred, (2) when and how the violation was discovered and (3) what steps will be taken to ensure compliance in the future.

Transactions Subject to Foreign Antitrust Notification-If to the knowledge or belief of the filing person at the time of filing this notification, a foreign antitrust or competition authority has been or will be notified of the proposed transaction, list the name of each such authority and the date or anticipated date of each such notification. Response to this item is voluntary.

Cash Tender Offer-Put an X in the appropriate box to indicate whether the acquisition is a cash tender offer.

Bankruptcy-Put an X in the appropriate box to indicate whether the acquired person's filing is being made by a trustee in bankruptcy or a debtor-in-possession for a transaction that is subject to section 363(b) of the Bankruptcy Code (11USC § 363).

Early Termination-Put an X in the yes box to request early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register as required by § 7A(b)(2) of the Clayton Act and on the FTC web site, www.ftc.gov.

ITEM 1

Item 1(a)-Give the name and headquarters address of the person filing notification. The name of the person is the name of the ultimate parent entity included within that person.

Item 1(b)-Indicate whether the person filing notification is an acquiring person, an acquired person, or both an acquiring and acquired person. (See § 801.2.)

Item 1(c)-Put an X in the appropriate box to indicate whether the person in Item 1(a) is a corporation, partnership or other (specify).

Item 1(d)-Put an X in the appropriate box to indicate whether data furnished is by calendar year or fiscal year. If fiscal year, specify period.

Item 1(e)-Put an X in the appropriate box to indicate if this Form is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file notification on its behalf pursuant to § 803.2(a), or if this Form is being filed pursuant to § 803.4 on behalf of a foreign person. Then provide the name and mailing address of the entity filing notification on behalf of the reporting person named in Item 1(a) of the Form.

Item 1(f)-If an entity within the person filing notification other than the ultimate parent entity listed in Item 1(a) is the entity which is making the acquisition, or if the assets or voting securities of an entity other than the ultimate parent entity listed in Item 1(a) are being acquired, provide the name and mailing address of that entity and the percentage of its voting securities held by the person named in Item 1(a) above. (If control is effected by means other than the direct holding of the entity's voting securities, describe the intermediaries or the contract through which control is effected (see § 801.1(b)).

Item 1(g)-Print or type the name and title, firm name, address, telephone number, fax number and e-mail address of the individual to contact regarding this Notification and Report Form. (See § 803.20(b)(2)(ii).)

Item 1(h)-Foreign filing persons print or type the name and title, firm name, address, telephone number, fax number and e-mail address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. (See § 803.20(b)(2)(iii).)

ITEM 2

Item 2(a)-Give the names of all ultimate parent entities of acquiring and acquired person which are parties to the acquisition whether or not they are required to file notification.

Item 2(b)-Put an X in all the boxes that apply to this acquisition.

Item 2(c)-*Acquiring persons* put an X in the box to indicate the highest threshold for which notification is being filed (see § 801.1(h)): $50 million, $100 million, $500 million, 25% (if value of voting securities to be held is greater than $1 billion), or 50%.

Item 2(d)-*Assets and voting securities held as a result of the acquisition* (to be completed by both acquiring and acquired persons). State:

Item 2(d)(i)-the value of voting securities;

Item 2(d)(ii)-the percentage of voting securities;

Item 2(d)(iii)-the value of assets:

Item 2(d)(iv)-the aggregate total amount of voting securities and assets of the acquired person to be held by each acquiring person, as a result of the acquisition (see §§ 801.12, 801.13, and 801.14).

Item 2(e)-Acquiring persons provide the name(s) of the person(s) who performed any fair market valuation used to determine the aggregate total value of the transaction reported in Item 2(d)(iv).

ITEM 3

Item 3(a)-*Description of acquisition.* Briefly describe the transaction. Include a list of the name and mailing address of each acquiring and acquired person, whether or not required to file notification. Indicate for each party whether assets or voting securities (or both) are to be acquired. Also indicate what consideration will be received by each party. In describing the acquisition, include the expected dates of any major events required to consummate the transaction (e.g., stockholders' meetings, filing of requests for approval, other public filings, terminations of tender offers) and the scheduled consummation date of the transaction.

If the voting securities are to be acquired from a holder other than the issuer (or an entity within the same person as the issuer) separately identify (if known) such holder and the issuer of the voting securities. Acquiring persons in tender offers should describe the terms of the offer.

Item 3(b)(i)-*Assets to be acquired.* This Item is to be completed only to the extent that the transaction is an acquisition of assets. Describe all general classes of assets (other than cash and securities) to be acquired by each party to the transaction, giving dollar values thereof.

Give the total value of the assets to be acquired in this transaction.

Examples of general classes of assets other than cash and securities are land, merchandising inventory, manufacturing plants (specify location and products produced), and retail stores. For each general class of assets, indicate the page or paragraph number of the contract or other document submitted with this Form in which the assets are more particularly described.

Item 3(b)(ii)-*Assets held by acquiring person.* (To be completed by acquiring persons). If assets of the acquired person (see § 801.13) are presently held by the person filing notification, furnish a description of each general class of such assets in the manner required by Item 3(b)(i), and the dollar value or estimated dollar value at the time they were acquired.

Item 3(c)-*Voting securities to be acquired.* Furnish the following information separately for each issuer whose voting securities will be acquired in the acquisition: (If, as a result of the acquisition, the acquiring person will hold 100 percent of the voting securities of the acquired issuer or if the acquisition is a merger or consolidation (see § 801.2(d)), the parties may so state and provide the total dollar value of the transaction instead of responding to items 3(c)(i)-3(c)(viii).

Item 3(c)(i)-List each class of voting securities (including convertible voting securities) which will be outstanding after the acquisition has been completed. If there is more than one class of voting securities, include a description of the voting rights of each class. Also list each class of non-voting securities which will be acquired in the acquisition;

Item 3(c)(ii)-Total number of shares of each class of securities listed which will be outstanding after the acquisition has been completed;

Item 3(c)(iii)-Total number of shares of each class of securities listed which will be acquired in this acquisition. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 3(c)(iv)-Identity of each person acquiring any securities of any class listed. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 3(c)(v)-Dollar value of securities of each class listed to be acquired in this transaction (see § 801.10). If there is more than one acquiring person of any class of securities, show data separately for each acquiring person (If the exact dollar value cannot be determined at the time of filing, provide an estimated value and indicate the basis on which the estimate was made);

Item 3(c)(vi)-Total number of each class of securities listed which will be held by acquiring person(s) after the acquisition has been accomplished. If there is more than one acquiring person for any class of securities, show data separately for each acquiring person;

Item 3(d)-Furnish copies of final or most recent versions of all documents which constitute the agreement among the acquiring person(s) and the person(s) whose voting securities or assets are to be acquired (Do not attach these documents to the Answer Sheets).

ITEM 4

Furnish one copy of each of the following documents. For each entity included within the person filing notification which has prepared its own such documents different from those prepared by the person filing notification, furnish, in addition, one copy of each document from each such other entity. Furnish copies of:

Item 4(a)-all of the following documents which have been filed with the United States Securities and Exchange Commission (or are to be filed contemporaneously in connection with this acquisition); the most recent proxy statement and Form 10-K, each dated not more than three years prior to the date of this Notification and Report Form; all Forms 10-Q and 8-K filed since the end of the period reflected by the Form 10-K being supplied; any registration statement filed in connection with the transaction for which notification is being filed; if the acquisition is a tender offer, Schedule TO. Alternatively, if the person filing notification does not have copies of responsive documents readily available, identification of such documents and citation to date and place of filing will constitute compliance;

NOTE: In response to Item 4(a), the person filing notification may incorporate by reference documents submitted with an earlier filing as explained in the staff formal interpretations dated April 10, 1979, and April 7, 1981, and in § 803.2(e).

Item 4(b)-the most recent annual reports and most recent annual audit reports (of person filing notification and of each unconsolidated United States issuer included within such person) and, if different, the most recently prepared balance sheet of the person filing notification and of each unconsolidated United States issuer included within such person;

Item 4(c)-all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document.

Persons filing notification may provide an optional index of documents called for by Item 4 of the Answer Sheets.

NOTE: If the person filing notification withholds any documents called for by Item 4(c) based on a claim of privilege, the person must provide a statement of reasons for such noncompliance as specified in the staff formal interpretation dated September 13, 1979, and § 803.3(d).

ITEMS 5 through 8 and the Appendix

NOTE: *For Items 5 through 8 and the Appendix*, the acquired person should limit its response in the case of an acquisition of assets, to the assets to be sold, and in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such issuer. A person filing as both acquiring and acquired may be required to provide a separate response to these items in each capacity so that it can properly limit its response as an acquired person. (See § 803.2(b) and (c).)

Item 5(a)-5(c): These items request information regarding dollar revenues and lines of commerce at three levels with respect to operations conducted within the United States. (See § 803.2(c)(1).) All persons must submit certain data at the 4-digit (SIC code) *industry level.* To the extent that dollar revenues are derived from manufacturing operations (SIC major groups 20-39), data must also be submitted at the 5-digit product class and 7-digit product levels (SIC based codes).

NOTE: See the "References" listed in the General Instructions to the Form. Refer to the 1987 edition of the *Standard Industrial Classification Manual* for the 4-digit (SIC code) industry codes. Refer to the Numerical List of Manufactured and Mineral Products, 1992 *Census of Manufactures and Census of Mineral Industries* (MC92-R-1) for the 5-digit product class and 7-digit product codes. Report revenues for the 5-digit and 7-digit codes using the codes in the columns labeled "Product code."

Insurance carriers (2-digit SIC major group 63) should supply the information requested only with respect to industries not within 2-digit major group 63. Credit agencies other than banks; security and commodity brokers, dealers, exchanges, and services; holding and other investment offices, and real estate companies (2-digit SIC major groups 61, 62, 67 and 65) should identify or explain the revenues reported (e.g., dollar sales, receipts).

Persons filing notification should include the total dollar revenues for 1992 derived by all entities included within the person filing notification at the time this Notification and Report Form is prepared (even if such entities have become included within the person since 1992). For example, if the person filing notification acquired an entity in 1994, it must include that entity's 1992 revenues in items 5(a) and 5(b)(i).

Item 5(a)-*Dollar revenues by industry*. Provide aggregate 4-digit (SIC code) industry data for 1992.

Item 5(b)(i)-*Dollar revenues by manufactured product*. Provide the following information on the aggregate operations for the person filing notification for 1992 for each 7-digit product of the person in 2-digit SIC major groups 20-39 (manufacturing industries).

NOTE: When the Numerical List refers to footnote 3, which cites Appendices A and C for detail collected in a specified Current Industrial Report, you must provide revenue information using 7-digit product codes listed in Appendix A.

Item 5(b)(ii)-*Products added or deleted*. Within 2-digit SIC major groups 20-39 (manufacturing industries), identify each product of the person filing notification added or deleted subsequent to 1992, indicate the year of addition or deletion, and state total dollar revenues in the most recent year for each product that has been added. Products may be identified either by 7-digit product code or in the manner ordinarily used by the person filing notification.

Do not include products added since 1992 by reason of mergers or acquisition occurring since 1992. Dollar revenues derived from such products should be included in response to item 5(b)(i). However, if an entity acquired since 1992 by the person filing notification (and now included within the person) itself has added any products since 1992, these products and the dollar revenues derived therefrom should be listed here. Products deleted by reason of dispositions of assets or voting securities since 1992 should also be listed here.

Item 5(b)(iii)-*Dollar revenues by manufactured product class*. Provide the following information about the aggregate operations of the person filing notification for the most recent year for each 5-digit product class of the person within SIC major groups 20-39 (manufacturing industries). If such data have not been compiled for the most recent year, estimates of dollar revenues by 5-digit product class may be provided if a statement describing the method of estimation is furnished.

Item 5(c)-*Dollar revenues by non-manufacturing industry*. Provide the following information concerning the aggregate operations of the person filing notification for the most recent year for each 4-digit (SIC code) industry in SIC major groups other than 20-39 in which the person engaged. If such data have not been compiled for the most recent year, estimates of dollar revenues by 4-digit industry may be provided if a statement describing the method of estimation is furnished. Industries for which the dollar revenues totaled less than one million dollars in the most recent year may be omitted.

NOTE: *This million dollar minimum is applicable only to item 5(c).* Insurance carriers (2-digit SIC major group 63) should supply the information requested only with respect to industries not within SIC major group 63, and, if voting securities of an insurance carrier are being acquired directly or indirectly, should complete the Insurance Appendix to this Form.

JOINT VENTURE OR OTHER CORPORATIONS

Item 5(d)-Supply the following information only if the acquisition is the formation of a joint venture or other corporation. (See § 801.40.)

Item 5(d)(i)-List the name and mailing address of the joint venture or other corporation.

Item 5(d)(ii)(A)-List contributions that each person forming the joint venture or other corporation has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

Item 5(d)(ii)(B)-Describe any contracts or agreements whereby the joint venture or other corporation will obtain assets or capital from sources other than the persons forming it.

Item 5(d)(ii)(C)-Specify whether and in what amount the persons forming the joint venture or other corporation have agreed to guarantee its credit or obligations.

Item 5(d)(ii)(D)-Describe fully the consideration which each person forming the joint venture or other corporation will receive in exchange for its contribution(s).

Item 5(d)(iii)-Describe generally the business in which the joint venture or other corporation will engage, including location of headquarters and principal plants, warehouses, retail establishments or other places of business, its principal types of products or activities, and the geographic areas in which it will do business.

Item 5(d)(iv)-Identify each 4-digit (SIC code) *industry* in which the joint venture or other corporation will derive dollar revenues. If the joint venture or other corporation will be engaged in manufacturing, also specify each 5-digit *product class* in which it will derive dollar revenues.

ITEM 6

This item need not be completed by a person filing notification only as an acquired person if only assets are to be acquired. Persons filing notification may respond to Items 6(a), 6(b), or 6(c) by referencing a "document attachment" furnished with this Form if the information so referenced is a complete response and is up-to-date and accurate. Indicate for each Item the specific page(s) of the document that are responsive to that Item.

Item 6(a)-*Entities within the person filing notification*. List the name and headquarters mailing address of each entity included within the person filing notification. Entities with total assets of less than $10 million may be omitted.

Item 6(b)-*Shareholders of person filing notification*. For each entity (including the ultimate parent entity) included within the person filing notification the voting securities of which are held (see § 801.1(c)) by one or more other persons, list the issuer and class of voting securities, the name and headquarters mailing address of each other person which holds five percent or more of the outstanding voting securities of the class and the number and percentage held by that person. Holders need not be listed for entities with total assets of less than $10 million.

Item 6(c)-Holdings of person filing notification. If the person filing notification holds voting securities of any issuer not included within the person filing notification, list the issuer and class, the number and percentage held, and (optionally) the entity within the person filing notification which holds the securities. Holdings of less than five percent of the outstanding voting securities of any issuers, and holding of issuers with total assets of less than $10 million may be omitted.

ITEM 7

If, to the knowledge or belief of the person filing notification, the person filing notification derived dollar revenues in the most recent year from operations in any 4-digit (SIC code) industries in which any other person which is a party to the acquisition also derived dollar revenues in the most recent year (or in which a joint venture or other corporation will derive dollar revenues), then for each such 4-digit (SIC code) industry:

Item 7(a)-supply the 4-digit SIC code and description for the industry;

Item 7(b)-list the name of each person which is a party to the acquisition which also derived dollar revenues in the 4-digit industry;

Item 7(c)-*Geographic market information*:

Item 7(c)(i)-for each 4-digit industry within SIC major groups 20-39 (manufacturing industries) listed in Item 7(a) above, list the states (or if desired, portions thereof) in which, to the knowledge or belief of the person filing notification, the products in that 4-digit industry produced by the person filing notification are sold without a significant change in their form, whether they are sold by the person filing notification or by others to whom such products have been sold or resold;

Item 7(c)(ii)- for each 4-digit industry within SIC major groups 01-17 and 40-49 (agriculture, forestry and fishing, mining, construction, transportation, communications, electric, gas and sanitary services) listed in item 7(a) above, list the states (or, if desired, portions thereof) in which the person filing notification conducts such operations;

Item 7(c)(iii)-for each 4-digit industry within SIC major groups 50-51 (wholesale trade) listed in Item 7(a) above, list the states (or, if desired, portions thereof) in which the customers of the person filing notification are located;

Item 7(c)(iv)-for each 4-digit industry within SIC major groups 52-61, 70, 75, 78, and 80 (retail trade, banking, and certain services) listed in Item 7(a) above, provide the address, **arranged by state, county and city or town,** of each establishment from which dollar revenues were derived in the most recent year by the person filing notification;

Item 7(c)(v)-for each 4-digit industry within SIC major groups 62, 64-67, 72, 73, 76, 79, and 81-89 (certain finance, insurance and real estate groups and certain services) listed in Item 7(a) above, list the states (or, if desired, portions thereof) in which establishments were located from which the person filing notification derived revenues in the most recent year; and

Item 7(c)(vi)-for each 4-digit industry within SIC major group 63 (insurance) listed in Item 7(a) above, list the state(s) in which the person filing notification is licensed to write insurance.

NOTE: Except in the case of those SIC major industry groups mentioned in Item 7(c)(iv) above, the person filing notification may respond with the word "national" if business is conducted in all 50 states.

ITEM 8

Item 8-*Previous acquisitions* (to be completed by acquiring persons). Determine each 4-digit (SIC code) industry listed in Item 7(a) above, in which the person filing notification derived dollar revenues of $1 million or more in the most recent year and in which either the acquired issuer derived revenues of $1 million or more in the recent year, (or in which, in the case of the formation of a joint venture or other corporation, the joint venture or other corporation reasonably can be expected to derive revenues of $1 million or more), or revenues of $1 million or more in the most recent year were attributable to the acquired assets. For each such 4-digit industry, list all acquisitions made by the person filing notification in the five years prior to the date of filing of entities deriving dollar revenues in that 4-digit industry. List only acquisitions of more than 50 percent of the voting securities or assets of entities which had annual net sales or total assets greater than $10 million in the year prior to the acquisition.

For each such acquisition, supply:

(a) the name of the entity acquired;
(b) the headquarters address of the entity prior to the acquisition;
(c) whether securities or assets were acquired;
(d) the consummation date of the acquisition;
(e) the annual net sales of the acquired entity in the year prior to the acquisition;
(f) the total assets of the acquired entity in the year prior to the acquisition; and

(g) the 4-digit (SIC code) industries (by number and description) identified above in which the acquired entity derived dollar revenues.

CERTIFICATION-(See § 803.6.)

APPENDIX TO NOTIFICATION AND REPORT FORM: INSURANCE

Insurance carriers (2-digit SIC major group 63) are required to complete this Appendix if voting securities of an insurance carrier are being acquired directly or indirectly.

ITEM 1

Item 1(A)-*Life Insurance*. Provide for the most recent year the amount of premium receipts (calculated on the accrual basis) for each of the lines of insurance listed on page 16 of the Answer Sheets.

Item 1(B)-*New Business*. Provide for the most recent year the amount of new life insurance business issued in the United States (exclusive of revivals, increases, dividend additions and reinsurance ceded) for each of the lines of insurance listed on page 16 of the Answer Sheets.

ITEM 2

Item 2(A)-*Property Liability Insurance*. Provide for the most recent year the amount of direct premiums written in the United States for each line of insurance specified in Part 2 of the Underwriting and Investment Exhibit of your carrier's annual convention statement.

Item 2(B)-Provide for the most recent year the amount of net premiums written in the United States for each line of insurance specified in Part 2 of the Underwriting and Investment Exhibit of your carrier's annual convention statement.

ITEM 3

Item 3(A)-*Title Insurance*. Provide for the most recent year the amount of net direct title insurance premiums written in the United States.

Item 3(B)-Provide for the most recent year the amount of direct title insurance premiums earned in the United States.

TRANSACTION NUMBER ASSIGNED ☐☐☐☐☐☐☐☐

16 C.F.R. Part 803 - Appendix
NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

Approved by OMB
DRAFT
Expires 00/00/00

THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS

➢ Attach the Affidavit required by § 803.5 to this page.

FEE INFORMATION

AMOUNT PAID $_____

In cases where your filing fee would be higher if based on acquisition price or where the acquisition price is undetermined to the extent that it may straddle a filing fee threshold, attach an explanation of how you determined the appropriate fee *(acquiring persons only)*.

Attachment Number _____

TAXPAYER IDENTIFICATION NUMBER _____
or SOCIAL SECURITY NUMBER of payer _____
(acquiring person (and payer if different from acquiring person))

CHECK ATTACHED ☐ MONEY ORDER ATTACHED ☐

WIRE TRANSFER ☐ CONFIRMATION NO._____

FROM: NAME OF INSTITUTION _____

NAME OF PAYER (if different from PERSON FILING) _____

IS THIS A CORRECTIVE FILING? ☐ YES ☐ NO

IS THIS ACQUISITION SUBJECT TO FOREIGN FILING REQUIREMENTS? ☐ YES ☐ NO
If YES, list jurisdictions: _____

IS THIS ACQUISITION A CASH TENDER OFFER? ☐ YES ☐ NO | BANKRUPTCY? ☐ YES ☐ NO

DO YOU REQUEST EARLY TERMINATION OF THE WAITING PERIOD? *(Grants of early termination are published in the Federal Register AND on the FTC web site www.ftc.gov)*
☐ YES ☐ NO

ITEM 1 – PERSON FILING

1(a) NAME and
HEADQUARTERS ADDRESS
of PERSON FILING

1(b) PERSON FILING NOTIFICATION IS
☐ an acquiring person ☐ an acquired person ☐ both

1(c) PUT AN "X" IN THE APPROPRIATE BOX TO DESCRIBE PERSON FILING NOTIFICATION
☐ Corporation ☐ Partnership ☐ Other *(Specify)* _____

1(d) DATA FURNISHED BY
☐ calendar year ☐ fiscal year *(specify period)* _____(month/year) to _____ (month/year)

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person which, by reason of a merger, consolidation or acquisition, is subject to §7A of the Clayton Act, 15 U.S.C. §18a, as added by Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The statute and rules are set forth in the *Federal Register* at 43 FR 33450; the rules may also be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. §18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty of not more than $11,000 for each day during which such person is in violation of 15 U.S.C. §18a.

All information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act, and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

Filing - Complete and return *two* copies (with one original affidavit and certification and one set of documentary attachments) of this Notification and Report Form to: Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. *Three* copies (with one set of documentary attachments) should be sent to: Director of Operations and Merger Enforcement, Antitrust Division, Department of Justice, Patrick Henry Building, 601 D Street, N.W., Room #10013, Washington, D.C. 20530. (For FEDEX airbills to the Department of Justice, do not use the 20530 zip code; use zip code 20004.)

DISCLOSURE NOTICE - Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 39 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office,
H-303
Federal Trade Commission
Washington, DC 20580

Office of Information and
Regulatory Affairs,
Office of Management and Budget
Washington, DC 20503

NAME OF PERSON FILING NOTIFICATION	DATE

1(e) PUT AN X IN THE APPROPRIATE BOX AND GIVE THE NAME AND ADDRESS OF ENTITY FILING NOTIFICATION (if other than ultimate parent entity)

☐ NA ☐ This report is being filed on behalf of a foreign person pursuant to § 803.4. ☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a).

NAME OF ENTITY FILING NOTIFICATION	ADDRESS

1(f) NAME AND ADDRESS OF ENTITY MAKING ACQUISITION OR WHOSE ASSETS OR VOTING SECURITIES ARE BEING ACQUIRED IF DIFFERENT FROM THE ULTIMATE PARENT ENTITY IDENTIFIED IN ITEM 1(a)

PERCENT OF VOTING SECURITIES HELD BY EACH ENTITY IDENTIFIED IN ITEM 1(a)

1(g) IDENTIFICATION OF PERSON TO CONTACT REGARDING THIS REPORT

NAME OF CONTACT PERSON	
TITLE	
FIRM NAME	
BUSINESS ADDRESS	
TELEPHONE NUMBER	
FAX NUMBER	
E-MAIL ADDRESS	

(h) IDENTIFICATION OF AN INDIVIDUAL LOCATED IN THE UNITED STATES DESIGNATED FOR THE LIMITED PURPOSE OF RECEIVING NOTICE OF ISSUANCE OF A REQUEST FOR ADDITIONAL INFORMATION OR DOCUMENTS. (See § 803.20(b)(2)(iii))

NAME OF CONTACT PERSON	
TITLE	
FIRM NAME	
BUSINESS ADDRESS	
TELEPHONE NUMBER	
FAX NUMBER	
E-MAIL ADDRESS	

ITEM 2

2(a) LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRING PERSONS	LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRED PERSONS

2(b) THIS ACQUISITION IS *(put an X in all the boxes that apply)*

- ☐ an acquisition of assets
- ☐ a merger (see § 801.2)
- ☐ an acquisition subject to § 801.2(e)
- ☐ a formation of a joint venture of other corporation (see § 801.40)
- ☐ an acquisition subject to § 801.30 (*specify type*)
- ☐ other (*specify*)_____
- ☐ a consolidation (see § 801.2)
- ☐ an acquisition of voting securities
- ☐ a secondary acquisition
- ☐ an acquisition subject to § 801.31

2(c) INDICATE THE HIGHEST NOTIFICATION THRESHOLD IN § 801.1(h) FOR WHICH THIS FORM IS BEING FILED *(acquiring person only)*

☐ $50 million ☐ $100 million ☐ $500 million ☐ 25% (see Instructions) ☐ 50%

2(d)(i) VALUE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION	(ii) PERCENTAGE OF VOTING SECURITIES	(iii) VALUE OF ASSETS TO BE HELD AS A RESULT OF THE ACQUISITON	(iv) AGGREGATE TOTAL VALUE
$	%	$	$

NAME OF PERSON FILING NOTIFICATION	DATE

2(e) If aggregate total value in 2(d)(iv) is based in whole or in part on a fair market valuation pursuant to § 801.10(c)(3), identify the person or persons responsible for making the valuation *(acquiring persons only)*.

ITEM 3

3(a) DESCRIPTION OF ACQUISITION

NAME OF PERSON FILING NOTIFICATION	DATE

3(b)(i) ASSETS TO BE ACQUIRED (to be completed only for asset acquisitions)

3(b)(ii) ASSETS HELD BY ACQUIRING PERSON

3(c) VOTING SECURITIES TO BE ACQUIRED

3(c)(i) LIST AND DESCRIPTION OF VOTING SECURITIES AND LIST OF NON-VOTING SECURITIES:

3(c)(ii) TOTAL NUMBER OF SHARES OF EACH CLASS OF SECURITY:

3(c)(iii) TOTAL NUMBER OF SHARES OF EACH CLASS OF SECURITY BEING ACQUIRED:

NAME OF PERSON FILING NOTIFICATION	DATE

3(c)(iv) IDENTITY OF PERSONS ACQUIRING SECURITIES:

3(c)(v) DOLLAR VALUE OF SECURITIES IN EACH CLASS BEING ACQUIRED:

3(c)(vi) DOLLAR VALUE OF SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION:

3(d) SUBMIT A COPY OF THE MOST RECENT VERSION OF CONTRACT OR AGREEMENT (or letter of intent to merge or acquire)

DO NOT ATTACH THIS DOCUMENT TO THIS PAGE ATTACHMENT OR REFERENCE NUMBER OF CONTRACT OR AGREEMENT _____

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 4 PERSONS FILING NOTIFICATION MAY PROVIDE BELOW AN OPTIONAL INDEX OF DOCUMENTS REQUIRED TO BE SUBMITTED BY ITEM 4 (See Item by Item instructions). THESE DOCUMENTS SHOULD NOT BE ATTACHED TO THIS PAGE.

4(a) DOCUMENTS FILED WITH THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION	ATTACHMENT OR REFERENCE NUMBER

4(b) ANNUAL REPORTS, ANNUAL AUDIT REPORTS, AND REGULARLY PREPARED BALANCE SHEETS	ATTACHMENT OR REFERENCE NUMBER

4(c) STUDIES, SURVEYS, ANALYSES, AND REPORTS	ATTACHMENT OR REFERENCE NUMBER

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5 (See the "References" listed in the General Instructions to the Form. Refer to the 1987 edition of the *Standard Industrial Classification Manual* for the 4-digit (SIC Code) industry codes. Refer to the Numerical List of Manufactured and Mineral Products, *1992 Census of Manufactures and Census of Mineral Industries* (MC92-R-1) for the 5-digit product class and 7-digit product codes. Report revenues for the 5-digit and 7-digit codes using the codes in the columns labeled "Product code.")

5(a) DOLLAR REVENUES BY INDUSTRY

4-DIGIT INDUSTRY CODE	DESCRIPTION	1992 TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5(b)(i) DOLLAR REVENUES BY MANUFACTURED PRODUCTS

7-DIGIT INDUSTRY CODE	DESCRIPTION	1992 TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5(b)(ii) PRODUCTS ADDED OR DELETED

DESCRIPTION (7-DIGIT PRODUCT CODE)	ADD	DELETE	YEAR OF CHANGE	TOTAL DOLLAR REVENUES

ITEM 5(b)(iii) DOLLAR REVENUES BY MANUFACTURED PRODUCT CLASS

5-DIGIT INDUSTRY CODE	DESCRIPTION	YEAR |_____| TOTAL DOLLAR REVENUES
	(item 5(b)(iii) continued on page 9)	

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5(b)(iii) DOLLAR REVENUES BY MANUFACTURED PRODUCT CLASS - CONTINUED

5-DIGIT INDUSTRY CODE	DESCRIPTION	YEAR |_____| TOTAL DOLLAR REVENUES

ITEM 5(c) DOLLAR REVENUES BY NON-MANUFACTURING INDUSTRY

4-DIGIT INDUSTRY CODE	DESCRIPTION	YEAR |_____| TOTAL DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

5(d) COMPLETE ONLY IF ACQUISITION IS IN THE FORMATION OF A JOINT VENTURE OR OTHER CORPORATION

5(d)(I) NAME AND ADDRESS OF THE JOINT VENTURE OR OTHER CORPORATION

5(d)(ii)

(A) CONTRIBUTIONS THAT EACH PERSON FORMING THE JOINT VENTURE OR OTHER CORPORATION HAS AGREED TO MAKE

(B) DESCRIPTION OF ANY CONTRACTS OR AGREEMENTS

(C) DESCRIPTION OF ANY CREDIT GUARANTEES OR OBLIGATIONS

(D) DESCRIPTION OF CONSIDERATION WHICH EACH PERSON FORMING THE JOINT VENTURE OR OTHER CORPORATION WILL RECEIVE

5(d)(iii) DESCRIPTION OF THE BUSINESS IN WHICH THE JOINT VENTURE OR OTHER CORPORATION WILL ENGAGE

5(d)(iv) SOURCE OF DOLLAR REVENUES BY 4-DIGIT SIC CODE (non-manufacturing) AND BY 5-DIGIT PRODUCT CLASS (manufacturing)

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 6

6(a) ENTITIES WITHIN PERSON FILING NOTIFICATION

6(b) SHAREHOLDERS OR PERSON FILING NOTIFICATION

NAME OF PERSON FILING NOTIFICATION	DATE

6(c) HOLDINGS OF PERSON FILING NOTIFICATION

ITEM 7 DOLLAR REVENUES

7(a) 4-DIGIT SIC CODE AND DESCRIPTION

7(b) NAME OF EACH PERSON WHICH ALSO DERIVED DOLLAR REVENUES

NAME OF PERSON FILING NOTIFICATION	DATE

7(c) GEOGRAPHIC MARKET INFORMATION

ITEM 8 PRIOR ACQUISITIONS (to be completed by acquiring person only)

NAME OF PERSON FILING NOTIFICATION	DATE

CERTIFICATION

This **NOTIFICATION AND REPORT FORM,** together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

NAME (Please print or type)	TITLE
SIGNATURE	DATE

Subscribed and sworn to before me at the
City of _____, State of _____

this _____day of _____, the year _____

Signature _____

My Commission expires _____

[SEAL]

NAME OF PERSON FILING NOTIFICATION	DATE

APPENDIX: INSURANCE

ITEM 1

	YEAR _____ AMOUNT
A PREMIUM RECEIPTS	
1 LIFE INSURANCE	
1a. ORDINARY LIFE INSURANCE	
1b. GROUP LIFE INSURANCE (including Federal Employees' Group Life Insurance) and Servicemans' Group Life Insurance, but excluding credit life insurance)	
1c. INDUSTRIAL LIFE INSURANCE	
1d. CREDIT LIFE INSURANCE	
2 ANNUITY CONSIDERATIONS	
2a. INDIVIDUAL ANNUITY CONSIDERATIONS	
2b. GROUP ANNUITY CONSIDERATIONS	
3 HEALTH INSURANCE	
3a. INDIVIDUAL HEALTH INSURANCE	
3b. GROUP HEALTH INSURANCE	
TOTAL	

	YEAR _____ AMOUNT
B NEW BUSINESS	
1 ORDINARY LIFE INSURANCE	
2 GROUP LIFE INSURANCE	
3 INDUSTRIAL LIFE INSURANCE	
4 CREDIT LIFE INSURANCE	
TOTAL	

ITEM 2 PROPERTY LIABILITY INSURANCE

LINE OF INSURANCE	A. DIRECT PREMIUMS	YEAR _____ AMOUNT B. NET PREMIUMS

ITEM 3 TITLE INSURANCE

A. NET DIRECT PREMIUMS WRITTEN	B. DIRECT PREMIUMS EARNED	YEAR _____ AMOUNT

BILLING CODE 6750–01–P

By direction of the Commission.

Dated: January 24, 2001.

Donald S. Clark,

Secretary.

[FR Doc. 01–2605 Filed 1–31–01; 8:45 am]

BILLING CODE 6750–01–C

FEDERAL TRADE COMMISSION

16 CFR Part 2

Rules of Practice

AGENCY: Federal Trade Commission (FTC).

ACTION: Interim rule with request for comments.

SUMMARY: The FTC is amending its Rules of Practice to incorporate procedures for internal agency review of requests for additional information or documentary material relating to transactions subject to the premerger notification requirements of Section 7A of the Clayton Act. These procedures are necessary to implement recent amendments to Section 7A. The procedures will ensure that petitions for such review are handled in accordance with the statute's requirements.

DATES: These rules are effective February 1, 2001. Comments should be filed no later than March 19, 2001.

ADDRESSES: Address all comments concerning these rules to Secretary, Federal Trade Commission, Room 159, 600 Pennsylvania Avenue, NW, Washington, DC 20580, or by e-mail to hsr-rules@ftc.gov.

FOR FURTHER INFORMATION CONTACT: Christian S. White, Assistant General Counsel, Room 592, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580. Telephone: (202) 326–32424.

SUPPLEMENTARY INFORMATION: On December 21, 2000, the President signed into law certain amendments to Section 7A of the Clayton Act, 15 U.S.C. 18a, which requires that parties to certain mergers or acquisitions file reports with the FTC and with the Department of Justice and to wait a specified period of time before consummating such a transaction, so that the agencies can determine whether the transaction may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation. *See* Pub. L. 106–553, 114 Stat. 2762 (''2000 Amendments''). The statutory amendments are effective on February 1, 2001.

In a separate **Federal Register** document, the Commission is adopting interim implementing amendments to its rules and notification form for premerger review under Section 7A (16 CFR Parts 801, 802, and 803) and, in another **Federal Register** document, is proposing additional rule amendments.

In this **Federal Register** document, the Commission, in accordance with Section 7A(e)(1)(B) of the Clayton Act, 15 U.S.C. 18a(e)(1)(B), as added by the 2000 Amendments, is adopting administrative procedures for persons seeking to obtain internal agency review of requests for additional information or documentary material (''second requests'') relating to proposed transactions for which premerger notification is required under Section 7A. These ''second request'' review procedures will be incorporated into previously reserved Subpart B of Part 2 of the Commission's Rules of Practice and will implement the statute's requirement that a senior agency official be designated for the review, upon petition, of a ''second request'' to determine whether it is unreasonably cumulative, unduly burdensome, or cumulative, or whether the petitioner has substantially complied with the request.

Administrative Procedure Act

These procedures are exempt from the notice-and-comment requirements of the Administrative Procedure Act as rules of agency organization, procedure or practice. *See* 5 U.S.C. 553(b)(A). Nonetheless, the Commission seeks public comment on these procedures and reserves the right to amend them based on its experience and on any comments that may be received after the procedures take effect.

Regulatory Flexibility Act

The requirements for initial and final regulatory analyses under the Regulatory Flexibility Act, 5 U.S.C. 601–612, do not apply to these procedural rules, because they will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605. Under the recent statutory amendments to Section 7A of the Clayton Act, transactions valued at less than $50 million are exempted, and these ''second request'' review procedures do not expand or otherwise alter the coverage of the premerger notification rules in a way that would affect its impact, if any, on small business. Accordingly, the Commission certifies that these procedural rules will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

Paperwork Reduction Act

These procedural rules do not contain any record maintenance, reporting, or disclosure requirements that would constitute agency ''collections of information'' that would have to be submitted for clearance and approval by the Office of Management & Budget under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3518.

List of Subjects in 16 CFR Part 2

Administrative practice and procedure.

Accordingly, for the reasons stated in the preamble, the Federal Trade Commission amends 16 CFR part 2 as follows:

PART 2—NONADJUDICATIVE PROCEDURES

1. Revise the authority citation for part 2 to read as follows:

Authority: 15 U.S.C. 46, unless otherwise noted.

2. Add subpart B to read as follows:

Subpart B—Petitions Filed Under Section 7A of the Clayton Act, as Amended, for Review of Requests for Additional Information or Documentary Material

Authority: 15 U.S.C. 18a(d), (e).

§ 2.20 Petitions for review of requests for additional information or documentary material.

(a) For purposes of this section, ''second request'' refers to a request for additional information or documentary material issued under 16 CFR 803.20.

(b) *Second request procedures.* (1) *Notice.* Every request for additional information or documentary material issued under 16 CFR 803.20 shall inform the recipient(s) of the request that the recipient has a right to discuss modifications or clarifications of the request with an authorized representative of the Commission. The request shall identify the name and telephone number of at least one such representative.

(2) *Second request conference.* An authorized representative of the Commission shall invite the recipient to discuss the request for additional information or documentary material soon after the request is issued. At the conference, the authorized representative shall discuss the competitive issues raised by the proposed transaction, to the extent then known, and confer with the recipient about the most effective way to obtain information and documents relating to the competitive issues raised. The

conference will ordinarily take place within 5 business days of issuance of the request, unless the recipient declines the invitation or requests a later date.

(3) *Modification of requests.* The authorized representative shall modify the request for additional information or documentary material, or recommend such modification to the responsible Assistant Director of the Bureau of Competition, if he or she determines that a less burdensome request would be consistent with the needs of the investigation. A request for additional information or documentary material may be modified only in writing signed by the authorized representative.

(4) *Review of request decisions.* (i) If the recipient of a request for additional information or documentary material believes that compliance with portions of the request should not be required and the recipient has exhausted reasonable efforts to obtain clarifications or modifications of the request from an authorized representative, the recipient may petition the General Counsel to consider and rule on unresolved issues. Such petition shall be submitted by letter to the General Counsel with a copy to the authorized representative who participated in the second request conference held under paragraph (b)(3) of this section. The petition shall not, without leave of the General Counsel, exceed 500 words, excluding any cover, table of contents, table of authorities, glossaries, proposed form of relief and any appendices containing only sections of statutes or regulations, and shall address petitioner's efforts to obtain modification from the authorized representative.

(ii) Within 2 business days after receiving such a petition, the General Counsel shall set a date for a conference with the petitioner and the authorized representative.

(iii) Such conference shall take place within 7 business days after the General Counsel receives the petition, unless the request recipient agrees to a later date or declines to attend a conference.

(iv) Not later than 3 business days before the date of the conference, the petitioner and the authorized representative may each submit memoranda regarding the issues presented in the petition. Such memoranda shall not, without leave of the General Counsel, exceed 1250 words, excluding any cover, table of contents, table of authorities, glossaries, proposed form of relief and appendices containing only sections of statutes or regulations. Such memoranda shall be delivered to counsel for the other participants on the same day they are delivered to the General Counsel.

(v) The petitioner's memorandum shall include a concise statement of reasons why the request should be modified, together with proposed modifications, or a concise explanation why the recipient believes it has substantially complied with the request for additional information or documentary material.

(vi) The authorized representative's memorandum shall include a concise statement of reasons why the petitioner's proposed modifications are inappropriate or a concise statement of the reasons why the representative believes that the petitioner has not substantially complied with the request for additional information and documentary material.

(vii) The General Counsel shall advise the petitioner and the authorized representative of his or her decision within 3 business days following the conference.

By direction of the Commission.

Dated: January 24, 2001.

Donald S. Clark,

Secretary.

Statement of Commissioner Orson Swindle Concerning Premerger Notification Rules Changes File No. P989316

The Commission and its staff have worked quickly and diligently on a package of interim rules to implement statutory changes to the premerger notification program that will take effect shortly. Other amendments to the premerger rules are designed to achieve needed housekeeping improvements or spell out procedures for the appeals process in Hart-Scott-Rodino matters. Although the interim rules announced today take effect imminently, I look forward to—and would encourage—any comments that members of the public care to submit concerning the clarity, consistency, and anticipated effects of these rules.

[FR Doc. 01–2607 Filed 1–31–01; 8:45 am]

BILLING CODE 6750–01–P

FEDERAL TRADE COMMISSION

16 CFR Parts 801 and 802

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is proposing amendments to the premerger notification rules (''the rules'') that require the parties to certain mergers and acquisitions to file reports with the Federal Trade Commission (''the Commission'') and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (''the Assistant Attorney General'') and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable these enforcement agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation. This document seeks comments on proposed amendments to clarify and improve the effectiveness of the rules, including corrections, clarifications, and updates to examples.

DATES: Comments must be received on or before March 19, 2001.

ADDRESSES: Address all comments concerning this proposal to Secretary, Federal Trade Commission, Room 159, 600 Pennsylvania Avenue, NW, Washington, DC 20580, or by e-mail to hsr_rules@ftc.gov and the Director of Operations and Merger Enforcement, Antitrust Division, Department of Justice, Room 10103, 601 D Street, NW, Washington, DC 20530. With regard to the Paperwork Reduction Act, send a copy of any comments regarding the burden estimate or any other aspect of the information collection, including suggestions for reducing the burden, to: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, Washington, DC 20503; ATTN.: Edward Clarke, Desk Officer for the Federal Trade Commission.

FOR FURTHER INFORMATION CONTACT: Karen Berg or Tom Hancock, Attorneys, Premerger Notification Office, Bureau of Competition, Room 303, Federal Trade Commission, Washington, DC 20580. Telephone: (202) 326–3100.

SUPPLEMENTARY INFORMATION:

Background

Section 7A of the Clayton Act (''the act''), 15 U.S.C. 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1390, requires all persons contemplating certain mergers or acquisitions to file notification with the Commission and the Assistant Attorney General and to wait a designated period of time before consummating such transactions. Congress empowered the Commission, with the concurrence of the Assistant Attorney General, to require ''that the notification * * * be in such form and contain such documentary material and information * * * as is necessary and appropriate'' to enable the agencies ''to determine whether such acquisitions may, if consummated, violate the antitrust laws.'' Congress similarly granted rulemaking authority to, *inter alia,* ''prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.'' 15 U.S.C. 18a(d).

Pursuant to that section, the Commission, with the concurrence of the Assistant Attorney General, developed the Antitrust Improvements Act Rules (''the rules'') and Notification and Report Form for Certain Mergers and Acquisitions (''the Form''), has amended or revised the rules and Form on fourteen occasions, and now proposes these rules changes.

These proposed changes include updating examples in Sections 801.4, 801.14, 801.90 and 802.8; amending Section 801.15 to reflect the $50 million threshold and give proper reference to other rules sections; modifying Section 802.2 to remove an exemption for associated agricultural assets; revising Section 802.6(b) regarding federal regulatory approval; restructuring and revising Sections 802.50 and 802.51 to clarify and refocus exemptions for acquisitions of foreign assets and voting securities; and amending the example to Section 802.52 to correctly cite restructured Section 802.50.

Statement of Basis and Purpose for the Commission's Proposed Revision of Its Premerger Notification Rules

Section 801.4 Secondary Acquisitions

Example 5 in section 801.4 will be amended so that it refers to ''B's shareholders'' instead of ''B'', correcting an original drafting error.

Section 801.14 Aggregate Total Amount of Voting Securities and Assets

The Commission proposes to add clarifying language to Example 2. This change does not alter the application of the rule, but essentially fills in gaps and makes the logic of the example easier to follow.

Section 801.15 Aggregation of Voting Securities and Assets the Acquisition of Which Was Exempt

In conjunction with the modifications to sections 802.50 and 802.51, changes proposed to section 801.15 will correspond with the proposed $50 million threshold for foreign transactions. The Commission also proposes amendments to the body of section 801.15 which cites paragraphs of current sections 802.50 and 802.51 which will no longer be correct due to our restructuring of these two rules. Accordingly, Example 4 of section 801.15 is also modified to correct the paragraph cited and to incorporate the proposed $50 million threshold. Examples 1, 5, 7 and 8 have received the benefit of clarifying language which will not alter the application of the rule but make the examples easier to follow.

Section 801.90 Transactions or Devices for Avoidance

As with other rules, the Commission proposes that clarifying language be added to Example 1. The reference to Section 802.20, which no longer exists, was deleted. Again, this change does not alter the application of the rule but makes the example more accurate.

Section 802.2 Certain Acquisitions of Real Property Assets

An amendment is proposed to section 802.2(g) to remove ''associated agricultural assets'' from the agricultural property exemption. Associated agricultural assets are defined in paragraph (1) as assets that are integral to the agricultural business activities conducted on the property. Such assets include inventory (*e.g.*, livestock, poultry, crops, fruit, vegetables, milk, eggs); structures that house livestock raised on the real property; and fertilizer and animal feed. Associated agricultural assets do not include processing facilities such as poultry and livestock slaughtering, processing and packing facilities. Proposed paragraph (1) has been rewritten to eliminate the exemption for associated agricultural property assets, while continuing to make clear that processing facilities are not exempt under section 802.2(g), and to move current paragraph (2) into this section. Proposed paragraph (1) now specifies two types of property that are not covered by the agricultural property exemption. Current paragraph (3) has been renumbered paragraph (2). Parenthetical language has been added describing assets incidental to the ownership of agricultural property as ''cash, prepaid taxes or insurance, rentals receivable, and the like.'' This

language comes from an earlier incarnation of the rule, 1978 section 802.1(a), but was not included in section 802.2(g) when it was promulgated in 1996 (see 61 FR 13666, Mar. 28, 1996). The Commission believes this parenthetical will help define what is meant when such assets are referenced.

The removal of associated agricultural assets from section 802.2(g) is proposed because the general increase in the filing threshold to $50 million will itself exclude acquisitions involving associated agricultural assets that are likely to be of little or no competitive consequence. Maintaining an exemption for acquisitions where the associated agricultural assets, such as livestock on the property, are valued at greater than $50 million seems unnecessary and ill-advised. The section 802.2 exemption titled ''certain acquisitions of real property assets'' is based on the rationale that these categories of assets ''are abundant and used in markets that are generally unconcentrated''; where associated agricultural assets valued at greater than $50 million are being acquired in conjunction with agricultural property, there is little reason to presume that this justification for their exemption would still apply (see 61 FR at 13669).

In addition, amending the rule to remove ''associated agricultural assets'' from the exemption as well as making clear that ''agricultural property'' is limited to real property (by deleting ''and assets'' from its definition) will eliminate whatever ambiguity may arguably exist in section 802.2(g). Some parties have contended that the exemption covers, in addition to real property transferred in an acquisition and livestock raised on that real property, livestock raised by contract growers on other real property. The Commission's Premerger Notification Office (''PNO'') and the Antitrust Division of the Department of Justice, on the basis of both the rationale of the real property exemptions created by the antitrust enforcement agencies in 1996 and the language of the agricultural property exemption itself, have read the agricultural property exemption as not extending to assets located elsewhere. The Commission believes that the amendments proposed comport with the agencies' responsibility to exempt only those categories of transactions that are not likely to violate the antitrust laws and also eliminates any ambiguity in the language of the rule.

Section 802.6 Federal Agency Approval

In the 1978 rules (43 FR 33450, July 31, 1978), section 802.6 in its entirety consisted of what is currently section 802.6(a), namely, a description of the nature and manner of submission of ''information and documentary material'' for purposes of sections 7A(c)(6) and (c)(8) of the act. Section 802.6(b) was added in a 1983 rules change (48 FR 34427). Section 802.6(b)(1) of this new provision exempted acquisitions of parties involved in aeronautics and air transportation that required approval by the Civil Aeronautics Board (''CAB'') prior to consummation. Section 802.6(b)(2) of the 1983 rules made it explicit that this exemption did not exempt the acquisition of ''assets which are engaged in a business or businesses *other than* aeronautics or air transportation as defined * * *.'' (Emphasis added.) The acquisition of such assets did not require CAB approval and, accordingly, was not exempt under section 802.6(b)(1), even though portions of the acquisition may be exempt.

Pursuant to the Airline Deregulation Act of 1978, the CAB went out of existence in 1985. As airline deregulation progressed, the Department of Transportation assumed regulatory authority over airline mergers, but its authority to approve (and to grant antitrust immunity for) airline mergers sunsetted on January 1, 1989. See Formal Interpretation 14 (Nov. 14, 1988). Thus, except for paragraph (a), section 802.6 has no direct application at this time. This does not mean that the 1983 version of section 802.6(b) is without significance: The principle it embodies has been relied on several times. Formal Interpretation 14, while recognizing that section 802.6(b) would no longer directly apply to any transactions, recognized the value of leaving the provision in the rules because of its application to other regulated industries: '' * * * through informal interpretations * * *, the Commission's Premerger Notification Office has used the method reflected in section 802.6(b)(2). * * * The Premerger Notification Office will continue to apply this method to such other transactions consummated after December 31, 1989.''

On November 12, 1999, The Gramm-Leach-Bliley Act (''the GLB Act''), Public Law 106–102, was signed into law. The GLB Act allows bank holding companies and banks to affiliate with companies in financial services markets that were previously off limits to such entities. Section 133(c) of the GLB Act amends subsections (c)(7) and (c)(8) of section 7A of the Clayton Act, which exempt from premerger notification certain mergers and acquisitions involving banking institutions and thrifts that receive advance antitrust review by federal bank regulatory agencies. The amendments to these subsections make explicit in certain circumstances that where a transaction includes portions that receive premerger antitrust review by banking agencies and other portions that do not, the parts not so reviewed by the banking agencies must go through the HSR premerger notification process, provided the size criteria are met and no other exemption applies. In discussing these amendments, sponsors of the legislation described their approach as codifying the approach taken in section 802.6. *See, e.g.*, Cong. Rec. H11276 (Nov. 2, 1999).

On April 3, 2000, the PNO, with the concurrence of the Assistant Attorney General, published Formal Interpretation 17 describing the changes in sections 7A(c)(7) and (c)(8) of the Clayton Act mandated by the GLB Act. Employing the term ''mixed transactions'' to apply to those that have some portions subject to regulatory premerger competitive review and other portions not, this Formal Interpretation gives examples of the analysis under section 7A for certain types of ''mixed transactions'' in the banking industry that were not explicitly addressed by the GLB Act. Again referring to section 802.6(b), Formal Interpretation 17 reiterates the PNO's position that the portions of such mixed transactions not subject to advance competitive review and approval by a regulatory agency will be subject to the HSR filing and waiting period requirements if they meet the HSR size criteria and are not otherwise exempt.

Because of the importance of maintaining a readily accessible statement of the treatment of mixed transactions in the rules, the Commission is proposing to revise section 802.6(b) rather than to remove it. Proposed section 802.6(b) has been revised to state a general rule regarding mixed transactions rather than one that is industry specific. Paragraph (b)(1) defines a ''mixed transaction'' as one that has some portion that is exempt pursuant to subsections (c)(6), (c)(7), or (c)(8) of the act because it requires regulatory agency premerger competitive review and approval and another portion that does not require such review. (Note that subsection (c)(6) also requires that the regulatory approval grant antitrust immunity for

the exemption to be effective, and (c)(8) also requires that all information and documentary material submitted to the regulatory agency be contemporaneously filed with the Commission and the DOJ at least thirty days prior to consummation.) Paragraph (b)(2) then states the principle that the portion of a mixed transaction that does not require advance competitive review and approval by a regulatory agency is reportable under HSR as if it were a separate transaction—that is, if the Act's thresholds are met and there is no other applicable exemption. Finally, the Example has been amended to concern the application of section 802.6(b) to the banking industry.

Section 802.8 Certain Supervisory Acquisitions

In section 802.8, the Commission proposes to amend the section to substitute the word ''if'' for ''it'', correcting a typographical error.

Sections 802.50 and 802.51 Acquisitions of Foreign Assets and Voting Securities

The Commission proposes both structural and substantive revisions to sections 802.50 and 802.51. The structural changes are intended to make the rules governing foreign transactions easier to understand and apply. The PNO receives numerous calls each year requesting advice on the applicability of sections 802.50 and 802.51 of the rules. As global merger activity has increased, the exemptions for foreign assets and foreign voting securities have become more relevant to determinations of a party's HSR reporting requirements. In response to input from the private sector, the Commission proposes revising these rules for greater ease of comprehension. The proposals frame the rules more straightforwardly by organizing the sections by the type of acquisition they deal with, rather than by the type of acquiring person involved. Thus, proposed section 802.50 applies to the acquisition of foreign assets and section 802.51 to the acquisition of foreign voting securities. Each section begins with general criteria for reportability for U.S. and foreign acquiring persons and then proceeds to outline further criteria that exempt a transaction from reporting requirements in certain circumstances.

The new organization should make the parallels and the differences between the treatment of assets and voting securities more readily apparent, and thereby facilitate the application of both rules.

The substantive revisions simultaneously narrow and expand the reporting requirements so that they apply to those foreign transactions that are most likely to have an appreciable and direct impact on U.S. commerce. In addition to the threshold changes discussed below, the Commission also proposes to add to the rules the longstanding interpretation by the PNO of requiring the aggregation of U.S. sales and assets of multiple foreign issuers if controlling interests in such issuers are being acquired. Additionally, the Commission proposes that sales in or into the United States be determined by the amount of such sales in the most recent fiscal year combined with the amount of such sales since the end of the most recent fiscal year, calculated no more than sixty days prior to the filing of notification or if notification is not required, within sixty days prior to the consummation of the acquisition. This change is intended to ensure that where U.S. sales generated by foreign assets and voting securities have been trending steeply upward prior to the acquisition, a filing will be required if that trend has resulted in over $50 million in U.S. sales. Finally, for the sake of consistency with the rest of the rules, the Commission has also changed the measure of the value of assets located in the U.S. from book value to fair market value.

The first major proposed change to these sections consists of raising both the $15 million and $25 million thresholds that trigger reporting obligations for foreign transactions to $50 million. This change is intended to preserve the principle underlying these sections, that acquisitions of foreign assets or voting securities should not be subject to the reporting requirements unless the assets or voting securities being acquired have a direct impact on U.S. commerce. That direct impact would be measured by the $50 million threshold amount established in the new legislation. For asset transactions, the impact would be reflected by the amount of sales in or into the U.S. For voting securities transactions, the impact would be reflected either by the amount of sales in or into the U.S. or by the total value of assets, measured by fair market value, held by the issuer in the U.S. Sales or assets of multiple foreign issuers are to be aggregated where controlling interests in these issuers are being acquired, in accordance with the PNO's longstanding position. Sales in or into the United States would be determined by the amount of such sales in the most recent fiscal year plus the amount of such sales since the end of the most recent fiscal year, in order to assure that the acquisition of assets or voting securities that have only recently begun to generate large U.S. sales not escape notification. Sales since the end of the most recent fiscal year should be calculated no more than sixty days prior to the filing of notification or if notification is not required, within sixty days prior to the consummation of the acquisition. Fair market value would replace book value of assets in order to harmonize these sections with the rest of the rules.

The Commission also proposes to exempt an acquisition between foreign persons that do not meet the $110 million aggregate sales and assets test only where such acquisition is not valued at over $200 million. The 1978 Statement of Basis and Purpose explains that the $110 million threshold was adopted to approximate the size-of-person criteria of Section 7A(a)(2), as it seemed appropriate and consistent with congressional intent not to exempt a transaction involving two foreign persons with a U.S. presence similar in size to the general criteria of the act for all persons. 43 FR 33498 (July 31, 1978). Since the new legislation removes the size-of-person test for acquisitions valued at over $200 million, the Commission believes it is appropriate and consistent with congressional intent to require filings from foreign persons, regardless of the size of their U.S. presence, where the transaction is valued at over $200 million and the $50 million threshold of these exemption rules is satisfied.

The remaining substantive proposed change is the extension of reportability to acquisitions of foreign assets by foreign persons. The 1978 Statement of Basis and Purpose justified the blanket exclusion of these transactions in existing section 802.51(a) on the grounds that asset transactions were less likely to affect the U.S. economy than voting securities transactions. Experience at both agencies has shown that foreign assets acquisitions can and do have a direct impact on the U.S. economy. This is more likely to be true where the assets generate over $50 million in sales in or into the U.S. Thus, it appears to be appropriate to require that their acquisition be reported where minimum contacts are present. Finally, the examples to these rules and to section 802.52 have been revised to reflect these changes.

Section 802.52 Acquisitions By or From Foreign Governmental Corporations

The proposed change to the example following section 802.52 incorporates the proposed change to section 802.50

which would raise the threshold of sales in or into the U.S. for acquisitions of foreign assets. The figure ''$50 million'' has been substituted for ''$25 million'' in the parenthetical at the end of the proposed example to reflect the fact that the sale of assets in the example would also be exempt under Section 802.50 if the aggregate sales in or into the U.S. were $50 million or less.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on small businesses, except where the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605.

Because of the size of the transactions necessary to invoke a Hart-Scott-Rodino filing, the premerger notification rules rarely, if ever, affect small businesses. Indeed, the recent amendments to section 7A of the Clayton Act, which these rule amendments implement, were intended to reduce the burden of the premerger notification program by exempting all transactions valued at less than $50 million. Further, none of the proposed rule amendments expands the coverage of the premerger notification rules in a way that would affect small business. Accordingly, the Commission certifies that these proposed rules will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3518, requires agencies to submit requirements for ''collections of information'' to the Office of Management and Budget (''OMB'') and obtain clearance before instituting them. Such collections of information include reporting, recordkeeping, or disclosure requirements contained in regulations. The Hart-Scott-Rodino Premerger Notification rules and report Form contain information collection requirements, as defined by the Paperwork Reduction Act, that have been reviewed and approved by OMB under OMB Control No. 3084–0005. Because the proposed amendments would affect the information collection requirement of the premerger notification program, the proposed amendments are being submitted to OMB for review pursuant to the Paperwork Reduction Act. As noted in the Supporting Statement accompanying the Request for OMB Review, however, staff believes that the proposed rules will not pose any net change to paperwork burden estimates regarding filing entities.

List of Subjects in 16 CFR Parts 801 and 802

Antitrust.

For the reasons stated in the preamble, the Federal Trade Commission proposes to amend 16 CFR parts 801 and 802 as set forth below:

PART 801—COVERAGE RULES

1. The authority citation for part 801 continues to read as follows:

Authority: 15 U.S.C. 18a(d).

2. Amend § 801.4 by revising Example 5 in paragraph (b) to read as follows:

§ 801.4 Secondary acquisitions.

* * * * *

(b) * * *

Examples: * * *

5. In example 4 above, suppose the consideration paid by ''A'' for the acquisition of B is $60 million worth of the voting securities of ''A.'' By virtue of § 801.2(d)(2), ''A'' is both an acquiring and acquired person; B is an acquired person and B's shareholders are acquiring persons. A will still be deemed to have acquired control of B, and therefore the resulting acquisition of the voting securities of X is a secondary acquisition. Although B's shareholders are now also acquiring persons, unless one of them gains control of ''A'' in the transaction, no B shareholder makes a secondary acquisitions of stock held by ''A.'' If the consideration paid by ''A'' is the voting securities of one of ''A''s subsidiaries and a shareholder of B thereby gains control of that subsidiary, the shareholder will make secondary acquisitions of any minority holdings of that subsidiary.

* * * * *

3. Amend § 801.14 by revising Example 2 to read as follows:

§ 801.14 Aggregate total amount of voting securities and assets.

* * * * *

Examples: * * *

2. In the previous example, assume that the assets acquisition occurred first, and that the acquisition of the voting securities is to occur within 180 days of the first acquisition. ''A'' now looks to § 801.13(b)(2) and determines that the previously acquired assets are not treated ''as part of the present acquisition'' because the second acquisition is of voting securities and not assets; thus, the asset and voting securities acquisitions are not treated as one transaction. Therefore, the second acquisition would not be subject to the requirements of the act since the value of the securities to be acquired does not exceed the $50 million size-of-transaction test.

4. Amend § 801.15 by revising the introductory text, paragraphs (a)(2) and (b), and Examples 1, 4, 5, 7, and 8, to read as follows:

§ 801.15 Aggregation of voting securities and assets the acquisition of which was exempt.

Notwithstanding § 801.13, for purposes of determining the aggregate total amount of voting securities and assets of the acquired person held by the acquiring person under section 7A(a)(2) and § 801.1(h), none of the following will be held as a result of an acquisition:

(a) * * *

(2) Sections 802.1, 802.2, 802.5, 802.6(b)(1), 802.8, 802.31, 802.35, 802.52, 802.53, 802.63, and 802.70;

(b) Assets or voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the act and these rules been in effect), or the present acquisition of which is exempt, under section 7A(c)(9) and §§ 802.3, 802.4, 802.50(a), 802.51(a), 802.51(b) and 802.64 unless the limitations contained in section 7A(c)(9) or those sections do not apply or as a result of the acquisition would be exceeded, in which case the assets or voting securities so acquired will be held; and

* * * * *

Examples: 1. Assume that acquiring person ''A'' is simultaneously to acquire $51 million of the convertible voting securities of X and $12 million of the voting common stock of X. Since the overall value of the voting securities to be acquired (§ 801.1 defines convertible voting securities as ''voting securities'') is greater than $50 million, ''A'' must determine whether it is obliged to file notification and observe a waiting period before acquiring the securities. However, because § 802.31 is one of the exemptions listed in paragraph (a)(2) of this section, ''A'' would not hold the convertible voting securities as a result of this acquisition. Therefore, since as a result of the acquisition ''A'' would hold only the $12 million of common stock, the size-of-transaction tests of Section 7A(a)(2) would not be satisfied, and ''A'' need not observe the requirements of the act before acquiring the common stock. (Note, however, that the $51 million of convertible voting securities would be reflected in ''A''s next regularly prepared balance sheet, for purposes of § 801.11.)

* * * * *

4. Assume that acquiring person ''B,'' a United States person, acquired from corporation ''X'' two manufacturing plants located abroad, and assume that the acquisition price was $160 million. In the most recent fiscal year and to date since the end of that fiscal year, sales into the United States attributable to the plants were $40 million, and thus the acquisition was exempt under § 802.50(a). Within 180 days of that acquisition, ''B'' seeks to acquire a third plant from ''X,'' to which United States sales of $12 million were attributable in the most recent fiscal year and to date since the end of that fiscal year. Since under § 801.13(b)(2), as a

result of the acquisition, ''B'' would hold all three plants of ''X,'' and the $50 million limitation in § 802.50(a) would be exceeded, under paragraph (b) of this rule, ''B'' would hold the previously acquired assets for purposes of the second acquisition. Therefore, as a result of the second acquisition, ''B'' would hold assets of ''X'' exceeding $50 million in value, would not qualify for the exemption in § 802.50(a), and must observe the requirements of the act and file notification for the acquisition of all three plants before acquiring the third plant.

5. ''A'' acquires producing oil reserves valued at $400 million from ''B.'' Two months later, ''A'' agrees to acquire oil and gas rights valued at $75 million from ''B.'' Paragraph (b) of this section and § 801.13(b)(2) require aggregating the previously exempt acquisition of oil reserves with the second acquisition. If the two acquisitions, when aggregated, exceeds the $500 million limitation on the exemption for oil and gas reserves in § 802.3(a), ''A'' and ''B'' will be required to file notification for the latter acquisition, including within the filings the earlier acquisition. Since, in this example, the total value of the assets in the two acquisitions, when aggregated, is less than $500 million, both acquisitions are exempt from the notification requirements. In determining whether the value of the assets in the two acquisitions exceed $500 million, ''A'' need not determine the current fair market value of the oil reserves acquired in the first transaction, since these assets are now within the person of ''A.'' Instead, ''A'' is directed by § 801.13(b)(2)(ii) to use the value of the oil reserves at the time of their prior acquisition in accordance with § 801.10(b).

* * * * *

7. In Example 6, above, assume that ''X'' acquired 30 percent of the voting securities of M and proposes to acquire 40 percent of the voting securities of N, another entity controlled by ''Z.'' Assume also that M's assets at the time of ''X's'' acquisition of M's voting securities consisted of $90 million worth of producing coal reserves and non-exempt assets with a fair market value of $39 million, and that N's assets currently consist of $60 million worth of producing coal reserves and non-exempt assets with a fair market value of $28 million. Since ''X'' acquired a minority interest in M and intends to acquire a minority interest in N, and since M and N are controlled by ''Z,'' the assets of M and N must be aggregated, pursuant to §§ 801.15(b) and 801.13, to determine whether the acquisition of N's voting securities is exempt or whether it is reportable pursuant to the terms of § 802.4(c). ''X'' is required to determine the current fair market value of M's assets. If the fair market value of M's coal reserves is unchanged, the aggregated exempt assets do not exceed the limitation for coal reserves under § 802.3(b). However, if the present fair market value of N's non-exempt assets also is unchanged, the present fair market value of the non-exempt assets of M and N when aggregated is greater than $50 million. Thus the acquisition of the voting securities of N is not exempt under § 802.4. If ''X'' proposed to acquire 50 percent or more of the voting securities of both M and N in the same acquisition, the assets of M and N must be aggregated to determine if the acquisition of the voting securities of both issuers is exempt. Since the fair market value of the aggregated non-exempt assets exceeds $50 million, the acquisition would not be exempt.

8. ''A'' acquired 49 percent of the voting securities of M and 45 percent of the voting securities of N. Both M and N are controlled by ''B.'' At the time of the acquisition M held rights to producing coal reserves worth $90 million and N held a producing coal mine worth $90 million. This acquisition was exempt since the aggregated holdings fell below the $200 million limitation for coal in § 802.3(b). A year later, ''A'' proposes to acquire an additional 10 percent of the voting securities of both M and N. In the intervening year, M has acquired coal reserves so that its holdings are now valued at $140 million, and the value of N's assets remained unchanged. ''A's'' second acquisition would not be exempt. ''A'' is required to determine the value of the exempt assets and any non-exempt assets held by any issuer whose voting securities it intends to acquire before each proposed acquisition (unless ''A'' already owns 50 percent or more of the voting securities of the issuer) to determine if the value of those holdings of the issuer falls below the limitation of the applicable exemption. Here, the holdings of M and N now exceed the $200 million exemption for acquisitions of coal reserves in § 802.3, and thus do not qualify for the exemption of voting securities provided by § 802.4(a).

5. Amend § 801.90 by revising Example 1 to read as follows:

§ 801.90 Transactions or devices for avoidance.

* * * * *

Examples: 1. Suppose corporations ''A'' and ''B'' wish to form a joint venture. ''A'' and ''B'' contemplate a total investment of over $100 million in the joint venture; persons ''A'' and ''B'' each have total assets in excess of $100 million. Instead of filing notification pursuant to § 801.40, ''A'' creates a new subsidiary, A1, which issues half of its authorized shares to ''A.'' Assume that A1 has total assets of $3000. ''A'' then sells 50 percent of its A1 stock to ''B'' for $1500. Thereafter, ''A'' and ''B'' each contribute $53 million to A1 in exchange for the remaining authorized A1 stock (one-fourth each to ''A'' and ''B''). ''A''s creation of A1 was exempt under § 802.30; its $1500 sale of A1 stock to ''B'' did not meet the size-of-transaction filing threshold in Section 7A(a)(2)(B); and the second acquisitions of stock in A1 by ''A'' and ''B'' were exempt under Sections 7A(c)(3) and (10), because ''A'' and ''B'' each already controlled A1, based on their holdings of 50 percent of A1's then-outstanding shares. Since this scheme appears to be for the purpose of avoiding the requirements of the act, the sequence of transactions will be disregarded. The transactions will be viewed as the formation of a joint venture corporation by ''A'' and ''B'' having over $10 million in assets. Such a transaction would be covered by § 801.40, and ''A'' and ''B'' must file notification and observe the waiting period.

* * * * *

PART 802—EXEMPTION RULES

6. The authority citation for part 802 continues to read as follows:

Authority: 15 U.S.C. 18a(d).

7. Revise § 802.2(g) to read as follows:

§ 802.2 Certain acquisitions of real property assets.

* * * * *

(g) *Agricultural property.* An acquisition of agricultural property and assets incidental to the ownership of such property shall be exempt from the requirements of the act. Agricultural property is real property that primarily generates revenues from the production of crops, fruits, vegetables, livestock, poultry, milk and eggs (activities within SIC Major Groups 01 and 02).

(1) Agricultural property does not include either:

(i) Processing facilities such as poultry and livestock slaughtering, processing and packing facilities; or

(ii) Any real property and assets either adjacent to or used in conjunction with processing facilities that are included in the acquisition.

(2) In an acquisition that includes agricultural property, the transfer of any assets that are not agricultural property or assets incidental to the ownership of such property cash, prepaid taxes or insurance, rentals receivable and the like) shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition.

* * * * *

8. Amend § 802.6 by revising paragraph (b) and the Example to read as follows:

§ 802.6 Federal agency approval.

* * * * *

(b)(1) A mixed transaction is one that has some portion that is exempt under section 7A(c)(6), (c)(7) or (c)(8) because it requires regulatory agency premerger competitive review and approval, and another portion that does not require such review.

(2) The portion of a mixed transaction that does not require advance competitive review and approval by a regulatory agency is subject to the act and these rules as if it were being acquired in a separate acquisition.

Example: Bank ''A'' acquires Bank ''B'', which owns a financial subsidiary engaged in securities underwriting. ''A''s acquisition of ''B'' requires agency approval by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System

or Federal Deposit Insurance Corporation (depending on whether ''A'' is a national bank, state member bank, or state non-member bank under section 18(c) of the FDI Act), and therefore is exempt from filing under section 7A(c)(7). However, the acquisition of the financial subsidiary is subject to HSR reporting requirements, and ''A'' and ''B'' each must make a filing for that portion of the transaction and observe the waiting period if the act's thresholds are met.

9. Revise § 802.8(a) to read as follows:

§ 802.8 Certain supervisory acquisitions.

(a) A merger, consolidation, purchase of assets, or acquisition requiring agency approval under sections 403 or 408(e) of the National Housing Act, 12 U.S.C. 1726, 1730a(e), or under section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464 shall be exempt from the requirements of the act, including specifically the filing requirement of section 7A(c)(8), if the agency whose approval is required finds that approval of such merger, consolidation, purchase of assets, or acquisition is necessary to prevent the probable failure of one of the institutions involved.

* * * * *

10. Revise § 802.50 to read as follows:

§ 802.50 Acquisitions of foreign assets.

(a) The acquisition of assets located outside the United States shall be exempt from the requirements of the act unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding $50 million during the acquired person's most recent fiscal year, combined with such sales to date since the end of that fiscal year.

(b) Where the foreign assets being acquired exceed the threshold in (a) above, the acquisition nevertheless shall be exempt where:

(1) Both acquiring and acquired persons are foreign;

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million in their respective most recent fiscal years, combined with such sales to date since the end of those fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(c)(2)) are less than $110 million; and

(4) The transaction does not meet the criteria of Section 7A(a)(2)(A).

(c) Any determination of sales in or into the U.S. must be made within 60 calendar days prior to the filing of notification or if such notification is not required, within 60 calendar days prior to the consummation of the acquisition.

Examples: 1. Assume that ''A'' and ''B'' are both U.S. persons. ''A'' proposes selling to ''B'' a manufacturing plant located abroad. Sales in or into the United States attributable to the plant totaled $13 million in the most recent fiscal year and to date. The transaction is exempt under this paragraph.

2. Sixty days after the transaction in example 1, ''A'' proposes to sell to ''B'' a second manufacturing plant located abroad; sales in or into the United States attributable to this plant totaled $38 million in the most recent fiscal year and to date. Since ''B'' would be acquiring the second plant within 180 days of the first plant, both plants would be considered assets of ''A'' held by ''B'' as a result of the second acquisition (see § 801.13(b)(2)). Since the total sales in or into the United States exceed $50 million, the acquisition of the second plant would not be exempt under this paragraph.

3. Assume that ''A'' and ''B'' are foreign persons with aggregate sales in or into the United States of $200 million. If ''A'' acquires only foreign assets of ''B,'' and if those assets generated $50 million or less in sales into the United States, the transaction is exempt.

4. Assume that ''A'' and ''B'' are foreign persons with aggregate sales in or into the United States and assets located in the United Sates of less than $100 million. If ''A'' acquires only foreign assets of ''B'', and those assets generated in excess of $50 million in sales into the United States during the most recent fiscal year and to date, the transaction is exempt from reporting if the assets are valued at $200 million or less, but is reportable if valued at greater than $200 million.

11. Revise § 802.51 to read as follows:

§ 802.51 Acquisitions of voting securities of a foreign issuer.

(a) *By U.S. persons.* The acquisition of voting securities of a foreign issuer by a U.S. person shall be exempt from the requirements of the act unless the issuer (including all entities controlled by the issuer) either:

(1) Holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(c)(2)) having an aggregate total value of over $50 million; or

(2) Made aggregate sales in or into the United States of over $50 million in its most recent fiscal year, combined with such sales to date since the end of that fiscal year.

(b) *By foreign persons.* The acquisition of voting securities of a foreign issuer by a foreign person shall be exempt from the requirements of the act unless the acquisition will confer control of the issuer and the issuer (including all entities controlled by the issuer) either:

(1) Holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(c)(2)) having an aggregate total value of over $50 million; or

(2) Made aggregate sales in or into the United States of over $50 million in its most recent fiscal year, combined with such sales to date since the end of that fiscal year.

(3) If controlling interests in multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether the $50 million thresholds are exceeded.

(c) where a foreign issuer whose securities are being acquired exceeds the threshold in paragraph (b)(1) or (b)(2) of this section, the acquisition nevertheless shall be exempt where:

(1) Both acquiring and acquired persons are foreign;

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million in their respective most recent fiscal years, combined with such sales to date since the end of those fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to § 801.40(c)(2)) are less than $110 million; and

(4) The transaction does not meet the criteria of Section 7A(a)(2)(A).

(d) Any determination of sales in or into the U.S. must be made within 60 calendar days prior to the filing of notification or if such notification is not required, within 60 calendar days prior to the consummation of the acquisition.

Examples: 1. ''A,'' a U.S. person, is to acquire the voting securities of C, a foreign issuer. C has no assets in the United States, but made aggregate sales into the United States of $77 million in the most recent fiscal year and to date. The transaction is not exempt under this section.

2. Assume that ''A'' and ''B'' are foreign persons with aggregate sales in or into the United States of $200 million, and that ''A'' is acquiring 100% of the voting securities of ''B.'' Included within ''B'' is U.S. issuer C, whose total U.S. assets are valued at $161 million. Since ''A'' will be acquiring control of an issuer, ''C'', with total U.S. assets of more than $50 million, and the parties' aggregate sales in or into the U.S. in the relevant time period exceeds $110 million, the acquisition is not exempt under this section.

12. Amend § 802.52 by revising the Example to read as follows:

§ 802.52 Acquisitions by or from foreign governmental agencies.

* * * * *

Example: The government of foreign country X has decided to sell assets of its wholly owned corporation, B, all of which are located in foreign country X. The buyer is ''A,'' a U.S. person. Regardless of the aggregate sales in or into the United States attributable to the assets of B, the transaction is exempt under this section. (If such aggregate sales were $50 million or less, the transaction would also be exempt under § 802.50.)

Dated: January 24, 2001.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 01–2606 Filed 1–31–01; 8:45 am]

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Federal Register

Thursday,
February 1, 2001

Part VI

Securities and Exchange Commission

17 CFR Parts 228 et al.
Disclosure of Equity Compensation Plan Information; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 240 and 249

[Release Nos. 33–7944, 34–43892; File No. S7–04–01]

RIN 3235–AI01

Disclosure of Equity Compensation Plan Information

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: We are publishing for comment proposed amendments to the disclosure requirements applicable to proxy statements and periodic reports under the Securities Exchange Act of 1934. We seek to enhance disclosure of the number of securities authorized for issuance under, and received by or allocated to participants pursuant to, equity compensation plans.

DATES: Comments should be submitted on or before April 2, 2001.

ADDRESSES: You should submit three copies of your comments to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. You also may submit your comments electronically to the following electronic mail address: rule-comments@sec.gov. All comment letters should refer to File Number S7–04–01; please include this file number in the subject line if you use electronic mail. Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. We will post electronically submitted comment letters on our Internet web site <http://www.sec.gov>.[1]

FOR FURTHER INFORMATION CONTACT: Raymond A. Be, Office of Rulemaking, Division of Corporation Finance, at (202) 942–2886.

SUPPLEMENTARY INFORMATION: Today, we are publishing for comment proposed amendments to Item 201[2] of Regulation S–B,[3] Item 201[4] of Regulation S–K[5] and Form 10–K,[6] Form 10–KSB[7] and Schedule 14A[8] under the Securities Exchange Act of 1934.[9] Schedule 14C[10] under the Exchange Act also would be affected by the proposed amendments. These amendments would require disclosure in a registrant's proxy statement or annual report on Form 10–K or 10–KSB of the following information:

- The number of securities authorized for issuance under each equity compensation plan of the registrant in effect as of the end of the most recently completed fiscal year;
- The number of securities issued pursuant to equity awards made during the last completed fiscal year, plus the number of securities to be issued upon the exercise of options, warrants or rights granted during the last completed fiscal year, under each plan;
- The number of securities to be issued upon the exercise of outstanding options, warrants or rights under each plan; and
- Other than securities to be issued upon the exercise of outstanding options, warrants or rights, the number of securities remaining available for future issuance under each plan.

We also are making a non-substantive change to Exchange Act Rule 14a–3[11] to make clear that this disclosure is not required in an annual report to security holders.

I. Discussion of Proposals

A. Background

Today, the use of equity compensation, particularly in the form of stock options, appears to be growing.[12] As the use of equity incentives has grown, so too have concerns about their impact.[13] These concerns involve:

- The absence of full disclosure to security holders about equity compensation plans;
- The potential dilutive effect of equity compensation plans; and
- The adoption of many plans without the approval of security holders.

Our current rules do not require disclosure of the total number of securities that a registrant has authorized for issuance under its entire equity compensation program. Although our rules require disclosure in a registrant's proxy statement of the material features of a compensation plan when submitting the plan for security holder action,[14] including, in the case of a plan containing options, warrants or rights, the title and amount of securities underlying such options, warrants or rights,[15] that disclosure need address only the plan upon which action is being taken.[16] Accordingly, we have been urged to consider greater transparency of all equity compensation plans, whether or not the plans have received security holder approval.[17] This information is important if investors are to assess the effect that equity compensation plans have on their ownership or to compare the equity compensation plans of a registrant with those of its competitors.

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[1] We do not edit personal, identifying information, such as names or electronic mail addresses, from electronic submissions. Submit only information you wish to make publicly available.

[2] 17 CFR 228.201.

[3] 17 CFR 228.10, *et seq.*

[4] 17 CFR 229.201.

[5] 17 CFR 229.10, *et seq.*

[6] 17 CFR 249.310.

[7] 17 CFR 249.310b.

[8] 17 CFR 240.14a–101.

[9] 15 U.S.C. § 78a, *et seq.*

[10] 17 CFR 240.14c–101.

[11] 17 CFR 240.14a–3(b)(9).

[12] The National Center for Employee Ownership, a non-profit research organization, estimates that nearly 10 million employees currently receive stock options, up from one million in 1992. *See* Pallavi Gogol, *When Good Options Go Bad,* Bus. Wk., Dec. 11, 2000, at EB 96. *See also Broad-based Stock Options—1999 Update,* William J. Mercer, Inc. (1999) (survey of 350 major industrial and service corporations finding that 39.4% have broad-based (at least 50% of employees eligible to participate) stock option plans and 18% made grants under such plans; compared with 17% of companies offering broad-based stock option plans and 5.7% making grants in 1993).

[13] *See* Eric D. Roiter, *The NYSE Wrestles with Shareholder Approval of Stock Option Plans,* Corp. Gov. Adv., Vol. 8, No. 1 (Jan./Feb. 2000), at 1. *See also,* for example, Gretchen Morgenson, *Hidden Costs of Stock Options May Soon Come Back to Haunt,* N.Y. Times, June 13, 2000, at A1; Robert McGough, *Tech Companies' Liberal Use of Stock Options Could Swamp Investors, Drain Firms' Resources,* Wall St. J., July 28, 2000, at C1; Shawn Tully, *The Party's Over,* Fortune, June 26, 2000, at 156.

[14] See Item 10(a)(1) of Schedule 14A [17 CFR 240.14a–101, Item 10(a)(1)].

[15] See Item 10(b)(2)(i)(A) of Schedule 14A [17 CFR 240.14a–101, Item 10(b)(2)(i)(A)].

[16] Similarly, while Item 402(c) of Regulation S–B [17 CFR 228.402(c)] and Item 402(c) of Regulation S–K [17 CFR 229.402(c)] require disclosure of the number of stock option grants during the last fiscal year, that disclosure need address only the named executive officers of the registrant (as defined in the item). *See also* Item 402(b)(2)(iv)(B) of Regulation S–B [17 CFR 228.402(b)(2)(iv)(B)] and Item 402(b)(2)(iv)(B) of Regulation S–K [17 CFR 229.402(b)(2)(iv)(B)].

[17] *See,* for example, the letter dated September 1, 2000 from Keith Johnson, Chief Legal Counsel, State of Wisconsin Investment Board, the letter dated August 28, 2000 from James P. Hoffa, General President, International Brotherhood of Teamsters, the letter dated August 23, 2000 from Peter C. Clapman, Senior Vice President & Chief Counsel, Investments, Teachers Insurance and Annuity Association—College Retirement Equities Fund and the letter dated August 17, 2000 from Sarah A.B. Teslik, Executive Director, Council of Institutional Investors, each to the Commission responding to Self-Regulatory Organizations; New York Stock Exchange, Inc. (''NYSE''); Notice of Filing of Proposed Rule Change by the NYSE to Extend the Pilot Relating to Shareholder Approval of Stock Option Plans, Securities Exchange Act Release No. 43111 (Aug. 2, 2000) [65 FR 49046 (Aug. 10, 2000)]. These letters are available in our Public Reference Room at 450 Fifth Street, NW., Washington, DC 20549–0609, in File No. SR–NYSE–00–32. *See also* Self-Regulatory Organizations; NYSE; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendments Nos. 1 and 2 Thereto Relating to Shareholder Approval of Stock Option Plans, Securities Exchange Act Release No. 41479 (June 4, 1999) [64 FR 31667 (June 11, 1999)].

Disclosure of the overall number of securities of a registrant authorized for issuance under employee stock option plans then in effect is sometimes available indirectly through the registrant's financial statements included in its annual report to security holders.[18] This disclosure is not necessarily effective, however, since it is not consistently available in any one location or format, may not include non-derivative securities awarded to employees and may not include stock options granted to non-employees.[19]

In addition, significant concern has arisen as to the level of potential dilution that equity compensation plans now represent. This concern relates to dilutive potential from the standpoint of both economic and voting power. Issuance of equity securities under these plans may result in a significant reallocation of ownership in the enterprise between existing security holders and management and employees.[20]

Finally, many equity compensation plans may not receive security holder approval. At the state level, approval by security holders is required in only a few jurisdictions.[21] At the federal level, approval by security holders is required only to qualify for favorable treatment under the federal income tax laws [22] or in the case of the issuance of options, warrants or rights by a business development company.[23] While the rules of self-regulatory organizations require publicly-traded companies to obtain security holder approval for some plans,[24] these rules contain exceptions that enable companies to implement many employee stock plans without security holder approval.[25] Accordingly, some market participants have expressed concern that a growing number of employee stock plans escape security holder scrutiny because they are not submitted for approval.[26]

We are proposing amendments that would require registrants to disclose, at least annually, information about the total number of securities that have been authorized for issuance under equity compensation plans in effect [27] as of the end of the last completed fiscal year, whether or not the plans have been approved by security holders. The purpose of the amendments is to promote investor understanding of a registrant's equity compensation policies and practices so that investors can make informed voting and investment decisions.

This disclosure would be set forth in a tabular format:

- In the registrant's proxy statement [28] whenever the registrant is seeking security holder action regarding a compensation plan; [29] or
- In the registrant's annual report on Form 10–K [30] in years when the registrant is not seeking security holder action regarding a compensation plan.

B. Proposed Disclosure

The proposed amendments would require a registrant to provide a table identifying each equity compensation plan in effect as of the end of the last completed fiscal year and containing the following information with respect to each plan:

- The number of securities that have been authorized for issuance by the registrant's board of directors;
- The number of securities issued pursuant to equity awards made during the last completed fiscal year, plus the number of securities to be issued upon the exercise of options, warrants or rights granted during the last completed fiscal year; [31]
- The number of securities to be issued upon the exercise of outstanding options, warrants or rights; [32] and
- Other than securities to be issued upon the exercise of outstanding options, warrants or rights, the number of securities remaining available for future issuance.

This information would be provided with respect to any equity compensation plan [33] that provides for the award of a registrant's securities or the grant of options, warrants or rights to purchase

[18] *See* Exchange Act Rule 14a–3(b) [17 CFR 240.14a–3(b)]. Statement of Financial Accounting Standards No. 123, *Accounting for Stock-Based Compensation,* (Oct. 1995), requires that an entity disclose in its financial statements the number of shares authorized for grants of options or other equity instruments (¶ 46), the number and weighted-average exercise prices of options outstanding at the beginning of the year, outstanding at the end of the year, exercisable at the end of the year and granted, exercised, forfeited or expired during the year for each year for which an income statement is presented (¶ 47(a)) and the number, weighted-average exercise price and weighted-average remaining contractual life of options outstanding and options currently exercisable at the date of the latest statement of financial position presented (¶ 48).

[19] In a recent annual study on stock plan dilution, the Investor Responsibility Research Center, Inc. (''IRRC'') found that about 20% of the companies surveyed did not disclose the number of shares available for future awards under their employee stock plans. *See Potential Dilution—1999, The Potential Dilution from Stock Plans at the S&P Super 1,500 Companies,* IRRC (2000) (''IRRC Dilution Study'').

[20] The amount of securities allocated for equity compensation plans has been increasing for several years. A recent study of the stock-based pay practices at the nation's 200 largest corporations indicates that these companies allocated 13.7% of outstanding shares (calculated on a fully diluted basis) for management and employee equity incentives in 1999, compared to only 6.9% in 1989. *See 1999 Equity Stake, Study of Management Equity Participation in the Top 200 Corporations,* Pearl Meyers & Partners, Inc. (1999). The percentage may be even higher in some industries, such as the high-technology sector. *See Trends in Equity Compensation 1996–2000,* iQuantic, Inc. (2000) (number of options outstanding as a percentage of the total number of common shares outstanding for 200 major high-technology companies was 15.8% in 1999 compared to 12.4% in 1997). This figure does not take into account securities available for future grant. *See also IRRC Dilution Study* (average potential dilution for 1,175 companies studied was 13.5% in 1999 compared to 11.6% in 1997; average potential dilution of 434 ''S&P 600 SmallCap'' companies studied was 16.3% in 1999 compared to 13.8% in 1997).

[21] *See* Herbert Kraus, *Executive Stock Options and Stock Appreciation Rights,* L.J. Press (2000), at 2.07. These states include Alaska (Alaska Stat. § 10.06.343), Hawaii (Haw. Rev. Stat. § 415–20), Maine (13A Me. Rev. Stat. Ann. § 508[3]), New Mexico (N.M. Stat. Ann. § 53–11–20), South Dakota (S.D. Comp. L. § 47–3–48 (security holder approval required for issuance of shares to officers or employees)), Vermont (Vt. Stat. Ann. § 6.24) and West Virginia (W. Va. Code Ann. § 31–1–84). *See also* N.Y. Bus. Corp. Law § 505(d). Prior to October 11, 2000, Section 505(d) of the Business Corporations Law of the State of New York required approval of any stock option plan by a majority of a corporation's shareholders. As amended by S. 6780 (Oct. 11, 2000), this provision now requires approval of a stock option plan by a majority of the shareholders only where the corporation's shares are not listed or authorized for trading on a stock exchange or automated quotation system.

[22] *See* 26 U.S.C. 162(m) and 422 (1998).

[23] *See* Section 61(a)(3)(A)(iv) of the Investment Company Act of 1940, 15 U.S.C. § 80a–61(a)(3)(A)(iv).

[24] *See* NYSE, NYSE Listed Company Manual, ¶ 312.03(a) (Foundation 1996); American Stock Exchange, LLC (''AMEX''), AMEX Company Guide, § 711 (Foundation 1996); Nasdaq Stock Market Rule 4460(i)(1)(A), NASD Securities Dealer Manual (CCH) at 5512 (1996 Supp).

[25] *Id. See also* Randall S. Thomas and Kenneth J. Martin, *The Determinants of Shareholder Voting on Stock Option Plans,* 35 Wake Forest L. Rev. 31, 48 (2000).

[26] *See* n. 17 above.

[27] An equity compensation plan that provides for the grant of options, warrants or rights is considered to be in effect as long as securities remain available for future grant under the plan or options, warrants or rights previously granted under the plan remain outstanding.

[28] The discussion of proxy statements in this release also includes information statements.

[29] As discussed in section I.B. below, the required disclosure would encompass each equity compensation plan of the registrant in effect as of the end of the last completed fiscal year other than the compensation plan or plans subject to security holder action. Those plans, of course, would be subject to the existing disclosure requirements of Item 10 of Schedule 14A.

[30] The discussion of Form 10–K in this release also includes Form 10–KSB.

[31] This disclosure would not apply to any plan, contract, authorization or arrangement for the issuance of warrants or rights on substantially similar terms to all security holders of the registrant generally that did not discriminate in favor of officers or directors of the registrant. *See* Proposed Item 201(d), Instruction 2, of Regulation S–B and Regulation S–K.

[32] *See* n. 31 above.

[33] This would include, without limitation, employee stock purchase plans that provide for the acquisition of authorized but unissued securities or repurchased or ''treasury'' shares, but would exclude so-called ''open market'' employee stock purchase plans.

the registrant's securities [34] to officers, directors and employees of the registrant or its parent or subsidiary corporations, or to any other person.[35] Individual arrangements that contemplate the award of a registrant's securities or the grant of options, warrants or rights providing for the purchase of the registrant's securities may be aggregated and disclosed as a single item.[36]

This information would be provided without regard to whether the equity compensation plan was previously approved by a registrant's security holders. Registrants would be required to identify, either in the table or through a narrative statement, which of the equity compensation plans, if any, was adopted without security holder approval. They also would be required to provide a brief, narrative description of the material features of each plan adopted without security holder approval during the last completed fiscal year.[37] Finally, this information would be provided without regard to whether the securities to be issued under the equity compensation plan were authorized but unissued securities of the registrant or repurchased or ''treasury'' shares.

We request comment as to the appropriateness of the proposed disclosure. Would narrative disclosure be preferable to the proposed tabular format? Are there any additional categories of information (such as weighted average exercise price information) or different categories of information that should be included in the disclosure? Is it useful to disclose information about the number of securities awarded and the number of options, warrants or rights granted during the last completed fiscal year? Would disclosure of prior awards and grants over a different time period be more appropriate, and, if so, what period? Is it necessary, as proposed, for registrants to provide totals for the information set forth in each column of the tabular disclosure? When disclosure is being made in a registrant's proxy statement because the registrant is seeking security holder action regarding a compensation plan, should the tabular disclosure also cover the plan upon which action is being taken?

Is aggregated disclosure of individual arrangements appropriate? If not, what alternative approach would be preferable? Should aggregated disclosure be permitted in the case of certain equity compensation plans (such as plans that are assumed by the acquiring company in a merger, consolidation or other acquisition transaction)?

Should additional or different disclosure be required with respect to equity compensation plans that have been adopted without security holder approval (such as the information currently required under Item 10 of Schedule 14A)? Should disclosure be required if the plan was adopted in a year prior to the most recently completed fiscal year? Is it sufficient to require the disclosure of such plan's ''material features,'' or should we identify the specific terms and conditions of the plan that must be disclosed (such as exercise price, vesting and expiration date information, or the existence of reload, stock swap, loan or option repricing features)? In lieu of, or in addition to, the disclosure required for an equity compensation plan that has been adopted without security holder approval, should a registrant be required to file any such plan as an exhibit to the registrant's annual report on Form 10–K for the fiscal year in which the plan was adopted? [38] Should specific disclosure about equity compensation plans that involve the use of repurchased or ''treasury'' shares be required?

C. Location of Disclosure

1. Disclosure in Proxy Statement

We believe that an understanding of a registrant's equity compensation policies and practices is relevant to a security holder's decision regarding the adoption of a new compensation plan or the modification of an existing plan. Accordingly, if security holders are acting on a plan at a meeting, the proposed amendments would require that the disclosure be included in the registrant's proxy statement relating to the meeting at which security holders will be voting on the compensation plan.[39]

2. Disclosure in Annual Report on Form 10–K

Even in years when a registrant is not submitting a compensation plan for security holder action, we believe that it is important for security holders to know the extent to which the registrant has awarded securities or granted options, warrants or rights to participants under its existing equity compensation plans. The proposed amendments would require a registrant to disclose in its annual report on Form 10–K the information required by Proposed Item 201(d) of Regulation S–K.[40] This information would be included in Part III of Form 10–K. As such, the information could be incorporated by reference from a registrant's definitive proxy statement that involves the election of directors, if the definitive proxy statement is filed with the Commission not later than 120 days after the end of the fiscal year covered by the Form 10–K.[41]

We request comment as to the appropriateness of the location for the proposed disclosure. Should disclosure be required in the proxy statement whether or not a registrant is submitting a compensation plan for security holder action? If so, how would the disclosure

[34] Notwithstanding that an equity compensation plan may permit alternative types of awards (for example, restricted stock *or* stock options), the securities authorized for issuance under the plan and remaining available for future issuance under the plan are to be counted only once.

[35] Thus, disclosure would be required with respect to all equity compensation plans, without regard to whether the plan participants are employees, directors, general partners, trustees, officers, consultants and advisors, vendors or independent contractors.

[36] *See* Proposed Item 201(d) of Regulation S–B and Regulation S–K. Item 402(a)(6)(ii) of Regulation S–B [17 CFR 228.402(a)(6)(ii)] and Item 402(a)(7)(ii) of Regulation S–K [17 CFR 229.402(a)(7)(ii)] define the term ''plan'' to include any plan, contract, authorization or arrangement, whether or not set forth in any formal documents, that is applicable to one or more persons.

[37] *See* Proposed Item 201(d)(3) of Regulation S–B and Regulation S–K. In 1992, we eliminated the requirement under Item 10 of Schedule 14A (and Item 1 of Schedule 14C) that a registrant provide extensive disclosure of all existing plans when seeking security holder approval of a compensation plan. *See* Executive Compensation Disclosure, Securities Exchange Act Release No. 31327, section II.L (Oct. 16, 1992) [57 FR 48126 (Oct. 21, 1992)]. We are not proposing to reinstate that specific requirement. We seek to ensure that adequate information is available to security holders, however, about the number of securities authorized for issuance under a registrant's existing equity compensation plans, whether or not the plans have been approved by security holders.

Once disclosure of the material terms of an equity compensation plan that was adopted without security holder approval has been made, in subsequent years a registrant need only identify the filing containing the narrative description of the plan if the plan was still in effect as of the end of the last completed fiscal year.

[38] Currently, Item 601(b)(10)(iii)(A) of Regulation S–K [17 CFR 229.601(b)(10)(iii)(A)] requires the filing of any compensatory plan, contract or arrangement in which any director or any of the named executive officers of the registrant, as defined by Item 402(a)(3) (17 CFR 229.402(a)(3)), participates, as well as any other compensatory plan, contract or arrangement in which any other executive officer of the registrant participates unless immaterial in amount or significance. *See also* Item 601(b)(10)(ii)(A) of Regulation S–B [17 CFR 228.601(b)(10)(ii)(A)].

[39] *See* Proposed Item 10(c) of Schedule 14A. This would include a vote to modify an existing compensation plan, such as a vote to increase the number of securities authorized for issuance under the plan.

[40] *See* Proposed Item 11 of Form 10–KSB and Proposed Item 12 of Form 10–K.

[41] *See* General Instruction E(3) to Form 10–KSB [17 CFR 249.310b] and General Instruction G(3) to Form 10–K [17 CFR 249.310].

requirements be made applicable to registrants that are subject to reporting under section 15(d) of the Exchange Act?[42] Alternatively, is it necessary to provide disclosure in years when a registrant is not submitting a compensation plan for security holder action? Is similar information currently available to security holders,[43] and, if so, is this information adequate? Should the proposed disclosure be required in registration statements filed under the Securities Act of 1933?[44]

II. General Request for Comments

Any interested person wishing to address the rule changes that are the subject of this release, to suggest additional or different changes or to comment on other matters that may have an effect on the proposals contained in this release, is requested to submit comments. We request comment from the point of view of registrants, security holders and other users of information about the use of securities to compensate officers, directors, employees, consultants and advisors.

III. Paperwork Reduction Act

Portions of the proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995,[45] or PRA. We are submitting the proposed amendments to the Office of Management and Budget, or OMB, for review in accordance with the PRA.[46] The titles for the collections of information are (1) ''Regulation 14A (Commission Rules 14a–1 through 14b–2 and Schedule 14A),'' (2) ''Regulation 14C (Commission Rules 14c–1 through 14c–7 and Schedule 14C),'' (3) ''Form 10–K,'' (4) ''Form 10–KSB,'' (5) ''Regulation S–B'' and (6) ''Regulation S–K.'' 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.

Regulation 14A (OMB Control No. 3235–0059) was adopted pursuant to section 14(a) of the Exchange Act[47] and prescribes information that a registrant must include in its proxy statement to ensure that security holders are provided information that is material to their voting decisions. Preparing and sending a proxy statement is a collection of information.

Regulation 14C (OMB Control No. 3235–0057) was adopted pursuant to section 14(c) of the Exchange Act[48] and prescribes information that a registrant must include in an information statement when a security holder vote is to be held but proxies are not being solicited. Schedule 14C refers to Schedule 14A for the disclosure requirements related to compensation plans. Preparing and sending an information statement is a collection of information.

Form 10–K (OMB Control No. 3235–0063) was adopted pursuant to sections 13[49] and 15(d) of the Exchange Act and prescribes information that a registrant must disclose annually to the market about its business. Preparing and filing an annual report on Form 10–K is a collection of information.

Form 10–KSB (OMB Control No. 3235–0420) was adopted pursuant to sections 13 and 15(d) of the Exchange Act and prescribes information that a registrant that is a ''small business issuer'' as defined under our rules[50] must disclose annually to the market about its business. Preparing and filing an annual report on Form 10–KSB is a collection of information.

Regulation S–B (OMB Control No. 3235–0417) was adopted pursuant to the Securities Act and the Exchange Act and is the source of disclosure requirements for ''small business issuer'' filings under the Securities Act and the Exchange Act. Preparing this disclosure involves a collection of information.

Regulation S–K (OMB Control No. 3235–0071) was adopted pursuant to the Securities Act and the Exchange Act and sets forth the requirements applicable to the content of the non-financial statement portions of registration statements under the Securities Act and registration statements under section 12,[51] annual and other reports under sections 13 and 15(d), going-private transaction statements under section 13, tender offer statements under sections 13 and 14, annual reports to security holders and proxy and information statements under section 14 and any other documents required to be filed under the Exchange Act. Preparing this disclosure involves a collection of information.

The proxy disclosure requirements of section 14 of the Exchange Act, as well as the reporting requirements of section 13 of the Exchange Act, apply to those entities that have securities registered under section 12 of the Exchange Act. The reporting requirements of section 15(d) of the Exchange Act apply to those entities with effective registration statements under the Securities Act that are not otherwise subject to the registration requirements of section 12 of the Exchange Act. The likely respondents, therefore, include entities with more than 500 security holders and more than $10 million in assets (section 12(g)),[52] entities with securities listed on a national exchange (section 12(b))[53] and entities with an effective registration statement under the Securities Act (section 15(d)).

We estimate that approximately 9,892 respondents file proxy statements under Schedule 14A and annual reports on Form 10–K or 10–KSB, approximately 253 respondents file information statements under Schedule 14C and annual reports on Form 10–K or 10–KSB and approximately 1,939 respondents just file annual reports on Form 10–K or 10–KSB. We have based the number of entities that would complete and file each of the forms on the actual number of filers during the 2000 fiscal year.

We further estimate that approximately 60% of these respondents, or 7,250 respondents, have adopted equity compensation plans and, thus, will be subject to the enhanced disclosure contemplated by the proposed amendments. We estimate that approximately 50% of these respondents, or 3,625 respondents, adopt a new equity compensation plan or modify an existing plan each year. In addition, we estimate that approximately 25% of the respondents with equity compensation plans, or 1,813 respondents, have adopted non-security holder approved plans[54] and will be required to describe the material terms of these plans as part of their enhanced disclosure. We note that, while each respondent with an equity compensation plan will need to make the required disclosure, the disclosure will appear in only one filing each year—either the proxy or information statement or the annual report on Form 10–K or 10–KSB.

Based on these assumptions, we estimate that 60% of the respondents that file proxy statements under Schedule 14A and annual reports on Form 10–K or 10–KSB, or 5,935 respondents, will need to prepare and provide the required tabular disclosure. We further estimate that 25% of these

[42] 15 U.S.C. 78o(d).

[43] *See* n. 18 above and the accompanying text.

[44] 15 U.S.C. 77a, *et seq.*

[45] 44 U.S.C. 3501, *et seq.*

[46] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[47] 15 U.S.C. 78n(a).

[48] 15 U.S.C. 78n(c).

[49] 15 U.S.C. 78m.

[50] Exchange Act Rule 12b–2 [17 CFR 240.12b–2].

[51] 15 U.S.C. 78*l*.

[52] 15 U.S.C. 78*l*(g).

[53] 15 U.S.C. 78*l*(b).

[54] *See Trends in Equity Compensation 1996–2000,* iQuantic, Inc. (2000) (estimated percentage of companies with non-security holder approved stock option plan was 27.3% in 1999 (161 survey respondents) compared to 3.2% before 1996).

respondents, or 1,484 respondents, will need to prepare and provide descriptions of their non-security holder approved equity compensation plans. We estimate that one-half of the respondents will need to include this disclosure in their proxy statements and one-half in their annual reports on Form 10–K or 10–KSB,[55] as the case may be. Finally, we estimate that preparation of the required tabular disclosure will add two burden hours to each proxy or information statement or annual report on Form 10–K or 10–KSB and, where required, preparation of the required description of an equity compensation plan's material terms will also add two burden hours.[56] Thus, we estimate that the proposed amendments will require 7,419 burden hours to prepare the required disclosure [(one-half of 5,935 respondents × 2 hours) + (one half of 1,484 respondents × 2 hours)] and will add 3,710 hours [57] to the current Schedule 14A annual burden of 179,144 hours, resulting in a total Schedule 14A annual hour burden of 182,854 hours.

We estimate that 60% of the respondents that file information statements under Schedule 14C and annual reports on Form 10–K or 10–KSB, or 152 respondents, will need to prepare and provide the required tabular disclosure. We further estimate that 25% of these respondents, or 38 respondents, will need to prepare and provide descriptions of their non-security holder approved equity compensation plans. We estimate that one-half of this disclosure will be included in respondents' information statements and one-half in respondents' annual reports on Form 10–K or 10–KSB,[58] as the case may be. Thus, we estimate that the proposed amendments will require 190 burden hours to prepare the required disclosure [(one-half of 152 respondents × 2 hours) + (one-half of 38 respondents × 2 hours)] and will add 95 hours to the current Schedule 14C annual burden of 4,582 hours, resulting in a total Schedule 14C annual hour burden of 4,677 hours.

We estimate that 60% of the respondents that just file annual reports on Form 10–K or 10–KSB, or 1,163 respondents, will need to prepare and provide the required tabular disclosure. We further estimate that 25% of these respondents, or 291 respondents, will need to prepare and provide descriptions of their non-security holder approved equity compensation plans. We estimate that 20% of the respondents will include this disclosure in their annual report on Form 10–K and 80% in their annual report on Form 10–KSB. Thus, we estimate that the proposed amendments will require 6,668 burden hours to prepare the required disclosure [{(20% of 1,163 respondents × 2 hours) + (20% of 291 respondents × 2 hours)} + {(80% [59] of one-half of 5,935 respondents × 2 hours) + (80% of one-half of 1,484 respondents × 2 hours)} [60] + {(80% of one-half of 152 respondents × 2 hours) + (80% of one-half of 38 respondents × 2 hours)} [61]] and will add 3,334 hours to the current Form 10–K annual burden of 4,463,830 hours, resulting in a total Form 10–K annual hour burden of 4,467,194 hours. We also estimate that the proposed amendments will require 3,848 burden hours to prepare the required disclosure [{(80% of 1,163 respondents × 2 hours) + (80% of 291 respondents × 2 hours)} + {(20% [62] of one-half of 5,935 respondents × 2 hours) + (20% of one-half of 1,484 respondents × 2 hours)} + {(20 % of one-half of 152 respondents × 2 hours) + (20% of one-half of 38 respondents × 2 hours)}] and will add 1,924 hours to the current Form 10–KSB annual burden of 1,070,454 hours, resulting in a total Form 10–KSB annual hour burden of 1,072,378 hours.

In addition to the internal hours they will expend, we expect that respondents will retain outside counsel to assist in the preparation of the required disclosures. The total dollar cost of complying with Regulation 14A, revised to include the additional outside counsel costs expected from the proposed amendments, are estimated to be $93,263,250, an increase of $649,250 from the current annual burden. The total dollar cost of complying with Regulation 14C, revised to include the additional outside counsel costs expected from the proposed amendments, are estimated to be $2,385,625, an increase of $16,625 from the current annual burden. The total dollar cost of complying with Form 10–K, revised to include the additional outside counsel costs expected from the proposed amendments, are estimated to be $2,344,093,450, an increase of $583,450 from the current annual burden. The total dollar cost of complying with Form 10–KSB, revised to include the additional outside counsel costs expected from the proposed amendments, are estimated to be $562,324,700, an increase of $336,700 from the current annual burden.

We believe that the proposed amendments will enable investors to ascertain more readily the total number of securities that a registrant has authorized for issuance under its equity compensation plans. As discussed elsewhere in this release, there is growing concern about the level of potential dilution that equity compensation plans now represent. In addition, investors have expressed concern that many plans are implemented without the approval of security holders and that the current disclosure rules do not require comprehensive information about all of a company's plans. The proposed amendments will require registrants to present additional information in their proxy or information statements or their annual reports on Form 10–K or 10–KSB about their equity compensation plans. We believe that this information is important to an investor's decision to vote to approve a new compensation plan or the modification of an existing plan.

Compliance with the disclosure requirements will be mandatory for all registrants. There would be no mandatory retention period for the information disclosed, and responses to the disclosure requirements will not be kept confidential.

We request comment in order to (a) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility, (b) evaluate the accuracy of our estimate of the burden of the proposed collections of information, (c) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected and (d) evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through

[55] *See* n. 59 below and the accompanying text.

[56] These time estimates are based on the fact that the information needed to make the proposed disclosure should be readily available to respondents.

[57] We estimate that respondents will prepare 50% of the required disclosure and that outside counsel will prepare the remaining 50%. Accordingly, 50% of the total burden resulting from our equity compensation disclosure rules is reflected as burden hours and the remaining 50% is reflected in the total cost of complying with the information collection requirements. We used an estimated hourly rate of $175.00 to determine the estimated cost to the respondent of the disclosure prepared by outside counsel. We arrived at that hourly rate estimate after consulting with several private law firms.

[58] *See* n. 59 below and the accompanying text.

[59] We estimate that in years where respondents are not submitting new compensation plans or modifications of existing plans for the approval of security holders, 80% of the required disclosure will be included in respondents' annual report on Form 10–K and 20% in respondents' annual report on Form 10–KSB.

[60] *See* n. 55 above and the accompanying text.

[61] *See* n. 58 above and the accompanying text.

[62] *See* n. 59 above.

the use of automated collection techniques or other forms of information technology.[63]

Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0609, with reference to File No. S7–04–01. Requests for materials submitted to the OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7–04–01 and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street NW., Washington, DC 20549–0609. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

IV. Cost-Benefit Analysis

We have identified certain costs and benefits of the proposed amendments. We request comment on all aspects of this cost-benefit analysis, including identification of any additional costs or benefits of, or suggested alternatives to, the proposals. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

The proposed amendments to require certain information to be provided in the proxy or information statement when submitting a compensation plan for security holder action, or in the annual report on Form 10–K or 10–KSB in fiscal years when a registrant is not submitting a compensation plan for security holder action, will, if adopted, increase the amount of information available to investors about a registrant's equity compensation program, enabling investors to better understand the forms and amounts of equity compensation paid to officers, directors, employees, consultants and advisors. The proposed amendments are consistent with our existing disclosure requirements for executive compensation,[64] and further our objective of enabling investors to make better informed voting and investment decisions.

The potential benefit to investors would include greater insight into a registrant's equity compensation policies and practices. This information would benefit investors by providing additional information in a useful format about existing equity compensation plans when called upon to consider action on a new equity compensation plan or the modification of an existing plan. In addition, this information would be of use to investors in evaluating the performance of a registrant's management and board of directors.

We believe that the proposed amendments also would benefit investors by providing information, which is not always readily available, regarding the overall potential dilutive effect of a registrant's equity compensation program. This information also would lead to greater transparency concerning a registrant's capital structure and enable greater comparability of equity compensation programs between companies. Accordingly, this information may be factored into investment decisions, thereby leading to more accurate pricing for a registrant's securities. These benefits are difficult to quantify.

The proposed amendments may increase the costs to registrant in several ways. Specifically, the amendments will increase the costs associated with the preparation of information currently required to be furnished to security holders in proxy or information statements or reported in annual reports on Form 10–K or 10–KSB. Since this information is readily available to registrants, however, and portions must be disclosed in other filings,[65] we do not expect these additional costs to be significant. As discussed in Section III of this release for purposes of the PRA, we estimate the aggregate annual paperwork cost of compliance with the proposed amendments to be $3,172,050.

The proposed amendments may have indirect effects, as well. For example, the availability of additional information about a registrant's equity compensation policies and practices may have an impact on the market price of a registrant's securities where the number of securities reserved for issuance under the registrant's equity compensation plans is higher than expected. In addition, disclosure of further information about a registrant's equity compensation policies and practices may cause the registrant to scale back its equity compensation program if not received favorably by investors. This may make it difficult for some registrants, particularly small businesses, which rely heavily on equity compensation to recruit, motivate and retain key employees. These costs, to the extent they exist, are difficult to quantify. Therefore, we request information regarding these matters. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

V. Summary of Initial Regulatory Flexibility Analysis

We have prepared an Initial Regulatory Flexibility Analysis, or IRFA, regarding the proposed amendments.[66] The following summarizes the IRFA:

As discussed in greater detail in the IRFA and in other sections of this release, the recent, increased use of equity compensation has raised concerns about the potential dilutive effect of equity compensation plans, the absence of the approval of security holders and the absence of full disclosure to security holders about a company's plans. These concerns may be especially acute in smaller companies, which often make liberal use of equity compensation in order to attract and retain key employees and to preserve scarce cash resources. In this regard, we are proposing amendments to our current requirements to increase the information provided to investors regarding equity compensation plans. This information will be included in proxy or information statements or in annual reports on Form 10–K or 10–KSB.

The IRFA sets forth the statutory authority for the proposed amendments. It also discusses ''small entities'' that would be subject to the proposals.[67] As described in the IRFA, we have estimated that there are approximately 2,500 Exchange Act reporting companies that currently satisfy the definition of ''small business'' under our rules. The IRFA indicates that the proposed amendments would affect all registrants. The IRFA states that the

[63] Comments are requested pursuant to 44 U.S.C. § 3506(c)(2)(B).

[64] *See* Item 402 of Regulation S–B [17 CFR 228.402] and Item 402 of Regulation S–K [17 CFR 229.402].

[65] *See*, for example, n. 18 above and the acompanying text.

[66] The analysis has been prepared in accordance with the Regulatory Flexibility Act, 5 U.S.C. 603.

[67] For purposes of this analysis, we have defined ''small business'' in Securities Act Rule 157 as any entity whose total assets on the last day of its most recent fiscal year were $5 million or less and is engaged, or proposes to engage, in small business financing. [17 CFR 230.157]. 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, 15 U.S.C. 77c(b).

proposed amendments will increase costs for registrants, including some small businesses, because the proposal imposes new reporting and compliance requirements.

The new disclosure requirements would apply to small businesses only if they are subject to section 14 of the Exchange Act or have an effective registration statement under the Securities Act and if they adopt or maintain an equity compensation plan. We estimate the number of those entities to be approximately 1,500.[68] The proposed amendments relate to only one item of the proxy or information statement or annual report on Form 10–K or 10–KSB, and the information should be readily available to registrants because they already maintain records regarding their equity compensation plans. This information is needed for investors to better understand a registrant's equity compensation program. In addition, all registrants have various corporate law, financial reporting and other disclosure obligations that require maintenance of information regarding equity compensation plans similar to that covered by the proposed amendments. We believe that the proposed amendments will provide improved information for the investing public.

As explained in the IRFA, the Regulatory Flexibility Act directs us to consider alternatives that would accomplish the stated objective, while minimizing adverse impact on small entities. In that regard, we are considering the following alternatives: (a) Differing compliance or reporting requirements that take into account the resources of small entities, (b) the clarification, consolidation or simplification of compliance and reporting requirements under the rule for small entities, (c) the use of performance rather than design standards and (d) an exemption from the coverage of the proposed amendments for small entities.

We encourage the submission of comments with respect to any aspect of the IRFA. In particular, we request comment on the number of small businesses that would be affected by the proposed amendments, the nature of the impact, how to quantify the number of small entities that would be affected and how to quantify the impact of the proposed amendments. Commenters are requested to describe the nature of any effect and provide empirical data and other factual support for their views to the extent possible. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments. A copy of the IRFA may be obtained by contacting Raymond A. Be, Office of Rulemaking, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

VI. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA''[69] we request information regarding the potential impact of the proposed amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

Section 23(a)(2) of the Exchange Act[70] requires us, when adopting rules under the Exchange Act, to consider the anti-competitive effects of any rule that we adopt. The proposed amendments are intended to improve the comparability of registrants' equity compensation policies and practices, which should promote competition. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

In addition, section 2(b) of the Securities Act and section 3(f) of the Exchange Act[71] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. The proposed amendments enhance our disclosure requirements in light of trends in the use of equity compensation. The proposed amendments affect the information that registrants must provide to investors concerning their equity compensation plans. The purpose of the amendments is to promote investor understanding of a company's equity compensation policies and practices so that investors can make informed voting and investment decisions. Informed investor decisions generally promote market efficiency and capital formation. We request comment on whether the proposed amendments, if adopted, would promote efficiency and capital formation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VII. Statutory Authority

The amendments contained in this release are being proposed under the authority set forth in sections 3(b), 6, 7, 8, 10 and 19(a) of the Securities Act and Sections 12, 13, 14(a), 15(d) and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Parts 228, 229, 240 and 249

Reporting and recordkeeping requirements, Securities.

Text of Proposed Rule Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations, is proposed to be amended as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. The authority citation for Part 228 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

1. By amending § 228.201 to add paragraph (d) before the *Instruction* to read as follows:

§ 228.201 (Item 201) Market for common equity and related stockholder matters.

* * * * *

(d) *Securities authorized for issuance under equity compensation plans.*

(1) In the following tabular format, provide the information specified in paragraph (d)(2) of this Item as of the end of the most recently completed fiscal year with respect to each compensation plan of the registrant under which equity securities of the registrant are authorized for issuance.

[68] This figure is based on our estimate that 60% of registrants that file proxy or information statements under section 14 of the Exchange Act or annual reports on Form 10–K or 10–KSB have adopted equity compensation plans.

[69] Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[70] 15 U.S.C. 78w(a)(2).

[71] 15 U.S.C. 77b(b) and 78c(f).

EQUITY COMPENSATION PLAN INFORMATION

Name of plan (a)	Number of securities authorized for issuance under the plan (b)	Number of securities awarded plus number of securities to be issued upon exercise of options, warrants or rights granted during last fiscal year (c)	Number of securities to be issued upon exercise of outstanding options, warrants or rights (d)	Number of securities remaining available for future issuance (e)
Plan #1				
Plan #2				
Plan #3				
Individual Arrangements (Aggregated)				
Total				

(2) The table shall include the following information as of the end of the most recently completed fiscal year:

(i) For each plan (other than individual arrangements):

(A) The name of the plan (column (a));

(B) The number of securities authorized for issuance under the plan (column (b));

(C) The number of securities issued pursuant to equity awards made under the plan during the most recently completed fiscal year, plus the number of securities to be issued upon the exercise of options, warrants or rights granted under the plan during the most recently completed fiscal year (column (c));

(D) The number of securities to be issued upon the exercise of options, warrants or rights outstanding under the plan (column (d)); and

(E) Other than securities to be issued upon the exercise of outstanding options, warrants or rights, the number of securities remaining available for issuance under the plan (column (e)).

(ii) For individual arrangements:

(A) The number of individual arrangements being disclosed (column (a));

(B) The aggregate number of securities authorized for issuance under the individual arrangements (column (b));

(C) The aggregate number of securities to be issued upon the exercise of options, warrants or rights outstanding under the individual arrangements (column (d)); and

(D) Other than securities to be issued upon the exercise of outstanding options, warrants or rights, the aggregate number of securities remaining available for issuance under the individual arrangements, if any (column (e)).

(3) Identify each plan that was adopted without security holder approval and:

(i) If such plan was adopted during the most recently completed fiscal year, describe briefly, in narrative form, the material features of the plan; or

(ii) If such plan was adopted in a prior fiscal year, identify the filing containing such description.

(4) If any individual arrangement exceeds 25% of the aggregate number of securities disclosed pursuant to paragraph (d)(2)(ii)(B) of this Item, identify the relationship of the recipient to the registrant and describe briefly, in narrative form, the material features of the arrangement.

Instructions to Item 201(d).

1. For purposes of this paragraph, the term *plan* shall be defined in accordance with Item 402(a)(6)(ii) of Regulation S–B (§ 228.402(a)(6)(ii)).

2. No disclosure is required under this Item with respect to any plan, contract, authorization or arrangement, whether or not set forth in any formal documents, for the issuance of warrants or rights on substantially similar terms to all security holders of the registrant generally that does not discriminate in favor of officers or directors of the registrant. No disclosure is required under column (c) of Item 201(d)(1) with respect to individual arrangements involving equity awards and grants.

3. Except where it is part of a document that is incorporated by reference into a prospectus, the information required by this paragraph need not be provided in any registration statement filed under the Securities Act.

* * * * *

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

3. The general authority citation for Part 229 is revised to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), and 80b–11, unless otherwise noted.

* * * * *

4. The authority citation following § 229.201 is removed.

5. By amending § 229.201 to add paragraph (d) before *Instructions to Item 201* to read as follows:

§ 229.201 (Item 201) Market price of and dividends on the registrant's common equity and related stockholder matters.

* * * * *

(d) *Securities authorized for issuance under equity compensation plans.*

(1) In the following tabular format, provide the information specified in paragraph (d)(2) of this Item as of the end of the most recently completed fiscal year with respect to each compensation plan of the registrant under which equity securities of the registrant are authorized for issuance.

EQUITY COMPENSATION PLAN INFORMATION

Name of plan (a)	Number of securities authorized for issuance under the plan (b)	Number of securities awarded plus number of securities to be issued upon exercise of options, warrants or rights granted during last fiscal year (c)	Number of securities to be issued upon exercise of outstanding options, warrants or rights (d)	Number of securities remaining available for future issuance (e)
Plan #1				
Plan #2				
Plan #3				
Individual Arrangements (Aggregated)				
Total				

(2) The table shall include the following information as of the end of the most recently completed fiscal year:

(i) For each plan (other than individual arrangements):

(A) The name of the plan (column (a));

(B) The number of securities authorized for issuance under the plan (column (b));

(C) The number of securities issued pursuant to equity awards made under the plan during the most recently completed fiscal year, plus the number of securities to be issued upon the exercise of options, warrants or rights granted under the plan during the most recently completed fiscal year (column (c));

(D) The number of securities to be issued upon the exercise of options, warrants or rights outstanding under the plan (column (d)); and

(E) Other than securities to be issued upon the exercise of outstanding options, warrants or rights, the number of securities remaining available for issuance under the plan (column (e)).

(ii) For individual arrangements:

(A) The number of individual arrangements being disclosed (column (a));

(B) The aggregate number of securities authorized for issuance under the individual arrangements (column (b));

(C) The aggregate number of securities to be issued upon the exercise of options, warrants or rights outstanding under the individual arrangements (column (d)); and

(D) Other than securities to be issued upon the exercise of outstanding options, warrants or rights, the aggregate number of securities remaining available for issuance under the individual arrangements, if any (column (e)).

(3) Identify each plan that was adopted without security holder approval and:

(i) If such plan was adopted during the most recently completed fiscal year, describe briefly, in narrative form, the material features of the plan; or

(ii) If such plan was adopted in a prior fiscal year, identify the filing containing such description.

(4) If any individual arrangement exceeds 25% of the aggregate number of securities disclosed pursuant to paragraph (d)(2)(ii)(B) of this Item, identify the relationship of the recipient to the registrant and describe briefly, in narrative form, the material features of the arrangement.

Instructions to Item 201(d).

1. For purposes of this paragraph, the term *plan* shall be defined in accordance with Item 402(a)(7)(ii) of Regulation S–K (§ 229.402(a)(7)(ii)).

2. No disclosure is required under this Item with respect to any plan, contract, authorization or arrangement, whether or not set forth in any formal documents, for the issuance of warrants or rights on substantially similar terms to all security holders of the registrant generally that does not discriminate in favor of officers or directors of the registrant. No disclosure is required under column (c) of Item 201(d)(1) with respect to individual arrangements involving equity awards and grants.

3. Except where it is part of a document that is incorporated by reference into a prospectus, the information required by this paragraph need not be provided in any registration statement filed under the Securities Act.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

6. The authority citation for Part 240 is revised to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77f, 77g, 77h, 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.

* * * * *

7. The authority citation following § 240.14a-3 is removed.

8. By amending § 240.14a-3 to revise paragraph (b)(9) to read as follows:

* * * * *

§ 240.14a–3 Information to be furnished to security holders.

* * * * *

(b) * * *

(9) The report shall contain the market price of and dividends on the registrant's common equity and related security holder matters required by Item 201(a), (b) and (c) of Regulation S–K (§ 229.201(a), (b) and (c) of this chapter).

* * * * *

9. By amending § 240.14a–101, Item 10 of Schedule 14A by adding paragraph (c) before the undesignated heading *Instructions* and revising Item 14(d)(4) of Schedule 14A to read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 10. Compensation Plans. * * *

(c) *Information regarding plans and other arrangements not subject to security holder action.* The information called for by Item 201(d) of Regulation S–K (§ 229.201(d) of this chapter) with respect to each equity compensation plan in effect as of the end of the last completed fiscal year (other than the plan or plans being acted upon as described in paragraph (a) of this Item), whether or not such plan has been approved by security holders.

* * * * *

Item 14. Mergers, consolidations, acquisitions and similar matters. * * *

(d) *Information about parties to the transaction registered investment companies and business development companies.* * * *

* * * * *

(4) Information required by Item 201(a), (b) and (c) of Regulation S-K (§ 229.201(a), (b) and (c) of this chapter), market price of and dividends on the registrant's common equity and related stockholder matters;

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

10. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * *

11. By amending Form 10–K (referenced in § 249.310) by revising Item 12 of Part III to read as follows:

Note.— The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–K

Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

* * * * *

Part III

* * * * *

Item 12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters.

Furnish the information required by Item 201(d) of Regulation S–K (§ 229.201(d) of this chapter) and by Item 403 of Regulation S–K (§ 229.403 of this chapter).

* * * * *

12. By amending Form 10–KSB (referenced in § 249.310b) by revising Item 11 of Part III to read as follows:

Note— The text of Form 10–KSB does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–KSB

* * * * *

Part III

* * * * *

Item 11. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters.

Furnish the information required by Item 201(d) of Regulation S-B and by Item 403 of Regulation S–B.

* * * * *

Dated: January 26, 2001.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 01–2730 Filed 1–31–01; 8:45 am]

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CFR PARTS AFFECTED DURING FEBRUARY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

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.

RULES GOING INTO EFFECT FEBRUARY 1, 2001

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TRICARE program—

Family member dental plan; published 10-23-00

ENVIRONMENTAL PROTECTION AGENCY

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FEDERAL COMMUNICATIONS COMMISSION

Common carrier services:

Interconnection—

Arbitration procedures; published 2-1-01

FEDERAL TRADE COMMISSION

Hart-Scott-Rodino Antitrust Improvements Act:

Premerger notification; reporting and waiting period requirements; published 2-1-01

Organization, procedures, and practice rules:

Premerger notification requirements; additional information or documentary material requests; internal agency review; published 2-1-01

PENSION BENEFIT GUARANTY CORPORATION

Single-employer plans:

Allocation of assets—

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SECURITIES AND EXCHANGE COMMISSION

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Federal Aviation Administration

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Airbus; published 12-28-00

Airbus; correction; published 1-17-01

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Supplemental standards of ethical conduct:

Office of Thrift Supervision employees; published 2-1-01

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Animal and Plant Health Inspection Service

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DEFENSE DEPARTMENT

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Radio spectrum, efficient use promotion; secondary markets development; regulatory barriers elimination; correction; comments due by 2-9-01; published 1-29-01

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LIST OF PUBLIC LAWS

Note: The List of Public Laws for the 106th Congress, Second Session has been completed and will resume when bills are enacted into public law during the next session of Congress.

A cumulative List of Public Laws was published in Part II of the **Federal Register** on January 16, 2001.

Public Laws Electronic Notification Service (PENS)

Note: PENS will resume service when bills are enacted into law during the next session of Congress.

This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.

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This table is used by the Office of the Federal Register to compute certain dates, such as effective dates and comment deadlines, which appear in agency documents. In computing these dates, the day after publication is counted as the first day.

When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

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